TRIBAL NATION ECONOMICS: REBUILDING COMMERCIAL PROSPERITY IN SPITE OF U.S. TRADE RESTRAINTS—RECOMMENDATIONS FOR ECONOMIC REVITALIZATION IN INDIAN COUNTRY

Angelique A. EagleWoman*

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I. TRIBAL TRADE ROUTES & THE TRIBALIST ECONOMIC PHILOSOPHY IN PRACTICE

A. *Introduction*

Tribal commerce created the current highways that stretch from coast-to-coast in North America today. The roads that are traveled by semi-trucks full of cargo, grocery produce, and all manner of commercial goods are on top of the ancient trade routes Natives have traveled for centuries. Unfortunately, the history and sophistication of Native commercial activities have been largely suppressed and left out of the story of the North American continent as Euro-Americans rewrote the continent's history to reflect the glorification of colonization. The truth is that there was no need for the "rugged pioneer" to cut through tall grass to head out West, rather Euro-Americans followed the well-traveled paths connecting commerce centers and village areas of Native peoples as they set about seizing land for their own interests.[1] Building railroad lines from the West

* Angelique A. EagleWoman is an Associate Professor of Law, James E. Rogers Fellow in American Indian Law at the University of Idaho College of Law. She is a citizen of the Sisseton-Wahpeton Dakota Oyate of the Lake Traverse Reservation. Her educational background includes: B.A. Stanford University in Political Science; J.D. University of North Dakota School of Law with Distinction; L.L.M. University of Tulsa College of Law in American Indian and Indigenous Law with Honors. Professor EagleWoman maintains memberships in the following bar associations: District of Columbia, North Dakota, Oklahoma and South Dakota.

** This is the author's Dakota name. This article is dedicated to the tribal children of Turtle Island who deserve a high quality of life from the resources that were nurtured and stewarded seven generations ago for them by their ancestors in mid-North America.

1. Many of the sources relied upon in this section of the article detailing pre-European Native American trading practices derive from non-Native documentary sources. An inherent problem with this form of research is that the source of the factual record is a foreign source. "The greatest problem confronting scholars in researching the history of Native Americans is that the written sources for that history derive largely from the non-Native side and are subject to the distortions, misconceptions, biases, and ignorance that are generally associated with history seen from an external cultural perspective." Bruce G. Trigger & Wilcomb E. Washburn, *Native Peoples in Euro-American Historiography*, in *The Cambridge History of the Native Peoples of the Americas Vol. I North America Part I* ch. 2, 61 (Bruce G. Trigger & Wilcomb E. Washburn eds., Cambridge U. Press 1996).

coast to the Midwest and connecting with the eastern routes was facilitated by laying the lines along Tribal routes existing for centuries. This article will examine a few of the Native trading centers pre-European colonization and the internationalist focus of Native trade up until the U.S. implemented a policy of warfare and treaty abrogation to the detriment of Tribal Nations. Over the course of the last two centuries, from the late 1700s through the late 1900s and into the 2000s, the United States government has undermined tribal nationhood, commercial activity, and prosperity. U.S. policies have led to the high rise in poverty, disease, and shortened life expectancy of the tribal citizens on this continent. In recent years, U.S. law has provided limited remedial measures, which Tribal Nations have utilized to create opportunities to rebuild the historic prosperity once known on this continent by Native peoples. These developments will be traced to demonstrate the growing measures being employed by Tribal Nations to re-enter commerce, both domestic and international, and to regain a high quality of life for tribal citizens.

In Part I, various trade routes and commercial relations in mid-North America prior to the formation of the United States will be examined. This examination will demonstrate the sophistication of Native commerce within the balanced philosophy of the tribalist economic theory. Part II will explore the trading interactions with the United States and the attendant restraints on tribal economic prosperity that resulted. Detailed within this section will be the U.S. eras of Indian policy that have resulted in oftentimes shifting sands for Tribal Nations to navigate in order to rebuild tribal prosperity. As U.S. federal laws matured into providing remedial measures for tribal economic activity to resume, Part III will set forth the tribal economic development that has taken place in relation to U.S. laws and policies. Part IV will provide a perspective on the future economic development of Tribal Nations consistent with the tribalist economic theory and a return to widespread Native prosperity in mid-North America.

B. An Overview of Trade Routes and Market Centers

Tribal values permeated the commercial activities of Native peoples as they journeyed amongst different Tribal Nations and interacted with those from other regions. Indigenous peoples of mid-North America expressed spiritual practices related to the geography over which they provided stewardship.[2] In terms of trade practices, spiritual values found expression through key concepts that were, by and large, known and practiced by all Natives on this continent. These concepts form a system embraced in the philosophy known as tribalist economics. The tribalist economic theory weaves together the key elements of trade interactions between Native peoples in mid-North America. These key elements include the kinship basis for trade relationships, good faith in transactions, generosity as the basis for tribal prosperity, stewardship and protection of

2. *See* Gregory Schrempp, *Distributed Power: An Overview, A Theme in American Indian Origin Stories*, in *Stars Above, Earth Below: American Indians and Nature* 24–26 (Marsha C. Bol ed., Roberts Rinehart Publishers for Carnegie Museum of Nat. History 1998). "The human entitlement to the natural world, as portrayed in Native American origin stories, is not unlimited. Humans are portrayed not as possessing the right to unconditional exploitation of nature, but rather as possessing the prerogative to enter into relations of reciprocity with nature." *Id.* at 26.

intergenerational resources, and sense of interdependence with all living beings.[3] Kinship provided the fundamental ground rules for interacting with other groups.[4]

Through the ceremonies of marriage and the adoption of adult relatives, kinship networks expanded and commerce followed. For example, "historical Easterners visited other groups as a part of their domestic and kinship-based activities, bringing with them such items as might prove useful for barter."[5] Once relatives were made in distant places, journeys followed to maintain connections. "There are well-authenticated cases of Indians having gone on visits to a series of distant friendly tribes, covering from 1,000 to 2,000 miles, and being absent from home for two months or more."[6]

Tribal peoples for thousands of years have had established market centers located at the intersections of trade routes stretching across this continent. Those studying the cultural history of the area by examination of artifacts and physical remnants have proposed theories on how items moved through vast trade networks to reach far-off regions. Since approximately 3000 BCE, commercial activities had "been going on for centuries among the eastern [T]ribes: copper from Isle Royale and the Keweenaw Peninsula in Lake Superior had been moving through the Midwest."[7] In the Lake Superior region were copper mining Tribes who traded for marine shells and other decorative items originating in the southern Atlantic and Gulf Coasts regions.[8] "Copper from Lake Superior, obsidian from the West, mica, and galena were all moved over very great distances."[9] The conclusion that "[l]ong before Europeans arrived, active trading relationships existed throughout most of North America" is well supported by the archaeological and anthropological record.[10]

As Europeans began documenting tribal trade routes, they found that some of the roads "may be regarded as trunk lines and are traceable almost from the Gulf to the Great Lakes" whereas, others "might equally well be defined as so many separate trails tied together."[11] Items from specific regions entered into the tribal stream of commerce, which stretched from coast to coast and north to south.

> In the mounds in Ohio, Tennessee, and elsewhere objects from the Atlantic, the Gulf of Mexico, and the Pacific, and from nearly every section of the interior of the United States have been found obsidian from the Rocky Mountain region, pipestone from the great red pipestone quarries of Minnesota or Wisconsin, steatite and mica from the Appalachians,

3. *See* Angelique EagleWoman, *The Tribal Values of Taxation within the Tribalist Economic Theory*, 18 Kan. J.L. & Pub. Policy 17–20 (2008).

4. *See* Robert A. Williams, Jr., *Linking Arms Together* 63 (Oxford U. Press 1997). "To be related to another in a system of kinship is to expect assistance from that other person and to expect to be asked for and be ready to render assistance as well." *Id.*

5. Jon Muller, *Regional Interaction in the Later Southeast*, in *Native American Interactions: Multiscalar Analyses and Interpretations in the Eastern Woodlands* 324 (Michael S. Nassaney & Kenneth E. Sassaman eds., U. Tenn. Press 1995).

6. William E. Myer, *Indian Trails of the Southeast* 1 (Blue & Gray Press 1971).

7. Robert Claiborne, *The First Americans: Emergence of Man* 131 (Time Life Bks. 1973).

8. *Id.*

9. Muller, *supra* n. 5, at 319.

10. Bruce L. Benson, *Property Rights and the Buffalo Economy of the Great Plains*, in *Self-Determination: The Other Path for Native Americans* 41 (Terry L. Anderson, Bruce L. Benson & Thomas E. Flanagan eds., Stan. U. Press 2006).

11. Myer, *supra* n. 6, at ix.

> copper from the region of the Great Lakes and elsewhere, shells from the Gulf of Mexico and the Atlantic, dentalium and abalone shells from the Pacific coast, and now and then artifacts which at least hint at some remote contact with Mexican Indian culture.[12]

For thousands and thousands of years, commercial networks have existed across mid-North America developed by Tribal Nations and utilized at given times of the year for trading and social gatherings. Historians have attempted to imagine these gatherings and market events.

> A day's vigorous paddling up this river [the Ohio River] brought these traders to their goal: another trading center, less elaborate than their own community, but the site of a sort of annual fair. Here traders and tribesmen from several hundred miles around gathered to barter whatever valuable objects they had obtained during the past year; most had already passed from hand to hand half a dozen times. A dugout from farther down the Ohio might have brought a few dozen conch shells that had made their way up the Mississippi from the Gulf. Another, perhaps, carried copper knives and spear points that had traveled a much more complicated journey: first by birchbark canoes from Lake Superior through the Mackinac Straits into Lake Michigan, into the narrower waters of Green Bay and the still narrower Fox River, then overland along the forest trail near the 20th Century city of Portage, Wisconsin, down the Wisconsin and into the Mississippi by dugout and at last up the Ohio and Wabash to the fair.[13]

Although only an imagined account of trading items moving through Tribal commerce, it was likely that much commercial activity did center around seasonal gatherings and fairs as is still the custom today with Tribes.

In the Great Plains region, the Teton Lakota joined with the closely related Santee Dakota and Yankton Nakota to enjoy large trade gatherings in the valley of the James River at certain times of the year. Buffalo products were traded for "dried wild rice, corn, and items of European manufacture."[14] The Dakota and Nakota had acquired European items through trade along the Minnesota River beginning in the mid-1600s. Farther north, the Mandan were known as overseeing important trade centers along the Missouri River.[15] Accounts from a French fur trader in 1738 described Mandan villages as "already operating a flourishing trade center and [they] were in possession of metal weapons and utensils which they obtained from Assiniboin and Cree, who acted as middlemen between the European traders to the north and east."[16] Up until two smallpox epidemics devastated the Mandan people, "the Mandan villages remained important trade and cultural centers, mainly to the central Plains and Plateau (via the Crow) but also to the southern Plains via the Cheyenne and northern Plains via the Assiniboin and the Cree."[17] As a trading center, the Mandan joined with the Hidatsa and did business with thousands of members of different Tribes during seasonal markets in

12. *Id.* at 2.
13. Claiborne, *supra* n. 7, at 133.
14. Raymond J. De Mallie, *Pine Ridge Economy: Cultural and Historical Perspectives*, in *American Indian Economic Development* 241 (Sam Stanley ed., Mouton Publishers 1978).
15. Colin F. Taylor, *The Plains Indians: A Cultural and Historical View of the North American Plains Tribes of the Pre-Reservation* 18–19 (Crescent Bks. 1994).
16. *Id.* at 21.
17. *Id.* at 22.

June or early July. The markets centered on the agricultural products of the Mandan and Hidatsa often in exchange for hunting products from other regions.[18]

The Northwest region is known for seasonal fishing ceremonies, sites, gatherings, and large markets. Celilo Falls and the close by area known as the Dalles along the Columbia River were major trade centers for those in the Northwest. "The Dalles was one of the most important trade centers in Aboriginal America."[19] Since at least 11,000 years ago, Tribal members have been fishing for salmon along the Dalles, which formed "a series of turbulent falls—the Long Narrows including Five-Mile Rapids and the better-known Celilo Falls—that trapped traveling salmon in swirling eddies and backwaters where Indians netted them."[20]

> The Dalles was an integral part of a continental trade network that extended west from the Pacific coast east to the Plains, north from what is now Alaska south to present-day California. The marketplace extended well beyond material goods to include languages, social systems, technologies, and mythologies. Cultural intermixing, borrowing, and exchange characterized the area.[21]

Local residents welcomed bands from all over the Northwest to the mid-Columbia area for socializing, trading, and fishing. Goods exchanged included obsidian from the south, "from the north, dentalia, blankets, and beads; from the east, pipestone, buffalo meat, and horses; and, hailing from the west, wappato, an important root food."[22] In the Southwest, three major trade routes served to radiate out from the region—the Old Indian Trail, the Old Gila Trail, and the Zuni Trail (renamed the Santa Fe Trail).[23] The historical tribal names for these trails were not preserved by European mapmakers.[24]

Tribal Nations trading with other Tribal Nations were engaged in international trade through all of the examples above. This willingness to expand the kinship circle to bring in others for commercial and social relationships was evident as other people arrived on the shores of mid-North America.[25] The concept of entering into alliances, allegiances, and kinship connections underlay the commercial networks of the Tribes across the continent and would form the Native concept of trading relations as others journeyed from distant parts of the world to the North American shores.[26] International trade is a millennia-old tradition among Tribal Nations beginning with trade with other Tribal Nations and encompassing trade relations with Europeans and others worldwide in contemporary times.

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18. Benson, *supra* n. 10, at 42.

19. Katrine Barber, *Death of Celilo Falls* 22 (U. Wash. Press 2005).

20. Katrine Barber, *Narrative Fractures and Fractured Narratives: Celilo Falls in the Columbia Gorge Discovery Center and the Yakama Nation Cultural Heritage Center*, in *The Great Northwest, the Search for Regional Identity* 49 (William G. Robbins ed., Or. St. U. Press 2001).

21. Barber, *supra* n.19, at 22.

22. *Id.* at 23.

23. Louis Thomas Jones, *Red Man's Trail* 32–34 (Naylor Co. 1967).

24. *Id.* at 34.

25. *See* Williams, *supra* n. 4, at 105. "In American Indian visions of law and peace, a treaty connected different peoples through constitutional bonds of multicultural unity." *Id.*

26. *Id.* at 123. "[D]ifferent peoples in a relationship of close connection were expected to embrace the sacredly revealed truth of their shared humanity as a basis of normative action toward each other." *Id.*

C. Trading Relationships with Europeans

When Tribal Nations first encountered Europeans from distant shores, friendship was extended to provide the foreigners the means to survive. As these foreigners entered into trade relationships with the Tribes, North American goods were sent by ship to countries in Europe.[27] In short time, demand resulted for North American goods and products including tobacco, potatoes and other vegetables, spices, furs of all types, and mineral-derived goods.[28] Indigenous peoples in Central and South America fought bitterly against the flood of foreign immigrants, which included those who sought to claim all of the Native resources once identified.

In mid-North America, the Tribal Nations were met with intra-European conflicts over establishing trading posts and territorial claims to trading areas with Native peoples. In terms of the fur trade, "[a]ll the colonial powers were involved in the mass commercial exploitation of animal pelts and skins—France, England, the Netherlands, Russia, and to a lesser extent Spain—to fulfill the furious demand for furs in Europe, especially beaver pelts for hat making."[29] In the 1500s to the 1700s, Europeans were allowed to operate trading posts near traditional trading centers across the continent. Various Europeans set up their trading outfits in particular regions. The British operated in the Great Lakes area southward to the Potomac River trading center. The French, Spanish, Dutch and English all sought alliances and trading relationships with the various Tribal Nations through treaty-making.[30]

Some of the Tribal Nations from the eastern seaboard to the Great Lakes Region to the Gulf of Mexico enjoyed highly successful trading relationships with those from France.[31] "The French sought to create strong friendships with their Indian trading partners, because their livelihoods depended on it. Traders often adopted Indian customs, particularly the ritual of giving gifts to express goodwill, and they sometimes married Indian women to strengthen these crucial business relationships."[32] The French focused almost entirely on the fur trade with various Tribes acting as intermediaries to other Tribes to keep the merchandise flowing.

> Eastern [T]ribes, such as the Algonquian-speaking Abenaki, Cree, Micmac, Montagnais, and Naskapi, all were involved in the French fur trade. Yet the Iroquoian-speaking Huron (Wyandot), living farther to the west, became the foremost suppliers. From the years 1616 to 1649, the Huron, in conjunction with the Algonquian Ottawa and Nipissing, a subgroup of the Chippewa (Ojibway), developed a trade empire among the Indians from the Great

27. Donald Laverdure, Written testimony before Sen. Fin. Comm., *Hearing on Indian Governments and the Tax Code: Maximizing Tax Incentives for Economic Development* (July 22, 2008) (available at http://finance.senate.gov/hearings/testimony/2008test/072208dltest.pdf). "As the original inhabitants, Indian nations had established local economies and trade networks. Contact from Europeans had initiated an economic link between separate societies—an exchange of goods and services among Indian nations, colonies and European countries." *Id.* at 2.

28. *See* Jay Miller, *American Indian Foods: A True Book* 40–43 (Grolier Publg. Co. 1996).

29. Carl Waldman, *Atlas of the North American Indian* 85 (rev. ed., Checkmark Bks. 2000).

30. *See Felix Cohen's Handbook of Federal Indian Law* § 102[1] (Nell Jessup Newton ed., Lexis 2005) [hereinafter *Cohen's*].

31. *See e.g.* Wilbur R. Jacobs, *Dispossessing the American Indian: Indians and Whites on the Colonial Frontier* 53–54 (Charles Scribner's Sons 1972).

32. Liz Sonneborn, *Chronology of American Indian History* 48 (updated ed., Infobase Publg. 2007).

> Lakes to the Hudson Bay to the St. Lawrence. Each of the three main trading partners had a particular river and portage route for travel by canoe, plus a yearly schedule, linking up with other [T]ribes as well, such as the Iroquoian Tobacco and Neutral. Acting as middlemen, the Huron traded agricultural products to other [T]ribes for pelts, which they then carried to the French in Quebec City or Montreal, to trade for European wares. In their flotillas of canoes, now laden with such products as textiles, beads, paints, knives, hatchets, and kettles, they then completed the trade circle, returning to the other [T]ribes to trade a percentage of their take for still more furs.[33]

In addition, Frenchmen intermarrying with the Cree Nation in the northern regions of the Great Lakes eventually led to a new cultural group, the Métis of mixed-blood heritage.[34]

In the Southwest, the Tribal Nations had uneven relationships with Spaniards who had forcibly attacked many of the Indigenous peoples of Central and North America. The Alaskan Natives and the Northwest Tribes had sporadic trading relationships with those from Russia and other areas of the world.[35] Trading and commerce between Tribes was actively engaged in during this time period as well. Thus, international trade was well-known to Tribal Nations in mid-North America prior to the establishment of the United States.

Successful agricultural techniques had been learned from tribal peoples and new crops had been introduced to the European diet such as tomatoes, potatoes, bean varieties, peppers, squash varieties, rice and grain varieties, along with a multitude of fruits. The North American continent had been masterfully tended to and nurtured to produce harvestable resources on a seasonal basis by past generations and carried forward by present-day tribal members. For several centuries prior to the formation of the U.S., minerals, various shells, weaponry, daily utensils, pottery, furs, blankets and robes, all types of clothing, saddles, canoes, and a host of other goods had been mainstays in the tribal economic systems.[36]

In dealing with the Europeans, Tribes maintained their own sense of identity and arrangement of cultural and trading relationships. The interaction that was primarily fostered between the various Tribal Nations and the Europeans anchored on beneficial trading practices.

> Trade jargons facilitated business associations and even military or defensive alliances, but they did not lend themselves well to fostering the wholesale assimilation of one culture into another. Protecting their languages allowed Native Americans to maintain them as a distinctive and valued cultural property and to exercise considerable control over information the Europeans desired. Furthermore, as a practical matter it enabled them to communicate privately or secretly during intercultural encounters. As Michaelius pointed out in the late 1620s, colonists who thought they had learned Munsee, Unami, or another Algonquian language found themselves "bewildered" when the Native Americans spoke

33. Waldman, *supra* n. 29, at 86.

34. *Id.*

35. *Do Alaska Native People Get Free Medical Care* 20 (Libby Roderick ed., U. Alaska Anchorage/Alaska P.U. 2008) [hereinafter Roderick]. Russia claimed Alaska as a colony in 1784 and sold its rights to the United States in 1867. *Id.*

36. *Infra* pt. I(B).

among themselves.[37]

By shielding language, spiritual practices, and other culturally significant aspects of community, Tribes did not seek to fully engage with all of the traders they interacted with. When a trading partner from another group became a consistent comrade, Tribes would then invite in closer community relationships with those trusted allies.[38]

As international trade was engaged in by Tribal Nations, tribalist economics provided a framework for trade relationships and partnerships. This was the model upon which treaty agreements were entered into with other nations. As intra-European conflict took root in North America, Tribal Nations organized in confederacies and alliances by kinship relations had to choose which group of foreign Europeans to assist in their struggles against other foreign Europeans for territorial economic control. For example in 1754, the long simmering conflict between England and France broke out over control of the Ohio River Valley area and became known as the "French and Indian War."[39] France drew on its alliances with Tribes against the British, but ultimately France agreed to cede its trading territory to England in the Peace of Paris agreement of 1763.[40] During the seven years that the war lasted, tribal life was disrupted in supporting or resisting alliances between the newcomers. Additionally, commercial relations were fractured as the intra-European conflicts engulfed the Tribal Nations' homelands.

As the British colonies revolted against the government of Great Britain, warfare was particularly intense for those Tribal Nations who had formed alliances with the British in previous European conflicts. Tribal Nations that entered into treaty relationships strained under the foreigners' conflicts, which at times resulted in the splitting of Tribal alliances. This was particularly apparent when the League of the Iroquois united under the Great Law of Peace split over assisting the British or the British colonies in revolt.[41]

II. TRIBAL NATIONS IN TRADE RELATIONSHIPS WITH THE UNITED STATES

As the British colonies successfully revolted and formed a new government in North America, the new government's officials had a high priority on maintaining stable trade relations with Tribal Nations. Tribes were viewed in terms of their former alliances with either Britain or the thirteen colonies.[42] U.S. government officials set about entering into treaty agreements to establish trade relations, set boundary lines between U.S. citizens and the Tribal Nations' territorial boundaries, and claim tribal lands for

37. Cynthia J. Van Zandt, *Brothers among Nations: The Pursuit of Intercultural Alliances in Early America, 1580–1660* 64 (Oxford U. Press 2008).

38. *See generally* Williams, *supra* n. 4.

39. *See* Sharon O'Brien, *American Indian Tribal Governments* ch. 4, 45–47 (U. Okla. Press 1989).

40. *Id.* at 47.

41. G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands within and without the Box—An Essay*, 82 N.D. L. Rev. 811, 816 (2006). "In 1784, the newly independent United States gained peace from the Six Nations which had divided on the question of whether to support the British, the colonists, or remain neutral." *Id.*

42. *See* Robert W. Venables, *American Indian History: Five Centuries of Conflict & Coexistence* 1 (Clear Light Publishers 2004). "Indian nations that were neutral or had sided with the Patriots would find that their lands were no safer from white expansion than the lands of Indians who had been pro-British." *Id.*

expansionist plans.[43] With the adoption of the U.S. Constitution, explicit reference was made for the federal government to regulate commerce with Tribes.[44] Economics played a key role in the early relationship between Tribal Nations and the U.S. Commerce with Tribes was of primary concern to the new federal government officials of the United States.

In the U.S. Constitution, the primacy of trade with Tribes found expression in the first Article. In Article I, Section 8 of the document, the U.S. Congress was authorized to regulate trade with foreign states, among the several states, and with the Tribes.[45] Federal regulation was a means to ensure that other European countries or large private interests could not gain a foothold in tribal commerce without federal permission. Congress passed a series of statutes, the Trade and Intercourse Acts, commonly known as the Non-intercourse Acts beginning in 1790 to ensure that those entering the tribal territories did so only under the authority of the federal government.[46]

A. Tribal Nations and the U.S.: Treaty-Making and Military Force

Following the British process of entering into relationships with Tribal Nations, the U.S. entered its first treaty in 1778 with the Delaware Nation.[47] There was a stark difference in the views of the treaty-making act between the U.S. and the Tribal Nations. Tribal Nations agreed to cede vast tracts of land to remain on particular portions of their homelands in treaties with the U.S. In the treaty negotiations, U.S. legal terms were written in the English language and often loosely translated to the tribal people present.[48] Tribes solemnly promised to uphold the terms of the treaties entered into and not engage in warfare with the U.S. or its citizens. When it became inconvenient for the federal government to halt encroachment into reserved tribal lands, federal officials sought further cessions through treaties from the Tribes with the threat of military force.

During the same time period, roaming groups of U.S. military officers massacred peaceful summer and winter settlements of tribal members in efforts to lay claim to tribal lands.[49] With the very survival of the women, children and elderly at stake, Native men began campaigns of resistance and attack.[50] Many times, tribal members became refugees in their own lands as cavalry forces tracked them through their age-old routes where they sought safety in familiar terrain.[51] As the U.S. actively turned to military

43. *Id.* at 5. "The United States had won its independence, but the national government and state governments still owed money to their soldiers and creditors whose businesses or capital had provided war supplies. In lieu of money, these debts—the price of liberty—would be paid with Indian lands." *Id.*

44. *See* Robert T. Anderson et al., *American Indian Law: Cases and Commentary* 31 (Thomson West 2008).

45. U.S. Const. art. 1, § 8, cl. 3.

46. *See Documents of United States Indian Policy* 14 (Francis Paul Prucha ed., 3d ed., U. Neb. Press 2000).

47. *See* Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 3 (U. Tex. Press 1983).

48. *Id.* at 5.

49. *See* Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* 104–09 (U. Okla. Press 1987) (describing the genocide perpetrated on Natives during this time period).

50. *See* Venables, *supra* n. 42, at 48–79 (describing the efforts of Tecumseh to unite Tribal Nations to resist U.S. expansion); *see also* Jacobs, *supra* n. 31, at 87–89 (describing the leader Pontiac and his influence in resisting the whites in the Northwest).

51. *See* Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of American West* 31 (Holt, Rinehart & Winston 1970) (describing a warning sent to Manuelito of the Navajo "that he and his band would

aggression in violation of treaty agreements, tribal economies slammed to a halt.[52] Without the people tending to agricultural areas and processing the produce and fruits for the winter, the harvests went to ruin and the people were left without sustenance as they fled from the cavalry; often with the cavalry soldiers burning the crops and villages as they pursued tribal people.[53]

Those adhering to treaties and relying on federal rations did not fare much better.[54] One example is the Dakota War of 1862, which resulted from the restrictions on tribal members to leave the reservation area to feed their families and to instead wait on promised U.S. food rations.[55] When the U.S. promised rations arrived late and were rancid, the Sisseton-Wahpeton Dakota men went off the reservation and were declared hostiles.[56] In the ensuing battles along the Minnesota River, the Dakota women and children were marched to Fort Snelling and other areas in concentration camps.[57] In the end, the U.S. military imprisoned over 300 Dakota men and executed 38 of them in the largest mass hanging in the history of the U.S on Dec. 26, 1862.[58] With genocidal acts and military retaliation, the U.S. asserted control over the Tribal Nations despite the provisions in treaties setting the standard for relations.

B. U.S. "Plenary Power" and Allotment

As policies shifted and federal officials assumed total control over the tribal land base in the late 1800s, Indian agents and federal officials began the unbridled selling off of tribal lands authorized by the 1887 General Allotment Act (also known as the Dawes Act).[59] One of the justifications for the Dawes Act was to prepare tribal members for full assimilation into white Christian society.[60] The breaking of the land base had been determined to be an expedient way to destroy the communal mentality of tribal people.[61] This was accomplished by abrogating the treaty agreements that reserved lands to the separate Tribal Nations and asserting control over the Tribal lands through a trustee relationship.[62] This legal manipulation has been upheld in U.S. federal courts as within

be hunted down to the death unless they came in peaceably" to the military fort).

52. *See* Thornton, *supra* n. 49, at 90. "In sum the European expansion throughout North America during the sixteenth, seventeenth, and eighteenth centuries produced a demographic collapse of American Indians, primarily because of disease, warfare, and destruction of Indian ways of life." *Id.*

53. *See* Brown, *supra* n. 51, at 25, 157, 302.

54. *See* Deloria & Lytle, *supra* n. 47, at 7.

55. *See* Angelique EagleWoman, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 Am. Indian L. Rev. 239, 244–45 (2004–2005).

56. *See In the Footsteps of Our Ancestors: The Dakota Commemorative Marches of the 21st Century* 43–47 (Waziyatawin Angela Wilson ed., Living Just. Press 2006).

57. *Id.* at 197–202.

58. *Id.* at 25–30.

59. 25 U.S.C. § 331 (2006) (also known as the "Dawes Act" after Senator Henry Dawes).

60. *See* Judith Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 9 (1995).

61. *Id.*

62. The federal trustee relationship with Tribes and tribal members was first announced in the decisions known as the Marshall trilogy after U.S. Supreme Court Chief Justice John Marshall. The three cases are: *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823) (holding that the U.S. held superior title to all Indian lands by operation of the doctrine of discovery justified by the "character and habits" of Indian people); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding that the Cherokee Nation was not a foreign nation, but was a domestic dependent nation with the U.S. a guardian to the Indian ward); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that the federal government's authority over Indian affairs in the U.S.

the federal government's "plenary power" over Native peoples.[63] In referring to the allotment and assimilation policy, U.S. President Theodore Roosevelt referred to it as "a mighty pulverizing engine to break up the tribal mass."[64]

The allotment policy allowed the U.S. President to determine that a tribal land base be allotted, dividing up land parcels into 160-acre tracts or less to each Indian head of household.[65] Tribal lands remaining after the allotment process were declared "surplus" by the U.S. and purchased by the U.S. at a price it set.[66] Allotment titles were held in "trust" status for a 25-year period by the U.S. Secretary of the Interior on behalf of the Indian beneficiary, with management authority in the Secretary.[67] Indian owners had the designation of incompetent under the trust status. To hasten the selling off of more tribal lands, the U.S. Congress passed the 1906 Burke Act permitting the Secretary of the Interior through the local Indian agent to determine an Indian "competent" and, therefore, capable of authorizing a land sale of his/her allotment parcel.[68] "As a consequence of the allotment policy, Indian landholdings were reduced from 138 million acres in 1887 to 48 million in 1934."[69] A small number of Tribal Nations escaped allotment, including many Tribes in the southwest and the Red Lake Band of Chippewa in Minnesota.[70]

C. The Indian Reorganization Act

Without an intact contiguous land base and under the control of federal agents, many tribal economies floundered and, all but, completely halted.[71] When political winds publicized the outright subjugation and impoverishment of the Tribal Nations, federal legislation was enacted to reflect a changed policy.[72] With the passage of the

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Constitution preempting state laws).

63. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress had full administrative power over Indian tribal property not subject to review by the U.S. Supreme Court); *U.S. v. Kagama*, 118 U.S. 375 (1886) (holding that Indian nations were "wards of the nation" under the power of Congress).

64. *See* Theodore Roosevelt, *Addresses and Presidential Messages of Theodore Roosevelt 1902–1904* 336 (G.P. Putnam's Sons 1904). In the message communicated to the Two Houses of Congress at the beginning of the Fifty-Seventh Congress, President Theodore Roosevelt characterized the General Allotment Act as follows: "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual. Under its provisions some sixty thousand Indians have already become citizens of the United States. We should now break up the tribal funds, doing for them what allotment does for the tribal lands; that is, they should be divided into individual holdings." *Id.*

65. *See* Indian Land Tenure Found, *History of Allotment Part 1*, http://www.indianlandtenure.org/ILTFallotment/introduction/introI.htm (accessed May 23, 2009).

66. *Id.*

67. 25 U.S.C. § 348.

68. *Id.* at § 349 (amended by 34 Stat. 182); *see Cohen's*, *supra* n. 30, at § 16.03[2][b].

69. *See* Deloria & Lytle, *supra* n. 47, at 10.

70. *See* Cohen's, *supra* n. 30, at § 16.03[2][b], *see also*, Kathryn Jody Beaulieu, *Mis-qua-ga-mi-wi-saga-eh-ganing: History of the Red Lake Band of Chippewa Indians*, http://www.rlnn.com/archives.html (accessed May 23, 2009).

71. *See* Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. Rev. 827, 834 (2004). "Regardless of the condition of a tribe's pre-allotment economy or pattern of individual property rights, one thing is clear: not only was the allotment era a failure of social engineering and property law, but it was responsible for the destruction of tribal economies." *Id.*

72. *See Cohen's*, *supra* n. 30, at § 16.03[2][c]. "[A]llotment was generally suspended in 1928 after publication of the Meriam Report, which criticized the policy." *Id.* (citation omitted).

Indian Reorganization Act (IRA)[73] of 1934, the very first section halted the policy of breaking up the tribal land base and stopped the further allotment of tribal lands and indefinitely extended the trust status of lands held for Indian beneficiaries.[74] The primary purpose behind the IRA was to reorganize tribal governments into quasi-U.S. constitutional model governments for dealings with the federal government and in turn lessen the control of the Bureau of Indian Affairs.[75]

A key feature of the IRA encouraged Tribes to adopt constitutional forms of government approved by the U.S. Secretary of the Interior.[76] With the adoption of the reorganized form of government, Tribes began the re-establishment of tribal economic activity through the powers enumerated in the federally-approved Tribal Constitutions. Another key element was the ability to adopt a federal charter of incorporation forming a business entity to conduct tribal commercial activities.[77] Both of these features led to opportunities many tribal leaders have taken advantage of in developing reservation and community economies once again. "While the act did not provide [Tribes] with powers they had not previously possessed, it did recognize these powers as inherent in their status and resurrected them in a form in which they could be used at the discretion of the tribe."[78] As discussed later, the IRA has had a significant impact on the development of the tribal government owned corporation.[79]

D. The U.S. Termination Policy: Ending Federal Recognition of Tribes

For those Tribal Nations that managed their remaining resources after allotment well, opponents of tribal peoples surfaced to seek curtailment of tribal success. In the late 1940s and early 1950s, Congress aligned with anti-tribal forces to usher in the federal "Termination policy" that would terminate the tribal-federal relationship and dispose of all tribal assets.[80] "The Bureau of Indian Affairs was directed by Congress to draw up a list of tribes deemed most capable of handling their own affairs, and with significant economic resources, with the intent of abrogating all federal government-to-tribal government relations and all federal trust responsibilities."[81] As a result of the termination policy, approximately 110 Tribes were terminated from federal recognition.[82]

Tribes identified for termination had their tribal rolls closed.[83] Tribal lands fundamentally changed by one of the following methods: distribution to tribal members,

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73. 25 U.S.C. § 461 (2006).

74. *Id.*

75. *See* Deloria & Lytle, *supra* n. 47, at 14–15.

76. 25 U.S.C. § 476(e) (2006); *see also On the Drafting of Tribal Constitutions: Felix Cohen* 173 app. A (U. Okla. Press 2006) (detailing the model constitutions that were drafted for Tribes to adopt that limited Tribal powers to the status of municipal organizations).

77. 25 U.S.C. § 477 (2006).

78. *See* Deloria & Lytle, *supra* n. 47, at 14.

79. *Infra* pt. III(A)(1).

80. H.R. Res. 108, 83d Cong. (Aug. 1, 1953).

81. David E. Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* 132 (U. Okla. Press 2001).

82. *See Cohen's, supra* n. 30, at § 3.02[8][a].

83. *Id.*

placement in a private land trust, transfer to a state corporation or sold with the proceeds distributed to tribal members. Federal services and recognition ended leading to state assumption of jurisdiction and imposition of state and local taxes.[84] "Termination was a reversal of the Indian Reorganization Act of 1934 and a return to the Dawes Act of 1887."[85] This severe unilateral action of the U.S. has had lasting impacts on the relationship with the Tribal Nations.

In furtherance of the termination policy, the U.S. Congress enacted federal legislation conferring state criminal and limited civil jurisdiction over tribal lands in six states with the option of other states assuming such jurisdiction.[86] This legislation was commonly known as Public Law 280.[87] Tribal leaders united in opposition to the termination policy and Public Law 280. Eventually, U.S. President Nixon repudiated the termination policy[88] and after 1968, no state was allowed to assume Public Law 280 jurisdiction over tribal lands without tribal consent.[89]

E. U.S. Indian-Self-Determination Policy: Current Era

With the halting of the termination policy, federal policy returned to one of supporting tribal government and economic activity in the 1960s and 1970s. The civil rights movement of the 1960s inspired tribal members to organize and initiate their own protests to bring attention to the failed federal policies of the last century. One of the primary organizations spearheading the discontent felt by both reservation and urban Indians was the American Indian Movement.[90] Large-scale protests included the "Trail of Broken Treaties[,]" a vehicle promenade that culminated in taking over the Bureau of Indian Affairs offices in Washington, D.C. when security guards tried to evict the Indians assembled inside.[91] With increased activity surrounding Indian issues, a renewed policy strengthening tribal government and tribal programs was heralded by the U.S. government. This renewed policy has been known as the Indian self-determination era and is the current U.S. Indian policy.

One of the key initial pieces of federal legislation in line with the new policy was the 1975 Indian Self-Determination and Education Assistance Act (ISDEAA).[92] In the congressional declaration of policy introducing the legislative provisions, the U.S. Congress stated, "[t]he Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the

84. *Id.*
85. Venables, *supra* n. 42, at 325.
86. 25 U.S.C. §§ 1321–1325 (2006).
87. 18 U.S.C. § 1162 (2006).
88. *See* David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 218–20 (5th ed., Thomson West 2005).
89. 25 U.S.C. § 1326 (2006).
90. *See* Wendell H. Oswalt, *This Land Was Theirs: A Study of Native North Americans* 56 (8th ed., Oxford U. Press 2006).
91. *See* Venables, *supra* n. 42, at 338.
92. 25 U.S.C. §§ 450–450(n) (2006).

needs and desires of those communities."[93] To that end, the Act established two major changes to BIA service delivery: first, was the ability for Tribes to assume managerial control over such services with reporting requirements to the BIA[94] under "638" self-determination contracts[95] and second, an amendment in 1994 allowed Tribes to receive the federal funds for necessary services and to deliver those services under their own regulatory authority under a self-governance funding agreement.[96]

Steps have been made during the self-determination era to lessen federal control over Tribal Nations, however, as the following sections of this article detail—there are many more steps to be taken. The IRA and the ISDEAA have been progressive measures of the U.S. Congress, but tribal leaders must continue to alleviate the impact of the Dawes Act and deal with a government that passed termination legislation. In the area of tribal economic development, the U.S.-Tribal Nations relationship has been memorialized in the U.S. Constitution regarding commerce between the U.S. and Indian tribes. The next section explores the contours of contemporary tribal economics and identifies on-going U.S. trade restraints.

III. OVERVIEW OF TRIBAL ECONOMIC DEVELOPMENT, INDUSTRIES, AND U.S. TRADE RESTRAINTS

Since the formation of the United States, the federal government has imposed trade restraints on Tribal Nations in mid-North America. These restraints have taken the form of federal regulation, federal decision-making, federal management, and even federal delegation to allow state regulation of some tribal governmental business activity. "[B]y the end of treaty-making in 1871, the federal government was advancing a 'command-control economic system' that sought to place control of tribal economies, including tribal resources, in the hands of federal agencies or individuals."[97] While federal policies schizophrenically have swung between imposing greater federal control of tribal resources and at the same time declaring a policy of tribal self-determination, Tribal Nations have been challenged to rebuild economies for the betterment of their citizens. This section will describe the U.S. trade restraints that have been imposed in the major areas of tribal governmental business operation and the tribal response to such continued opposition.

In the past three decades, Tribal Nations have become increasingly savvy in negotiating through Euro-American framed economic systems. This has not led to the large-scale adoption of the underlying Euro-American philosophy of full exploitation of resources. Rather, Tribes have framed their entry into global economic systems as part and parcel of tribal values, otherwise termed by this author as the "tribalist economic philosophy." As one commentator has noted, "Indian economic development may be less about creating wealth than it is about creating the conditions for political power in

93. *Id.* at § 450a.
94. *Id.* at § 450c.
95. *Id.* at § 450f.
96. *Id.* at § 458cc.
97. Lori M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 599–600 (2005).

the context of socially responsible choices for the continued existence and cohesion of the Indian nation."[98] In navigating capitalistic based economic systems, Tribes have found ways to uphold tribal values in their trading relationships, choice of industry activities, contractual agreements, and overall economic development plans.

The mission statement of S & K Technologies, a corporation owned by the Confederated Salish and Kootenai Tribes of Montana, articulates these values.

> Our mission is to adopt traditional principles and values into all facets of tribal operations and services. We will invest in our people in a manner that ensures our ability to become a completely self-sufficient society and economy. And we will provide sound environmental stewardship to preserve, perpetuate, protect and enhance natural resources and ecosystems.
>
> Today a new generation celebrates the traditional ways while shaping new opportunities for economic growth through the measured use of tribal resources. Our people—lawyers, nurses, farmers, professionals, homemakers, loggers, teachers and entrepreneurs—have developed a tribal way of life that is the foundation for many generations to come.[99]

Native cultural adaptability has allowed tribal members and leaders to envision full participation in global markets guided by sound traditional principles. Tribal corporations serve functions greater than other for-profit corporations as they embody the livelihood of communities as well as the self-enrichment of corporate officers and employees.

Bringing traditional tribal values into European model corporate structures has been an on-going challenge and, at times, tension as Tribes adhere to U.S. policies. Tribal adherence to federal policies is based upon taking advantage of opportunities when the U.S. Congress has legislated the removal of federal restrictions on inherent tribal sovereignty.[100] In the economic realm, loosening of federal control over tribal business decisions allows for tribal creativity to emerge. For centuries, Tribes have been in resistance and survival mode. With greater tribal autonomy harkened by the self-determination era in U.S. Indian policy, tribal commercial ventures are steadily reemerging in the life of the tribal community.

A. Tribal Corporate Structures through U.S. Policy

Tribal economic development activities exist in various environments and climates throughout the continent. The overarching structure to these enterprises is the tribal government corporate model.[101] Tribally chartered and owned corporations are the

98. John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, in Robert Odawi Porter, *Sovereignty, Colonialism and the Indigenous Nations: A Reader* 583, 586 (Robert Odawi Porter ed., Carolina Academic Press 2005).

99. S & K Techs., *The Confederated Salish and Kootenai Tribes*, http://www.sktcorp.com/AboutSKT/SalishandKootenaiTribes/tabid/141/Default.aspx (accessed May 23, 2008).

100. *See U.S. v. Lara*, 541 U.S. 193, 204 (2004) (stating that there is "no explicit language in the [U.S.] Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches"). *See also* Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. § 3502(a)(1) (2006) (defining the purpose of the Act "[t]o assist Indian tribes in the development of energy resources and further the goal of Indian self-determination . . . .").

101. This article does not discuss private tribal member-owned business entities but focuses purposefully on tribal government-owned corporations. The page constraints for this article do not allow for an in-depth discussion of the former.

engine driving contemporary tribal economic development at all levels. Through the corporate framework, Tribes are able to build branches of enterprises under an umbrella tribal corporation or to have a variety of tribal corporations working in tandem all under the ultimate supervision of the tribal governing body.[102] Tribal corporations are, for all intents and purposes, government-run businesses with Tribal Councils ultimately overseeing business activities. Unlike state law corporations, tribal corporations have been formed by federal statute and are governed by tribal law, not the body of law that has arisen around state law corporations.[103]

> In the case of tribal corporations, a government owns the business, and the citizens constituting that government vote for representatives to govern the tribal corporation. That is to say, Indians do not vote corporate policy in tribally owned business as "shareholders" in the typical sense, but rather express their opinions through the usual means of electing and influencing elected representatives, who in turn appoint officers of the corporation and set policy.[104]

With tribally elected officials at the helm of tribal corporations or overseeing the tribal board of directors appointed to oversee tribal businesses, careful strategies must be developed to obtain the desired results. "[S]ome tribes may form businesses that intend to maximize profit, money that is then returned to the tribal government or to tribal members through a per capita payment. Some tribes do a little of both: profit maximizing and job creation."[105] It is through tribal government-owned businesses that Tribal Nations are rebuilding economies and providing necessary services in Indian country.

1. The IRA and Tribal Corporation Formation

The Indian Reorganization Act purported to create business structures for tribal governments in Sections 16[106] and 17.[107] Under Section 16, Tribes had the option of creating tribal governments characterized with a central governing body that had the power and authority to initiate business decisions over tribal resources, revenues, and ventures. Tribes through the legislative function contained in a tribal constitution were in the position to adopt law and order codes that regulated business entities within the tribal jurisdiction, including regulating through issuance of business licenses to all those seeking to do business within the tribal jurisdiction.[108] Tribal codes could be developed

102. *See e.g.* Chickasaw Nation Indus., Inc., *Company Overview*, www.chickasaw.com/index.cfm?content=about/companyoverview (accessed May 26, 2009). "CNI is now a holding company with over a dozen Limited Liability Companies (LLCs) that operate as subsidiaries engaged in diverse lines of business including information technology, medical support, construction, aviation and aerospace technologies, business and administration support services." *Id.*

103. *See e.g. Oneida Indian Nation (New York) Codes and Rules*, *Business Corporation Code* chs. 1–5 (2004) (available at http://www.narf.org/nill/Codes/oneidacode/businesscorporation1.htm).

104. Jonathan B. Taylor, Statement before H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Oversight Hearing on 110-44*, 110th Cong. (Sept. 19, 2007).

105. Matthew Fletcher, *In Pursuit of Tribal Economic Doevelopment as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 776 (2004) (citation omitted).

106. 25 U.S.C. § 476.

107. *Id.* at § 477.

108. *See e.g.* White Mt. Apache, *Business Code: Chapter One* (rev. ed., 2000) (available at www.wmat.nsn.us/Legal/contents.html).

to charter corporations under tribal law as well. In some instances, the governing council under the IRA adopted tribal constitution was even designated as the "tribal business committee."[109] A primary purpose of the IRA was to reorganize Tribes to provide a means for federal negotiation over tribal resources, and the establishment of federally-recognized tribal governing councils accomplished this end.

By seeking federal charters under Section 17, Tribes have another option to bypass state laws for corporate entity recognition. Tribally held federal charters allow Tribes to incorporate as a tribal entity.[110] The federally incorporated tribal entity then may receive from the Tribe "the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business . . . ."[111] These same provisions are available to Oklahoma Tribes through the Oklahoma Indian Welfare Act, Section 3.[112]

The formation of a federally incorporated tribal entity requires persistence and meeting the various requirements throughout the cumbersome federal process. A tribal governing body authorizes the intent for a federal incorporation of a tribal charter through a tribal resolution and must draft its proposed charter. The approved tribal charter has to be submitted to the BIA with the tribal resolution for approval and, subsequently, the Tribe must ratify the BIA-approved tribal charter to begin business operations.[113] In comparison under Section 16, a Tribe has the ability to create its own process to establish corporate entities under tribal law without involving the federal government in the process.

While Section 16 tribal corporations are shielded by the Tribe's own sovereign immunity from suit, litigation has arisen where courts have held that Section 17 tribal charter corporations do not possess tribal sovereign immunity.[114] Tribal charters often include a "sue and be sued" clause that has been interpreted as allowing for litigation which may reach the tribally chartered corporation's assets, but not general tribal property, such as trust lands.[115] This result has obtained from the reasoning that a

109. *See e.g.* Comanche Nation of Okla., *Constitution and By-laws of the Comanche Nation of Oklahoma* (Feb. 23, 2002) (available at http://www.narf.org/nill/Constitutions/comancheconst/comancheconsttoc.htm) (providing in Art. VI Business Committee, the powers of the elected business committee as the governing council of the Comanche Nation); Blackfeet Tribe, *Constitution and By-laws of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana* (1998) (available at http://www.narf.org/nill/Constitutions/BlackfeetConst/bfconttoc.htm) (providing in Art. III—Governing Body Amendment IV § 1—that "[t]he governing body of the Blackfeet Tribe shall consist of a council known as the Blackfeet Tribal Business Council").

110. *See e.g.* Sac & Fox Nation, *Charter of Incorporation, Federal Corporate Charter* (accessed May 13, 2009) (available at http://www.sacandfoxnation.org/gove_deta.htm?id=2454670.4193287).

111. 25 U.S.C. § 477.

112. *Id.* at § 503.

113. *See Cohen's*, *supra* n. 30, at § 21.02[1][b].

114. *See S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376, 1382–83 (Ariz. App. 1983) (holding that the business conducted under Section 16 was different than the business conducted under Section 17 and due to the "sue and be sued" clause in the Section 17 charter, that the Indian corporation did not have tribal sovereign immunity from suit in state court).

115. The power of the Tribes under the IRA limits any "sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets" when the Tribe has not so consented. 25 U.S.C. § 476(e).

judgment against a tribal charter corporation is limited to the assets of that corporation rather than a full-scale waiver of tribal sovereign immunity for all tribal properties.[116]

2. Federal Statutory Formation of Tribal Corporate Structures Comparable to State Law Models

The U.S. federal government has provided a corporate structure for governance of Tribal Nations through the IRA as discussed in the previous section. Through other federal legislation, the corporate structure modeled along state corporate entities has been a popular means to further redefine the relationships over tribal resources and assets. Three such situations illustrating these types of federal enactments are: 1) the reorganization by federal statute of the Osage Nation of Oklahoma with tribal member headrights;[117] 2) the creation of state corporations to receive tribal land upon termination of a Tribe with tribal member stock options; and 3) the reorganization into corporations of the Native villages in Alaska under the Alaska Native Claims Settlement Act with tribal members becoming corporate shareholders.[118] Complex issues have arisen when the U.S. government has imposed foreign forms of governing and relating into tribal communities. These examples will demonstrate some of the challenges that have resulted from unilateral federal legislation imposing state model corporate structures into tribal communities.

Pursuant to the 1906 Osage Act, the U.S. sought to impose a governing structure on the Tribe and define tribal members according to their membership on a federal tribal roll through which pro rata shares of the tribal proceeds would be distributed.[119] Section 9 of the Act directed the process for electing the officers of the Osage Nation and provided that there would be "[a] principal chief, an assistant principal chief, and eight members of the Osage tribal council." [120] Additionally, the Secretary of the Interior was "authorized to remove from the council any member or members thereof for good cause, to be by him determined."[121] The reason for this heavy-handed federal authority was that underlying Osage lands lay huge oil fields and other energy resources.[122]

In sections 3 and 4, the Secretary of the Interior had the authority to approve leases for oil, gas, and other minerals on Osage land based upon standards he determined and then to hold all proceeds from such leases in trust for the Tribe.[123] In addition, the 1906 Act provided that members on the federal roll created under the Act were entitled to a

116. *See e.g. Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1111 (Ariz. 1989) (distinguishing between tribal government controlled "subordinate economic organizations" that possess tribal sovereign immunity and tribally incorporated entities that do not and thus, may be sued to the extent of their assets and insurance coverage).

117. Osage Act of 1906, Pub. L. No. 321, 34 Stat. 539 (June 28, 1906).

118. 43 U.S.C. § 1601 (2006).

119. 34 Stat. at 540–41.

120. *Id.* at 545.

121. *Id.*

122. *See Cohen's*, *supr*a n. 30, at § 4.07[1][d][ii]. "An 1896 oil and gas lease of the reservation was followed by substantial discoveries of oil and gas in 1904 and 1905. The Osage Nation quickly accumulated a large tribal trust fund in the Treasury from oil and gas leases, grazing leases, sales of townsite lots, permit taxes, and sale of an earlier tribal reservation in Kansas." *Id.*

123. 34 Stat. at 543–44.

"pro rata" or headright share in tribal assets.[124] Headright ownership in the tribal assets has been interpreted by the Department of the Interior as bestowing political rights as well.[125] Thus, persons of Osage ancestry who did not own or had not inherited headrights were not eligible to hold office or to vote in the election of Osage officers. "As of 1977, there were 9205 Osages, 7022 of whom had no headright interests."[126] The membership situation was remedied by federal law in 2004 by allowing the Osage governing council to pass membership requirements that did not require headright ownership as a prerequisite.[127]

The complexity of headright devise through intestate and wills of original headright owners continues to plague the Osage Nation.[128] Other issues that have arisen include the holding of lifetime estates by non-Indians who inherit a headright[129] and provisions for a non-Indian to sell a headright upon approval of the Secretary of the Interior. [130] This type of imposed corporate structure through the headright system has failed to match tribal values of membership or wealth distribution. Rather, the federally mandated headright system has been a source of contentious disagreement within the Osage Nation for generations.

Turning to the policy period of termination in the late 1940s and the 1950s, Congress began unilaterally terminating selected Tribes who were characterized as no longer in need of tribal status. Both the Mixed-Blood Utes[131] and the Menominee Tribe[132] were targeted under the termination policy. In both cases, the federal government sought to inventory all tribal assets and then transfer them to state formed corporations to oversee the remaining assets.[133]

For the Menominee, assets were transferred to Menominee Enterprises, Inc. with "[o]ne hundred shares of stock in the Corporation and one income bond . . . issued to each member of the tribe on the final roll."[134] In restoring the Menominee Tribe's federal recognition, Congress recognized that "[t]his plan brought the Menominee people to the brink of economic, social and cultural disaster."[135] Citing to the collapse of the tribal sawmill operation, the accumulation of corporate debts leading to the selling of tribal land, the high taxation imposed by state and county schemes, and the domination

124. *Id.* at 544.

125. 25 C.F.R. § 90.21 (2009).

126. *See* Cohen's, *supra* n. 30, at § 4.07[1][d], 310 n. 846.

127. Pub. L. No. 108-431, 118 Stat. 2609, 2609 (2004) (an Act Reaffirming Certain Rights of the Osage Tribe, § 1(b)(1): "MEMBERSHIP.—. . . Congress hereby reaffirms the inherent sovereign right of the Osage Tribe to determine [sic] its own membership.")

128. *See* Mark Freeman, Testimony before H.R. Resources Comm., *Reaffirming the Sovereign Rights of the Osage Tribe Hearing on H.R. 2912*, 108th Cong. (Mar. 15, 2004) (available at http://republicans.resourcescommittee.house.gov/ archives/108/testimony/2004/markfreeman.htm). "Now non-Osages own approximately 25% of those headrights . . . . And being born to an Osage family does not mean an individual will ever become a headright owner." *Id.*

129. Pub. L. No. 95-496, § 7, 92 Stat. 1660, 1662 (1978).

130. *Id.* at 1663.

131. 25 U.S.C. § 677.

132. *Id.* at § 891.

133. *See Affiliated Ute Citizens v. U.S.*, 406 U.S. 128, 132–40 (1972) (describing the stock structure and other features of the newly created corporation for the Mixed-Blood Utes following termination).

134. Getches, Wilkinson & Williams, *supra* n. 88, at 215.

135. *Id.*

of the corporate management by non-Menominees, the Congress found for all of these reasons the termination plan had been a failure.[136]

A final example of federal statutory imposition of corporate structures was the passage of the 1971 Alaska Natives Claims Settlement Act (ANCSA) bringing into existence some two hundred Native village corporations and leading to the creation of thirteen additional regional corporations for asset management.[137] The Act centered on settling title claims in the Alaska area with the Alaska Natives retaining 16 percent of their lands and extinguishing their title to 300 million acres.[138] For settling their aboriginal claims, the Alaska Natives included in the Act retained 40 million acres divided among the corporations, four million acres restricted from economic activity for ceremonial and other uses; graduated payments over an 11-year period to their corporate structures; and received a lump sum for oil revenues in certain Alaska lands.[139] Again, Congress mandated a new tribal relationship by creating shareholders and stockowners of the individual Alaska Natives who were listed as members in 1971 on the official federal roll.[140] "Both regional and village corporations issued 100 shares of stock to each Native enrolled in their region and village."[141] This corporate scheme failed to provide for any Alaska Native born after 1971, referred to as "afterborns."[142] This scheme has been characterized as Congress' intent to fully assimilate Alaska Natives by not allowing the enrollment of new Natives in corporations.[143]

In 1988, ANCSA was successfully amended through the efforts of Alaska Native leadership and these amendments are popularly referred to as the "1991 amendments."[144] "Based on their cultural values and traditions and despite the potential of diluting the value of existing stock, the Native community sought an amendment that would allow for the enrollment of 'New Natives' or those Natives born after December 18, 1971."[145] Similar to the problems experienced by the Osage with the headright system, Alaska Natives are now faced with the conundrum resulting from weighing the feasibility of offering stock to those born after 1971 to share in the limited assets controlled by the corporations formed under ANCSA.

In sum, the federal government has for several decades through these various legislative enactments attempted to boil down the Tribal existence to corporate shareholders and managers. Complex issues have surfaced when tribal membership has been predicated on individual ownership rights to tribal resources. Further, imposed corporate structures have failed to protect tribal assets when such structures have been visited upon an unprepared tribal group. The tribal corporations that have flourished are those that have been sought after by tribal leadership and formed with tribal expertise

136. *Id.*
137. *See* Roderick, *supra* n. 35, at 22.
138. *Id.* at 19, 22.
139. *Id.* at 22.
140. *See* Rosita Worl, *Alaska Native Corporations*, in *Handbook of North American Indians, Indians in Contemporary Society* vol. 2, 143 (Garrick Bailey ed., Smithsonian Instn. 2008).
141. *Id.*
142. *See* Roderick, *supra* n. 35, at 23.
143. *See* Worl, *supra* n. 140, at 145.
144. *Cohen's*, *supra* n. 30, at § 4.07[3][b][ii][C]; *see* Pub. L. No. 100-241, 101 Stat. 1788 (1988).
145. Worl, *supra* n. 140, at 145–46.

under tribal law. Tribal Nations have responded best to the pressure by the U.S. to reorganize into business entities by adopting the tribal corporate structure into the tribal culture as an expression of tribal values without relinquishing the tribal philosophy and sense of community.

B. Resource Focused Industries

Early on, the U.S. government sought to control the management of tribal natural resources, exploit such resources often at below market value, and has only gradually lessened federal oversight in terms of the development of tribal resources. Through federal legislation, federal confiscations, federal treaty negotiation and unilateral treaty interpretation, the U.S. has gained a stronghold in many aspects of tribal natural resource use. Those Tribes who were able to hold fast to large land areas and/or clung to areas that were resource abundant have benefited from natural resource utilization.[146] Tribal Nations have stewarded resources such as grasslands, forests, fisheries, and natural mineral deposits for centuries. As the U.S. asserted trust authority over such resources under federal policies, the U.S. Secretary of the Interior through the BIA became an active agent leasing and extracting such resources.

With the tribalist economic philosophy in mind, Tribes have continued the centuries-old traditions of utilizing resources for the betterment of tribal communities. Distinct geographical locations have led to industries focusing on a particular resource. Across the country, the Pacific Northwest Tribes have engaged in the timber harvesting industry and at times, fisheries industries, the Wind River Reservation Tribes benefit from the production of oil and gas from their lands, and mining operations have been in place for decades on the lands of the Navajo Nation.[147] Natural resource development is an area that has proved a dependable source of revenue for Tribal Nations and, with proper stewardship and conservation practices, will provide on into the foreseeable future.

For example, the Navajo Nation reservation is the largest in mid-North America with multiple natural resources. In 1888, the first sawmill was built on the reservation to harvest timber from the estimated 430,302 acres of forest commercially used.[148] This led to the creation of the Navajo Forest Products Industry employing 564 Navajos by 1975 and an additional 80 in 1976.[149] In addition to timber, the Navajo reservation has an estimated vast reserve of oil, natural gas, coal, and uranium.[150] The exploitation of these resources has been the subject of contention and, at times, litigation between the Navajo Nation and the Secretary of the Interior for decades.[151]

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146. Joe Garcia, Testimony before the H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Oversight Hearing on 110-44*, 110th Cong. 110–44 (Sept. 19, 2007).

147. *See generally Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* (Veronica E. Velarde Tiller ed., BowArrow Publg. Co. 1996).

148. Lorraine Turner Ruffing, *Navajo Economic Development: A Dual Perspective*, in *American Indian Economic Development* 28 (Sam Stanley ed., Mouton Publishers 1978).

149. *Id.*

150. *Id.*

151. *See U.S. v. Navajo Nation*, 537 U.S. 488, 499 (2003) (holding that Tribe could not maintain an action for violation of the general federal trust obligation when the Secretary of the Interior conducted ex parte communications with a coal mining company in active negotiation for a coal lease with the Tribe that the

1. Early Federal Control of Tribal Natural Resource Exploitation

Congress in 1891 began authorizing federal oversight of tribal natural resources for all Tribal Nations be providing that reservation federal agents recommend tribal land areas and terms for grazing and mining leases subject to the approval of the Secretary of the Interior once tribal council consent was secured.[152] At this time in the history of relations between Tribal peoples and the U.S. government, Tribal governments by and large were repressed by federal Indian agents who held ultimate control over every aspect of tribal life on reservations.[153] Thus, the consent provisions in these pre-IRA federal statutes would not be equivalent to "free, prior and informed consent" as it is commonly understood.[154] In 1919, Congress dispensed with any tribal consent provision for the leasing of tribal lands for the purpose of mining gold, silver, copper, and other valuable minerals in the states of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, and Wyoming, requiring only the approval of the Secretary of the Interior.[155]

By 1924, Congress had taken another step to exploit tribal oil and gas resources by enacting legislation enabling the Secretary of the Interior to put unallotted lands into public auctions for extraction of oil and gas and by providing further that all production proceeds and royalty payments to the Tribes were taxable by the surrounding states.[156] The 1924 Act also extended the length of oil and gas leases to "as long as oil or gas shall be found in paying quantities."[157] Congress allowed in 1926 for oil and gas leases on tribal lands set aside for Indian schools and agency purposes with proceeds maintained by the U.S. Treasury to be distributed for education expenses or Indian administration costs of the federal Indian agencies.[158] In the 1927 amendments, tribal lands within executive order reservations were included in the oil and gas leasing provisions.[159]

To standardize mineral leases for Indian country, Congress passed the 1938 Indian Mineral Lease Act, which was intended to further the purposes set out in the IRA for strengthening tribal governments and "to promote tribal economic development by ensuring the greatest return on tribal minerals."[160] The 1938 Act provided again for tribal consent of mineral leases but retained the approval of the Secretary of the Interior

Secretary had ultimate review and approval authority over).

152. 25 U.S.C. § 397 (2006) (providing that upon the authority of a tribal council, lands may be leased for five years for grazing purposes and ten years for mining purposes "in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.")

153. *See Cohen's*, *supra* n. 30, at § 1.04. "In the late nineteenth[] century[,] coercive attempts at assimilation were applied to almost all aspects of Indian's lives. Local agents were charged with pressing white civilization upon native peoples by controlling such details as hair length, funeral procedures, hunting and fishing practices, and beef slaughtering." *Id.*

154. *See e.g.* UN Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 61st Sess., UN Doc. A/RES/61/295, Art. 19 (Sept. 13, 2007). "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." *Id.*

155. 25 U.S.C. § 399 (2006).

156. *Id.* at § 398.

157. *Id.*

158. *Id.* at § 400(a).

159. *Id.* at § 398(a).

160. *See Cohen's*, *supra* n. 30, at § 17.03[2][a].

for all such leases.[161]

2. Tribal Self-Determination in the Management of Natural Resources

With the U.S. participation in World War II, the search for greater fuel, energy, and uranium reserves led to exploratory drilling in the western states and within Indian country.[162] The BIA overseeing the leasing of Indian natural resource extraction and mining often accepted leases at far below market value in the 1960s and 1970s.[163] When the 1970s ushered in the federal self-determination policy for Tribes, tribal organizations had sprung up around common concerns over natural resource development and management. Two such groups included the Native American Natural Resources Development Federation formed by twenty-six Plains Tribes and the Council of Energy Resource Tribes (CERT) composed of twenty-five original Tribes.[164] These types of combined efforts then led to amending federal laws providing greater tribal control in terms of leasing and development plans. An estimated $5.8 billion was lost to Native Americans "because of inadequate accounting procedures and lax BIA enforcement" of the natural resource leases.[165]

The Indian Mineral Development Act of 1982[166] and the Federal Oil and Gas Royalty Act of 1982[167] both provided greater avenues for tribal authority in the development process and greater accountability with the government to calculate royalty rates "owed to Indian tribes as well as to punish with civil and criminal penalties those companies that cheated."[168] These stronger safeguards resulted from Tribes taking the initiative to hold the federal government accountable for tribal natural resource exploitation.

Conservation and environmental impacts have been at the forefront of tribal concerns since tribal lands have been opened to exploratory drilling. "The effort to provide economic development through mining and waste storage has split many Indian communities because in the pursuit of such goals spiritual ties to the land have been threatened, damaged, or destroyed."[169] Tribal natural resources development may include everything from forest harvesting, water projects, coal mining to the storage of nuclear waste. Proper management of these resources has driven the concerted efforts for greater tribal self-determination in decision-making over the form, process, and revitalization of such resources.[170]

161. 25 U.S.C. § 396(a) (2006).

162. *See* Paul C. Rosier, *Contemporary American Ethnic Issues: Native American Issues* 145 (Ronald H. Baylor ed., Greenwood Press 2003).

163. *Id.*

164. *See* Taylor Keen & Angelique EagleWoman, *Tribal Sovereignty and Economic Development*, in *Handbook of North American Indians*, *supra* n. 140, at 130.

165. Rosier, *supra* n. 162, at 148–49.

166. 25 U.S.C. § 2101 (2006).

167. 30 U.S.C. § 1701 (2006).

168. Rosier, *supra* n. 162, at 148.

169. *Id.* at 158.

170. *See e.g.* Dean Chavers, *Modern American Indian Leaders: Their Lives and Their Works* 91 (Edwin Mellen Press 2007) (detailing the federal mismanagement of timber on the Red Lake Reservation in Minnesota, the successful litigation to reclaim proceeds from loss in timber revenue led by Chairman Roger Jourdain, and

In recent years, Tribes with natural resources that meet energy needs have been increasingly involved in developing resource extraction, production and refining methods in an innovative environmentally-conscious manner. With the passage of the Indian Tribal Energy Development and Self-Determination Act of 2005 (Tribal Energy Act),[171] many Tribal Nations have begun strategizing to develop plans for entering energy markets. The Tribal Energy Act provided that Tribes may enter into a tribal energy resource agreement (TERA) with the Secretary of the Interior which would grant authority for Tribes for two primary purposes: to execute business agreements and leases for energy development on tribal lands and to grant rights-of-way through tribal lands for energy activities.[172] With this authority, Tribes need not seek approval for such actions on a transaction-by-transaction basis with the Secretary of the Interior once the TERA is in place furthering the federal policy of tribal self-determination.[173]

In fiscal year 2007, several Tribes receiving grants through the Department of the Interior's Office of Indian Energy and Economic Development (IEED) were pursuing energy initiatives based from natural resources.[174] These initiatives included: 1) development of a hydropower generating plant by the Cherokee Nation of Oklahoma; 2) development of a hydroelectric power plant by the St. Regis Mohawk Tribe for cost effective delivery to local businesses; 3) the planning and building of a woody biomass generating facility by the Coquille Indian Tribe; 4) development of tidal energy by the Passamaquoddy Tribe; and 5) a joint venture to produce fuel wood pellets and select lumber from timber resources by the Jicarilla Apache Tribe and the San Juan Pueblo (Ohkay Owingeh).[175]

In sum, tribal resource development as an industry has been a mainstay of tribal economies for over a century. Federal control over this development was once an iron fist and has gradually loosened in the recent future with federal statutes implementing the self-determination policy of the 1970s. As Tribes have organized and vocalized federal mismanagement of tribal natural resources, new federal laws have opened up greater access to decision-making in the areas of securing fair market value in energy leases and business agreements. With tribal values in mind and the creativity of developing resources in a sustainable manner, Tribes will continue to be involved in economic activities surrounding their remaining natural resources. Revenues from such activities have allowed some Tribes to operate full-scale enterprises as they have sought to diversify their economies.

C. The Tribal Gaming Industry and Other Enterprises

Beginning with bingo operations encouraged by the Christian missionaries as sanctioned recreational activities for tribal members, bingo operations have grown into

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the reforestation project undertaken by the Red Lake Band of Chippewa to grow back the pine forests).

171. 25 U.S.C. §§ 3501–3504 (2006) (the Energy Policy Act of 2005).

172. *Id.* at § 3504.

173. *See* 25 C.F.R. § 224.10 (2009).

174. Robert W. Middleton, statement before H.R. Comm. on Nat. Resources, Statement before H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Oversight Hearing on 110-44*, 110th Cong. (Sept. 19, 2007).

175. *Id.*

full-scale gaming entertainment complexes for a small number of Tribes located near major urban centers. As Tribes have branched out from natural resource development into other commercial activities, surrounding states have been quick to challenge tribal economic activity leading often to federal litigation to establish the preeminence of tribal sovereignty. In the area of tribal governmental gaming, states have been especially aggressive, which eventually led to the assertion of federal control over tribal governmental gaming through federal legislation.

1. Tribal Governmental Gaming Businesses Hindered by the Development of Federal and State Regulation

Beginning in 1979, the Seminole Tribe of Florida is credited with one of the first commercially run bingo operations.[176] With this entry into commercial gaming, the Seminole Tribe also had to defend tribal authority to enter into such economic authority. In *Seminole Tribe of Florida v. Butterworth*,[177] the Tribe sought to enjoin Broward County sheriff Robert Butterworth from arresting those involved with the operations of the bingo hall or participating in bingo games as the sheriff had threatened that the operation was in violation of state law.[178] The Fifth Circuit considered the application of a federal statute, commonly referred to as Public Law 280,[179] which provided Florida with the ability to assume full criminal jurisdiction over adjacent tribal lands.[180] Public Law 280 was a federal measure enacted during the termination policy to permit states to assert criminal jurisdiction and limited civil jurisdiction within tribal lands.[181] In considering whether Florida could impose its criminal laws to economic activity on the reservation, the Fifth Circuit determined that Public Law 280 jurisdiction only applied to conduct that was considered "criminal/prohibitory" and if the state regulated like economic activity, such activity fell within the "civil/regulatory" sphere which was beyond the state's reach.[182]

Six years later, this same analysis was utilized by the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*[183] when California sought to impose criminal penalties through Public Law 280 on two tribal governments' bingo operations. The Supreme Court held that California regulated gaming activity and, therefore as a civil matter, had no jurisdiction through Public Law 280 to impose its laws on tribal government economic activity.[184] The Court found relevant as well that the tribal governments' gaming operations furthered the federal interest in tribal economic development.

> These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon

176. *See* Jessica R. Cattelino, *Gaming*, in *Handbook of North American Indians*, *supra* n.140, at 148.
177. 658 F.2d 310 (5th Cir. 1981).
178. *Id.* at 311.
179. 18 U.S.C. § 1162 (codifying the criminal law provisions in Pub. L. No. 280).
180. 658 F.2d at 312–17.
181. *See Cohen's*, *supra* n. 30, at § 6.04[3][a].
182. *Id.*
183. 480 U.S. 202 (1987).
184. *Id.* at 207–13.

> and Morongo Reservations contain no natural resources that can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.[185]

With the supportive decision in *Cabazon*, tribal governmental gaming operations opened up in many areas throughout Indian country. However, the hostility of state officials to tribal economic activity was carried to the halls of the U.S. Congress—where representatives are elected from states and then become responsible for drafting federal legislation.[186]

In 1988, the U.S. Congress passed the Indian Gaming Regulatory Act (IGRA)[187] asserting various types of federal and state regulation over tribal governmental gaming activity. First, the IGRA established three levels of tribal gaming activity: Class I traditional tribal games exempt from outside regulation,[188] Class II bingo, pull-tabs, lotto, punch boards, other games similar to bingo and certain types of card games to be regulated by both tribal and federal authorities,[189] and Class III all other gaming activities not included in Class I and II subject to a federally approved tribal-state gaming compact and federal regulation.[190] To implement the federal regulation of tribal government business operations in this area, the IGRA established a new federal agency, the National Indian Gaming Commission (NIGC).[191]

Key provisions of the IGRA indicate the extent of regulatory control being asserted over tribal governmental gaming operations by the federal government. To fund the work of the NIGC, the IGRA includes a fee schedule that tribal governmental gaming operations conducting Class II and Class III will pay annually from gross revenues.[192] The Chairman of the NIGC has the authority to "issue orders of temporary closure" of tribal governmental gaming enterprises, assess and collect civil fines, approve or disapprove tribal gaming laws covering Class II and Class III categories, and approve or disapprove any management contracts that tribal governments may enter into for the operation of tribal governmental gaming enterprises.[193]

As for the profits of the tribal governmental gaming operations, the IGRA sets forth that Tribes may only use such profits for five specific purposes under the federal law:

> net revenues from any tribal gaming are not to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the

185. *Id.* at 218–19 (citation omitted).
186. *See* Brad Jolly, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 Ariz. St. L.J. 273, 297–99 (1997).
187. 25 U.S.C. § 2701 (2006).
188. *Id.* at §§ 2703(6), 2710(a)(1).
189. *Id.* at §§ 2703(7), 2703 (7)(A)(i)(III), 2710(a)(2).
190. *Id.* at §§ 2703(8), 2710 (d).
191. *Id.* at § 2704.
192. 25 U.S.C. § 2717.
193. *Id.* at § 2705(a)(1).

> Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.[194]

The ability of the U.S. government to regulate tribal economic activities has been taken to a new level with the passage of the IGRA in regards to dictating to the Tribal Nations engaged in gaming how their revenues must be spent. The IGRA also builds in a mandatory annual audit to be conducted by an outside company and supplied to the NIGC.[195]

Another serious infringement on tribal sovereignty has occurred with the IGRA's provisions that force Tribal Nations to enter into compacts with state governments for the operation of Class III gaming on tribal lands.[196] The IGRA provides that a Tribe may conduct Class III gaming only in a state "that permits such gaming" and pursuant to an approved tribal-state compact.[197] As for state participation, the IGRA sets the standard of good faith for negotiations; however, this standard has been effectively eviscerated by the U.S. Supreme Court's holding in *Seminole Tribe of Florida v. Florida*.[198] There, the U.S. Supreme Court held that the IGRA's provisions allowing Tribes to file suit against uncooperative states is violative of the states' Eleventh Amendment sovereign immunity.[199] In consequence of the court decision, states have the clear upper hand in bargaining over the terms of tribal-state gaming compacts since without a compact the Tribes are denied the right of conducting any Class III gaming.

State officials have used this bargaining position to try to attach non-gaming issues to the compact process to the detriment of tribal interests. Through the compact process, states have demanded revenue flows from the Tribes from their 'all or nothing' bargaining approach.[200] Another example of state coercion occurred in Wisconsin, when Governor Tommy Thompson "wanted to abrogate the tribes' hunting and fishing treaty rights and to impose state taxation on reservation cigarette and gasoline sales."[201] In the end, the Tribes in Wisconsin agreed to "excessive annual payments" to preserve their other rights against further state intrusion.[202] With enactment of the IGRA, U.S. trade restraints have risen to a new level as states are able to impose conditions on tribal governmental gaming businesses through the tribal-state compacting process for Class III gaming.

A great deal of litigation has resulted from passage of the IGRA including

194. *Id.* at § 2710(b)(2)(B).
195. *Id.* at § 2710(b)(2)(C).
196. *Id.* at § 2710(d).
197. 25 U.S.C. at § 2710(d)(1)(B), (C), 2710(d)(2)(B).
198. 517 U.S. 44 (1996).
199. *Id.* at 72.
200. *See e.g.* Mark Van Norman & John Harte, *Indian Gaming: Legislative, Regulatory, and Litigation Report*, in 29th Annual F.B. Assn. Indian L. Conf., *The Role of Indian Tribes in Modern American Society Course Materials* 221 (Apr. 15–16, 2004). "A number of tribes and states have reached viable and fair revenue sharing agreements. However, in light of the recent state budget troubles, many tribes are concerned that some states will be tempted to use the imbalance in the compacting process, created in *Seminole Tribe v. Florida*, to pressure tribal governments into unreasonable revenue sharing agreements to fix their budget problems." *Id.*
201. Chris Rausch, *The Problem with Good Faith: The Indian Gaming Regulatory Act a Decade after Seminole*, 11 Gaming L. Rev. 423, 426 (2007).
202. *Id.*

litigation over the following: the constitutionality of the IGRA;[203] which types of games are Class III and not Class II, thereby requiring tribal-state compacts;[204] what types of games should be included within tribal-state compacts as permitted by a state;[205] whether proper state officials have entered into tribal-state compacts;[206] whether the NIGC has overstepped its authority with implementation of internal control regulations for tribal governmental gaming operations;[207] the validity of the IGRA's provision[208] that tribal lands acquired for gaming purposes must have the consent of the state governor prior to operating gaming facilities;[209] and other issues in interpretation of the IGRA's provisions.

In spite of the high hurdles the IGRA has imposed, a small number of Tribes have been enormously successful in operating gaming enterprises near heavily populated areas and another group of Tribes have been moderately successful in running governmental gaming businesses for the purposes of basic economic stimulation, employment opportunities, and capital for diversifying into other economic activities. An overview of the revenues accrued from tribal governmental gaming enterprises demonstrates that Tribal Nations have been able to establish lucrative operations in spite of the many layers of control exerted by both the U.S. federal government and its component state governments.

> Indian gaming exhibited significant growth in 2004. There were 228 tribes operating 405 gaming facilities in 30 states. In total, these gaming facilities generated approximately $19.6 billion in gaming revenue, a 15 percent increase over the $17 billion generated in 2003. Total non-gaming revenue rose about 8 percent from about $1.8 billion in 2003 to 1.9 billion in 2004.[210]

Tribes located in different areas of the country experienced different levels of growth in 2004. For example, Tribes in Louisiana, Maine, Mississippi, and South Carolina had

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203. *See Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 10–11 (D.D.C. 1990) (challenging the IGRA as violative of tribal self-determination, violative of the federal trust responsibility, unlawfully restricting the power of the federal judiciary, and as violative of the fundamental right to tribal self-government).

204. *See e.g. Cabazon Band of Mission Indians v. N.I.G.C.*, 14 F.3d 633, 634 (D.C. Cir. 1994) (holding that electronic pull-tabs were not Class II games under IGRA and that summary judgment was appropriate in favor of the NIGC, the U.S. Department of the Interior and the Secretary of the Interior, the U.S. Department of Justice and the U.S. Attorney General, and the fifteen states that had intervened in the action).

205. The following two cases followed the *Cabazon* holding to find that once a state regulates gaming all games are available for negotiation in a tribal-state compact: *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1030–33 (2nd Cir. 1990); *Lac du Flambeau Band of Chippewa Indians v. Wis.*, 770 F. Supp. 480, 484–89 (W.D. Wis. 1991). Other federal courts have held that tribal-state compacts may only include the same games already regulated under state law under a "particular game" limitation. *See Cheyenne River Sioux Tribe v. S.D.*, 3 F.3d 273, 278–80 (8th Cir. 1993); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, 426–27 (9th Cir. 1994).

206. *See e.g. Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1558–59 (10th Cir. 1997) (holding that the governor of New Mexico lacked the authority to enter into a tribal-state compact).

207. *See Colo. River Indian Tribes v. Natl. Indian Gaming Commn.*, 466 F.3d 134 (D.C. Cir. 2006) (holding that the N.I.G.C. was not permitted to issue Minimum Internal Control Standards for Class III tribal governmental gaming operations).

208. 25 U.S.C. § 2719(b)(1)(A) (2006).

209. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. U.S.*, 367 F.3d 650 (7th Cir. 2004) (finding governor's consent provision for taking 'after acquired lands' into trust for purpose of tribal governmental gaming under the IGRA constitutionally permissible).

210. Alan Meister, *Casino City's Indian Gaming Industry Report* 2 (updated ed., 2005–2006).

decreased revenues in 2004, whereas, Tribes in California, Connecticut, Arizona, Minnesota and Wisconsin increased their revenues and accounted for 61 percent of the total gaming revenue of all tribal governmental gaming in 2004.[211] Location has been a key factor in determining whether tribal governmental gaming will lead to significant profits and/or serve another significant function as a job-creation venture for the tribal community.[212]

Many Tribal Nations have successfully funneled gaming dollars into other types of economic activities to allow for the circulation of funds within the tribal community.[213] These efforts are generally included in diversification strategies for furthering overall tribal economic development plans.[214]

2. Expansion of Tribal Corporations and Economic Diversification

Diversification is the new slogan in Indian country for those who have successfully built, financed, and reaped profits from gaming enterprises. Because of the history of the IGRA and the repeated attempts to circumscribe Tribal Nations' abilities to operate their gaming enterprises even within the narrow confines of that federal statute, Tribes are increasingly aware that capital raised from gaming operations or natural resource development need to be reinvested into other economic sectors for a broad-based tribal government economic portfolio.[215]

As noted in 2007 by the National Congress of American Indians (NCAI) President Joe Garcia (Governor of Ohkay Owingeh), most Tribal Nations face basic challenges to building economies and diversifying those economies.

> The vast majority of tribes remain in desperate need of meaningful, diversified economic development opportunities. There are a few high-profile examples of tribes around the country who have prospered economically. However, there are hundreds more who remain nearly invisible, who are struggling to preserve their reservations, their culture, and their sovereignty. The social and economic conditions in many Indian communities are comparable to those in developing nations around the world.[216]

Thus, the reality is that with a few exceptions, Tribes in Indian country continue to be in a state of devastation following the military anti-tribal activity carried out by the United States against Tribal Nations since the 1700s and the 1800s.[217] To address the lack of economic opportunity in tribal societies, the tribal government corporate model has been a vehicle for branching out into various industries to provide a base for a renewed tribal

211. *Id.*

212. For the job creation benefits that have occurred as a result of tribal governmental gaming businesses, see Stephen Cornell et al., *American Indian Gaming Policy and Its Socio-Economic Effects: A Report to the National Gambling Impact Study Commission* 34 (Econ. Resource Group July 31, 1998). "It appears that whatever arguments can be made for job creation through casinos in general can be made with even greater force with respect to Indian casinos, since average tribal unemployment prior to the introduction of Indian gaming was more than four times the national unemployment rate." *Id.*

213. *See* Graham, *supra* n. 97, at 602.

214. *See* Keen & EagleWoman, *supra* n. 164, at 131.

215. *See* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 782 (2004).

216. Garcia, *supra* n. 146.

217. *Infra* pt. II.

economy.

3. Tribal Enterprises, Federal Contract Awards, and 8(a) Certification

One of the means for garnishing profitable activity has been to enter into the federal procurement process through 8(a) certification of tribal corporations. In the 1960s, the general 8(a) program was enacted to assist small disadvantaged business entities to compete in the larger U.S. economy. Through the U.S. Small Business Administration, the federal government authorized a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or "8(a) BD" program).[218] The nine-year 8(a) program to assist disadvantaged minority businesses includes tribally-owned businesses within the program's target constituency as of 1986.[219]

Under federal law, Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Native Hawaiian Organizations (NHOs), and Tribally-owned 8(a) businesses are classified as socially disadvantaged and must demonstrate economic disadvantage to participate in the 8(a) program.[220] The purpose behind this access to ANCs, CDCs, NHOs, and Tribally-owned entities is to support community economic development, not simply the individual enrichment purpose of general 8(a) eligible small businesses. To this end, there is an Office of Native American Affairs within the Small Business Administration with a goal of providing "full access to the necessary business development and expansion tools available through the Agency's entrepreneurial development, lending and procurement programs."[221] In the view of National Congress of American Indians (NCAI) President Joe Garcia, this access is in fulfillment of the federal trust responsibility and promotes tribal self-sufficiency by providing "an economic tool for tribes and villages (through federally mandated Alaska Native Corporations (ANCs)) to access the largest purchaser of goods and services in the world—the federal government."[222]

Within the 8(a) program, Tribal Nation businesses and ANCs are able to obtain sole source contracts, which are contracts that need not be divided among several businesses or be subject to competitive bidding practices.[223] Tribal corporations and ANCs are able to qualify more than one tribal business for 8(a) certification as affiliates or under the larger tribal corporate umbrella. Another provision that assists tribal corporations and ANCs is the non-capped dollar amount for sole source contracts obtained through federal procurement, whereas other businesses have a limit to the total contract amounts awarded non-competitively (three million dollar cap for basic goods and services sole source contracts and five million dollar cap for constructing and manufacturing sole course contracts).[224] The federal legislative intent for these

218. 15 U.S.C. § 637 (2000).
219. *Id.* at § 637(a)(4)(A)(i)(II).
220. *See* 13 C.F.R. §§ 124.109(b)(2), 124.110.
221. U.S. Small Bus. Administration, *Office of Native American Affairs: Mission*, http://www.sba.gov/aboutsba/sbaprograms/naa/index.html (accessed May 23, 2009).
222. Garcia, *supra* n. 146 (citation omitted).
223. 13 C.F.R. § 124.506(b) (2009).
224. *Id.* at § 124.519(a).

provisions was to support tribal enterprises and ANCs in building economic activity in some of the most poverty-stricken areas of the country.

For tribal and ANC businesses that have the facilities and capabilities to handle large-scale federal contracts, participation in the 8(a) program for the nine-year period has offered the opportunity to expand. Examples of the success of tribal corporations entering into the 8(a) program include the Coeur D'Alene Tribe in northern Idaho, which received a contract to provide equipment for the U.S. Army valued at "up to $400 million" through its company Berg Integrated Systems.[225] Coeur D'Alene Tribal Chairman Chief Allan stated, "[t]his contract is a major milestone in our initiative to expand our economic portfolio, while also creating sustainable employment opportunities for our future."[226] Another example is from the Winnebago Reservation in Nebraska, home to HoChunk, Inc., a tribal corporation founded in 1995 that has grown into a multi-million dollar enterprise.[227] HoChunk, Inc. has a family of subsidiary companies with most participating in the 8(a) program, including All Native Solutions (computer hardware provider), All Native Services (IT services), Blue Earth Marketing (marketing and advertising agency), HCI Construction (general contractor), and All Native Systems (telecommunication technology and manufacturer of computer hardware).[228]

In Oklahoma, Chickasaw Nation Industries, Inc. (CNI) has become a major contractor for large-scale federal contracts through the 8(a) program as well.[229] "Headquartered in Norman, OK, CNI and its subsidiaries are experienced federal contractors with more than a decade of recorded excellence in contract and subcontract management."[230] One of the 12 companies in the CNI family, the CNI Administrative Services operates contracts with the U.S. Department of Defense, the U.S. Department of Energy, and the U.S. Department of Health and Human Services.[231]

Farther north in Montana, S & K Technologies, Inc. (SKT) is another tribal industry leader that has experienced expansion through its participation in the 8(a) program.[232] The Salish and Kootenai Tribes have developed S & K Aerospace, Inc. and, in addition, S & K Global Solutions, Inc.[233] One of the beginning contracts for SKT was a $325 million eight-year contract to track service parts for U.S. Air Force F-15 fighter aircraft all over the world.[234] "Four years ago, SKT was a small company comprised of

225. *See* Marc Stewart, *Cd'A Tribe Finalizes $400M Deal*, Coeur d'Alene Press Newsp. (Oct. 2, 2007) (copy on file with author).

226. *Id.*

227. *See* HoChunk, Inc., *Welcome to HoChunk, Inc*., http://www.hochunkinc.com/index.html (accessed May 23, 2009).

228. *See* HoChunk, Inc., *National/International Subsidiaries*, http://www.hochunkinc.com/subsidiaries/national.html (accessed May 24, 2009).

229. *See* Chickasaw Nation Indus., http://www.chickasaw.com/ (accessed May 24, 2009).

230. Chickasaw Nation Indus., Inc., *supra* n. 102.

231. *See* Chickasaw Nation Indus., *Customers*, http://www.chickasaw.com/ (accessed May 24, 2009).

232. *See* S & K Techs., Inc., *Contracting Solutions*, http://www.sktcorp.com/Contracting/tabid/197/Default.aspx (accessed May 24, 2009).

233. *S&K Technologies, Inc. Announces New Branding* Strategy, 1 Group Spirit (newsltr. for employees of S&K Technologies, Inc.) 3 (Spring 2008) (available at http://www.sktcorp.com/Portals/0/Newsletters/GroupSpirit_Vol1_Issue1_Digital. pdf).

234. *See* David Melmer, *Salish-Kootenai Firm Gets $325 Million Air Force Service Contract*, Indian

a very small workforce, with sales of approximately $200,000. At the end of FY 2004, SKT will realize sales of over $40,000,000 and employ over 210 individuals."[235]

Alaska Native Corporations have also realized new economic opportunities, and employment has risen in their communities through the 8(a) federal procurement program. "The public policy rationale for ANCSA federal procurement preferences is to jump-start Alaska Native economies and flow the economic and other benefits to tribal shareholders."[236] ANCs were meant to participate in the U.S. market economy as other corporations with the added responsibility of providing benefits for the Native community composed of the Native shareholders—a type of hybrid corporate purpose.[237] Participation in the 8(a) program has furthered this goal.

> In recent years, ANCs incrementally have gained management capabilities that enable them to start competing and negotiating for government and 8(a) contracts. In 2000, ANCs were contracting about $265 million through 8(a) programs and in 2004 contracting increased to $1.1 billion. Non-competitive contracting with agencies of the US government totaled $207 billion in 2006, and $145 billion in 2005. In 2005, all federal contracts awarded to ANCs and American Indian tribal businesses collectively totaled $3.197 billion, which represented less than one percent (0.847%) of all government contracts. . . . The gain to ANCs is not coming at great expense to other government contractors, especially when one considers that 8(a) contracts with ANCs benefit thousands of Alaska Native shareholders, not a single small business owner.[238]

With passage of the ANCSA, Alaska Natives ceded millions of acres of land, negotiated away aboriginal title to their remaining lands and formed corporations to manage the remaining assets and enter into the U.S. market economy. Through the 8(a) nine-year program, ANCs have developed a foothold and many are moving their economies forward. "Market entry and eventual economic self-sufficiency of ANCs are primary goals of ANCSA and several subsequent Congressional amendments."[239] Despite the fact that the intended purpose of ANCSA was for this type of economic activity and is in fulfillment of the SBA 8(a) program to provide training and market access to disadvantaged businesses, this new success of some ANCs has garnered anti-tribal forces to once more align to curtail the building of lasting economic foundations for all ANCs and other Tribal Nations.[240]

The Government Accountability Office (GAO) in April 2006 released the report, "Increased Use of Alaskan Native Corporations' Special 8(a) Provisions Calls for

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Country Today (May 16, 2001) (available at http://www.indiancountrytoday.com/archive/28192779.html).

235. *See Greetings from the Vice President of IT Operations: Montana*, 2 S&K Techs. In Sync (newsltr. for employees of S&K Technologies, Inc.) 5 (Summer/Autumn 2003) (available at http://www.sktcorp.com/Portals/0/Newsletters/Insync_ Summer_03.swf).

236. E. Budd Simpson, *Doing Business with Alaska Native Corporations*, 16 Bus. L. Today (newsltr. Of the ABA Sec. Bus. Law) (July/Aug. 2007) (available at http://www.abanet.org/buslaw/blt/2007-07-08/simpson.shtml).

237. Duane Champagne & Carole Goldberg, *Federal Contracting Support for Alaska Natives' Integration into the Market Economy* 6–7 (Sept. 13, 2007) (available at http://www.law.ucla.edu.docs/uclanativenationswhite_paper_8a_9_13_07.pdf).

238. *Id.* at 11.

239. *Id.*

240. *Id.*

Tailored Oversight,"[241] criticizing the process of ANCs federal procurement awards and maintenance under the 8(a) program. GAO criticisms leveled against the Small Business Administration's (SBA's) oversight of sole-source contracts awarded to ANCs included allegedly failing to monitor changes in the scope and amount of contracts post-award; allowing ANCs unfair competitive advantages in certain industries; allowing ANCs to partner with large firms and pass on 8(a) benefits in an unintended manner; and failure to monitor ANCs activity with 8(a) contracts.[242] In response, the SBA indicated that the tone of the GAO report suggested concerns with the primary purpose of 8(a) awards to ANCs—"using the statute to bring resources back to improve their Native Alaskan communities."[243]

The Chairman of the Government Reform Committee Henry Waxman (D-Calif.) helped mount a legislative campaign in the summer of 2007 to limit the size of contracts awarded to Tribal corporations and ANCs and he expressed dismay that Tribes were doing business beyond tribal borders.[244] Two bills introduced in 2007 were intended to target Tribal corporations and ANCs engaged in the 8(a) program. The Accountability in Contracting Act (H.R. 1362) and the Small Business Fairness in Contracting Act (H.R. 1873) were attempts at undermining the fledging success of tribal businesses and ANCs who have benefited from the 8(a) program. At the time these bills were introduced, the NCAI stated that the tribal 8(a) provisions were "only beginning to fulfill its congressional intent of providing incentives for federal agencies to contract with historically underrepresented tribal enterprises."[245]

On September 19, 2007, the U.S. House Committee on Natural Resources held an oversight hearing to discuss the specifics of the 8(a) program for Tribal and Alaska Native corporations in light of the GAO's 2006 report charging unequal compliance for such corporations in the federal procurement process and in response to the bills introduced to limit tribal participation. In the opening remarks of the oversight hearing, Chairman of the Committee Rep. Nick Rahall II stated that "[d]ata shows that Tribal and Alaska Native Corporations received less than 1 percent of the $377.5 billion awarded through Federal procurement contracts. Of the $145 billion awarded through sole source contracts, Tribal and Alaska Native Corporations only received approximately 1.4 percent of that amount."[246] In addition, he stated, "[w]ith a 26 percent poverty rate in Indian country and unemployment rates as high as 80 percent, the need for economic

241. U.S. Govt. Accountability Off., *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight* (Apr. 2006) (available at http://www.gao.gov/new.items/d06399.pdf).

242. Katherine V. Schinasi, statement before the H.R. Comm. on Nat. Resources, Testimony before the H.R. Comm. on Nat. Resources, *Alaska Native Corporations: Increased Use of Special 8(a) Provisions Calls for Tailored Oversight* (Sept. 19, 2007) (available at http://www.gao.gov/new.items/d071251t.pdf).

243. Kimberly Palmer, *GAO Criticizes Oversight of Contracts to Alaska Native Firms*, http://www.govexec.com/dailyfed/0406/042706k1.htm (Apr. 27. 2006).

244. *See* Tex Hall, *Stand United for 8(a)*, Indian Country Today (July 20, 2007) (available at http://www.indiancoutrytoday.com/archive/28201789.html).

245. Natl. Cong. of Am. Indians, *Brief Update on Major Legislative Issues* (Aug. 7, 2007) (available at http://ncai.org/ncai/resource/data/docs/legislative/NCAI_Legislative_Update_for_August_Recess_-_FINAL__2_.pdf).

246. Nick J. Rahall, Opening Remarks before the H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Oversight Hearing on 110-44*, 110th Cong. 110–44 (Sept. 19, 2007).

development in Native communities is self-evident."[247]

The real reason behind the charge levied against the provisions for Tribal and Alaska Native corporations may be that it is a defensive strategy by the largest corporations in the U.S. who have come under heavy scrutiny for their large-scale federal contracts potentially awarded as a result of political connections.[248]

> In the 110th Congress there has been a significant focus on federal procurement reform largely in response to contracts awarded for the Iraq war, Afghanistan and Katrina resulting in intense scrutiny on investigations and oversight of government contracting practices and non-competitive awards. These reform initiatives could have a significant and disproportionate impact on Native communities. Notwithstanding the fact that we are but a sliver of federal contracting, we face several proposals to eliminate or diminish the Native 8(a) contracting preferences.[249]

This smokescreen tactic to divert public attention from these enormous corporate politically motivated contracts and focus on the less than one percent awarded to tribal corporations and ANCs have been met with facts and figures in congressional hearings. With the politically charged atmosphere surrounding the tribal 8(a) program, Tribes and advocacy groups are once more defending positive economic growth in Indian country.[250]

D. Imposition of U.S. Trade Restraints as Taxation on Tribal Nations

The pattern to be drawn from the previous sections should be clearly discernable—each economic activity that Tribal Nations succeed at has been met with U.S. trade restraints. The very relationship that has been imposed upon Tribal Nations by the U.S. Supreme Court decisions and the U.S. Congress as one of "plenary power" over tribal resources and decisions has stifled in large part tribal economics. These foundational restraints serve as U.S. trade restraints as well as successive federal legislation and policies as described throughout this article. In summarizing the tribal industries outlined above, a clear pattern of U.S. trade restrictions on tribal economics is discerned.

In terms of natural resource development, Tribal Nations possessing vast natural resources have dealt with comprehensive federal regulatory schemes that have denied full profit or even competitive market returns through the federal control over leasing provisions.[251] With the entry into the gaming market, Tribal Nations have been severely limited by the federal statute enacted with the aberrant provisions that Tribes must comply with either a federal oversight agency's regulations (Class II gaming) or negotiate with states in an uneven balance of power to conduct full gaming activities

247. *Id.*

248. *See e.g.* Evelyn Pringle, *The Inexplicable Enrichment of Bush Cronies*, http://www.countercurrents.org/pringle200407.htm (Apr. 20, 2007).

249. Greg DuMontier, Testimony before the H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Hearing on 110-44*, 110th Cong. 110–44 (Sept. 19, 2007).

250. *See* Jerry Reynolds, *Report Shows Alaska Native Contracting Has Outgrown SBA Oversight*, Indian Country Today (May 5, 2006) (available at http://www.indiancountrytoday.com/archive/28166629.html).

251. *See* Venables, *supra* n. 42, at 349. "The [Tribal] Nation's profits from energy resources were far below market value because the Bureau of Indian Affairs, charged with the responsibility of ensuring that fair prices were provided in leases to energy companies, followed the goals of the energy companies instead." *Id.*

(Class III gaming). As Tribes have integrated the corporate model into a tribally owned business entity, economic diversification has led to participation in government contracting through the federal 8(a) program. As discussed in the previous section, there have been several high profile efforts to diminish ANCs and tribal business participation in the 8(a) program. This pattern of tribal success followed by federal limitation is not the appropriate federal response in the era of U.S. Indian self-determination policy or in terms of the tribal-federal relationship established by treaties.

Over time, the U.S. has imposed a general variety of trade restraints, including federal and state taxation, on Tribal Nations which have no basis other than that the will of the U.S. to do so.[252] Tribes have never consented to the taxation that has been forced upon tribal members, tribal resources, and tribal activities. This section will set forth three other major impositions by the U.S., which serve to limit Tribal Nations' economies: 1) the imposition of federal taxation on tribal members, tribal resources and tribal activities; 2) the financing limitations imposed on Tribal Nations for issuance of tax-exempt bonds; and 3) the incursion of the state taxing power within tribal territories.

To begin with, the imposition of any taxes by the United States and its component state governments should be viewed as suspect in terms of a legally justifiable basis. One of the justifications for taxation of Tribal Nations' resources and activities has been based on the "plenary power" of the U.S. Congress, which gained legitimacy in the U.S. Supreme Court cases of the assimilation era.[253] Taxation of tribal members by the U.S. federal government has been justified by the passage of the 1924 Indian Citizenship Act[254] and federal decisions determining Indians as U.S. citizens and therefore, subject to federal income taxes. Over time, the U.S. Supreme Court has upheld the encroachment of state taxation within Indian Country in a variety of contexts. Through specific Internal Revenue Service (IRS) Revenue Rulings, U.S. Supreme Court decisions and sparse federal statutes, the area of federal and state taxation within Indian Country has become a quagmire significantly restraining tribal economic development.

1. Federal Taxation of Tribal Members, Tribal Resources, and Tribal Activities

U.S. federal courts have held that tribal individual income is subject to federal taxation,[255] including the income of the elected tribal officials paid solely from tribal

252. *See* U.S. Const. art. I, § 2, cl. 3. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons." *Id.* (emphasis added). "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*." *Id.* at amend. XIV, § 2. (emphasis added).

253. *Infra* pt. II(B).

254. *See generally* Indian Citizenship Act of 1924, 43 Stat. 253 (June 2, 1924) (also known as the Snyder Act of 1924, which unilaterally naturalized all tribal members as U.S. citizens).

255. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *Choteau v. Commr.*, 283 U.S. 691, 694 (1931) both providing that Indians are citizens of the United States and subject to general federal income taxes. These cases have been relied upon by the U.S. Internal Revenue Service to apply federal income tax to tribal members. *See* I.R.S., *Indian Tribal Governments Topics: ITG FAQ # 2 Answer—Federally Recognized Indian Tribal Governments Subject to Employment*, http://www.irs.gov/govt/tribes/article/0,,id= 184735,00.html (last updated Nov. 18, 2008).

funds.[256] Within the IGRA, per capita payments to individual tribal members are subject to federal income tax.[257] State income taxation has been held to attach to any tribal member who does not reside on tribal land.[258] Thus, tribal members are subject to federal taxation by the United States for regular income and gaming dividends and may be subject to state income taxation depending on the land status of where they reside.[259] This is a significant incursion into the tax-exempt status of Indians as citizens of separate sovereigns—Tribal Nations.

A series of IRS Revenue Rulings have recognized that Tribal governments are not subject to federal taxes as government entities.[260] In spite of this stance, tribally owned businesses must pay federal and state employment taxes.[261] In certain instances, the U.S. Congress has legislated in the area of taxation with Tribes being treated as imperfectly subsumed within the federal-state structure of the U.S. government. However, tribal governments have not enjoyed the same benefits under the Internal Revenue Code as state and local governments.[262]

> Despite the fact that the federal government has expressly recognized tribal governments as sovereign entities for more than 150 years, with responsibilities to constituents equal to that of state and local governments, Indian tribes have historically been denied an equal federal tax status. Rather, Indian governments have occupied an anomalous niche within the structure of federal tax laws, enjoying some of the privileges afforded states, while at the same time being subjected to many of the burdens borne by ordinary individual taxpayers.[263]

This anomalous situation for Tribal Nations has led to uneven IRS Revenue Rulings and restrictive federal legislation imposing taxation on tribal government activities.[264]

2. Limitations on Tribal Government Financing Using Tax-Exempt Bonds

In the area of financing through tax-free bond offerings, tribal governments have been limited to narrowly-defined general obligation bonds whereas state and local governments have many more tax-exempt bond issuing options, such as private activity

256. *See Jourdain v. Commr*., 617 F.2d 507, 509 (8th Cir. 1980), *cert. denied*, 449 U.S. 839 (1980) (holding that income for position as Tribal Chairman was taxable by the Internal Revenue Code); *see also*, I.R.S, *supra* n. 255 (stating that certain federal employment taxes are not imposed on Tribal Council salaries, however, general federal income taxes do attach).

257. 25 U.S.C. § 2710(b)(3)(D); *see also* U.S. Gen. Acctg. Off., *Tax Policy: A Profile of the Indian Gaming Industry* 4 (May 1997) (available at http://www.gao.gov/archive/1997/gg97091.pdf). "Individual trib[al] members are subject to federal income tax. Payments of net revenues from gaming operations to members of Indian tribes are generally taxable, and the tribe is responsible for withholding income taxes from the payments." *Id*.

258. *See Okla. Tax Commn. v. Chickasaw Nation*, 515 U.S. 450, 462 (1995). "The holding on tribal members who live in the State outside Indian country runs up against a well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Id.* at 462–63.

259. *See* Rev. Rul. 67-284, 1967-2 C.B. 55.

260. *Id. See also* Rev. Rul. 94-16, 1994-1 C.B. 19.

261. *See* I.R.S. Rev. Rul. 59-354, 1959-2 C.B. 24.

262. *See* Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 Harv. J. on Legis. 335, 360–63 (1985).

263. *Id.* at 358–59.

264. *Id.* at 359.

bonds. In 1982, the U.S. Congress passed the Indian Tribal Governmental Tax Status Act (ITGTSA)[265] for the purpose of clarifying the tax status of tribal governments as similar to state governments for certain purposes including tax-exempt bond issuance.[266] Tribes seeking to begin major development projects must secure funding usually through a financing method in order to get the project underway. State and local governments, on the other hand, have access to securing capital through either governmental bonds[267] (providing funding for infrastructure projects, such as building a power plant or sewage treatment facility) and private activity bonds[268] (issued by a governmental entity in partnership with a private business for economic development where at least 10 percent of the proceeds will be used for a private business purpose, such as financing a stadium, horse race tracks, or public golf courses).[269] The majority of Tribes do not have access to significant capital or tax revenues for infrastructure projects or economic expansion.[270] Therefore, the ability to issue debt instruments with tax advantages to investors would be of significant assistance to Tribes in spurring on economic projects.

The 1982 Act provided a federal income tax deduction for taxes paid to Tribes; allowed as deductible income any charitable contributions made to a tribal government and exempted tribal governments from specific federal excise taxes.[271] The important limitations on tribal governments issuing tax-exempt bonds in the Act included a prohibition on Tribes issuing any private activity bonds and tribal tax-exempt bonds limited to activities classified as "essential governmental functions."[272] These limitations were not known to state or local governments issuing tax-exempt bonds under the Internal Revenue Code.[273] In 1987, the ITGTSA was amended to add a second prong to the test for tribal tax-exempt bonds so that currently tribal bond offerings must be both: 1) classified as "'essential government function[s]'" and 2) an activity that is "customarily performed by State and local governments with general taxing powers."[274]

The IRS subsequent to the 1987 amendment has narrowly construed the "essential government function" test for tribal government tax-exempt bonds.[275] For example, the IRS determined that financing a golf course owned by a Tribe does not meet the essential function and customary public purpose test.[276] This decision has resulted in spite of the

265. Pub. L. No. 97-473, § 202, 96 Stat. 2605, 2608 (Jan. 14, 1983).

266. *Id.*

267. 26 U.S.C. § 103(c).

268. 26 U.S.C. § 141.

269. *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. Rev. 1009, 1054–61 (2007).

270. *See* Raymond C. Etcitty, *Tribal Advice and Guidance Policy* II-7 (Advisory Comm. Tax Exempt and Govt. Entities June 9, 2004) (available at http://www.qai.irs.gov/pub/irs-tege/act_rpt3_part2.pdf). "[G]aming does not provide sufficient funds to meet the needs of all tribal governments. It is a general misconception that all Indian tribes are rich and have gaming, since more than a majority of all Indian tribes are without gaming of any kind." *Id.*

271. 26 U.S.C. § 7871 (2006).

272. *Id.* at § 7871(c).

273. *See* Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 Admin. L. Rev. 333, 335 (1994).

274. 26 U.S.C. § 7871(e).

275. *See* Wayne Shammel, Statement before Sen. Fin. Comm., *Hearing on Indian Governments and the Tax Code: Maximizing Tax Incentives for Economic Development* (July 22, 2008).

276. *See* Clarkson, *supra* n. 269, at 1076–80.

2,645 municipal golf courses publicly owned in the U.S.[277] With the narrow construction of the ITGTSA, tribal governments have also been "the subject of disproportionate IRS audits with casino financing transactions."[278]

In the end, many Tribes cannot afford to issue general obligation tax-exempt bonds that carry with them the pledge of the Tribe to repay the debt obligation from tribal revenues.

> The Tribal Tax Act did permit tribes to issue public activity bonds for essential governmental functions. Yet, many traditional governmental functions, including school construction, have usually been financed with general obligation bonds. Indian tribal governments lack a diversified economy as well as the broad, stable tax base such an economy generates. As a result, they have little ability to issue general obligation bonds, whatever authority the tax code may give them as a matter of law. Thus, in the Tribal Tax Act, tribal governments were given bonding authority they were unable to use and denied bonding authority they would have welcomed.[279]

With the severe limitations on tribal offerings of tax-exempt bonds, the benefit to Tribes has been largely illusory without the full menu of bond offerings available to state and local governments.[280]

Without the ability to offer private activity bonds for commercial activities like state and local governments, Tribes have been severely restrained in creating economic-friendly environments for investors and for the development of full-scale tribal economies.[281] Tribal Nations have been left in the position of not having similar financing options as state and local governments in building infrastructure and joining with private business to engage in commercial projects. This crippling of the ability of tribal governments to fully participate in the U.S. market economy as governmental entities is a direct trade restraint on Tribal Nations.[282]

Pursuant to the U.S. Congress' legislative authority under the "plenary power" doctrine, Tribes have been restrained in their economic development activity by federal legislation, like the ITGTSA, within the U.S. tax system where Tribes are not treated as full governmental entities like state and local governments. This adds injury to insult when the federal government has a trust responsibility to Tribal Nations and a vested interest in the self-sufficiency of Tribes to provide for tribal members in this era of Indian self-determination.[283]

3. State Taxation within Indian Country

A further erosion of the ability of tribal governments to gain self-sufficiency and

277. *See* Etcitty, *supra* n. 270, at II-11.
278. *See* Laverdure, *supra* n. 27, at 5.
279. *See* Aprill, *supra* n. 273, at 348.
280. *See* Clarkson, *supra* n.269, at 1083.
281. *See* Laverdure, *supra* n. 27, at 5.
282. *See* Etcitty, *supra* n.270, at II-7. "Therefore, if the creation of self-sustaining revenue sources is the goal, tribal governments must be permitted to issue tax-exempt bonds, the bread and butter of most state and local governments treasuries." *Id.*
283. *See* Clarkson, *supra* n. 269, at 1084. "The policy of self-determination, along with the legal recognition of tribes as governments with responsibilities to their constituent populations, necessitates tax-free bond authority." *Id.*

end reliance on federal funds has occurred with U.S. Supreme Court decisions upholding state taxation in certain circumstances within Indian country. Tax revenue is a significant source for any government's funding of services. Tribal governments have not been able reap substantial benefits from taxation within the tribal jurisdiction, largely as a result of U.S. Indian law and policy.[284] Where the U.S. federal, state, and local governments have exclusive taxing jurisdiction within their territories, tribal governments have been circumscribed in their taxing authority by U.S. Supreme Court decisions.[285]

As discussed in the previous sections, tribal governments must contend with complexity and uncertainty within the Internal Revenue Code for tax exemptions and, at the same time, remain subject to federal taxation on activities not exempted. The U.S. Congress opened the door to state taxation within Indian country in 1891 by providing that state taxes would attach to the production of oil and gas from tribal lands.[286] As a general rule, states are barred from taxing tribal members or tribal governments.[287] However, state assertions of taxation over non-members within Indian country gained momentum and validation in the U.S. Supreme Court in recent decades.[288]

Beginning in the late 1970s, the U.S. Supreme Court upheld states' assertions to tax within tribal territories. In *Moe v. Confederated Salish and Kootenai Tribes*,[289] Montana sought to impose several state taxes within tribal territories, including state sales taxes of cigarettes on both tribal members and non-members.[290] In this 1976 decision, the Court held the state tax on Indians invalid[291] but stated that as for non-members the imposition of the tax presented a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."[292] This reasoning allowing for state taxation of non-members within tribal jurisdictions has carried over into other areas of taxation, such as state excise taxes on motor fuels as long as the legal incidence is found to fall on non-members.[293]

By allowing for state taxation on non-members within Indian country, the U.S. has created another trade restraint on Tribal Nations. The draining of potential tribal tax revenues by states and the holding of the U.S. Supreme Court that states have concurrent taxing jurisdiction on transactions involving non-members within the tribal territories are

284. *See* Angelique EagleWoman, *The Philosophy of Colonization underlying Taxation Imposed upon Tribal Nations within the United States*, 43 Tulsa L. Rev. 43, 70–72 (2007).

285. *See e.g. Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (holding that the Navajo Nation could not impose a hotel occupancy tax on a non-Indian owned hotel on fee land within the Navajo Nation reservation's boundaries).

286. *Infra* pt. III(B)(1).

287. *See Cohen's*, *supra* n. 30, at § 8.03[1][b].

288. In the area of retail taxes on cigarette sales to non-members, the U.S. Supreme Court has held that state taxes are valid within Indian country. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976).

289. 425 U.S. 463.

290. *Id.* at 467–68.

291. *Id.* at 480–81.

292. *Id.* at 483.

293. *See Wagnon v. Prairie Band of Potawatomi*, 546 U.S. 95, 103 (2005).

significant barriers to tribal tax revenue generation. Tribal nations must now weigh whether to impose a tribal tax upon production or sales where a state tax is asserted, and thereby, create a double taxation scenario.[294] State taxation has resulted in a loss of tax revenue for Tribes leading to lack of governmental revenue for necessary infrastructure.[295] With jurisdictional complexity, potential double taxation, and lack of economic infrastructure in Indian country, all of these factors amount to a large chilling effect on private business activity within tribal territories.[296]

Federal and state taxation amounts to significant trade restraints on tribal governments. Tribes have been forced into an imperfect fit into the Internal Revenue Code as not quite exempt governmental entities to the detriment of the tribal governments.[297] The U.S. Supreme Court has opened tribal boundaries to state transactional taxation as long as states word their tax laws so that the legal incidence falls on non-members.[298] With Tribal Nations unable to reap the full benefits of an exclusive tax base, they will continue to be dependent on federal funding for essential government services and will be unable to push ahead economically.[299]

IV. RECOMMENDATIONS FOR ECONOMIC REVITALIZATION IN INDIAN COUNTRY

The economic relationship between the U.S. and Tribal Nations is one that requires a historical viewpoint. From such a perspective, the U.S. has by various means purposefully and deliberately hampered, and at the extreme destroyed, tribal economies. This is especially evident after the enactment of the 1887 Dawes Allotment Act. With passage of the IRA in 1934, Tribes followed the federal lead and adopted government-owned corporate business entities. Through the last seven decades, Tribes have attempted to enter the market economy through a variety of means including natural resource development, gaming enterprises with recreational amenities, and through diversification efforts utilizing the tribal corporate structure.

Instead of encouraging Tribal economic prosperity, a pattern has been followed by the U.S. Congress in the past to stifle such prosperity whenever tribal success became apparent. After dragging the weight of historical federal restraints, the successes of Tribes have been truly exemplary. However, each time Tribes gain a foothold in

294. *See* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 Pitt. Tax Rev. 93, 95 (Spring 2005).

295. *See* Etcitty, *supra* n. 270, at II-7. "In reality, many tribal governments, still suffering from the impacts of historical federal policies, lack the ability to provide the most basic infrastructure that most U.S. citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity and telephone services that come with a modern home." *Id.*

296. Cowan, *supra* n. 294, at 95. *See also* EagleWoman, *supra* n. 284, at 64. As a result of U.S. Supreme Court decisions holding that state taxation was valid for nonmembers within Indian country, "the Court failed to mention . . . that this kind of super-taxation would oust prospective businesses from the reservation." *Id.*

297. *See* Laverdure, *supra* n. 27, at 17. "Existing Indian tax law is the primary obstacle to tribal self-determination and economic development in Indian country." *Id.*

298. *See Cohen's*, *supra* n. 30, at § 8.03[1][d].

299. *See* Laverdure, *supra* n. 27, at 17. "[U]nder current conditions, Indian nations cannot achieve meaningful self-determination in Indian country because they are not the primary tax and governing authority—they lack public revenue to provide basic services, and they are unable to address substandard socioeconomic conditions." *Id.*

prosperity federal legislators stymie such economic prowess. This counter-effort of the U.S. Congress has doubly disabled tribal government when the Tribes are not able to build revenue for tribal needs and sufficient funds are not received federally to uphold federal obligations of health care, education, land and resource management, conservation, housing,[300] road maintenance, and infrastructure support.

As the federal treaty obligations to Tribes are not being fulfilled,[301] Tribes have stepped up to meet the needs of their membership in effect helping to alleviate federal obligations.

> It is also important to recognize that successes of Native people and their governments come only after they have endured the residual effects of the eras of removal, reservation, assimilation and termination. One should also note that certain of these historic eras, and the actions taken in them, were responses to the then increasing economic strength of Tribal nations as land owners and market participants. While in the past our presence served to threaten others, today we represent an important opportunity for partnership and shared success across America, especially in rural and remote America.[302]

In negotiating treaties and ceding millions of acres, it could not have been the intention of historic tribal leadership to condemn their citizens to lives of abject poverty.[303] Yet, this has been the outcome for far too many tribal members in mid-North America as a result of being in a relationship with the U.S.[304] Economics are at the heart of the negotiations between the Tribal Nations and the U.S.[305] Thus, economic relief for tribal governmental business should be the policy of the U.S. for Tribes to realize self-determination and throw off the shackles of dependence on ever-decreasing federal appropriations.[306] Such economic relief would be a win-win situation as the federal trust responsibility towards Tribes would be met, and the Tribes would be able to actualize a sustainable territorial economy with the attendant gain of a quality living standard for tribal citizens.

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300. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921 (2008) (asserting a federal trust responsibility claim against the U.S. for unsafe and unsanitary housing built on the Blackfeet Reservation under HUD guidelines).

301. *See* Allison M. Dussias, *Indigenous Languages under Siege: The Native American Experience*, 3 Intercultural Hum. Rts. L. Rev. 5, 67–68 (2008). "The treaties and agreements that the federal government made with tribes over the course of many years, along with judicial decisions and other aspects of the dealings between the tribes and the government, gave rise to the trust relationship, encompassing a responsibility to respect and protect tribes, tribal resources, and tribes' rights to separate identities." *Id.*

302. Neal McCaleb, Testimony before the H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Hearing on 110-44*, 110th Cong. 110–44 (Sept. 19, 2007).

303. *See e.g. The Problem of Indian Administration* ch. 1, http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Indian_Admin_Problms.html (accessed Feb. 21, 1928). "The Conditions Among the Indians. An overwhelming majority of the Indians are poor, even extremely poor, and they [have] not adjusted to the economic and social system of the dominant white civilization." *Id.*

304. *See* Natl. Ctr. for Educ. Statistics, *Status and Trends in the Education of American Indians and Alaska Natives: 2008*, http://nces.ed.gov/pubs2008/nativetrends/ind_1_6.asp (Sept. 2008). For the year 2006, "39 percent of American Indian/Alaska Native children under the age of 5 lived in poverty, which was nearly twice as high as the percentage for the total U.S population . . . ." *Id.*

305. *See* U.S. Const. art. 1, § 8, cl. 3.

306. *See* Natl. Cong. Of Am. Indians, *Appropriations*, http://www.ncai.org/Federal_ Appropriations. 87.0. html (accessed May 24, 2009). "In the last 25 years, federal expenditure per capita for Indians has steadily declined as compared to spending for the U.S. population at large. Starkly identified in a 1999 Congressional Research Service study this trend demonstrates a troubling failure by the federal government to uphold its trust responsibilities with adequate appropriations." *Id.*

In the 2000s, it is time for Tribal Nations to send a unified and clear message to the U.S. Congress that tribal government-owned business deserves an economic package tailored to tribal needs. This is not merely because Tribes are disadvantaged businesses benefiting underserved communities, but this is because the federal government has treaty and federal obligations to rebuild tribal communities and carry out the promises made over the last two centuries to tribal peoples for the resources that the U.S. now claims as its own.[307] At a minimum, the treaties should stand for the joining of Tribal Nations and the U.S. as allies, including economic allies. By imposing trade restraints on Tribal Nations, the U.S. has treated the Tribes as communities subject to sanctions rather than as treaty partners for over a century or more.[308]

In support of the above call for changes to support tribal economic prosperity, the following recommendations are offered as simple federal legislative "fix" measures and long term federal legislative "overhaul" measures to realign the tribal-federal relationship into sovereign economic partners in mid-North America. As many of the trade restraint policies have emanated from the U.S. Supreme Court's decisions where the U.S. Congress has not legislated, these recommendations focus on proactive U.S. federal legislation to end the anti-tribal policy-making of that court.[309]

Federal legislative "fix" measures aimed at infusing Tribal Nation economics with much needed capital should include: 1) federal legislation affirmatively recognizing full tribal jurisdiction extending over anyone within tribal territorial boundaries which would end the carving out of exceptions for non-members;[310] 2) repeal all federal tax statutes and regulations imposing taxes on tribal members, tribal resources, and tribal activities with the recognition that Tribal Nations will impose appropriate tribal taxes to build tribal governmental revenue;[311] 3) prohibit state or local taxation within tribal territories as a necessary result of the Indian Commerce Clause in the U.S. Constitution; 4) repeal the Indian Gaming Regulatory Act in recognition of tribal authority for self-regulation and tribal self-determination in exercising the tribal spending power;[312] 5) repeal federal statutes and regulation pertaining to tribal natural resource development (timber, mining, energy resources, etc.) in furtherance of the Indian self-determination policy; and 6) provide an annual federal economic relief package for Tribal Nations to rebuild tribal economies in the aftermath of anti-tribal U.S. law and policy.

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307. *Id.*

308. *See e.g.* U.S. Dept. of Treas., *Office of Foreign Assets Control: Mission*, http://www.treas.gov/offices/enforcement/ofac/ (accessed Dec. 19, 2008). "The Office of Foreign Assets Control ("'OFAC'") of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes . . . ." *Id.*

309. *See e.g.* Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, 55 Fed. L. 26, 27 (Mar./Apr. 2008).

310. This would include both criminal and civil jurisdiction. For a discussion on the limited jurisdiction the U.S. recognizes for tribal criminal jurisdiction, see generally William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 Am. Indian L. Rev. 349 (1992). For a discussion on the activism of the U.S. Supreme Court to limit tribal civil jurisdiction, see generally Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 Tulsa L. Rev. 573 (2001).

311. For a discussion on not expanding state taxation over non-member Indians and the general negative consequences of state taxation on any Indian income, see generally Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 Marq. L. Rev. 917 (2008).

312. *See Paternalism or Protection? Federal Review of Tribal Economic Decisions in Indian Gaming*, 12 Gaming L. Rev. & Econ. 435 (2008).

These legislative "fix" measures would end the jurisdictional checkerboard that has resulted from state incursion into the tribal territory. With full tribal jurisdiction, outside business would have certainty in the governmental entity providing regulatory guidance, statutory mandates, and infrastructure services. Certainty is a fundamental necessity for a thriving business climate.[313] Tribal law would be able to provide that certainty with full jurisdiction over criminal matters, civil matters, regulatory matters, and taxation matters within the tribal territory.[314] The prejudices, falsehoods, and pretenses of bygone eras that Tribal Nations were somehow incompetent entities in terms of governance and territorial regulation should be sealed into the past as the self-serving notions they were, as unjust charges wrongly propagated by those anxious to acquire tribal lands and terminate tribal governments.[315] As this article illustrates and tribal members are aware, Tribal Nations have been commercial centers in mid-North America for thousands of years and have exercised market economies based on the principles underlying the tribalist economic theory. With federal legislation "fixing" the unfortunate and irrational policies of past decades, Tribal Nations would have the ability to economically succeed and share tribal prosperity with neighboring communities and states within the U.S., while also continuing to build economic bridges internationally across the oceans and present-day political boundaries.[316]

In the implementation of "overhaul" measures, a cautious approach will be necessary to prevent a return to "termination era" thinking as federal control over Tribes is lessened and eventually eliminated.[317] The ultimate goal for the "overhaul" measures is the reestablishment of the sovereign-to-sovereign relationship between the Tribal Nations and the U.S. as evidenced in the concept of international treaty-making. One of the first legislative acts that would serve this purpose would be an explicit federal law recognizing inherent full tribal sovereignty as sovereignty is understood in the international sense. Such a law would prevent the U.S. Supreme Court from developing further limitations seeking to circumscribe tribal governmental authority.[318] Secondary effects of express federal legislation recognizing inherent full tribal sovereignty would

313. *See* Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, 33 Hum. Rts. 9, 11–12 (Spring 2006).

314. *Id.* at 12. "Many tribes have exercised their sovereignty by adopting commercial codes and independent judiciaries, and experienced an increase in economic activity." *Id.*

315. *See* Robert B. Porter, *A Proposal to The Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. Mich. J.L. Reform 899, 904 (1998).

316. Tex G. Hall, Testimony before the H.R. Comm. on Nat. Resources, *Diversifying Native Economies*: *Oversight Hearing on 110-44*, 110th Cong. 110–44 (Sept. 19, 2007).

> We ought to have federal policies and programs that do not measure our tribal enterprises against individually-owned businesses or stockholder-owned corporations. Doing so entirely misses the tremendous gifts our communities have to offer the marketplace—an untapped and unified resource of labor in some of the most remote and rural communities in the country. Our Tribal governments and business enterprises are located in 35 of 50 states, with 56 million acres of trust lands and a million plus man and woman work force, a large portion of which is either underemployed or unemployed.

Id.

317. *See* David Melmer, *South Dakota Continues Land-into-Trust Battle*, Indian Country Today (Oct. 11, 2004) (available at http://www.indiancountrytoday.com/archive/28174429.html).

318. *See e.g. Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998) (stating that the Tribal Nations "[a]s sovereigns or quasi sovereigns" qualified for governmental immunity to suit).

include repealing all Secretary of the Interior approval provisions in federal laws and regulations over tribal matters[319] and relinquishing federal control of the tribal land base.

The latter would require extensive work in partnership between Tribal Nations and the U.S. Tribal Nations would need to prepare for the transfer of tribal land deeds currently held in trust status by the U.S. to the Tribal Nation realty offices, which would have jurisdiction over the specific parcels of land within each office's management territory.[320] Internally, the tribal realty office would need to be prepared to accept the transfer of trust status and begin the long process of record-keeping, accounting, and leasing management for all such tribal lands.[321] With the federal legislative "fix" prohibiting state or local taxation within tribal territorial boundaries, tribal lands would be automatically exempt from external taxation, and the respective tribal government would decide whether to impose property taxes within tribal boundaries.[322]

A final "overhaul" measure that would positively impact every area of tribal existence would be the formulation of a new treaty between Tribal Nations and the United States that would contain language memorializing a sovereign-to-sovereign relationship in economic activities. By re-asserting the treaty relationship as the cornerstone for tribal-federal relations, the sovereign partnership for economic prosperity between the signatory Tribal Nations and the U.S. will have a firm foundation for future generations.[323] Unilateral acts of the U.S. have proven destructive in the short term and the long term for Tribal Nations. In the philosophy of the tribalist economic theory, Tribal Nations engaged in commerce through kinship networks grounded in the concept of good faith relations with one's relatives. Historic tribal leadership embraced federal officials in kinship, and oral tradition continues to reaffirm those ties.[324] A formal return to treaty-making between the U.S. and Tribal Nations will resurrect those kinship ties and allow for economic prosperity to flow between the peoples united as relatives once again in international respect for one another.[325]

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319. Tribal governments would have the ability to amend Tribal Constitutions to remove any reference to approvals by the U.S. Secretary of the Interior or the U.S. Indian Affairs Commissioner.

320. For a discussion of the U.S. mismanagement of Indian trust lands, see Kevin Gover, *Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship For This Century*, 46 Nat. Resources J. 317 (2006).

321. *See* Rice, *supra* n. 41, at 845–46.

322. *Id.*

323. *See* Williams, *supra* n. 4, at 131. "Thus, the white man failed to learn one of the essential lessons taught by American Indian visions of law and peace. A vital term of many of the very treaties that made it possible for Europeans to settle the land in North America, this lesson teaches us that different peoples achieve justice between each other by agreeing to build relationships of trust and reliance. In the language of Indian diplomacy, they imagine the possibility of sharing from a common bowl." *Id.*

324. *See* David Melmer, *Treaties need to be honored*, Indian Country Today (Jan. 24, 2005) (available at http://www.indiancountrytoday.com/archive/28171949.html). Reporting on the continued validity of the treaties between Tribal Nations, the U.S. Chairman of the Rosebud Sioux Tribe, Charles Colombe commented, "'Rosebud honors the treaty, we live with it.'" *Id.* *See also* Jack McNeel, *Grandmothers March to Raise Treaty Awareness*, Indian Country Today (Oct. 23, 2008) (available at http://www.indiancountrytoday.com/living/33083134.html).

325. Indigenous Nations have returned to treaty-making in contemporary times to join together on a nation-to-nation basis. *See* Gale Courey Toensing, *Indigenous Nations Treaty Helps Build Alliances*, Indian Country Today (Dec. 21, 2007) (available at http://www.indiancountrytoday.com/archive/28141909.html).