

TRACK 3: INFRASTRUCTURE FOR ECONOMIC DEVELOPMENT



PHYSICAL INFRASTRUCTURE AND ECONOMIC DEVELOPMENT

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LEGAL INFRASTRUCTURE AND ECONOMIC DEVELOPMENT

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This paper was commissioned for the National Congress of American Indians Policy Research Center (Center) for the purpose of stimulating discussion at the National Native American Economic Summit (Summit) to be held in Phoenix, Arizona on May 15-17, 2007. The paper is not intended to be comprehensive, but to provide an introduction to relevant issues and policies and some preliminary thoughts about the appropriate role of federal and tribal policy-makers. The positions and opinions found within this paper are the views of the authors only and are not representative of the views of the Center or the Summit participants.

Physical Infrastructure and Economic Development

By Ted Jojola¹

Introduction

Physical infrastructure and economic development are interwoven. Indeed, it is often a matter of contention as to whether it is the construction of new infrastructure that is a prelude to development or whether the pressures of underserved development are the prelude to infrastructure. The old adage, “build a road and they will come” often typifies the trailblazing nuance of economic development. Yet, for most Native communities, something as basic as road building or maintenance is more of a reactive decision that is leveraged against other basic domestic needs.

Physical infrastructure can serve two major development roles. The first is to reinforce and shape the socio-cultural and political milieu of the community. The second is the role it plays in competitively positioning the economy of its enterprises for capital gain.² Although mainstream America is driven by an economic market built on physical infrastructure, Native America has yet to regard such infrastructure as capital investment.³

Due to the scale, length of time and complexity of the work necessary to construct infrastructure projects, they require the infusion of enormous amounts of capital. In addition to the cost of construction, they also require continued investment and maintenance. Infrastructure projects are never “finished” per se. Rather, ongoing infrastructure projects are considered to be add-on segments of a “trunk” system. These expansive systems require interconnected branches to function in a comprehensive fashion.

Typically, public-works are grouped into three basic categories: (1) transportation (highways, roads, streets, bridges, and mass transit); (2) utilities (water, sewer and electricity); and, (3) housing and telecommunications (TV, radio, phone, computer networks and wireless technologies).

In the realm of transportation infrastructure alone, there are 55,724 miles in the Bureau of Indian Affairs (BIA) Indian Reservation Road system that currently exist within lands of the 562 Federally-recognized tribal governments. They are under the authority of numerous entities including federal, tribal, state and local jurisdictions.⁴ In 2003, it was estimated that there existed a \$11.8 billion backlog of improvement needs for BIA and selected state and local tribal

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² *Overcoming Challenges and Seizing Opportunities in Indian Country*, Remarks by Governor Mark W. Olson, At the System's Sovereign Lending Conference: Banking Opportunities in Indian Country, Scottsdale, Arizona, Federal Reserve Board, November 18, 2002, <http://www.federalreserve.gov/boarddocs/Speeches/2002/default.htm>.

³ *Commercial Lending in Indian Country: Potential Opportunities in an Emerging Market*, Insights: Community Developments, March 2006 Community Affairs Department, US Department of the Treasury, pg. 7.

⁴ Senate Report 108-150 - *Amending The Transportation Equity Act For The 21st Century To Make Certain Amendments With Respect To Indian Tribes, To Provide For Training And Technical Assistance To Native Americans Who Are Interested In Commercial Vehicle Driving And For Other Purposes*, Calendar No. 284, 108TH CONGRESS, September 22, 2003.

roads.⁵ Whereas states spent an average of \$4,000 to \$5,000 per mile for road maintenance annually, the federal government spent only \$500 per mile for roads in Indian Country.⁶

Similarly, the provision and placement of basic utilities for the adequate provision of drinking water, sanitation, and electricity are considered fundamental for the physical and mental health of communities as well as being a measure of the overall quality of life.⁷ The disparities, however, in Indian Country are enormous. Tribal lands continue to be underserved by electricity services. 14.2 percent—nearly a sixth—of Indian households have no access to electricity.⁸ For specific Native nations, that disparity is even more pronounced. The Navajo Tribal Utility Authority estimates that 18,000 homes throughout the Navajo Nation are without utility services.⁹ The cost of expanding the gridline to these houses is about \$27,000 per mile.¹⁰ In the region of Alaska, of the 4,757 occupied housing units among the Yu'pik, 48% were reported to lack complete plumbing facilities.¹¹

Telecommunications infrastructure is considered integral to work productivity, personal safety and personal advancement.¹² In particular, wireless technologies have been seen as integral to surmounting barriers such as geographic isolation and low population densities as well as bridging the need for training, technical assistance and education.¹³ Compared with the rest of America, however, native communities lag behind. Whereas 95% of all White households had phones, regardless of where they lived, rural-dwelling American Indians/Eskimos/Aleuts only had a telephone penetration rate of 76.4%.¹⁴ In Arizona, some residents on reservations had been quoted prices as high as \$70,000 for the installation of simple local telephone service.¹⁵ The Federal Communications Commission estimated that broadband penetration on Indian lands was

⁵ Ibid.

⁶ *The State of Indian Nations Today: Mapping a Course for the Next Seven Generations*,

Presented by the National Congress of American Indians, Tex Hall, President, January 31, 2003.

⁷ *The Human Right to Adequate Housing*, Office of the High Commissioner for Human Rights, Fact Sheet No. 21, <http://www.unhchr.ch/html/menu6/2/fs21.htm>

⁸ Tex Hall, *The State of Indian Nations Today*, op. cit.

⁹ Navajo Tribal Utility Authority website, <http://www.ntua.com/>.

¹⁰ *Light-bringer Debby Tewa Provides Advice About Solar Power To People On Indian Reservations*, News Release, December 13, 2005, Sandia Labs, <http://www.sandia.gov/news-center/news-releases/2005/renew-energy-batt/tewa.html>.

¹¹ *Physical Housing Characteristics of Housing Units With an American Indian and Alaska Native Householder for Selected American Indian and Alaska Native Tribes (One Tribe Reported)*, Characteristics of AIAN by Tribe & Language, US Dept. of the Census, Table 53, pg 763.

¹² *Lines In the Sand: A Four Corners Regional Perspective*, Greg Anesi, David Eppich, and Thomas Taylor. Economic Review (Kansas City), 2004, pg 101.

¹³ *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, [GAO-06-189](#), (Washington, D.C., Jan. 11, 2006). Available through GAO's Web site (www.gao.gov).

¹⁴ *Falling through the Net: Defining the Digital Divide*. National Telecommunications & Information Administration, 1999. <http://www.ntia.doc.gov/ntiahome/fttn99/index.html>

¹⁵ *Arizona's Telecommunications Infrastructure*, A Report Prepared for the Arizona Department of Commerce, Jerry Conover, Ph.D., Bureau of Business and Economic Research Northern Arizona University, July 2002, pg. 6.

less than 10%.¹⁶

Background: Role of Planning and Physical Infrastructure

The role of infrastructure in Indian Country has been critically understated. Perhaps no single aspect of community development requires that leadership balance the immediacy of action (short-term) with a precise plan of development (long term).

The basic premise behind planning is the orderly progression of development as well as the anticipation of future needs for a place. Usually, the two conditions that provoke governments to enable planning are: (1) the need to manage growth; and, (2) the need to regulate land-use in a manner that protects public health.

Few tribes grasp the significance of planning in Indian Country. Even fewer understand the role it plays in choosing appropriate infrastructure. Together, the coordination of land-use and infrastructure planning should forward the public goals of sustainability in a manner that balances the ecology, economic development and the value system of its community.

Indeed, the planning for sustainable development is even more critical for Native America. As articulated by the Karuk Nation of California, “Purely rational and technical approaches, unaugmented by a sense of the sacred or by the sensibilities specific to place, will necessarily become destructive and irrational over time ...”¹⁷

Planning in Indian Country has largely taken place in response to sporadic governmental funding.¹⁸ As such, tribal communities, at best, represent a quilted patchwork of projects that may or may not be culturally relevant for them.¹⁹ The following brief historical overview represents planning approaches that have shaped tribal communities over the generations.

Context: Pre WWII

When planning was first introduced in the United States at the turn of the 20th Century, it was a consequence of rapid urban growth and industrialization. Substandard housing conditions, unsanitary waterworks and overcrowding in cities created health emergencies. In addition, the unregulated placement of polluting industries within residential areas created hazardous situations for the public.²⁰

¹⁶ *Testimony of the National Congress of American Indians before the Senate Committee on Indian Affairs*, Oversight Hearing on Economic Development, presented by President Joe Garcia May 10, 2006.

¹⁷ *Environmental Management: American Indian Knowledge & The Problem of Sustainability*, Leaf Hillman & John F. Salter, Ph.D., in *Forest, Trees & People: Newsletter # 34, 1997*, <http://www.magicriver.net/karuk.htm>.

¹⁸ Joe Garcia, *Testimony*, May 10, 2006, op.cit.

¹⁹ *Housing in Four Case Studies*, National American Indian Housing Council, 2004, http://naihc.net/NAIHC/files/ccLibraryFiles/Filename/00000000537/2004_Economic_Dev_Report.pdf, pg.10.

²⁰ It is no surprise that two of the densest industrial cities, New York and Chicago, were the first to craft ordinances to regulate land-use. The milestone for the urban planning tradition of the US is considered to be the 1909 Plan of Chicago (Burnham Plan). See the Encyclopedia of Chicago, www.encyclopedia.chicagohistory.org, 4/7/07.

The premise for organizing the cityscape into defined zones was simple—separate parcels with similar uses into the same contiguous area. This practice accomplished two things. First, it created a decidedly homogeneous radial ordering of land-usage (sometime called the concentric-zone model) and, secondly, it matched the infrastructure to the type of land-use activities being developed.²¹

The indigenous experience was both part of and not part of this urban history. When the U.S. population began its rapid rise from rural to urban habitations around the 1880s, tribes were being subjected to the confines of reservation life.²² The most prevalent practice for the development of rural lands was the land apportionment concept called the “Section.” Promulgated by the U.S. Congress with the passage of the Land Ordinance of 1785, it specified that open lands had to be surveyed before they could be distributed. Roads were generally placed along section lines.²³

This survey system was applied in the General Allotment (Dawes) Act of 1887. Treaty lands were divided into 160 acre fee-simple properties, allocated to each adult male in the tribe and the surplus opened up for homesteading.²⁴ With the advent of federal initiatives in education (Indian boarding school era) and health (Public Health Service), basic facilities and infrastructure were introduced into tribal lands. In essence, the first Indian Agencies were designated as “section townships.”

The local school and/or the local clinic became the nexus whereupon tribal villages or proto-towns emerged. In some cases, township-style master plans were created to facilitate the influx of housing needs for administrators, teachers and health practitioners. In other instances, the federal government made arrangements with religious groups like the Friends of the Indians to employ charity and churches as the center place of tribal communities. As parcels were subdivided even further, Euclidean zoning (the grid), became commonplace.²⁵

Post WWII

The advent of World War II shifted the whole nature of planning in the US from voluntary to required compliance. It was first instituted under U.S. statutes in 1958 as 701 Comprehensive Planning and was seen as necessary for regulating the growth and development of urban communities. American cities experienced unprecedented growth. Demand for new housing and commerce outstripped the capacity of local towns. Infrastructure that radiated

²¹ *The Nature of Cities*, Harris & Ullman, The Annuals of the American Academy of Political and Social Science, Nov. 1945.

²² For the districts that had the most populous settlements that occurred in 1920 (51.4% were urban). *Growth of Urban Population in the United States*, Rosalind Tough, Journal of Land and Public Utility Economics, 1925, pg. 227.

²³ A good discussion of this system is found in a map entitled *Surveyors and Homesteaders, 1880-1940*, Jerry L. Williams, *New Mexico in Maps*, 2nd Edition, UNM Press, 1986, pg. 126.

²⁴ In one fell-swoop, the land base of Indian tribes declined from 139 million acres to 34.2 million acres.

²⁵ Named after the township of Euclid, Ohio, a milestone Supreme Court decision upheld the authority of its government to impose a pattern of development that was based on the imposition of a grid. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)

outward from urban cores necessitated the establishment of systems that were coordinated in a manner that linked metropolitan regions. Regional planning, coordinating growth across multiple jurisdictions and involving local governments came into vogue. Demographics became the powerbase for funding capital improvement projects.

Native communities were similarly caught up in the tide of mainstream planning reforms. In 1968, the statutes were amended to encompass tribal governments and were implemented under a newly formulated 601 Comprehensive Planning mandate.²⁶ Under this authority, the Secretary of Interior was designated to implement this for its wards and comprehensive planning became mandatory under services provided by the BIA.

The earliest examples of 601 tribal comprehensive planning were largely reminiscent of inventory approaches. These were designed to comply with objectives issued by the Office of Economic Opportunity (OEO).²⁷ Because the economic base of many tribes was basically limited to their natural resources, the application of the planning approach was mixed and uneven.²⁸ Most plans were not grounded in the immediacy of meeting community needs, but were driven by unrealistic assumptions of social behavior modeled after non-native approaches to economic development. During this period, new ventures were seeded in recreational tourism, adventure destination amenity businesses and other enterprises intended to capitalize on the cultural aspects of a given tribe. Another strategy was to partition desirable parcels for lease-hold residential arrangements among non-Native amenity seekers.²⁹

A second wave of planning was implemented by the Department of Housing and Urban Development (HUD). In 1961, the 1937 Housing Act was amended to allow HUD to establish Tribal Housing Authorities under the provisions of “self-help” and “turnkey” programs.³⁰ These HUD houses, as they are popularly called, ushered in suburban-style, cluster subdivisions and fundamentally changed the rural and social character of Indian Country. HUD requirements for individually apportioned land-deeds, zoning for residential areas and the provision of public infrastructure for electricity, roadways, water and sewer created a master plan approach to housing. Intended to alleviate substandard housing, the shoddy construction practices and

²⁶ Title IV, *Urban Planning and Facilities Comprehensive Planning*, sec. 601 amended in 1968 from Section 701, Housing Act of 1954 (40 USC 461).

²⁷ *One Generation of Self Determination: Native American Economic Self-Reliance in New Mexico*, chapter in *Proceedings of the Annual Conference*, National Rural Center. Theodore Jojola and Herman Agoyo, coauthors, 1993.

²⁸ *Indigenous Planning and Resource Management*, in *Trusteeship in Change: Toward Tribal Autonomy in Resource Management*, edited by Richmond L. Clow and Imre Sutton, University of Colorado Press, 2001, pg. 308.

²⁹ For example, in 1969, the Pueblo of Cochiti signed a lease with Great Western Cities, Inc. to create a 6,500 acre housing development called Cochiti Lake. It had such amenities as a golf course and a marina fronting the water reservoir. This “master-planned community” was designed for 50,000 residents and afforded non-native residents a 99-year lease-hold on their properties. In 2000, the US Census Bureau tabulated the population of the Cochiti Lake subdivision at 507 residents. In 1985, the corporation went bankrupt and management was assumed by a Pueblo-owned corporation, the Cochiti Community Development Corporation. *Stopping the Flood of Damages from Cochiti Dam*, Sandra Lee Pinel, Cultural Survival Quarterly, Issue 12.2, June, 1988.

³⁰ By 1988, over 65,000 housing units had been built under the aegis of 183 Indian housing authorities. *Housing*, Vernon Harragarra, *Native America in the 20th Century: An Encyclopedia*, Mary B. Davis, Edtr., Garland, pg. 245.

culturally mismatched projects tended to introduce as many social problems as they alleviated.³¹ Nevertheless, the tribal subdivisions that evolved from the massing of these houses continue to dominate the landscape of many reservations.

Indian Self Determination

The present-day practice of comprehensive planning was ushered in with the issuance of the 1975 Indian Self Determination and Educational Assistance Act.³² Under the same contractual provisions afforded to the Secretary of Interior and the tribes, major trust responsibility provisions in education, public health, housing, etc., were amended through public laws to empower tribes to take over their own planning efforts.³³ Most importantly, the Act allowed tribal governments to assume or delegate planning authority on par with surrounding local governments.

Within a decade of the passage of this Act, infrastructure needs for many tribes mushroomed. As tribes opted to contract their own services in health, government and education, capital intensive programs spurred building construction. New local jobs became available and many Native white-collar employees who had worked at centralized urban programs were enticed to return back to their communities. Due to the multiplicity of tribal operations that were created as result of building local capacity, tribal government became a full-time business.³⁴

A second wave of local development occurred with the advent of casino gaming. The boom economies and consequent net revenues generated by successful Indian gaming enterprises significantly boosted those tribes' ability to leverage federal trust projects.³⁵ Many tribal operations used gaming funds to supplement the remodeling or construction of new buildings and utilities. School, health, recreational and elder centers became showcase projects. In contrast, tribes that either chose not to pursue gaming as a tribal enterprise or whose locations were not suitable for successful gaming operations, continued to depend on federal trust allocations and struggled with meeting basic social needs.

³¹ Ironically, it was the contentious provision of a HUD house to a female Pueblo Indian member who was married to a Navajo that set the challenge in the *Pueblo of Santa Clara v. Martinez* [436 US 49, 69 (1978)]. The ruling is considered a touchstone US Supreme Court decision for the affirmation of tribal sovereign authority in matters pertaining to membership and its privileges. *Memoirs of an American Indian House: US Federal Indian Housing*, Theodore S. Jojola, Unpublished Master Thesis in City Planning, MIT, 1973.

³² Public law 93-638

³³ Examples include, Indian Sanitation Facilities Act (PL 86-121; the Contracting Transportation Programs Under the Indian Self-Determination Act and SAFETEA-LU (Public Law 109-59); and the Native American Housing and Self-Determination Act (NAHASDA— 25 U.S.C. 4101), among others.

³⁴ A very interesting chronology of such growth for the Zuni Tribe can be found in an article on *Twentieth Century Zuni Development: 1965-1985*, T.J. Ferguson, E. Richard Hart & Calbert Seciwa, in *Public Policy Impacts on American Indian Development*, C. Matthew Snipp, et.al, Institute for Native American Development, Development Series #4, University of New Mexico, 1988.

³⁵ *Indian Gaming as Community Economic Development*, Theodore S. Jojola & Paul Ong, chapter in *Jobs and Economic Development in Minority Communities*, Paul Ong and Anastasia Loukaitou-Sideris, editors, Temple University Press, 2006

The advent of gaming as an enterprise also served to create a new type of planning approach. Strategic planning, an enterprise business model, gained widespread application in Indian Country.³⁶ A basic paradigm shift occurred as tribal business operations shifted community discussions away from problem-solving to strategic “wants” or “needs.” “Visioning” became synonymous with 601 Comprehensive Planning.

Types of Tribal Planning

Tribal planning is unique from mainstream America. Today, many tribal communities bear the imprint of successive waves of reform and development. Unlike the radial patterns that characterized early American cities, tribal development is a mosaic of land uses that are often noncontiguous and mixed use. Although, theoretically, tribal governments have been vested with the authority to manage themselves like townships, they have not opted to do so. Tribes continue to exercise their sovereignty and shape their governments under the aegis of the 1934 Indian Reorganization Act (IRA). They have not organized as township governments as defined by state statute. The generation of local taxes for capital infrastructure and the enforcement of land use through a permit system is still a remote concept.

This is not to say, however, that the role of state government has become increasing important. It is probably because state/Indian gaming compacts have allowed state governments a share of casino revenues that tribal governments have become poised to leverage funding through state legislation for capital improvement projects.³⁷ Similarly, many casino-revenue tribes have purchased private property for the specific goal of keeping it fee-simple. In cases where a tribe shares boundaries with a city, they have used these parcels as a strategy for creating buffers, thereby distancing competing urban development.³⁸ This has prompted regional entities like the Council of Governments (COGs) to invite tribes to become equal and active members in regional planning efforts.

The newest face of tribal/state-based authority has tremendous and untested powers for self-governance. Among the most immediate is the implementation of land-use regulation and codes used to oversee the public health conditions of its residents. Land-use regulation contains provisions for the exercise of eminent domain. Tribal planning also has the potential of unleashing extra-territorial jurisdiction along buffer zones contiguous and adjacent to reservation boundaries. Indeed, planning requires tribes to build their legal capabilities in the realm of local planning enforcement. The following are the main types of planning being practiced by tribes today.

³⁶ *Public Participation and the Choice of Casinos as Development Strategy in Iroquois Nations*, unpublished Ph.D. dissertation, Eve L. Baron, Rutgers University, 1998.

³⁷ In New Mexico alone, in 2006 the 22 tribes were able to leverage 33.5 million dollars for capital infrastructure projects on reservation lands. This was a 3-fold increase from 2004. *Comprehensive Planning in New Mexico*, Powerpoint prepared for the NM Office of Indian Affairs, 2006.

³⁸ *Economic Development*, Sandia Pueblo website, <http://www.sandiapueblo.nsn.us>.

Comprehensive Planning

Comprehensive planning is an all-inclusive approach intended to provide guidance for the future growth of a community. A comprehensive plan (comp plan) is complex document that is legislated and carries the power of enforcement. The approved plan is intended to be a policy instrument first and a technical instrument second.³⁹ It is not static and may be periodically updated. The substance of a comp plan relates physical design to the social and economic goals of a community.

The main tool of comprehensive planning is zoning. Zoning assumes that the interests of private property owners must yield to the interests of the public.⁴⁰ For tribes, this is an unreasonable assumption. At the root level, most reservation land is held in trust and there may be no clear process for tribal governments to determine and/or control its usage. Authoritarian governmental regimes as typified by IRA-style tribes do not generally square well with public-participation processes. Tribal comp plans tend to be driven more by technicians who respond to or comply with federal or state initiatives.

As is the case with most comprehensive land-use models, property is designated into six basic zoning designations: agricultural, commercial, industrial, public, residential and other special-uses. Most reservation lands fall into only four types of usage—agricultural, public, residential and special-use. Commercial and industrial, which is considered to be the mainstay of business development, is minimal or often not present in Indian Country.

In general, zoning has delivered less on keeping incompatible land uses separate and more on designating cultural buffer zones to distance incompatible enterprises from their main population centers. This has created a type of “leap-frogging” where infrastructure may not bridge domestic and commercial zones. This practice often results in producing high-quality business environments, sometimes at the cost of high-quality living environments.

In particular, zoning as applied to tribal housing has created suburban-style, cluster communities that segregate and isolate extended families into nucleated households. As evidenced by reports critical of mainstream planning practices, the Center for Disease Control has implicated exclusionary zoning for contributing to unhealthy community lifestyles and neighborhood designs that are totally dependant on the automobile.⁴¹ The continued rising incidence of early onset diabetes and child obesity among Native populations is linked to such patterns.⁴²

³⁹ *Principles and Practices of Urban Planning*, William I. Goodman, Ed., and Eric C. Freund, Assoc. Ed., Chicago, Ill. International City Managers Association. 1968.

⁴⁰ *Foreword: Zoning at Sixty—A Time for Anniversary Reckonings*, Charles M. Haar and Jerold S. Kayden, *Zoning and the American Dream*, from Haar and Kayden, Chicago: Planners Press, 1989, pp. ix-xi.

⁴¹ *How Land Use and Transportation Systems Impact Public Health: A Literature Review of the Relationship Between Physical Activity and Built Form*, Lawrence D. Frank & Peter Endelke, ACES: Active Community Environments Initiative Working Paper, Centers for Disease Control and Prevention, n.d.

⁴² *New Mexico American Indian Health Status*, Dawn McCusker, *New Mexico Epidemiology*, vol. 2005, no. 12, Nov. 12, 2005.

Comprehensive planning has been applied in Indian Country with mixed results. Most tribes have been hindered in fully implementing such plans because of their complexity and inordinate timeframe for implementation. The lack of qualified tribal planners who are authorized to manage planning offices in tribes has also added to their lack of implementation.⁴³

Strategic Planning

Strategic planning is not comprehensive planning. It can be one integrated aspect of comprehensive planning, but it does not necessarily fulfill the intent of the law. Whereas comprehensive planning is based on an inventory approach—that is, what can you do with the resources you currently have—strategic planning is based on formulating a plan for attaining stated economic development objectives.⁴⁴

It was only after a few tribes operating gaming businesses received windfall profits that they began to pursue economic development in this manner. When the resource base did not exist within their lands, tribes expanded their economic base through outside capital ventures. Capital infrastructure plays a central role in this strategy. These are types of infrastructure projects that are treated as long-term investments and leveraged for the revenues that new development may generate. Revenues are the primary source for capital infrastructure.

Strategic planning has hastened the transformation of community development from BIA dependency toward tribal-local and state government capital investment strategies. Strategic planning, above the rest, has been the most responsible for linking infrastructure to economic development and capital gain.

Performance Zoning

Performance zoning, like that of land-use zoning, is also considered to be a tool of comprehensive planning. Unlike land-use approaches, the primary objective of performance-based land-use is to tailor land to its site characteristics.⁴⁵ Performance standards are based on criteria such as carrying capacity, threshold of safety and environmental impacts. The most important aspect of this approach is that each site is evaluated separately from another site. It is assessed for land-use compatibility and has been applied to protect agricultural lands, unique habitats and historic places.

⁴³ It is not know how many comprehensive plans have been officially adopted by each respective tribe. A few tribes like the Pueblo of Jemez and Ohkay Owingeh have recently adopted theirs after lengthy consultancies with their tribal members.

⁴⁴ The difference in comprehensive planning and strategic planning can be easily demonstrated by drawing on a simple analogy. Suppose a group of individuals decided to go to lunch together. One choice would be to select from the restaurants that were in the immediate vicinity, thereby tempering one's pallet on what was available. This is the comprehensive planning approach. Another strategy would be to agree on what type of cuisine everyone wanted and then figure out the resources necessary to get everyone to a restaurant that served such food, even if it meant going across town and getting a ride to get there. This is the strategic planning approach.

⁴⁵ *Performance Based Planning: Perspectives from the United States, Australia, and New Zealand*, Douglas C. Baker, Neil G. Sipe & Brendan J. Gleeson, *Journal of Planning Education and Research* 2006, vol 25, pg. 396.

McHargian analysis is the basic paradigm used in this approach. It creates models for deconstructing the complexity of physical characteristics by generating “layers” of geographic-based information.⁴⁶ Evaluation of criterion was considered complex and administratively unmanageable. With the advent of microcomputers and GIS software a means for generating complex land-use maps, an in-house capacity was established.

The extent of performance zoning practiced by tribes is unknown.⁴⁷ The use of GIS was introduced by agencies like the Bureau of Land Management for developing extensive inventories of natural resources on tribal lands. As the local GIS capacity became more established, mapping products began to drive how tribes made decisions for locating basic infrastructure like roads, water systems and electrical lines.

Indigenous Planning

Indigenous Planning is a new emerging paradigm among tribal planners.⁴⁸ What distinguishes Indigenous Planning from the mainstream application of comprehensive planning is its reformulation of planning approaches in a manner that incorporates ‘traditional’ knowledge and cultural identity. Unlike the Western approach, which has its focus primarily upon the regulation of land-use and the protection of private-property rights, the indigenous planning approach was formulated on values associated with land tenure and the collective rights associated with inheritance.

The problem as seen by indigenous planners is that simply “putting more eggs into the economic development basket” does not necessarily resolve the enormous cultural, social, political problems that contemporary tribes continue to face. Foremost to this effort, is to adopt a community development process that is informed and driven by the respective indigenous world-views. World-views are endowed with cultural ideals that integrate the past, the present and the future. Central to a world-view are values associated with cultural identity, land-tenure and stewardship. These values have and continue to be the hallmark of tribal survival. Simply put, without that philosophical construction, humankind’s community planning role and its balanced relationship to the natural world cannot evolve.

Indigenous planning is heavily invested in consensus building and the community participatory approach. Concepts to describe the value and meaning of place are taken from the local language and qualitative approaches like place-naming and cognitive mapping are used to

⁴⁶ The pioneer work in this area is still considered to be *Design with Nature*, Ian L. McHarg, Natural History Press, Garden City, N.Y., 1969

⁴⁷ One of the best examples of performance zoning is practiced by the Oneida Nation of Wisconsin. Designated as the LUTU (Land Use Technical Utilization) process, it is driven by GIS data products produced by their Geographic Land Information System.

⁴⁸ In 2005, a new Division of Indigenous Planning was created in the American Planning Association. This division superseded the United Indian Planners Association (UIPA) which became inactive. UIPA was established in the early 70s as a component of the Economic Development Administration (EDA). This organization provided technical assistance and shared the experiences of tribes as they attempted to comply with the federal mandate for the submission of comprehensive plans.

explore the deeper philosophical roots of identity and culture. Vernacular architecture and physical symbolism become central to organizing key planning concepts.⁴⁹

Challenges Still Facing Indian Country

In many ways, indigenous principles used to sustain tribal communities for millennia are now being embraced by mainstream society. Wrongly or rightly, the advent of global warming has pushed the concept of sustainability to the forefront. Sustainability has been described as an approach to thinking that focuses on the long term and the interrelationships between human and natural systems.⁵⁰ For tribes that have long been recognized as “stewards of the earth,” such practices validate their community philosophies.

According to the 2000 U.S. census, only about one-third (34%) of American Indians and Alaska Natives (AIAN) lived on reservations or in tribally designated statistical areas.⁵¹ The percentage of those that lived in rural areas for all reservations and designated statistical areas was between 71% and 79%. This was roughly the inverse of the percent of all Americans (21%) that lived in rural places.⁵² For the majority of AIANs, this means that the rural way of life is dominant in their community development patterns. For the poorest tribes, they will not be able to sustain basic infrastructure needs without federal or state assistance. The scales of economy often attributed to dense populations cannot be assumed in rural areas.

The ten largest American Indian tribes as a group comprise roughly 46% of the entire population that reported AIAN alone.⁵³ For the rest, their reservations can be largely characterized as rural with a small population base. As such, tribal communities are not subject to the same boom and bust cycles that result from high labor force migration.⁵⁴ Rather, they sustain their population grown from their high fertility.

Similarly, the population composition of Native America shows an imbalance among age groups. Although AIAN populations generally tend to exhibit high fertility at birth, by ages 15,

⁴⁹ An example of this process is the evolution and successful construction of the Turtle School on the Oneida Nation of Wisconsin. The case study can be downloaded from the APA Indigenous Planning Division website [<http://www.planning.org/indigenous/>]. *Indigenous Planning and Community Development*, Theodore Jojola, 7th IASTE Conf, The End of Tradition?, Trani, Italy, 2000.

⁵⁰ *Thinking Like a Sustainable Community*, Minnesota Office of Environmental Assistance, October 2000, www.moea.state.mn.us.

⁵¹ *We the People: American Indians and Alaskan Natives in the United States*, Stella U. Ogunwole, Census 2000 Special Reports, US Bureau of the Census, Washington, DC, Feb. 2006, pg. 14.

⁵² *American Indians on Reservations: A Databook of Socioeconomic change between the 1990 and 2000 Censuses*, Jonathan B. Taylor & Joseph P. Kalt, Harvard Project on AI Development, Harvard University, 2005, pgs. 4-5.

⁵³ *The American Indian and Alaska Native Population: 2000: Census 2000 Brief*, US Census Bureau, Feb. 2002, pgs. 10-11.

⁵⁴ It should be noted that the standard Components of the Population Equation ($P_2 = P_1 + \text{births} \pm \text{deaths} \pm \text{migrants}$) does not factor in the same way as communities that exhibit high mobility. Because tribal populations are basically fixed at birth (tribal membership) very few, if any, adopted members are added to tribal enrollment. *Census 80: Continuing the Factfinder Tradition*, Charles P. Kaplan & Thomas L. Van Valey, Bureau of the Census, Jan. 1980, pg 194.

both male and female out-migrate in significant proportions to seek education and employment opportunities. This tends to even out by the mid-30 age groups with their gradual return. By age 60, though, there is a rapid decline in population due to poor health and mortality. Such shifts pose even more challenges to the provision of infrastructure as need-based by age.

Ultimately the provision of utilities may be shared by tribal ventures or by the private-sector. As major utility lines crisscross over reservation lands, many tribes have negotiated special privileges for its citizens. Overall, land-use is becoming increasingly regulated. Tribal utility authorities now assume additional responsibilities including regular trash pick-up and environmental waste-hazard monitoring and enforcement. Emergency services now require tribes to provide unique street addresses.

For those communities that are more isolated, basic utility infrastructure tends to favor systems that are self-reliant. Technologies like fuel cells, solar and wind have begun to make important strides in electrical generation. These have spurred the development of a few tribally-headed enterprises and tribal utility companies.⁵⁵ They have also resulted in cooperative ventures with utility companies and tribal governments.⁵⁶ Others have begun to integrate natural riparian efforts with state entities to improve domestic water and wastewater management.⁵⁷ Still such systems require existing antiquated, outmoded and/or overstressed systems to be improved.

Transportation infrastructure continues to be problematic. Funds for road improvement are chronically under-funded by the federal government. This has led to third-world type interventions by non-profit organizations.⁵⁸ Yet as tribal communities continue to grow, they will be faced with urbanization. Many reservation areas that were once rural and isolated are now bisected by interstate highways that pass-through and bypass their townships. Major intersections provide motorists access to one-stop services and recreation (e.g., gaming). Feeder roadways link tribal housing HUD-type clustered subdivisions and government operations. Building construction along main thoroughfares tends to favor a point-to-point linear style development. There is still little or no consideration for the separation of pedestrians, autos and farm equipment. This lack of differentiation gives a semblance of congestion even through the local population itself may not be large.

Telecommunications infrastructure pins its highest hope on the penetration of wireless technologies. Among the major impediments though, have been the regulation of services within reservation areas and the role of leadership in the incorporation of new technologies.⁵⁹ This has

⁵⁵ An example is NativeSUN, a Hopi-managed non-profit organization that installs photovoltaic units for remote and isolated houses. <http://www.nativesun.biz/>

⁵⁶ Since 1993, the Navajo Utility Authority with the collaboration of the Department of Energy and Sandia National Labs has installed over 300 homes with photovoltaic systems. News Release, December 13, 2005, Sandia Labs, <http://www.sandia.gov/news-center/news-releases/2005/renew-energy-batt/tewa.html>

⁵⁷ *Native Nations, The Environment, and The State Of California: Tribal-State Relationships and Environmental Quality*, U.S Environmental Protection Agency, Region 9, Native Nations Institute, Udall Center for Studies in Public Policy, The University of Arizona, April 14-15, 2003

⁵⁸ An example is the Walking Shield American Indian Society. Recipients of the Maxwell Award of Excellence from the Fannie Mae Foundation, they provide funding for road improvement. www.walkingshield.org.

⁵⁹ *Native American Access to Technology Program: Progress Report*, A Report to the Bill & Melinda Gates

spurred some communities to form their own tribally-controlled telecommunications enterprises.⁶⁰ Others are working with nationwide providers to provide reduced fees and access to reservation members.⁶¹ Still others are taking on their own local solutions.⁶²

Nonetheless, the telecommunications divide is largely along socio-economic lines. Those that can afford to subscribe and pay monthly fees, often do. Moreover, even when cable TV, cellular subscription and high-speed internet services can be had, its educational intent is questionable. Little or no programming with cultural or tribal language content is accessible. Local schools may or may not have community curriculum to make such access culturally relevant.

In conclusion, despite the enormous needs that tribes face in meeting infrastructure needs, they are best positioned to adapt self-reliant technologies and best-practices for their communities. Unencumbered by local regulations, there is still a great amount of latitude for experimentation and innovation in Indian Country.

Foundation, John E. Sirois. et.al., Public Access to Computing Project, Daniel J. Evans School of Public Affairs, University of Washington, December 2001.

⁶⁰ Examples in Arizona include Gila River Telecommunications, Inc., Fort Mojave Telecommunications, Inc., Saddleback Communications (Salt River Pima-Maricopa), San Carlos Apache Telecommunications, Inc., and Tohono O'odham Utility Authority. Jerry Conover, Arizona's Telecommunications Infrastructure, 2002, pg. 6, op. cit.

⁶¹ Mescalero Apache Telecom, Inc, works with Cellular One to provide low-cost access. <http://www.matisp.net/>

⁶² Wireless WALRUS (Web Access Links for Remote User Services) in Alaska utilizes advanced wireless and satellite earth station technology to accomplish its mission. <http://www.kawerak.org/walrusProject/index.html>

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Legal Infrastructure for Economic Development

By Kevin Gover¹

Introduction

Investors, entrepreneurs, and other business actors need rules for their activities, rules that permit them to achieve their legitimate goals at the least expense. Thus, for tribes to compete with other jurisdictions, the tribal legal system should establish rules that permit business owners and lenders to make decisions quickly; to calculate their risks and act accordingly; to allow them to protect their interests through governmental processes (but not so much process that decisions are stymied); to carry out their business in a fair and honest manner; and to obey the law without exposing themselves to corrupt or incompetent government agencies. Law is the means of providing these rules.

The impact of legal reforms in encouraging economic development is a relatively new field of study. The literature on the subject relates primarily to economic development in developing countries. Although there are undoubtedly lessons that may be drawn from the developing world, they cannot simply be lifted from that context and applied in Indian Country for a variety of reasons. First, there are few examples of law reform that have been studied sufficiently to permit reliable models to be developed.

Second, the studies that do exist share an important conclusion: law reforms that work in one context do not necessarily work in another. Countries, their cultures, their forms of government, their legal customs, and their physical circumstances are so different that any law reforms undertaken must be tailored to the country. The diversity of Indian Country is vast, and reforms that might work—and even those that *have* worked—for one tribe may tell very little about what will work for another tribe.

Third, and most tellingly, unlike the nations of the developing world, tribes do not have unfettered sovereignty over their territories. A nation-state may make and apply its laws without having to contend with other sovereigns imposing their laws. Indian tribes, on the other hand, must contend with state encroachment into their jurisdiction because states have authority over non-Indians on the reservations in many circumstances. Further, a broad overlay of federal laws governing many aspects of tribal life and tribal property can render tribal laws ineffective. In short, tribes often are deprived of the traditional tools of law reform—tax policy and regulatory policy—that other governments rely upon to encourage economic development.

Still, the law reform literature discusses concepts around which tribal efforts can be organized. While the specific application of these concepts will vary from tribe to tribe, they do provide a framework for tribal consideration of how tribal law can be used to encourage reservation development.

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Rule of Law and Economic Development

A primary thesis of experts in economic development might be called the “good governance” or “Rule of Law” thesis. The idea, of course, is that if a country is to develop, government cannot behave arbitrarily, selfishly, or worst of all, corruptly.² Law is the regulator, encompassing both rules of conduct and forums for the enforcement of those rules. The rules should be clear and understandable, and they should be readily available to the public. The rules should rarely be retroactive, they should not be contradictory, and they should not require conduct that is beyond the capabilities of the regulated community. The rules should be relatively constant and stable over time. Finally, the acts of the tribe itself must comply with the rules.

The Rule of Law is necessary for the development of a vibrant private sector. Investors and entrepreneurs can thrive only where law defines and enforces their rights. But the Rule of Law is equally necessary in the common circumstance that a tribe is the primary business owner—perhaps even the only business owner—on the reservation. Decisions made by the tribe as a proprietor, just like decisions made by the tribe as a government, should be principled and consistent, not arbitrary and *ad hoc*. Further, as is discussed in more detail below, when the tribe is the primary business owner on the reservation, the risk is great that inefficiencies and reduced profits will result from the tribe’s monopolistic status. The more a tribe can encourage its businesses to compete with each other and with the private sector within the boundaries of established rules of conduct, the more entrepreneurial, efficient, and profitable both tribal and private enterprises will be. Thus, tribes should make laws governing the conduct of their own enterprises, not just the enterprises of individual business owners and lenders.

For tribal law reform efforts to be successful, the tribe must embrace certain objectives as guiding principles in the reform. The following are a few of such objectives.

Transparency

Transparency in government is widely acknowledged as an element in guaranteeing that government acts properly—“sunshine is the best disinfectant.” Thus the federal government and many states have laws and traditions requiring that government bodies meet in public. These are generally known as “Sunshine” laws. Their purpose is to prevent public bodies from operating in secret. The theory is that, if public bodies must make their decisions in public and explain the reasons for their decisions in public, the chances of government acting arbitrarily or corruptly are reduced.

Tribal practices in this regard vary widely. Some tribes have Council meetings in public; other Council meetings are closed to the public. Some tribes permit only tribal members to attend Council meetings. Still others do only some of their business in public. Tribes are unlike other governments, however, in an important respect. Not only do tribes exercise governmental power, but they also are important property owners on most reservations and usually are the primary business owners, as well. This means that they have a broader range of proprietary—and

² See P. Brietzke, *the Politics of Legal Reform*, 3 Wash. U. Global Studies L. Rev. 1 (2004).

legitimately confidential—business than do other governments. Clearly tribes must establish rules that distinguish clearly and predictably between those matters that are the legitimate business of persons subject to governmental regulation, and those matters that are proprietary and therefore legitimately confidential.

Public Participation

Closely related to transparency is the notion of public participation in government decision making. Public participation brings a number of benefits to governmental process. First, interested persons may bring to decision makers information and ideas that have not previously been considered. Public hearings may yield testimony that decision makers need to improve their lawmaking.

Second, like the benefits of “Sunshine” laws, public hearings and other participatory processes reduce the opportunity for arbitrary decisions. Decision makers cannot simply ignore credible information brought before them in a public process, but instead must account for that information in a rational way.

Third, the willingness of people to abide by laws is affected by whether they believe that the law is substantively fair and was adopted through a fair process.³ In the case of lenders and entrepreneurs, they have the option of lending and doing business elsewhere. Thus, it is especially important that they believe that the tribal process of making law is a fair one. Participation in the law making process is an important way to cultivate not just the perception of fairness, but also the reality.

Accountability

Governmental accountability is critical to the establishment of an environment conducive to entrepreneurship. A tribe might have a perfect set of laws to promote development, but if those laws are poorly implemented, the benefits of having perfect laws are lost. Accountability requires that there be a system that reviews the government’s implementation of the law.

Accountability requires that the tribe submit its decisions to impartial review by a forum with appropriate expertise. The United States, for example, routinely submits to federal court review of decisions by federal agencies.⁴ Federal courts review agency action to make certain that agency decisions are not arbitrary; that they are consistent with federal statutes and the constitution; and that they were reached through appropriate procedures. In 1946, Congress passed the Administrative Procedure Act (“APA”)⁵, waiving sovereign immunity and authorizing federal courts to hear cases against federal agencies.

³ See, B. Tamahana, *On the Rule of Law: History, Politics, Theory* (Cambridge 2004).

⁴ See, Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (“APA”).

⁵ *Id.*, 5 U.S.C. § 702.

As tribes develop more tax and regulatory laws, it will become increasingly important that tribal agencies implementing those laws be made accountable for their actions. This is done through specific tribal waivers permitting such suits and by establishing qualified forums for hearing and resolving such suits. In other words, tribes will need tribal APAs and tribal judges trained to enforce them. Tribal court enhancement is discussed more fully below.

Predictability

The point of every reform is to attract entrepreneurs and lenders to the reservation. What these investors need most in deciding where to spend their money and effort is the ability to predict to the extent possible the risks they are accepting. They cannot accurately predict risks without understanding the tribal laws that will apply to their business. Nor can they predict risk when the outcomes in tribal legal systems are unpredictable. For example, if tax rates fluctuate drastically, businesses cannot predict their likely tax liability and therefore cannot determine where to set their prices, what amount of profit they will make, or whether the enterprise is economically feasible at all.

External Factors

If the establishment of a tribal legal infrastructure for development is to have the desired effects, tribal lawmakers will have to try to address external factors that undermine the tax and regulatory environment and the organizational structures that the tribes attempt to establish. As noted above, tribal tax and regulatory policy is undermined by the application of state tax and regulatory laws to reservation businesses, and by federal laws that limit tribal discretion in the use of tribal property.

External interference is not unique to tribes. States' tax and regulatory policies are limited by federal laws that tax and regulate many enterprises. So long as the federal government has constitutional authority to tax and regulate a particular enterprise—and it most usually does—the federal laws apply whether or not a state is taxing and regulating the same enterprise. The states may usually add their own regulatory requirements to the federal requirements, and they can pile their own taxes on top of the federal taxes. Thus, a facility seeking to discharge pollution into navigable waters must meet the federal minimum standards prescribed by the Environmental Protection Agency as well as any additional requirements imposed by state laws.⁶ Businesses that pay federal income and excise taxes also pay state income and excise taxes.

The same is true of course for tribes in regulating and taxing business activities on the reservations. Tribal regulation and taxation is in addition to any applicable federal taxes and regulations. These federal requirements do not by themselves put the tribes at a disadvantage. Because these federal requirements generally apply everywhere in the country, businesses in any given state and on any given Indian reservation are subject to the same rules.

In the case of Indian reservations, though, businesses often face additional burdens. This is because, in addition to the federal and tribal tax and regulatory laws that apply to them, these

⁶ See, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (“Clean Water Act”).

businesses may be subject to a third set of requirements—those imposed by the states. This fact alone makes the establishment of effective tax and regulatory policy a unique challenge for tribal governments.

In addition, tribes must contend with another body of law that singles out tribes for special treatment. These are the laws arising from the federal trust responsibility that govern transactions involving Indian land. The application of these laws has contributed historically to the tribes' inability to maximize income from their resources.

State Regulation and Taxation

In general, states may not tax or regulate Indians on Indian reservations without explicit federal consent.⁷ Matters become more complex, though, if the Indian transacts business with non-Indians because, though the state may lack authority over Indians, the state generally does have authority over non-Indians, even on reservations.⁸ Thus, states may impose non-discriminatory sales taxes on sales by Indian vendors to non-Indians, even though they may not tax sales to Indians.⁹ Similarly, states may impose their severance taxes on oil and gas produced on Indian lands, even though the tribe also taxes that production.¹⁰

Tribal efforts are further complicated by the fact that tribal jurisdiction over non-Indians is limited. Over the last 25 years, the Supreme Court has steadily whittled away the scope of tribal jurisdiction over non-Indians. However, tribes do have civil jurisdiction over non-Indians who engage in consensual commercial transactions with a tribe or individual Indian on a reservation.¹¹ Where states have jurisdiction over those same non-Indians, though, the combined burden of tribal and state taxes puts the Indian-owned business at a disadvantage.

There are strategies for addressing this problem. First, while the Supreme Court has upheld state taxes on sales by Indian vendors to non-Indian buyers, this rule only clearly applies when the Indian seller has simply imported items from off the reservation and resold them on the reservation (e.g., cigarettes).¹² The Court has indicated that where the Indian seller “adds value” to the product on the reservation—either by producing it there or altering or supplementing the product in some meaningful way—the state may not be able to tax sales of the product, even sales to non-Indians.¹³ Thus, to the extent tribal policy encourages such “value adding” activities, it is encouraging transactions that the state cannot tax but that the tribe can. Tribal tax policy might, for example, create incentives for manufacturers of products on the reservation in hopes of higher tax revenues from sales of the product on the reservation.

⁷ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

⁸ *Nevada v. Hicks*, 533 U.S. 353 (2001).

⁹ *Confederated Tribes of the Colville Indian Reservation v. Washington*, 447 U.S. 134 (1980) (“*Colville*”).

¹⁰ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 193 (1989).

¹¹ *Montana v. United States*, 450 U.S. 544 (1981).

¹² See, *Colville*, *supra*, n. 9.

¹³ E.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

A second strategy for defeating state jurisdiction involves federal pre-emption. In essence, where state taxation or regulation of an activity would interfere with federal policies for Indians, the state action is pre-empted by the federal policy.¹⁴ Thus, the more the federal government is involved in a particular enterprise or transaction, the more likely state taxation or regulation will be pre-empted. For example, if an enterprise receives a federally-guaranteed loan under the Indian Financing Act, or is on trust land and requires some federal approval, state regulation interfering with the enterprise may be pre-empted because it interferes with the federal objective.¹⁵

The problem with the federal pre-emption strategy is that it creates transaction costs that may outweigh the costs of state taxation or regulation. Meeting the myriad federal regulations that accompany federal assistance and approvals create both direct expenses and costs resulting from delays and missed opportunities.

Further, none of these strategies bring certainty as to whether state taxation and regulation will be permitted. Federal pre-emption is a well-established doctrine, but because it involves balancing federal, tribal, and state interests in a particular enterprise and is applied on a case-by-case basis,¹⁶ the outcome in any particular case can be difficult to predict. Similarly, just how much of a product's value needs to be created on the reservation in order to defeat state taxation of sales of the product is hard to know. Thus, one key objective of law reform—predictability—is not possible to achieve just through changes in tribal law.

Federal Law Limitations on Tribal Law Reform

Federal Tax and Regulatory Laws

As noted above, the federal government imposes a variety of tax and regulatory requirements on business throughout the country. The federal government imposes a variety of excise taxes that apply to businesses owned by individuals on the reservations, some of which apply to the tribes themselves. (Tribes enjoy exemptions from certain federal excise taxes under certain circumstances.)¹⁷ Income tax laws apply to individual business owners on the reservations, but not to the income of the tribes themselves. Thus, tribal tax policies must be made with an understanding of the federal tax burdens that businesses already face. Too great a tribal tax applied on top of a federal tax obviously discourages development.

Federal environmental regulatory laws have a broad reach, and all businesses on reservations, including those owned by the tribes, must meet standards established by the

¹⁴ *Id.*

¹⁵ *Id.*, and see *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Company v. Arizona State Tax Commission*, 448 U.S. 160 (1980).

¹⁶ *Id.*

¹⁷ See, Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7871.

Environmental Protection Agency for air and water quality, pesticides and other toxins, and the disposal of solid and hazardous wastes. In the case of the Federal Water Pollution Control Act (the Clean Water Act)¹⁸ and the Clean Air Act,¹⁹ Congress has provided for tribes to take primary responsibility for implementation, just as the states may. Other statutes have not been so amended. Whether or not the federal statutes have been amended to provide for tribal participation, tribes have inherent authority to adopt and implement environmental laws (though the jurisdictional reach of those laws is uncertain as to non-Indian lands and non-Indian activities). However, to the extent tribal law is more permissive than federal law, federal statutes and regulations pre-empt the tribal laws. Thus, federal law limits tribal discretion in setting and implementing environmental standards.

An area of growing concern for tribes is federal labor and workplace safety laws. For example, while tribes had long been thought exempt from the National Labor Relations Act,²⁰ recent actions of the National Labor Relations Board have imposed the requirements of the NLRA on tribal businesses.²¹ Tribes also must comply with the Occupational Safety and Health Act²² and provide safe workplaces in tribal enterprises. As with environmental regulation, tribes may enact their own laws on these subjects and apply them to persons and activities within their jurisdiction. However, tribal laws are pre-empted by federal laws to the extent they conflict, so tribes are not free to set their policies without regard to these federal statutes.

To the extent federal tax and regulatory laws are enforced and implemented on the reservations in the same manner that they are off-reservation, they do not put tribes at any particular competitive disadvantage. However, statutes such as the Resource Conservation and Recovery Act²³ and the Occupational Safety and Health Act create roles for state laws and state agencies that are not available to tribes. Thus, rather than creating laws of their own to customize environmental and workplace regulation to the circumstances, tribes are left to deal with federal agencies implementing and enforcing these laws. Whatever good intentions these agencies may have, their work cannot be as responsive and sensitive to the needs of tribal businesses as the tribes themselves.

¹⁸ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (“Clean Water Act”).

¹⁹ 42 U.S.C. §§ 7401-7671q.

²⁰ 29 U.S.C. §§ 151-169.

²¹ *See, San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F. 3d 1306 (D.C. Cir. 2007).

²² 29 U.S.C. §§ 651-678.

²³ 42 U.S.C. §§ 6901 *et seq.*

Federal Trust Responsibility

Under the trust, Indian resources often have been administered inefficiently and largely for the benefit of outsiders rather than the tribes themselves.²⁴ Further, the trust creates structural impediments to maximizing income that even the best administrative practices will not overcome. A primary finance tool of most local governments is a tax on the value of real property. Individually owned Indian trust land--11 million acres in all--cannot practically be taxed by the Tribes due to fractionated ownership and the generally low income of reservation Indians. As for tribal land, there would obviously be little point in Tribes taxing themselves. Further, trust land is not easily used as collateral for capital loans. Tribal trust land, for example, cannot be mortgaged. While many Tribes have been able to finance enterprises through leasehold mortgages, the leasehold lacks the security and marketability of title to the land. Thus, the Tribes can borrow only a fraction of the value of the land, and then only at the premium interest rate that lenders apply to higher risk loans.

There are also problems in administration of the trust that further devalue trust resources. The Interior Department must approve every transaction conveying an interest in trust land. Tribes constantly complain about the delay involved in this process, and with good reason. Even after a tribe has negotiated the terms of a transaction, the Interior Department, acting through the Bureau of Indian Affairs and the Office of the Special Trustee, enters the process and redoes all of the tasks the tribe has just completed. The Department finally decides the value of the land and whether the Indian party to the transaction has received fair value.²⁵ The Department conducts its own appraisal of the property and makes its own evaluation of the economic benefit to the Tribe or individual owner. The Department may or not agree with the tribe as to whether applicable regulatory requirements are met. The Department might find that the parties have adequately documented the transaction, or it might not. The Department may ask for amendments to the lease, requiring another round of negotiation and drafting by the parties. This process takes time, and the Department rarely binds itself to a deadline for its review.²⁶ Consider further that BIA realty officers may be handling dozens of other transactions at the same time and that the Tribe has no ability to set the priorities of the federal employees reviewing the transaction. Thus, the multi-million dollar transaction may be arbitrarily made to wait behind lesser transactions depending upon the discretion of a federal employee.

Finally, under the National Environmental Policy Act,²⁷ Interior's approval of leases, especially for larger, non-agricultural enterprises, often require the creation of an Environmental Assessment or Environmental Impact Statement. Such studies obviously add to both the cost of transactions and the time it takes to approve them.

²⁴ In his *Handbook of Federal Indian Law*, Felix Cohen observed that the early 20th Century legislation governing the trust was concerned "almost entirely in the problem of how Indian lands or interests therein may be transferred from Indian tribe to individual Indian or from individual Indian to individual white man."

²⁵ 25 C.F.R. § 162.604 (2005).

²⁶ No deadlines for review and approval of business leases, for example, appear in the regulations. *See id.* at § 162.600-621.

²⁷ 42 U.S.C. §§ 4321-4347.

The Tribes can shorten this path somewhat by assuming responsibility for the federal realty program under the Indian Self-Determination Act.²⁸ Thus, a tribe might be able to improve administration of the program by taking over these functions. In the end, though, final approval authority still rests with the Interior Department.²⁹ Further, current reform efforts threaten to make these problems worse. The Department has chosen to establish duplicative reviews of tribal trust transactions by having OST officials review the work of BIA officials.³⁰ This approach should result in fewer errors in the approval process, but is most unlikely to improve the Department's speed in acting on leases.

Under current law, Indian owners of trust lands can do little to expedite the process, except to remove the lands from trust. If they do so, however, they may be inviting state taxation and regulation on the land,³¹ and no tribe will be willing to permit that. Thus, the trust laws as currently written constitute an external factor that well could undermine tribal efforts at law reform.

The effects of past trust administration must also be considered. The fractionation of allotted land among heirs drastically reduces the land's value. Gaining the approval of the many owners of allotments can be a Herculean task, and the Interior Department is no Hercules. The likelihood of allotted lands being leased for commercial purposes is remote. Instead, the Department renews agricultural (mostly grazing) leases year after year rather than seeking out opportunities for more profitable uses.

For the same reasons, most allottees cannot use what is usually their only asset—their land—as collateral for loans. A partial owner of an allotment can seek partition, but the Department rarely grants a partition request. All of the owners could agree to a mortgage, but that is unlikely. This deprives Indian country of one of the primary financing mechanisms for small businesses. Many small business owners off reservations obtain initial financing for their businesses by mortgaging their homes. Fractionation devalues the ownership interests of allottees and prevents them from using their land to build a home, develop equity in their home, and borrow against that equity to start small businesses.

Federal Limitations on Tribal Authority

Perhaps the most problematic aspect of federal intrusion is the limitation on tribal authorities over non-Indians. Tribes do not have criminal jurisdiction over non-Indians.³² Tribes do not have civil regulatory jurisdiction over non-Indians on fee lands within the reservations,

²⁸ 25 U.S.C. §§ 450f *et seq.*

²⁹ 25 C.F.R. § 162.110 (2005).

³⁰ See Department of the Interior, *Comprehensive Trust Management Plan* (Mar. 28, 2003) at Chapter 4, available at http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf.

³¹ See, e.g., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

³² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

save in limited circumstances.³³ Nor may tribes tax non-Indians for their activities on fee lands within the reservations.³⁴

These limitations, along with the federal government's policy of permitting state jurisdiction over non-Indians on the reservations, not only undermine tribal efforts, they create incentives for tribes *not* to reform their laws and *not* to develop a vibrant private sector. Professor Jacob T. Levy recently wrote of the "Perversities of Indian Law."³⁵ First, he notes that economic activities that create an influx of non-Indians actually have the effect of *reducing* a tribe's ability to provide the basic protections of law. The influx of a population largely immune from tribal law, especially tribal criminal laws, actually reduces a tribe's ability to provide a safe and secure environment.

Second, the development of a stable and vibrant local economy ordinarily leads to an influx of businesses, workers, and residents seeking economic opportunity. "Ordinarily local jurisdictions have incentives to provide good policies, uncorrupt government, stable laws, and prosperity-encouraging fiscal arrangements, because those will lead to an inflow of residents and firms, increasing the jurisdiction's tax revenue."³⁶ But because tribes have limited regulatory and tax authority over non-Indians, especially if the non-Indians seek to buy land, the influx of firms, workers, and residents actually *diminish* the tribe's jurisdiction and its tax base.

Third, to avoid intrusive state jurisdiction, tribes have every incentive to focus on tribally-owned businesses rather than private sector businesses. Certain federal tax preferences are available only to tribes, and immunities from state and local regulation and taxation are more certain to be upheld for tribes than for individuals. Tribally-owned business, like any government-owned enterprise, "impair the economic development that is supposed to be a central goal of Indian policy; political connections and short-term success at serving as *de facto* jobs programs become more important than productivity or efficiency to a firms' survival."³⁷

I would add a fourth perversity to Professor Levy's list. The greatest protection from state intrusion into reservation economies, and especially into the economic activities of non-Indians, arises from the federal pre-emption doctrine. Thus, only by inviting increased federal regulation of tribal decision-making may the tribes insulate their policies from state interference.

These ironic repercussions of federal law and policy clearly discourage tribes from inviting non-Indians into the reservations, regardless of the value of non-Indian investment and entrepreneurialism. The importation of non-member capital, expertise, and experience comes at the price of creating a class of reservation actors over whom tribal authority is quite limited. Further, they discourage tribes from creating a class of individual Indian business owners in

³³ *Montana v. United States*, 450 U.S. 544 (1981); *Nevada v. Hicks*, 533 U.S. 353 (2001).

³⁴ *Atkinson Trading Co., v. Shirley*, 532 U.S. 645 (2001).

³⁵ Levy, Jacob T., "Three Perversities of Indian Law" (July 31 2006).

³⁶ *Id.* Paper and abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921470.

³⁷ *Id.*

favor of tribally-owned enterprises. Finally, they encourage tribes to invite federal supervision over tribal activities, thus retarding the maturation of tribal government and business institutions.

These factors explain in part why tribal gaming has been a successful economic development strategy where other strategies have failed. But, as Professor Levy points out, the development of tribal economies centered on gaming inhibit tribal institutional development and the growth of an expansive private sector. Further, because tribal gaming relies almost entirely on non-Indian funds from outside the reservation, the gaming-based economy does not necessarily result in internal wealth creation or economic productivity. Further, tribal gaming funds usually are under the control of a small political leadership which, like any political and economic elite, is prone to rent-seeking and corruption. Scholars of developing economic systems note that this centralization of economic power in the government has been fed by World Bank policies that result in loans to governments rather than private entrepreneurs. Similarly, federal implementation of the Indian Financing Act, federal tax laws that favor tribal enterprises but not individual Indian enterprises, and—in the case of the Indian Gaming Regulatory Act—laws that require tribal ownership of enterprises have done little to create private sector economic activity on the reservations. Rather, economic power on the reservation rests in the tribe alone. Economists refer to this phenomenon as “the resource curse,” pointing to economies such as in the Arabian Gulf states, where natural resources have created fabulous wealth in an elite class. As oil reserves dwindle, the failure of these countries to spread the wealth throughout the population and create an entrepreneurial class threatens eventually to leave them destitute and unstable.

Recommended Reforms to Federal Law

The problem, of course, is that reforming tribal law does nothing to resolve these problems. Instead, it is reform in *federal* law that the tribes must seek. Looking first to the general federal laws regulating economic conduct, tribes should seek amendments that permit tribes the same regulatory roles over activities on the reservations that states currently have in their territories. This does not eliminate the impact of federal regulation and taxation, but it at least helps to insure that tribes are at no unintentional disadvantage.

Turning next to the impact of trust administration, as noted above, tribes can use self-determination contracting and self-governance compacting to take primary responsibility for most trust administration activities. Further, tribes should seek changes in the applicable leasing regulations to maximize tribal discretion in the management of Indian lands. However, because some of the limitations on tribal discretion arise from statutes, tribes clearly will have to seek changes in the trust statutes to gain maximum control. There are some recent examples of tribes seeking specific changes to the trust laws to expand tribal control of trust resources and reduce the discretion of the Interior Department. The National Indian Forest Resources Management Act³⁸ specifies Interior’s duties with regard to Indian timber resources, and puts the tribes in charge of decision making regarding the resource, even requiring the Department to assist in the implementation of tribal laws. Another example is the Navajo Nation Trust Land Leasing Act of

³⁸ 25 U.S.C. §§ 3101-3120.

2000.³⁹ Under this law, the Navajo Nation developed a process for the approval of non-mineral leases of tribal land. With Interior's approval of the tribal process, the Navajo Nation itself now provides the final approval for the lease. This combination of federal *and* tribal law reform gives the Navajo Nation far greater control of its primary economic asset—its land.

Even broader reforms in federal trust statutes may be desirable. Many tribes clearly have reached the point that they are better able to administer their lands than the Interior Department. Under current law, though, their only option for removing the Department from its role in administering their lands is to remove the land from trust. However, doing so would subject Indian lands to state taxation and regulation, and tribes should not remove lands from trust. Instead, tribes should seek legislation that would permit them to take full administrative authority over their lands while preserving the advantages of immunities from state tax and regulatory laws.

Finally, there is the matter of federal limitations on tribal authority. Tribes face challenging problems, yet lack many of the authorities that state, local, and federal governments employ to address such problems. Certainly situations will arise in which a tribe will consider asking Congress to restore jurisdiction over particular classes of persons or activities within the reservations. Yet every time a tribe seeks such legislation, and every time Congress grants such a request, they run a considerable risk that the restoration will be deemed illegal by the Supreme Court. Although the Supreme Court has upheld a restoration of tribal authority over non-member Indians,⁴⁰ the opinion was narrow and dissents in the case were rife with warning that broader restorations, especially of authority over non-Indians, would not be approved by the Court. Further, Justice O'Connor and Chief Justice Rehnquist voted to uphold Congress's power to restore tribal authorities, but they have been replaced by Justices whose views on the issue are unknown.

Given that the Court is diffident at best about restorations of tribal power, this is not a time to pursue restoration of tribal power "as a matter of principle." Further, the response of Congress to tribal proposals in the aftermath of the decision in *Nevada v. Hicks*,⁴¹ (or rather, Congress's *lack* of response to the proposal) suggests that broad restorations will not find political support in Congress. The "*Hicks* fix" contained too many provisions that would have prevented even those members of Congress that have been most favorable to the tribes from supporting the legislation. It seemed to be asking much to expect a member of Congress to empower a small minority of her constituents at the expense of this vast majority.

Further, members of Congress have genuine concerns aside from electoral politics. For example, many tribal judges, particularly at the trial level, are not law school graduates. That alone is hardly disqualifying, of course. America has thousands of lay judges in state and local judicial systems. The difference, though, is that none of these exercises the expansive jurisdiction that tribal judges would exercise under the *Hicks* fix.

³⁹ 25 U.S.C. § 415(e).

⁴⁰ *United States v. Lara*, 541 U.S. 193 (2004).

⁴¹ 533 U.S. 353 (2001).

In addition, rules of procedure—especially criminal procedure—in tribal courts need not meet constitutional standards. Despite passage of the Indian Civil Rights Act,⁴² tribes do not have to provide free representation to criminal defendants, and tribal procedures need not include grand juries. One can readily understand the reluctance of policy makers to expand the authority of these courts while these conditions exist.

Finally, despite the Supreme Court’s expectation in *Santa Clara Pueblo v. Martinez*⁴³ that tribal forums would enforce the Indian Civil Rights Act, tribal sovereign immunity still prevents tribal court review of tribal action in many circumstances. It is not for nothing that the *Hicks* fix would have proscribed federal court review of tribal election disputes and controversies over tribal membership. Such issues are constantly being reported in the media, and tribes have steadfastly refused to permit neutral review of such matters.

Thus, tribes should seek restorations only in certain circumstances. First, the tribes should seek restorations only to address discrete problems having serious impacts in their communities. Second, tribes should choose circumstances in which federal and state authorities demonstrably lack either the authority or the willingness to address the problem, or where federal and state authority has actually served to undermine legitimate tribal interests. In Public Law 280 states, for example, some tribes complain that their law enforcement needs are low priorities for state and county law enforcement. If this is true—and the tribes should be prepared to prove that it is true—then it may be appropriate to restore some measure of law enforcement authority to the tribes and limit that of the states. Third, tribes should demonstrate that they have made earnest efforts to address the problem with tribal authorities that already exist, and that the lack of the requested authority prevents the success of the tribal efforts. Fourth and corollary to the third consideration, there should be a strong likelihood that tribal efforts will be more effective if authority is expanded. If the tribes cannot demonstrate that they have already tried to solve the problem, and that the restoration of certain authorities is necessary to succeed in solving the problem, then there is little reason for members of Congress to agree to the restoration. Last, but hardly least, the issue of consent must be considered. Congress will be most wary of any effort by tribes to assert authority over those who have no voice in tribal government and have not in any way indicated a willingness to be subject to tribal authority.

Subjects for Tribal Law Reform

The magnitude of the challenges tribes would face in getting Congress to enact these reforms is daunting, and it is most unlikely that Congress would respond promptly, or perhaps respond at all, to all of these tribal requests. Thus, even as tribes press the Congress to enact these reforms, the tribes also must focus on changes to their own laws to address as much of the problem as they reasonably can. Because most tribal legal systems remain relatively undeveloped, there are many subjects that may require the attention of tribes that set out to

⁴² 25 U.S.C. §§ 1301-1303.

⁴³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

reform their laws to facilitate economic development. Following is a brief discussion of some of the more likely areas for tribal law reform.

Constitutional/Structural Reform

A first step in tribal law reform is to examine the structure of the tribe's governance and business organizations. Much has been written on the necessity of separating business and governmental functions, and it will not be repeated here. I do, however, encourage tribes to think not so much in terms of *separation* of powers, but rather in terms of *distribution* of powers, accompanied by real accountability. For example, most tribes are much too small to adopt American style separation of powers. The establishment of a judiciary with life tenure and the power of constitutional review is likely to make despots of the judges in small communities with intertwining family relations. Similarly, too complete a separation of the tribe's business from its governmental processes could well over-empower the business wing, resulting in corruption and overreaching.

Thus, tribal councils must be willing to make major delegations of authority and to abide by their decisions to delegate power to a court, to the tribal executive, or to a tribal corporation. This means that the tribal council does not involve itself in the day-to-day financial, managerial, and personnel decisions of tribal businesses, just as they must not interfere in decision making by the tribe's courts. However, the tribal council may not thereby abdicate its responsibility to oversee both the business and governance of the tribe. Thus, a tribal corporate board that is not effectively running the tribal business or is micro-managing the enterprise should be called to account, made to change its ways, or dismissed. A tribal judge who is not efficiently dealing with the cases that come to him likewise should be called to account. It is a question of balance. The balance will be different from tribe to tribe, and a tribe may find it necessary to experiment with different distributions of powers and manners of holding its subunits accountable.

In this regard, tribes that adopted IRA constitutions face a difficult chore. Those constitutions, often created more by the Interior Department than by the tribes, are difficult to amend, especially when the tribal membership is apathetic, because they can only be amended by referendum. Nevertheless, through a careful process of community involvement in the constitutional revision process, the tribe can establish new institutions for business and governance, and have those institutions legitimized by the community through the referendum process.

Sovereign Immunity

As tribes have become more active in credit markets, waivers of sovereign immunity have become common. Many tribes now routinely grant such waivers, as they must if they are going to borrow money for economic enterprises. What is often missing, though, is a consistent, published policy on when and how the tribe will waive its immunity. Such a law provides several advantages. The most important is that tribal decisions regarding waivers will no longer be made *ad hoc*. Rather, both the tribe and its creditors will know early in the process the scope of the waiver that tribal policy permits. This means, of course, that the tribe should involve lenders in the development of the tribal policy. There is little point to enacting a policy that no lender finds

adequate to secure its interests. By satisfying lender concerns in an enacted policy, the tribe eliminates uncertainty in the lending community as to sovereign immunity issues and eliminates transaction costs arising from negotiating separate waivers in each transaction in which it engages.

General Commercial Laws

Establishing the legal environment for economic development requires that investors, creditors, entrepreneurs, suppliers, merchants, and customers be secure in their rights as they make their transactions. Uncertainty as to those rights discourages economic activity; certainty encourages it. Thus, tribes should adopt an array of laws that govern basic commercial activities on the reservations.

Debtor/Creditor

Virtually every business must borrow at times. Consumers borrow as well. Such borrowing and lending is governed by a number of federal laws, but more importantly, every state has laws governing lending transactions and the collection of debts. Such laws establish both substantive rules of law and the procedures for the execution of those laws. A tribe must enact laws that are fair to the consumer by protecting them from oppressive lending practices. At the same time, they must be fair to lenders by allowing them prompt collection of valid debts. The states have broad experience and well-tested laws governing debtor-creditor matters, and tribes should draw on those laws in devising their own.

A strong tribal code will address such matters as whether to permit self-help repossession of personal property on the reservation, or whether such matters must be submitted to the tribal court and repossession carried out by tribal law enforcement. Similarly, tribal law should spell out whether and how the wages of tribal employees and others employed on the reservation may be garnished. Finally, tribes should clear and reliable processes for recognizing and enforcing foreign judgments, such as those from state courts.

Mortgages and Secured Transactions

Laws governing secured debt (debt in which the item purchased is pledged as security) is a special category of debtor/creditor law. Looking first to mortgages, because land is often the primary asset of individual tribal members, it is also the most likely security for loans to raise capital for business ventures. Thus, a tribe should have laws governing mortgages and accommodate tribal members who wish to borrow against their land. (If the mortgage involves trust land, the transaction must also be in a form and on such terms as are approved by the Bureau of Indian Affairs.)

Tribes should specify by ordinance how mortgages are documented and recorded. The tribes should feel free to rely on BIA Land Titles and Records Offices, as well as on County Recorder Offices. (Most mortgage lenders are likely to insist on recording the mortgage in both systems.) A tribe might wish to set up a duplicate system of recording in order to keep track of the status of mortgages of reservation lands. In some circumstances, tribal courts may have

jurisdiction over foreclosure actions against tribal members. The tribe should have specific rules governing foreclosure and whether and how borrowers may reinstate mortgages and prevent foreclosure. Finally, tribes should consider how property will be sold at foreclosure sales, perhaps establishing a first purchase option for the tribe in order to maintain Indian ownership of reservation lands.

For transactions involving personal property, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has prepared a recommended Model Tribal Secured Transactions Act. The Model Act addresses the creation and perfection of security interests in personal property. It is essentially a simplified version of the provisions of the Uniform Commercial Code governing secured transactions. The Model Act addresses enforcement of security interests and specifies consequences for failure to abide by the Act. It also addresses potentially difficult issues of how to record security interests by encouraging cross-jurisdictional agreements between tribes, states and counties. Tribes wishing to encourage retail transactions, banking, and other transfers of personal property on the reservation should consider enacting the Model Act.

Tribal Commercial Codes

All of the states have enacted versions of the Uniform Commercial Code created by the National Conference of Commissioners on Uniform State Laws. The UCC governs sales and leases of personal property; commercial paper and its electronic equivalents; letters of credit; bulk sales; investment securities; and secured transactions. Few tribes will need all nine articles of the UCC, but most tribes should consider enacting both the Model Tribal Secured Transactions Act and some version of the provisions relating to sales and leases of personal property. As is true of all commercial laws, the more tribal laws are consistent with the laws of surrounding states, the more comfortable business owners will be with transacting on the reservation.

In addition to the UCC, the NCCUSL has written a number of other uniform codes and model acts on subjects relating to business. These include the Consumer Leases Act, the Debt-Management Services Act, the Enforcement of Foreign Judgments Act, the Model Consumer Credit Code, the Residential Mortgage Satisfaction Act, and the Trade Secrets Act. Tribes should not simply comb through the various uniform laws and enact all of them. Rather, tribes should simply be aware of the existence of these model codes. As economic activity on the reservations expands and matures, the tribes can enact versions of these codes as needed to meet circumstances on the reservations.

Corporation Codes

Modern business is conducted in many legal forms. Many business owners create a fictitious entity to carry out the business, such as a corporation or limited liability company. Tribes are familiar both with tribally-chartered corporations and with the federally-chartered corporations established pursuant to the Indian Reorganization Act.⁴⁴

⁴⁴ 25 U.S.C. §§ 461-479.

Rather than granting corporate charters on a case-by-case basis, tribes should consider establishing a code and administrative process for the establishment of corporations, whether those corporations are owned by the tribe or by individuals. As noted above, it is important that tribes follow the same rules of business as it imposes on others.

In addition, tribes should authorize the establishment of other forms of business organizations and specify the rights and responsibilities of those entities and the individuals who own them. The NCCUSL has created model codes governing, for example, partnerships and limited liability companies. The increased flexibility as to the forms reservation businesses can take will encourage entrepreneurs to start businesses and will make lenders more willing to lend to such businesses.

Taxation

For most jurisdictions, be they countries, states, counties, or municipalities, tax policy is essential to economic development. Taxes provide revenue that permits governments to create the basic infrastructure to support economic development. Roads and water and sewer systems are financed by tax revenues, as are basic services such as police, fire protection, and schools. In addition, non-Indian jurisdictions use taxes to create revenue streams that permit them to borrow money through bond issues. In the Phoenix area, for example, municipal tax revenues support not only common municipal services, but also the construction of stadiums, convention centers, and university buildings. Finally, non-Indian jurisdictions use tax concessions to attract key businesses.

Tribes face numerous obstacles in attempting to generate revenues through taxation. First, because unemployment is high on many reservations, income taxes will not generate adequate revenues to support infrastructure development. Similarly, because most land on the reservation is owned by the tribes, and because much of what remains is allotted, highly fractionated, and therefore of minimal value, property taxes are not a viable option. In addition, because there is no infrastructure, there are few private retail businesses, and sales or value-added taxes are unlikely to generate meaningful revenues. Finally, as discussed above, because states can tax the sales and profits of non-Indian businesses on the reservations in many circumstances, tribes are prevented as a practical matter from imposing such taxes, even when the tribes have the legal authority to do so.

Still, a well-considered tribal tax policy is worthwhile. First, the reservations are experiencing increasing economic development, and while the tax bases remain inadequate, they are growing and will one day generate meaningful tax revenues. Further, in order to make the case to Congress that the state tax jurisdiction issue must be addressed, tribes must show that they are doing the best they can with their tax programs. Finally, tribes can experiment with their tax programs to determine what activities, persons, and properties are most likely to generate needed revenues.

A strong tribal tax program will have a number of characteristics. First, it will clearly define the reach of the taxes it imposes; that is, the tribe's jurisdiction to tax will be well-defined in the tax statutes themselves. The persons, property, and activities to be taxed should be

identified clearly in the statute, and the procedures for paying taxes spelled out. Needless to say, taxes should apply equally to all persons within the tribe's jurisdiction without regard to tribal membership.

Second, the program will be predictable for taxpayers. Tax rates will not change drastically from year to year. Rates will reflect the prevailing rates of other jurisdictions in the area so as not to discourage investment on the reservation. The public will have access to decision makers through public hearings before tax laws, tax rates, and tax procedures are changed. Tax laws will be readily available to give taxpayers the opportunity to comply without formal process.

Finally, the tax program will be administered professionally by civil servants who are properly trained. Further, the decisions of the tax administrators can be reviewed by impartial hearing officers and judges.

Civil Regulatory Laws

Zoning and Land Use

Tribes should have a comprehensive plan for the development of the reservation. The planning process should be inclusive and thorough. Economic development inevitably will involve commitments of the primary resource of the tribe—land—to uses that cannot be changed easily. Thus, before developing or permitting the development of an enterprise in a particular location, a tribe should consider the project in the context of an overall plan.

For many reservations, tribal jurisdiction to zone non-Indian fee lands is questionable. Although the Supreme Court has upheld tribal authority to zone in areas of a reservation that are predominantly Indian in population and land ownership, the Court has limited tribal power in areas where non-Indian residents and lands are more prevalent.⁴⁵

To be effective, tribal zoning codes and the administration of those codes must be predictable and uniform. Potential developers of enterprises should be able to predict, from looking at the code and at prior decisions of the tribal zoning authority, what is the likely outcome of any given land use application. An effective system will be public; hearings should be held and decisions made in open session. Further, the decision of the zoning authority should be subject to review in tribal court to insure that the decision of the authority is in compliance with the code.

Environmental Regulation

As noted above, federal law imposes a variety of environmental requirements on businesses on reservations. Tribes can best make sure that environmental standards reflect tribal priorities by taking responsibility for the implementation of federal laws themselves. As noted

⁴⁵ *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

above, the Clean Water Act,⁴⁶ Clean Air Act,⁴⁷ and Safe Drinking Water Act⁴⁸ have been amended to permit tribes to assume primary responsibility for the implementation of those laws on the reservations. All tribes should set as a goal to take over the responsibility for setting standards under the Clean Water Act and Clean Air Act for lands on their reservations. In addition, the U.S. Environmental Protection Agency has policies that permit tribal participation in the implementation of the Resource Conservation and Recovery Act⁴⁹ and the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),⁵⁰ among others.

In addition to implementing federal laws, tribes may also wish to make environmental and conservation laws of their own. As discussed above, tribal civil regulatory jurisdiction, even over non-Indians and non-Indian lands, has been consistently upheld in the context of environmental regulation. The more closely a tribal environmental law can be connected to the health and welfare of the tribe, the more likely tribal power will be upheld. Moreover, in the area of environmental regulation, federal courts are consistently finding that states have no authority within the reservations due to the need for a single set of rules to govern environmental protection.

Labor and Workers Rights

In the area of workers rights and health and safety in the workplace, federal law dominates. Tribes are free to legislate in areas where federal law is silent, but the most important issues have been resolved by the federal government. For example, the National Labor Relations Act⁵¹ grants workers the right to organize and bargain collectively on the terms and conditions of employment. Further, employers are prohibited from engaging in “unfair labor practices” that might deprive workers of the opportunity to organize. While the policy of the National Labor Relations Board has long been that tribes are not covered by the NLRA, the Board recently changed its position and applied the NLRA to a tribally-owned casino.⁵² The Board’s decision has been upheld on appeal.⁵³ Tribes, like states, do have the authority to enact “right-to-work” laws.⁵⁴

Regulation of occupational safety and health also is largely pre-empted by federal law. The Occupational Safety and Health Agency has broad authority to set and enforce standards for workplace safety. While the OSHA’s work has been focused primarily on industrial workplaces,

⁴⁶ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

⁴⁷ 42 U.S.C. §§ 7401-7671q.

⁴⁸ 42 U.S.C. §§ 300f-300j-25.

⁴⁹ 42 U.S.C. §§ 6901 *et seq.*

⁵⁰ 7 U.S.C. §§ 136-136y.

⁵¹ 29 U.S.C. §§ 151-169.

⁵² *See, San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007).

⁵³ *Id.*

⁵⁴ *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).

any tribally-owned business with a substantial number of employees could find itself dealing with federal inspectors.

To the extent federal laws are insufficient to meet tribal objectives, tribes are free to set higher standards than the OSHA and to set standards for certain workplaces even in the absence of federal standards. Certainly any enterprise employing substantial numbers of reservation residents should be supervised by tribal regulators enforcing tribal standards.

Workers Compensation

An area that requires tribal attention is that of workplace injuries. Every state—and, as to certain categories of workers, the federal government—has established a system of compensating injured workers. Tribes generally do not have such laws, and tribally-owned enterprises generally do not participate in state workers compensation systems. As tribal and Indian owned businesses on the reservations employ more and more workers, pressure will grow to establish a system of workers compensation.

State systems work by having employers pay into an insurance pool that is used to compensate injured workers. It will be very difficult for most tribes to establish equivalent systems of their own, because few reservations will have a sufficient number of employees to create the economies of scale enjoyed by the state system. Thus, some tribes have opted to join the state systems, paying their premiums into the state fund. In some states there may be state law impediments to tribal participation in the workers compensation system. To the extent that is true, tribal law reform efforts should be directed to state legislatures to encourage changes to state law to permit tribes to compensate reservation workers the same as workers in the general population.

Land Tenure

As discussed earlier. Tribal communities often are unable to leverage their primary asset, land, into working capital for economic enterprises. The trust status of tribal land and the fractionation of allotted lands make such leveraging difficult if not impossible. There are a few steps tribes can take to improve the marketability of lands to encourage individual entrepreneurship on the reservations.

First, tribes should enact probate laws that reduce, and eventually reverse, fractionation of allotted lands. The American Indian Probate Reform Act⁵⁵ provides for the application of tribal probate laws to probate of Indian trust estates, and tribes should enact such laws.

Second, because most tribal members do not own parcels of property that can readily be developed due to fractionation or because all lands are owned by the tribe. Some tribes have made tribal lands available to individual tribal members through lease arrangements or through “assignments” of tribal lands. To be effective in permitting tribal members to borrow against assigned lands, the tribal member’s rights must be clearly and irrevocably defined so that lenders

⁵⁵ 25 U.S.C. §§ 2201 *et seq.*

will know the exact ownership rights that are securing any given loan. The emergence of a private entrepreneurial class is essential to the development of self-sufficient reservation economies, and tribes must find some means of making land available to individual entrepreneurs.

Third, tribes should consider making use of Indian Reorganization Act Section 17 corporations to lease tribal lands. These corporations can be granted rights to tribal lands and can, in turn, transfer those rights to individual tribal members for economic enterprises. Obviously, tribes must have aggressive standards for determining when an assignment or lease of tribal land should be made, but those standards should be based on business considerations, not political ones. In many circumstances a tribe will do better by assigning responsibility for such decisions to a business entity like a Section 17 corporation rather than requiring the political arms of tribal government to make such decisions.

Lastly, the tribes should be encouraging the federal government to accelerate and expand its efforts to address fractionation. While the consolidation program contained in the AIPRA is a big step in the right direction, appropriations have been meager when compared with the scale of the problem. In short, unless fractionated lands move rapidly toward more consolidated ownership, their value will continue to be diminished and they will remain essentially unusable by individual Indian entrepreneurs.

Establishment of Tribal Forums

Needless to say, a tribe can have the best set of commercial laws in the world, yet they will have no meaningful effect if they are not implemented and enforced by capable institutions. The laws described above are complex; lawyers with years of training still work to deepen their understanding of them. If tribal laws are to be effective, their enforcement must be entrusted to people trained to interpret and apply them.

Tribal courts come in many forms. There are traditional tribal courts enforcing laws and customs of the tribes. There are Courts of Indian Offenses or “CFR Courts” that are federally-created and supported. The courts are holdovers from the allotment and assimilation policy days when the Bureau of Indian Affairs was trying to teach “civilization” to Indians. I focus here on true tribal courts—courts established under the written laws of the tribes and applying written tribal laws in their decision making.

Tribal courts come in two basic forms: (1) courts established in the tribe’s constitution or other organic document; and (2) courts created by tribal governing bodies pursuant to authority granted to the governing body in the tribal constitution. In general, it matters little whether a tribal court is constitutional or statutory, so long as the court has independence in deciding the cases that come before it. This means that the tribal legislative and executive bodies must leave the court alone when it comes to deciding particular cases. Attempts to influence court decisions through means other than the public judicial process are by definition corrupt and undermine the credibility of tribal government. If a tribal council is unwilling to delegate enforcement of tribal law to the courts and to live with that delegation, the council should not bother with law reform.

No reform of law can overcome the failure to give tribunals the freedom to decide cases as they see fit.

One option the tribes have is to assign commercial matters to their standing courts. Tribal courts tend to be courts of general jurisdiction, meaning that they hear cases of all types arising under tribal law. Like state trial courts, tribal courts of general jurisdiction hear a range of matters, civil and criminal, and are often the only forum in which a case may be brought. If complex commercial matters are to be brought before a tribal court of general jurisdiction, it is essential that the judges of the court be qualified to interpret and apply commercial laws. For tribes that have lay judges, those judges will require a great deal of experience and specialized training to have the ability to properly modern commercial laws. Only if the tribal court is staffed with such judges should commercial matters be assigned to tribal courts of general jurisdiction.

An important alternative is for a tribe to establish a court whose jurisdiction is limited to commercial matters. A tribe may prefer the sort of common sense and community based justice that lay judges provide when it comes to matters affecting only tribal members. In commercial matters involving outsiders, however, it may be better to establish a specialized court staffed by judges with specialized knowledge and experience. If a tribe is to attract private investment and entrepreneurship to the reservation, it is essential that prospective investors and entrepreneurs have confidence that their rights will be enforced by a court capable of rendering fair and proper decisions in complex commercial matters. Thus, tribes should consider establishing specialized Commercial Courts for such matters. The judges of such courts should be law-trained attorneys experienced in the interpretation and application of complex commercial and regulatory laws.

As noted above, tribes should also consider establishing specialized administrative agencies to implement certain of its laws. Federal and state governments rely heavily on agencies, believing that the establishment of agencies staffed by experts will improve governmental decision making. As a practical matter, Congress and state legislatures could not begin to address every policy issue that arises in the complex modern economy. By the same token, elected tribal officials face increasing work loads, and as reservation economies continue to expand, they undoubtedly will have to delegate some decision making authority to subordinate agencies. In order to protect the integrity of agency decision making and allow qualified, expert tribal staff to do their work free from politics, tribes should consider enacting personnel rules that, like federal and state civil service laws, protect agency employees from arbitrary or retaliatory personnel actions.

Tribes should also consider establishing specialized forums to hear appeals from decisions of tribal administrative agencies. Tribal regulatory laws will be implemented primarily by career professionals employed by agencies of the tribe. To insure the accuracy and lawfulness of the decisions made by these agency professionals, their decisions should be subject to review by a neutral body. As noted above, state and federal governments have administrative procedures acts that supply substantive rules for agency conduct and permit court review of agency actions. Tribal forums for reviewing administrative actions do not necessarily have to be courts as such. Special administrative review boards or Administrative Law Judges can hear such matters, and unless a tribe's constitution establishes a tribal court and calls for separation of powers, the decision of administrative forum can be final and binding.

Conclusion: The Process of Law Reform

There is little doubt that the establishment of tribal legal systems that provide fair and efficient rules and processes for governing businesses will assist economic development on the reservations. There is a considerable danger, however, that law reform results in “too much law.” Unless undertaken with care, law reform can lead to the enactment of laws the tribe simply does not need or, worse, laws that are so contrary to customary practices that they are simply ignored. Therefore, the wholesale importation of state commercial laws, for example, is unwise. Rather, law reform is a process that takes many years and a great deal of experimentation as tribes seek to balance the various interests of the business community, consumers, workers, and the tribe itself.

Tribes must first take inventory of the business activity on the reservation and determine whether additional laws are needed to properly regulate those activities. The answer will often be that no further law is needed. For example, tribes with gaming operations likely have considerable experience with regulating gaming, and while tribal gaming laws should be reviewed regularly, existing laws will be largely adequate.

Greater challenges arise, though, as a tribe undertakes economic planning and determines that it wishes to attract certain new forms of business. As new opportunities are identified, tribes should take care to develop tax, regulatory, and transactional laws to lay the legal infrastructure for the new business. A manufacturing enterprise, for example, should be preceded by careful consideration of the environmental and workplace safety laws needed to encourage profitable, safe, and healthy operation of the factory. It is unwise to wait for problems to arise before enacting such laws.

Thus, tribal leaders face challenges in trying to anticipate what laws will be needed and the likely impacts of the laws they pass. The best way to anticipate problems and to avoid unintended consequences from the laws they pass is to involve the public at every step in the process. The initial inventory of reservation business, the planning of future development and the formulation of the law itself will be done better through the participation of tribal members, prospective entrepreneurs, lenders, tribal regulators, tribal judges, and outside experts, when necessary. Not only will the substantive laws that result from the process be improved, but the process itself will also encourage compliance by the business community, because the business community will have confidence that its concerns were heard and considered. On the other hand, laws made in haste or in secret will almost surely cause unanticipated problems, and the business community is more likely to evade laws it played no role in creating.

The rules of law are of no value if they are not accompanied by empowered tribal courts and agencies. Tribes must consider various options in determining where to assign the power to implement and enforce laws. Further, tribal courts and agencies must have sufficient personnel, equipment, training, and financial resources if the laws are to have their intended effect. If a tribe is unwilling or unable to invest in such institutions, but still wants to create a legal regime that encourages development, it must consider alternatives such as permitting state courts to hear reservation disputes.

The tribes of course have the option of not seeking additional development of the reservations. To some degree, all new laws displace existing customs and understandings among the people. That is to say, law can reflect culture, and it can also change culture. This is an especially important consideration for tribes, who are deeply mindful of the effect of their decisions on the maintenance of tribal culture. It is a perfectly respectable stance for tribal leadership to decide that the impacts on tribal culture of further economic development are not acceptable. Such a stance means that the tribe will forego at least some economic opportunities, of course, but tribes regularly reject economic proposals that do not conform to tribal objectives and tribal culture.

Finally, tribes must remember always that lawmaking is an iterative process. Lawmakers rarely pass perfect laws, and tribes should be willing to revisit and amend laws that are not working as they had hoped. Further, a law that works well in a given time and place will not necessarily work as well in the future, as the economy grows and business practices change. Technological advances in the past twenty years, for example, have required wholesale changes in certain state commercial laws. So law will change periodically, and tribes should have procedures for regularly reviewing their commercial laws to insure their continuing effectiveness.