CAN A SOVEREIGN PROTECT INVESTORS FROM ITSELF? TRIBAL INSTITUTIONS TO SPUR RESERVATION INVESTMENT

by
*David D. Haddock and Robert J. Miller**

A bilateral danger of underperformance exists when two parties sink investments with payoffs dependent on the behavior of the other. There are five general categories of defense against that danger: (1) Legal action against a misbehaving co-investor; (2) Reliance on a reputation for non-opportunistic behavior; (3) Agreement by the party with the less substantial reputation to modify the relative payouts, thus paying the partner a risk premium; (4) Vertical integration that makes a partnership unnecessary; and (5) Forgoing the opportunity altogether. A sovereign can be sued only if it permits that outcome, and must invest in a reputation that assures the partner that it will permit suit. Thus, for a sovereign the first two categories merge. Such a reputation can arise from a history of successful meritorious suits by aggrieved co-investors. But many tribal reservations are small and poor, offer few attractive investment opportunities, and hence exhibit thin histories on point. Consequently they more often pay high risk premiums than similar non-tribal investors, more often vertically integrate where others rely on experts, and more often forego potentially valuable investments altogether. We explore ways to ameliorate those disadvantages and thus improve returns from assets held by or on reservations.

* Haddock is Professor of Law and Professor of Economics at Northwestern University, and Senior Associate, PERC. Miller is Associate Professor of Law at Lewis & Clark Law School, and Chief Justice for the Court of Appeals of the Confederated Tribes of the Grand Ronde Community of Oregon. They may be reached at dhaddock@northwestern.edu and rmiller@lclark.edu.

I. INTRODUCTION

As a group, the indigenous peoples of the Americas are among the continents' most impoverished, worst educated, and least healthy.[1] The early period of contact between Indians and Europeans often witnessed mutually beneficial exchanges while later years witnessed substantial conflict,[2] but one way or another most of the accessible and productive land between Tierra del Fuego and Hudson Bay eventually became owned by the immigrants and their progeny, or by their governments. Well over a century after the 1886 defeat of Geronimo's band of Chiricahua—the last to pose a serious military threat within the United States—utilization of the residual Indian resources remains severely encumbered by government policy.

Original U.S. Indian policy was not intended to improve the lot of the tribes beyond the incidental buffering of reciprocal threats that settlers and Indians posed for each other.[3] But on-going litigation has exposed a Bureau of Indian Affairs (BIA) that administers with gross negligence more recent initiatives that were advertised as beneficial for Indians.[4] Maladroit national governance and anachronistic constraints on the utilization of Indian resources translate into poor incentives for investment in physical, human, and institutional capital, as reflected by abrupt differences between encumbered and

---

[1] U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION: CHARACTERISTICS OF AMERICAN INDIANS BY TRIBE AND LANGUAGE, 1990 CP-3-7, tbls. 4, 6. "The country's 2.1 million Indians, about 400,000 of whom live on reservations, have the highest rates of poverty, unemployment and disease of any ethnic group in America." Peter Carlson, *The Un-fashionable*, WASHINGTON POST, Feb. 23, 1997 (Magazine), at W06; *see also* Diane T. Putney, Fighting the Scourge: American Indian Morbidity and Federal Policy, 1897–1928 (1980) (unpublished Ph.D. dissertation, Marquette University).

[2] Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39, 40 (1994).

[3] Among the multitude of entries touching on the point, one highly readable selection is ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1970).

[4] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

adjacent unencumbered land.[5] However, less obvious, similar differences exist between encumbered and unencumbered non-land resources. A proud and energetic people, from all evidence nineteenth century America's best nourished,[6] have been brought low.

From one generation to the next, popular perception of tribal reservations has gradually eroded from an uncomplimentary, nightmarish vision of concentration camps for dangerous and cunning prisoners of war to an even less complimentary one of wasted ghettos for the lethargic and apathetic underemployed. Both visions—neither ever really accurate—have motivated injurious government policy, first through policies that closely confined Indians geographically, later through policies that even today limit their economic opportunities in a way appropriate only for mental incompetents. Today's Indians require the paternalism of the national government no more than do other citizens. Consider that the median African-American is similarly less wealthy, educated, and healthy than the national average (though better off in those regards than the median reservation resident), but a proposal to establish a Bureau of Negro Affairs, with BIA-like approval powers over black people's plans, and in some spheres the power literally to usurp the planning role altogether, would rightly ignite a firestorm of protest.

Indians would benefit from a reduction in oversight from Washington that would place them on a footing with other citizens. But how is that transformation to be effected? One route would be to unfetter individual Indians by removing the BIA as trustee over private assets; a transfer that could be accompanied by limited constraints on asset alienability when and if a tribe decided that would protect desirable features of their culture.[7] A distinct route is to increase tribal governance over local matters. If the former route has been poorly exploited, some movement has come along the latter as courts and Congress have strengthened tribal sovereignty.[8]

---

[5] Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427 (1992).

[6] Richard H. Steckel & Joseph M. Prince, *Nutritional Success on the Great Plains: Nineteenth Century Equestrian Nomads*, 33 J. INTERDISCIP. HIST. 353, 354 (2003).

[7] The tribe might vote, for instance, to permit alienation of a member's land only to another member of the tribe. Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, 19 J. LEGAL STUD. 297 (1990). If that policy reduced land value by excluding some potential purchasers, the tribe and not the BIA would have decided it was worthwhile. But if tribal culture is valuable to members, the value of the plot to them would increase, so it is an empirical question which influence would dominate and thus whether the land value would rise or fall. Regarding the impact on asset value accompanying an alteration of the value of an amenity attaching to it, see DAVID D. HADDOCK, IRRELEVANT EXTERNALITY ANGST, Northwestern U. Law & Econ. Research Paper No. 16, 2003, *available at* http://papers.ssrn.com/abstract=437221.

[8] Some consider the Indian Reorganization Act of 1934 to be a major benchmark in the growth of tribal sovereignty, though others point to the resulting stubborn increase in BIA intrusion into tribal affairs. McChesney, *supra* note 7, at 325. One might instead date the process from *Williams v. Lee*, 358 U.S. 217 (1959).

Sovereignty is an ambiguous term, and *Webster's New Collegiate Dictionary*[9] offers several definitions. Two that are useful here are "supreme in power; superior in position to all others" and less grandly "independent of, and unlimited by, any other; possessing . . . original and independent authority."[10] Superior in position to all others clearly implies that there are others of an inferior position, hence some nature of hierarchy that is usually taken to mean a government-subject relationship. But while independent of and unlimited by any other precludes existence of a higher authority, it is silent regarding subordinate ones, and thus might apply to an individual living in anarchy. Stated differently, while the first definition implies a sovereign who can demand subservience from somebody, the second requires only that nobody can demand subservience from a sovereign.

Sovereigns of the former type certainly existed in some pre-contact locales.[11] As in the eastern hemisphere at the same time, Mayan princes boastfully recorded wars they won as well as the frequently dreadful aftermaths. At first contact, the Aztec and Inca ruled states of a sort very familiar to Europeans. Indeed, Inca is not the name of a tribe or language as is commonly imagined—a proper Quechuan translation is king or emperor.[12] When the Conquistadors arrived, one Inca governed a northern empire from Quito while another Inca governed the southern part from Cuzco. In the more densely populated parts of what became the United States, pre-contact hierarchical structures with coercive governmental authority over subjects also had evolved, perhaps the most widely-remembered being the Haudenosaunee (or Iroquois) Confederacy.[13]

---

[9] WEBSTER'S NEW COLLEGIATE DICTIONARY (1960).

[10] *Id.*

[11] *See, e.g.*, CAHOKIA: DOMINATION AND IDEOLOGY IN THE MISSISSIPPIAN WORLD (Timothy R. Pauketat & Thomas E. Emerson eds., 1997) (near St. Louis, Missouri, in present day Illinois, in 1000–1200 A.D. an indigenous culture organized labor and built the largest earthen mound in the United States, larger in volume than the Cheops Pyramid in Egypt); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 844–45 (2002) (tribal cultures built 300 miles of paved road and the 650-room Pueblo Bonito and other massive structures at Chaco Canyon, New Mexico).

[12] Both the Aztec and the Inca ruled states rather than tribes in that in each instance peoples of several languages and cultures had been incorporated under central authority.

[13] The Haudenosaunee Confederacy dates either from 1142 or 1451. The three hundred plus year margin of error is attributable to oral tradition that the Seneca, the last of the pre-contact members to join, were finally convinced to adopt the Great Law of Peace by a solar eclipse that occurred during a tense afternoon of negotiation. In that vicinity a total eclipse occurred on August 31, 1142 and a near total eclipse occurred on June 28, 1451. Whichever date is applicable, it is clear from their records that Europeans found an operational government at first contact in the early 1500s. The still functioning multi-tribal and multi-lingual Haudenosaunee Confederacy spans the New York-Ontario border, consisting of the pre-contact member tribes—Cayuga, Mohawk, Oneida, Onondaga, and Seneca—as well as the Tuscarora who joined circa 1700. *See* Barbara A. Mann & Jerry L. Fields, *A Sign in the Sky: Dating the League of the Haudenosaunee*, 21 AM. INDIAN CULTURE RES. J. 105 (1997); Bruce E. Johansen, *Dating the Iroquois Confederacy*, AKWESASNE NOTES NEW SERIES, Fall 1995, at 62 (1995), http://www.ratical.com/many_worlds/6Nations/DatingIC.html (last visited Mar. 2, 2004).

But tribe implies a group of people sharing a language and culture, with or without a government, and sometimes the latter definition of sovereignty—individuals merely independent of, and unlimited by, any other—would have been appropriate. Those whom the Europeans referred to as chiefs among such peoples were in truth persuasive individuals capable frequently of convincing a number of their fellows to participate in cooperative undertakings, but without coercive authority over dissenters.[14] The Chiricahua for instance "had no formal leader such as a tribal chief, or council, nor a decision making process. The core of the band was . . . predominantly, but not necessarily, kinsmen."[15] Indeed, formerly allied Apache bands sometimes fell into war against each other while erstwhile enemies might ally against a common foe.[16] Those societies and chiefs recall saga era Icelanders and Norwegians[17] or the Kung of today.[18] Putting aside slaves (where a particular tribe held them), the men, and in some tribes the women, were independent of and unlimited by any other sovereign, but hardly governmental.[19]

Being the form familiar to colonizing Europeans, throughout our colonial and national history, the Crown, the courts, and Congress have analogized all tribes to governments. Tribal members have consequently been taken to bear allegiance to those sometimes fictitious governments, and to be obliged to abide by tribal decisions and shoulder whatever burdens result.[20]

Such tribal government power can be enhanced via distinct routes that are different in important ways—at the expense of the national government, at the expense of the government of the state or states that overlap the tribe geographically, or at the expense of private parties—both Indian and non-Indian—who have interests on the reservation. Increasing any sovereign power may well afford benefits but will surely impose costs.[21] Fixating on the benefits of increased tribal sovereignty in no way assures individual Indians of any

---

[14] DEBO, *supra* note 3; TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS (1995); Bruce Benson, Buffalo Wars (manuscript presented at the Southern Economic Association Meetings (2003)).

[15] *Apache Nation*, *at* http://www.crystalinks.com/apache.html (last visited Mar. 2, 2004).

[16] DAVID ROBERTS, ONCE THEY MOVED LIKE THE WIND: COCHISE, GERONIMO, AND THE APACHE WARS (1993).

[17] *See* NJAL'S SAGA (Robert Cook trans., 2001); EGIL'S SAGA SKALLAGRÍMSSONAR (Christine Fell trans. & ed., 1975).

[18] ELIZABETH MARSHALL THOMAS, THE HARMLESS PEOPLE (1959).

[19] ROBERTS, *supra* note 16; ANDERSON, *supra* note 14.

[20] Today's tribal governments are not considered legitimate by some tribal members. These persons argue that federal policies resulted to a great extent in the imposition of Anglo-American governmental and judicial systems upon tribes which inhibit traditional governments and ways of life. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 14–15 (1983); EDWARD H. SPICER, CYCLES OF CONQUEST 351–52 (1962).

[21] David D. Haddock & Thomas D. Hall, *The Impact of Making Rights Inalienable*, 2 SUP. CT. ECON. REV. 1 (1983); Yoram Barzel, *Confiscation by the Ruler: The Rise and Fall of Jewish Lending in the Middle Ages*, 35 J.L. & ECON. 1 (1992); David D. Haddock, *Sizing Up Sovereigns*, *in* ENVIRONMENTAL FEDERALISM 1 (Terry L. Anderson & Peter J. Hill eds. 1998).

improvement. To the extent permitted by the courts, a wise and benevolent tribal government would seek to restrict exploitation of its sovereign power to forms where benefits exceed costs, and to control the costs of all forms. Our objective is to elucidate that goal.

Fully appreciating the differences among transfers of sovereignty requires keeping a separate perspective on constraints that have been imposed without a tribe's consent versus constraints that the tribe assumes willingly in order to induce a corresponding commitment from another. Both backward-looking ethical issues and forward-looking efficiency issues are important within their proper spheres, but one must take care to distinguish the one from the other. Many a tribe can point to past non-consensual losses of sovereignty to justify disappointing particular individuals today (whether tribal members or not), but that is largely beside the point when an interaction is consensual. Potential consensual contributors to reservation welfare will be absent if tribal power is exploited ruthlessly. For brevity we call such contributors *investors*, though their contribution need not be financial. An investor who simply remains off the reservation easily and at low cost avoids tribal policy, but that outcome may impose substantial opportunity costs on reservation residents who hold complementary resources.

Regardless of the tribe's moral standing, therefore, the wise and benevolent tribal government would carefully ponder investors' interests and concerns. But U.S. courts seem hardly to recognize how difficult it can be for tribes to convince investors of their good intentions unless the courts will insure the veracity of tribal proclamations. Profligate use of a first mover's tribal power more easily injures other tribes than it injures investors, and by their neglect of that principle the courts have trapped the tribes in a prisoner's dilemma. Though most tribes act reliably, many potential investors fear that they are unreliable even when they are not.[22]

II. INTERCONTINENTAL FACTOR EQUILIBRATION

Indian tribes now occupy a fraction of the land they exploited before immigrants arrived from the East. Most reservations have been impoverished through their entire histories. Despite widespread conviction to the contrary, those two facts are not closely related. The tribes yielded land because to them land had low marginal productivity relative to its value to the immigrants. That hardly implies that Indians were ignorant or even unlucky—all else being equal a high marginal productivity of land is associated with a low marginal productivity of other inputs, such as labor.[23] It was no accident that the highly productive European land witnessed frequent famines—the high productivity

[22] David D. Haddock, *Foreseeing Confiscation by the Sovereign, in* THE POLITICAL ECONOMY OF THE AMERICAN WEST 129 (Terry L. Anderson & Peter J. Hill eds., 1994).

[23] David D. Haddock, *Force, Threat, Negotiation: The Private Enforcement of Rights, in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 168, at 178–80, 192 (Terry L. Anderson & Fred S. McChesney eds., 2003).

was per acre, not per capita. Productivity per person was deplorably low.[24] In America a great deal of land was completely vacant, but people seem to have been well nourished by the standards of the age.[25] The geographically different marginal productivity does imply that there existed gains from trade. Of course in a voluntary transaction, Indians would have demanded more before ceding land had the marginal productivity of land to them been as high as it was in Europe; but by the same token, the European offers would have been reduced had the marginal productivity of land to them been as low as in America.

Tribal impoverishment arises from two other sources. First, the Indians' starting point from the latter nineteenth century forward was lowered by an absence of an impartial third party enforcer that permitted a trans-Atlantic variance in military technology to alter bargaining threat points, and thus the distribution of gains from trade.[26] But growth rates are distinct from starting points. Subsequent failure of reservation economies to converge toward the national economy can largely be laid at the feet of constraints the law has imposed on Indian management of their residual assets.

Population, capital, and technological differences yielded marginal products of American land that were well below those in Europe in 1492. There had been no ongoing contact between hemispheres that could equilibrate the factor ratios. Though the period following the Black Death provided an interlude,[27] the marginal product of European labor had been suppressed by a high labor to land ratio. Less than ten percent of the human race appears to have occupied the more than thirty percent of habitable land that lies in the Americas.[28] Concurrently, Europe held more than half that population on a quarter the area, an unadjusted European population density more than six times the American.[29] Aggregate, per unit area, and per capita European capital holdings also exceeded the American, from all evidence by a wide margin. Since much knowledge is a public good, European productive technology also ran ahead.[30]

---

[24] *See* David D. Haddock & Lynne Kiesling, *The Black Death and Property Rights*, 31 J. LEGAL STUD. S545, S548–54, S573–85 (2002).

[25] *See* Steckel & Prince, *supra* note 6.

[26] Anderson & McChesney, *supra* note 2.

[27] Haddock & Kiesling, *supra* note 24.

[28] THE WORLD BOOK ATLAS 11 (1969).

[29] Though Antarctica was excluded from the calculation, there were no additional adjustments for soil fertility, climate, terrain, or the like. Land's usefulness depends on contemporaneous conditions—high fiber prices convert desert land into high-yield (albeit high cost) irrigated cotton fields; high grain prices convert open access native grass prairie into low-yield unirrigated wheat fields. It is unclear even which direction quality adjustment would move the ratio of European to American population densities, but certainly it would not come close to overcoming the 6:1 unadjusted ratio.

[30] Given the population and capital differences, the remarkable thing is that European technology was not further ahead. *See* GERALD GUNDERSON, A NEW ECONOMIC HISTORY OF AMERICA (1976). Many Indian tribes made surprising progress given their limited population and physical capital, not to mention the large intercontinental gap in formal education, archives, and other measurable indices of human capital.

The cost of defining and enforcing individual title will be borne only if less than an asset's value.[31] Prior to European contact, the marginal product of a good portion of American land seems to have been too meager to justify privatization. In fact, the marginal product of land across vast reaches of America must have been nil—in many biologically fertile and now highly productive places the land was rarely utilized.

Even three centuries after Columbus landed, the Lewis and Clark expedition encountered only scattered empty villages and not a single Indian through the first several hundred miles of the Missouri River above St. Louis.[32] That territory now contains Kansas City, St. Joseph, and Omaha in addition to many smaller cities and towns and a great many prosperous farms. Most of the area through which the expedition passed was native grass prairie suitable for wildlife with only small parts used for agriculture. We now know that widely scattered agrarian villages were occupied part of each year by semi-nomadic peoples, but they were far to the west hunting bison as Lewis and Clark passed. That they would habitually leave their fields utterly untended for months speaks to land's low value relative to the marginal product of the labor necessary to defend it.

Where Indians cultivated land, usufruct rights were much more common than fee simple ownership, as property rights economics would predict.[33] Usufruct yields presumptive rights to output not by abstract title to the low or zero-value marginal land input, but according to application of more valuable inputs such as labor and capital.

Since land is immobile, those pre-Columbian features imply that output aggregated over the two hemispheres could be increased by relocating a good share of eastern hemisphere labor and capital to America while adopting best practice technology (not always the European). Restated, the maximum that Europeans would have been willing to pay for American land would have exceeded the minimum that the Indians would have required in an informed and fully voluntary transaction.

Ample evidence exists that there were often gains from trade when Indian land moved into the hands of northern Europeans wishing to settle in America.[34] Many peaceable, voluntary land transactions took place during the

---

[31] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

[32] STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST (1996).

[33] To understand why usufruct rights are predictable under such circumstances, see Haddock & Kiesling, *supra* note 24 at S556–66.

[34] Avid pursuit of relatively abundant precious metals generated violence in the Spanish sphere from the outset. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 48–54 (4th. ed. 1998). Many conquistadors were disinterested in permanent settlement but merely took their plunder back to Spain. In contrast, those American areas open to northern Europeans contained few caches of precious metals, and hardly any proven deposits. North of the Gulf of Mexico the only reason for Europeans to migrate were farming and trade, each requiring extended (usually permanent) American residence in order to recoup the objective and subjective costs of an Atlantic crossing. The contrast between the early northern European and the Spanish interactions with Indians thus

early years of contact between northern Europeans and Indians.[35] That the divergence in the Indian and the European valuation of land was substantial is implicit in European astonishment that negotiated land prices seemed so small. And though we have little record of their thoughts, the Indian sellers must have been similarly amazed by how much Europeans willingly paid in manufactured goods that were unique to the Indians for a resource of near zero marginal product to the sellers.[36] When a band bartered away rights to territory where they were then living, they obviously retained an expectation of occupying presently vacant lands elsewhere (or, less admirably, expelling some weaker band). With that expectation and the bartered goods, they considered themselves to be advantaged.

During most early encounters the aboriginal population vastly outnumbered the immigrants.[37] In addition, at least until the Civil War, Indian weapons and tactics seemed to have been superior during mobile warfare; though from the start slow-to-reload muskets provided a marked advantage over rapidly-reloading bows when a combatant could entrench behind stable fortifications. But like its productive counterpart, European military technology was also at or near the world standard, and it was advancing more rapidly than that of the Indians. Once the populations facing each other along the frontier were similarly numerous, the balance of power swung away from the Indians. Though each side adopted many of the other's military practices, such as Indian adoption of firearms and horses, the Indians started no better than equal and slowly lost ground.

When an even-handed sovereign enforces contracts between its citizens, power imbalances are largely immaterial to the bargains that are struck. But

---

is generally consistent with the settlement-versus-extraction hypothesis of Daron Acemoglu et al., *The Colonial Origins of Comparative Development*, 91 AM. ECON. REV. 1369 (2001).

[35] Anderson & McChesney, *supra* note 2, at 39.

[36] Some Europeans thought, and some people think today, that Indians were taken advantage of because of the subjective and relative cultural values placed on some of the items Europeans traded for furs. However, the Indians had a similar cultural perspective. *See* JAMES AXTELL, AFTER COLUMBUS 161 (1988) (observing that one person's trash is another's treasure); Ronald L. Trosper, *That Other Discipline: Economics and American Indian History, in* NEW DIRECTIONS IN AMERICAN INDIAN HISTORY 199, 205 (Colin G. Calloway ed., 1988); CALVIN MARTIN, KEEPERS OF THE GAME 153 (1978) (quoting an Indian who thought the English were crazy for trading twenty beautiful steel knives for one silly beaver fur). There is an important complication. Europeans perceived the purchase of fee simple exclusionary rights in perpetuity, often expecting sovereignty of a "superior in position to all others" variety, and saw many collateral rights—the right to hunt across the land or fish in its streams or to hold ceremonies at consecrated spots—also to have been severed. The economic theory of property rights would expect that the latter lower value rights might have been communal among the Indians, as they often were, not alienable by a usufruct holder of cultivation rights. Through mutual misunderstanding, what the one thought to have sold might well have differed from what the other thought to have bought. Even so, if aggregate output increased, the parties could have shared the gains in a way that made trades advantageous for both sides individually and in aggregate, though ultimately they surely did not share in that way.

[37] *See, e.g.*, ALVIN M. JOSEPHY, JR., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 287–89 (1965).

when contract enforcement relies on self-help, power matters.[38] An advantage affects terms of trade due to a threat that an asset will simply be taken if the asking price is too high. If accurately evaluated by each side that threat need not lead to violence, and then violence will be avoided because violence imposes dead weight costs on both parties. But a militarily weaker seller cannot demand a price that exceeds the stronger buyer's cost of seizing the asset. That implies that sellers unprotected by a strong and disinterested third party may "voluntarily" sell property that is worth more to them than what they receive in exchange, given that one does not confuse being permitted to escape a threat with receiving a productive asset.[39]

As time passed, the military divergence between Indians and European-Americans grew, becoming reflected in the terms of trade for land concessions. Originally European payments had been wholly in manufactured goods, with each party advantaged relative to the pre-contact position. But even before the Cherokee were compelled by the 1785 Treaty of Hopewell to cede a large part of their territory simply to end hostilities resulting from their alliance with the British during the American Revolution, payments sometimes included (or consisted solely of) a promise by the European-Americans not to encroach still further in exchange for the tribe's agreement to abandon a margin of tribal territory.[40] The Pequot reservation, for instance, was instituted by colonial Connecticut as a mutually beneficial substitute for a costly extermination policy under which Pequot women and children had been hounded into the forests, hunted and killed along with warriors.[41]

Pesky squatters repeatedly sparked government takings when they carved farms from recognized tribal territories without permission or compensation.[42] Those outlaws (even in the view of their own government) were difficult and dangerous to remove due to their relatively formidable armament and uncompromising manner. Though European-American writings of the time focused on the terrifying dangers that the squatters (or settlers) faced from the Indians, it was the Daniel Boones of the former population that advanced relentlessly into the territories of the latter.[43] Though resistance against the

---

[38] John Umbeck, *Might Makes Rights*, 19 ECON. INQUIRY 38 (1981); Jack Hirshleifer, *Anarchy and Its Breakdown*, 103 J. POL. ECON. 26, 44–46 (1995); Haddock, *supra* note 23, at 168.

[39] DAVID D. FRIEDMAN, LAW'S ORDER 152–57 (2000) discusses why such confusion is misguided. Threats consume resources merely to exact a transfer from another party and therefore reduce aggregate wealth. Voluntary non-fraudulent asset exchanges transfer resources from less to more productive configurations and therefore increase aggregate wealth.

[40] CARL WALDMAN, ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES 45–46, 132–33, 211 (1988).

[41] *Id.* at 185.

[42] *See, e.g.*, FRED ANDERSON, CRUCIBLE OF WAR 522, 530 (2000) (the single most disruptive trend in North America was the rapid movement of colonists and emigrants into the backwoods because it "destabilize[d] localities, muddle[d] politics and business enterprise, and at least indirectly render[ed] the periphery of the empire less manageable").

[43] *See, e.g., id.* at 112 n.3, 162 (most colonies paid bounties for Indian scalps, which often just led to the murder of Christianized, neutral, peaceful Indians); GEORGE WASHINGTON, WRITINGS (John Rhodedamel ed., 1997) (To Richard Henry Lee, Dec. 14,

encroaching margin of settlers and even raids purely for booty were common along the frontier, never in the history of the interaction did any tribe launch a serious converse invasion into territory that had been thoroughly settled by European-Americans.

Rather than continue a politically unpopular, expensive, and feckless program of squatter removal, the Jefferson administration began to negotiate treaties with tribes to cede their entire territories in exchange for reservations further removed from the frontier of European-American settlement.[44] There it was imagined the tribes would remain buffered until they became assimilated into European-American culture.[45] In addition to locating a mainly water route to the Pacific, President Jefferson hoped the Lewis and Clark expedition could define beneficial trade opportunities with the tribes.[46] But Jefferson thought it would be a thousand years before European-Americans began settling in numbers on the Mississippi's far bank—the frontier advanced completely across the continent within a lifetime.[47] Nee-Me-Poo (Nez Perce) children saw their tribe aid Lewis and Clark during the expedition's descent from the continental divide in the fall of 1805 and again on its ascent in the spring of 1806.[48] In 1877 some of those same children, now elderly, were forced by the U.S. Army to abandon their entire homeland to settlers.[49]

Whatever ones view of earlier voluntary land transactions, by the Jackson administration many removals were clearly coercive, though even then bloodshed was limited. The Trail of Tears from the southeastern U. S. to Cherokee, Creek, Choctaw, Chickasaw, and Seminole reservations is relatively

---

1784, at 567; To David Humphreys, July 20, 1791, at 777; Fourth Annual Message to Congress, Nov. 6, 1792, at 826; To Edmund Pendleton, Jan. 22, 1795, at 903; Seventh Annual Message to Congress, Dec. 8, 1795, at 919; Eighth Annual Message to Congress, Dec. 7, 1796, at 978); JACK M. SOSIN, WHITEHALL AND THE WILDERNESS 108–09, 122 (1961). Most people think Daniel Boone was a brave, upstanding man who once led a group of landless settlers through the Cumberland Gap into unknown reaches of southeastern Kentucky, then organized defenses against unmotivated attacks from savages. In truth, Boone literally made a lifelong profession of squatting illegally on tribal land. Even as an adolescent Boone had defied the borders recognized by his own government. After partially clearing the plot, Boone sold that southwest Virginia holding to a less audacious settler, assembled a crew of allies, and went to establish new claims even further west in Kentucky. He died a natural death as an old man who had eventually reached Missouri, having by then plied his land-acquiring vocation across a thousand miles. Boone actively placed himself in harm's way and survived several battles. It is difficult to credit a claim that he and his followers were in much terror of the tribes. SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES 90–92 (1939).

[44] Robert J. Miller, *A New Perspective on the Indian Removal Period,* 38 TULSA L. REV. 181, 182 (2002).

[45] *Id.*

[46] 1 LETTERS OF THE LEWIS AND CLARK EXPEDITION WITH RELATED DOCUMENTS, 1783–1854, at 10–14, 61–66, 165–66 (Donald Jackson ed., 2d ed. 1978) (Jefferson's Jan. 1803 message to Congress; Jefferson's June 20, 1803 instruction letter to Lewis; Jefferson's Jan. 22, 1804 letter to Lewis).

[47] *Id.* at 12.

[48] AMBROSE, *supra* note 32, at 294, 370.

[49] JEROME A. GREENE, NEZ PERCE SUMMER 1877 (2000), *available at* http://www.nps.gov/nepe/greene/index.htm.

well known. Less well understood is that those removals displaced nomadic tribes such as the Wichita, Osage, Comanche, and Kiowa who were already exploiting the territory that had been selected for the reservations in what became Oklahoma.[50] The Indians' bane arrived in the form of the nation's first substantial peacetime standing army following the Civil War. The Army's main attention focused on the moving internal frontier, not on the defeated Confederacy or external U.S. borders.[51] Forced confinement of the last free roaming Indians to western reservations followed the Great Indian Wars of the 1870s and 1880s. From that day forward, all tribes have remained wards of the United States government, and by delegation, of the BIA.[52]

To summarize, due to substantial factor proportion differences and land's immobility, it is unsurprising that many mobile complementary inputs moved to America from the eastern hemisphere. European-American, African-American, and Asian-American labor and capital now complement much formerly Indian land. Given the enormous productivity gains that resulted on both sides of the Atlantic, the transition could have advantaged all those communities. But coercion ultimately led to concessions from tribes desperate to terminate unequal wars. As a result, the territory that the tribes retained was often the least attractive portion over which they had once roamed, or even less valuable land seized from another tribe. That the aboriginal population now holds so little territory is not surprising. That so much of the ceded territory was bargained away under duress or simply confiscated remains a national embarrassment.

III. YIELDING AND ACQUIRING SOVEREIGNTY

Being sovereign is to be superior in position to all others, or at least independent of and unlimited by any other. According to either definition, yielding sovereignty implies subordination to another and thus being subjected to limits the other consequently imposed. Consider several ways that a party can increase the limits impinging on others.

First, one way to sovereignty is as William the Conqueror seized power from King Harold—by force.[53] Dominion was gained by the one and ipso facto lost by the other, accompanied by a great deal of uncompensated collateral damage. Harold would have been pleased by the outcome neither *ex ante* nor (had he survived) *ex post*, and unambiguously would have been advantaged by the existence of a party that would have prevented William's incursion at

---

[50] WALDMAN, *supra* note 40, at 68, 111–12, 171, 249–50.

[51] Anderson & McChesney, *supra* note 2, at 54.

[52] The BIA has recently been embarrassed by revelations of its gross mismanagement of tribal trust property. Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). Unfortunately that has been a chronic and well-documented problem since the BIA's inception, when employment as an Indian agent provided many opportunities to skim transfers coming from Washington, and often was awarded to low-ranking hacks by influential politicians as payback for political services performed back east. *See* TERENCE O'DONNELL, AN ARROW IN THE EARTH 290–91 (1991). What has changed is less the BIA's mismanagement than the attention given to it by the media.

[53] MALCOLM BARBER, THE TWO CITIES 305–08 (1992).

Hastings. It is largely irrelevant for our purposes whether that sovereignty could be passed on peaceably through inheritance or election.

Second, William yielded limited sovereignty over various parts of his new English realm by disenfranchising Saxon landowners for the benefit of his Norman lieutenants. William hoped in that way to retain the loyalty of those lieutenants and expected both he and they would be advantaged. But the displaced Saxon lords must surely have been displeased. Both *ex ante* and *ex post* they would have been advantaged had they been able to appeal to a party who would have prevented William's expropriations.

Third, the tenant Saxon peasants sometimes limited their own future options in exchange for a present benefit from a merchant, Norman or Saxon. For instance, the merchant might provide food to tide the peasants over a period of famine, and the peasants might promise to repay with interest once crop yields recovered. Surviving peasants would be advantaged *ex post* were they able to appeal to a party strong enough to reduce or bar the repayment. But both parties would be disadvantaged if that were anticipated *ex ante*, because then the merchant would provision only those who could pay spot prices. The rest would starve. The injury to the merchants would be limited to the extent they could lend or sell their provisions elsewhere where no similar threat existed. Every starving peasant would ardently disavow any intention to interfere with repayment, but following the famine each peasant's incentive would be to do precisely that. Disavowal would be credible only if no party existed to which the peasants could appeal, or if that party was expected to refuse the peasants' *ex post* entreaties.

With respect to tribal governments, the analogues are as follows: first, the unilateral extension of authority over Indians by the United States government; second, the delegation of a part of that authority to state governments; and third, contractual relations between Indians or tribal governments with investors, either Indian or non-Indian. Insofar as there is good reason to think that many tribes were disadvantaged when they involuntarily yielded sovereignty to the United States, it is plausible that they would be advantaged if they recaptured it. State governments rarely provide anything in exchange for the limited sovereignty they acquire over the tribes,[54] so it is similarly plausible that the tribes would be advantaged if they recaptured sovereignty from the states. But voluntary non-fraudulent agreements are mutually beneficial *ex ante*. A tribe that interferes with contractual relationships does so at its hazard. Insofar as the long-run injury is largely limited to the actor, there is no obvious

[54] Without explicit enabling legislation, the Constitution's Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3., and the Trade and Intercourse Act, 25 U.S.C. § 177 (2000), permit only the national government to deal with Indian nations. These are functionally a continuation of King George III's Royal Proclamation of 1763 that barred colonies and colonists alike from direct intercourse with tribes. In consequence, what state sovereignty exists over tribes and their citizens emerges from political balancing of interest groups within the United States Congress rather than being an outcome reflecting a mutually-advantageous bargain between state and tribe. Those few voluntary bargains that were concluded between state and tribe are routinely set aside by federal courts. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988).

reason to interfere. But if courts inadvertently interfere with a willing tribe's credibility, a beneficial change is in order. Consider those three in turn.

IV. RECAPTURING SOVEREIGNTY FROM THE U.S. GOVERNMENT

This section can be concisely and objectively (if not normatively) summarized as follows: If being sovereign means to be superior in position to all others, or at least independent of and unlimited by any other, tribes are not in fact sovereign, nor have they recaptured any substantial sovereignty from the national government. By 1831 the tribes had been characterized by the Supreme Court not as sovereign nations but as "domestic dependent nations."[55] Those nations were recognized as being positioned to deal directly with the national government, but certainly not as equals.[56] Nor were they permitted to deal directly with any other government, state or foreign, but like other protectorates of that age had (and continue to have) all their intergovernmental relations channeled through the United States government.[57]

From there the situation actually deteriorated.

> The contention [that Congress could not divest the tribes of their lands in violation of treaty terms] in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to *materially limit and qualify the controlling authority of* Congress . . . and to deprive Congress . . . of all power to act, if the assent of the Indians could not be obtained.[58]

Popular perception is that treaties do indeed "materially limit and qualify the controlling authority of" the signatories.[59] Though dealings between sovereigns inevitably incorporate a large dollop of might-makes-rights,[60] perhaps it eases the job of U.S. negotiators that such a bald-faced recognition is not routinely quoted at the commencement of treaty negotiations.

This is certainly not to say that a transfer of sovereignty from the United States would be of no benefit to the tribes, merely that to the extent it may seem from time to time to have occurred, it is a mere delegation of authority that can readily be withdrawn. In that sense, the tribes are older sovereigns, but nonetheless less sovereign than states. Though the Constitution's Supremacy Clause permits the national government to set aside a great deal of state law, there remain limited reserved rights that protect state action in the absence of a constitutional amendment.[61] *Lone Wolf v. Hitchcock*, in contrast, grants the

---

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

[56] *Id.* (tribes are the wards and the United States is their guardian).

[57] *See County of Oneida*, 470 U.S. at 226; *Oneida Indian Nation,* 860 F.2d at 1145; *Cherokee Nation*, 30 U.S. at 1, 17; Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

[58] Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903) (emphasis added).

[59] *Id.*

[60] On the theory of might-makes-rights, see Umbeck, *supra* note 38. For a brief inter-sovereign application, see Haddock, *supra* note 23, at 189.

[61] U.S. CONST. amend. X.

national government wide discretion in unilaterally abrogating tribal treaty rights.[62]

V. RECAPTURING SOVEREIGNTY FROM STATE GOVERNMENTS

This would seem a promising avenue for increased tribal sovereignty since states can only attain sovereignty over tribes if the national government transfers it to them, and can only retain it so long as the national government does not remove it from them.[63] Most reservations predate the states that were layered atop them, so why not allocate taxing authority to the tribes as the original sovereigns, thus providing finance for tribal expenditures? That in fact is the legal default, but Congress can and does override it. Oddly, the courts occasionally do so as well, even without Congressional authorization, as discussed momentarily. To permit both entities to tax similar undertakings creates a successive monopoly problem, meaning that when the state power to impose a parallel tax is removed the aggregated gain to the tribes and taxpayers exceed the loss to states.[64]

As is widely perceived, tribes have acquired sovereignty from the states to the extent that gaming operations have recently been permitted on reservations though forbidden by the encompassing state.[65] That sovereignty transfer is clearly limited, as the national government authorizes and indeed insists on tribe-state negotiations before a tribal gambling operation can commence.[66] Due in part to the Barona Casino, on that San Diego County reservation, the median annual household income now exceeds $100,000, two and one-third times the national average for all households.[67] Located just off the Boston-New York City interstate as it passes through eastern Connecticut, receipts from the Mashantucket Pequot Tribe's Foxwoods Resort Casino, the world's largest, enable the tribe to send all their children to a private school that serves a sizeable non-Indian enrollment as well.[68] Indeed, the Pequot saved the school from having to close.[69] But most reservations, frequently the most impoverished, are too remote to attract many customers, so incurring sizable

---

[62] *Lone Wolf*, 187 U.S. at 565–66.

[63] *See, e.g.*, 18 U.S.C. § 1162 (2000); 28 U.S.C. § 1360 (2000) (in 1953 Congress enacted "Public Law 280" which created state civil and criminal jurisdiction in Indian country in six specific states).

[64] *See generally* Fritz Machlup & Martha Taber, *Bilateral Monopoly, Successive Monopoly, and Vertical Integration*, 27 ECONOMICA 101 (1960).

[65] In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court held that states had no authority to regulate tribal gaming on reservations. Congress altered that situation slightly the following year by enacting the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166–1168 (2000); *see also* 25 U.S.C. §§ 2107 et seq. (2000) (giving states some say in the subject).

[66] Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166–1168, 25 U.S.C. §§ 2107 et seq.

[67] U.S. Census Bureau, DP-3, Profile of Selected Economic Characteristics, Census 2000 (SF-3): Barona Reservation, CA.

[68] Kirk Johnson, *Gambling Helps Tribe Invest in Education and the Future*, N.Y. TIMES, Feb. 21, 1995, at A5.

[69] *Id.*

fixed costs for gaming operations would actually reduce tribal welfare. Thus fewer than half of the tribes participate in any gaming enterprises.[70]

> For the majority of tribal governments that do run gambling facilities, the revenues have been modest . . . . The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.[71]

When a tribal casino frustrates efforts to suppress all gambling within its borders, states often authorize competing nontribal gaming. What looked initially like a profitable enterprise can then find it difficult to pay for its capital and struggle to survive. Thus gaming seems to be extremely valuable to a few tribes, but viewing it as a panacea merely distracts attention from the unaltered poverty on most reservations.

Unfortunately, much of the rest of the tribe-state record proves to be similarly discouraging. *Washington v. Confederated Tribes of the Colville Indian Reservation*,[72] for instance, moved away from rather than toward increased tribal sovereignty. A Court that loves competition among private enterprises is skeptical of competition among political enterprises, thus this Court held that activities on a reservation would be subject to state taxation if a substantial part of the business was motivated by tribes' desire to market its tax exemption.[73] Such a state tax can be avoided only if it can be documented that an individual transaction was not motivated in that way, for example because the customer is a tribal member.

Thus the Court has outlined an Orwellian[74] form of sovereignty—all sovereigns are equal, but some are more equal than others. Imagine the Court informing Illinois that Indiana could tax its entire retail liquor sector unless, at substantial cost, Illinois documented that a sale was not made to Indianans who (as they often do) make cross-border purchases due to a state liquor tax differential. Imagine the Court informing North Carolina that New York could tax all tobacco sales for analogous reasons. The practical result of *Washington v. Confederated Tribes* is that both a reservation and the state or states that have been layered atop it can tax a good deal of on-reservation activity but only the state can tax off-reservation activity. Single-taxed liquor stores and bars may line one side of reservation borders if a tribe tries to impede alcohol imports, but double-taxed smoke shops along the opposite side will find survival difficult.

---

[70] The National Indian Gaming Association states that only 217 tribes participate in Class II (mainly bingo) or Class III (casino style gaming) enterprises. National Indian Gaming Assoc., *Indian Gaming Facts*, *at* http://www.indiangaming.org/library/index.html#facts (last visited Feb. 3, 2004). There are at least 557 federally recognized Indian tribes in the United States. GETCHES ET AL., *supra* note 34, at 8.

[71] NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 2–10, http://govinfo.library.unt.edu/ngisc/reports/2.pdf.

[72] 447 U.S. 134, 136 (1980).

[73] *Id.*

[74] GEORGE ORWELL, ANIMAL FARM 118 (1946).

Even when the Court seems first to help retrieve tribal sovereignty from the states, as in *Montana v. Blackfeet Tribe of Indians*,[75] it may quickly be lost as a result of the Court's economic confusion, as in *Cotton Petroleum v. New Mexico*.[76] Those cases were similar in that the plaintiff in each challenged the ability of a state to tax mineral production on tribal reservations. By default a tribe and its members are immune to most state tax liens against on-reservation activities because the tribe, not the state, is sovereign there. In 1924, however, Congress acted explicitly to permit nondiscriminatory state taxes on royalties accruing on minerals withdrawn from reservation territory.[77] There was no legal question, then, whether such state intrusion on tribal sovereignty was ever permitted. But had it survived legislation that later streamlined tribal mineral leasing though remaining completely silent regarding state taxes? It might seem that where the latter statute was silent, former state powers would remain. But the Supreme Court's canons of construction of Indian law require that "ambiguous expressions must be resolved in favor of the Indian parties concerned . . . and Indian treaties must be liberally construed in favor of the Indians."[78] As a result, in *Montana v. Blackfeet Tribe of Indians* the Court decided that the state power had not survived.[79]

Could a state, then, tax mineral extraction companies that had been engaged by tribal governments to make the severances that formed the basis of the tribal royalties? Although the companies might operate exclusively within the reservation borders, non-Indians (including fictive persons such as non-tribal corporations) are not tribal citizens. Whether they were subject to state sovereignty regarding their on-reservation activities was an open question. In *Cotton Petroleum v. New Mexico* the Court held that the reservation hole in state sovereignty was too shallow to shield the companies, who were thus simultaneously subject to both sovereigns.[80]

Assuming that the states, the tribes, the companies, the consumers—everyone that is except the courts—are interested in the revenues that they pay and receive for a given output rather than in filamentary legal distinctions, then according to rudimentary economic theory, *Cotton Petroleum* seems simply to undo *Blackfeet Tribe*. Each case deals with the distribution between state and tribe of economic rents from mineral deposits on tribal land, but the economic model indicates that the cases reached diametrically opposing outcomes.[81] *Blackfeet Tribe* implied that the states were entitled to no share, while *Cotton Petroleum* implies that the states are entitled to whatever share the state judges

---

[75] 471 U.S. 759, 761 (1985).

[76] 490 U.S. 163, 166 (1989).

[77] 25 U.S.C. § 398 (2000).

[78] Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975); *see also Blackfeet Tribe of Indians*, 471 U.S. at 766.

[79] 471 U.S. at 766.

[80] 490 U.S. at 163.

[81] The model is presented in David D. Haddock, *To Tax Indians or Not to Tax Indians? That is the Question*, (forthcoming) (manuscript on file with authors).

to maximize state revenue. *Blackfeet Tribe* seems to have died before its fifth birthday.

Unfortunately, public choice analysis indicates that *Blackfeet Tribe*'s ghost remains abroad. Throughout the United States, specialized private companies undertake nearly all of the extraction of minerals, hinting that other forms of organization are less efficient. Ranchers do not drill their own oil wells; specialized companies can do it at vastly less cost. That such mineral exploration and production might result simply from the small scale of a rancher's holding rather than the value of specialization is belied by the fact that even the national government utilizes specialized private companies. A tribe-owned company, however, is exempt from state taxes. If the avoidable tax is greater than the inefficiency arising from the use of a tribe-owned extractor, the incoherence of the cases could motivate creation or acquisition of mineral extraction companies that tribal governments would be forced to manage.

Mineral withdrawals from reservations would become more costly than withdrawals beyond reservation borders, though the increased cost would be justified from the tribe's viewpoint so long as it was less than the state taxes the tribe avoids. But every cent of tax a tribe saved would be a cent that a state would not receive, so the tribe's savings would be a transfer from one to the other rather than an economic gain in aggregate. To go to extremes, if all mineral extraction on reservations resulted from tribe-owned enterprises, the cost of extraction would increase but no state government would receive any tax revenue. As there would be no tax revenue to balance the higher extraction costs, such a result would represent an inefficiency that could have been avoided through a more discerning approach by the Court. The crucial, if elementary, theory has been taught in first semester undergraduate economics courses for many decades,[82] but this pair of cases hints that it has yet to penetrate Supreme Court reasoning on a consistent basis.

There is assuredly a good deal of *ad hoc* semantic grooming that might distinguish the two cases. But those legal distinctions could not have been overwhelming *ex ante* or a very busy Supreme Court would never have even heard the cases. The outcome was not foreordained. Hence, operational coherence and avoiding a threat of inefficient extraction of minerals with no offsetting benefit to anyone could have determined the outcome, but did not.

VI. EXERCISING SOVEREIGNTY OVER VOLUNTARY RELATIONSHIPS

> Truth is stranger than fiction . . . Fiction is obliged to stick to possibilities.[83]

Sometimes truth leaves one incredulous. A novelistic tale that might cause a reader to scoff will be greeted with gape-mouthed wonder if gleaned from the media or a court record. Perhaps truth would seem less strange were it not for the way we become aware of it. That events yesterday transpired more or less

---

[82] DAVID D. FRIEDMAN, PRICE THEORY (1990).

[83] MARK TWAIN, *PUDD'NHEAD WILSON'S NEW CALENDAR*, ch. 15, *Following the Equator* (1911), *quote available at* http://www.twainquotes.com/truth.html.

as they usually do is hardly news. News comes from the statistical distribution's tails—even under the best circumstances the media accurately reports the few events that were most remarkably bad or good, and usually only the remarkable features of those remarkable events. The many unremarkably normal events are left unreported. That, of course, is an efficient way to distribute information about the local environment to time-constrained readers.

But peculiar perceptions result when one's only information regarding an unfamiliar locale comes solely from distributional tails. Thus things can seem bizarre and unusually risky on a reservation because non-members ordinarily learn only of the aberrational features of a few aberrational events, and have no first-hand acquaintance with the many humdrum events that fill out daily reservation life. Perhaps we learn that a reservation's tribal police apprehended some non-member who was passing through. We learn that the person had to appear in tribal court, which applied tribal law that differed in some noteworthy way from state law. What remains unreported is the unremarkable, that thousands of non-members behaved in a reasonable way as they passed through, met no tribal officer or judge, but would have been treated reasonably if they had. Sufficient information is rarely provided to permit the reader to judge whether the difference between tribal and state law makes sense given the contrasting environments.

The legal record also censors data, though for a different reason. Social arrangements that work as planned are rarely litigated, so those that become reflected in court records are a biased sample.[84] Since litigation is costly, litigated cases come from a rather extreme subset of those social arrangements that failed to work as planned. Indeed, in at least one way, the bias is more severe with legal reporting because things that work unexpectedly well may make the news but rarely become the subject of litigation. As with news reports, legal selection bias can make activities on reservations appear to outsiders to be more risky than they actually are. We learn of investors who are disappointed by a breakdown in their arrangements with the tribe or by becoming subject to an unexpected tribal tax, but the legal record is silent when the arrangements work smoothly or the tax finances tribal activity that the taxpayer finds meritorious.

Reservations' poverty relative to the rest of the nation means that much potential investment capital resides elsewhere.[85] Coupled with the natural bias of the media toward unusual outcomes and the natural bias of the courts toward unwanted outcomes, tribes appear more threatening to external investors than they are, meaning that the tribes must be careful to remain evenhanded in their dealings. It similarly behooves readers to weigh the following discussion in light of those natural biases when evaluating concerns of business entities and

---

[84] *See* Stock W. Corp. v. Taylor, 942 F.2d 655, 657 (9th Cir. 1991) ("As is generally the rule in matters which come to this court's attention, the once-promising business relationship between the contracting parties soured."), *rev'd en banc*, 964 F.2d 912 (9th Cir. 1992).

[85] *See, e.g.*, Hunter R. Clark & Amanda Velazquez, *Foreign Direct Investment in Latin America: Nicaragua—A Case Study*, 16 AM. U. INT'L L. REV. 743, 759 (2001) (stating that Nicaragua's extreme poverty is one of the reasons investors are reluctant to invest there).

investors who are interested in working in Indian country[86] or otherwise dealing with tribal governments and reservation residents.

This Article considers both successful and unsuccessful tribal initiatives along with various avenues that might facilitate economic development. But it is for each tribe to evaluate their idiosyncratic preferences when deciding how to react to the discussion. Though an informed tribe's chosen policy might not satisfy an observer's preferred combination of magnitudes—pecuniary and non-pecuniary, objective and subjective—it is the tribe's decision to make absent unilateral *ex post* alteration of earlier understandings or deleterious external impacts on other tribes' reputations.

A. Sovereign Immunity

Tribal sovereign immunity is an important component of business investment in Indian country, but it need not be an inevitable impediment.[87] Knowledge, due diligence, proper planning, and careful negotiations can defuse sovereign immunity as a problem.[88]

As sovereigns, national, state, and tribal governments are immune to suit except when they expressly waive their immunity.[89] The national and state governments regularly defend law suits on that basis, and the U.S. Supreme Court has long recognized that tribal governments are protected to the same extent, whether a case is brought in tribal, state, or federal court.[90] Thus, tribes can only be sued if they have waived their immunity, unless, of course, the U.S.

---

[86] "Indian country" has a specifically defined meaning under federal law. 18 U.S.C. § 1151 (2000). In general, it refers to all land within an Indian reservation, no matter who owns it, and to other lands held in trust by the United States for a tribe or individual Indians. *Id.*

[87] Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. IND. L. REV. 309, 355 (2000).

> Sovereign immunity is misunderstood, less far reaching than often believed, and greatly limited throughout the twentieth century by the doctrine of *Ex parte Young*. Maintaining a functioning government requires protecting the public treasury and domain. Yet people demand remedies for government-caused injuries. These are provided by all levels of government, including tribes, through thoughtful administrative or judicial claims procedures and dispute resolution sections in contracts.

Id.

[88] Lobo Gaming, Inc. v. Pit River Tribe of Cal., No. C037661, 2002 WL 922136, at *3 (Cal. Ct. App. May 7, 2002) (sophisticated businesses should not be careless about sovereign immunity when dealing with tribes), *rev. denied* (Aug. 14, 2002), *cert. denied*, 537 U.S. 1190 (2003); World Touch Gaming v. Massena Mgmt., LLC, 117 F. Supp. 2d 271, 275–76 (N.D. N.Y. 2000) (World Touch is no novice and frequently deals with tribes); Danka Funding Co. v. Sky City Casino, 747 A.2d 837, 842 (N.J. Super. Ct. Law Div. 1999) (plaintiff knew it was dealing with a tribe and is charged with the knowledge that tribes have sovereign immunity and that tribal law describes how immunity is waived).

[89] Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940); Turner v. United States, 248 U.S. 354, 358 (1919).

[90] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. Oregon, 657 F.2d 1009, 1012 (9th Cir. 1981).

Congress has waived it for them.[91] Both types of waiver, however, must be clearly and expressly stated.[92]

Sovereign immunity regarding business activities in Indian country gets an inordinate amount of attention because tribes are more often intimately involved in business and investment within their realms than states and the national government are within theirs. Whether or not the tribes would be as heavily involved if U.S. government constraints on ownership of Indian resources were relaxed, tribes own or control most business, land, and natural resources on the typical reservation.[93]

Though immunity can protect the treasury, this does not mean it is unimportant to private parties who desire an impartial judicial forum in the event of disputes with government. Consequently, many businesses are disinclined to make a reservation investment due to the bias in media and legal reporting that was discussed above, which tends to magnify the impression that tribal immunity is a common problem. Undoubtedly tribes lose unperceived economic opportunities from that investor uncertainty.

1. National and State Waivers of Sovereign Immunity

The United States did not fully and clearly waive its immunity to suits in contract until 1887; most state governments acted at even later dates—much later in instances such as Oregon in 1959 and Pennsylvania in 1978.[94] The national government only waived immunity against tort actions in 1946.[95] Again, most states followed later—as Oregon did, for instance, only in 1968.[96] Most states have severely limited their tort waivers in various ways, such as by restricting the immunity to cases involving very small amounts—$100,000 in Oregon as of 2003 and $25,000 in Nevada up to 1977.[97]

---

[91] *Santa Clara Pueblo*, 436 U.S. at 58; Sokaogon Gaming Enterp. Corp. v. Tushie-Montgomery Assoc., 86 F.3d 656, 659 (7th Cir. 1996).

[92] *Santa Clara Pueblo*, 436 U.S. at 58; United States v. Testan, 424 U.S. 392, 399 (1976).

[93] Miller, *supra* note 11, at 760–61, 842–48.

[94] The Tucker Act, 28 U.S.C. §§ 1346, 1491 (2000); Anderson v. Dept. of Revenue, 828 P.2d 1001, 1005 n.4 (Or. 1993) ("In Oregon Laws 1959, chapter 614, section 1, the legislature amended ORS 30.320 to provide a waiver of the state's sovereign immunity to contract claims against state instrumentalities."); Nevada v. Hall, 440 U.S. 410, 417 n.13 (1979) ("The States' practice of waiving sovereign immunity in their own courts is a relatively recent development; it was only last year, for example, that Pennsylvania concluded that the defense would no longer be recognized, at least in certain circumstances, in that State.").

[95] The Federal Tort Claims Act was enacted in 1946 and is only a limited waiver of federal sovereign immunity. 28 U.S.C. §§ 1346, 2402, 2672, 2674–75 (2000) (no right to a jury trial; no recovery of interest or punitive damages; strict jurisdictional administrative procedures); *see also* 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 2.01 (2003).

[96] Oregon Tort Claims Act, OR. REV. STAT. § 30.270 (2001).

[97] Griffin v. Tri-County Metro. Transp. Dist., 870 P.2d 808 (Or. 1994) ($100,000 statutory cap on tort damages against state, officials, & agencies included any award of attorney fees); *Hall*, 440 U.S. at 412 n.2 (citing Nevada law up to 1978 which states "No award for damages in an action sounding in tort . . . may exceed the sum of $25,000").

Many governmental tort waivers bar punitive damages, interest, and jury trials, while imposing strict jurisdictional procedural requirements.[98] California retains a statutory immunity for failure to provide fire protection.[99] Such immunity situations have rarely stopped businesses from contracting and dealing with the national and state governments. If tribal sovereign immunity deters businesses from dealings with or on reservations, it must be because they find it more difficult to evaluate the legal environment there.

2. Tribal Waivers of Sovereign Immunity

The main reason that tribal sovereign immunity should not stop businesses and investors from working in Indian country is that most, if not all, Indian tribes have prospectively waived, and will prospectively waive, their immunity in specific contracts to facilitate business deals. Tribes primarily do so on a case-by-case, ad hoc basis in specifically drafted provisions in individual contracts. In fact, this prospective, individualized method is the only way to handle waivers that affect tribal property that is held in trust by the United States. This is because specific BIA approval of an individual contract in regards to such property is necessary for the contract and, hence, the waiver to be valid because the U.S. is the legal owner of trust property while the tribe or individual Indian is the beneficial owner.[100] This is an important reason why waivers of tribal immunity are more efficiently and effectively done on an individual ad hoc basis.

Numerous tribes have also made limited waivers for tort lawsuits similar to the national and state governments. Many tribes have adopted tort claims acts, similar to the national and state acts that require adherence to certain procedural limitations or provide for limited recoveries. For example, the Grand Ronde, Umatilla, Siletz, and Warm Springs Tribes in Oregon, the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan, and the Mashantucket Pequot Tribal Nation in Connecticut have all adopted tort claims ordinances.[101] This makes good business sense because these tribes operate

---

[98] The Federal Tort Claims Act does not allow jury trials, recovery of interest or punitive damages, and contains strict jurisdictional administrative procedures. 28 U.S.C. §§ 1346, 2402, 2672, 2674–75; *see also* JAYSON & LONGSTRETH, *supra* note 95, at 2–4; *Hall*, 440 U.S. at 412–13, n.2 (citing Nevada law which does not allow exemplary or punitive damages or interest prior to judgment.)

[99] CAL. GOV. CODE §§ 850, 850.2, 850.4 (West 1995); *see also* Weaver v. State of California, 63 Cal. App. 4th 188, 200 (1998) (noting that section 17004.7 of the California Vehicle Code "was enacted in 1987 to provide immunity to governmental entities which previously had enjoyed only limited immunity while their police officer employees were entirely immune").

[100] 25 U.S.C. §§ 81, 177, 415 (2000) (the U.S. must approve contracts regarding timber, mineral, and grazing resource decisions); 25 U.S.C. §§ 466, 3104(b) (2000) (resource decisions); 25 U.S.C. § 2103(b) (2000); 25 C.F.R. § 166.300 (2003) (minerals agreements); *see also* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115 (1938) (the U.S. holds legal title to reservation trust lands; tribes hold the beneficial interest).

[101] *See, e.g.*, Confederated Tribes of the Grand Ronde Community of Oregon, Tribal Tort Claims Ordinance, TRIBAL CODE § 255.6 (1988), *available at* http://www.grandronde.org/Legal/Docs/TortTableofContents.PDF (last visited Mar. 2, 2004); *see also* Duran v. Confederated Tribes of the Grand Ronde Cmty., No. C-99-08-003 (Apr. 18, 2000). *at* http://www.grandronde.org/court/PublishedOpinions/DURAN.PDF;

casinos and other commercial entities and have invited the public to visit their reservations for commercial purposes. Thus, they have wisely made provisions to reassure the public by enacting waivers and opening their tribal courts to litigants allegedly injured in tribal establishments.

The authors recommend one strategy to help businesses in dealing with tribes on this subject: sensitivity to tribal sovereignty can grease the wheels of business deals. This makes sense because many aspects of U.S. law upholding tribal sovereignty have only been defined and enforced in the past few decades. Tribes are thus understandably sensitive about being asked to waive these newly enforced powers for every little purchase of ten computers, for example. Potential business partners can be sensitive to tribal sovereignty by not seeking waivers in small deals and by exploring viable alternatives to total waivers of tribal immunity such as partial waivers, waivers only for specific tribal assets, performance bonds, insurance, escrow accounts, non-binding arbitration, or other imaginative methods in seeking to put together mutually beneficial business deals.

3. Tribal Insurance and the Federal Tort Claims Act

Many tribes have contracted and compacted numerous Indian programs away from the United States and operate the programs in lieu of the national government.[102] Congress has provided that in this situation, tribal employees are treated as if they are U.S. employees, and any person they might injure has a remedy against the U.S. government in federal court under the Federal Tort Claims Act as if the injury had been caused by a federal employee. Thus, persons claiming tort injuries caused by tribal employees will often have a remedy under U.S. law.[103] Many activities of tribal governments are the subject of compacts and contracts under the Indian Self-Determination and Educational Assistance Act of 1975 (ISDA).[104] Under the present law, while carrying out ISDA-authorized activities, tribal employees are "deemed employees of the Bureau or Service while acting within the scope of their employment . . . [and] claims . . . shall be deemed to be . . . against the United States and will be defended by the Attorney General and be afforded the full protection and

---

Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT, tit. IV, *available at* http://www.narf.org/nill/Codes/mpcode/ mpcodet4tortclaims.htm (last visited Feb. 5, 2004).

[102] The Indian Self-Determination Act, 25 U.S.C. §§ 450–450n (2000), allows tribes to enter into contracts with the BIA and other federal agencies to operate social and economic programs administered for the benefit of Indians. The most recent development, the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa–458hh (2000), allows Self-Governance tribes to consolidate and manage all programs administered by the BIA, as well as the programs of other Department of the Interior agencies which have some "special geographical, historical or cultural significance" to the tribe. 25 U.S.C. § 458cc(c).

[103] 25 U.S.C. §§ 450f, 458cc (tribal employees are like federal employees); Dept. of Interior and Related Agencies Appropriations Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959–60 (1990), *amended by* Dept. of Interior and Related Agencies Appropriations Act, Pub. L. No. 103-138, § 308, 107 Stat. 1379, 1416 (1993); 25 C.F.R. § 900.197 (2003). The Federal Tort Claims Act is an exclusive remedy. Tribal Self-Governance, 63 Fed. Reg. 7201, 7245 (Feb. 12, 1998) (to be codified at 25 C.F.R. pt. 1000).

[104] 25 U.S.C. §§ 450–450n.

coverage of the Federal Tort Claims Act."[105] In addition, many tribes carry liability insurance to protect persons injured by the tribe and have expressly waived their immunity to such actions against their insurance carriers or against the national government.[106] These provisions protect investors and businesses and help to alleviate some concerns about working in Indian Country.

4. The Indian Civil Rights Act

In 1968, Congress enacted the Indian Civil Rights Act. This law requires that "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . ."[107] This law requires tribal governments and courts to apply constitutional principles of equal protection and due process to *all* persons that come under tribal jurisdiction. This fact also helps ease the concerns of businesses and investors contemplating working in Indian Country.

5. Examples

There are probably thousands of examples of tribes voluntarily waiving their immunity in contracts and probably hundreds of examples of tribes being amenable to lawsuits or arbitration procedures to settle business disputes.[108] These examples of tribes providing for and abiding by dispute resolution methods do not draw much media attention. Inevitably, however, there have been some instances in which investors have not protected themselves by carefully obtaining adequate waivers of tribal sovereign immunity. This failure has worked to the detriment of some Indian and non-Indian investors. While this result is no different than when a party loses a case to the U.S. or state governments due to immunity defenses, it is these kinds of cases that garner extensive publicity and frighten investors away from dealing with tribes and reservation businesses. A few examples will suffice to demonstrate the problems potential investors perceive from tribal sovereign immunity and also to demonstrate how simply the problems could have been avoided in advance with proper planning and negotiation by the investors.

In 1998, the Supreme Court decided *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[109] In that case, the chairman of the Tribe's business committee signed a promissory note in the name of the Tribe agreeing

---

[105] § 314, 104 Stat. at 1959–60, *amended by* § 308, 107 Stat. at 1416. The regulations are found at 25 C.F.R. § 900.180–.210 (2003).

[106] *See, e.g.*, Confederated Tribes of the Grand Ronde Community of Oregon, Tribal Tort Claims Ordinance, TRIBAL CODE § 255.6(c), (e) (1998), *available at* http://www.grandronde.org/Legal/Docs/TortTableofContents.PDF (last visited Mar. 2, 2004); WARM SPRINGS TRIBAL CODE, §§ 205.002, 205.004 (on file with authors); Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT, tit. IV, *available at* http://www.narf.org/nill/Codes/mpcode/mpcodet4tortclaims.htm (last visited Feb. 5, 2004).

[107] 25 U.S.C. § 1302(8) (2000).

[108] For example, the Confederated Tribes of the Siletz Indian Reservation casino has approximately 275 contracts with various entities. Thirty-five of them contain waivers of sovereign immunity. Craig J. Dorsay, Address at the Oregon State Bar Indian Law Section Conference (Nov. 1, 2002) (notes on file with authors).

[109] 523 U.S. 751 (1998).

to pay Manufacturing Technologies $285,000 for stock.[110] The note stated that it was signed on tribal trust lands, but according to the company the Tribe executed and delivered the note to Manufacturing Technologies in Oklahoma City, and the note obligated the Tribe to make its payments in Oklahoma City.[111] The note did not specify the governing law for interpreting the note but it did provide: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."[112]

The Tribe later defaulted and the company sued on the note in state court. The Oklahoma trial and appellate courts held that Indian tribes are not protected by sovereign immunity and are subject to suit in state court for contract actions involving off-reservation commercial conduct.[113] The U.S. Supreme Court disagreed and held that Indian tribes enjoy sovereign immunity from civil suits on contracts, whether they involve governmental or commercial activities, and whether they are signed in or out of Indian country.[114] Since Manufacturing Technologies failed to negotiate and include an immunity waiver clause in the note, it lost any chance to bring a lawsuit against the Tribe regarding the note.

In contrast, in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[115] a unanimous Supreme Court had no problem finding that the Tribe had waived its sovereign immunity when it signed a standard form construction contract that it proposed. The contract contained an arbitration clause stating that any and all disputes would be arbitrated, that Oklahoma law would apply, and that any arbitration award was final and enforceable in any court having jurisdiction.[116] In this case, the Tribe and C & L signed a contract for a construction project regarding a tribal commercial building located on land owned in fee-simple by the Tribe. The land was not held in trust by the United States for the Tribe and it was not located in Indian Country.[117] Even though the actual language of the contract did not mention sovereign immunity nor expressly waive the Tribe's immunity, the unanimous Court distinguished the *Kiowa Tribe* case and held that a clear waiver of the Tribe's sovereign immunity was express in the actual language used in the contract.[118] First, the contract provided that "[a]ll . . . disputes . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."[119] Second, it included a choice-of-law clause that read: "The contract shall be governed by the law of the place where

---

[110] *Id.* at 753.
[111] *Id.* at 753–54.
[112] *Id.* at 754.
[113] *Id.*
[114] *Id.* at 760.
[115] 532 U.S. 411 (2001).
[116] *Id.* at 414, 418–19.
[117] *Id.* at 414.
[118] *Id.* at 418.
[119] *Id.* at 415.

the Project is located."[120] The Court concluded that these provisions in the contract, even though they did not mention sovereign immunity or a waiver, constituted an express waiver of tribal immunity to a state court suit because the language was clear enough to state a waiver with the "requisite clarity."[121]

For the most part, arbitration clauses in contracts have been successful in waiving tribal sovereign immunity but a business has to be careful how it drafts such clauses.[122]

In recent years, gambling in Indian Country has generated new interest in working with tribes for businesses that are unfamiliar with dealing with governments and sovereign immunity. This situation has led to many lawsuits about sovereign immunity in which tribes have used their immunity to suits as a defense in cases with gaming consultants, managers, and construction companies, for example.[123]

---

[120] *Id.*

[121] *Id.* at 418, 420, 423. The Court cited and quoted with approval *Sokaogon Gaming Enterprises Corp. v. Tushie-Montgomery Association*, 86 F.3d 656, 659–60 (7th Cir. 1996) (contract language providing for arbitration "specifically enforceable in accordance with applicable law in any court having jurisdiction" was an express waiver of tribe's immunity). The Court arguably went outside the four corners of the contract to find more evidence of the Tribe's intention to waive its immunity in the rules of the American Arbitration Association (AAA) and Oklahoma's Uniform Arbitration Act. 532 U.S at 419 n.1. However, Oklahoma law and the rules of the AAA were expressly incorporated by the contract. *Id.* The Court cited and relied upon the AAA rules and Oklahoma law as proof that the Tribe had consented to the arbitration award being enforced in state court. *Id.* at 418–20.

[122] *See, e.g.,* Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) (contract which provided for disputes to be arbitrated but did not mention court actions for judicial enforcement of any award did not waive immunity). *Contra* Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560 (8th Cir. 1995) (contract waived sovereign immunity on exact same facts). *Compare* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000) (contractor working on tribal housing could sue tribal housing authority because of arbitration clause in contract which waived tribal housing authority's immunity); *Sokaogon Gaming Enterp. Corp.*, 86 F.3d at 659–60 (contract language providing for arbitration "specifically enforceable in accordance with applicable law in any court having jurisdiction" was an express waiver of tribe's immunity).

[123] *See, e.g.*, Turn Key Gaming, Inc. v. Oglala Sioux Tribe, 313 F.3d 1087, 1092 (8th Cir. 2002) (investor contracted to build tribal casino and later sued tribe under Management Agreement and lost on the merits; then tried to sue the tribe under the Rental Agreement but failed because that agreement did not contain a waiver of sovereign immunity); Sungold Gaming USA, Inc. v. United Nation of Chippewa, No. 226524, 2002 WL 522886 (Mich. Ct. App. Apr. 5, 2002) (purported waiver of tribe's immunity was ineffective because the tribal official did not possess that power under the tribe's controlling documents); Sharp Image Gaming, Inc. v. Big Sandy Rancheria, No. F038580, 2002 WL 31684972 (Cal. Ct. App. Nov. 25, 2002) (motion to compel arbitration of contract dispute denied because the purported waiver of tribal immunity by the tribal chairperson was not authorized by the tribal constitution; the Rancheria's acceptance of contracts benefits could not be constructed as ratifying the unauthorized waiver since it was not an express and unequivocal waiver of immunity); Lobo Gaming, Inc. v. Pit River Tribe of Cal., No. C037661, 2002 WL 922136 (Cal. Ct. App. May 7, 2002) (contractor loaned money and leased gaming machines to tribe and sued for breach; service of summons was quashed because the purported waiver of sovereign immunity by the tribal council was invalid; the tribe's constitution required waivers of immunity to be consented to by the tribal membership, all the adult members of the tribe), *rev. denied* (Aug. 14, 2002), *cert. denied*, 537 U.S. 1190 (2003); World Touch Gaming v. Massena Mgmt., LLC, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) (senior vice-

One on-going and long-standing tribal gaming case demonstrates the business person's nightmare regarding tribal sovereign immunity. In this case, however, it is apparent that the non-Indian company's problems were largely brought about by an inadequate immunity waiver provision in the relevant contract.

In February 1990, pursuant to a management agreement to operate a tribal bingo enterprise for the Miccosukee Tribe of Indians of Florida, Tamiami Partners, Limited (TPL) invested $6.5 million to buy land for the Tribe and to construct the bingo hall.[124] Disputes arose, and in January 1992 the Tribe filed suit in tribal court. The next day, TPL filed a federal lawsuit seeking to enforce the management agreement's arbitration clause and to enjoin the Tribe from taking control of the bingo operation.[125] The federal district court determined that the Tribe had waived its sovereign immunity in the agreement to arbitration procedures but stayed its proceedings until TPL exhausted its remedies in tribal court.[126]

Ultimately, however, the Tribe appealed decisions made by the federal trial court to the Eleventh Circuit Court and raised a sovereign immunity defense, while primarily it argued that there was no federal court subject matter jurisdiction over the case because a mere contract action does not create federal subject matter jurisdiction merely because it involves Indian tribes.[127] In 1994, in *Tamiami I*, the Eleventh Circuit agreed with the Tribe; there was no federal court subject matter jurisdiction.[128] Thus, any waiver of sovereign immunity in the management agreement became a moot point as to whether or not this federal law suit could continue. TPL's breach of contract action was a tribal or state court issue, and not a federal court question.

TPL then filed an amended complaint and the federal trial court concluded that it now had subject matter jurisdiction over the case, but it held that sovereign immunity barred TPL's suit against the Tribe, the tribal business council, and the tribal gaming agency. However, tribal immunity did not protect the individual tribal defendants from suit.[129] In 1995, all parties appealed these rulings and were back before the Eleventh Circuit, in *Tamiami II*.[130] The appellate court agreed that the trial court had federal subject matter jurisdiction over three of TPL's claims, but the court held that sovereign

---

president of tribe's casino management company did not have the authority to waive the tribe's immunity because the tribe's constitution and civil judicial code only provided the tribal council with the authority to waive sovereign immunity); Danka Funding Co. v. Sky City Casino, 747 A.2d 837, 841–42 (N.J. Super. Ct. Law Div. 1999) (agreements signed by tribal casino comptroller allegedly waiving the tribe's immunity were invalid because tribal law mandated that only the tribal council could waive the tribe's immunity).

[124] Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 504 (11th Cir. 1993).

[125] *Id.* at 504–05.

[126] *Id.* at 505.

[127] *Id.* at 506.

[128] *Id.* at 508.

[129] Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1043–45 (11th Cir. 1995).

[130] *Id.*

immunity barred TPL's breach of contract claim against the Tribe and tribal entities because in the management agreement the Tribe had waived its immunity only to suits regarding arbitration.[131] Thus, the contract lawsuit claim in which TPL now sought money damages and injunctive relief against the Tribe was not allowed by the tribe's waiver of immunity to arbitration proceedings. Hence, TPL's error in drafting a waiver provision that covered only arbitration now defeated its breach of contract lawsuit.

The Eleventh Circuit, however, allowed TPL's claim to proceed against the individual tribal officers because they were not protected by the Tribe's sovereign immunity under well-settled principles of law that tribal officials can be sued for prospective injunctive relief to prevent them from violating U.S. law.[132] Such suits do not raise sovereign immunity issues because they are considered to be a suit against the individual and not against the sovereign government.[133]

In 1999, the Eleventh Circuit was faced with *Tamiami III* in which TPL continued to sue tribal officials, including the Tribe's attorney.[134] The tribal officials appealed the trial court's refusal to dismiss TPL's complaint, primarily on sovereign immunity grounds. The Eleventh Circuit held that the Tribe's sovereign immunity required the dismissal of three counts in TPL's second amended complaint but held that other counts relating solely to arbitration could proceed to trial because the Tribe had waived its immunity in the casino management agreement to arbitration issues.[135] Regarding the individual tribal officials, the circuit court now changed its holding from *Tamiami II* because the second amended complaint was "a thinly-disguised attempt . . . to obtain specific performance of the Tribe's obligations" by suing the individual defendants.[136] Since this was now actually a suit against the Tribe, sovereign immunity protected the individual tribal officials and they could not be sued.[137] The Eleventh Circuit remanded the case again for trial on the arbitration issues. The case was still ongoing in 2002 after more than ten years of litigation.[138]

Other recent cases demonstrate that in suing tribes, parties also often encounter the immunity defense of the United States since it is the legal owner of many tribal assets. For example, non-Indian plaintiffs were held not to be able to sue the U.S. with regard to a tribal self-help eviction of the plaintiffs from cabins they leased on tribal lands; non-Indian owners of an easement were

---

[131] *Id.* at 1046–49.

[132] *Id.* at 1050–51.

[133] Ex parte Young, 209 U.S. 123 (1908) (holding that a suit against an individual in his or her official governmental capacity—one claiming that the individual is acting beyond their legal authority—is not a suit against the sovereign).

[134] Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 177 F.3d 1212, 1225–26 (11th Cir. 1999) (the tribal attorney was added because he removed funds from a TPL account and endorsed them over to tribe, thus raising a conversion claim), *cert. denied*, 529 U.S. 1018 (2000).

[135] *Id.* at 1226.

[136] *Id.* at 1225.

[137] *Id.* at 1225–26.

[138] Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 35 Fed. Appx. 855, 2002 WL 833314 (11th Cir. April 15, 2002), *cert. denied*, 537 U.S. 1030 (2002).

not able to sue the U.S. to contest a tribe's vastly expanded use of the easement; and an Indian contractor repairing a dam was unable to sue the tribe or the United States.[139]

In conclusion, it is obvious that sovereign immunity is a crucial issue to be negotiated and settled with tribes by businesses and investors considering operating in Indian country. But it bears reemphasizing that this is an easily solved issue by knowledgeable investors who perform their due diligence. Furthermore, almost all tribes will work with investors on this issue because they are interested in bringing businesses and jobs to their reservations. Sovereign immunity, then, does not stand in the way of investing in successful economic activity in Indian country.

B. Political Instability and Sanctity of Contracts[140]

All governments encounter political problems at various times. In recent decades, the national government endured a hotly contested presidential election in 2000 which the Supreme Court ultimately settled in the *Bush v. Gore* cases; President Clinton's impeachment by the House of Representatives in 1998; and President Nixon's and Vice-President Agnew's resignations in 1974 and 1973.[141] Members of Congress and presidential cabinets have had to resign and some have even been convicted of crimes. State governments encounter similar problems. In 2003, the governor of California faced a recall election, which economists predicted would hurt the California economy, and crimes committed by state and local politicians resulted in many state politicians going to prison.[142] Tribal governments encounter these same types of situations.

Furthermore, elections in national and state governments and changing public opinions often cause major changes in governmental fiscal and political policies. Similarly, in Indian country, new elections and shifts in public opinion occasionally cause extreme changes in tribal policies. Perhaps it is the nature of

---

[139] Saucerman v. Norton, 51 Fed. Appx. 241, 2002 WL 31557880 (9th Cir. Nov. 5, 2002) (plaintiffs were evicted by the tribe; suit against United States dismissed because the 1972 Quiet Title Act expressly reserves federal immunity to suits involving property held in trust for tribes); Demontiney v. United States, 255 F.3d 801 (9th Cir. 2001); Proschold v. United States, 244 F. Supp. 2d 1027 (N.D. Cal. 2002) (the Quiet Title Act expressly reserves federal immunity to suits involving property held in trust for tribes).

[140] In several of the cases discussed, the contract at issue was determined to be void, so technically the tribes were not "violating" the sanctity of contracts.

[141] *See, e.g.*, Linda Greenhouse, *Contesting the Vote: The Court Ruling*, N.Y. TIMES, Dec. 10, 2000, at A1; Bush v. Gore, 531 U.S. 98 (2000); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 640–42, 735 (4th ed. 2000) (Richard Nixon resigned the presidency in 1974; Bill Clinton was impeached by the House in December 1998 but the Senate acquitted him in February 1999); Bruce Kauffmann, *Spiro Agnew Spiraled into Scandal 30 Years Ago*, OREGONIAN, Oct. 19, 2003, at D2.

[142] *See, e.g.*, Michael Liedtke, *Recall May Damage California Recovery*, OREGONIAN, Aug. 9, 2003, at E1; Jack Elliott Jr., *Justice, Attorney Indicted in Bribery Case*, OREGONIAN, July 26, 2003, at A8; Paul Mogin, *Reining in the Mail Fraud Statute*, CHAMPION, May 2002, at 12, 17, 19 n.101 (former Louisiana Governor Edwin Edwards received a ten-year prison sentence).

small populations and political entities to be more affected by turnover in the personalities operating the government and from the shifting opinions of the electorate. Recall elections and wholesale changes of tribal councils also occur in some tribal governments. Sometimes such elections are deemed to be a referendum on a past tribal council's policies and economic development objectives. Thus, a new tribal council might feel bound to change the direction of such activities.

Such changes in tribal political and fiscal policies can have an immediate effect on persons investing and operating businesses on reservations. Occasionally, this turnover in tribal councils has led to repudiation of existing contracts and business relationships.[143] It is anathema to those who have invested time and money on reservations to see the rules of the game change just because there is a change in the political situation. When tribal council changes result in alterations of contracts and business developments it chills the ardor of investors to work in Indian Country.

Commentators have noted this problem and its effect on persons desiring to invest on reservations. Frank Pommersheim writes that tribes occasionally "intervene directly in and even legislatively terminate a particular [business] project . . . ."[144] In the same vein, John Mohawk notes that some tribal councils have changed the rules on Indian investors and engaged in "opportunistic behavior" and that this "can go a long way toward discouraging Indians from investing their resources in their own businesses."[145] Clearly, this type of behavior is a serious concern to investors considering Indian country.

1. Insecure Tribal Council Policy

The diminishment of vested contractual property rights by a few tribal councils in response to political changes is very destructive to the goal of fostering a reservation business climate where people want to invest. A solution for this problem, in essence a way to save tribal councils from themselves, is not easy to suggest since politicians are naturally inclined to try to please the voters who elected them. Perhaps tribes who might face this issue would benefit by adopting constitutional provisions, such as in the U.S. Constitution,[146] which would prevent a tribal government from altering vested contractual rights.

The following examples highlight this issue for tribal governments and demonstrate the problems that can arise when a tribal council changes its mind and works against the interests of investors that an earlier tribal council had worked to attract to the reservation. These situations create a perception of

---

[143] James C. McKinley Jr., *Mohawk Tribe is Rethinking Land Accord With Albany*, N.Y. TIMES, Oct. 31, 2003, at B5 (newly elected tribal council wants to rewrite agreement that prior council had reached with Gov. Pataki); Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); John J. Miller, *Off the Rez*, NAT'L REV. Dec. 31, 2002, at 28 (stating that everyone in Indian country knows of projects cancelled after the latest election).

[144] FRANK POMMERSHEIM, BRAID OF FEATHERS 170 (1995).

[145] John C. Mohawk, *Indian Economic Development*, AKWE:KON J., Summer 1992, at 42, 46–48.

[146] U.S. CONST. art. I, § 10, cl. 1.

uncertainty in dealing with some tribes and thus raise the costs and the risks of doing business with those tribes. A generalized perception that this is a common problem in Indian country obviously rebounds to the detriment of all tribes.

In spring 1998, the Rosebud Sioux Tribe in South Dakota and Sun Prairie, a Nebraska pork producer, negotiated a lease for the construction of production facilities on tribal lands.[147] The Bureau of Indian Affairs (BIA) determined, after conducting an Environmental Assessment instead of a more extensive Environmental Impact Statement, that the operation of the facilities would not cause a significant impact to the environment.[148] The BIA approved the lease in September 1998.[149]

In November 1998, environmental groups brought suit in federal court in Washington D.C. to stop the facilities from being built.[150] In January 1999, the Assistant Secretary of Interior for the BIA voided the lease claiming that the environmental review had not complied with the National Environmental Policy Act.[151] The Tribe and Sun Prairie then sued the BIA in South Dakota federal court.[152] That court ultimately issued a permanent injunction restraining the BIA from interfering with the construction or operation of the pork project.[153] By February 1999, Sun Prairie, and the Tribe to some extent, had spent $5 million on the project.[154]

The BIA appealed the injunction. Later, after a tribal general election, the composition of the tribal council changed.[155] In addition, the Tribe held a referendum on the project and 556 people voted against the hog facilities and 451 voted in favor.[156] The new tribal council no longer favored the project and decided to support the BIA's decision to void the lease. Hence, the Tribe sought permission to realign itself from an appellee, supporting Sun Prairie's position, to an appellant, supporting the BIA decision to void the lease.[157] The court granted the motion!

The Eighth Circuit Court of Appeals then held that Sun Prairie alone did not have standing to contest the BIA's invalidation of the lease.[158] Its complaint was dismissed and the injunction against the BIA was lifted. Thus, the shift of the Tribe to the BIA's side doomed Sun Prairie's chances to even litigate the case. Furthermore, in March 2003, the new tribal council requested that the BIA shut down the 48 hog barns that Sun Prairie had already built and was

---

147 *Rosebud Sioux Tribe*, 286 F.3d at 1035.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 Rain Archambeau, Note, *Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, Hog Farm Corporation in Indian Country Lacks Standing in Federal Court to Challenge BIA Action Voiding Land Lease*, 7 GREAT PLAINS NAT. RES. J. 243, 249, n.37 (2002).

157 *Rosebud Sioux Tribe*, 286 F.3d at 1035.

158 *Id.* at 1035, 1040.

operating, which mostly employed tribal members.[159] By then, Sun Prairie had invested about $20 million in the project. Sun Prairie is understandably continuing litigation to enforce its lease.[160]

Similarly, in 1970, the Tesuque Pueblo in New Mexico and the Sangre de Cristo Development Company entered a lease to develop a substantial part of the reservation into a residential community that would primarily house non-Indians.[161] The Department of the Interior approved the lease in May 1970. In 1971, neighbors and environmental groups sued to enjoin construction until the environmental impact study mandated by NEPA was conducted.[162] The Tenth Circuit agreed that the Secretary's approval of the lease for tribal lands was a major federal action under NEPA that triggered the environmental study requirement.[163] The national government then worked on the EIS for the next four and one-half years.

In April 1976, the Pueblo elected a new tribal council and asked the Department of the Interior to void the lease.[164] In August 1977, the Department of the Interior "rescinded" the lease because of environmental concerns and the Tribe's opposition, due to fear that the development would bring 16,000 non-Indians onto a reservation of 300 Indians and threaten social, economic, and political upheaval for the Pueblo.[165]

Sangre then sued the U.S. government for a Fifth Amendment taking of its leasehold property rights.[166] In 1991, the Tenth Circuit held that Sangre did not possess a property right in the lease because the lease was void since the Department's approval was in violation of NEPA.[167] Hence, the tribal council and Department of the Interior did not interfere with a vested, valid property right.

---

[159] Steve Miller, *Rosebud Tribe Seeks Hog-Farm Closure*, RAPID CITY J., Apr. 18, 2003, http://www.rapidcityjournal.com/articles/2003/04/18/news/local/top/news01.txt.

[160] Sun Prairie is seeking an injunction to stop the BIA from shutting down the hog farms. David Melmer, *Courts No Help Against Hog Farm*, INDIAN COUNTRY TODAY, June 18, 2003, at B1 (apparently a June 2003 federal court decision held the lease was valid; "This fall another election will be held, which could change everything."). Later a federal judge found the lease to be valid so the battle is far from over. Sun Prairie v. Martin, No. CIV 02-3030 RHB (D.S.D. June 5, 2003) (on file with authors). The judge is reported to have asked how a new tribal council could simply void a contract that an earlier elected tribal government had signed and as having said: "It is important for tribes' economic well-being that contracts be enforced and not subject to elections." Steve Miller, *Judge Says Hog-Farm Lease Valid*, RAPID CITY J., June 10, 2003, http://www.rapidcityjournal.com/articles/2003/06/10/news/local/news02.txt.

[161] Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 893 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992).

[162] *Id.*

[163] Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972).

[164] *Sangre de Cristo Dev. Co.*, 932 F.2d at 893.

[165] *Id.*; GETCHES ET AL, *supra* note 34, at 696–97.

[166] *Sangre de Cristo Dev. Co.*, 932 F.2d at 892.

[167] *Id.* at 894–95.

A final example from 1971 concerns leases United Nuclear Corporation entered into with the Navajo Nation to mine uranium on the reservation.[168] The Secretary of the Interior properly approved the leases and United's exploration plan. United then spent more than $5 million prospecting for uranium. According to the leases, United had to receive secretarial approval of a mining plan before commencing mining. United's mining plan met all the regulatory requirements, but the Secretary refused to approve it without tribal approval.[169] United then spent three years trying to secure tribal consent. U.S. officials and the Federal Circuit Court believed that the Nation was using its veto power to force United to pay the Nation more money or to just stall until the leases lapsed.[170] Finally, when the leases expired because mining had not commenced, United sued the national government for a Fifth Amendment taking and won, because the United States had taken the company's vested property right in the lease by unreasonably, and without authority, refusing to approve the mining plan without tribal approval.[171]

Without question, tribes can also point to hundreds of examples where they have been taken advantage of by businesses, contracts, and royalty arrangements, for example.[172] But, it does not assist tribal economic development to respond in kind. Instances such as the ones discussed above make investors think twice about working in Indian country. Tribal governments must take whatever steps are necessary to prevent examples such as those above from occurring if they want to reassure investors about the benefits of working with tribes.

2. Tribal Internal Political Disputes

Two brief examples highlight the ways in which internal tribal political disputes can interfere with attracting business and investments to reservations. In March 2003, a political dispute over governance in the Sac and Fox Tribe in Iowa led to the take over of the tribal offices and the Tribe's Meskwaki casino by a group appointed by a traditional tribal leader.[173] The group was not elected pursuant to constitutional requirements and the existing tribal government had not been legally removed from office. Consequently, the National Indian Gaming Commission (NIGC) gave the Tribe thirty days to put its official government back in control of the NIGC approved casino or NIGC would shut it down.[174] The elected government was not restored to power and NIGC closed

---

[168] United Nuclear Corp. v. United States, 912 F.2d 1432, 1433 (Fed. Cir. 1990).

[169] *Id.*

[170] *Id.* at 1434–35.

[171] *Id.* at 1436–37.

[172] *See e.g.*, United States v. Navajo Nation, 537 U.S. 488 (2003) (Navajo Nation sued the U.S. for $600 million in lost royalties because its "trustee," the Secretary of Interior, had ex parte contacts with the mining company working on the Navajo Reservation and assisted the company to pay lower royalties for coal extraction).

[173] Sac & Fox Tribe of the Miss. v. United States, 264 F. Supp. 2d 830, 833 (N.D. Iowa 2003); Sac & Fox Tribe of the Miss. v. Bear, 258 F. Supp. 2d 938, 939 (N.D. Iowa 2003).

[174] *Sac & Fox Tribe*, 264 F. Supp. 2d at 834.

the casino, putting 1,300 people out of work.[175] Later, the national government froze federal funds that had been distributed to the Tribe to keep the unofficial group from spending the money.[176] Obviously, this internal dispute has interfered with beneficial tribal economic activity.

Additionally, in Utah, a long-running controversy regarding nuclear waste storage on a reservation has engulfed the Skull Valley Goshute Tribe. In 1996, the Tribe signed a lease to allow a consortium of nuclear utilities to build a long-term nuclear waste storage facility on its reservation.[177] This decision was very controversial, to say the least, and caused dissension within the Tribe leading to recall actions and law suits against the tribal leadership.[178] The Governor of Utah stated that nuclear waste would be brought to Utah only over his dead body and, in fact, the State helped pay the legal fees of tribal members who sued the tribal council over this dispute.[179] A Utah congressman also wrote the Secretary of the Interior that if she approved the lease it would not be in accordance with her fiduciary duties to the Tribe.[180] One has to wonder, with good reason, whether the Tribe will ever be able to honor the lease it signed.

Changes in political policies and political disputes will occur in any government. However, tribes and their citizens must recognize that they can be detrimental to current and future economic benefits. Plainly, instances of political instability and the occasional disregard of contractual rights can make investors very cautious about dealing with tribes.

C. Tribal Courts

In 1987, the United States Supreme Court stated: "Civil jurisdiction over [the activities of non-Indians on reservations] presumptively lies in the tribal courts . . ."[181] Thus, tribal courts are the primary fora for the adjudication of civil disputes that arise in Indian country.[182] The Court has subsequently retreated somewhat from that definitive statement.[183] However, investors and

---

[175] *Iowa Tribal Dispute Shuts Casino*, N.Y. TIMES, May 24, 2003, http://college3.nytimes.com/guests/articles/2003/05/24/1090757.xml.

[176] *Id.*

[177] Judy Fahys, *Goshute Dissidents Ask For Help*, SALT LAKE TRIB. July 11, 2003, at C1.

[178] *Id.*

[179] Tom Gorman, *Tribe Offers to Store Nuclear Waste*, OREGONIAN, June 2, 2002, at A21 (state leaders "in a frenzy to stop the plan"); Jim Woolf, *Leavitt's N-Waste Crusade Cannot Build Up Steam; Leavitt's Nuke Crusade Starts Slowly*, SALT LAKE TRIB., Nov. 26, 1997, at D1 (Governor Leavitt stated that nuclear waste would be brought to the Goshute Reservation over his dead body); Jim Woolf, *E. Utah Goshutes Seek Funds For N-Dump Study*, SALT LAKE TRIB., Aug. 12, 1993, at A1 (same); Fahys, *supra* note 177, at C1 (Utah has helped pay the attorneys for the dissident tribal members).

[180] Judy Fahys, *Utahns Ask Help to Block N-Waste*, SALT LAKE TRIB., Apr. 25, 2003, http://www.sltrib.com/2003/Apr/04252003/utah/51087.asp.

[181] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

[182] *Id.*; Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

[183] The Court has explained that the holdings of *Iowa Mutual Insurance Co.* and *National Farmers Union Insurance Cos.* must be applied in light of the rule from *Montana v. United States*, 450 U.S. 544, 566–67 (1981) that tribes do not necessarily have adjudicatory

businesses who sign contracts with tribes and tribal entities and who work on tribally and Indian owned lands are correctly concerned that any disputes they might have with tribes, tribal entities, and Indians will be litigated in tribal courts.[184] Non-Indians probably assume that a tribal court will be biased in favor of the tribal or Indian litigant to the detriment of the non-Indian. This concern is false in the vast majority of cases, but it is one that is difficult to completely disprove to non-Indians.

There has been a tremendous growth in tribal court systems and tribal law in the past three decades. About 250 of the 565 federally recognized tribes in the United States have tribal court systems of varying sophistication and complexity ranging from the Navajo Nation judicial system, which has seven district courts and a Supreme Court that decides thousands of cases a year, to some tribes that have a part time judge who might hear one case a year.[185] Some tribes have yet to enact separation of power clauses to make the court system truly independent from the legislative branch, the tribal council.[186] Furthermore, in some tribes, the tribal council acts as the court or is the tribe's appellate court and thus hears appeals of the decisions of the trial judge.[187] This last point would not be surprising to many Europeans because in various civil law countries there are many different methods of legislative control over

---

jurisdiction over non-Indians on non-Indian owned fee lands within reservations. Nevada v. Hicks, 533 U.S. 353, 358–61 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 447–54 (1997).

[184] In *Montana v. United States*, the Court set forth two categories in which tribes can exercise jurisdiction over non-Indian activities, even on non-Indian owned fees lands, within reservations. 450 U.S. at 566–67. First, tribes may regulate non-Indian, non-member activities through taxation, licensing, or other means where the non-Indian or non-member has entered a consensual relationship with the tribe or its members through contracts, leases, or other commercial arrangements. *Id.* at 565. Second, tribes can regulate non-Indians and non-members, even on non-Indian owned fee lands, where the conduct of the person threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Id.* at 566. Thus, jurisdiction over civil matters regarding non-Indians and non-members for issues arising in Indian country will often be exclusive with the tribal court. Furthermore, in most situations in which a federal and state court might have concurrent jurisdiction these courts will defer hearing an action that arose in Indian country until the parties have exhausted their tribal court remedies. *Iowa Mut. Ins. Cos.*, 480 U.S. at 18; Middlemist v. Sec'y U.S. Dep't of Interior, 824 F. Supp. 940, 946 (D. Mont. 1993); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. Ct. App. 1995); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995).

[185] APRIL SCHWARTZ & MARY JO B. HUNTER, UNITED STATES TRIBAL COURTS DIRECTORY 73 (2002); NATIONAL TRIBAL JUSTICE RESOURCE CENTER, TRIBAL JUSTICE SYSTEMS: DIRECTORY LISTING, at iii (2002).

[186] *See, e.g.*, Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y 97, 120 (1999); *compare* Marley Shebala, *Navajo Council Votes* Navajo Times *to be Independent*, NEWS FROM INDIAN COUNTRY, Dec. 1, 2003, at 11 (Navajo Tribal Council voted 63–1 to allow the tribal newspaper to incorporate and operate independently of the Council), *with* Kim Christensen & Brent Walth, *A Place Where Children Die Driven to Death*, OREGONIAN, Dec. 8, 2003, at A1 (the Warm Springs Reservation tribal newspaper is owned by the tribe and rarely covers the Tribal Council or controversial issues).

[187] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978); Sac & Fox Tribe of the Miss. v. United States, 264 F. Supp. 2d 830, 833 (N.D. Iowa 2003).

judicial systems, even in common law England where the House of Lords has long had review power over judicial matters.[188]

One thing is clear about tribal courts, however: businesses and investors contemplating working in Indian country need to analyze the specific court system of the reservation they are considering. Moreover, tribes that want to attract business and investors must also critically examine their courts to see if they are set up and operated in such a manner as to establish a legal system where the rule of law controls and thus helps the tribe to attract persons to invest on the reservation.[189] Kalt and Cornell argue that tribes have to compete for jobs and investors, and that they must make their reservations attractive to investors by establishing the rule of law, by drafting and enforcing fair and sound business codes, and by establishing courts that are independent from politics.[190] Kalt adds that "without the building of an independent tribal court system, small business has virtually no chance."[191] Kalt and his associates estimate that tribes that have truly independent court systems have a five percent lower unemployment rate, demonstrating the importance to tribes of providing independent and competent courts.[192]

Tribes are well aware of these issues and are working on developing their court systems, increasing their competence, and granting them more independence. More and more tribes have adopted ordinances or constitutional amendments providing for separation of power so as to increase the independence of their courts.[193] Additionally, tribes have worked to increase

---

[188] MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 61–66, 198–200 (2d ed. 1999) (many European governments have little or no separation of powers principles or judicial review of legislative enactments; in England the House of Lords, a legislative body, possesses appellate court function; the Lord Chancellor is the head of the appellate body, is usually a Cabinet member, and is a legislator, and thus is a member of all three branches of government).

[189] Miller, *supra* note 11, at 847–48; Ron Selden, *Economic Development Attitudes Must Change*, INDIAN COUNTRY TODAY, June 13, 2001, http://www.indiancountry.com/367 &style=printable (last visited Feb. 25, 2004) (a former Montana tribal chair says tribes must change their attitudes to attract business, stabilize tribal governments, clean up their courts, use incentives to entice new business, and streamline tribal regulations; business needs certainty and consistency from government); Cathy Siegner, *Making and Keeping Dollars on Montana Reservations,* AM. INDIAN REP., Feb. 1999, at 18 (a Montana Indian banker says tribes lack a friendly business environment and "aren't taking an appropriate role in supporting economic development").

[190] Stephen Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action, in* PROPERTY RIGHTS AND INDIAN ECONOMIES 215, 227, 235, 237 (Terry L. Anderson ed., 1992) (arguing that tribes need strong independent judiciaries and to keep business separate from politics so that investments will be safe from political manipulation).

[191] *What Tribes Can Do: An Interview with Joseph P. Kalt*, AM. INDIAN REP., Mar. 1999, at 18.

[192] Miller, *supra* note 11, at 848 & n.338; Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations, in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 25–26 (Am. Indian Manual & Handbook Series No. 4, 1992).

[193] Confederated Tribes of Grand Ronde v. Loy, No. A-01-08-024 (Grand Ronde 2003) ("We also have the constitutionally granted authority 'to review and overturn tribal legislative and executive actions for violation of [the Grand Ronde] Constitution or the

the expertise and competence of their courts by appointing legally trained and experienced judges. Tribes have also worked to ensure a systematic and regulated judicial process by adopting rules of procedure for tribal courts that are often patterned after the Federal Rules of Civil Procedure.[194] Many tribal courts also utilize various case reporting methods and/or post their tribal court opinions on a tribal web cite to educate lawyers and all persons of judicial decisions establishing points of law for the tribe.[195] All of these efforts help to lessen concerns about unfamiliar or incompetent tribal courts.

The vast majority of tribal court decisions are rendered after fair procedures and deliberations by a court or jury, using standard rules and practices, and after granting all parties equal protection and due process. Notwithstanding this fact, as with all human endeavors, there have been a few tribal court cases that cause serious concerns for non-Indians and Indians alike and might make investors hesitate to work in Indian country. These rare examples emphasize to tribes that they must continue to work to ensure their courts are impartial and fair and that they create a government that follows the rule of law, where vested contractual and property rights are protected, and where investors can invest with confidence. Court systems that work in this fashion will assist in attracting economic development to reservations, because no one, Indian or non-Indian, is going to invest their capital and efforts building up property and contract rights where everything they have worked for can be taken away by an unfair or biased court decision.[196] Consequently, it is clearly

---

Indian Civil Rights Act of 1968.' Grand Ronde Constitution, Art. IV, § 3."); *cf.* Miller, *supra* note 143, at 30.

[194] *See infra* Appendix A for a comparison of the discovery rules of the federal and Oregon state court systems with Montana's Northern Cheyenne Tribe's Rules of Civil Procedure and Oregon's Coquille Tribe's Rules of Civil Procedure; *see also* Tribal Court Promulgation of Tribal Court Rules for the Confederated Tribes of the Grand Ronde Community of Oregon (December 21, 1998) (adopting the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Rules of the U.S. District Court of Oregon as the tribal trial court rules) (on file with the authors). In 2001, the Grand Ronde Tribe's Court of Appeals adopted the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit as its rules. Court of Appeals Order (October 8, 2001) (on file with the authors).

[195] The National Tribal Justice Resource Center has a searchable database of 1800 tribal court opinions at http://www.tribalresourcecenter.org/legal/opfolder/ default.asp. The tribal court for the Confederated Tribes of the Grand Ronde Community of Oregon, for example, posts its opinions on the tribal web page, http://www.grandronde.org/court/ index.html. The Native American Training Program, Inc. has published for thirty years the monthly Indian Law Reporter ("ILR"). ILR gathers a cross-section of tribal cases, and federal and state cases on Indian law.

[196] *Compare* Clark & Velazquez, *supra* note 85, at 760 (2001) (investors lack confidence in Nicaraguan courts; on-going controversy over private property confiscations by the government has been a major factor in inhibiting foreign investments); *Vlad the Impaler*, ECONOMIST, Nov. 1, 2003, at 13; *The Trial of K*, ECONOMIST, Nov. 1, 2003, at 45; *Fishing at the Frothy Waters*, ECONOMIST, Nov. 1, 2003, at 69 (apparent politically motivated arrest and prosecution of rich industrialist has caused instability and uncertainty, a lack of confidence in the Russian government's commitment to democracy and capitalism, and a flight of investment capital out of the country); Sabrina Tavernise, *Glimmers of an Investor-Friendly Russia*, N.Y. TIMES, February 15, 2003, at C1 (Russia attracts far less foreign investment per capita than other ex-communist countries because it has no culture of

in the best interests of reservation economic development for tribes to build competent and fair court systems, and societies where the rule of law is enforced.

D. Tribal Bureaucracies

Tribal bureaucracies and administrative agencies also play an important role in helping tribes attract economic development. It is, however, almost an axiom that business developers hate bureaucracies because bureaucrats can cause high business start-up costs, a difficult and slow start-up, and low productivity for existing businesses. It is also true that investors and businesses will locate where they have the best opportunity to make the highest profit. Subsequently, an efficient and knowledgeable tribal bureaucracy that assists investors and businesses to locate and begin operations quickly is a big boost to attracting investment to reservations.

Like all bureaucracies, tribes have good and bad ones. Varying levels of knowledge, experience, and helpfulness are encountered on different reservations. If tribes are serious about exercising their sovereignty and providing business friendly environments where investors will develop businesses, this is one of the subjects tribes should address. Studies by Cornell and Kalt demonstrate that efficient tribal bureaucracies and agencies are a significant element in strengthening both tribal sovereignty and economic development because they are helpful to investors working on reservations and are highly efficient in operating tribal businesses.[197] In fact, a systematic, statistical study demonstrated that forty-nine tribes that had taken some degree of control over their forestry programs from the BIA operated the programs more efficiently than the BIA.[198] The tribal bureaucracies were significantly better at timber management, dramatically improved productivity, created sharply higher prices, and lowered costs over the results of the national bureaucracy. The conclusion of the study is that tribal institutions and tribal control can be the keys to a more productive reservation timber industry.[199] This is an example of tribal bureaucracies that successfully assisted tribes in expanding economic activity.

There are obviously examples of ineffective tribal bureaucracies that demonstrate tribes have room to improve in this area. In 2003, for example, the BIA had to assume operation of the law enforcement duties on the Blackfeet

---

playing by the rules in business or politics; property rights are not well protected; its legal system is too fragile and influenced by powerful interests; and the courts are manipulated or ignored).

[197] Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 CMTY. REINVESTEMENT 5, 5–7, 9–13 (1997), *reprinted in* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 721, 723 (4th ed. 1998).

[198] Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry, in* WHAT CAN TRIBES DO? 182–83, 199 (Stephen Cornell & Joseph P. Kalt eds., 1992) (tribes that operate their own forestry programs make more profit with better forest health; tribal members are more motivated because the profits benefit their tribe).

[199] *Id.*

reservation in Montana after years of complaints about poor performance by the tribal police department.[200] Also, on the Pine Ridge reservation in South Dakota, the head of the chamber of commerce states that the difficulty of securing tribal business licenses stems from the fact that the Tribal Land Committee rarely has any experienced members in business and people securing a license can depend on family connections.[201] He also points out that the Tribe only issues five-year leases and few banks will make loans to businesses with that length of lease.[202] He also alleges that there are many layers of tribal bureaucracy at Pine Ridge and any of them can delay the business permitting process.[203]

Tribes that have bureaucracies that assist investors instead of creating problems for them will be successful in attracting economic development. All tribes, as well as all governments, need to develop bureaucracies that fairly and competently enforce necessary rules but that also facilitate economic activity as much as possible.

E. Tribal Taxes and Regulation

Tribes possess the sovereign authority to regulate and tax many businesses operating on tribal lands.[204] Tribes are becoming increasingly interested in this subject, like all governments, as they search for funding and a viable tax base. Some businesses have been surprised by the right of tribes to tax and regulate. Again, as part of due diligence and proper planning, investors should be aware of these sovereign powers of tribes.

Tribes too need to be aware of their powers in this arena and should avoid thinking only in the short term and "killing the golden goose" by getting too active at taxing businesses in Indian country. Some tribes have been locked in long-running battles with railroads, utility companies, and businesses on reservations over taxation. After winning some of these cases in the early 1990s, tribes have been losing them more often under recent Supreme Court case law.[205]

It is of course a political decision to be made by tribal councils whether they vigorously wield their powers as a stick or consider using various kinds of tax and regulatory incentives as a carrot to entice business to reservations. It is a difficult economic decision that all governments have to address. In 2001, the Navajo Nation tribal council, for example, voted a 25% business activity tax break for reservation based coal companies.[206] This is a similar tactic that states

---

[200] *BIA Replaces Blackfeet Police*, INDIAN COUNTRY TODAY, Apr. 30, 2003, at A1.

[201] Miller, *supra* note 143, at 28–30.

[202] *Id.*

[203] *Id.*

[204] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (upholding tribal authority to tax oil and gas production on reservation lands).

[205] *See, e.g.*, Big Horn County Elec. Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000) (overruling Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992)).

[206] Marley Shebala, *Tax Credit for Coal Companies OK'd*, NAVAJO TIMES, Aug. 9, 2001.

and counties have offered to businesses to get them to locate in their areas. Such considerations can also help to attract investment to reservations.

Several tribes have extensive regulatory departments and ordinances that impact business. For example, most tribes have adopted Tribal Employment Rights Ordinances (TERO). Usually these ordinances require payments by contractors to the TERO office of a set percentage of any contracts with the tribe.[207] They also require all businesses on reservations to register with the TERO office, file certain reports, and give a hiring preference to tribal members and other Indians.[208] Such ordinances create paperwork and monetary burdens on businesses.

Tribal taxation, the regulation of business activities, and TERO ordinances, for example, are no different than the national, state, and local governmental regulation of business. However, it is up to tribal governments to decide whether and how far such taxes and regulations might be imposed or relaxed so as to become an enticement for investors to operate on reservations.

F. United States Bureaucracy

The national government plays a major day-to-day role in the majority of economic activity in Indian country. This stems from the trustee and fiduciary responsibilities the United States has assumed towards tribes, and individual Indians in certain circumstances, and its ownership as the trustee of much of tribal land and assets.[209] The United States holds the legal estate, the legal ownership of these assets, while the tribe, or individual Indian in certain cases, is the beneficial owner. Consequently, national law requires that anyone seeking to buy or lease tribal or individual Indian trust assets has to secure the approval of the United States.[210] Moreover, tribes and individual Indians cannot even pledge such assets as collateral for loans, or develop, or sometimes even use these assets themselves without time-consuming bureaucratic approval.[211]

---

[207] *See, e.g.*, Tribal Employment Rights Ordinance, Hoopa Valley Indian Reservation, Ord. No. 2-80, §§ 13.4, 13.5 (1995) (on file with authors); Red Lake Band of Chippewa Indians, Tribal Employment Rights Organization, *at* http://www.redlakenation.org/jtpa/tero/html (last visited Feb. 25, 2004); Daniel W. Long, *Employment Law on Indian Land*, Oct. 1, 1999, *at* http://www.modrall.com/articles/article_33.htm; Daniel W. Long, *Navajo Nation Employment Law*, Mar. 5, 2003, *at* http://www.modrall.com/articles/article117.htm; Mont. Dept. of Transp. v. King, 191 F.3d 1108, 1111 (9th Cir. 1999) (Fort Belknap Indian Community could not enforce its TERO against a state highway repair project on reservation; the tribe's TERO requires hiring, promotion, transfer, and reduction preferences for Indians, required filings and permits, cross-cultural training, and payment of several types of fees including a project fee up to 2% of the total amount of each contract).

[208] *See supra* note 207.

[209] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115 (1938) (the U.S. holds legal title to reservation trust lands; tribes hold the beneficial interest); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (the United States has assumed a guardianship responsibility towards its ward, the Indian tribes).

[210] 25 U.S.C. §§ 81, 415 (2000).

[211] Miller, *supra* note 11, at 804–06; *see also* Miller, *supra* note 143, at 28 (quoting a Pine Ridge resident that BIA approvals of tribal business permits, although just a rubber stamp job, can take months or up to a year).

Needless to say, this situation slows down, increases the cost, and sometimes completely stymies certain forms of economic activity in Indian country. Additionally, the approvals require compliance with the National Environmental Policy Act that sometimes can radically slow down a project.[212]

An example of how bureaucratic involvement can affect activity in Indian country is the problem of the glacial pace of BIA title searches, which are needed to facilitate private mortgages on reservations. The General Accounting Office reported as of 2003 that the BIA had a 113-year staff backlog for title search requests.[213] Some Indians have waited up to six years to get a title search report that other Americans could get in a few days.[214] Obviously, bureaucratic inefficiency is frustrating any possible benefits that tribal economies could gain from the private home construction industry and other activities that require timely title reports. Furthermore, the underfunded, understaffed BIA probate process is so far behind in its workload that it is near collapse.[215] The delay in probating wills leaves the question of ownership of land in Indian country in limbo for years and further handicaps economic development concerning such lands.

In addition, national bureaucrats do not necessarily have any particular business expertise, yet they can substitute their judgment for that of tribal governments and their experts in deciding whether projects should proceed. In the hog farm and nuclear waste storage cases discussed above, opponents of the projects argued that it was imperative for the Secretary of the Interior to tell the tribes the right thing to do in regards reservation economic development.[216]

Some of the more contentious situations concerning economic development on reservations have arisen regarding federal approvals of business deals with tribes. For example, in 1983, James Stock was invited to the Confederated Tribes of the Colville Reservation in Washington to discuss building a sawmill for the Tribes.[217] Subsequently, in July 1984, two tribal corporations and Mr. Stock for the Stock West Corporation signed contracts on the reservation requiring Stock West to supervise the construction of the mill and then to manage and market the mill. These contracts contained arbitration

---

[212] *See, e.g.*, Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 893 (10th Cir. 1991) (pueblo development project agreement; BIA and other federal bureaucracies took four and one half years to work on the environmental impact statement), *cert. denied*, 503 U.S. 1004 (1992).

[213] John Stromnes, *Indian Housing Woes Outlined*, MISSOULIAN, June 13, 2003, http://www.missoulian.com...s/2003/06/13/news/mtregional/news07 (last vistited June 22, 2003) (mandatory title searches for mortgages by the BIA are 113 "staff years" backlogged); Mark Fogarty, *Title Insurance Getting Off the Ground in Indian Country*, INDIAN COUNTRY TODAY, May 14, 2003, at B1 ("BIA's notoriously slow [title search process] has been 'a stumbling block'").

[214] Stromnes, *supra* note 213.

[215] Judge Sally Willett, Cherokee Tribe, *An Overview of Indian Probate Past and Present* (Mar. 2002), *in* SOVEREIGNTY SYMPOSIUM XV 2002—LANGUAGE AND THE LAW I4 to I-7, I-18 to I-26.

[216] Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

[217] Stock W., Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1222–23 (9th Cir. 1989).

clauses which could be enforced in any court having jurisdiction, choice of law provisions applying Oregon and Washington law to determine the validity and meaning of the contracts, and express waivers by the two tribal corporations of sovereign immunity in a court of competent jurisdiction.[218] The Tribes requested BIA approval of the contracts but the BIA decided several times that such approval was not required.[219] Stock West did not appeal these decisions.

Disputes ensued over the mill and the Tribes filed suit against Stock West in tribal court in July 1986.[220] While that court was deciding whether it possessed jurisdiction over the action and over Stock West, Stock West filed its first suit in federal court seeking to enforce the arbitration procedure provided for in the contracts. That case was dismissed based on principles of comity and the tribal court's concurrent and on-going jurisdiction.[221] The Ninth Circuit affirmed the decision and Stock West was required to exhaust its tribal court remedies before going to federal court.[222]

Stock West then sued the Tribes' in-house, reservation-based attorney in federal court for malpractice and misrepresentation based on an allegedly misleading letter he delivered to a Portland, Oregon bank that was considering a loan to Stock West.[223] The Ninth Circuit initially held for Stock West, but ultimately an *en banc* court reversed the decision for Stock West and held that the tribal attorney had raised a reasonable question as to whether Stock West's claim against him arose from the on-reservation contractual relations of the Tribes and Stock West.[224] Because the assertion of tribal jurisdiction was "plausible," the appellate court agreed that the federal district court should abstain from hearing the case in favor of the tribal court.[225] Thus, even though both parties to this suit were non-Indians and the act leading to the suit arguably occurred outside the reservation, the case had to proceed first in tribal court. Consequently, Stock West had all its cases against the Tribes and the tribal attorney returned to tribal court where no doubt Stock West felt it had no chance of prevailing. In fact, the tribal court ultimately held that the contracts were void because they had not been approved by the BIA under 25 U.S.C. § 81.[226]

Finally, Stock West sued the Secretary of the Interior in March 1990 over the BIA's decisions in 1985 and 1987 that it need not review and approve the contracts.[227] The Ninth Circuit dismissed the suit because Stock West had failed to exhaust its federal administrative remedies when it did not appeal

---

[218] *Id.* at 1223–24 nn.4–6.

[219] Stock W. Corp. v. Taylor, 964 F.2d 912, 914–15 (9th Cir. 1992).

[220] *Id.* at 915.

[221] *Stock W., Inc.*, 873 F.2d at 1225.

[222] *Id.* at 1227–30 (holding it was appropriate for the district court to defer to the tribal court on the basis of comity).

[223] Stock W. Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991), *rev'd en banc*, 964 F.2d 912 (9th Cir. 1992).

[224] *Id.* (principles of comity required federal court abstention).

[225] *Stock W. Corp.*, 964 F.2d at 919–20.

[226] Stock W. Corp. v. Lujan, 982 F.2d 1389, 1392 (9th Cir. 1993).

[227] *Id.*

either of those BIA decisions through the Department of Interior's administrative appeal process.[228] Thus, Stock West lost its claims due to its failure to have the contracts with the Tribes approved by the federal bureaucracy, even though Stock West tried to gain that approval, and had its suit heard in tribal court due to the principle of federal court deference to tribal court proceedings.

For a full and fair understanding of this case, however, it must be pointed out that under 1981 and 1985 Supreme Court cases, it was nearly certain that Stock West would be subject to tribal court jurisdiction for its actions under the contracts.[229] Consequently, it is understandable why these cases ended up in tribal court, and it seems unreasonable to feel too sorry for Stock West since this situation was the result of arm's length negotiations and business decisions made by sophisticated business entities. The lingering result, however, is that businesses and investors hear of such stories and become leery of dealing with tribes.

Further examples of the national bureaucracy's involvement in tribal business affairs are provided in the gaming arena where many companies have lost cases against tribes regarding management contracts and construction contracts, for instance, because of a failure to secure the necessary approvals of the national government required under the Indian Gaming Regulatory Act and other federal laws. In one situation, a contract to develop a gaming facility was void only because it was deemed to be collateral to a gaming management contract which itself had not been approved by the Indian Gaming Commission as required by federal law.[230]

In conclusion, the description of these kinds of business litigations might be enough to frighten many investors away from dealing with tribal entities. Congress has long been concerned with economic development in Indian country and recognizes that bureaucratic involvement can be an impediment to business development. Thus, in 2000, Congress amended one of the relevant laws to now only require approvals of leases for tribal trust lands if a lease is for seven years or longer.[231] And, addressing the Stock West situation, approvals are not required if the Secretary of Interior determines a lease does not need approving.[232] In addition, to be approved, a lease must provide remedies in case of breach and must reference a tribal code or ordinance disclosing the tribe's right to assert sovereign immunity unless the document includes an express waiver of sovereign immunity.[233] There is, of course, little tribes can do about the requirements under federal law for national approvals of most economic activities on reservations. Tribes can lobby Congress to

---

[228] *Id.* at 1400.

[229] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Montana v. United States, 450 U.S. 544 (1981).

[230] Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Kean-Argovitz Resorts, 249 F. Supp. 2d 901, 904–05 (W.D. Mich. 2003).

[231] 25 U.S.C. § 81 (2000); Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, §2, 114 Stat. 46 (2000).

[232] 25 U.S.C. § 81(c).

[233] 25 U.S.C. § 81(d)(2).

continue to lessen these requirements, as Congress did for § 81, if tribes think it is to their benefit and encourages business development in Indian country.

G. Success Stories

Numerous tribes across the United States have been successful to varying degrees at developing economic activity on their reservations. Gaming has been an important factor in kick starting several of these tribal successes. Gaming tribes are well aware, however, that casino profitability might not last forever and that self-sustaining economies have to be created in Indian country.[234] Many gaming tribes are busy diversifying their holdings and investments, and partnering with non-Indian investors to bring non-casino businesses to their reservations.[235]

Several other tribes have been economically successful without gaming. In fact, only about 217 tribes have casino gaming out of the 565 federally recognized tribes in the United States.[236] Furthermore, just eight of the casino tribes took in more than 50% of the total income earned by Indian gaming nationwide in 1996, according to a national study.[237] Thus, tribes are well aware that they have to look beyond gaming to other forms of tribal business and to the private sector to develop functioning economies in Indian country.

The Mississippi Choctaw Tribe's success is well documented. In the 1950s and 1960s, tribal members suffered a poverty level sharecropper existence with 75% unemployment, a low life expectancy, and the highest infant mortality rate in the United States.[238] By the late 1990s, tribal members enjoyed full employment, a life expectancy that had increased by twenty years, and infant death rates below the state and national average.[239] Family income and educational levels had soared, substandard housing was greatly reduced, and the Tribe was among the ten largest employers in the state.[240] By adopting hard nosed business practices and a business friendly environment, the Tribe attracted companies like GM's Packard Electric, Ford, and Navistar to enter contractual arrangements in which tribal entities built and sold finished products to the companies.[241] Tribal products have won awards for best quality from Ford and GM and, for example, had the lowest rejection rate for completed wiring harnesses of any other American or Japanese manufacturer.[242] The Tribe also entered into relationships with the Oxford Speaker Company, AT&T, Xerox, and the American Greetings Card Company.

---

234 Miller, *supra* note 11 at 834–35.

235 *Id.*

236 *See supra* note 70.

237 Joseph P. Kalt, Statement to the National Gambling Impact Study Commission, (March 16, 1998)) (in 1996 eight tribes made more than half of all Indian gaming revenues) (citing U.S. General Accounting Office, *A Profile of the Indian Gaming Industry* (May 1997)); *see also supra* note 71.

238 PETER J. FERRARA, THE CHOCTAW REVOLUTION 13–14 (1998).

239 *Id.*

240 *Id.*

241 *Id.* at 64–66, 70–71.

242 *Id.* at 71.

The success of the Mississippi Choctaw has also greatly assisted the surrounding Mississippi counties, has caused an economic boom in east central Mississippi, and increased the political power and influence of the Tribe.[243] The Tribe's activities have an economic impact on Mississippi equal to $1.2 billion a year and create more than 8,000 jobs, more than 60% of which are held by non-Indians.[244] Understandably, unemployment in these counties is way down, county tax revenues are soaring, and they have enjoyed population increases in contrast to the decreases suffered by the rest of the state's rural counties. The Tribe has truly created a success story by creating a business environment on its reservation, by training motivated employees, and by working towards the goal of improving the economic situation of its citizens.[245]

Many other tribes across the country have also made giant strides in developing successful tribal businesses and building reservation environments where business can flourish. For example, the Confederated Tribes of the Grand Ronde Community of Oregon has turned its casino into the number one tourist attraction in the state.[246] Casino profits fund all sorts of tribal educational, governmental, and family programs, and are being diversified into numerous other business ventures. The Tribe also created the Spirit Mountain Community Fund and has given away in excess of $20 million dollars to help local governments, museums, and charities.[247] Thus, the Tribe has been a good neighbor and has built up much good will and influence in Oregon.

The Southern Ute Tribe in Colorado has shrewdly and carefully invested its profits from natural gas assets into a $1.45 billion investment portfolio.[248] The living standards of tribal members have dramatically changed since the 1950s when they were mostly living without indoor bathrooms and electricity, whereas now all tribal members are paper millionaires and receive annual cash disbursements.[249] The Tribe is also its county's biggest employer.

Many Alaska Native corporations have also been very successful at using their oil income to diversify and expand their business interests into many new business fields, including large defense contracts.[250] Some of the corporations have earned outstanding returns and are major employers in Alaska.[251]

---

[243] *Id.*; Barbara Powell, *Choctaws: From Poverty to Prosperity in 40 years*, CLARION-LEDGER (Mississippi), June 26, 2003, http://www.clarionledger.com/news/0306/26/m08.html (on file with authors).

[244] FERRARA, *supra* note 238, at 71.

[245] *Id.* at 13–14, 45–50, 64, 68–73, 80, 82, 84–85.

[246] Fred Leeson, *Grand Ronde Deals Casino into Hotel Project*, OREGONIAN, Dec. 5, 2003, at A1; Joe Bob Briggs, *The Vegas Guy: Spirit Mountain Casino*, UNITED PRESS INT'L, July 17, 2002 (tribe's casino is Oregon's number one tourist attraction).

[247] Peta Tinda, *The Tribe's Community Fund Reaches the $20 Million Mark in Style, at* http://www.grandronde.org/pr/past_articles/2003/0601/20million.html (last visited Feb. 24, 2004).

[248] Ianthe Jeanne Dugan, *Indian Affairs: A Business Empire Transforms Life for Colorado Tribe*, WALL ST. J., June 13, 2003, at A1, *available at* 2003 WL-WSJ 3970544.

[249] *Id.*

[250] *See, e.g.*, Joan Pardes, *A Helping Hand*, ALASKA BUSINESS MONTHLY, Mar. 2002, at 53; Melissa Campbell, *Bright Spots in Alaska Business*, ALASKA BUSINESS MONTHLY, Mar. 2002, at 58; Julie Stricker, *Cook Inlet Region Inc.*, ALASKA BUSINESS MONTHLY, Mar. 2002, at 61; Julie Stricker, *Konaig Inc.*, ALASKA BUSINESS MONTHLY, Mar. 2002, at 66, *all*

The Salish and Kootenai Tribe of Montana has also been successful in business. The Tribe established businesses insulated from governmental involvement by creating independent, business experienced boards to operate the businesses.[252] The first goal of these tribal entities is profits and thus sustainability, and not just the creation of make-work jobs.[253]

Tribes in Wisconsin have been extremely successful with gaming and have made a valuable impact on that state's economy. Indian gaming has contributed 18,000 workers to the state's employment, $1 billion to the state's gross domestic product, and increased per capita income and sales taxes.[254] These positive economic developments have also seen commensurate decreases in state aid to children, unemployment insurance, and crime levels.[255] The list of successful tribes could go on and on.

Several tribes have also seen the wisdom of developing private economies on their reservations to develop even more economic activity so that the dollars reservation residents earn can circulate on the reservation between increasing numbers of tribal and individual Indian owned businesses.[256] Chief Phillip Martin of the Mississippi Choctaw states proudly that part of his Tribe's success is that "[w]e developed an economy."[257] Many tribes are also working on building economies by encouraging tribal members to start their own

---

available at http://www.akbizmag.com/2002/march_2002.htm (last visited Feb. 5, 2004); Press Release, U.S. Senator Stevens of Alaska, Stevens Welcomes Alaska Native Wireless Success in Spectrum Auctions (Jan. 26, 2001), http://stevens.senate.gov/pr012601.htm (last visited Feb. 5, 2004) (congratulating the native corporations on their success in telecommunications).

[251] *Id.*

[252] Ron Selden, *Tribes attempt to get beyond government economies*, BILLINGS OUTPOST, June 19, 2002, http://www.billingsnews.com/story?storyid=360 & issue= 22 (last visited Mar. 10, 2004).

[253] *Id.*; *see also* Dan Morse, *Tribal Pursuit: The Salish-Kootenai Tribe Has Succeeded Where Others Have Failed; Its Secret: Think Business, Not Bureaucracy*, WALL ST. J., Mar. 27, 2002.

[254] Jeff Mayers, *Tribal Gaming in Wisconsin: An Emerging Political and Economic Force*, WIS. INT. Spring 2003, http://www.wpri.org/WIInterest/Vol12No2/ Mayers12.2.pdf (last visited Feb. 20, 2004).

[255] *Id.;* Heidi L. McNeil, *Indian Gaming—Prosperity, Controversy, in* THE GAMING INDUSTRY ON AMERICAN INDIAN LANDS 139, 157 (PLI Corp. L. & Practice Course, Handbook Series No. B-872, 1994) (reporting that in Wisconsin 4,500 employed by tribal gaming; half were unemployed and 20% were on welfare). *See also* Kathie Durbin, *Means To An End: Gambling Casinos Offer Oregon Tribes a Path Out of Poverty*, OR. Q., Summer 2000, at 21–22 (noting that Oregon tribes have used casino profits to build day care centers, provide a burial fund for tribal members, improve the fire department, and provide employment for all members who desire it); Kirk Johnson, *Connecticut Tribe to Invest Casino Profits in a Boatyard*, N.Y. TIMES, May 4, 1996, at A1 (Indian casinos have created 140,000 jobs in the United States and 85% of them are held by non-Indians); FRANK POMMERSHEIM, *supra* note 144, at 181 (1995) (claiming that Minnesota Indian gaming is the state's seventh largest industry; has created more than 10,000 jobs directly and 20,000 indirectly).

[256] Robert J. Miller, *Creating Entrepreneurial Reservation Economies*, NATIVE AM. L. DIG., Oct. 2003, at 1, *available at* http://www.falmouthinstitute.com/ nald_issue.asp; Miller, *supra* note 11 at 829–32.

[257] Powell, *supra* note 243, at http://www.clarionledger.com/news/0306/26/ m08.html.

businesses. Many tribes now offer business start-up loans to tribal members, some as high as $100,000.[258] Tribes in Oregon and South Dakota, for example, are also heavily involved in efforts to train and assist their tribal members to learn the skills to start and operate private businesses.[259] In 1992, four Oregon tribes created the Oregon Native American Business & Entrepreneurial Network (ONABEN) to provide individualized training for Indians on drafting business plans, starting, and then operating privately owned businesses.[260] ONABEN has been very successful in helping Oregon and Washington tribes to foster the entrepreneurial spirit and to educate and guide tribal members to start their own businesses.[261] The creation and operation of ONABEN is an example of the crucial role tribal governments play in developing economic success in Indian country.

In fact, it is plain that tribal governments have an extremely important role to fill in reservation economic activity and in developing a private business sector. Governments act as the watchdog to protect the public interest, to keep their economies in balance, and to see that fair and true business competition continues.[262] All governments also take a crucial part in creating a healthy economic environment by enacting laws and regulations, maintaining law and order, enforcing contracts, defining property rights, and establishing court systems and procedures that enforce economic rights. The stability provided by government encourages people to work to secure commercial and property rights and to risk investments of their human and monetary capital.[263] Tribal

---

[258] Miller, *supra* note 11 at 844–45.

[259] *Id.* at 838–41.

[260] *Id.* at 838–40; *see also* Interview with Kathleen Flanagan, Business Service Center Manager, Wildhorse Resort Casino, in Portland, Or. (June 10, 2004) (Confederated Tribes of the Umatilla Indian Reservation services have helped twenty tribal members start businesses over the past five years; seventeen of those businesses are still in existence and six of them operate downtown store front locations in Pendleton, Oregon, a small town in rural northeastern Oregon).

[261] Miller, *supra* note 11, at 839–40; *see also* Interview with Gary George, Chief Operating Officer, Wildhorse Resort Casino, in Portland, Or. (June 10, 2004) (the business operations of the Confederated Tribes of the Umatilla Indian Reservation create a $60 million payroll and vendor payments annually in rural northeastern Oregon; only a fraction of the vendor benefits go to tribal members because so few Indians operate their own businesses).

[262] Miller, *supra* note 11 at 842–48.

[263] *See, e.g.*, THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 15, 27 (1999) (governments must maintain law and order, define and enforce contract and property rights; government is essential both as a forum for determining the 'rules of the game' and as an umpire to interpret and enforce the rules decided on); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 41 (14th ed. 1992) (governments set the rules by laws, establish court systems and procedures to enforce contract and property rights; stability encourages people to work to secure rights; governments promote efficiency, fairness and foster macroeconomic growth and stability); POMMERSHEIM, *supra* note 144, at 171 (arguing that tribes must reduce business uncertainty, help businesses to be free from political pressures); Cornell & Kalt, *supra* note 192, at 21–24, 36–37 (investor risks go up if there is uncertainty in enforcing contracts, are no commercial codes, are delays in gaining approvals, or politics get into business).

governments have this important role to fill on reservations and in attracting investors to Indian country.

An extremely important aspect of fostering economic development on reservations is for tribes to recognize the elements that prevent Indian and non-Indian private businesses and investors from locating on reservations. The items we have discussed demonstrate that tribes have many issues to consider, and also many possibilities to exploit, in bringing beneficial economic activity to Indian country.

H. Black Letter Law

Everyone enjoys certainty and security, business investors included. In fact, investors are more inclined to invest their hard earned money and valuable time in a business venture if they can better foretell the future and be sure about subjects such as what court will hear any disputes that arise regarding their investment and what law that court will apply.

The *C&L Enterprises* case discussed above is a good example of "Black Letter Law" from which investors can gain a reasonable level of certainty and security.[264] In *C&L Enterprises*, a unanimous Supreme Court determined the legal effect of specific contractual language and held that it waived tribal sovereign immunity and provided for the application of state law and private arbitration rules in that particular situation. This is a start to the kind of certainty and guarantee business investors seek in regards to investments in Indian country. The fact pattern in which that case arose and the actual language of the contract must be carefully scrutinized by legal counsel; but it does provide a measuring stick against which future arbitration and waiver of sovereign immunity clauses can be measured.[265] We leave it to future cases and situations to further define the Black Letter Law for business investment in Indian country.

VII. CONCLUSION

An unanticipated landmass thwarted Columbus's search for a westward route to the Orient. Instead of Hindi—Indians as Columbus understood the term—he encountered an unrelated people, but mistook them for the same. From surviving and reconstructed evidence, the American Indians seem to have been an energetic people bearing one of the world's lowest parasite loads.[266] At first contact explorers noted that the salmon fishing tribes of the Pacific

---

[264] *See supra* notes 115–21 and accompanying text.

[265] The court in *C&L Enterprises, Inc. v. Citizen Band Potamtomi Tribe* also cited and quoted with approval four other cases in which the arbitration clauses contained very similar language to that used in *C&L Enterprises,* as follows: Sokaogon Gaming Enterp. Corp. v. Tushie-Montgomery Ass'n, 86 F.3d 656 (7th Cir. 1996); Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560 (8th Cir. 1995); Native Vill. of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983); Val/Del, Inc. v. Superior Court, 703 P.2d 502 (Ariz. Ct. App. 1985). 532 U.S. 411, 421–22. These cases also help establish the certainty, or Black Letter Law, that investors desire.

[266] WILLIAM H. MCNEILL, PLAGUES AND PEOPLES (1976).

Northwest were well nourished and remarkably robust in comparison with Europeans of the day.[267] Adult height correlates positively with health, and no later than the nineteenth century (perhaps as early as the seventeenth, when Indians living where New Mexico is today first acquired the horse from Spaniards), bison-hunting equestrian plain Indians numbered among the world's tallest people.[268]

What demon's road led from there to today's withered tribal reservations? That Indians now occupy a tiny fraction of their ancestral land was a predictable manifestation of disequilibria in population densities that are still adjusting. Though some land was undeniably seized from tribes without compensation, at other times impressive financial and real resources were placed into accounts held for them—unusual in the history of military displacement of a weaker population.[269] Even those tribes languish. Why?

Well over a century after the 1886 defeat of Geronimo's Apache band—the last to pose a serious military threat within the United States—utilization of the residual Indian resources remains severely encumbered by government policy designed for tribes posing a military threat to the United States and consisting of primitive people unready to cope with a modern world. Such grossly maladroit national constraints on Indian resource utilization translate into poor incentives for investment. Those third-world islands would surely converge economically with their surroundings but for stubborn institutional inertia—the government of the United States treats Indians as less capable than others of properly utilizing their property, even now holding many assets in trust as a failed safeguard.

That so many of their assets remain under governmental trust under outdated policy rationales creates great difficulty for indigenous peoples. When no relevant external effect ensues, the economist's concept of consumer sovereignty forbids challenging individual preferences. An informed Indian who actually preferred unmarketable thorns and succeeded in growing them would not have mismanaged the family plot, no matter the neighbors' scorn. A trustee inattentively permitting that plot to go to thorns is a different matter entirely. Indeed, mismanagement of Indian resources tests the very borders of criminal malfeasance, but bureaucrats rather than individual Indians are implicated.[270]

---

[267] D. Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. OF LEGAL STUD. 41, 41–67 (1986).

[268] Richard H. Steckel & Joseph M. Prince, *Tallest in the World: Native Americans of the Great Plains in the Nineteenth Century*, 91 AM. ECON. REV. 287, 287–94 (2001); *see also* American Museum of Natural History, New York, NY, *Amazonia Display* (a male's upper arm bone found on Marajo Island, Brazil, and dating to 700-1000 A.D., demonstrates a height of five feet eight inches, which is taller than most modern day Brazilian Indians (notes on file with authors).

[269] Contrast the practice in North America with the so-called ethnic cleansing recently practiced in the Balkans, or the massive compelled migrations and expropriations during the Soviet Union's early history.

[270] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) (in litigation commenced in 1996, the class action plaintiff alleges that the federal government has withheld up to $40 billion in

Taking as a given their portfolio of treaty recognized property rights, marked efficiencies would flow from giving Indians the same rights as their fellow citizens to plan and conduct their own lives. By the plain meaning of many treaties, that would require restoring substantial sovereignty to those people both as tribes and as individuals. Indians have long been said to be domestic dependent nations—in brief, subordinate to the national sovereign, though in many ways parallel to states. Words are one thing, however, and actions are quite another. Of what use was tribal sovereignty at Wounded Knee?[271] Indian sovereignty, to the extent it has recently been enhanced, has grown by recapturing a pathetic bit of lost tribal sovereignty from states and the national government (as long as Congress agrees) and more extensively by gaining tribal power over consensual arrangements, but not through any substantial strengthening of individual sovereignty of tribal members.

Ours is a cautionary tale—sovereignty comes in varieties, and some varieties threaten those who might be of the most aid to Indians, potential investors. An offer to limit one's own discretion (i.e., to purposely reserve one's sovereign power) may be necessary to achieve consensual, mutually beneficial undertakings. Making the limitation credible requires a judiciary as sensitive to future opportunities to be gained and lost as to past equities. Thus, restoring control of Indian assets to their rightful owners will impose daunting responsibilities on judiciaries. Exchanging assets for a residual share of returns from a joint venture exposes one to shirking by co-investors. Judiciaries known reliably to penalize those who renege on commitments help investors persuade others to sink complementary assets in promising projects.

A court, however, is an arm of the sovereign. Across history and geography, justifiable rulings adverse to sovereigns have so often been honored in the breach that private parties are especially leery of sovereigns as co-investors. To attract assets into its realm, a sovereign may thus invest in a reputation for abiding by waivers of sovereign immunity, or rely on a still stronger sovereign to bond its waivers. Reputations arise from observed court successes by aggrieved co-investors when their suits against the sovereign are meritorious. But many tribal reservations are small and poor, have offered few investment opportunities, and hence possess thin legal histories. At the same time, investors are skeptical that courts of more powerful sovereigns, such as the United States, dependably bond tribal waivers. Thus, tribes often must pay investors high risk-premiums, resort to costly tribal ownership, or even forego promising opportunities altogether. The Sovereign's Paradox refers to the difficulty that an entity with power to compel involuntary outcomes has in negotiating voluntary ones.[272] This Article has explored ways to ameliorate that Paradox and thus improve returns from reservation assets.

States are the tribes' chief competitors for investment—competitors with two notable advantages: states have a great deal of ongoing enterprise that has tested their inclinations and supplied a grown body of precedent, and, being

---

funds that belong to Indian beneficiaries; two Cabinet secretaries were fined $625,000 for discovery violations).

[271] DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1970).

[272] Haddock, *supra* note 22, at 129.

larger, individual states risk substantially more in the way of future investments than individual tribes do. Thus, it is a mistake to view the dearth of tribal precedent mainly as a problem for investors, who often have reasonably good off-reservation substitute opportunities in the surrounding states. It is instead a problem for the tribes. Correctly or incorrectly, many investors are skeptical of tribal courts while many Indians are skeptical of state courts. There are undoubtedly many ways to ameliorate that problem while a good tribal reputation is formed. Perhaps counterintuitively, one tool for reassuring potential investors would be for tribes consciously to structure their laws and contracts with an eye to facilitating federal court intervention in disputes, or even evicting that court system altogether through formation of intertribal compacts that would compel arbitration and mutual bonding of commitments.[273] Given that the cost falls more heavily on tribes than on potential investors, crafting a solution would likewise be of more benefit to tribes than investors.

Humans seem hardwired to see economic relationships as a series of zero-sum games where one party benefits only if another suffers, but modern life actually is full of mutually-beneficial opportunities.[274] In those positive sum games the main problem is not how to take a larger share from a partner, but how to persuade a stranger to become a partner in the first place. If so, then when the intent of the parties was clear *ex ante,* it is bound to be mutually disadvantageous in the long run to seize *ex post* opportunities that are inconsistent with that intent. Though a bird in the hand might be worth two in the bush, it is doubtful that the one could be worth two hundred, two thousand, or two million in the bush.

---

[273] David D. Haddock & Robert J. Miller, *Facets of Sovereignty*, *in* SELF DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS (Terry Anderson, Bruce Benson & Thomas Flanagan eds., forthcoming).

[274] Paul H. Rubin, *Folk Economics*, 70 S. ECON. J. 157, 157–71 (2003).

APPENDIX

DISCOVERY TOOLS

DEVICE	OREGON RULES	FEDERAL RULES	COQUILLE TRIBAL RULES OF CIVIL PROCEDURE	NORTHERN CHEYENNE RULES OF CIVIL PROCEDURE
Request for Admission	ORCP 45: Scope is basically the same as FRCP 36. Must state: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B WILL RESULT IN THE ADMISSION OF THE FOLLOWING REQUESTS." 30 days to respond or 45 days after service of summons. Limited to 30 requests.	FRCP 36: To establish truth of facts, opinions, genuineness of documents, and any other relevant, nonprivileged matter whether it would itself be admissible. 30 days to respond or 45 days from service of summons.	CRCP 620.130(11): Scope is basically the same as FRCP 36. 30 days to respond or 45 days from service of summons. Must state: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION . . . WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."	None.

DISCOVERY TOOLS

DEVICE	OREGON RULES	FEDERAL RULES	COQUILLE TRIBAL RULES OF CIVIL PROCEDURE	NORTHERN CHEYENNE RULES OF CIVIL PROCEDURE
Request for Production	ORCP 34: To request any party to produce relevant things under the party's control which are not privileged, or to permit inspection and copying. Defendant has 45 days after service of summons, unless the court specifies a shorter time. Request shall specify a reasonable time, place, and manner for production.	FRCP 34: To request any party to produce relevant things in the party's control, not privileged, or to permit inspection and copying. Request shall specify a reasonable time, place, and manner of production. Party on whom request is served shall serve a written response within 30 days of request or 45 days after service of summons.	CRCP 620.130(9)(a)(1): To request any party to produce documents or things in their custody for inspection and copying. Production to be required not before 45 days of service of summons or earlier upon court order. CRCP 620.130(9)(b).	Rule 14 C: To request any party to produce any documents or things in their custody for inspection and copying within 25 days of the request.

DISCOVERY TOOLS

DEVICE	OREGON RULES	FEDERAL RULES	COQUILLE TRIBAL RULES OF CIVIL PROCEDURE	NORTHERN CHEYENNE RULES OF CIVIL PROCEDURE
Motion to Compel	ORCP 46A: Remedy for failure to respond to request for production. UTCR 5.010(2): Attorneys must confer before motion filed.	FRCP 37(a): Remedy for failure to respond to request for production. LR 230-2: Attorneys must confer before motion filed.	CRCP 620.130(12): Remedy for failure to respond to request for production.	Rule 14 F: Remedy for failure to respond to request for production.
Entry on Land for Inspection	ORCP 43	FRCP 34	CRCP 620.130(9)(a)(2)	Rule 14 C
Interrogatories	None. But see ORCP 40. Depositions upon written questions.	FRCP 33: To any party for the purpose of obtaining facts, opinion, or relationship of law to fact, but see LR 230-1(b).	None: But see CRCP 620.130(6). Depositions upon written questions.	Rule 14 A: Answers must be made in writing, under oath, and within 25 days of receipt of interrogatories.

DISCOVERY TOOLS

DEVICE	OREGON RULES	FEDERAL RULES	COQUILLE TRIBAL RULES OF CIVIL PROCEDURE	NORTHERN CHEYENNE RULES OF CIVIL PROCEDURE
Physical and Mental Examination	ORCP 44: Allowed when mental or physical condition or blood relationship is in controversy.	FRCP 35: Allowed when mental or physical condition (including blood group) is in controversy.	CRCP 620.130(10): Allowed when mental or physical condition or blood relationship is in controversy.	None.
Production of Reports of Examining Physicians, Psychologists, and Other Licensed Examiners	ORCP 44 B, C, and D: Claimant and party ordering examination have rights to results of examination, under certain circumstances. Provides remedy for failure to produce report.	FRCP 35(b): Claimant and party ordering examination have rights to results of examination under certain circumstances. Provides remedy for failure to produce report.	CRCP 620.130(10)(b) & (c): Claimant and party ordering examination have rights to results of examination, under certain circumstances.	No specific provisions regarding such records.

DISCOVERY TOOLS

DEVICE	OREGON RULES	FEDERAL RULES	COQUILLE TRIBAL RULES OF CIVIL PROCEDURE	NORTHERN CHEYENNE RULES OF CIVIL PROCEDURE
Production of Hospital Records	ORCP 44 E: Provides for obtaining hospital records of injured person by subpoena under ORCP 55 H.	No particular provisions referring to hospital records. Refer to FRCP 34 and FRCP 45.	CRCP 620.130(10) (e):	No specific provisions regarding hospital records.
Motion and Order to Compel Discovery	ORCP 46: Provides that application for an order to compel may be made when a party fails to make discovery under ORCP 36 B(2), 44 B or C, 39, 40, or 43.	FRCP 37: Provides that application for an order to compel may be made when a party fails to make discovery under FRCP 30, 31, 33, or 34.	CRCP 620.130(12): Application for an order to compel may be made when a party fails to make discovery. Sanctions may be awarded against either party.	Rule 14 F: Provides that a party may move for an order to compel discovery and the Court may award costs.
Depositions	ORCP 37, 38, 39, 40, 41	FRCP 27, 28, 30, 31, 32	CRCP 620.130(4) & (5) Sanctions may be awarded against either party.	Rule 14 B