

AN INTERDISCIPLINARY APPROACH TO AMERICAN INDIAN ECONOMIC DEVELOPMENT

LORIE M. GRAHAM*

Abstract: Economic development is at the cornerstone of indigenous peoples' claims to self-determination. In the past twenty-five years, Native American nations within the United States have experienced significant growth in terms of their development efforts. And while the long-term effects are yet to be tested, short-term studies indicate socio-economic gains for Indian nations as well as local, state, and federal economies. At the same time, many tribes continue to confront serious issues of poverty and its social consequences. Thus an overarching question is why the variation in the levels and rates of economic growth. This article explores the many dimensions affecting tribal economies—from politics to socio-economic and cultural norms, as well as the various legal dimensions that influence tribal development efforts. Similarly, it offers insight on key aspects of Indian economic development, while demonstrating linkages between a policy supporting self-determination for Native peoples and improved economic conditions.

*Lorie Graham is an Associate Professor of Law at Suffolk University Law School.

I. INTRODUCTION.....	598
II. THE PROCESS OF DEVELOPMENT: POLITICAL, SOCIO-ECONOMIC, AND CULTURAL ISSUES:.....	605
A. POLITICAL ISSUES	606
1. Sovereignty	606
2. Governmental Institutions	609
3. Indigenous Strategic Planning.....	614
B. ECONOMIC AND SOCIAL DEVELOPMENT ISSUES.....	617
1. Economic Norms and Systems.....	617
2. Economic Resources: Land, Labor and Capital.....	622
a. Land, Natural Resources, and Infrastructure	623
b. Human Capital and Social Welfare.....	624
c. Capital Investment and Financing.....	625
C. THE ROLE OF CULTURE	627
III. THE LEGAL DIMENSIONS OF DEVELOPMENT.....	629
A. TRIBAL GOVERNMENTS AND BUSINESSES.....	630
B. SOVEREIGN IMMUNITY	630
C. LAND OWNERSHIP & CONTROL OF PROPERTY.....	633
D. TAXATION	635
E. REGULATION	641
1. Commercial Law	642
2. Land Use and the Environment.....	646
3. Employment Issues.....	650
F. CONTRACTS AND THE SALE OF GOODS	652
G. JURISDICTION AND CHOICE OF LAW.....	653
IV. CONCLUSION	654

I. INTRODUCTION

*"We tried poverty for 200 years, so we decided to try something else."*¹

The right to development for "all peoples" is a basic human right.² It is closely linked with the right of self-determination in international law and is

1. Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, N.Y.U. J. INT'L L. & POL. 531, 568 (1994).

2. See, e.g., *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., U.N. Doc. A/RES/41/128 (1987). See also *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Comm'n on Human Rights, 46th Sess., 36th mtg., at art. 38, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) [hereinafter *Draft Declaration*] (relating to the rights of indigenous peoples to freely pursue their economic development); and Convention

deemed an important attribute to the realization of other human rights.³ As sovereign entities, Native American nations have the right “to pursue freely their economic . . . development”⁴ and the authority to “control economic activity within [their] jurisdiction.”⁵

Indigenous economies flourished prior to and during the early years of contact with European traders and colonists.⁶ Yet disease, warfare, and forced land cessions began to weaken these thriving economies, as well as the customs, laws, and institutions that supported them.⁷ This was not a phenomenon unique to North America. As Professor James Anaya notes with respect to indigenous peoples worldwide, “the progressive plundering of . . . lands and resources,” along with systemic discrimination have “impaired or devastated indigenous economies and subsistence life, and left indigenous people among the poorest of the poor.”⁸

Tribal economies were similarly hurt by the federal Indian policies of the past two centuries. Treaties (and later treaty substitutes) recognized the unique role of the federal government in regulating commerce with Indian nations, as well as the retained economic rights of tribes as sovereign entities.⁹ Yet, by the end of treaty-making in 1871, the federal government was advancing a “command-control economic system” that sought to place

Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1990). *See generally* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 151-2 (1996) (discussing international treaty and customary law regarding indigenous peoples’ rights to freely pursue their economic development).

3. *See* ANAYA, *supra* note 2, at 129-56 (articulating the international norms that elaborate the elements of indigenous self-determination, including social welfare and development); *see also* International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (G.A. Res. 2200, 21 U.N. GAOR, 21st Sess., Supp. 16 U.N. Doc A/6316, at 52) (entered into force Mar. 23, 1976); *Declaration on the Right to Development*, *supra* note 2, at art. 1(1). *Cf.* Rick Geddes & Dean Lueck, *The Gains from Self Ownership and the Expansion of Women’s Rights*, 92 AM. ECON. REV. 1079 (2002).

4. *Draft Declaration*, *supra* note 2, at art. 38.

5. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

6. *See generally* R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA* (1987); RICHARD WHITE, *THE ROOTS OF DEPENDENCY* (1983); WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983); Neal Salisbury, *The Indians’ Old World: Native Americans and the Coming of Europeans*, 53 WM. & MARY Q. 435 (1996).

7. *See generally* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); KENNETH M. MORRISON, *THE EMBATTLED NORTHEAST: THE ELUSIVE IDEAL OF ALLIANCE IN ABENAKI-EURAMERICAN RELATIONS* (1984); WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983).

8. *See* Anaya, *supra* note 2, at 108.

9. Since the United States was founded, the federal government has exercised constitutionally based powers to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

U.S. CONST. art. 1, § 8, cl. 3.

control of tribal economies, including tribal resources, in the hands of federal agencies or individuals.¹⁰ These policies led to further loss of tribal lands and resources, as well as deplorable socio-economic conditions for a majority of Native Americans.¹¹ The Indian Reorganization Act of 1934 sought to reverse this trend and improve tribal economic conditions by reviving tribal governments and chartering tribal business entities that would engage in economic development.¹² The federal government nevertheless maintained substantial control under the IRA, thereby limiting the effectiveness of the law in promoting and supporting tribal economies.

With the emergence of self-determination and its attendant emphasis on tribal control, sustained economic development for Native American nations has begun to take hold once again.¹³ As one group of scholars observed, "it is perhaps in the arena of economic development that Indian tribes have made their most significant advances over the past half-century, and their most significant impact on the larger society."¹⁴

Despite centuries of pillage and federal mismanagement, Indian nations still control a sizable amount of land and natural resources.¹⁵ Some are using these resources to re-build their economic base. For instance, The White Mountain Apache have developed a thriving recreation and tourism economy that includes such things as prized trophy elk, fishing expeditions, and guided outdoor tours.¹⁶ Tribes such as the Warm Springs Tribe of Oregon, the Mescalero Apache Tribe, and the Salish and Kootenai have

10. See generally ERIC HENSEN & JONAHTON B. TAYLOR, HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF NATIVE AMERICA (forthcoming 2005) (manuscript at 100, on file with the author). An earlier draft of this work is available online. ERIC HENSEN & JONAHTON B. TAYLOR, HARVARD PROJECT ON AM. INDIAN ECON. DEV., NATIVE AMERICA AT THE NEW MILLENNIUM (2002), at <http://www.ksg.harvard.edu/hpaied/docs/CIP%20-%20NANM%20Final%20Working%20Draft%20July%2011%202001.pdf> (last visited May 18, 2005). See also Stephen Cornell & Joseph 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 3, 35-36 (Stephen Cornell et al. eds., 1993).

11. See, e.g., THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928).

12. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (2004).

13. This linkage between self-determination and economic development echoes recent thinking on development generally, which recognizes the importance of developing sovereigns to direct their own development. Richard Cameron Blake, *The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 YALE HUM. RTS & DEV. L.J. 159 (2000).

14. DAVID H. GETCHES, CHARLES F. WILINSON, & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 679 (5th ed. 1998). See generally ROBERT H. WHITE, TRIBAL ASSETS: THE REBIRTH OF NATIVE AMERICA (1990).

15. See White, *supra* note 14, at 20-26.

16. White Mountain Apache Tribe, Apache Office of Tourism website, at <http://www.wmat.nsn.us/tourism.shtml> (last visited May 10, 2005).

utilized their lands' natural amenities to build luxury vacation resorts.¹⁷ The Navajo Nation operates a successful tribal park in Monument Valley and the Uintah and Ouray Tribe of Utah issue fishing permits for its blue ribbon Rocky Mountain trout streams.¹⁸

Indeed, fish and wildlife are crucial to many tribal economies, from the fisheries of the Pacific Northwest to the renewed buffalo herds of the Great Plains. Others such as the Osage Tribe of Oklahoma hold valuable sub-surface mineral resources, while still others have substantial timber, grazing, and agricultural resources.¹⁹ Each emphasizes the importance of combining "stewardship with commerce" as they pursue development of their natural resources.²⁰

Tribes are also engaged in wide variety of domestic and international business ventures not dependent on natural resource endowments. The Mississippi Band of Choctaw Indians owns and operates a diversified portfolio of manufacturing, retail, and tourism enterprises, including an American Greetings card company and a factory that manufactures auto parts for Ford, Chrysler, General Motors and others.²¹ The Blackfeet National Bank, one of the first Indian-owned banks, has gone from \$1 million in initial capitalization in 1987 to over \$13 million by 1999.²² Other tribes have followed suit, starting banks, credit unions and reservation-based loan companies.²³ The Pueblo of Pojague have blended

17. E.g., Kah-NeeTa High Desert Resort website, at <http://www.kah-nee-taresort.com/> (last visited May 10, 2005).

18. E.g., Monument Valley Navajo Tribal Park website, at <http://www.navajonationparks.org/monumentvalley.htm> (last visited May 10, 2005).

19. See generally Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541 (1994).

20. E.g., *Tulalip Getting Started in New Fishery: Tribe Combines Stewardship with Commerce for the Future*, INDIAN COUNTRY TODAY, Apr. 18, 2001, at C1. See HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING CONTRIBUTIONS IN THE GOVERNANCE OF AMERICAN INDIAN NATIONS 12 (1999) (honoring Pte Hca Ka, Inc., an economic development enterprise of the Cheyenne River Sioux Tribe that manages the tribal buffalo herd) [hereinafter 1999 HONORING NATIONS]; HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING CONTRIBUTIONS IN THE GOVERNANCE OF AMERICAN INDIAN NATIONS, 30 (2000) (honoring White Mountain Apache Wildlife and Recreation Program) [hereinafter 2000 HONORING NATIONS]. See generally David Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. W. 54 (1990).

21. Marguerite Michaels, *Winning Big Without Casinos: Jobs on the Reservation*, TIME, June 18, 2001, at 69.

22. *A Special Supplement on Lending in Indian Country*, COMT'Y REINVESTMENT (Fed. Reserve Bank of Kansas City), Winter 1994, at 13.

23. See generally U.S. Dept. of the Treasury website, at <http://www.occ.treas.gov/> (last visited May 10, 2005) (discussing information regarding tribal bank ownership). See also *A Special Supplement on Lending in Indian Country*, supra note 22, at 12. Kenneth E. Robbins, *American Indian Banks: Good Business for Indian Communities*, AM. INDIAN REP., May 2000, at 22.

cultural revitalization and economic development with the creation of a for-profit construction company that has primary responsibility for the construction and maintenance of a non-profit cultural center and museum.²⁴ The Passamaquoddy Tribe of Maine utilized their land claims settlement to purchase a cement plant, and then developed and patented several new processes.²⁵ Others are seeking to break new ground by tapping into international export markets or developing new technologies in such areas as energy and agriculture.²⁶

Still others have chosen the path of technology as a means of rejuvenating their economy. For instance, the Cheyenne River Sioux Tribe is currently engaged in satellite-TV, cell-phone, and Internet service, as well as data processing.²⁷ The Gila River and Mescalero Apache Tribes have formed telecommunications companies for the purpose of expanding basic telephone service as well as creating fiber-optic networks and high-speed Internet connections.²⁸

Tribes such as the Confederated Tribes of Grand Ronde and the Mashantucket Pequot Nation have pursued economic development through gaming.²⁹ Many are using the proceeds from these enterprises as a building block to diversification. For instance, the Winnebago Tribe of Nebraska has created a separate economic development corporation, Ho-Chunk, Inc. (HCI), to help diversify its economy and ensure long-term economic self-sufficiency.³⁰ The company is currently engaged in a number of successful non-gaming enterprises that include hotels, retail stores, and internet startups.³¹

24. 2000 HONORING NATIONS, *supra* note 20, at 10.

25. WHITE, *supra* note 14, at 115-39, 253-70 (1990).

26. E.g. Kenneth E. Robbins, *International Marketing: New Niche for Native Business*, AM. INDIAN REP., May 1999, at 18; Kay Humphrey, *Wind Power Projects Fueling Emerging Opportunities for Tribal Entities*, INDIAN COUNTRY TODAY, Sept. 12, 2001, at B1; *Indian Tribe Sets Up Offshore Bank*, BILLINGS GAZETTE, Jan. 17, 2000 (on file with the author); AP, *Mohegans Now Own Lobster Company*, INDIAN COUNTRY TODAY, Sept. 12, 2001 (on file with the author).

27. Michaels, *supra* note 21, at 69. Gregg Bourland, Chairman of The Cheyenne River Sioux Tribe, tells of how his tribe "had no timber to sell . . . no coal to mine. But the Internet is something anyone can do anywhere." *Id.*

28. Simon Romero, *Tribes Seeking Phone Systems as Step to Web*, N.Y. TIMES, Oct. 2, 2000, at A1.

29. *Id.*

30. See 2000 HONORING NATIONS, *supra* note 20, at 4. The Winnebago Tribe of Nebraska, through its economic development corporation Ho-Chunk Inc., owns two internet startups, Indianz.com and AllNative.com. *Id.*

31. *Id.*

In addition, HCI and others participate in a number of joint ventures and partnerships with non-member companies.³² As between tribes, organizations such as The United Southern & Eastern Tribes and the National Tribal Development Association are reaching out to re-establish ancient trade relationships as well as form new ones.³³

And as tribes themselves have emphasized, the greatest resource they have are their own people.³⁴ Tribes are investing in education and training as a means of enhancing their human capital.³⁵ As one tribal leader notes “the true measure of economic success for a tribe is its ability to educate the next generation so they can assume positions of leadership.”³⁶ Indeed, the Indian-owned business sector is perhaps one of the fastest growing sectors in the United States—growing at a rate of 83.7% between 1992 and 1997.³⁷

While the above list of tribal economic endeavors is by no means exhaustive, it represents the scope and breadth of Indian economic development in the 21st century. The long-term effects of this development are yet to be realized. Yet, short-term studies indicate socio-economic gains for tribes as well as off-reservation local, state, and federal economies.³⁸ Tribes such as the Cheyenne River Sioux have experienced a precipitous drop in unemployment from a rate of 75% to 25% and a cut in welfare roles from 500 families to 150.³⁹ The Mississippi Choctaw, which has experienced similar drops in unemployment, is among one of the largest employers in the State of Mississippi.⁴⁰ The Confederated Tribes of Grand Ronde’s economic pursuits provide important revenue for government services such as health, education, and infrastructure.⁴¹

32. See Charles Flowers, *Nation-Nation Trade Dominates USET*, SEMINOLE TRIB., July 9, 1999, available through the archives website at <http://www.seminoletribe.com/tribune/archives.shtml>.

33. *Id.*

34. See *infra* notes 184-95 and accompanying text.

35. See *id.*

36. Telephone interview Ray Halbritter, Nation Representative, Oneida Nation of New York (Apr. 12, 2001).

37. See CENSUS BUREAU, U.S. DEP’T OF COMMERCE, AMERICAN INDIANS & ALASKA NATIVES, 1997 ECONOMIC CENSUS, SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, COMPANY STATISTICS SERIES (2001), available at <http://www.census.gov/prod/ec97/e97cs-6.pdf> (last visited May 10, 2005). According to the U.S. Department of Commerce, Indian-owned businesses grew at a rate of 93% between 1987 and 1992. See *id.*

38. See *id.*

39. Michaels, *supra* note 21, at 69.

40. See *Tribal Sovereign Immunity: Hearings Before the Senate Comm. on Indian Affairs*, 105th Cong. 52 (April 9, 1998) (statement of Philip Martin, Chief of the Mississippi Band of Choctaw Indians) (hereinafter Martin, Congressional Testimony); *Blazed Trail for Tribal Sovereignty*, INDIAN COUNTRY TODAY, Aug. 15, 2001, at D1.

41. Michael Killeen, *Case Study: Prosperity in the Cards*, HEMISPHERES, Nov. 1997, at 41.

In many parts of the country, the economic momentum of tribes is spilling over into the surrounding communities. As recently as 1998, it was demonstrated that “tribal governments account for \$1.2 billion in off-reservation spending for goods and services and that reservation businesses account for \$4.4 billion in off reservation spending.”⁴² Within that same time frame “\$246 million in tax revenue for state and local governments and \$4.1 billion in annual tax revenue for the federal government” was created as a result of spending by tribal governments and reservation-based businesses and residents.⁴³

Yet, an overarching question that scholars and others continue to grapple with is why the variation in the levels and rates of economic growth among tribes. Indian nations continue to confront serious issues of poverty and its social consequences. Unemployment rates run as high as 50% in some places.⁴⁴ Health and social welfare indicators are equally troubling.⁴⁵ Development thus remains an important priority for tribes and their members.

There are many regulatory and tax advantages to doing business in Indian Country.⁴⁶ Tribes also are able to capitalize on economic resources such as geographical location, natural resource endowments, and an abundant labor force.⁴⁷ At the same time, the unique legal status of tribes has resulted in a complex set of rules that impact development efforts.⁴⁸ And as is true for most of federal Indian law, these rules are open to legislative and judicial modification. Equally important are the many non-legal dimensions affecting tribal economies from politics to socio-economic and cultural norms.⁴⁹ In addition some tribes are confronted with significant institutional and structural barriers to development.⁵⁰ These and other related challenges are analyzed in the remainder of this article. Section II discusses the process of development from a number of

42. HENSEN & TAYLOR, *THE STATE OF NATIVE AMERICA*, *supra* note 10 (manuscript at 107).

43. HENSEN & TAYLOR, *THE STATE OF NATIVE AMERICA*, *supra* note 10 (manuscript at 107). *See also* Kenneth Robbins, *State Support for Healthy Reservation Economies: Win-Win Strategy for All*, AM. INDIAN REPORT, June 1999, at 18.

44. *See also Tax Initiative Economic Development Kayenta Township Commission, Navajo Nation*, at http://www.ksg.harvard.edu/hpaied/hn/hn_1999_tax.htm (last visited June 21, 2005); BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, 1997 LABOR MARKET INFORMATION ON THE INDIAN LABOR FORCE: A NATIONAL REPORT (1998).

45. *See sources listed supra* note 44.

46. *See infra* Part III.D-E.

47. *See infra* Part II.B.2.

48. *See infra* Part III.C.

49. *See infra* Part II.B.

50. *See infra* Part II.B.2.

disciplines, while section III analyzes the various legal dimensions associated with tribal economic development. Section IV provides some concluding thoughts on economic development trends in Indian country, particularly in light of recent Supreme Court decisions that have significantly impacted tribal development efforts.

II. THE PROCESS OF DEVELOPMENT: POLITICAL, SOCIO-ECONOMIC, AND CULTURAL ISSUES

“[D]evelopment is a process of becoming As a caterpillar becomes a butterfly, it is allowing the unfolding through time and space of our becoming what is already in our nature to be.”⁵¹

The Penobscot Nation’s Business Book echoes the sentiments of David Lester and others that sustained economic development “is an evolutionary process, not a mathematical formula.”⁵² Law and development scholars similarly note the importance of viewing development as both “a set of goals” as well as a “process.”⁵³ Other scholars have emphasized a “nation-building” concept of economic development, which focuses on “building viable, sovereign nations.”⁵⁴

Experience has shown that there is “no one best program [or project] for tribal economic development, no clearly defined set of steps that if followed . . . will lead inexorably to new jobs, new revenues, and an improved quality of life for tribal members.”⁵⁵ Rather, development decisions are shaped by an Indian nation’s distinct history as well as its social, political and cultural structures.⁵⁶ Even the World Bank, which is steeped in development issues, has come to recognize the need for “a

51. *A Special Supplement on Lending in Indian Country*, *supra* note 22, at 3 (statement of Creek tribal member David Lester).

52. DEP’T OF ECON. DEV. & PLANNING, PENOBSCOT INDIAN NATION, *THE PENOBSCOT NATION BUSINESS BOOK: ECONOMIC DEVELOPMENT AND THE PENOBSCOT INDIAN NATION 2* (1998) (on file with the author).

53. *E.g.*, Richard Cameron Blake, *The World Bank’s Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 *YALE HUM. RTS & DEV. L.J.* 159, 165 (2000).

54. *See generally* Cornell & Kalt, *supra* note 10; Stephen Cornell, *Sovereignty, Prosperity, and Policy in Indian Country Today*, reprinted in *CMT’Y REINVESTMENT* (Fed. Reserve of Kansas City), Winter 1997, at 5. *See generally* Stephen Cornell & Marta Cecilia Gil-Swedberg, *Sociohistorical Factors in Institutional Efficacy: Economic Development in Three American Indian Cases*, in *ECONOMIC DEVELOPMENT AND CULTURAL CHANGE* 239-68 (1995).

55. PENOBSCOT INDIAN NATION, *supra* note 52 at 2. *Cf.* Albert O. Hirschman, *THE STRATEGY OF ECONOMIC DEVELOPMENT* (1978).

56. *See, e.g.*, Cornell & Kalt, *supra* note 10, at 47 (stating “the fact that American Indian tribes, like other societies, have goals of political and social sovereignty means that development success must also be assessed in political and cultural terms”). *See generally* Cornell & Gil-Swedberg, *supra* note 54.

holistic approach to development,” that takes into consideration “the interdependence of all elements of development—social, structural, human, governance, environmental, economic, and financial.”⁵⁷

Moreover, there is tremendous diversity in the economies of Indian nations. Persons interested in doing business with Indian nations must take the time to understand a tribe’s political and socio-economic structures, in much the same way they would if they sought to do business with another country such as Japan.⁵⁸ However, despite the many differences, some crucial issues affecting the rate and extent of tribal development have been identified through research and experience. These issues fall into three major categories: political, socio-economic, and cultural.

A. POLITICAL ISSUES

1. *Sovereignty*

Native American nations are self-governing political entities with the power to regulate their members and their territory to the extent those powers have not been limited by federal law.⁵⁹ Generally speaking, tribes retain the power to raise revenue, to regulate the conduct of their members and others within their jurisdiction, to enact laws, to remedy disputes, and to conduct government-government relations with the United States and other domestic governmental bodies.

Yet, Federal economic policy toward Indian nations has not always been consistent with these legally retained powers. United States economic decisions toward Indian nations were driven primarily by a policy of assimilation and made by federal officials who were not generally supportive of the Indian cultures in which they worked.⁶⁰ One notable example was the allotment of tribal lands, which sought to break up tribally-controlled lands and replace them with individual homesteads.⁶¹

57. See Blake, *supra* note 53, at 160 (citing WORLD BANK GROUP, COMPREHENSIVE DEVELOPMENT FRAMEWORK available at <http://www.worldbank.org/cdf> (last visited Apr. 24, 2005) [hereinafter WORLD BANK]).

58. See, e.g., *Profiles, CMT’Y REINVESTMENT* (Fed. Reserve Bank of Kansas City), Winter 1997, at 17 (interview with Laguna Pueblo Governor on forming partnerships with Indian nations). “Financial institutions need to recognize that we are unique sovereign entities We have rules, processes and traditions appropriate to the communities in which we live. Our practices may not conform to those of the dominant society, but it’s no different from the U.S. doing business with a foreign country.” *Id.*

59. See *infra* Part III.

60. See generally Cornell & Kalt, *supra* note 10; Duane Champagne, *Organization Change and Conflict: A Case Study of the Bureau of Indian Affairs*, 7 AM. INDIAN CULTURE & RES. J. 3 (1983).

61. See Dawes Act, 25 U.S.C. §§ 331-332 (2005).

Rather than alleviate poverty on reservations, such policies further depleted the economic, political, and social structures that had historically supported tribal economies.

In the past several decades, the economic status and social conditions in Indian country has steadily improved for some tribes. Research indicates two related factors supporting the change: the policy of self-determination and the exercise of tribal sovereignty.⁶² Professor Duane Champagne notes “the move toward self-determination, coupled with aggressive Indian assertions of control, has begun to put decision-making power in Indian hands. In so doing it has made widespread reservation economic development possible for the first time. . . .”⁶³ This demonstrated linkage between self-determination and economic development echoes changes in international policy regarding the rights of developing sovereigns to direct their own development.⁶⁴

The Harvard Project on American Indian Economic Development identifies two reasons why self-determination and sovereignty may be crucial to a tribe’s development process.⁶⁵ First, “[s]overeignty brings with it accountability.”⁶⁶ Decisions regarding the tribes’ resources and well-being are being made by those most directly accountable to their constituency, as opposed to federal officials whose objectives may be different than the tribes they represent.⁶⁷ Second, sovereignty itself is a major development resource, since it offers “distinct . . . market opportunities, from reduced tax and regulatory burdens” as well as “unique niches [in areas such as] gaming and the commercial use of wildlife.” The project’s researchers conclude “one of the quickest ways to bring development to a halt and prolong the impoverished conditions of reservations would be to undermine the sovereignty of Indian tribes.”⁶⁸

The experiences of individual tribes support this conclusion. Chief Philip Martin of the Mississippi Choctaw notes that “the Choctaws’ ability to exercise our sovereignty, to operate our own tribal government and to

62. See Cornell & Kalt, *supra* note 10, at 14 (discussing the exercise of “defacto sovereignty” on the part of tribes and its impact on development); John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495 (1991); Duane Champagne, *Economic Culture, Institutional Order, and Sustained Market Enterprise: Comparisons of Historical and Contemporary American Indian Cases*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 195 (Terry L. Anderson ed., 1992). See generally SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989).

63. Champagne, *supra* note 62, at 245; see also Cornell & Kalt, *supra* note 10, at 14-16.

64. See Blake, *supra* note 13, at 160; see also WORLD BANK, *supra* note 53.

65. Cornell & Kalt, *supra* note 10, at 14.

66. *Id.* at 15.

67. *Id.*

68. *Id.* at 16.

work in conjunction with the local, county, state and federal governments on a government-to-government basis” were crucial factors in the tribe’s economic revitalization, which began in the early 1970s.⁶⁹ “De facto” sovereignty, as it is referred to by some scholars, enabled the Choctaws to determine for themselves what steps needed to be taken to develop a “viable reservation economy,” such as amending the Choctaw constitution to improve governmental stability and setting development priorities consistent with the needs and strengths of the Choctaw people.⁷⁰

Tribal Representative Ray Halbritter of the Oneida Indian Nation of New York similarly emphasizes the “practical value” of Native American sovereignty in his tribe’s effort to “maintain and to rebuild” Oneida society and culture:

We have empowered ourselves in a way that cannot be denied, and in a way that allows us to do things for our people that we have been unable to do for centuries I believe that such empowerment is more than just a statement of sovereignty, it is sovereignty, and we have established that sovereignty without waiting or depending on other people to define what that term means. Whatever the international legal definition, whatever the pronouncements of the Supreme Court, sovereignty to us is the power to act by ourselves, for ourselves. . . . The debate, we believe, ends when one looks upon our once muddy thirty-two acres and our once potholed road and sees the wonderful buildings, services, and new opportunities we now can provide for our people.⁷¹

Other tribes, such as the Pueblos of New Mexico, are similarly able to demonstrate the practical value of exercising on-the-ground sovereignty in the face of conflicting law and policy.⁷²

Case studies further highlight the effects of “de facto” sovereignty on individual sectors of a tribe’s economy. One study analyzed the performance of 75 tribes with significant forestry operations, 49 of whom shifted a portion of their forest product industry control from the BIA to the tribe under Public Law 638.⁷³ This shift in power yielded a significant increase

69. Martin, Congressional Testimony, *supra* note 40, at 54; *see also*, SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 5-12 (1989); WHITE, *supra* note 14, at 55-113.

70. *See* Martin, Congressional Testimony, *supra* note 40, at 57. Cornell and Kalt use the phrase “de facto sovereignty” (as opposed to “de jure sovereignty”) to describe what practical steps tribes have taken to improve their chances of economic sustainability. *E.g.* Cornell & Kalt, *supra* note 10, at 14.

71. Halbritter, *supra* note 1, at 570-71.

72. *E.g.*, A *Special Supplement on Lending in Indian Country*, *supra* note 22, at 14.

73. Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, in WHAT CAN TRIBES DO?, *supra* note 10, at 179-203.

in productivity, revenue, and the quality of services offered.⁷⁴ Similar results have been found in other tribal sectors such as wildlife management, health services, and foster care.⁷⁵ Steven Cornell of the Harvard Project notes that:

In virtually every case that we have *seen* sustained economic development on American Indian reservations, the primary economic decisions, are being made by the tribe, not by outsiders The role of the Bureau of Indian Affairs and other outsider agencies has shifted from decision-maker to resource, from the controlling influence in decisions to advisor or provider of technical assistance.⁷⁶

The assumption and exercise of tribal authority appears to be an important first step in the development process. Beyond sovereignty, two other important political factors relevant to long-term economic recovery include: institutions of government and strategic planning.

2. *Governmental Institutions*

Although the institutional structures of tribes vary,⁷⁷ an important common denominator to economic growth is strong governmental institutions. "Effective sovereignty exists not simply in the recognized right to decision making but in the ability to make decisions and carry them out."⁷⁸ This is not an issue unique to Indian nations. Sovereigns around the world face similar political challenges in their quest for economic growth and stability. As one leading United States economist notes in relation to the experiences in Latin America and Asia, "the key to economic growth is not resources . . . it's institutions. It's things like stability in government, clear rules governing contracts and [] effective judicial systems."⁷⁹

Three institutional strategies emphasized in the literature as playing important roles in the rebuilding of tribal economies after centuries of federal control include: (1) creating or maintaining culturally appropriate laws,

74. *Id.*

75. *See, e.g.,* NAT'L INDIAN HEALTH BD., TRIBAL PERSPECTIVES ON INDIAN SELF-DETERMINATION AND SELF-GOVERNANCE IN HEALTH CARE MANAGEMENT REPORT (1998).

76. Stephen Cornell, Presentation to the Nation-Building Conference: Building Tribal Legal Infrastructure for Economic Prosperity (Apr. 1997), available at <http://www.kc.frb.org/publicat/commrein/u97pers2.htm> (last visited May 17, 2005).

77. *See infra* Part III.A.

78. Champagne, *supra* note 62, at 245-46. *See also* Cornell & Kalt, *supra* note 10, at 16; FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND COMTEMPORARY TRIBAL LIFE 174 (1995).

79. *See* Cornell, *Sovereignty, Property, and Prosperity in Indian Country Today*, *supra* note 54, at 4-5.

rules and procedures to increase governmental stability, (2) having dispute resolution mechanisms in place that meet the needs of various parties engaged in the development process, and (3) insulating day-day business decisions from the political process.⁸⁰

Indian tribal governments are diverse in terms of their structures and modes of governance. Examples of this diversity is represented in the traditional theocracy of the Santa Ana Pueblo, the “Non-IRA” government of the Navajo Nation that operates pursuant to resolution and an unwritten constitution, and the large number of tribal governments that are organized pursuant to the Indian Reorganization Act of 1934.⁸¹ Yet, to varying degrees, tribes have faced institutional challenges that have their roots in historical and contemporary circumstances.⁸² For instance, certain federal policies such as the IRA have had lasting effects on the governing structures of some tribes, particularly those whose histories and cultures suggested a different mode of governance.⁸³ Equally relevant are current policies that support political and economic self-sufficiency on the part of tribes after 500-plus years of colonial rule.⁸⁴ These and other related events have brought about a need for varying levels of change in the governing structures and laws of tribes.

Some tribes have chosen the path of governmental or constitutional reform. As earlier noted, The Mississippi Choctaw restructured the tribe’s constitution to provide more “stability to [the Choctaw’s] institutions.”⁸⁵ The Tribe made its government more stable in two ways: by increasing the length of the Council members’ terms from two to four years and staggering those terms so that the entire Council wouldn’t change at a single election.⁸⁶ The Tribe also voted to establish an executive branch headed by a Chief who would be elected to a four-year term and provide leadership on the issue of economic planning and implementation.⁸⁷ Tribes such as the Navajo, Cherokee, Hualapai, and Northern Cheyenne have chosen similar

80. See, e.g., Cornell & Kalt, *supra* note 10, at 14-15; POMMERSHEIM, *supra* note 64, at 162-79. See also Martin, Congressional Testimony, *supra* note 40.

81. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (2004).

82. O’Brien, *supra* note 62, at 93; see generally VINE DELORIA, JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND PRESENT OF AMERICAN INDIAN SOVEREIGNTY* (1984).

83. E.g., Cornell & Kalt, *supra* note 10, at 17-21. Cf. DELORIA & LYTLE, *supra* note 82, at 186-89.

84. Marilyn J. Ward Ford, *ANSCA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 *TOURO L. REV.* 479, 493 (1999).

85. Martin, Congressional Testimony, *supra* note 40.

86. *Id.*

87. *Id.*

paths.⁸⁸ While acknowledging differences in each nation's story, scholars have noted some recurring patterns of reform: restructuring tribal councils and patterns of representation, adopting longer and staggered terms of office, changing election procedures, and separating various governmental functions.⁸⁹ Other tribes have focused on changes in administrative structure, while maintaining the basic elements of their traditional governing structure.⁹⁰ Examples of tribal codes intended to support economic growth are discussed elsewhere in this article.⁹¹

Whatever path tribes have chosen, a strong emphasis has been placed on the need to match changes in law and institutional structure with the values and traditions of the people who are governed by them. Research conducted by the Harvard Project on American Indian Economic Development indicates that when there is not a "match" between the formal institutions of governance and "the values and culture of the people they govern," the institutions of government will lack community legitimacy thereby thwarting development efforts.⁹² Culture is such an integral aspect of the development process that it warrants a separate discussion later in this article.⁹³

A corollary to community legitimacy is the need for certainty in commercial transactions. The National American Indian Court Judges Association states that "effective and efficient resolution of disputes arising from commercial dealings is an essential component of the governance infrastructure."⁹⁴ While different tribes face different types of dispute resolution issues depending on their development strategy, many have moved toward "improving economic conditions in their communities by establishing and supporting tribal judiciaries which provide impartial and efficient resolution of commercial disputes."⁹⁵ Some examples include tribal commercial courts of limited jurisdiction,⁹⁶ claims commissions with

88. Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 149-50 (2002).

89. *Id.* See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What are the Issues?*, 7 KAN. J.L. & PUBL. POL'Y 72 (1997).

90. *A Special Supplement on Lending in Indian Country*, *supra* note 22, at 19.

91. See *infra* Part III.E.

92. Cornell & Kalt, *supra* note 10, at 17.

93. See *infra* Part II.C.

94. See generally *Hearing on Economic Development Before the Sen. Comm. on Indian Affairs*, 105th Cong. 161 (April 9, 1998) (statements of Donald R. Wharton and Jill E. Shibles, National American Indian Court Judges Association) [hereinafter Wharton & Shibles, Congressional Testimony].

95. See sources cited in note 94.

96. See, e.g., LAW AND ORDER CODE OF THE LAS VEGAS TRIBE OF PAIUTE INDIANS, tit. I, § 10-015 (1994) (creating a special division to handle commercial matters that exceed \$50,000).

the right of appeal to trial and appellate courts,⁹⁷ and mediation and arbitration agreements with limited waivers of sovereign immunity.⁹⁸ This effort has been buttressed by the development of commercial laws specific to the economic needs of tribes.⁹⁹

An issue raised by scholars and practitioners alike is the question of judicial independence through separation of powers.¹⁰⁰ Many tribal constitutions do not provide for a separate judiciary. Research conducted by the Harvard Project suggests that this factor may affect the economic performance of tribes.¹⁰¹ Others have emphasized the perception of fairness that one derives from the principle of judicial independence. More importantly, tribes themselves recognize the important role that a judiciary can play in the development process and have taken a number of steps to strengthen that role. Some have incorporated the principle of separation of powers through constitutional amendment or judicial determination. Others note that while they may not have “a direct separation of powers on paper . . . it exist as a matter of practice.”¹⁰² It is important to remember that the issue isn’t whether a particular tribe has adopted a particular judicial structure, but rather does that structure meets the legitimate needs of the people it serves.¹⁰³

The third institutional strategy of separating politics and business is a complicated one for tribes. Tribal governments run an assortment of tribal businesses, which are the byproduct of both law and governmental necessity.¹⁰⁴ For instance a tribe may carry out business activities as an IRA Section 17 corporation or directly as a governmental entity.¹⁰⁵ Whatever the legal vehicle for doing so, tribal businesses are an essential source of revenue for tribes. Tribal governments are responsible for providing services to their constituencies, such as health, education, law enforcement,

97. ONEIDA NATION ORDINANCE No. 0-94-02A (Sept. 8, 1995) (establishing the Oneida Indian Nation Claims Commission).

98. *See infra* Part III.B (discussing the use of such waivers in contracts).

99. *See infra* Part III.E.

100. *E.g.*, Cornell & Kalt, *supra* note 10 at 28; POMMERSHEIM, *supra* note 64, at 61-66. *See generally* Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393 (1992).

101. Cornell & Kalt, *supra* note 10, at 24-29. *See generally* STEPHEN CORNELL & JOSEPH P. KALT, *WHERE’S THE GLUE?: INSTITUTIONAL BASES OF AMERICAN INDIAN ECONOMIC DEVELOPMENT* (1991).

102. *See, e.g.*, *A Special Supplement on Lending in Indian Country*, *supra* note 22, at 18 (quoting Pojoaque Pueblo Attorney Joe Little).

103. Dispute resolution mechanisms will vary given the wide variety of economic players present in Indian country.

104. *See supra* Part II.B.1 (discussing the various types of economic systems operating in Indian country).

105. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (2000).

and housing. Most sovereigns levy taxes to pay for these essential governmental functions. However, the broad array of taxes available to state and local governments are not as readily available to tribes. For instance, the trust status of tribal lands precludes its inclusion in the tribal tax base.¹⁰⁶ Additionally, cases such as *Atkinson Trading Company Inc. v Shirley*,¹⁰⁷ which limits a tribe's ability to tax a non-member commercial enterprise located on fee land within its territory, severely restrict a tribe's ability to raise governmental revenue through taxation.¹⁰⁸ Moreover, economic considerations further limit the practical value of relying on taxes to pay for services.¹⁰⁹ Thus, tribes have had to rely on other revenue streams to meet their governmental responsibilities, including tribal commercial enterprises.

Yet, the more tribes move into the commercial sector the more susceptible they become to various criticisms regarding their status as governments.¹¹⁰ Moreover, close ties between tribal governments and tribal enterprises have raised concerns among lenders and investors.¹¹¹ Two related concerns are the pressure tribes face in alleviating high unemployment and the potential for political patronage.¹¹² Tribes have developed various mechanisms to address these issues. . Specific examples include creating a separate entity (such as a board of directors or business commission) to insulate day-to-day business decisions from the political process, encouraging joint and private business ventures to create a buffer zone between government and business, and having as a primary goal the reinvestment of profits whenever feasible to ensure long term stability.¹¹³

106. Most tribal taxes are in the form of licensing fees, business activity tax, leasing, sales tax, excise and severance tax. Lease income on tribal land may nevertheless represent a form of taxation. For additional information on property and taxation, *see infra* notes 239-303 and accompanying text.

107. 532 U.S. 645 (2001).

108. *Atkinson*, 532 U.S. at 654.

109. As is true for sovereigns generally, tribes must weigh the impact taxation has on their ability to attract businesses to the reservation. *See infra* notes 257-268 and accompanying text regarding available tax incentives.

110. *See, e.g.*, Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Gaming*, 5 GAMING L. REV. 311 (2001).

111. *See, e.g.*, Timothy J. Smith, *Financing Economic and Business Development on Indian Reservations*, in Federal Reserve Bank of Kansas, *supra* note 22, at 13, 18-19.

112. *Id.*

113. 2000 HONORING NATIONS REPORT, *supra* note 20 at 4. Ho-Chunk, Inc., an economic development corporation of the Winnebago Tribe of Nebraska charged with the task of diversifying the tribe's business interests while maintaining a separate existence from the tribal government. *See id.*

The issue of profits versus jobs raises additional social and economic dilemmas. Unemployment is a serious concern of many tribal governments given that in some places the rate is as high as 50%. *See sources cited supra* note 44. However, businesses that operate solely as "employment services" have had difficulty competing in the market. Cornell, *Sovereignty, Prosperity, and Policy*, *supra* note 54, at 10. As Professor Stephen Cornell explains "A competitive business in

This institutional restructuring has yielded positive results for some tribes in terms of profitability and access to capital.¹¹⁴

As a general matter, indigenous institutional building after years of federal control is costly and time-consuming. As Professor Frank Pommersheim points out, “although it is easy to make sweeping pronouncements about what tribal governments must do to aid development, it is largely ineffective and pointless to do so. Tribes must undertake to achieve what they are capable of, not the utopia imagined by experts.”¹¹⁵ A range of programs and organizations—from tribal consortiums to Indigenous non-profits—are working with tribes to address issues of institution building and development.¹¹⁶ Other tribes for whom substantial institutional building may not be feasible or even necessary are relying on contracting and compacting as a means of ensuring stability in business relations.¹¹⁷ For many tribes the issue becomes one of planning; that is developing a strategy that puts them on the path to economic growth.

3. *Indigenous Strategic Planning*

Strategic planning is the process by which tribes arrive at decisions regarding economic and community development.¹¹⁸ The design and implementation of an economic development strategy rests primarily with the tribal government. Indeed, critics of early federally-controlled economic development initiatives note the lack of internal strategic planning as one of

which profits are reinvested will grow or provide capital to invest in new businesses, thereby employing more people.” *Id.* Tribes have dealt with these concerns by implementing strategies that seek to balance employment goals with principles of profitability and sustainability. *E.g.*, *Fort Peck Business Hopes to Double its Work force*, INDIAN COUNTRY TODAY, Aug. 1, 2001, at D1.

114. *See, e.g.* MIRIAM R. JORGENSEN & JONATHAN TAYLOR, PATTERNS OF INDIAN ENTERPRISE SUCCESS: A STATISTICAL ANALYSIS OF TRIBAL AND INDIVIDUAL INDIAN ENTERPRISE PERFORMANCE, A REPORT TO THE NATIONAL CONGRESS OF AMERICAN INDIANS (2000). *See also* Cornell & Kalt, *supra* note 10, at 29-34.

115. POMMERSHEIM, *supra* note 78, at 169.

116. *See* HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 111) for additional information on the emerging non-profit sector. The Native American Rights Fund has a web page devoted to Native American Business and Economic Development Law resources, including information on tribal business consortiums and non-profits. *See* <http://www.narf.org/nill/research/AALLBib.html> (last visited May 18, 2005).

117. *See infra* notes 306-323 and accompanying text on how various tribes are addressing commercial law and related issues through compacts with states.

118. Cornell & Kalt, *supra* note 10, at 10. *See generally* Ted Jojola, Indigenous Planning and Community Development, Presentation Before the Seventh IASTE Conference, The End of Tradition?, Trani, Italy (October 12-15, 2000) (on file with the author); Nicholas Christos Zaferatos, *Planning the Native American Tribal Community: Understanding the Basis of Power Controlling the Reservation Territory*, 64 J. AM. PLANNING ASSOC. 395 (1998).

the primary reasons for their failure.¹¹⁹ Many of these programs were aimed at creating jobs to combat high unemployment based on available resources, but lacked any systematic approach to long-term development.

Professor Ted Jojola in his work on *Indigenous Planning and Community Development*, notes the distinction between a comprehensive planning or inventory model that assesses “what you can do with the resources you currently have” and a strategic planning model that is based on “crafting a futuristic ‘vision statement.’”¹²⁰ The concept of strategic planning is not new to tribes.¹²¹ Professor Jojola reminds us that prior to indigenous authority being “usurped through colonial processes,” tribal societies planned their communities in accordance with a “collective ideology.”¹²² Contrary to “western planning practices” that often rely on “privileges associated with private property rights,” indigenous planning practices have historically placed the emphasis on “values associated with territory, land-tenure and stewardship.”¹²³ Equally compelling is the demonstrated role that culture and intergenerational knowledge has played in the process of indigenous planning.¹²⁴

Armed with these historically-based values, tribes are constructing their own economic visions for the future. Some of the larger strategic issues tribes confront are: What economic development objectives does the tribe wish to pursue? How well do those objectives fit with the tribe’s own values and traditions? What resources is the tribe willing and able to commit to the development process? Who will the tribe foster economic relations with? And how will the benefits of development be used?¹²⁵

One of the initial decisions that Indian nations and their governments face is whether and to what extent they want to participate in a market

119. See, e.g. Jojola, *supra* note 118, at 6-7 (discussing the comprehensive planning model adopted by the U.S. Office of Economic Opportunity and its impact on tribal planning); HENSEN & TAYLOR, *THE STATE OF NATIVE AMERICA*, *supra* note 10 (manuscript at 102) (providing a critique of the “economic-development-by-project-initiation” approach adopted by the Economic Development Administration and other federal agencies in the 1960s); POMMERSHIEM, *supra* note 78, at 172 (providing a similar critique of the CETA Program).

120. Jojola, *supra* note 118, at 6-7 (discusses the shift from comprehensive planning to strategic planning and how such shift may have helped transform Indian policy toward self-determination).

121. *Id.* at 5.

122. *Id.* at 5.

123. *Id.* at 6, 19.

124. Cf. Jojola, *supra* note 118, at 7-19 (using the planning of the Oneida Nation of Wisconsin’s Turtle School to demonstrate a shift in paradigm toward indigenous planning).

125. PENOBSOT INDIAN NATION, *supra* note 52, at 95-100 for a discussion of the issues faced by one Indian nation. See Cornell & Kalt, *supra* note 10, at 8-13 (listing some development ingredients). Cf. NAT’L CENTER FOR AM. INDIAN ENTER. DEV., *JOINT VENTURES CREATING PROFITS AND JOBS* 35-47 (1989) (discussing issues relevant to developing successful tribal business partnerships).

economy. Many of the concerns that have been voiced over this issue center around the potential conflict between notions of “materialism” and indigenous views of “unity, cooperation, and mutual inter-dependence.”¹²⁶ As previously noted, tribes do not speak in a monolithic voice, nor do they operate under identical value systems. Yet, as is true for all developing sovereigns, tribes face the fundamental question of how to organize their economy in manner that is consistent with the values and beliefs of the people they serve. Not surprisingly tribes have dealt with this question differently.

One often cited example is the decision of whether to pursue gaming as an economic strategy. For the Oneida Nation of New York, the decision became one of political, economic, and cultural necessity.¹²⁷ Tribal Leader Ray Halbritter states, “the casino is not a statement of who we are but only a means to get us to where we want to be.”¹²⁸ He notes that the value of this economic endeavor extends “far beyond mere materiality” to providing a pathway for the survival of a people, their culture and way of life.¹²⁹ The Navajo people, on the other hand, have voted in several referenda not to pursue gaming as a means of stimulating their economy.¹³⁰ There seems to be very little value in claiming that one decision is necessarily better than the other. Rather, as tribes themselves point out, tribal development efforts “can only be judged within the context of [a] particular peoples’ unique history, culture, political and social structure, and internal and external economic environment.”¹³¹ According to Professor Jojola, the “visioning” component of strategic planning allows tribes to do just that—it “opens the window for tribal organizations to articulate the . . . values they want to use in informing their approach to community development.”¹³²

From a practical standpoint, tribes may need to undertake a number of studies before committing scarce resources or making long-term economic commitments. General data collection that measures such things as demographics (e.g., population, residence, age, income, education), health and familial needs, and community business interests has been particularly

126. PENOBSCOT INDIAN NATION, *supra* note 52, at 99.

127. Halbritter, *supra* note 1, at 564-72.

128. *Id.* at 567-68.

129. *Id.* at 571-72.

130. *Hearings before the Nat'l Gambling Impact Study Comm'n.*, July 30, 1998, (testimony of The Honorable Ferdinand Notah), available at <http://govinfo.library.unt.edu/ngisc/meetings/jul3098/p390730.html> (last visited May 18, 2005).

131. PENOBSCOT INDIAN NATION, *supra* note 54, at 3; Carpenter & Halbritter, *supra* note 110, at 321.

132. Jojola, *supra* note 118, at 18.

helpful to some tribes.¹³³ This process has often been coupled with a feedback mechanism to let tribal officials know how the development strategy is resonating with the community. A comprehensive analysis of the existing labor pool is also useful. For instance, “[w]hat are the characteristics of the unemployed . . . in terms of gender, age, education, job experience, and job skills? What employment opportunities are best suited for this particular group or any subgroup of individuals? What cultural attitudes, if any, might affect receptivity or adaptability to particular kinds of employment?”¹³⁴ Other relevant studies include resource assessments, market feasibility studies, and business analyses that look at the economic conditions and demographics of both the tribe and surrounding communities.

These are just a sampling of the issues tribes confront in the strategic planning stage—a process that will ultimately inform two important choices: how to organize the tribe’s economy in terms of its overall economic system and what development activities and projects to pursue within that system.

B. ECONOMIC AND SOCIAL DEVELOPMENT ISSUES

1. *Economic Norms and Systems*

Tribal norms with respect to economic matters may differ from those of Western sovereigns, as well as from tribe to tribe.¹³⁵ For instance, tribal governments often play a greater role in their economy than other governmental entities in the United States. For reasons previously noted, a tribe may be the “principal actor” as well as “monitor,” “regulator” and “catalyst” of development efforts.¹³⁶

Indigenous perceptions of land and natural resources also play an important role in the development process. Land is not merely a valuable development asset, it is vital to indigenous cultural, spiritual, and social existence.¹³⁷ This is not to say that tribes are unwilling to engage in

133. See, e.g., Martin, Congressional Testimony *supra* note 40 (outlining some of the information that has informed the tribe’s business plan).

134. POMMERSHEIM, *supra* note 78, at 173.

135. What follows are a few examples of those norms, but is clearly not a substitute for learning more about a particular tribe. Each Indian nation has its own government, culture, history, and treaties with the United States that are relevant to forming business relationships.

136. POMMERSHEIM, *supra* note 78, at 168.

137. See, e.g., Erica-Irene A. Daes (Chairperson of the UN Working Group on Indigenous Populations 1984 to date), *The Concepts Of Self-Determination And Autonomy Of Indigenous Peoples In The Draft United Nations Declaration On The Rights Of Indigenous Peoples*, 14 ST. THOMAS L. REV. 259, 264-65 (2001). According to Professor Daes:

activities such as mining, fishing, logging, or tourism. We have seen many examples to the contrary. However, as Professor Getches notes, “there is no necessary contradiction” between these activities and “being touted as stewards of the earth.”¹³⁸ He goes on to state that “Indian tribal cultures have survived because they do use the earth’s resources, but with a sensitive touch.”¹³⁹

Two additional norms that may inform economic decisions are the distribution of wealth through “give aways” and fair trade through “equality in exchange.”¹⁴⁰ An example of these values at work is The Lakota Fund, a non-profit micro-lending program set up to encourage economic development on the Pine Ridge Reservation.¹⁴¹ It operates lending circles that are intended to operate in “congruence with Lakota cultural norms . . . allowing members to build and use wealth on their own terms.”¹⁴² Tribes themselves have long-standing practices of redistributing economic profits through governmental services, grants, or per capita payments. For example, the Tohono O’odham of Arizona offers grant moneys to tribal members interested in purchasing an existing business or starting their own business.¹⁴³ Requirements for the grant include: 51% tribal member ownership, completion of college level business courses for the prospective owner, completion of a business plan and financial statement, and passage of a tribal review board interview.¹⁴⁴

Another frequently noted norm is the tradition of dialogue between tribes and other sovereigns as a means of resolving disputes.¹⁴⁵ A good

Land is not only an economic resource for Indigenous Peoples. It is also the peoples’ library, laboratory and university; land is the repository of all history and scientific knowledge. All that the Indigenous Peoples have been, and all that they know about living well and humanly is embedded in their land and in the stories associated with every feature of the land or landscape.

Id.

138. David Getches, *A Philosophy of Permanence: The Indians’ Legacy for the West*, J. WEST, July 1990, at 54, 66-68.

139. *Id.*

140. See, e.g., FED. RESERVE BANK OF MINNEAPOLIS, LENDING IN INDIAN COUNTRY: CULTURAL AND LEGAL ISSUES 3-4 (1997) (seminar materials on file at the University of Minnesota Law Library) (discussing decision making by consensus and sociological factors affecting economic development within the Indian tribal context).

141. See HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 117); see also The Lakota Fund, *About the Fund*, available at <http://www/lakotafund.org/aboutus.htm> (last visited Apr. 20, 2005).

142. See *supra* note 141.

143. Kenneth E. Robbins, *A New Meaning to ‘Give Away’: American Indians, Business and Gaming*, AM. INDIAN REPORT, Oct. 2000, at 20. Other tribes have similar programs designed to promote small businesses. E.g., 2000 HONORING NATIONS REPORT, *supra* note 20.

144. See Robbins, *supra* note 143, at 20.

145. See generally Philip Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1779-84 (1997).

example of how open dialogue can further economic and social goals is the “Statement of Relationship” negotiated in 1994 between the White Mountain Apache and the Fish and Wildlife Service.¹⁴⁶ The statement recognizes the tribe’s sovereign rights to manage its own ecosystem, while promoting cooperation and coordination with the Service on the protection of endangered species and habitat within White Mountain territory.¹⁴⁷

Beyond potential normative issues, the overall organization of tribal economies can vary. The four models of economic organization that have emerged in Indian Country are: federally controlled or sponsored activity, tribally-owned enterprises, individual or family-owned enterprises, and non-member enterprises.¹⁴⁸ Two others that may be subsumed under or exist separate from the above categories are: subsistence and barter economies.¹⁴⁹ While tribal economies are often made up of a combination of these sectors, each raises important considerations for tribes.

For instance, various legislative policies historically supported federal control over tribal economies. Yet studies indicate that the “historical lack of progress in reservation economies is in part . . . a direct consequence of non-tribal control.”¹⁵⁰ As earlier discussed, a number of tribes with recent histories of sustained development attribute part of their success to wresting control of tribal economic affairs from the BIA in the 1970s and 80s.¹⁵¹ Yet for some tribes, federal control has been and continues to be a necessary expedient given their size and resources.

Also, it is important to distinguish between federally “controlled” versus “sponsored” activity. Several tribes have noted the need for adequate federal assistance to finance social and economic development efforts, particularly when private capital is limited.¹⁵² Moreover, some of these sponsored activities are linked to the federal government’s treaty-based and trust obligations to tribes. Since the beginning of the self-determination era, the federal government has worked to transfer control over tribal economies to tribes through such programs as Public Law 638 and tribal self-

146. Statement of Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (Dec. 6, 1994).

147. *Id.*; see generally Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Right-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063 (1997).

148. See Cornell & Kalt, *supra* note 10, at 10, 34-43.

149. See *id.*

150. See *id.* at 35.

151. *Id.*; see also WHITE, *supra* note 14, at 3.

152. See, e.g., WHITE, *supra* note 14, at 78 (discussing the Choctaw’s success at recouping “indirect costs” to assist in the early stages of development).

governance projects without diminishing the federal support that is a necessary part of its ongoing trust responsibility.

Tribal control of economic development can take many forms. As noted earlier, the Indian nation may be both developer and manager of economic development efforts. One well known example is tribal gaming, which has generated substantial revenue for a small number of tribes.¹⁵³ Other more common examples include natural resource management and development, retail, tourism, and manufacturing. As Professors Cornell and Kalt note “one of the strengths of a [tribal enterprise] model is that it takes full advantage of the economic payoffs to tribes’ legal status.”¹⁵⁴ The difficulties that arise out of this formation particularly in the area of business and politics were discussed earlier in this article.¹⁵⁵

Tribes, along with indigenous non-profits, may also be facilitators of economic development efforts.¹⁵⁶ One of the fastest growing sectors in the economy is the private Native-owned business sector.¹⁵⁷ Some of these enterprises have found a unique niche fulfilling local needs; others are relying heavily on exports.¹⁵⁸ One study suggests that this type of a system may be particularly well suited to communities whose cultural norms support entrepreneurship and a non-centralized, non-hierarchical structure of authority.¹⁵⁹ Small businesses may meet important socio-economic needs of individual members. For instance, small businesses are particularly well

153. See generally U.S. GEN. ACCOUNTING OFFICE, TAX POLICY: A PROFILE OF INDIAN GAMING INDUSTRY (1997); Nat’l Indian Gaming Assoc., *Indian Gaming Facts*, available through the NIGA Library and Resource Center website, at <http://www.indiangaming.org/library/indian-gaming-facts/index.shtml> (last visited May 18, 2005).

154. Cornell & Kalt, *supra* note 10, at 36.

155. See *supra* Part II.A.2.

156. See HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 111). See also Kenneth E. Robbins, *Nonprofit Organizations, Community Development, and Economic Stability*, AM. INDIAN REPORT, July 2000, at 22. Non-profits are playing an increasing role in tribal economic development. *Id.* They serve as innovators of economic development approaches by placing an emphasis on both the social and economic components of development. *Id.* They assist tribes and individuals in a variety of ways. *Id.* Some provide training for individuals interested in small business development. *Id.* Others have been established to meet the financing, funding, or advocacy needs of tribes and their members. *Id.* A few participate directly in the development process through income generating activities. *Id.*

157. See CENSUS BUREAU, *supra* note 38. A 1997 Department of Commerce survey of minority-owned business enterprises indicates that Native-owned businesses generally grew at a rate of 83.7% from 1992 to 1997 (as compared to an overall US business rate of 7%), generated \$34.3 billion in revenues, and employed 298,661 persons. *Id.*; see also HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 110) (noting the existence of 13,000 on-reservation small businesses generating 500 million in revenues in 1982); Kenneth E. Robbins, *Women, Minorities and Business: Looking Through the “Glass Ceiling”*, AM. INDIAN REPORT, Apr. 2000, at 20.

158. *Id.*

159. Cornell & Kalt, *supra* note 10, at 40.

suites to capture the income from goods and services that has historically flowed to off-reservation communities.¹⁶⁰ They may also generate important tax revenue for the tribe.¹⁶¹ These businesses nevertheless face many of the same institutional and legal challenges to further growth and sustainability that confront tribal enterprises.¹⁶²

Another growing area in the private sector is non-member enterprises. Limits on access to financial capital, technical expertise, and labor may influence a tribe's choice on whether to build an economic system dependent in part on non-member investors. Indian nations have adopted a range of strategies from encouraging the development of individual businesses, to providing for non-member management of tribal resources, or entering into joint ventures and partnerships.¹⁶³ Some tribes insist upon co-ventures or partnership as a condition to doing business with the tribe or its members.¹⁶⁴ Tribes rely on many of the same incentives that other sovereigns rely on—such as tax breaks, reduced labor costs, and regulatory relief—to attract outside investors to the reservation.¹⁶⁵ Moreover, as noted earlier, factors such as stable institutional structures, opportunities for redress, and a demonstrated commitment to development are important concerns to potential investors. Private enterprise with non-member control is most commonly seen in the context of large-scale manufacturing and resource processing.¹⁶⁶

An important issue for tribes is the potential communal and cultural disruption that may result from an infusion of outside investment. Some tribes have found that combining outside investment with a strong assertion of tribal control over the course development can actually have the opposite affect, solidifying community cohesion.¹⁶⁷ Others emphasize the

160. See, e.g., H.R. Rep. No. 93-907, 93 Cong. 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 2875.

161. One example is Kayenta, Arizona, a Navajo community that generates over \$400,000 in Indian business taxes. *Tax Initiative Economic Development: Creation of Kayenta Township Localizes Decision Making*, in 1999 HONORING NATIONS, *supra* note 44, at 14. See generally www.kayentatownship.com (last visited May 18, 2005).

162. See generally HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 110).

163. See Kenneth E. Robbins, *Making the Dream a Reality: Developing 'Cutting Edge' Reservation Business*, AM. INDIAN REPORT at 22, June 2000, at 22 (discussing a seven-step process for developing business partnerships and joint ventures with non-member businesses). A tribe may need to retain a controlling interest in the enterprise to qualify for certain benefits that would otherwise accrue to minority or government-owned businesses. *Id.*

164. See *id.*

165. *Id.* Other incentives identified for attracting joint ventures and partnerships include possible qualification as a minority business, eligibility for federal financing and training programs, and a large, fairly young labor force. *Id.*

166. See Cornell & Kalt, *supra* note 10, at 41.

167. *Id.* at 41-42.

importance of having clear rules and procedures in place to ensure proper respect for community norms and customs.¹⁶⁸

Two final but longstanding components of tribal economies are the subsistence and “informal” or “sale by barter” economies. Examples of the latter would be the large number of informal, income-generating activities that are present on the Pine Ridge Indian Reservation.¹⁶⁹ Efforts are being made to build upon and enhance these activities through resource allocation and loans.¹⁷⁰ Additionally subsistence or land-based economies are crucial to the survival of many indigenous peoples. For instance, Native Alaskans continue to rely on hunting and fishing as a primary source of economic and social well-being. Other tribes, such as the Mille Lacs Band of Chippewa Indians, rely on important retained rights to hunt, fish and gather on lands located within and outside of Indian country to support their economy.¹⁷¹

The ultimate choice of how an economy should be organized rests with the tribe. Such decisions will be driven by economic as well as non-economic factors: by a tribe’s resources and market opportunities, as well as its unique history and culture.

2. *Economic Resources: Land, Labor and Capital*

Economic resources are typically divided into three categories: land, labor, and capital.¹⁷² All three categories present important legal considerations discussed elsewhere in this article. This section highlights a few of the more commonly noted economic advantages and challenges faced by tribes with respect to each of these elements.

With particular reference to Indian nations, the scholarship considers land and natural resources, infrastructure and geography, human development, and financial capital as key ingredients in the analysis of economic opportunity.¹⁷³ Moreover, as Professor Pommersheim notes, “[d]evelopment is, ultimately, competition over scarce resources, and tribes must carefully analyze where their competitive edge might lie.”¹⁷⁴

168. *See supra* Part II.C.

169. *See generally* RICHARD T. SHERMAN, ASPEN INST. FOR HUMANISTIC STUDIES, A STUDY OF TRADITIONAL AND INFORMAL SECTOR MICRO-ENTERPRISE ACTIVITY AND ITS IMPACT ON THE PINE RIDGE INDIAN RESERVATION ECONOMY (1988).

170. *See* HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 112).

171. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 173 (1999).

172. *See* HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 106-126) (discussing many of the major challenges to economic development identified in this section).

173. *E.g.* Cornell & Kalt, *supra* note 10, at 7-8.

174. POMMERSHEIM, *supra* note 78, at 171.

In mobilizing available resources, tribes retain certain advantages over other sovereigns. For instance, tribes are able to offer regulatory flexibility, tax breaks, and other governmental incentives to attract and enhance development opportunities.¹⁷⁵ Other potentially favorable economic attributes include: land and natural resource endowments, an abundant labor force, eligibility for federal financing and training, minority contracting opportunities, and unique economic niches to name a few. However, many of these advantages also present interesting challenges for Indian nations.

a. Land, Natural Resources, and Infrastructure

Tribes with significant lands and natural resources still face a number of historical and legal constraints to development. Some commonly noted challenges include checkerboard patterns of land ownership, limitations on the use of trust lands as collateral, and the lingering affects of decades of mismanagement by federal agencies.¹⁷⁶ Negotiation, creative financing, and assuming direct control over land and resources are three ways in which tribes have sought to overcome these challenges.¹⁷⁷

Additional development challenges are presented by inadequate infrastructure on some reservations. Yet, as one set of scholars note the lack of infrastructure may be as much “a symptom of economic underdevelopment as a cause of it.”¹⁷⁸ There are political and legal factors that complicate a tribe’s ability to address this issue. Two commonly noted factors include the lack of clear rules regarding a tribe’s taxing powers for infrastructure use and under-spending by the federal government in comparison with state infrastructure expenditures.¹⁷⁹

Telecommunications and technology are related areas of concern. Much has been written about the “digital divide” that exists in Indian

175. Indian reservations have been compared to enterprise zones in terms of the potential tax and regulatory advantages available to businesses.

176. *E.g.*, Smith, *supra* note 111, at 16.

177. *See infra* Part III.C. (discussing land ownership and control of property, as well as land use and cooperative agreements); *see also* Krepps, *supra* note 73, at 179-203 (indicating increase in productivity due to tribal control of resources). Information on creative financing is discussed later in this section on land, labor, and capital.

178. HENSEN & TAYLOR, *THE STATE OF NATIVE AMERICA*, *supra* note 10 (manuscript at 113).

179. *See, e.g.*, *Investing in Indian Nations: Building Tribal Self Government and Economic Development*, *Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong. 25-26 (February 23, 2000) (Testimony of Susan Masten, President of the National Congress of American Indians, discussing the discrepancies in funding for the construction and maintenance of public roads); Brian Stockes, *Tribal Task Force Demands Better Rez Roads*, *INDIAN COUNTRY TODAY*, Jan. 23, 2002, at A1. *See generally* *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

country and elsewhere.¹⁸⁰ One glaring example is apparent when comparing the rate of Indian households without basic telephone services to the nationwide rate.¹⁸¹ A number of tribes have been able to bridge the digital divide by entering the telecommunications market directly or linking up with other businesses that can provide such services.¹⁸² In terms of future growth, this is a crucial issue for tribes particularly those located in remote regions of the country. As Mr. Enjady of Mescalero Apache Telecom Inc. so aptly states “[t]he tribalization of telecommunications goes way beyond dealing blackjack to tourists from Texas This is about creating the infrastructure to attract investment in the same way an emerging market needs to lure foreign capital.”¹⁸³

b. Human Capital and Social Welfare

As noted earlier, human capital is an important tribal asset. The large increase in Native population during the latter half of the twentieth-century has created an abundant labor force in many Native communities. Yet, systemic unemployment, federally controlled projects, and poorly focused BIA job training programs have contributed to a mismatch on some reservations between the available labor pool and economic growth.

Tribes are working to increase the value of their human capital by investing in education and training. Tribal colleges and universities are taking a leading role in helping tribes meet their human development goals.¹⁸⁴ Some colleges have developed small business assistance or training centers.

180. See generally NAT'L CONG. OF AM. INDIANS, *CONNECTING INDIAN COUNTRY: TRIBALLY-DRIVEN TELECOMMUNICATIONS POLICY* (2001); NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, *FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE* (1999), available at <http://www.ntia.doc.gov/ntiahome/fttn99/contents.html> (last visited May 18, 2005); LINDA ANN RILEY, BAHRAM NASSERSHARIF, & JOHN MULLEN, ECON. DEV. ADMIN., U.S. DEP'T OF COMMERCE, *ASSESSMENT OF TECHNOLOGY INFRASTRUCTURE IN NATIVE COMMUNITIES* (1999); JAMES CASEY, *NATIVE NETWORKING: TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY IN INDIAN COUNTRY* (1999).

181. See generally, e.g., NAT'L CONG. OF AM. INDIANS, *supra* note 180. Studies indicate a telephone penetration rate of 20 to 70% on reservations, as compared to the national average of approximately 98%. *Id.*

182. For instance, the Gila River Indian community increased their penetration rate from 30% to 80% by purchasing a phone distribution company. See the National Congress of American Indian website at <http://www.indiantech.org/main/pages/access/index.asp> for a collection of references on what tribes are doing to increase infrastructure in this area.

183. Simon Romero, *Tribes Seeking Phone System as Step to Web*, N.Y. TIMES, Oct. 2, 2000, at A1.

184. See HENSEN & TAYLOR, *THE STATE OF NATIVE AMERICA*, *supra* note 10 (manuscript at 114). (discussing various college initiatives including the *American Indian Entrepreneurship: Curriculum and Case Studies* created by Michele Lansdowne and Lisa Little Chief Bryan for the Salish-Kootenai College). See also the website of the American Indian Higher Education Consortium, at <http://www.aihec.org> (last visited May 19, 2005), for additional information on tribal colleges and their programs.

Others offer courses and degree programs in economic development and related fields such as tribal management, health, computer technology, and resource development. Innovative K-12 programs are also being developed, such as the American Indian Business Leaders curricula for students interested in tribal economics.¹⁸⁵ These tribal programs are particularly noteworthy in that they link education and training to the socio-economic goals and traditions of a tribe. Many federal programs of the past were unsuccessful because they failed to do just that—provide both training and culturally relevant economic opportunity.

In addition to education and training, social welfare and human service programs are essential to building and sustaining strong tribal economies.¹⁸⁶ As one scholar notes, social welfare programs are a “necessary complement to development efforts . . . because they seek to advance the well-being of individuals,” thereby increasing their ability to fully “participate in the development process.”¹⁸⁷ The Administration for Native Americans (ANA) within the United States Department of Health and Human Services similarly links the two in terms of funding priorities.¹⁸⁸ According to the ANA, “[e]conomic and social development are interrelated, and development in one area should be balanced with development in the other in order to enhance self-sufficiency. Without a careful balance of the two, the community’s development efforts may be jeopardized.”¹⁸⁹ A good example would be the Mississippi Choctaw Nation, which relied on literacy, workfare, vocational education and rehabilitation programs to help move the tribe from a crop-based to a wage-based economy.¹⁹⁰ Additionally, while sustained development may ultimately decrease the need for some programs, it may also create additional social welfare needs, such as childcare, continuing education, and health and occupational services to name a few.

c. *Capital Investment and Financing*

Indian nations and their members face an array of economic challenges with respect to capital formation. The First Nations Development Institute

185. HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 114).

186. Social welfare and development are closely linked in international law and policy. See, e.g., Anaya, *supra* note 2, at 107-109.

187. POMMERSHEIM, *supra* note 78, at 178.

188. E.g., Office of Human Dev. Servs., U.S. Dep’t of Health & Human Servs., Program Announcement No. 13612-881, 52 Fed. Reg. 110 (1987).

189. *Id.*

190. Martin, Congressional Testimony, *supra* note 41.

places the unmet capital needs for Native American communities at between \$17.65 and \$56.5 billion a year.¹⁹¹ Similar to the Third World context, a three-prong approach to capital formation has been advanced in the Native American context: building strong institutions, developing ties with outside investors, and mobilizing local resources.¹⁹² As previously noted, institution building is a key component to long-term development. Strong institutions with well-established rules help tribes meet the second-prong—attracting potential investors—by lowering the risks of doing business. Yet other potential investment barriers exist such as: legal restrictions on collateralizing trust property,¹⁹³ issues of sovereign immunity,¹⁹⁴ and the absence of banks or other financial institutions in parts of Indian Country.¹⁹⁵ Moreover, as one tribal financial advisor notes, local capital accumulation is an important but underutilized source of investment.¹⁹⁶

Tribes have taken a number of steps to address these barriers. On the issue of collateral, tribes are using leasehold mortgages and other non-trust assets such as inventory to secure access to capital.¹⁹⁷ Some are also creating or partnering with commercial banks, credit unions, and community-based financial institutions to meet the wide variety of lending and financial service needs that exist in Indian country.¹⁹⁸ Additional sources of financing include:

- tribal bond issues;¹⁹⁹

191. FIRST NATIONS DEV. INST., SCOPE AND SCALE OF NEED FOR CAPITAL IN INDIAN COUNTRY (1999); *see also* HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 114-17). These estimates include the funds necessary to bring Indian nations in parity with investments in surrounding communities as well as addressing the backlog of needs resulting from centuries of under-investment. *Id.*

192. *See*, Smith *supra* note 111, at 20-25.

193. *See infra* Part III.C.

194. *See infra* Part III.B.

195. FIRST NATIONS DEV. INST., CRA RESEARCH EFFORTS: A 38-STATE STUDY OF FINANCIAL SERVICES, BANKING AND LENDING NEEDS IN NATIVE COMMUNITIES (1998). Summary information regarding this study is available at http://www.firstnations.org/narc/study_of_financial_service.htm (last visited May 19, 2005). *See also* HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 115-16).

196. Smith, *supra* note 111, at 23.

197. For instance, a bank can take a mortgage on trust land that has been leased by the tribe. If the leaseholder defaults on the loan, the bank can take over the lease for the remainder of the term.

198. The U.S. Dep't of Treasury, Office of the Comptroller of the Currency publishes a *Guide to Tribal Ownership of a National Bank* as well as other relevant material, at <http://www.occ.treas.gov> (last visited May 19, 2005). *See generally* A *Special Supplement on Lending in Indian Country*, *supra* note 22, at 12-13; FIRST NATIONS DEV. INST., *supra* note 195; Kenneth Robbins, *American Indian Banks: Good Business For Indian Communities*, AM. INDIAN REPORT, May 2000, at 22.

199. Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871 (2000). *See generally* Ellen D. Cook, *Federal Tax Law as a Catalyst for Economic Development: Incentives for Empowerment Zones, Enterprise Communities, and Indian Reservations*, 46 OIL, GAS &

- federal grants, loans and loan guarantees;²⁰⁰
- interest from trust funds and other BIA-controlled assets (such as land claims settlements, royalties, grazing fees, and investment or lease income);²⁰¹
- revenues from successful tribal enterprises; and
- tribal taxes.²⁰²

Several governmental and nonprofit institutions provide useful guides on issues of lending and capital formation that tribes and potential lenders may wish to consult for further information.²⁰³

C. THE ROLE OF CULTURE

The “preservation and enhancement of indigenous cultures” and “the freedom and ability to practice those cultures” are often cited as important goals of economic self-sufficiency.²⁰⁴ Thus, a crucial aspect of the development dialogue is whether a particular plan or project will enhance or jeopardize a tribe’s cultural integrity or traditions.

However, culture is more than just an end goal. Culture is itself a “critical factor” in the development process in that it “informs and legitimizes conceptions of self, of social and political organization, of how the world works, and of how the individual and group appropriately work in the world.”²⁰⁵ International human rights precepts seek to protect this important link between indigenous cultures and socio-economic rights.²⁰⁶

ENERGY Q. 113 (1997); Mark Fogarty, *More Tribes May Tap Bond Market for Debt*, INDIAN COUNTRY TODAY, May 30, 2001, at C1.

200. Examples include BIA grants, loans, and loan guarantees; Small Business Administration loan guarantees and technical assistance programs, and FMHA loans. Federal agencies such as the Department of Health and Human Services’ Administration for Native Americans provide additional support in the form of grants and/or technical assistance.

201. For a useful discussion to the assignment of trust funds and other BIA-controlled assets, see FED. RESERVE BANK OF MINNEAPOLIS, *supra* note 140.

202. *See infra* Part III.D.

203. *See generally* U.S. Dep’t of Treasury, *supra* note 198 (listing a host of relevant articles and reports on such things as tribal banks, mortgage lending, providing financial services to Native Americans in Indian Country, and Sovereign lending to name a few); FED. RESERVE BANK OF MINNEAPOLIS, *supra* note 201; *A Special Supplement on Lending in Indian Country*, *supra* note 22; Cornell, *Sovereignty, Prosperity, and Policy in Indian Country Today*, *supra* note 56; Native American Rights Fund, Native American Business and Economic Development Law Resources, at <http://www.narf.org/nill/resources/AALLBib.html> (last visited May 19, 2005) (providing a list prepared by David Selden and April Schwartz of nonprofits and tribal organizations involved in economic development initiatives).

204. *E.g.* David Lester, *Values of Economic Development*, COMT’Y REINVESTMENT (Fed. Reserve Bank of Kansas City), Winter 1994, at 4.

205. Champagne, *supra* note 60, at 245-46.

206. *See e.g.* ANAYA, *supra* note 2, at 131-41 (discussing the rights of indigenous peoples to maintain and develop their cultural identities).

For instance, in *Ominayak v. Canada*²⁰⁷ the UN Human Rights Committee found that the Lubicon Lake Band of Cree Indians' cultural survival was directly linked to its ability to control natural resource development on its aboriginal land.²⁰⁸ The United States' policy of self-determination similarly recognizes the right of tribes to shape their own socio-economic futures in ways that are culturally appropriate.

Research conducted by the Harvard Project on Economic Development further highlights the link between indigenous political and economic institutions and a tribe's own cultural values and norms:

Economic development can take hold in the face of a wide range of cultural attitudes on such matters as the sanctity of natural resources or the propriety of individuals trying to make themselves wealthier. However, unless there is a fit between the culture of the community and the structure and powers of its governing institutions, those institutions may be seen as illegitimate, their ability to regulate and organize the development process will be undermined, and development will be blocked.²⁰⁹

The issue is not whether tribes are too "Western" or not "Western" enough in their approach to development, but whether there is a "congruence between community norms" and economic development efforts.²¹⁰

Yet, recent scholarship suggests that historically based ethnocentric views of Indian culture continue to shape contemporary tribal development rights. Professor Kristen Carpenter and Tribal leader Ray Halbritter note "an undercurrent in debates about American Indian economic development is the concern that tribes are departing from certain [perceived] notions of 'Indianness' when they engage in commercial enterprises...."²¹¹ One example is *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*²¹² in which the Supreme Court questions the appropriateness of applying tribal sovereign immunity principles to situations in which tribes

207. *Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 267/1984, Report of the Human Rights Committee, U.N. GOAR, 45th Sess., Supp. No. 40, Vol. 2, at 1, U.N. Doc. A/45/40 Annex 9 (A) (1990) (views adopted March 26, 1990).*

208. *Id.*; see also ANAYA, *supra* note 2, at 134-35.

209. Cornell & Kalt, *supra* note 10, at 10; see generally STEPHEN CORNELL & JOSEPH P. KALT, WHERE'S THE GLUE? INSTITUTIONAL BASES OF AMERICAN INDIAN ECONOMIC DEVELOPMENT (Harvard Project on Am. Indian Econ. Dev., Report No. 52, 1991).

210. HENSEN & TAYLOR, THE STATE OF NATIVE AMERICA, *supra* note 10 (manuscript at 106); see generally CORNELL & KALT, WHERE'S THE GLUE? *supra* note 209.

211. Carpenter & Halbritter, *supra* note 110, at 311.

212. 523 U.S. 751 (1998).

are not engaged in what the court considers to be “traditional tribal customs and activities.”²¹³

The work of Dr. D’Arcy McNickle suggests that such legal constructs misread history and its impact on indigenous cultures:

What was not anticipated . . . was the tendency of human societies to regenerate themselves, keeping what is useful from the past, and fitting the new into old patterns . . . to make a working system. Indian societies did not disappear by assimilating to the dominant white culture . . . but assimilated to themselves bits and pieces of the surrounding cultural environment. And they remained indubitably Indian, whether their constituents lived in a tight Indian community or commuted between the community and an urban job market.²¹⁴

From a practical perspective, tribes and businesses have found that the most successful cross-cultural relationships are ones that are built on shared knowledge and mutual respect rather than preconceived notions about ones culture, government, or business philosophy.

III. THE LEGAL DIMENSIONS OF DEVELOPMENT

“You approach doing business with an Indian tribe as you would with any foreign country. . . . Talk to an attorney who has done business with the tribe. . . . Learn about their court system, what commercial laws are in place and what the process is of appearing in the tribal court.”²¹⁵

This section focuses on how law operates within the specific context of tribal economic development. It highlights some of the more commonly encountered legal issues both for tribes attempting to develop their economies, as well as those *seeking* to do business with tribes and their members.²¹⁶

213. *Kiowa Tribe*, 523 U.S. at 758. See also Carpenter & Halbritter, *supra* note 110, at 314-16 for a more detailed discussion of the Court’s analysis. Professor Bruce Duthu makes a similar point, demonstrating how “an atavistic narrative construct of tribalism” in Supreme Court opinions can diminish important sovereign rights. N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 175 (1997).

214. D’ARCY MCNICKLE, *THEY CAME HERE FIRST* 283 (rev. ed. 1975). See generally Fred Lomayesva, *Indian Identity—Post Indian Reflections*, 35 TULSA L.J. 63 (1999).

215. *A Special Supplement on Lending in Indian Country*, *supra* note 23, at 8 (quoting attorney Tom Acevedo, member of the Confederated Salash and Kootenai Tribe of Montana).

216. For a more comprehensive analysis of the various legal issues discussed in this section, see generally FELIX S. COHEN, *HANDBOOK ON FEDERAL INDIAN LAW* (forthcoming 2005 ed.); Mark A. Jarboe, *Doing Business in Indian Country*, in FED. RESERVE BANK OF MINNEAPOLIS, *LENDING IN INDIAN COUNTRY: CULTURAL AND LEGAL ISSUES* (1997) (seminar materials on file at the University of Minnesota Law Library).

A. TRIBAL GOVERNMENTS AND BUSINESSES

Native American nations have different organizational structures depending on their history, culture, and sources of power. For example, Section 16 Indian Reorganization Act (IRA) tribes are governed by written constitutions.²¹⁷ Non-IRA governments derive their powers from a variety of sources such as tribal history, custom, resolution, or ordinance. In addition, a tribe may be incorporated under Section 17 of the IRA with a governing business charter issued by the Secretary of Interior or may have formed business entities organized under tribal or state law.²¹⁸ Given the many differences in organization and structure, a tribe's organic law and relevant corporate documents (such as a charter or by-laws) should be consulted in all business transactions.²¹⁹ These laws and corporate documents will inform the parties on such important matters as who has the power to act on behalf of the tribe or corporation, what legal steps are necessary to pursue various economic activities, and what procedural and substantive rules might apply to such activities.

B. SOVEREIGN IMMUNITY

Immunity from suit without consent has long been viewed as an important attribute "inherent in the nature of sovereignty."²²⁰ The doctrine of sovereign immunity is justified in part on the theory that protection of the public treasury or domain is necessary to sustain a well functioning government. Similar to the federal government and states, suits against tribes are barred by the doctrine of sovereign immunity.²²¹ What follows is a brief summary of some of the issues relevant to tribal sovereign immunity and commercial transactions.²²²

217. See Indian Reorganization Act, 25 U.S.C. § 476 (2004).

218. *Id.* § 477.

219. See, e.g., HOOPA TRIBE BUSINESS CODES, tits. 50-58 (these titles include a comprehensive business policy, corporations and partnerships codes, commercial transactions codes and a tribal entities code); NAVAJO CODE, tit. 5A, §§ 1-9 (uniform commercial code); see generally, CONSTITUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION, art. IV, § 1(b) (1993) (outlining council's power to "negotiate, make and perform contracts and agreements"); CONSTITUTION AND BYLAWS OF THE ROSEBUD SIOUX TRIBE, art. IV, § 1(f) (1985) (outlining council's power to "make all economic affairs and enterprises of the [Oglala Sioux] Tribe in accordance with the terms of a charter that may be issued to the Tribe by the Secretary of the Interior").

220. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 310 (2000) (quoting Alexander Hamilton, THE FEDERALIST No. 81, at 130 (Henry S. Commager ed., 1949)).

221. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); see also *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

222. For a more detailed description of this doctrine and the relevant case law see COHEN, *supra* note 216, at § 7.01.

The right of sovereign immunity has been broadly defined by the United States Supreme Court to include immunity from suit regardless of where the tribal activities occur or whether those activities are governmental or commercial in nature.²²³ Thus, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,²²⁴ the Supreme Court held that a tribe was not subject to suit in state court for a breach of contract involving an off-reservation commercial activity.²²⁵

A tribe's immunity can be waived either by the tribe or Congress, but the waiver must be clear and unequivocal.²²⁶ Tribal immunity has been waived or limited by Congress in a few contexts. One example of a limitation (as opposed to an outright waiver) is the Indian Tribal Economic Development and Contracts Encouragement Act of 2000.²²⁷ As explained more fully below, the Act revises 25 U.S.C. § 81 by narrowing the scope of contracts needing Secretarial approval.²²⁸ Yet one stated pre-condition to approval of the remaining contracts covered by the statute is an express statement by the tribe disclosing or waiving tribal immunity from suit.²²⁹

It is in the area of contracts and commercial transactions that the waiver of sovereign immunity has received the most attention in recent

223. See *Kiowa Tribe of Okla.*, 523 U.S. 751 (1998).

224. 523 U.S. 751 (1998).

225. *Kiowa Tribe of Okla.*, 523 U.S. at 760; see also *Okla. Tax Comm'n*, 498 U.S. at 511. Some questions remain as to the scope of a tribe's immunity with respect to off reservation economic activity. E.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

226. See *C & L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Kiowa Tribe*, 523 U.S. at 754; *Oklahoma Tax Comm'n*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

227. Pub. L. No. 106-179, 114 Stat. 46 (2000) (codified at 25 U.S.C. § 81 (2000)). See generally Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?*, 33 CONN. L. REV. 667 (2001).

228. See *infra* Part III.F. The statute applies to any contracts that "encumber Indian lands for a period of 7 or more years." 25 U.S.C. § 81.

229. *Id.* § 81(d). The relevant portion of the statute reads:

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract

(2) does not include a provision that:

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

Id.

years.²³⁰ Sovereign immunity remains a necessary component of tribal sovereignty. From an economic standpoint, it ensures that tribes are able to protect the public trust from unlimited suits.²³¹ As is true for governments generally, however, the trend has been toward limited waivers of tribal immunity as means of stimulating economic development.²³² The key factor here (from an allocation of resources standpoint) is that tribes and not the federal government are determining the scope of the waiver to employ based on individual tribal circumstances. As one tribal attorney puts it “sovereign immunity is best understood as the power of a government to define the forum, procedure, and limits to be placed upon suits against itself.”²³³

Contractual waivers of immunity raise additional concerns for both tribes and those doing business with tribes. As noted earlier, waivers of immunity must be clear and unequivocal. Whether a tribe has waived its immunity will depend on the express terms of the agreement.²³⁴ Courts have held, however, that the phrase “sovereign immunity” is not necessary to constitute a waiver. Thus in *C & L Enterprises Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the United States Supreme Court held that an arbitration clause providing for “disputes . . . arising out of or relating to the Contract . . . [to] be decided by arbitration in accordance with the Construction Industry Arbitration Rules,” along with a choice-of-law clause constituted a clear waiver of immunity.²³⁵

To the extent a tribe wishes to contractually waive its immunity, practitioners have suggested several issues for tribes to consider: Whether to limit who may bring the claim? What types of claims to allow? What types of relief can be sought? What forum will the claim be heard in? What laws will apply—tribal, federal and/or state? Whether to limit the amount of the judgment and the sources from which the judgment can be

230. *E.g., Kiowa Tribe*, 523 U.S. at 760; *Okla. Tax Comm'n*, 498 U.S. at 514.

231. Critics of recent congressional proposals requiring a broad based waiver of tribal immunity in return for federal funds emphasize the political and economic consequences of such waivers, such as exposing the sovereign's public trust to an unlimited number of suits. *See generally* Scholasser, *supra* note 237.

232. *Hearings on S. 613 Before the Senate Committee on Indian Affairs*, 106th Cong. 44-45 (May 19, 1999) (statement of David Tovey, Confederated Tribes of the Umatilla Indian Reservation).

233. Scholasser, *supra* note 220, at 317.

234. *See generally* Ralph Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1984).

235. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 415 (2001). Lower courts have focused on similar factors, such as whether the agreement articulates a specific forum for the resolution of disputes and whether it specifies the laws that will be applicable to such suits. *See* Scholasser, *supra* note 220, at 324-35.

satisfied? Whether to limit the type of damages allowed? And whether to limit the waiver's duration?²³⁶

Businesses seeking waivers of immunity will have similar concerns, such as: What recourse it would like to have in the event of default? What assets are relevant to a potential claim? Who has control over those resources and what steps need to be taken to ensure those assets can be reached in the event of a dispute? And to what extent have those assets been set aside to secure other tribal obligations?²³⁷

One other approach that tribes have taken to address the sovereign immunity question is to create separate businesses entities that are not subject to immunity from suit. This has been a particularly useful tool for tribes running off reservation business. Any judgments, however, would be appropriately limited to assets held by that entity.²³⁸ These entities may be incorporated under Section 17 of the IRA or formed under tribal or state law. To determine whether the entity has the power to sue or be sued, the entity's organizational documents as well as the laws under which it is incorporated will need to be consulted.²³⁹ The organic laws of the tribe should also be consulted to the extent an individually owned business is incorporated under tribal law. While not covered by sovereign immunity, tribal law may nevertheless limit the forum in which the business can be sued.

C. LAND OWNERSHIP AND CONTROL OF PROPERTY

As noted earlier, land can be crucial to the development process. First, it is a key economic resource.²⁴⁰ Second, a tribal land base allows for the application of tribal law often to the exclusion of state and federal law.²⁴¹

236. Schlosser, *supra* note 220, 325-28.

237. *See Jarboe, supra* note 216, at 66.

238. Some state courts already to distinguish between "economic organizations" that are subordinate to the tribe and other businesses that are as a matter of practice separate from the tribe in terms of determining the scope of tribal waiver. *E.g.*, *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977); *Dixon v. Picopa Constr. Co.*, 755 P.2d 421 (Ariz Ct. App. 1987).

239. *Cf. Doyle v. Native Village of Mekoryuk*, 17 INDIAN L. REP. 5075 (Alaska Sup. Ct. 1990) (holding that the tribal corporation was immune from suit in the exercise of its § 16 IRA powers, and distinguishing between tribal entities operating under §16 of the IRA, which were immune from suit, and those operating under § 17, which were not immune).

240. *See supra* Part II.B.2. While development does occur off reservation, it raises a host of jurisdictional issues for tribes. *Cf. Mescalero Apache Tribe v. Jones*, 411 US 145 (1973).

241. *See infra* Parts III.D-E and G, for a discussion of some of the limitations on the application of state and federal law.

Third, it provides a place for tribes to undertake development that is tied directly to the needs and resources of its constituency.²⁴²

Current legal rules dealing with the ownership and control of property in Indian Country also present unique challenges for tribes. Most tribal land is held in trust by the federal government—the purpose of which is to prevent further loss of land and resources.²⁴³ Yet, certain restrictions relevant to commercial dealings flow from this trust status. For instance, such property cannot be sold, taxed, or encumbered without federal approval.²⁴⁴ Allotments held in trust for the benefit of Individual Indians are similarly restricted.²⁴⁵ What this means in terms of development is that such property is not readily available for collateral, since lenders generally secure loans with a mortgage on property.

However, tribes retain substantial control over the use and disposition of tribal property. For instance, tribes can lease their lands and the leases or leasehold improvements can then be used as security.²⁴⁶ Leases are generally granted for a term of 25 years with an option to renew for another 25 years.²⁴⁷ A limited number of tribes have the authority to lease their lands for a term of 99 years.²⁴⁸ In addition, with the exception of those tribes still burdened with long-term leases negotiated by the federal government, tribes determine in the first instance which lands will be leased and for what purpose.²⁴⁹ This ability to grant long-term leasing is an important economic tool to attracting investment capital, jobs, and goods and services to a reservation. It is also an important revenue stream for many tribes, particularly those rich in natural resources.

There are federal laws and regulations pertaining to leasing that need to be consulted.²⁵⁰ For instance, a party entering into a lease with a tribe should be aware that the Secretary of Interior retains certain powers with respect to leases, such as the power to disapprove or cancel a lease not in

242. See *supra* notes 184-190 and accompanying text (discussing the issue of human capital and social welfare and their relationship to economic development).

243. See generally *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). One example of where this goal was achieved would be the Eastern Land claims settlements that arose out of a series of suits against eastern states for failing to seek federal approval of Indian land transfers under the Trade and Intercourse Acts. *Id.*

244. 25 U.S.C. § 392 (2001).

245. *Id.*

246. *E.g.*, 25 U.S.C. § 415 (2001).

247. *Id.*

248. *Id.*

249. *Id.*

250. *E.g.*, 25 U.S.C. ch. 12 (2001) (Lease, Sale, or Surrender of Allotted or Unallotted Lands); 25 C.F.R. §§ 162.1-162.20 (2005). See generally Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974).

accord with applicable laws or regulations.²⁵¹ Leasing can also raise political and cultural issues regarding the proper balance between lands controlled by tribes and those leased to non-members.²⁵²

Beyond the issues of trust status and leasing, parties involved in commercial transactions need to be aware of the various types of land-holdings that exist within Indian country. Federal statutes, such as the General Allotment Act of 1887, brought about a checkerboard pattern of land ownership within some reservations.²⁵³ Today, the types of potential land ownership that one can find within Indian Country include: tribal lands, allotted lands held in trust by individual Indians, non-Indian and Indian fee lands, and lands held by the federal government or states.²⁵⁴ This land distribution presents a number of jurisdictional and regulatory concerns for tribes wishing to pursue a cohesive economic strategy. For instance, while tribes retain broad powers to regulate economic activity occurring on tribal land, it's authority may be limited with respect to lands not held by the tribe or its members.²⁵⁵ To determine the status of lands at issue, parties may need to consult various documents, such as treaties, congressional acts, federal regulations, and land records maintained by the Land Titles and Records Office of the Bureau of Indian Affairs.

Finally, tribes and businesses need to consider whether certain federal laws are triggered by the proposed development on tribal lands. For instance, courts have held that Secretarial approval of leases on tribal lands triggers a review under the National Environmental Policy Act.²⁵⁶

D. TAXATION

One common question raised in the area of taxation is the level of tax liability that a business may incur or be exempted from in the context of doing business with an Indian tribe. There are many variables to this question that are fact specific. For instance, who is *seeking* to collect the tax (e.g., tribe, state, or federal government)? What type of tax is at issue (e.g., property, sales and excise, or income)? Who is the tax being assessed against (e.g., tribal business, Individually-owned member business, or non-

251. *E.g.*, 25 U.S.C. § 415; 25 C.F.R. §§ 162.1-162.201. *See generally* Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072, *cert. denied* 464 U.S. 1017 (9th Cir. 1983); Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir. 1989).

252. Chambers & Price, *supra* note 250, at 1061-68.

253. General Allotment Act of 1887 ("Dawes Act"), 25 U.S.C. §§ 331-333 (repealed).

254. Chambers & Price, *supra* note 250, at 1061-68

255. *E.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

256. *See, e.g.*, Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

member business)? And where is the tax liability being incurred (e.g., tribal land or non-member fee land; on or off reservation)? Each variable will affect whether and to what extent a business will be taxed.²⁵⁷

Commercial planning in this area is complicated by the fact that relevant tax law is riddled with uncertainties. The remainder of this section highlights some of those uncertainties and what tribes and businesses are doing to address them.

While there are a number of tax advantages to doing business with Indian tribes, non-member businesses remain subject to varying levels of federal, tribal, and state taxation.²⁵⁸ As a general matter, such businesses must pay all the taxes they would otherwise have to pay to the federal government. However, Congress has created tax incentives for private enterprises interested in doing business in Indian country. Tax relief is provided primarily in the areas of accelerated depreciation,²⁵⁹ employment tax credit,²⁶⁰ interest on tax exempt bonds issued by the tribe,²⁶¹ empowerment zone credits and incentives,²⁶² and new markets tax credits for community development entity investors.²⁶³

Similarly, many Indian tribes offer incentives in the way of tax breaks as means of attracting business to the reservation. Tribes retain broad powers to tax transactions occurring on tribal land.²⁶⁴ This power extends to members and nonmembers alike.²⁶⁵ As the Supreme Court noted in *Merrion v. Jicarilla Apache Tribe*,²⁶⁶ "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."²⁶⁷ While some tribes rely on taxes as a source of revenue,²⁶⁸ many do not for reasons noted earlier.²⁶⁹ Moreover, additional savings can be realized in the context of property

257. For a complete analysis of other related tax issues see generally COHEN, *supra* note 216, at §§ 9.02[6], 9.03[2][c], 9.04[2][b],[3].

258. *See id.*

259. *See* 26 U.S.C. § 168(j) (2001).

260. *See* 26 U.S.C. § 45A (2001).

261. *See* 26 U.S.C. § 7871 (2001).

262. *See* 26 U.S.C. §§ 1391(g)(h), 1392 (2001).

263. *See id.* § 45D.

264. *E.g.* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

265. *Merrion*, 455 U.S. at 137.

266. 455 U.S. 130 (1982).

267. *Id.* at 130.

268. *See e.g.* *Kayenta Township Tax Initiative Economic Development*, *supra* note 44; *Absentee Shawnee Tribe of Oklahoma*, Absentee Shawnee Tax Commission, Rules and Regulations, AST-TCR 100.

269. *See supra* notes 104-109 and accompanying text.

taxes. Since tribes do not pay any property tax, these savings may be passed on to lessees of tribal property who normally incur such expenses.

One gray area of the law is the scope of tribal power to tax beyond tribal lands. In *Atkinson Trading Company v. Shirley*,²⁷⁰ the Supreme Court held that the Navajo Nation did not have the authority to impose its hotel tax on a business located on fee simple land within the borders of the reservation.²⁷¹ The court stated that the Nation's authority to tax did not extend beyond tribal land unless it could prove one of the two exceptions outlined in *Montana v. United States*.²⁷² The Court ultimately concluded that the hotel tax was not "related to any consensual relationship" with the hotel owner and was not "necessary to vindicate the Navajo Nation's political integrity."²⁷³ While the case raises a host of legal uncertainties, it also presents practical problems for tribes seeking to develop a comprehensive economic development strategy.

A related problem is the level of state taxation a non-member business could incur when doing business with an Indian tribe. This is yet another area of the law that is wrought with inconsistencies. As noted earlier, tribal lands are exempt from property taxation. In other areas, such as excise and sales tax, the rules are not as clear. The Supreme Court in *White Mountain Apache Tribe v. Bracker*²⁷⁴ articulated "two independent but related barriers" to the assertion of state taxation authority in Indian country.²⁷⁵ Such authority may either be preempted by federal law or infringe on the right of tribal self-governance.²⁷⁶ Yet, the Supreme Court has recognized a state's power to tax in situations where the state offers services to the Tribe and the state tax bears a relationship to those services being offered.²⁷⁷ Additionally, if no value is added on the reservation in relation to an activity or commodity being bought or sold by a non-member that activity or commodity may be subject to state taxation so long as the legal incidence

270. 532 U.S. 645 (2001).

271. *Atkinson*, 532 U.S. at 1835.

272. *Id.*; *Montana v. United States*, 450 U.S. 544 (1981).

273. *Atkinson*, 532 U.S. at 1835.

274. 448 U.S. 136 (1980).

275. *White Mountain*, 448 U.S. at 142.

276. *Id.* As the Court noted the two barriers are "independent" because either can serve as a barrier to state laws applying to activity on the reservation. *Id.* Yet, as the Court further notes, they are related because broad congressional powers can limit tribal self-government and tribal self-government informs interpretations of federal laws that are vague and ambiguous. *Id.* at 142-43; see also *Ramah Navajo Sch. Bd. v. New Mexico*, 458 U.S. 832 (1982); *Cent. Mach. Co. v. Ariz. Tax Comm'n*, 448 U.S. 160 (1980).

277. *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). *Cf.* Richard J. Anson Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective State*, 78 OR. L. REV. 501, 534 (1999).

of the tax does not fall on the tribe or its members.²⁷⁸ Yet, many uncertainties remain as to the scope and breadth of a state's ability to tax nonmembers doing business with tribes.²⁷⁹

The rules are somewhat different when dealing with businesses owned by tribal members within Indian country. As a general matter, tribal members who live and work within Indian country are subject to federal but not state taxation.²⁸⁰ However, certain variables can affect this analysis, such as the residency of the tribal member or a treaty or statute such as Section 6 of the General Allotment Act.²⁸¹ Additionally, to the extent these businesses rely on outside suppliers, states may attempt to assert jurisdiction prior to the goods or services entering the reservation. Such a tax would be of questionable validity.²⁸²

Tribes and tribal businesses also enjoy broad immunity from tax. Tribes are not subject to federal income tax regardless of where that income is earned.²⁸³ Additionally, The Indian Tribal Governmental Tax Act of 1982 placed tribes on par with states and local governments for certain tax purposes.²⁸⁴ For instance, individuals and businesses can deduct tribal taxes from their federal income tax.²⁸⁵ Tribal governments are also exempt from certain federal excise taxes so long as the purchases made by the tribe are in the exercise of an essential governmental function.²⁸⁶

278. See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155-59 (1980); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

279. See *Ansson*, *supra* note 277, at 536, and the 9th circuit cases discussed therein.

280. E.g., *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973).

281. See, e.g., *Chickasaw Nation*, 515 U.S. 450 (subjecting non-residents so state income tax); *Squire v. Capoean*, 351 U.S. 1 (1956) (exempting allottees from federal tax on income derived directly from the allotment).

282. See *Cent. Mach. Co. v. Ariz. Tax Comm'n*, 448 U.S. 160 (1980) (holding that state of Arizona could not impose its transaction privilege tax on non-Indian corporation located off reservation for a sale of farm tractors to tribal enterprise located on the Gila River Reservation); *but see Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (allowing action taken against off reservation wholesaler selling cigarettes to on reservation establishment allowed where tax could otherwise be assessed against on reservation purchasers).

283. The Internal Revenue Code does not include Indian tribes within the definition of taxable entities.

284. The Indian Tribal Governmental Tax Act of 1982, Pub. L. No. 97-473 (codified at 26 U.S.C. 7871 (2001)). The Act was designed to "strengthen tribal governments . . . by eliminating the unfair burden of taxes Indian tribal governments must now pay." Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS., 335, 338 n.13 (1985) (quoting 127 CONG. REC. S5666, S5667 (daily ed. June 2, 1981) (remarks of Sen. Wallop (R-Wyo.))).

285. 26 U.S.C. 7871(a)(3) (2005).

286. § 7871(b).

Moreover, Indian nations can issue tax-exempt bonds in much the same way as a state or municipal government.²⁸⁷ Investors in the bonds are then able to deduct the interest from their federal income tax.²⁸⁸ Yet, to qualify for the exemption, a tribe must use the proceeds from the issuance in the exercise of an “essential governmental function.”²⁸⁹ The exact contours of what constitutes an “essential governmental function” are not clear. In general, it covers infrastructure and a limited class of economic development projects.²⁹⁰ Legislation has been proposed that would loosen the restrictions on tribal debt obligations, allowing tribes to issue bonds for a greater range of activities.²⁹¹ Such legislation would be accord with the practice of tribes relying on tribal business ventures to pay for governmental services. Similar legislation may be necessary to clarify a tribe’s tax status as it relates to federal wagering and occupational excise taxes on certain gaming activities.²⁹²

In terms of state taxes, tribes are not required to pay any income tax or sales and excise tax on the purchases of goods and services within Indian country.²⁹³ From a transactional standpoint, the non-taxable status of a tribe may inure to the benefit of non-tribal business. For instance, if capital expenditures are necessary to meet the terms of a contract, the tribe could purchase the materials and supplies tax-free. Yet, in light of *Arizona Department of Revenue v. Blaze Construction Company, Inc.*,²⁹⁴ the parties need to be particularly cognizant of how they structure such an agreement.²⁹⁵ In that case, the Supreme Court held that the tax-exempt status of a tribe did not extend to an agreement with a private contractor to perform work on tribal roads where the Bureau of Indian Affairs retained contracting responsibility.²⁹⁶

287. § 7871(a)(4).

288. § 7871(c). While “private activity bonds” are generally not covered under the exemption, proceeds used in relation to certain types of tribal manufacturing facilities are covered. See § 7871(c)(3).

289. § 7871(c)

290. *Id.*

291. Current restrictions on the use of private activities bonds impede the law’s intended purpose of enhancing tribal economic development and self-government. As noted earlier, tribes rely heavily on tribal businesses to support essential governmental services, particularly given the limits on the ability of tribes to tax. See generally Williams, *supra* note 284.

292. *E.g.*, Chickasaw Nation v. United States 534 U.S. 84 (2001).

293. *Cf.* McClanahan v. Arizona State Tax Commission, 411 U.S. 164.

294. 526 U.S. 32 (1999) (the contractor was a member of the Blackfeet Tribe and incorporated under the laws of the tribe).

295. *Blaze*, 526 U.S. at 38.

296. See *id.* (indicating that contractor was a member of the Blackfeet Tribe and incorporated under the laws of the tribe).

Another possibility is for the Indian nation and corporation to form a joint venture. If the tribe owns 51% of the controlling interest, the venture may benefit from various advantages available to the tribe. The parties could also *seek* to allocate the risk by contract.²⁹⁷ Finally, a business may be insulated from any state excise or sales tax to the extent substantial value is added to a commodity or activity on the reservation.²⁹⁸

The issue of tribal taxation of businesses located outside Indian country also raises a host of unresolved questions. For instance in *Mescalero Apache Tribe v. Jones*,²⁹⁹ the Supreme Court held that income from a tribally owned ski resort located on federal lands outside the reservation was within the reach of a state gross receipts tax.³⁰⁰ Yet, the doctrine of sovereign immunity may shield the tribe from any enforcement proceedings by the state to collect such taxes.³⁰¹ Similar issues have been presented in the context of states seeking to involve tribes in the collection and remittance of state excise and sales tax on non-members.³⁰² One tribe that has a number of off-reservation businesses has averted potential clashes with the state by establishing limited liability corporations in accordance with state law for all business that do not, according to the tribe, provide essential governmental services.

A number of tribes have entered into tribal-state compacts to address some of the legal uncertainties in the allocation of tax liability. As recently as 2001, there were some 200 voluntary tribal-state compacts addressing issues of taxation.³⁰³ These agreements have been structured differently depending on the type of tax at issue and the concerns raised by the two sovereigns regarding the tax. For instance, sales tax agreements appear to

297. A Tribe could provide for a rebate on payments of any tax liability that is legally assessed against the corporation, the corporation could assume the risk, or the parties could split the difference. *Cf.* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 140 n.7 (1980).

298. *Cf.* *Washington v. Confederated Tribes of The Colville Indian Reservation*, 447 U.S. 134, 155 (1980). For instance, *Ho-Chunk, Inc. of the Winnebago Tribe of Nebraska* retains its exclusive taxing power by engaging in gasoline wholesaling and the sale of Indian-made cigarettes. The law in this area, however, appears to be in a state of flux. *See Ansson, supra* note 277, at 534-42.

299. 411 U.S. 145 (1973).

300. *Mescalero Apache Tribe*, 411 U.S. at 158.

301. *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751 (1998).

302. *E.g., Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

303. *Tax Fairness and Tax Base Protection: Hearings on H.R. 1168 Before the House Comm. on Resources*, 105th Cong. (June 24, 1998) (testimony of W. Ron Allen, President, National Congress of American Indians) (hereinafter *Allen testimony*), available at 1998 WL 373086; *see also* ARIZ. LEGISLATIVE COUNCIL, STARTED: STATE TRIBAL APPROACHES REGARDING TAXATION & ECONOMIC DEVELOPMENT 81-105 (1995); *Ansson, supra* note 277, at 545-50. *See generally* Frank Pommersheim, *Tribal State Relations: Hope for the Future*, 36 S.D. L. REV. 239 (1991).

fall into two general categories: (1) a tribe agrees to tax at the same level as the state and then retains the proceeds or divides the tax between the state and tribe (based on the percentage of sales to non-Indians v. Indians) or (2) the tribe agrees to collect some percentage of tax on non-Indians for the state.³⁰⁴

E. REGULATION

Three primary areas of regulatory authority important to doing business in Indian country and with Indian tribes are: environmental, employment, and commercial law.³⁰⁵

In thinking about regulatory issues, developers and businesses will need to assess: Who is likely to have regulatory authority over the proposed project (tribe, state and/or federal government)? Are there any tribal codes in place that apply to the proposed development (e.g., land use, environmental review, health and safety, employment rights, commercial law)? Has the tribe assumed any regulatory authority to enforce federal statutes (e.g., the Clean Water Act, the Clean Air Act, or CERCLA)? And what tribal administrative or judicial procedures are in place to address regulatory disputes?

Tribes are faced with a similar set of issues when seeking to ensure certainty and stability around commercial transactions. For instance, whether to adopt tribal codes that relate to economic development. Codes can be a useful tool for promoting economic development. They provide a measure of consistency that may not be achievable on a case-by-case basis. Uniform codes add yet another layer of predictability to the process.³⁰⁶ Yet, not every type of code is going to be relevant to every tribe's situation. In fact, too much regulation can actually impede economic growth. Moreover, even uniform codes may need to be modified to fit a particular tribe's socio-economic needs and traditions.

The remainder of this section discusses some relevant codes and their application to businesses operating within Indian country. It also includes some information on tribal-state agreements.

304. Allen testimony, *supra* note 303.

305. For additional analysis see COHEN, *supra* note 216, at §§ 5.04[2], 10.02.

306. As with states, tribes can benefit economically from using model codes for several reasons: uniform law facilitates commerce; model codes spare resources in legislation, enforcement, and facilitate use of attorneys familiar with the law. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has created a Committee on Liaison with Native American Tribes, in order to build relationships with tribal governments and facilitate adoption of model codes, as adapted to tribal concerns. See generally Fred H. Miller & Duchess Bartmess, *Uniform Laws: Possible Useful Tribal Legislation*, 36 TULSA L.J. 305 (2000).

1. *Commercial Law*

Although federal law regulates commercial activity in many ways, Congress has not used its Commerce Clause powers to enact a basic commercial law. Thus, commercial law has been left to the states and tribes. Commercial transactions within Indian Country, because they involve “consensual relationships” with tribes or their members, are likely to fall squarely within the jurisdiction of the tribe.³⁰⁷ Even if the initial transaction occurs outside of Indian country, non-member parties may nevertheless be subject to tribal law or face sovereign immunity issues.³⁰⁸

Commercial activity aids economic development by permitting exchange. If two parties enter into a voluntary, informed exchange (whether it is a sales contract, a secured loan, or any other transaction), then, in theory, both are better off in their own estimation. By hypothesis, each party preferred what it received to what it gave up in the transaction (or she would not have entered into the transaction). Thus, voluntary exchange is the basic way that a market economy allocates resources to uses. An important question tribes face is whether to adopt portions of the Uniform Commercial Code, which provides a legal infrastructure for the basic types of commercial exchange.³⁰⁹ The UCC provides articles governing such commercial areas as sales and leases of goods (articles 2 and 2A), banking and payment systems (Articles 3-5), warehouse receipts (Article 7), securities (Article 8) and security interest in personal property (Article 9). Adoption of the UCC (or any uniform business code) may be thought to aid economic development in a number of ways, but also has certain hazards:

310

Costs of drafting a law: As with the adoption of other uniform codes, it spares a tribe the cost of resources to form a new commercial law from scratch. The UCC, however, may not include rules and norms that a tribe would have chosen.

307. *E.g.*, *Montana v. United States*, 450 U.S. 544 (1981); *Babbit Ford, Inc. v. Navajo Nation*, 710 F.2d 587 (9th Cir. 1983) (holding that car purchased off reservation by tribal member could only be repossessed on the reservation in accordance with tribal law).

308. *See Babbit Ford*, 710 F.2d at 589.

309. The influence may also run in the other direction. Karl Llewellyn, principal drafter of UCC Article 2, had previously studied the law-ways of the Cheyenne, leading one commentator to suggest that Article 2's break from legal formalism towards recognition of existing norms (usually attributed to Llewellyn's legal realism) owed much to what he learned from the Cheyenne. *See generally*, David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 *BUFF. LAW REV.* 1457 (1999).

310. *See generally* Tribal Legal Code Project, *Commercial Codes*, at http://www.tribal-institute.org/codes/part_seven.htm (last visited May 22, 2005); Fred H. Miller & Duchess Bartmess, *Uniform Laws: Possible Useful Tribal Legislation*, 36 *TULSA L.J.* 305 (2000).

Accordingly, a tribe may adopt non-uniform provisions, as discussed below.

Uniformity: the UCC is perhaps the most successful of all uniform law projects, adopted with small changes in every state. By adopting the same rules, the cost of entering into transactions with tribes and businesses are reduced. Both can freely use lawyers, forms and such from other jurisdictions. Both are likely to have some experience in transactions governed by the UCC. Likewise, the parties need not learn a new set of commercial law to do business if the UCC governs. In addition, to the extent the tribal UCC is the same as the state UCC, any uncertainty about the governing law is reduced, because the governing rule would be the same. But this would not be the case where the tribe or the state has adopted a non-uniform provision. Nor would it be the case in one important area, the perfection of security interests by filing, if the state required filing in one UCC office and the tribe required filing in a different office—but the parties could simply file in both places, as permitted by UCC Article 9.

Certainty: The UCC seeks to provide simple and predictable rules, thereby permitting parties to plan their transactions and allocate risks more easily. But as with any area of the law, the UCC is at best only relatively clear and simple.

Reduced negotiation and contract drafting costs: The UCC provides a comprehensive set of rules applicable to commercial transactions. Thus, rather than drafting a contract to address every issue, the parties need only specifically address those issues where they wish to provide for a different rule than the UCC default rule. However, parties unfamiliar with the UCC may not realize what they have implicitly agreed to in the contract.

Financing: Because of the trust limitations on alienation of real estate interests, tribes and their members must place more reliance on personal property as collateral. UCC Article 9 provides a mechanism for the creation and enforcement of such secured transactions.

Non-exclusivity: The UCC provides a framework for commercial law, but does not preempt other applicable rules of law. In particular, the UCC largely provides a set of default rules that parties may tailor to their transaction, and does not play a regulatory role, other than such provisions as general obligations

of good faith, limits on the enforceability of unconscionable contracts, and limits on certain practices in debt collection. But adoption of the UCC leaves tribes free apply other laws that protect consumers and otherwise regulate commercial activity. In addition, adoption of the UCC may not raise issues that arise with respect to other uniform codes. Because the UCC generally provides default, rather than mandatory, rules, it leaves both tribes and non-tribal parties free to tailor their transactions.

The Tribal Legal Code Project suggests several issues for a tribe considering adoption of the UCC (or in drafting its own commercial code).³¹¹ A tribe should consider whether the UCC provisions are consistent with tribal norms concerning interpersonal dealings.³¹² The law should be adopted only if it fits, or can be adapted to fit the tribe's traditions and culture.³¹³ Adopting a mismatched law that is contrary to tribal norms and practices could result in disregard of the law. This would increase complexity and uncertainty in commercial dealings, not reduce them. The Project further suggests that tribal counsel support is essential.³¹⁴ In addition, which portions to adopt must also be considered: the most favored articles are Article 2 (Sales of Goods) and Article 9 (Secured Transactions). The Indian Law Clinic at the University of Montana has designed a useful model tribal code that tribes can modify to fit their own specific socio-economic and cultural needs.³¹⁵

A tribe can adopt the UCC as part of the tribal code, making such non-uniform provisions as it chooses. Alternatively, some tribes may ratify, or incorporate by reference, the UCC as enacted by a relevant state's UCC (which can also include case law interpreting the UCC), again with appropriate amendments. Adopting a state's UCC maximizes uniformity with a nearby jurisdiction. It also has the practical advantage of reducing costs of maintaining law libraries and facilitating work with attorneys. A third approach is to enter into an agreement with a state. For example, one Tribe recently entered into a compact with the State of South Dakota, adopting portions of South Dakota's UCC with provisions addressing

311. See Tribal Legal Code Project, *supra* note 310.

312. *Id.*

313. *Id.*

314. *Id.*

315. MODEL TRIBAL CODE (Tribal Legal Code Project, Third Draft, n.d.), at <http://www.umt.edu/lawinsider/library/lawbysub/ucc.htm#1-101> (last visited May 22, 2005). For additional tribal commercial codes, see generally NAVAJO CODE, tit. 5A, §§ 1-9; ROSEBUD SIOUX TRIBAL CODE, tit. 14, chaps. 1, 2, 9; MILLE LACS BAND CODE, tit. 18, chap. 3.

various concerns of the Tribe.³¹⁶ This approach has the benefits of uniformity and allows the tribe to address any potential conflicts in the agreement, but may not be suitable for all tribes. A tribe may work with the state toward other efficiencies, such as using the state's filing office for UCC filings, rather than maintaining a separate tribal office. The hazard of indirectly adopting rules or case law (even those arising after the tribe's action) that are inconsistent with tribal norms can be addressed with limiting provisions in the adoption, or by granting tribal courts power to interpret provisions appropriately (which in turn raises issues with respect to uniformity and predictability).

The actions of tribes in adopting portions of the UCC reflect some common concerns. Many tribes do not adopt the UCC rules permitting self-help repossession by creditors, a practice with a sorry history in Indian country.³¹⁷ Whether creditors could pursue such remedies is most likely a matter of tribal law.³¹⁸ Other tribes have limited enforceability of exclusions of warranties. At least one tribe has eliminated requirements that certain transactions be evidenced by a signed writing.

Parties doing business in Indian country must also remember that the UCC does not displace other applicable law. For example, perfecting a security interest under the UCC will not be sufficient, if BIA approval for the transaction is required.³¹⁹ Likewise, other tribal law may be applicable to a transaction. For instance, a transaction involving a manufactured home may have to meet requirements of the UCC and also the tribal housing code, in order to a creditor to have a perfected security interest.³²⁰ In addition, even where state law (rather than tribal law) appears to govern a transaction it may nevertheless be preempted by federal law or be unenforceable to the extent it infringes on tribal self-government.³²¹ Thus,

316. See Kay Humphrey, *New Code Bodes Well for Cheyenne River Development*, INDIAN COUNTRY TODAY, Jan. 24, 2001, at D1.

317. See Tribal Legal Code Project, *supra* note 310. Cf. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983) (discussing the Navajo Nation's repossession statute codified at NAVAJO CODE, §§ 607-609).

318. Whether a creditor could pursue such remedies under state law through state officials even if the goods were purchased off reservation is a matter of tribal law. *E.g. Babbitt Ford*, 710 F.2d at 594. The Supreme Court's decision in *Nevada v. Hicks* doesn't appear to change this analysis, since the limitations imposed on tribal jurisdiction in *Hicks* relate specifically "to the question of tribal-court jurisdiction over state officers enforcing state [criminal] law." 533 U.S. 353, 376 (Souter concurring).

319. See *infra* Part III.F.

320. HOUSING CODE (Tribal Law and Policy Inst. 1999), at http://www.tribal-institute.org/codes/part_three.htm (last visited May 22, 2005).

321. *E.g. In re Blue Lake Forest Prods.*, 30 F.3d 1138 (9th Cir. 1994); see generally *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

it would be prudent to perfect any security interest in accordance with tribal law to the extent practicable.

Tribes are also likely to consider other codes in the commercial area, raising similar issues as the UCC. A corporation code, for example, may facilitate economic development by aiding in the creation of institutions and enterprises. It may also aid business development by providing a vehicle for enterprises and entities that are more familiar to non-Indian business partners or investors.³²² One tribe in particular has adopted a series of comprehensive codes designed to facilitate economic development.³²³ But, as with the UCC, there may be conflicts with traditional ways of organizing people and with other tribal norms that need to be considered in the adoption of such codes. They may also raise important sovereign immunity and jurisdictional issues.³²⁴

2. *Land Use and the Environment*

Tribes retain broad authority to regulate environmental quality and land use on tribal lands and lands held by tribal members within their territory.³²⁵ They also have the power to regulate environmental activities on reservation land held by nonmembers who enter into “consensual relationships” with the tribe or undertake activities that affect “the political integrity, the economic security, or the health and welfare of the tribe.”³²⁶ The Supreme Court has employed a somewhat different test when considering the scope of tribal regulatory power in the specific area of zoning.³²⁷ A state generally lacks environmental or land use powers in Indian country, except in those instances where a tribe may lack authority over non-Indians within its territory.³²⁸

322. *See generally* Tribal Legal Code Project, Tribal Corporation Codes, at http://www.tribal-institute.org/codes/part_eight.htm (last visited May 22, 2005).

323. *See* HOOPA UNIFORM BUSINESS CODES, tits. 50-60 (covering such matters as: business corporations law, tribal entities law, non-profit corporations law, partnership law, licenses and standards law, secured transactions, and a small business incentive program).

324. *See infra* Part III.G.

325. *Montana v. United States*, 450 U.S. 544, 1981 (holding tribe had broad powers to regulate hunting and fishing of nonmembers on tribal land).

326. *Montana*, 450 U.S. at 565-66.

327. In *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 427-30 (1989), a divided court held that the tribe had exclusive zoning powers in areas of the reservation that were “closed” to non-member entry. However, it lacked the power to zone non-member fee land within those areas of the reservation that had been substantially “open” to non-members. *Id.* The exact scope of a tribe’s environmental regulatory authority under the *Montana* test or the *Brendale* decision remains unclear.

328. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Brendale*, 492 U.S. 408 at 429.

An important question tribes face is whether to adopt various types of land use or environmental codes. The Tribal Legal Code Project offers several model codes in the areas of land use, zoning and environmental review.³²⁹ As was the case with the UCC, a tribe needs to consider whether certain codes are consistent with tribal norms and traditions, since adopting a mismatched law could result in disregard of the law. Moreover, too much regulation that is not appropriately streamlined may actually impede the development process.

Land use planning is by definition a key aspect of the development process, since it involves important decisions about the future use of a key economic resource. It also provides a means to protecting important natural and cultural resources. The Tribal Legal Code Project suggests several areas for a tribe considering adoption of a land use and planning code:

The allocation of tribal lands to individual members: There are two ways that a tribe may allocate land to its members—either through a comprehensive code or standard form lease or permit document. Both have their advantages and disadvantages. A comprehensive code is useful in assuring neutral and uniform allocation of tribal lands. The downside is that it may be difficult to change. A lease or permit process, on the other hand, allows the tribe more flexibility in reconsidering land use rights.³³⁰

Land acquisition under the Indian Land Consolidation Act: This aspect of the code would address the reacquisition of lands lost to a tribe as a result of the General Allotment Act of 1887. It would involve an initial assessment of what lands the tribe currently holds and what lands it would like to buy or exchange, and then a process by which such lands would be added to the tribal land base.

Comprehensive law reform & planning and specific land use statutes: A tribe must decide in the first instance whether it needs to adopt a comprehensive land use policy and relevant laws or select specific areas for regulation. Which procedure a tribe

329. Tribal Legal Code Project, *supra* note 310. See generally Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J.L. & PUB. POL'Y 86 (1991).

330. See generally Tribal Legal Code Project, Land Use and Planning, at http://www.tribal-institute.org/codes/part_four.htm (last visited May 6, 2005). The Project identifies some issues a tribe may confront, such as: Who is eligible to receive land? What uses will be made of the land (e.g., business, grazing, hunting & fishing, timber or home)? Whether those uses will be exclusive? Who will handle the allocation of land rights and potential disputes? What procedures will be employed for both? See *id.*

chooses will depend in part on the scope of anticipated development and whether there is a current legal infrastructure in place to address that development. Moreover, there are specific areas of land use unique to tribes that may be important to consider, such as: environmental and aesthetic protection, historic preservation, use allocation and growth management, civil rights protections, and special provisions for tribal court jurisdiction.³³¹

The Tribal Legal Project offers some “best practices” in the area, such as the Navajo Nation Land Code (a fairly comprehensive code that addresses most of the issues raised above), the Cabazon Land Use Ordinance (a code that addresses high density use in a small area), and the Gila River Land Use Code (a specific land use statute addressing homesites).³³²

Zoning codes are a specific form of land use planning, addressing such things as use control and site plan review. The Tribal Legal Code Project identifies some major issues relevant to tribal development:³³³

Jurisdiction: A tribe needs to consider the scope of its power to zone in light of *Brendale*³³⁴, as well as ways to address jurisdictional uncertainties (such as intergovernmental agreements with states or local entities).

Use designation: In addition to the more common designations (e.g., residential, commercial, industrial), does the tribe wish to include special zoning areas to protect important cultural and natural resources.

Institutional infrastructure: Tribes may want to consider what agency or board will be responsible for overseeing zoning issues, who will serve on these boards (including whether to include non-members), and how to resolve disputes involving zoning (e.g., judicial review in tribal courts).

331. *See id.* The American Planning Association offers both model statutes and a Guidebook relating to land use planning, <http://www.planning.org> (May 6, 2005).

332. *See* Tribal Legal Code Project, *supra* note 330 (discussing NAVAJO CODE, tit. 16; CABAZON LAND USE ORDINANCE, chaps. 1-20; and the GILA RIVER LAND USE CODE).

333. Tribal Legal Code Project, Tribal Zoning Codes, *at* http://www.tribal-institute.org/codes/part_five.htm (last visited May 6, 2005).

334. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 432 (1989).

Individual civil rights protections: There may be relevant tribal or federal laws (e.g. Indian Civil Rights Act) that need to be considered in the exercise of tribal zoning powers.

Cases such as *Brendale* make it difficult for tribes to realize the complete benefits of these land use and zoning laws.³³⁵ The Tribal Legal Project highlights ways in which tribes have dealt with these legal uncertainties. As in the case of taxation, tribes have signed agreements with states and local governments to establish coordinated land use plans and increase predictability in this area. For example, the Swinomish Indian Tribal Community signed a cooperative land use agreement with Skagit County, Washington that provides, in part: (1) a comprehensive land use plan (which articulates land use goals, policies for protecting resources, and an implementation strategy), (2) a coordinated framework for conducting permitting activities, (3) an agreed upon mechanism for resolving disputes, and (4) a nine-member Planning Advisory Board made up of four Tribal appointees, four County appointees, and a neutral facilitator.³³⁶ Other tribes are utilizing this latter strategy of placing non-Indian residents on regulatory boards as a way of avoiding future conflicts.³³⁷

Tribes might also choose to rely on their environmental regulatory powers to control land use and development. Tribes may have assumed control over federal environmental programs in such areas of clean air, clean water, hazardous substance, and pesticide use. Since such powers can extend to the entire reservation irrespective of the type of landholding at issue, they may be more useful in furthering a tribe's development plans.³³⁸

Other tribal and federal environmental laws beyond the ones mentioned above may be relevant to economic development. For instance, the National Environmental Review Policy Act (NEPA) has been applied to certain activities involving Indian lands.³³⁹ Moreover, tribes often have

335. See generally Lorie M. Graham, *Securing Economic Sovereignty Through Agreement*, 37 N.E. L. REV. 523 (2003); Craighton Goeppele, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment after Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 65 WASH. L. REV. 415 (1990); Royster, *supra* note 329.

336. See Tribal Legal Code Project, *supra* note 354. Additional examples include the COLVILLE LAND USE ORDINANCE, §§ 4-3; MUCKLESHOOT ZONING ORDANANCE, § 7.01; MEMOMINEE TRIBAL ZONING ORDINANCE, § 34.

337. For instance, The Colville Tribe appoints two non-Indian residents to their Land Use Review Board, which administers the tribe's zoning ordinance. Tribal Legal Code Project, *supra* note 333.

338. In order to assert such jurisdiction, tribes must demonstrate that the "potential impacts of regulated activities on the tribe are serious and substantial." Environmental Protection Agency, Amendments to the Water Quality Standard Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991).

339. See, e.g., *Davis v. Morton*, 469 F.2d. 593 (10th Cir. 1972) (NEPA applies to the Secretary of Interior's approval of lease involving Indian lands).

their own environmental review processes in place. Tribal environmental review codes, among other things, provide a useful framework for coordinating compliance with a variety of federal and tribal regulations.³⁴⁰ These regulations can cover a broad spectrum, from housing and building codes to solid waste and environmental protection.

3. *Employment Issues*

There are a number of employment issues raised in the context of tribal economic development, from health and safety to retirement. As was true in the commercial and environmental law context, the overarching question for tribes and businesses working with tribes is the application of tribal, state, and federal labor and employment laws. State laws generally do not apply to tribes absent express agreement or legislation granting a state civil regulatory authority.³⁴¹

The analysis is different when considering federal labor and employment laws. The issue turns on whether federal laws that apply to all persons similarly apply to Indian tribes. Some federal statutes expressly exempt Indian tribes from their coverage.³⁴² Respect for tribal sovereignty appears to be the primary basis for such an exemption.³⁴³ However, the analysis is much more complicated when dealing with federal labor and employment laws that do not specifically mention Indian tribes. Currently, there is a split in the circuits with respect to the applicability of these laws to Indian nations, as well as the appropriate test for assessing their application.³⁴⁴ Applying the Indian canons of construction, which favor retention of tribal rights, some courts have ruled against the application of federal labor and employment laws absent clear congressional intent to the contrary.³⁴⁵ Another line of cases take a completely different approach to this question, starting from the general premise that federal statutes of

340. See Tribal Legal Code Project, *Environmental Review Codes*, at http://www.tribal-institute.org/codes/part_nine.htm (last visited May 22, 2005). See generally Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 AM. INDIAN L. REV. 297 (1997).

341. See generally William Buffalo & Keven J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995).

342. E.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2000); Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 1211(B)(i) (1999).

343. E.g., H.R. Rep. No. 88-914 (1963), reprinted in LEGISLATIVE HISTORY TO TITLE VII, at 110 (1964).

344. E.g., *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989).

345. E.g., *Cherokee Nation*, 871 F.2d at 938-39; *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493-94 (7th Cir. 1993).

general applicability apply to tribes unless the application of the law would interfere with tribal sovereignty (narrowly defined as “purely intramural matters”), treaty rights, or rights confirmed by statute.³⁴⁶ This latter approach has been criticized by a number of commentators.³⁴⁷

Some federal courts have similarly distinguished between what they perceive are “commercial” versus “governmental” endeavors by a tribe when addressing the question of general applicability. As noted earlier, this distinction is somewhat specious given the economic and legal reality of tribes and their need to rely on commercial enterprises as a means of funding essential governmental services.³⁴⁸ Nevertheless, this distinction was highlighted in a recent decision by the National Labor Relations Board regarding the application of the NLRA to certain on-reservation tribal activities.³⁴⁹ This decision has been criticized by one scholar for departing from “the foundational principles of federal Indian law” (including the canons of construction) and for its “overly-restrictive, subjective test that minimizes [tribal] sovereignty and ignores congressional policy” supporting tribal economic development.³⁵⁰

Another important factor to consider is the issue of sovereign immunity. As noted earlier, tribes are generally immune from suit unless that immunity has been “unequivocally” waived by a tribe or Congress.³⁵¹ There are no waivers of tribal sovereign immunity in federal labor and employment statutes. And while this immunity will not protect the tribe from enforcement of federal law by the federal government, it will bar private suits to enforce those laws.³⁵²

Perhaps more important in terms of the future success of tribal economic development is what tribes themselves are doing with respect to

346. *E.g.*, *Mashantucket Sand & Gravel*, 95 F.3d 174; *U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n*, 935 F.2d 182 (9th Cir. 1991); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

347. *See generally* Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 11 (2005); Vicki J. Limas, *Application of Federal Labor & Employment Statute to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); *see also* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

348. *See supra* Part II(1)(b).

349. *See* *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138, 2004 WL 1283584, at *13 (May 28, 2004) (“Running a commercial business is not an expression of sovereignty in the same way that running a tribal court is.”).

350. *See generally* Singel, *supra* note 347.

351. *See supra* notes 220-239 and accompanying text. *See also* *Kiowa Tribe of Indians of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

352. *See, e.g.*, *Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe*, 166 F.3d 1136 (11th Cir. 1999) (holding that Congress did not unequivocally abrogate tribal sovereign immunity in the ADA with respect to private suits).

labor and employment issues. Tribes are working to formulate policies that both promote the rights of workers as well as better reflect the concerns and realities of a tribe's unique political, economic, and cultural circumstance. As Professor Wenona Singel so aptly notes "[s]ince tribally-owned commercial enterprises provide revenues that fund public services, tribes have an interest in maintaining revenue flows and restricting business interruptions. Much like the states and the federal government, tribes must ensure that the collective bargaining process does not jeopardize the continued provision of essential public services."³⁵³ One example would be the passage of tribal "right-to-work" ordinances, dealing with compulsory membership in unions.³⁵⁴ As a sovereign entity, tribes have the right to pass such laws in much the same that states do.³⁵⁵ Tribes have been equally active in other areas of employment law, such as health and safety, worker's compensation, and unemployment benefits. Tribes are also legislating in the area of Indian employment preferences through the passage of tribal employment rights ordinances.³⁵⁶ Enforcement of these ordinances against businesses located within the reservation should fall within the jurisdiction of tribes because they directly impact the "economic security" and "health and welfare of the tribe" and often involve activities that arise out of "consensual relationships."³⁵⁷ Indian employment preferences have similarly been incorporated into federal law, with respect to such matters as the Bureau of Indian Affairs, the Indian Health Services, federal contracts or grants affecting Indian people, and employment by businesses operating "on or near a reservation."³⁵⁸ The Supreme Court has upheld these preferences as a proper means of promoting tribal self-government.³⁵⁹

F. CONTRACTS AND THE SALE OF GOODS

In addition to tribal commercial laws, certain federal statutes should be consulted when entering into contracts with tribes. For instance, 25 U.S.C. § 81 requires any contract with an Indian tribe that "encumbers Indian lands for a period of seven or more years" to be approved by the Secretary of the

353. Singel, *supra* note 347, at 11.

354. *See id.* at 35-39 (discussing tribal right-to-work laws).

355. *E.g.*, NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002).

356. *See generally* Kevin N. Anderson, *Indian Employment Preference: Legal Foundations and Limitations*, 15 TULSA L.J. 733 (1980).

357. *See generally* Montana v. United States, 450 U.S. 444 (1981).

358. *E.g.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e2(i) (2000) (allowing preferential treatment of Indians by employers "on or near a reservation"); Indian Preference Act, 25 U.S.C. § 472 (2000) (relating to hiring and promotion in the BIA and IHS).

359. Morton v. Mancari, 417 U.S. 535 (1974).

Interior or the Secretary's designee.³⁶⁰ Leasehold mortgages, easements, and any other contract that gives a third party "exclusive or nearly exclusive proprietary control over tribal land" are within the purview of the law.³⁶¹ According to BIA regulations, contracts that "violate federal law" or fail to include a notice of tribal immunity from suit will not be approved.³⁶² If disapproval occurs the contract is void as matter of law.³⁶³ The Section 81 approval requirement does not apply to certain types of contracts, such as contracts with tribal members, contracts entered into in connection with the Indian Self-Determination and Tribal Self-Governance Acts, and those entered into with Section 17 tribal corporations.³⁶⁴ Other statutes may nevertheless require secretarial approval, such as contracts relating to leases on tribal lands.³⁶⁵

Non-Indian businesses should also consult the federal Indian trader licensing laws when selling goods in Indian Country.³⁶⁶ The law generally requires non-Indian sellers with fixed places of businesses on Indian reservations to obtain a license from the Bureau of Indian Affairs. Yet, the law may apply more broadly.

G. JURISDICTION AND CHOICE OF LAW

Contracting parties may need to address three distinct, but interrelated jurisdictional and choice of law issues:

Which court or courts have subject matter jurisdiction to hear a claim; tribal, state or federal? Tribal courts may have subject matter jurisdiction to entertain suits arising out of commercial transactions with tribes or tribal entities given the consensual nature of the transaction.³⁶⁷ In determining the proper scope of tribal court powers, parties need to consider the extent of tribal court jurisdiction under tribal law, as well as any limitations

360. Pub. L. No. 106-179, 114 Stat. 46 (codified at 25 U.S.C. § 81 (2000)). Approval is normally obtained from the BIA area office with jurisdiction over the trust lands in question. Prior to the passage of the Indian Tribal Economic Development and Contracts Encouragement Act of 2000, the scope of Section 81 was rather ill defined. The Act not only narrowed the type of contracts needing Secretarial approval, it specified the general criteria to be used in the approval process. It also addressed the issue of tribal sovereign immunity.

361. 25 C.F.R. § 84.002 (2005).

362. *Id.* § 25 C.F.R. 84.006.

363. *Id.* § 25 C.F.R. 84.007.

364. *Id.* § 25 C.F.R. 84.004 (2005). Contracts with tribally-chartered corporations that are owned by the tribe or its members may also fall outside the scope of the law. Additional exemptions can be found at 25 C.F.R. section 84.0004.

365. *See, e.g.*, 25 U.S.C. § 415 (2000).

366. *See, e.g.*, 25 U.S.C. §§ 261-264.

367. *See generally* *Montana v. United States*, 450 U.S. 444 (1981).

arising as a matter of federal law. State and federal courts, on the other hand, often lack subject matter jurisdiction in such matters except under limited circumstances.

What law governs any transaction or dispute arising between the parties? To the extent a tribal court has jurisdiction, tribal law often dictates what law governs the transaction or dispute. State courts may similarly choose to apply tribal law to any commercial dispute arising in Indian country.

What are the personal jurisdiction questions that need to be addressed? The principle issue is one of sovereign immunity. As earlier discussed, even if a court has subject matter jurisdiction over a claim, it may nevertheless lack personal jurisdiction over the tribe without a proper waiver of immunity.³⁶⁸

Each of the above issues is governed by a number of complicated legal rules that require a case-by-case analysis.³⁶⁹ However, one commonly raised question is the ability of parties to contract around jurisdiction and choice of law rules involving Indian nations. Forum selection, sovereign immunity, and choice of law provisions may be utilized as a means of minimizing the jurisdictional uncertainty associated with such transactions. However, such provisions may not be enforceable in all instances. For example, a contractual agreement that provides for a right of repossession by self-help upon default for property located on reservation may be unenforceable as a matter of tribal law as was the case in *Babbitt Ford v. The Navajo Nation*.³⁷⁰ Contractual forum selection or choice of law provisions may run into similar problems to the extent they are inconsistent with the applicable laws of the tribe or seek relief in a court without proper subject matter jurisdiction. Additionally, contractual waivers of immunity must be clear and unequivocal if they are to be enforced.

IV. CONCLUSION

While some tribes have experienced a marked change in their socio-economic status in the last few decades, others continue to face high rates of poverty and unemployment. Research and the experiences of tribes support the conclusion that much of tribal economic development depends on a tribe's sovereignty over such things as resources, regulatory standards,

368. See *supra* Part III.B.

369. For further analysis of these difficult jurisdiction and choice of law issues see generally COHEN, *supra* note 216.

370. 710 F.2d 587.

taxation, and the like. Put another way, sustainable economic development is closely linked to tribal self-determination. For now, Congress remains supportive of this policy. Yet, efforts to undermine the self-determining powers of tribes remain constant. Moreover, recent Supreme Court cases (such as *Atkinson Trading Company, Nevada v. Hicks, and Chickasaw*)³⁷¹ that fail to recognize the link between sovereignty and the fundamental right to development create difficult institutional challenges for tribes seeking to improve the lives of their constituency through economic development.³⁷²

371. *Atkinson Trading Co. v. Shirley*, 535 U.S. 645 (2001); *Nevada v. Hicks*, 33 U.S. 353; *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

372. For a more in-depth discussion of how recent Supreme Court decisions impact tribal economic development efforts, see generally Lorie M. Graham, *Securing Economic Sovereignty Through Agreement*, 37 N.E. L. REV. 523 (2003).
