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Law Reform and Poverty Reduction: Legal Impediments to Economic Development in Indian Country and the Need for Changing Federal Indian Law

Robert T. Coulter
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Despite the profits of some Indian casinos, most Indian reservation communities and Indian individuals suffer the greatest economic poverty and the worst social and health conditions of any group in the United States. These dreadful conditions continue despite generations of programs, projects, and aid on the part of the federal government, private foundations, and others.

To be sure, some praiseworthy progress has been made in some Indian communities, but the overall pattern continues: extreme poverty, lack of opportunity, high unemployment, and bad social, health, and housing conditions on most Indian reservations, including epidemic levels of violence against Indian and Alaska Native women. Why have these conditions been so resistant to change? We believe that a large part of the answer is found in the impediments and barriers to development that are a part of federal Indian law. The National Congress of American Indians in a 2012 paper¹ wrote:

Underlying the state of Native peoples in America today is their inability to control and utilize their land as their sovereign governments so desire and as recognized by treaties with and the laws of the United States of America.

This paper, presented by Chickasaw Nation Lt. Governor Jefferson Keel, goes on to describe numerous legal barriers, hurdles, and challenges that impede tribal economic development.

¹ National Congress of American Indians, *In the United States: A Pressing Need to Develop Tribal Economies – Regaining Sovereignty Over Our Land*, a paper for the Conference and Consultation with the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, April 26-27, 2012.

Professors Stephen Cornell and Joseph P. Kalt, co-directors of the Harvard Project on American Indian Economic Development, addressed the critical connection between poverty and the legal rights of tribes in their 1998 article,² where they concluded:

The lesson of the research is clear. It is increasingly evident that the best way to perpetuate reservation poverty is to undermine tribal sovereignty. The best way to overcome reservation poverty is to support tribal sovereignty.

We are eager to find ways to examine and document this connection between the legal impediments to tribes' sovereignty and development and the persistent poverty in Indian communities.

In other fields, particularly the civil rights and racial equality fields of work, it has long been demonstrated and understood that equality of opportunity based upon a legal system that forbids discrimination and provides legal remedies for discrimination is an essential prerequisite to improving the living conditions of all people, especially African Americans and other racial minorities.³ But this relationship between the applicable legal framework and the alleviation of poverty and improvement of living conditions has not been given much attention with respect to Indian and Alaska Native nations and communities.

In the view of many people, the unfair and unconstitutional federal legal framework that tribes must work under makes it extremely difficult for them to reduce poverty or achieve lasting economic development or to otherwise improve the economic and social conditions in reservation communities. Economic development and measures to overcome the extreme poverty that characterizes most Indian reservations and communities are excessively difficult and vulnerable to reversal or failure, because the legal infrastructure that is taken for granted elsewhere does not exist in Indian Country. By "legal infrastructure that is taken for granted" I mean a system or framework of law that is reasonably fair and consistent with the Constitution and norms of human rights law. In Indian Country, that is, Indian reservations and communities, the applicable legal framework is a complex combination of federal law, state and local law, and the laws of the Tribe. It is not a good or reasonable system of law.

The negative effects of this existing legal framework include:

- Burdens or obstacles to economic development and poverty reduction.
- An adverse legal climate or context that discourages investment and business enterprise.

² Stephen Cornell and Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, p. 32 (Malcolm Weiner Center for Social Policy) (1998).

³ A notable example is the United States Supreme Court's famous school desegregation decision, *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Court relied heavily on the evidence that segregation laws had profound ill effects on the social and psychological well-being of Negro children, requiring that such laws be invalidated and replaced.

- A legal climate that belittles, intimidates, and discourages Indian and Alaska Native governments and individuals.
- Marginalization of tribes, denial of opportunities in the economic field, and reduction of tribes' capacity to act in the economic interests of their citizens.
- Diminishment or denial of tribes' and Indian people's political participation, thus making all tribal action to improve economic and social conditions more difficult.

A number of significant legal impediments have been identified and examined by scholars and lawyers. These are by no means all of the existing impediments, but they are ones that have been already identified as specific elements of the law that impair Indian nations' prospects for economic development. They fall into two categories that will be discussed below:

1. Legal impediments to tribes' financing for development, and
2. Legal impediments to tribes' resource use and regulatory jurisdiction.

Legal impediments to tribes' financing for development

Four specific legal impediments to tribal economic development have been identified and studied by Professor Gavin Clarkson. All of these impediments discriminate against Indian and Alaska Native tribes by imposing burdens or restrictions on them that do not apply to other governments. First is the denial of tax exemption for revenue bonds issued by tribes, an advantage enjoyed by other governments.⁴ This reduces tribes' ability to generate capital for economic development or for other government uses. Second, tribal governments are not recognized as "accredited investors" under Regulation D of the federal Securities Act of 1933, and this makes it significantly more difficult for tribes to invest their funds in business enterprises in their own communities or in other Native communities.⁵ The third impediment is that tribes, unlike cities and states, are not permitted to issue securities, that is, bonds, without registering the securities.⁶ Finally, banks that want to do business in Indian Country may not open a branch on a reservation without the permission of the governor of the state where the reservation is located.⁷ These and other legal problems have been addressed by other legal scholars as well.⁸

Tribes and their lawyers have been working for some time to correct these unfair restrictions, and there is some chance of correcting at least some of them. But these reforms are not yet accomplished. And there may well be other impediments or barriers of this sort that have not yet been identified for correction.

⁴ G. Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. Rev. 1009 (2007).

⁵ G. Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. Colo. L. Rev. 285 (2009).

⁶ *Id.* at 326.

⁷ *Idem.*

⁸ E.g., Matthew Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 784 (2004).

Legal Impediments to Tribes' Resource Use

Another group of unfair legal restrictions on tribes that has received some scholarly attention is the group of statutes and regulations that give the federal government unilateral and almost absolute control over tribes' lands and resources.⁹ Separate statutes provide that the Interior Department has authority over the use of all agricultural lands and all timber resources belonging to tribes – regardless of the consent or wishes of the tribal government. Other federal law gives the Interior Department unilateral control over the subsurface resources of tribes – minerals, coal, oil and gas, etc. In its role as trustee, a role that sometimes has little legal justification, the federal government has persistently failed to protect tribes' resources, failed to see that tribes receive the compensation due them, failed to turn over funds to tribes, and failed to properly account for the tribes' funds derived from trust resources. In addition, the federal government claims to hold trust title to most tribal lands and therefore insists on imposing restrictions on the leasing and other uses of nearly all tribal lands. The failure of the federal government to live up to its obligations as trustee also has negative effects on the many Indian individuals who hold interests in allotted lands. Because of the federal government's failure to deal with the fractionation of individual trust allotments, individuals are effectively prevented from deriving significant benefit from their allotted lands.

All of these legal restrictions and impediments are well-known to tribal leaders, who frequently complain of the red tape, the required approvals, and other difficulties in making use of and benefitting from the tribes' own lands and resources. There are, no doubt, still more specific legal impediments and barriers, and further research is needed to identify and analyze them.

Systemic Legal Impediments to Tribes' Development

In addition to these specific legal impediments to tribal economic development and poverty reduction, there are even greater and probably more damaging problems for tribes that derive from the general character of federal Indian law and from some of its general legal rules. I refer to this category of legal problems as systemic impediments or burdens. These are, in general, restraints or infringements upon the sovereignty and rights of Indian tribal governments. Moreover, federal Indian law is internally inconsistent, unclear, uncertain, and often unenforceable. Because of this, businesses, investors, tribes, and indeed everyone on a reservation, face risks and uncertainties unlike any that exist elsewhere. Additional uncertainty and risk are caused by the legal rules that permit the federal government to intervene and act at any time to control literally anything and every aspect of tribal governance and Indian life in Indian Country – without the normal restrictions on government action that apply everywhere else.¹⁰

The result of this defective and antiquated framework of federal law is a dreadful business climate on most reservations – usually much worse than surrounding areas.

⁹ R. Coulter, ed., *Native Land Law* 177 - 218 (2012).

¹⁰ See, Coulter, *NATIVE LAND LAW* 141 – 176 (2012).

Businesses, banks, and investors are less likely to invest, make loans, start businesses, or make business contracts where they see uncertainty in how the federal government may act, uncertainty about the legal rules that apply, the resulting lack of legal security for investments and property, and the possible lack of effective legal remedies if something goes wrong. These systemic legal problems in federal law also result over the long term in poor social conditions, poor health, lack of safe and sanitary housing, poor education, lack of a skilled work force, lack of adequate infrastructure for businesses (electricity, communication, water, roads, and buildings), and other conditions that would discourage most investors and business people.

Some of the worst elements of federal Indian law are the following:

1. The rule that Congress and the federal government have “plenary power” to do practically anything in the field of Indian affairs, without the usual restraints of the Bill of Rights and other parts of the U.S. Constitution. Because of this legal rule, federal action is unpredictable in its reach and can be catastrophic in its effects. This federal legal power includes:
 - a. Absolute control over all tribal governments, including the power to abolish tribal governments or replace them,
 - b. Control over all tribal funds,
 - c. Control over all tribal lands and trust allotments, and
 - d. Control over all tribal property of every nature.
2. The power of Congress to violate or ignore treaties, placing in doubt the ownership of lands and the status of the tribe and its government,
3. Federal control over the use of tribal lands and resources (described above),
4. The system of federal trusteeship that frequently cheats tribes of their funds and resources and that provides for little accountability,
5. The on-going failure to correct the economic and legal mess caused by allotment and extreme fractionation of ownership,
6. The denial to tribes of reasonable criminal and civil jurisdiction, along with very poor federal law enforcement, resulting in high crime, violence against Native women, and many other social problems,
7. The denial of adequate and fair legal remedies for tribes that are harmed by federal actions and policies, and
8. The frequent failure of the federal courts to provide tribes equality before the law, and their failure to apply the law consistently in Indian cases.

It is no exaggeration to see this legal framework as a nightmare for tribes, for businesses, and for potential investors.

All or nearly all of these legal impediments are discriminatory; they discriminate against Indian and Alaska Native tribes because they are Native tribes. That is, they place disadvantages and burdens on tribes and Indian communities that are not placed on others in this country. For this reason, these elements of law are, in principle, contrary to the United States Constitution – the “supreme law of the land,” but the federal courts have not so far overruled or reversed these long-standing legal rules.

The legal infrastructure that we take for granted elsewhere but that does not exist for Indian Country is, ideally, one that:

1. Is made up of rules that are clear, consistently applied, and capable of being known by all.
2. Makes property ownership relatively secure and clear.
3. Makes contracts secure and enforceable.
4. Provides prompt judicial remedies for wrongs.
5. Provides for a reasonable level of safety and freedom for individuals.

Not only does this kind of legal infrastructure not exist on Indian reservations, but even worse, federal law actually discriminates against Indian governments as compared to other governments and imposes on tribes and individuals on reservations many impediments and burdens that are not imposed on others.

While Professor Clarkson has thoroughly examined the disadvantages and harm caused by the four legal impediments he has studied, the other legal impediments and problems listed above have received relatively little attention with regard to their probably baneful effects on Indian and Alaska Native communities. Research and analysis are needed to more clearly establish what effect these elements of federal Indian law have on the business climate and on economic development efforts in Indian Country. If, as we believe, the present legal framework is a substantial impediment or barrier to economic development and alleviation of poverty, then that is an important fact that must be addressed if we hope to see a reduction of poverty and sustained economic development in Indian and Alaska Native communities.

We need to gather more factual information and hear the experiences and views of tribal leaders and experts on development in Indian Country. In addition to gathering documentary material and existing, written views of tribal leaders, we would like to bring together a group of knowledgeable tribal leaders and experts to present their experiences and insights about these issues. We would like to invite leaders such as Jefferson Keel (Lt. Governor, Chickasaw Nation and past President of NCAI), Robert Shepherd (Chairman Sisseton-Wahpeton Oyate), Melanie Benjamin (CEO, Mille Lacs Band of Ojibwe), Rocky Barrett, (Chairman, Citizen Potawatomi Nation), Rex Lee Jim (Vice-President, Navajo Nation), Stacy Leeds (Dean of Univ. of Arkansas Law School), Robert Porter (attorney and past President, Seneca Nation), and many others. Naturally, Professors Stephen Cornell, Joseph Kalt, Gavin Clarkson, and Matthew Fletcher would be important participants in such a gathering.

We believe that such a gathering, as the culmination of an initial research and data gathering effort, will provide a sound basis for understanding the relationship between poverty in Native communities and the unworkable legal framework that is imposed on them. We recognize that we may learn that the relationship is not what we expected or that there is no real connection between these two facts of Indian life. Whatever the result, we would wish to prepare a report summarizing the presentations and conclusions

of the gathering. We hope that this effort will provide a foundation for further work that would contribute to improvements in both the economic and legal conditions affecting Native tribes.

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