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Editorial contact: [editorial@theschola.org](mailto:editorial@theschola.org)

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Land Restitution: A Catalyst for Economic Development  
on Indigenous Reservations in the US

*Vinayak Menon '23*  
Lambert High School  
Georgia, USA

## **Land Restitution: A Catalyst for Economic Development on Indigenous Reservations in the US**

*Vinayak Menon '23*  
Lambert High School  
Georgia, USA

### **Abstract**

Indigenous reservation communities in the United States currently face high rates of poverty and unemployment. This paper aims to determine the socioeconomic issues affecting reservations and the underlying factors behind them. It provides context on the current state of reservations and the abject nature of living conditions. The paper then analyzes the history of federal policy and legislation in relation to reservation lands. It is well established that the tumultuous relationship between Native American tribes and the federal government has contributed to the current economic state of reservations. Importantly, the lack of tribal ownership of land contributes to dead capital – an asset that cannot be easily bought, sold, valued, or used as an investment. The structural causes of dead capital – inadequate access to formal property, bureaucratic interference by federal agencies, and legal uncertainty – reduce the economic productivity in indigenous reservation communities. This paper identifies those current economic approaches, such as the gambling industry, cigarette sales, and tourism, are inadequate to ensure sustainable poverty reduction. The concluding policy recommendations promote the implementation of a system of land restitution to tribal governments, which is a viable mechanism to promote economic growth on reservations.

### **Introduction**

Indigenous populations in the United States are diverse and are composed of many tribes with unique cultures, languages, and ancestral

lands. Five million two hundred thousand people (1.7 percent of the US population) identify as Native American or Alaska Native.

Approximately 30 percent of that subset resides on reservations.<sup>1</sup>

Reservations are the legal designation for an area of land managed by a federally recognized Native American tribe under the US Bureau of Indian Affairs. Unfortunately, individuals living on reservations experience poverty, unemployment, educational underachievement, and violent crime at disproportionate rates.

Across the United States, 1 in 3 Native Americans live in poverty with a median income of \$23,000 a year.<sup>2</sup> The poverty rate among indigenous people is the highest in the US – nearly twice the national average. Under 10 percent of Native Americans possess at least a bachelor’s degree, which is the lowest educational attainment rate among all other racial and ethnic groups.<sup>3</sup> Native American populations are also affected by social issues. As of 2019, the suicide rate among Native American youth aged 10 to 24 was 2.5 times higher than that of the general population.<sup>4</sup> Alcohol and substance-use disorders are more prevalent among Native American youth than any other ethnic group.<sup>5</sup>

The COVID-19 pandemic has exacerbated problems for indigenous populations. Indeed, as of April 2020, over 26 percent of the Native American workforce was unemployed whereas the national unemployment rate was 14 percent.<sup>6</sup> With tribal businesses – such as casinos – temporarily shuttered, tribal governments have lacked the revenue to provide basic public services – such as healthcare and education – to their members.

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<sup>1</sup> “United States: 2010 - Census Bureau.”

<https://www.census.gov/prod/cen2010/cph-2-1.pdf>. Accessed 17 Jul. 2021.

<sup>2</sup> “What Drives Native American Poverty?: Institute for Policy Research ....” 24 Feb. 2020, <https://www.ipr.northwestern.edu/news/2020/redbird-what-drives-native-american-poverty.html>. Accessed 17 Jul. 2021.

<sup>3</sup> “Degree Attainment for Native American Adults - The Education Trust.” 15 Nov. 2018, <https://edtrust.org/resource/degree-attainment-for-native-american-adults/>. Accessed 17 Jul. 2021.

<sup>4</sup> “American Indian Suicide Rate Increases - National Indian Council ....” 9 Sept. 2019, <https://www.nicoa.org/national-american-indian-and-alaska-native-hope-for-life-day/>. Accessed 17 Jul. 2021.

<sup>5</sup> “Substance Abuse Statistics for Native Americans.” 12 Feb. 2021, <https://americanaddictioncenters.org/rehab-guide/addiction-statistics/native-americans>. Accessed 17 Jul. 2021.

<sup>6</sup> “Establishing Economies on Indian Reservations | The Regulatory ....” 8 Apr. 2021, <https://www.theregreview.org/2021/04/08/miller-establishing-economies-indian-reservations/>. Accessed 17 Jul. 2021.

## Historical Background

In the treatment of indigenous populations, the federal government has a complex and turbulent history. Policies concerning reservations have been inconsistent, varying considerably from administration to administration.

The Bureau of Indian Affairs (BIA) is the main federal agency responsible for overseeing and managing the activities of tribes. Under the Department of Interior, the agency consists of approximately 4,600 employees with a budget of \$1.9 billion.<sup>7</sup> These funds are allocated in the form of social services, infrastructure maintenance, agricultural development, and natural resource management.<sup>8</sup> Other specialized organizations within the federal government that render services to indigenous peoples include the Bureau of Indian Education (BIE) and the Indian Health Service.

During the nineteenth and early twentieth centuries, the primary objective of the Bureau of Indian Affairs was to assimilate displaced native children into Euro-American culture by enrolling them in boarding schools.<sup>9</sup> In these schools, children were prohibited from using their native language, dressing in tribal clothing, and engaging in ceremonial dances. Often, tribal governments were dismantled, and BIA agents asserted control over indigenous resources and land. The General Allotment Act of 1887 further reduced tribal control over land by assigning parcels to individual landowners. This decreased tribal land ownership from 138 million acres to 48 million.<sup>10</sup>

With reports of the failure of the General Allotment Act along with widespread public outrage, in 1934, the federal government reversed course and repealed allotment, enacting the Indian Reorganization Act (IRA).<sup>11</sup> The policy secured indigenous land under “trust status” and encouraged the development of tribal governments.

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<sup>7</sup> “FY 2021 Interior Budget in Brief - US Department of the Interior.” <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-bib-bh093.pdf>. Accessed 17 Jul. 2021.

<sup>8</sup> “Indian Affairs: Home.” <https://www.bia.gov/>. Accessed 17 Jul. 2021.

<sup>9</sup> “The Allotment and Assimilation Era (1887 - 1934) - A Brief History of ...” <https://library.law.howard.edu/civilrightshistory/indigenous/allotment>. Accessed 17 Jul. 2021.

<sup>10</sup> “History – ILTF - Indian Land Tenure Foundation.” <https://iltf.org/land-issues/history/>. Accessed 17 Jul. 2021.

<sup>11</sup> “Federal Acts & Assimilation Policies | The US-Dakota War of 1862.” <https://www.usdakotawar.org/history/newcomers-us-government-and-military/acts-policy>. Accessed 17 Jul. 2021.

The act remains the foundation for federal law concerning tribal organizations, especially for the management of reservation lands and resources on reservations. In the aftermath of the IRA's passage, the federal government attempted once again to aggressively assimilate indigenous populations. Native Americans were relocated to urban areas in large numbers, scores of tribes lost federal recognition, and Public Law 280 enabled states to assume jurisdiction over reservations within their borders.

Again, the tide of public opinion eventually turned in favor of Native American populations, primarily due to the ongoing Civil Rights Movement in the 1960s and 1970s. With the Indian Civil Rights Act of 1968, the government began granting greater autonomy and self-rule to tribal authorities.<sup>12</sup>

Essentially, federally recognized tribes operated with a level of sovereignty. They could elect governments, create constitutions, and maintain jurisdiction over tribal members. However, for the most part, tribes do not own their land. As a result of this dynamic relationship, tribes or tribal members cannot use reservation lands for their benefit without approval from the federal government.<sup>13</sup>

### **Effects of Dead Capital**

This section isolates an underlying cause of endemic poverty on reservations - dead capital - and identifies the factors that contribute to its existence. "Dead capital" is an asset that cannot easily be bought, sold, valued, or used as an investment. The lack of ownership decreases the value of the asset and undermines the ability to lend or borrow against it. The term originated from Peruvian economist and Nobel Laureate Hernando de Soto Polar. He argued that the key to unlocking capital was a formal system of documented property.<sup>14</sup> Three fundamental factors contribute to the depreciation of an asset to the point that it becomes dead capital – all of which are present in Native American reservations. These factors are inadequate access to formal property, bureaucratic interference, and legal uncertainty.

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<sup>12</sup> "The United States Government's Relationship with Native Americans ...." 11 Dec. 2019, <https://www.nationalgeographic.org/article/united-states-governments-relationship-native-americans/>. Accessed 17 Jul. 2021.

<sup>13</sup> "Native Americans in the US and Property Rights: A ... - The Atlantic." 30 Jul. 2016, <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>. Accessed 17 Jul. 2021.

<sup>14</sup> "Finance & Development, March 2001 - The Mystery of Capital." <https://www.imf.org/external/pubs/ft/fandd/2001/03/desoto.htm>. Accessed 17 Jul. 2021.

*Inadequate Access to Formal Property*

More than 75 percent of reservation land is held in trust by the federal government and is managed by the BIA. Less than five percent is categorized as fee simple property, which is privately owned by Native Americans and can be easily bought or sold.<sup>15</sup> Land held in trust cannot be leased or mortgaged with a bank without being approved by the Bureau of Indian Affairs. The approval process is onerous and requires acquiring environmental and archaeological permits. This process can take up to 6 years to complete.<sup>16</sup>

Furthermore, land parcels on reservations suffer from fractionation. Under the aforementioned Dawes Act, parcels of land were divided up among the original landowner's heirs. As each landowner passed the land to their children, each child could claim a smaller ownership right to the tract of land. Over time, the number of people who owned an interest in reservation trust lands grew exponentially. Fractionated land interests over land created exorbitantly high transaction costs as consent from a majority of owners is required to initiate this form of development.<sup>17</sup> Therefore, tribal land is a "frozen asset," which prevents Native Americans from reaping its full value by selling, buying, or borrowing against it.

One of the primary issues associated with the trust status of reservation land is that it cannot serve as collateral,<sup>18</sup> which prevents banks from repossessing the land, home, or business in the case that the borrower defaults. The phenomenon has tragic consequences as multiple tribes suffer from acute housing crises. With an inability to receive a mortgage, members of reservations cannot afford to build homes. One example is the Navajo Reservation in Arizona where over 34,000 families lack access to adequate housing. Many reside in overcrowded trailer homes or wood-frame houses that offer inadequate shelter. Private developers often have difficulty in receiving financial backing from

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<sup>15</sup> "Un-American Reservations | Hoover Institution." 24 Feb. 2011, <https://www.hoover.org/research/un-american-reservations>. Accessed 17 Jul. 2021.

<sup>16</sup> "Native American Lands and Natural Resource Development ...." 15 Jun. 2011, <https://resourcegovernance.org/analysis-tools/publications/native-american-lands-and-natural-resource-development>. Accessed 17 Jul. 2021.

<sup>17</sup> "TESTIMONY OF MARY L. KENDALL ACTING ... - DOI OIG." 7 Apr. 2011, <https://www.doioig.gov/sites/doioig.gov/files/kendalltestimony110407.pdf>. Accessed 17 Jul. 2021.

<sup>18</sup> "Native American Entrepreneurship in South Dakota's Nine ...." <http://www.sdibaonline.org/docs/NativeAmericanEShipinSouthDakotas9Reservations.pdf>. Accessed 17 Jul. 2021.



lending institutions to complete Navajo home projects.<sup>19</sup> An RPI Consulting report isolates the cause: banks are wary of making loans against the property they cannot collateralize.<sup>20</sup> The Navajo are not alone; estimates from the National American Indian Housing Council found that 40 percent of reservation housing in the United States is substandard, compared to 6 percent of housing outside of reservations.<sup>21</sup> The severe and pervasive lack of housing on tribal land is a reality that is rooted in a lack of formal property rights.

Additionally, entrepreneurs, who seek to establish new businesses on reservations, lack access to financial capital. Traditionally, entrepreneurs can use their property as a location to establish their business or as collateral to receive a loan. This serves as critical start-up capital. The existing literature suggests that formal property rights enable parties to form reliable expectations when engaging in commerce. Indeed, ownership of assets is considered a catalyst for wealth creation by financing risky ventures.<sup>22</sup>

However, entrepreneurs in reservations face significant obstacles to market entry. Debt financing is scarce as tribal land cannot easily be purchased and used as collateral. Setting aside the lack of financial capital, there are numerous legal barriers to starting a business. Entrepreneurs must endure a lengthy and costly application process to receive a business lease. Because these leases are temporary, business owners incur the added risk of potentially having a renewal denied. Unsurprisingly, many small business owners on reservations are deterred by these obstacles and may enter the informal economy.<sup>23</sup> Although 10

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<sup>19</sup> “Why it’s so difficult to build homes on the Navajo Reservation.” 14 Dec. 2016, <https://www.azcentral.com/story/news/local/arizona-investigations/2016/12/14/why-its-difficult-build-homes-navajo-reservation/79541556/>. Accessed 17 Jul. 2021.

<sup>20</sup> “PHASE II HOUSING NEEDS ASSESSMENT AND DEMOGRAPHIC ....” [https://www.navajohousingauthority.org/wp-content/uploads/2015/08/Navajo\\_Nation\\_Housing\\_Needs\\_Assessment\\_091311.pdf](https://www.navajohousingauthority.org/wp-content/uploads/2015/08/Navajo_Nation_Housing_Needs_Assessment_091311.pdf). Accessed 17 Jul. 2021.

<sup>21</sup> “Housing & Infrastructure | NCAI.” <https://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure>. Accessed 17 Jul. 2021.

<sup>22</sup> “DISINCENTIVES TO BUSINESS DEVELOPMENT ... - World Scientific.” <https://www.worldscientific.com/doi/abs/10.1142/S1084946717500121>. Accessed 17 Jul. 2021, 4-6.

<sup>23</sup> “DISINCENTIVES TO BUSINESS DEVELOPMENT ... - World Scientific.” <https://www.worldscientific.com/doi/abs/10.1142/S1084946717500121>. Accessed 17 Jul. 2021, 7-8.

percent of all American workers own a business, only 7.6 percent of the Native American workforce owns a business.<sup>24</sup>

### *Bureaucratic Interference*

The trusteeship of reservation land allows the federal government to impose numerous regulations and restrictions on tribal economic activities. The BIA's mission statement indicates that its main responsibility is "to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives."<sup>25</sup> Some argue that the federal ownership of tribal assets is predicated on an outdated assumption that indigenous people are unable to manage their land or resources.<sup>26</sup>

Yet, federal agencies have repeatedly mismanaged assets on reservations. Charges of corruption and fraud date back to the 19<sup>th</sup> century in which BIA agents siphoned funds and supplies from tribal members.<sup>27</sup> More recently, government reports detailed the inefficiencies of the BIA's developmental projects. Road projects go unfinished and detention facilities are poorly maintained.<sup>28</sup>

Beyond the mismanagement of expenses, bureaucracy stymies economic development. The most significant case involves the BIA's poor management of natural resources. While some assume that reservations are in barren, desolate areas of the country, many reservations possess considerable energy resources (coal, natural gas, oil, and timber). According to the Council of Energy Resource Tribes, reservation land is endowed with untapped energy resources estimated at \$1.5 trillion.<sup>29</sup> Many tribal governments understand that mineral lands

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<sup>24</sup> "Opportunity Awaits: Native Americans and Entrepreneurship ...." 23 Jul. 2015, <https://www.kauffman.org/currents/opportunity-awaits-native-americans-and-entrepreneurship/>. Accessed 17 Jul. 2021.

<sup>25</sup> "Bureau of Indian Affairs (BIA) | Indian Affairs." <https://www.bia.gov/bia>. Accessed 17 Jul. 2021.

<sup>26</sup> "Moving Toward Exclusive Tribal Autonomy over Lands and Natural ...." <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1279&context=nrj>. Accessed 17 Jul. 2021.

<sup>27</sup> Jim Piecuch and Jason Lutz, "Indian Ring Scandal," in *The Encyclopedia of North American Indian Wars, 1607-1890*, ed. Spencer C. Tucker (Santa Barbara: ABC-CLIO, 2011), p. 384.

<sup>28</sup> "TESTIMONY OF MARY L. KENDALL ACTING ... - DOI OIG." 7 Apr. 2011, <https://www.doioig.gov/sites/doioig.gov/files/kendalltestimony110407.pdf>. Accessed 17 Jul. 2021.

<sup>29</sup> "Oversight Hearing on Indian Energy and Energy Efficiency | The ...." <https://www.indian.senate.gov/hearing/oversight-hearing-indian-energy-and-energy-efficiency>. Accessed 17 Jul. 2021.

offer the best hope for job creation, sustained income, and sufficient revenue to maintain social service programs. To begin development, the Bureau of Indian Affairs must approve and administer leases. However, the organization is notoriously slow in approving development projects, resulting in lost profit and missed economic opportunities. In a testimony delivered to the Committee on Indian Affairs in 2017, the Government Accountability Office (GAO) reported that the agency took as long as 8 years to approve energy-related leases. This cost one tribe over \$95 million in revenue.<sup>30</sup> Worse yet, the BIA often sells resources to energy companies far below market value. For instance, the BIA leased timber production for the Quinault tribe at “only about 2 percent of market value.”<sup>31</sup> The testimony identified other concerns with BIA management of energy development on reservations – such as deteriorating equipment and technology, incomplete data, and under-collection of income.<sup>32</sup>

In part, reservations experience low agricultural yields because the federal government operates as a trustee. That is, the BIA regulations limit the flexibility of farmers cultivating reservation land. BIA authorities, along with the Secretary of the Interior, can invalidate a leasing agreement if regulatory terms are not satisfied.<sup>33</sup> These restrictions often result in lost income for indigenous landowners as their farmland goes uncultivated and becomes infested with weeds – reducing productivity and overall yield. The effects are notable as previous studies found lands held in trust are 80 to 90 percent less productive than privately-owned, fee-simple land.<sup>34</sup>

### *Legal Uncertainty*

The complex relationship between the federal government and Native American tribes is evident in the litigation that has taken place between the two parties. In the landmark case *Cherokee Nation v. Georgia* (1832), Chief Justice John Marshall established that tribes were

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<sup>30</sup> “GAO-17-587T, HIGH RISK: Actions Needed to Address Serious ....” 17 May. 2017, <http://www.gao.gov/pdf/product/684699>. Accessed 17 Jul. 2021.

<sup>31</sup> “Modern Tribal Development: Paths to Self-Sufficiency ... - Amazon UK.” <https://www.amazon.co.uk/Modern-Tribal-Development-Self-Sufficiency-Contemporary/dp/0742504107>. Accessed 17 Jul. 2021.

<sup>32</sup> “GAO-17-587T, HIGH RISK: Actions Needed to Address Serious ....” 17 May. 2017, <http://www.gao.gov/pdf/product/684699>. Accessed 17 Jul. 2021.

<sup>33</sup> “Native Americans in the US and Property Rights: A ... - The Atlantic.” 30 Jul. 2016, <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>. Accessed 17 Jul. 2021.

<sup>34</sup> “Land Tenure and Agricultural Productivity on Indian ... - JSTOR.” <https://www.jstor.org/stable/725547>. Accessed 17 Jul. 2021.

“domestic dependent nations.” This established a relationship where indigenous peoples became wards, and the federal government became their guardian.<sup>35</sup> This conception of tribal sovereignty granted tribes the ability to manage internal affairs but enabled the federal government through Congress to determine the extent of their autonomy. The dilemma is that tribal, federal, and in some cases, state jurisdictions often overlap and can create uncertainty for external stakeholders.

Before discussing the legal issues with the existing property regime on reservations, it is important to establish the relevance of standardization. Dating back to the American Revolution, the “fee simple” property right system has existed within the United States market economy. As such, actors can negotiate transactions with relative ease without being burdened by certain legal nuances and statutes.<sup>36</sup>

On reservations – the situation is vastly different. Due to past federal policies, such as the General Allotment Act of 1887, lands located within reservation boundaries were often sold to non-Native buyers. When reservation land was later returned to tribes in the form of federal trust protections, it created a “checkerboard” of Native and non-Native land ownership across reservations.<sup>37</sup>

The jurisdiction of tribal governments and courts over non-Natives continues to be an ill-defined, uncertain matter. In the foundational case of *Montana v. United States* (1981), the Supreme Court devised the general principle that tribal courts lack jurisdiction over non-Native individuals or groups. There are two exemptions to this rule. The first is that tribal courts may exert jurisdiction over “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>38</sup> The other exemption occurs when the “conduct [of non-Native parties] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Subsequent cases, such as *Nevada v. Hicks* (2001), further limited tribes from exerting civil jurisdiction over non-Natives – even those

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<sup>35</sup> “*Cherokee Nation v. Georgia* :: 30 US 1 (1831) :: Justia US Supreme ....”  
<https://supreme.justia.com/cases/federal/us/30/1/>. Accessed 17 Jul. 2021.

<sup>36</sup> “Optimal Standardization in the Law of Property: The Numerus ....”  
<https://digitalcommons.law.yale.edu/ylj/vol110/iss1/1/>. Accessed 17 Jul. 2021.

<sup>37</sup> ““Emulsified Property” by Jessica A. Shoemaker - Pepperdine Digital ....”  
<https://digitalcommons.pepperdine.edu/plr/vol43/iss4/2/>. Accessed 17 Jul. 2021.

<sup>38</sup> “Tribal Jurisdiction over Nonmembers: A Legal ... - UNT Digital Library.”  
[https://digital.library.unt.edu/ark:/67531/metadc272063/m1/1/high\\_res\\_d/R43324\\_2013Nov26.pdf](https://digital.library.unt.edu/ark:/67531/metadc272063/m1/1/high_res_d/R43324_2013Nov26.pdf). Accessed 17 Jul. 2021.

residing on tribal lands.<sup>39</sup> As demonstrated, tribes do not have complete sovereign control over the activities and occurrences within reservations, leading to overlapping jurisdictions.

These legal issues affect the socio-economic outcomes for indigenous peoples by discouraging outside investors and businesses from conducting economic activities on reservations.<sup>40</sup> With neither stability nor the standardization of fee-simple property rights, investors may perceive that the risks associated with conducting commercial activity on reservations outweigh the potential benefits. Worse yet, several controversial court cases, *Plains Commerce Bank v. Long Family Land and Cattle Co.* (2008), demonstrate that financial institutions provide tribal members with less favorable terms for financing because they incur a higher risk premium.<sup>41</sup> Indeed, a report from the Federal Reserve Bank of Minneapolis found that “the lack of understanding of or confidence in tribal law and the tribal court systems” creates barriers to non-tribal investment in reservations.<sup>42</sup>

When considering the factors that contribute to dead capital, the plight of indigenous people residing on reservations seems inextricably linked to the lack of definite ownership of land. With fractionated land, lengthy lease approval processes, and overlapping jurisdictions – it is unsurprising that the federal government’s policy of holding reservation land in trust limits the potential for economic growth. In other words, even when reservations possess considerable natural resources and arable land, Native American tribes cannot benefit economically from these assets.

### **Current Policy Approaches**

Absent formal ownership of land, over the years, tribes still attempted to promote economic development. These efforts produced decidedly mixed results. This section discusses three policy approaches – gambling, cigarette sales, and tourism.

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<sup>39</sup> “*Nevada v. Hicks* | Oyez.” 21 Mar. 2001, <https://www.oyez.org/cases/2000/99-1994>. Accessed 17 Jul. 2021.

<sup>40</sup> “Subject Matter - University of Oklahoma College of Law Digital ....” <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1026&context=airl>. Accessed 17 Jul. 2021.

<sup>41</sup> “*Plains Commerce Bank v. Long Family Land & Cattle Co.* | Oyez.” 14 Apr. 2008, <https://www.oyez.org/cases/2007/07-411>. Accessed 17 Jul. 2021.

<sup>42</sup> “Tribal sovereign immunity: An obstacle for non-Indians doing ....” <https://www.minneapolisfed.org/article/1998/tribal-sovereign-immunity-an-obstacle-for-nonindians-doing-business-in-indian-country>. Accessed 17 Jul. 2021.

### *Gambling Industry*

Tribal gaming, or the building of casinos, is a common form of economic development on reservations. After the passing of the Indian Gaming Regulatory Act of 1988 – which made it difficult for states to prohibit gambling on reservation lands – the number of Indian casinos rapidly increased.<sup>43</sup> At present, there are 460 gambling operations run by indigenous tribes, which generate an annual revenue of \$34.6 billion.<sup>44</sup> For some tribes, such as the Muckleshoot in Washington, the gambling business was a boon for the tribal economy. For the Muckleshoot, gambling revenues allowed them to become self-sufficient, which improved the quality of life for tribal members.<sup>45</sup>

However, these benefits are concentrated among a handful of tribes. The National Gambling Impact Study Commission calculated that the 20 largest tribes accounted for roughly half of all gaming revenues.<sup>46</sup> Existing economic inequalities among tribes and political lobbying largely explain this uneven playing field. That is, tribes with pre-existing wealth can devote considerable resources to influence politicians who control those who receive federal gaming subsidies. In contrast, poorer tribes cannot afford to do the same.<sup>47</sup> Wealthier tribes are also better positioned to earn exemptions on regulations and taxes.

Even for tribes with already successful gaming operations, challenges to long-term prosperity persist. A gaming-dependent economy often produces devastating social costs that victimize tribal members. When gaming becomes integral to a tribal economy – pervasive gambling addiction, increased organized crime, and a declining labor force tend to follow.<sup>48</sup> The Seneca Nation of New York earned over a billion dollars in gambling that it distributed to members of the tribe in the form of annuities. Unfortunately, due to a lack of financial

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<sup>43</sup> “Indian Gaming Regulatory Act | National Indian Gaming Commission.” <https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act>. Accessed 17 Jul. 2021.

<sup>44</sup> “Gross Gaming Revenue Reports - National Indian Gaming ....” <https://www.nigc.gov/commission/gaming-revenue-reports>. Accessed 17 Jul. 2021.

<sup>45</sup> “Native Americans can’t always cash in on casinos ... - The Guardian.” 9 Aug. 2010, <https://www.theguardian.com/commentisfree/cifamerica/2010/aug/09/native-americans-casinos-poverty>. Accessed 17 Jul. 2021.

<sup>46</sup> “CHAPTER 6. NATIVE AMERICAN TRIBAL GAMBLING.” <https://govinfo.library.unt.edu/ngisc/reports/6.pdf>. Accessed 17 Jul. 2021.

<sup>47</sup> “Indian Casinos: Who Gets the Money? - TIME.” 16 Dec. 2002, <http://content.time.com/time/magazine/article/0,9171,1003869,00.html>. Accessed 17 Jul. 2021.

<sup>48</sup> “At what cost? The social impact of American Indian gaming - PubMed.” <https://pubmed.ncbi.nlm.nih.gov/10538184/>. Accessed 17 Jul. 2021.

literacy, the payouts are not properly managed by Native youth. This arrangement can also disincentivize work.<sup>49</sup>

In any case, the future of gambling for tribes is uncertain. As state governments relax restrictions and allow for gambling, tribes face increased competition that lowers profit margins. While gaming on reservations could remain profitable, it has not proved to be a sustainable pathway for tribes to reduce poverty and achieve prosperity.

### *Cigarette Sales*

Outside of gambling, some tribes operate businesses that sell cigarettes tax-free on reservations. Through the Indian Commerce Clause, cigarettes and other tobacco products sold to tribal members are exempt from state taxation.<sup>50</sup> Tribes can impose their taxes, but prices for cigarettes on reservations are still markedly lower than anywhere else. In certain states – such as New York, Iowa, and Kansas – reservation prices can be less than half the cost of state-taxed cigarettes.<sup>51</sup> The exemptions provided tribal convenience stores with market advantages and resulted in greater economic activity on tribal land. Thanks to internet sales and deliveries made via the US Postal Service, the discounted cigarettes eventually reached consumers well beyond tribal borders.

However, with the creation of new federal policies and several state-level lawsuits, the tribal tobacco business is threatened. In 2010, Congress passed the Prevent All Cigarette Trafficking Act (PACT), which is considered a violation of tribal sovereignty by some tribes.<sup>52</sup> The act prohibited the sale of tax-exempt tobacco products to non-tribal members through the Internet or the Post Office. Additionally, tribal businesses are further constricted by tax agreements that states have

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<sup>49</sup> “Native Americans in the US and Property Rights: A ... - The Atlantic.” 30 Jul. 2016, <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>. Accessed 17 Jul. 2021.

<sup>50</sup> “Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette ....” 9 Jul. 2017, <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3123&context=lawreview>. Accessed 17 Jul. 2021.

<sup>51</sup> “Preventing and Reducing Illicit Tobacco Trade in the United ... - CDC.” <https://www.cdc.gov/tobacco/stateandcommunity/pdfs/illicit-trade-report-121815-508tagged.pdf>. Accessed 17 Jul. 2021.

<sup>52</sup> “Senate passes ‘Termination Era’ PACT Act; tribal leaders will ....” 16 Mar. 2010, <https://indiancountrytoday.com/archive/senate-passes-termination-era-pact-act-tribal-leaders-will-continue-fight-2>. Accessed 17 Jul. 2021.

entered with tribes.<sup>53</sup> Notable cases, such as *Washington v. Confederated Tribes of Colville Indian Reservation* (1980)<sup>54</sup> and *Oklahoma Tax Commission v. Chickasaw Nation* (1995)<sup>55</sup> established that states may impose certain enforcement mechanisms of tax collection. At this point, 14 states have entered revenue-sharing agreements (compacts), which compel tribes to impose higher taxes to minimize the differences in cigarette prices on and off-reservation.<sup>56</sup> The overall effect of these agreements on tribal economies is unclear, as the reduced revenue from cigarette sales can be counterbalanced by increased tribal tax revenues.

### *Tourism*

Another economic opportunity tribes utilize involves attracting tourism to reservations. With transportation improvements, the remote areas where reservations are often located are now easier to access. Reservations can offer tourists unique travel experiences and recreation through scenic parks, lakes, and mountains. Moreover, the cultural traditions of tribes, such as powwow festivals, draw interest from outsiders. Since 2007, overseas reservation tourism has increased by 180 percent<sup>57</sup> with more than 300,000 Native companies benefitting from these visitors. For many tribes, tourism provides tribal governments with additional revenue that augments social services, healthcare systems, and education opportunities.

Unfortunately, like the casino industry, tourism-related profits are not equally distributed among tribes. Tribes located in underdeveloped areas lack the capacity and infrastructure to accommodate large numbers of tourists. For example, the Pine Ridge Indian Reservation – located near the site of the Wounded Knee Massacre – only owns a single motel with a limited number of rooms. Moreover, by straining finite water and energy reserves, an influx of tourists can negatively impact the quality of

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<sup>53</sup> “Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette ....” 9 Jul. 2017, <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3123&context=lawreview>. Accessed 17 Jul. 2021.

<sup>54</sup> “*Washington v. Confederated Tribes* :: 447 US 134 (1980) :: Justia ....” <https://supreme.justia.com/cases/federal/us/447/134/>. Accessed 17 Jul. 2021.

<sup>55</sup> “*Oklahoma Tax Comm'n v. Chickasaw Nation* :: 515 US 450 (1995 ....” <https://supreme.justia.com/cases/federal/us/515/450/>. Accessed 17 Jul. 2021.

<sup>56</sup> “Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette ....” 9 Jul. 2017, <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3123&context=lawreview>. Accessed 17 Jul. 2021.

<sup>57</sup> “2017-2018 Annual Report - AIANTA.” <https://www.ainta.org/wp-content/uploads/2018/10/2017-2018-AIANTA-Annual-Report-Final.pdf>. Accessed 17 Jul. 2021.



life for indigenous populations. Worse yet, tourists can disturb and degrade scenic areas, which tribes often hold sacred.<sup>58</sup>

### **Policy Recommendations**

For tribes to promote sustainable, long-term growth, the system that allows the federal government to hold tribal land in trust must be reformed. To be clear, many tribal leaders are deeply concerned by the prospect of converting all land held in trust into privatized, fee-simple land. For tribes, forced fee proposals serve as an unsubtle reminder of the assimilation efforts forced upon them by historical allotment policies; thus, such schemes are perceived as a threat to tribal culture.<sup>59</sup> In other words, for tribes, the value of land goes well beyond economic assessments. The question is, then, how can policymakers balance the economic potential of land reform and the expansion of property rights with the preservation of a collective land base for tribes?

The key to alleviating these concerns could be through encouraging tribal self-determination and empowering them to make decisions regarding the ownership of land. Previous research has indicated that placing reservation land under an “exclusive tribal trust” would grant tribes autonomy over their land and resources.<sup>60</sup> Under this proposal, tribes that submit a request to the Secretary of Interior would receive the legal title to land tenures from the federal government. Reclaiming land tenures would be optional as some tribes may not have the capacity to manage and regulate tribal land usage.

Another consideration for land restitution is protecting tribes from state interference. State interference in reservation communities includes the exertion of eminent domain or taxation. Federal statutes, such as Public Law 280, are central to these concerns as they enable states to assume criminal or civil jurisdiction over reservations.<sup>61</sup> Amendments to federal law are necessary to avert the alienation of tribal trust land by state governments. For example, federal lawmakers could

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<sup>58</sup> “Native Americans Shift Stereotypes, Boost Economies, Through ....” 27 Mar. 2019, <https://www.voanews.com/usa/native-americans-shift-stereotypes-boost-economies-through-tourism>. Accessed 17 Jul. 2021.

<sup>59</sup> “For Native Americans, Land Is More Than Just the Ground Beneath ....” 17 Sept. 2016, <https://www.theatlantic.com/politics/archive/2016/09/for-native-americans-land-is-more-than-just-the-ground-beneath-their-feet/500462/>. Accessed 17 Jul. 2021.

<sup>60</sup> “Moving Toward Exclusive Tribal Autonomy over Lands and Natural ....” <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1279&context=nrij>. Accessed 17 Jul. 2021.

<sup>61</sup> “Public law 280 - UCI School of Humanities.” <https://www.humanities.uci.edu/IDP/nativeam/pl280.html>. Accessed 17 Jul. 2021.

repeal Public Law 280 or enforce a congressional mandate that grants tribes exclusive land ownership. Absent such protections, tribes may incur substantial losses to self-determination over land and resources.

Given that land restitution occurs, tribes would be able to ameliorate economic dilemmas on reservations. For instance, tribal governments could more efficiently engage in commercial transactions with business enterprises, grant individual entrepreneurs with land plots, and mortgage land tenures to address housing scarcity. There is a historical precedent that supports this model of development. When the Mexican government granted indigenous farmers full titles to their land in the 1930s, communities, known as ejidos, could collectively decide whether to lease land to outsiders.<sup>62</sup> In the United States, business and industrial performance by more autonomous tribes fare significantly better than those that the BIA micromanages. For instance, a study of 75 tribes found those that transferred timber management from the BIA to tribal governments saw output increase by about 38,000 board feet of timber annually.<sup>63</sup>

Rather than a top-down hierarchy of trust property that concentrates authority in the hands of federal regulators, land reclamation by tribes promotes flexible, local market exchanges. Tribal governments could then be tasked with augmenting building capacity and replacing the federal bureaucracy as primary decision-makers.

## Conclusion

Indigenous populations in the United States encounter several institutional barriers to sustainable economic development and poverty alleviation. With high rates of unemployment, alarming amounts of violent crime, and limited potential sources of revenue for tribal governments – the quality of life on many reservations is abysmal. Although approaches to rejuvenate growth, such as gambling and tourism, seemed promising initially, the benefits remain concentrated among the tribes that possess pre-existing wealth and resources. To expand economic opportunities, the existing system of property ownership on reservations must be reimagined. Land tenures should be removed from their trust status so tribes can reclaim them. Through this

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<sup>62</sup> “Ownership Structure of Tribal Land Exacts a Multibillion-Dollar ....” 26 Aug. 2020, <https://anderson-review.ucla.edu/native-american-land/>. Accessed 17 Jul. 2021.

<sup>63</sup> “American Indian Self-Determination: The Political ... - Harvard DASH.” [https://dash.harvard.edu/bitstream/handle/1/4553307/RWP10-043\\_Cornell\\_Kalt.pdf](https://dash.harvard.edu/bitstream/handle/1/4553307/RWP10-043_Cornell_Kalt.pdf). Accessed 17 Jul. 2021.

transformative proposal, reservations can grant leases for mineral and agricultural development and award formal property rights to tribal members at their discretion. Although policies along these lines may not address all the issues that reservations face, they provide tribes with the tools to improve economic conditions by making the most of existing assets.

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