TRIBAL LEAKAGE: HOW THE CURSE OF TRUST LAND IMPEDES TRIBAL ECONOMIC SELF-SUSTAINABILITY

Gavin Clarkson[*]
Alisha Murphy[**]

ABSTRACT

Economic leakage occurs when money leaves or "leaks" away from the local economy sooner than expected and sooner than is optimal. From an ideal economic perspective, money should circulate in the local economy where it was received or earned five to seven times before leaving that community. When consumers cannot buy the goods and services they desire in their local areas, however, they are forced to spend their money outside their communities, and that money rarely cycles back. On some reservations, nearly 80% of the dollars flow out of the tribal economy without cycling even once, resulting in substantial economic leakage.

This article argues that a primary cause for the lack of on-reservation consumer options is the cumbersome and onerous policy of the United States government holding tribal land in trust. An artifact of a long since discredited congressional policy called Allotment, federally-imposed restrictions on trust land make it nearly impossible for on-reservation entrepreneurs to secure startup financing, as they cannot borrow against the equity they have in their homes. As a result, fewer entrepreneurial ventures exist on reservations and thus fewer options are available for on-reservation consumers to spend their money on reservation. The inevitable consequence of such a lack of consumer spending options on reservations is leakage.

This article also argues that title to trust land can and should be returned to tribes and individuals in fee under a new tribal status that confers permanent jurisdiction to the tribe, complete with full taxation powers. Such a system will end a primary cause of economic leaking while ensuring that the newly transferred land will always be subject to tribal jurisdiction regardless of the race of the landowner.

[*] Executive Director, Indian Resource Development Program and Associate Professor, New Mexico State University, Department of Finance

[**] MSW Candidate and Buder Fellow, Kathryn M. Buder Center for American Indian Studies, Washington University in St. Louis

Electronic copy available at: http://ssrn.com/abstract=2447289

TRIBAL LEAKAGE: HOW THE CURSE OF TRUST LAND IMPEDES TRIBAL ECONOMIC SELF-SUSTAINABILITY

Gavin Clarkson[*]
Alisha Murphy[**]

INTRODUCTION

Gallup, New Mexico, is a border town just outside the Navajo Nation reservation with an estimated 22,000 residents;[1] however, that number nearly triples on the first of the month. Social Security checks are distributed to the elders and veterans on the first of the month, and most tribal members have neither access to a local bank nor sufficient consumer spending options on the reservation. Therefore, most Navajos end up driving for an hour or more to purchase much needed groceries, lumber, auto-parts, and kid's school clothes in border towns such as Gallup. According to the University of New Mexico Bureau of Business and Economic Analysis study, significant competition for retail dollars from the Navajo Nation is spread among several surrounding non-Indian communities, such as Gallup, Grants, Farmington, Show Low, and Winslow.[2]

The 2014 Diné Policy Institute Food Sovereignty Report[3] found that 60% of respondents needed food items that were not available locally.[4] The Navajo Nation Department of Economic Development reports that 71% of Navajo dollars are spent off the reservation,[5] and nearly 80% of tribal consumers purchased their groceries off reservation.[6] This economic leakage happens despite the long drives off-reservation to the grocery store,

---

[*] Executive Director, Indian Resource Development Program and Associate Professor, New Mexico State University, Department of Finance

[**] MSW Candidate and Buder Fellow, Kathryn M. Buder Center for American Indian Studies, Washington University in St. Louis

[1] 2010 U.S. Census Bureau http://quickfacts.census.gov/qfd/states/35/3528460.html

[2] Mitchell, J. (2006, April 1). UNM Bureau of Business and Economic Analysis. . Retrieved April 27, 2014, from http://bber.unm.edu/pubs/MAINSTREET_Gallup.pdf

[3] *available at* http://www.dinecollege.edu/institutes/DPI/Docs/dpi-food-sovereignty-report.pdf (*hereinafter* Food Sovereignty Report).

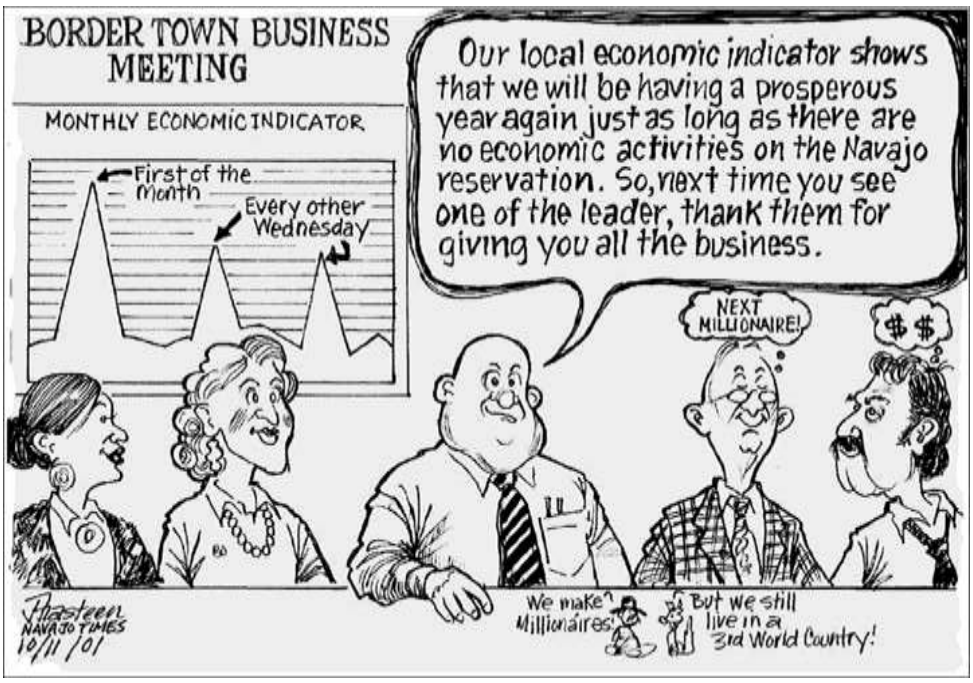
[4] *Id* at 17

[5] Trib, C. (2003, January 1). 2002 -- 2003 Comprehensive Economic Development Strategy of the Navajo Nation. Retrieved April 27, 2014, from http://www.navajobusiness.com/pdf/CEDS/CEDS%202002-03.pdf

[6] Navajo Nation Division of Economic Development Completes Consumer Shopping Preference Survey. (2012, February 1). Retrieved April 28, 2014, from http://navajobusiness.com/pdf/Ads/NavEconomicDataBulletinFinal_030212.pdf

Electronic copy available at: http://ssrn.com/abstract=2447289

some drives as long as 240 miles.[7] These startling statistics not only demonstrate the magnitude of the economic leakage that pervades the Navajo Nation but also explains why the Wal-Mart in Gallup is one of the largest in the world. Such leakage is not unique to the Navajo Nation.



The former Chairman of the Crow Nation in Montana suggested that if "anyone doubts that money flows into Billings [from the Crow Nation,] go to Wal-Mart today after members receive their per-capita check from the tribe. 'We don't call it Wal-Mart, we call it Crow-Mart.'"[8] According to the *Billings Gazette*, that quarter per-capita payment from the tribe's coal mining royalties was $310.[9] Of the Crow Nation's nearly 12,000 tribal members, approximately 8,000 live on the reservation and were highly likely to spend their per-capita checks in Billings[10].

The Crow Nation and the six other federally recognized tribes in Montana also conducted a study that found that tribal and BIA salaries pump more than $200 million directly into the state economy, and "since every dollar turns at least five times in a local economy, the total annual contribution may reach $1 billion."[11] When private-sector wages as well as

---

[7] Food Sovereignty Report, *supra* note 3 at 17

[8] Shay, Becky, *Crow leader outlines plan for fuel plant*, Billings Gazette, December 06, 2007

[9] *Id*.

[10] *Id*.

[11] Selden, Ron, *Economic development attitudes must change*, Indian Country Today,

goods and services purchased by tribal and BIA entities are considered, the contribution to the State of Montana "could reach $3 billion to $5 billion a year."[12] In his book, *Reservation Capitalism*, Professor Robert Miller identifies several studies on leakage from various reservations in addition to the Montana tribal study, such as research on the Zuni Pueblo economy that found that 84% of all individual income was spent off reservation.[13] Former Commissioner of Indian Affairs Robert L. Bennett perhaps best summarized the problem of leakage, "When a million dollars is invested in most communities, it generates approximately ten million dollars of cash flow. But in Indian communities, one million dollars generates just one million dollars of cash flow."[14]

The authors have seen firsthand how this economic leakage operates in Crownpoint, New Mexico, on the eastern edge of the Navajo Nation. Crownpoint has over 2,000 residents who live and work in the area but leave the reservation to spend their paycheck. Other than one overpriced grocery store,[15] a non-Indian-owned Mexican restaurant next door, and two gas station convenience stores, Crownpoint has no other stores, shops, or restaurants.

Tim and Kathy Murphy have lived in Crownpoint most of their lives, and the hour-long drive to Gallup has been a normal bi-weekly trip for as long as they can remember.[16] They shop off-reservation in order to get affordable produce and meats because the local grocery store is too expensive. Although demand exists for multiple grocery stores, and competition would certainly reduce grocery store prices,[17] the Murphys routinely make the decision not to shop at the non-Indian-owned grocery store in Crownpoint except in emergencies, and their experience mirrors that of most families in Crownpoint. Thus, their earnings, and the earnings of the entire community, routinely leave the reservation and never cycle back – a classic case of economic leakage.

But why is economic leakage so pervasive on reservation communities and yet the towns bordering those communities consistently see a net monetary inflow from tribal members? This article argues that a primary cause for the lack of on-reservation consumer options is the cumbersome and onerous policy of the United States government holding tribal land in

---

June 13, 2001.

[12] *Id*.

[13] Robert J. Miller, Reservation "Capitalism": Economic Development in Indian Country. (Native America: Yesterday and Today) Praeger (2012), p. 136.

[14] Robert L. Bennett, "The War on Poverty" in Indian Self-Rule: First Hand Accounts of Indian-White Relations from Roosevelt To Reagan 224 (Kenneth R. Philp ed., 1986)

[15] Food Sovereignty Report, *supra* note 3 at 16

[16] Telephone interview with Tim Murphy, May 5, 2014.

[17] See Part III *infra*

trust. An artifact of a long since discredited congressional policy called Allotment, federally-imposed restrictions on trust land make it nearly impossible for on-reservation entrepreneurs to secure startup financing, as they cannot borrow against the equity they have in their homes. As a result, there are fewer entrepreneurial ventures on reservations and thus fewer options for on-reservation consumers to spend their money on reservation. The inevitable consequence of such a lack of consumer spending options on-reservation is leakage.

Part I of this article explores the interplay between economic leakage and trust land, and Part II explores the historical origins of trust land as part of the overarching history of federal Indian policy. Part III returns to the interplay of economic leakage and trust land, focusing on both micro- and macroeconomic perspectives. Having explored both the legal and economic underpinnings of trust land and its concomitant consequences, Part IV of the article makes the argument that title to trust land can and should be returned to tribes and individuals in fee under a new tribal status that confers permanent jurisdiction, complete with full taxation powers, to the tribe. The core premise of this article is that ending the current trust land system will eliminate a primary cause of economic leaking while ensuring that the newly transferred land will always be subject to tribal jurisdiction regardless of the race of the landowner. We conclude with some final thoughts as well as suggestions for further research.

I. ECONOMIC LEAKAGE AND THE CURSE OF TRUST LAND

Miller lists three reasons why economic leakage in tribal communities like Pine Ridge, Rosebud Sioux (and Crownpoint) lead to disastrous economic situations for Indian reservations. First, the lack of community development

> [l]eads to more poverty and overall lower Indian family incomes. Second, having so few employers and jobs available in Indian Country leads to high unemployment rates. And, third, the absences of thriving economies, characterized by a sufficient number of privately and publically owned businesses in Indian Country, adds to the impoverishment of Indians and their families.[18]

Although the trust land issue is not specifically emphasized by Miller, this article focuses on trust land as a primary impediment for entrepreneurs who want to start up small businesses or pursue entrepreneurial endeavors on the Navajo reservation. Because Navajo land is held in trust, the United States government has legal ownership of the land, and tribes and individual Indians are merely beneficial owners. Selling and leasing Navajo land, even

[18] Miller, *supra* note 13 at 113.

for community development, must be approved by the United States. In his article, "Ending the Curse of Trust," noted tribal entrepreneur Lance Morgan says,

> Trust status hurts individual American Indians. It prevents us from using our land as collateral, which has effectively killed Native-owned agriculture. This system left us with almost no choice but to lease out our land, primarily to non-Indians. That's why we are land rich, but still dirt poor.[19]

Professor Miller echoes this sentiment when he points out that

> [T]ribes and Indian owners cannot sell, lease, develop, or mortgage [trust land] for loans without the express approval of the federal government. Needless to say, having the United States looking over the shoulders of tribal governments and requiring federal approvals of most economic decisions, and the time it takes to gain these bureaucratic approvals, adds enormous costs and inefficiencies to tribal and Indian economic endeavors. The inefficient and non-business-oriented federal bureaucracy creates serious obstacles for tribal governments and Indians in using trust assets for economic purposes, and for non-Indian companies who want to work in Indian Country.[20]

The policy of restricting tribal land as trust land means that potential entrepreneurs do not have access to a prime source of capital for business startup. Without entrepreneurship a tribal economy cannot be self-sustaining, yet tribal members still must meet their basic consumption needs. In an interview with the *Farmington Daily Times* in 2011, Navajo Nation president, Ben Shelly, pointed out the need to reverse economic leakage. President Shelly said "every weekend we come to town, into Farmington, especially the first of the month … same with Gallup, same with Page, same with Flagstaff"[21] and spend money earned on the reservation. Professor Miller similarly points out,

> The money Indians spend does not circulate on their reservations between various public and private business opportunities and jobs. Clearly, if there are no businesses on reservations where residents can buy necessary and luxury goods, they will make those purchases off reservation. The lack, then, of small businesses on reservations leads

---

[19] Morgan, Lance, *Ending the Curse of Trust*, Indian Country Today, March 25, 2005. Available at http://indiancountrytodaymedianetwork.com/2005/03/23/ending-curse-trust-94626

[20] Miller, p. 40

[21] Landry, Alysa, *Navajos break ground on third casino*, Farmington Daily Times, February 26, 2011.

to many negative economic impacts.[22]

The legal origins of trust land come, in part, from *Cherokee Nation v. Georgia*,[23] the first Supreme Court opinion involving an American Indian tribe,[24] where Chief Justice Marshall wrote that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[25] One of those "peculiar and cardinal distinctions" was the notion that Indian tribes were

> [d]omestic dependent nations … in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. … They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being … completely under the sovereignty and dominion of the United States[26]

Part of that guardian ward relationship was the notion that the federal government would be the protector of Indian lands, both from avaricious settlers and land speculators as well from the Indian himself. It was this sense of paternalism from the "Great White Father" that led to the disastrous policy of tribal trust land. In order to fully understand where that policy came from, it is necessary to go father back into history.

II. A BRIEF HISTORY OF TRIBAL LAW AND POLICY[27]

The paternalistic notions of tribal inferiority that led to the various restrictions of tribal economic development such as tribal trust land are not new and traces predate the origins of the United States itself. The year before Congress passed the Allotment Act, the Supreme Court would opine that "the relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[28]

The Court's temporal lens needed to extend much earlier, however, as the legal principles that existed when Europeans first made contact with the Indians had their origins in legal theories developed to justify the

---

[22] Miller, p. 114.

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

[24] An earlier Supreme Court case, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), dealt with the issue of who could acquire title to land from Indian tribes, but no tribe was a party to the case.

[25] *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

[26] *Id*. at 17

[27] An expanded discussion of Indian Country Economics can be found in Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. Rev. 1009 (2007) at 1019–30.

[28] United States v. Kagama, 118 U.S. 375, 381 (1886).

Crusades.[29] As the competing European nations began to expand their empires, the papacy began to grant exclusive rights to lands as they were "discovered," including rights of sovereignty over the indigenous populations.[30] Even after England broke away from the authority of Rome, English law still supported this "Doctrine of Discovery,"[31] although the validity of the doctrine was a subject of debate among early colonial settlers.[32] Irrespective of conflicting religious interpretations of Indian rights, "practical realities shaped legal relations between the Indians and

---

[29] *See*, *e.g.*, Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, *reprinted in* THE EXPANSION OF EUROPE: THE FIRST PHASE 191, 191–92 (James Muldoon ed. & trans., 1977) ("[I]s it licit to invade a land that infidels possess or which belong to them? . . . [I]t is licit for the pope to [demand allegiance, and] if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the pope and not by anyone else."). *See also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 14 (1990) (discussing the crusading era origins of the legal doctrines which governed European land claims in the Americas).

[30] *See*, *e.g.*, Bull "Inter caetera Divinae" of Pope Alexander VI dividing the New Continents and granting America to Spain, (May 4, 1493), *in* CHURCH AND STATE THROUGH THE CENTURIES 153, 156–57 (Sidney Z. Ehler & John B. Morrall trans. and eds., 1967) ("Wherefore, all things considered maturely and, as it becomes Catholic kings and princes . . . you have decided to subdue the said mainlands and islands, and their natives and inhabitants, . . . with the proviso, however, that these mainlands and islands found or to be found, discovered or to be discovered . . . be not actually possessed by some other Christian king or prince."). *See also* Bull "Romanus Pontifex" of Pope Nicholas V granting the Territories discovered in Africa to Portugal, (January 8, 1455), *in* CHURCH AND STATE THROUGH THE CENTURIES, *supra* at 144, 145; WILLIAMS, *supra* note 70, at 14. *See also generally* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1 (1942).

[31] *See*, *e.g.*, Calvin's Case, 77 Eng. Rep. 377, 397–98 (K.B. 1608). "All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; . . . And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, . . . he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity." This opinion was authored by Lord Chief Justice Edward Coke who, coincidentally, wrote the charter for the Virginia Company in 1606. *See* WILLIAMS, *supra* note 70, at 44.

[32] *Compare* the arguments of John Winthrop (as "for the Natives in New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, & soe have noe other but a naturall right to those countries.") with those of Roger Williams ("I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of Ground [and this they do] notwithstanding a sinfull opinion amongst many that Christians have right to *Heathens* Lands.") recounted in Cheister E. Eisinger, *The Puritan's Justification for Taking the Land*, 84 ESSEX INST. HIST. COLLECTIONS 135, 135–41 (1948).

colonists."[33] The necessity of getting along with powerful and militarily capable Indian tribes[34] dictated that the settlers seek Indian consent to settle if they wished to live in peace and safety, buying lands that the Indians were willing to sell rather than displacing them by other methods.

At the outbreak of the French and Indian War in 1754, treaty making assumed a new dimension, as each of the competing European powers sought to form alliances with the various tribes. The military importance of treaty alliances would continue throughout the Revolutionary War period as well. After the war, however, a powerful group of tribes who had sided with the British during the war directly confronted the founding fathers. Those tribes still maintained claims to the territory between the Appalachian Mountains and the Mississippi River. President George Washington detailed his proposed policy for dealing with the Indians in a letter to James Duane, the head of the Committee of Indian Affairs of the Continental Congress:

> Policy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic], and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[35]

Although many consider Washington's letter the founding document of American Indian policy,[36] its notion of Indians as "Savages" sits alongside the pragmatic necessity of entering into treaties with the Indians. As the newly formed United States began its inexorable march westward, the Indian lands usually were not taken by force but were instead ceded by treaty in return for, among other things, the establishment of a trust relationship,[37] often in specific consideration for the Indians' relinquishment of land.[38]

---

[33] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02 (2005)(1941).

[34] *Id*. Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades.

[35] Letter from George Washington to James Duane (Sept. 7, 1783), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 2 (Francis Paul Prucha ed., 3rd ed. 2000).

[36] *See*, *e.g.*, WILLIAMS, *supra* note 12, at 44.

[37] The scope of the trust relationship is multi-faceted. "Many treaties explicitly provided for protection by the United States." COHEN, *supra* note 74, at §1.03[1]. *See*, *e.g.*, Treaty with the Creeks, Aug. 7, 1790, art. II, 7 Stat. 35. Treaty Between the U.S.A. and the

Various political factions disagreed over whether tribalism could survive contact with white civilization and whether the appropriate course of action was to make the Indians assimilate into that society or to remove them beyond the reaches of that society.[39] Ultimately, notions of tribal inferiority prevailed, and Congress passed the 1830 Removal Act,[40] Sending dozens of tribes to the Indian Territory, often by force.[41]

While the formal existence of the United States began at a point when the prevailing policy recognized tribal sovereignty through the treaty-making process, such an orientation was not permanent. Once the removal process was essentially complete, responsibility for Indian affairs, along with the authority to negotiate on a government-to-government basis with the tribes, moved from the War Department to the Interior Department,[42] although such treaties still had to be ratified by Congress. In the 1870s, however, Congress ceased making treaties with the Indians[43] and instead developed a policy of allotting tribal lands to individual Indians,[44] characterizing the allotment program as a "mighty pulverizing engine"[45]

Kaskaskia Tribe of Indians, Aug. 13, 1803, art. II, 7 Stat. 78.. Other treaties provided the means for subsistence. *See*, *e.g.*, Fort Laramie Treaty, Sept. 17, 1851, art. VII, 11 Stat. 749 (providing for subsistence rations for the Sioux.); Treaty with the Western Cherokees, May 6, 1828, art. VIII, 7 Stat. 311. ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) . . . a just compensation for the property he may abandon.").

[38] *See*, *e.g.*, Treaty with the Creeks, *supra* note 78, at 35; Treaty with the Kaskaskia, *supra* note 76, at 78; Treaty with the Western Cherokees, *supra* note 76, Fort Laramie Treaty, *supra* note 76.

[39] *See* Letter from President Jefferson to William Henry Harrison (Feb. 27, 1803), *reprinted in* Prucha, *supra* note 76 at 22. ("[O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi.").

[40] Removal Act, ch. 148, 4 Stat. 411 (1830) (current version at 25 U.S.C. § 174 (2000)).

[41] The Choctaws were one of the first tribes to be removed along what one of their chiefs described as a "trail of tears and death" *See e.g.* Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty*, 50 KAN. L. REV. 473, 475 n.14 (2002).

[42] *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983).

[43] Treaty making with the Indians was ended by Congress in 1871: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Abolition of Treaty Making, 16 Stat. 544, 566 (1871), *reprinted in* Prucha, *supra* note 76, at 135.

[44] General Allotment Act of 1887, ch.119, §1, 24 Stat. 388. The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. *See* ROBERT WINSTON MARDOCK, THE REFORMERS AND THE AMERICAN INDIAN 213 (1971).

[45] In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy: "the time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The

that would destroy tribalism and force Indians to assimilate into dominant society as individuals.[46]

This theory of assimilation justified the legislation as beneficial to Indians. Some proponents of assimilation policies argued that if Indians adopted the habits of civilized life, tribes would need less land and the surplus land would be available for white settlers.[47]

Although anti-Indian prejudices undoubtedly contributed to the passage of the General Allotment Act of 1887,[48] historians agree that the Act was primarily "pushed through Congress, not by western interests greedy for Indian lands, but by eastern [liberals] who deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire . . . ."[49] These liberals believed that "[p]ride of ownership . . . would generate individual initiative . . . and bring material and cultural advancement" for the Indians.[50] Prominent liberal James Bradley Thayer of Harvard Law School enthusiastically praised the Dawes Act—designed to sever the individual from the tribal collective—as a "great, far-reaching, and beneficent" achievement.[51] These so-called "friends of the Indian," demanded that Indians be absorbed into the mainstream of American life and the "savagery" of tribal autonomy be destroyed.[52]

As the "mighty pulverizing engine" began its work, tribal members under the Act surrendered their undivided interest in the tribally owned lands for a personally assigned divided interest, usually held in trust for a limited number of years, but "allotted" to them individually.[53] The Allotment Act was the first statute to specifically mention the notion of trust land, and from this point forward, trust lands, whether owned by the tribe or an individual Indian, were subject to onerous and cumbersome federal

---

General Allotment Act is a mighty pulverizing engine to break up the tribal mass [acting] directly upon the family and the individual." Theodore Roosevelt, President of the U.S., Message to Congress (Dec. 3, 1901), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 315, 348 (George Raywood Devitt ed., Supp. 1903).

[46] *See* Gavin Clarkson, *Not Because They are Brown, but Because of* Ea*: Why the Good Guys Lost in* Rice v. Cayetano*, and Why They Didn't Have to Lose*, 7 MICH J. RACE & L. 317, 325 (2002).

[47] COHEN, *supra* note 74, at § 1.04.

[48] 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. *See* Robert Winston Mardock, The Reformers and the American Indians 212 (1971).

[49] Prucha, Great Father, at 669

[50] Mardock, *supra* note 48, at 22.

[51] James Bradley Thayer, *The Dawes Bill and the Indians*, The Atlantic Monthly, Mar. 1888, at 315.

[52] COHEN, *supra* note 74, at § 1.04.

[53] COHEN, *supra* note 74, at § 1.04.

oversight. At best, that oversight would turn out to be benevolently incompetent, but often it would prove insidiously exploitative of Indian interest for the benefit of non-Indians.[54]

The oscillating pattern of alternating congressional support and then hostility for tribal sovereignty would continue for the next century. By the 1930s it was clear that the Allotment Act was a colossal failure,[55] and Congress passed the Indian Reorganization Act of 1934 ("IRA").[56] Although Congressional policy had completely reversed itself with the passage of the IRA—tribal sovereignty was now to be encouraged rather than destroyed—federal Indian policy would oscillate through one more cycle in the next half century[57] before President Nixon issued a landmark statement calling for a new federal policy of "self-determination" for Indian nations.[58] By "self-determination," President Nixon sought "to strengthen the Indian's sense of autonomy without threatening his sense of community."[59] Self-determination[60] led to an increase in economic development activity, but access to capital remained an impediment.[61] President Reagan also made an American Indian policy statement on January 24, 1983, stating his support for "self determination."[62] In

---

[54] Cite to Navajo case involving Peabody Coal

[55] *See*, *e.g.*, BROOKINGS INSTITUTION, INSTITUTE FOR GOVT. RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928) (documenting the failure of federal Indian policy during the allotment period).

[56] 25 U.S.C. §§ 461-79 (2000).

[57] The period between 1945 and 1970 is referred to as the Termination Era, and was characterized by the passage of number of statutes that "terminated" individual tribes—"these acts distributed the tribes' assets by analogy to corporate dissolution and afforded the states an opportunity to modify, merge or abolish the tribe's government functions." BARSH & HENDERSON, *supra* note 90, at 132. Examples of this legislative activity include Act of August 13, 1954, ch. 732, 68 Stat. 718, and Act of August 3, 1956, ch. 909, 70 Stat. 963 (repealed 1978).

[58] RICHARD NIXON, PROPOSED RECOMMENDATIONS RELATING TO THE AMERICAN INDIANS—MESSAGE FROM THE PRESIDENT, H.R. Doc. No. 91-363, at 116 CONG. REC. 23258 (July 8, 1970). *See also* The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as 25 U.S.C. §§ 1451–1453). Perhaps the greatest of Nixon's contributions to Indian tribal sovereignty was Public Law 638, which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services. The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, §3, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C.)

[59] Samuel R. Cook, *What is Indian Self-Determination?,* RED INK, May 1, 1994, *available at* http://faculty.smu.edu/twalker/samrcook.htm.

[60] The key legislation of this era includes: The Indian Self-Determination and Education Assistance Act of 1975 §3; The Indian Civil Rights Act of 1968 (current version at 25 U.S.C. §§ 1301–1341 (2000)); The Indian Financing Act of 1974 (current version at 25 U.S.C. § 1451) (2000); and The Indian Child Welfare Act of 1978 (current version at 25 U.S.C. §§ 1901–1963) (2000). *See generally* COHEN, *supra* note 74, at § 1.07.

[61] COHEN, *supra* note 74, at § 21.03[1].

[62] PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES 7 (1984).

attempting to define "self-determination," he stated:

> Instead of fostering and encouraging self-government, federal policies have, by and large, inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources and promoted dependency rather than self-sufficiency.[63]

In 1983 President Reagan established the Presidential Commission on Indian Reservation Economies. In 1984 the Commission published its Report and Recommendations, again calling for a major shift in federal Indian policy.[64] The report identified "trust land" as the single greatest federal impediment to tribal economic development.

> Trust status constraints operate as an obstacle to Indian reservation economic development in a number of ways since these constraints constitute a complex framework of regulatory control over Indian assets. The constraints are authorized in treaties, statutes, regulations, procedures, and manuals governing specific resources such as land, minerals, timber, water, hunting and fishing, and trust funds. The trust status of Indian resources is not just an obstacle to economic development from the perspective of collateral for financing. Bureaucratic regulation and control of Indian asset management is also a problem.
>
> Trust status means that Indian tribes lack the same property revenue base that local governments have. It also means that capital which they already have cannot be flexibly used for tribal investment. Trust status freezes tribal assets in a pre-capitalist state.[65]

III. MICRO- AND MACROECONOMIC PERSPECTIVES

Lance Morgan suggests that the trust land policy "serves as the single largest impediment to Indian country's economic growth and tribal sovereignty,"[66] but how does the interplay between trust land and economic leakage manifest itself in economic terms. A primary source of market failure in the sense of economic development within Indian Country is the severe restrictions imposed on any market for tribal trust land. The restrictions on tribes regarding land ownership and activity is not conducive for business; therefore few if any entrepreneurs attempt to start a business. As Lance Morgan points out,

> Back in the late 1800s, in order to stop scam land sales and egregious tax seizures by state governments, the federal government took title to

---

[63] *Id.*
[64] *Id.*
[65] *Id.*, Part Two, p. 31
[66] Morgan, Lance, *Ending the curse of trust*, Indian Country Today, March 23, 2005

> all tribal and individual American Indian land. The side effect of creating trust land practically guaranteed our poverty as tribes and as a people. Trust land can't be sold, taxed, mortgaged or used as collateral. Trust status severely restricts the tribe's and an individual's ability to use our largest asset, our land and its resources.[67]

According to the 2012 summary of the Board of Governors of the Federal Reserve System, "the inability or difficulty in using trust or restricted land as collateral to access financing for business development eliminates a major source of equity and security for loans."[68] Individual Indian entrepreneurs are excluded holistically from opportunity for advancement. The Federal Reserve summary also identifies an important disincentive to small businesses in Indian Country, pointing out that "the title status reports process, typically administered by the U.S. Department of Interior, is often burdensome and time-consuming, which interferes with the efficient use of land for business development."[69] Navajo entrepreneurs are already at a disadvantage, coming from a low socioeconomic status. They don't have the time to wait for the Department of Interior to make a move.

Although the problem of economic leakage is a macroeconomic concept, the problem also manifests itself in microeconomic terms as well. Since Crownpoint has only one grocery store, despite being next to a state highway which connects directly to Interstate 40, prices at this grocery store are significantly higher than comparable stores in Gallup and Farmington and are also higher than grocery stores owned by the same company at one other location on the Navajo Nation. The *Navajo Times* recently reported that

> According to the U.S. Department of Agriculture, most of the Navajo reservation is considered a food desert. Being designated as a food desert means people have little access or no access to large supermarkets on their land to maintain a healthy diet.[70]

Because of the trust-land issues, it is harder for a competitor to open up in Crownpoint, and therefore that grocer has a local monopoly and can price accordingly. In microeconomic terms, demand remains the same, but supply is restricted, thus driving up prices. Certain consumers are unable to afford local prices and will spend the money to drive to Gallup to purchase groceries. Given the difficulty of starting up a small Navajo owned, affordable, grocery store in Crownpoint, how are other business startups to

---

[67] *Id*.

[68] Board of Governors of the Federal Reserve System 2012 summary

[69] *Id*, p. __

[70] Bitsoi, A., L., (2013). Food experts: summit aimed at preventing extinction of tribe. The Navajo Times, June 13, 2013. Retrieved April 4, 2014 at http://navajotimes.com/news/2013/0613/061313foo.php#.U2G3SPldXh5

succeed? Without the opportunity to develop the community, youth residents who attend Navajo Technical University have few local job opportunities after graduation except to leave Crownpoint or leave the reservation all together.

IV. ENDING THE CURSE OF TRUST LAND

Lance Morgan summarizes the impact of the failed policy of tribal trust land when he points out that these "trust-land issues make escaping from poverty very difficult, if not impossible and leave large portions of [Indian Country] stuck in a cycle of dependency."[71] Land held in trust is a debilitating factor that prevents tribes from having any opportunity to become self-sufficient and self-sustaining, as it restricts a significant source of capital for on-reservation activity. Access to capital provides the necessary means to build and maintain adequate infrastructure to improve the lives of tribal citizen, but tribes do not have access to capital if they do not have the right to mortgage or sell their land-like non-reservation entities. According to the Minneapolis Federal Reserve Bank newsletter, the *Community Dividend*, "a commonly cited barrier to the development of private market in Indian communities is the lack of access to affordable credit and capital." This lack of access to capital is clearly affecting all tribes.

Rather than merely lament the problem, however, Morgan suggests that the optimal solution is simply to give tribes back their land. He proposes that

> Title to trust land should be returned to tribes and individuals in fee under a new tribal status. This new tribal status must confer permanent jurisdiction, complete with full taxation powers, to the tribe, ensuring that the land will always be subject to tribal jurisdiction regardless of the race of the landowner. In one move, we can liberate Indian country economically and politically. … It is clear that there would be many details to work out, but the basic concept is sound.[72]

Legislation is currently pending before Congress that would allow tribes to take control of their trust assets and implement land ownership systems along the lines of Morgan's suggestion. Senator Crapo (R-Idaho) has introduced S.165, the Indian Trust Asset Reform Act, in the 113th Congress. Title II of this Act would allow certain tribes to participate in a pilot program that would give them control of their trust land and allow them to implement management strategies as they deem appropriate, subject to certain fiduciary restrictions.

---

[71] Morgan, Lance, *Ending the curse of trust*, Indian Country Today, March 23, 2005.
[72] *Id*.

CONCLUSION

Until the core issue of trust land is addressed, however, alternative strategies for increasing tribal entrepreneurship need to be pursued. One of the co-authors has suggested revisions to the securities laws to increase the availability of private investment capital in Indian Country.[73] Already in place, however, Community Development Financial Institutions (CDFIs) act as incubators for entrepreneurial start-ups by providing micro-loans that enable and encourage small businesses financially. A Native-owned CDFI can act as a catalyst for economic growth participation by finding and enabling accessible capital that will then generate the necessary financial aid or private and communal business development, even when home equity loans are unavailable due to restrictions on trust land. Further research is underway on how Native-owned CDFIs can stand in the gap until more comprehensive economic reforms are in place.

* * *

[73] See Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 Colo. L. Rev. 285 (2009)