Tribal Leakage: How the Trust Land Curse Impedes Tribal Economic Self-Sustainability (Part 2)

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A Brief History of Tribal Law and Policy

Paternalistic notions of tribal inferiority that led to restrictions on tribal economic development are not new; traces predate the origins of the U.S. The year before Congress passed the Allotment Act, the Supreme Court opined “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.”

The Court’s temporal lens needed to extend earlier, however, as legal principles when Europeans first made contact with Indians originated in legal theories developed to justify the Crusades. As 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 indigenous populations. Even after England broke away from the authority of Rome, English law supported this ‘Doctrine of Discovery’, although the validity of the doctrine was subject to debate among early colonial settlers. Irrespective of conflicting religious interpretations of Indian rights, “practical realities shaped legal relations between the Indians and colonists.” The necessity of coexisting peacefully with powerful and militarily capable Indian tribes dictated that settlers seek Indian consent to settle, buying lands the Indians were willing to sell rather than displacing the Indians by other means.

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

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. 9

Although many consider Washington’s letter the founding document of American Indian policy, 10 its notion of Indians as “Savages” sits alongside the pragmatic necessity of entering into treaties with Indians. As the newly formed U.S. began its inexorable march westward, Indian lands usually were not taken by force; instead, they were ceded by treaty in return for, among other things, establishing a trust relationship, 11 often in specific consideration for Indian relinquishment of land. 12

Various political factions disagreed whether tribalism could survive contact with white civilization and whether the appropriate course of action was to force Indians to assimilate or to remove them from that society. 13 Ultimately, notions of tribal inferiority prevailed, and Congress passed the 1830 Removal Act, 14 sending dozens of tribes to the Indian Territory, often by force. 15

Although the formal existence of the U.S. began when the prevailing policy recognized tribal sovereignty through the treaty-making process, such an orientation was impermanent. Once the removal process was essentially complete, responsibility for Indian affairs, along with authority to negotiate with tribes ‘government to government’, moved from the War Department to the Interior Department 16 (although Congress still had to ratify such treaties). In the 1870s, however, Congress ceased making treaties with Indians 17 and instead developed a policy of allotting tribal lands to individual
Indians,\textsuperscript{18} characterizing the allotment program as a “mighty pulverizing engine”\textsuperscript{19} that would destroy tribalism and force Indians to assimilate into the dominant society as individuals.\textsuperscript{20}

This assimilation theory 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.\textsuperscript{21}

Although anti-Indian prejudices undoubtedly contributed to the passage of the General Allotment Act of 1887,\textsuperscript{22} 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.”\textsuperscript{23} These liberals believed that “[p]ride of ownership...would generate individual initiative...and bring material and cultural advancement” for the Indians.\textsuperscript{24} Prominent liberal James Bradley Thayer enthusiastically praised the Dawes Act—designed to sever the individual from the tribal collective—as a “great, far-reaching, and beneficent” achievement.\textsuperscript{25} 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.\textsuperscript{26}

As the “mighty pulverizing engine” began its work, tribal members under the Act surrendered their interest in tribally owned lands for a personally assigned divided interest, usually held in trust for a limited period, but ‘allotted’ to them individually.\textsuperscript{27} The Allotment Act was the first statute to mention trust land; whether owned by the tribe or an individual Indian, such land was subject to onerous and cumbersome federal oversight. At best, that oversight would be benevolently incompetent, but often it would prove insidiously exploitative of Indian interest for the benefit of non-Indians.\textsuperscript{28}

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 the Allotment Act was a colossal failure\textsuperscript{29}; hence, Congress passed the Indian Reorganization Act of 1934 (IRA).\textsuperscript{30} Although Congressional policy had completely reversed with the IRA’s passage—tribal sovereignty was now encouraged rather than destroyed—federal Indian policy would oscillate through one more cycle in the next half century\textsuperscript{31} before President Nixon issued a landmark statement calling for a new federal policy of self-determination for Indian nations.\textsuperscript{32} By self-determination, Nixon sought “to strengthen the Indian’s sense of autonomy without threatening his sense of community.”\textsuperscript{33} Although self-determination\textsuperscript{34} led to increased economic development...
activity, access to capital remained an impediment. President Reagan also made an American Indian policy statement on January 24, 1983, stating his support for self-determination. In 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.

In 1983, 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. The report identified trust land as the single greatest federal impediment to tribal economic development.

Trust status impedes Indian reservation economic development in several ways, as it creates a complex framework of regulatory control over Indian assets. This status is 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 the only 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 Indian tribes lack the same property revenue base as local governments. It also means capital they already have cannot be used flexibly for tribal investment. Trust status freezes tribal assets in a pre-capitalist state.

Micro- and Macroeconomic Perspectives

Lance Morgan suggests trust land policy “serves as the single largest impediment to Indian country’s economic growth and tribal sovereignty.” How does the interplay between trust land and economic leakage manifest itself economically? A primary cause of market failure—in terms of economic development within Indian Country—is the tribal land ownership restriction, which discourages entrepreneurs from starting businesses. As Lance Morgan states,

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 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. 

According to the 2012 summary of the Federal Reserve System’s Board of Governors, “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.” Individual Indian entrepreneurs are excluded from advancement opportunities. 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.” Navajo entrepreneurs are already at a disadvantage due to their low socioeconomic status. They cannot 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. Crownpoint has only one grocery store despite being off a state highway that connects directly to Interstate 40. Prices at this store, which are meaningfully higher than comparable stores in Gallup and Farmington, are higher than stores owned by the same company at another Navajo Nation location. The Navajo Times recently reported:

> 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.

Because of 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 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.
Ending the Trust Land Curse

Lance Morgan summarizes the impact of the failed tribal trust land policy when he states 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.” Land held in trust precludes tribes from becoming self-sufficient and self-sustaining, as it restricts a significant source of capital for on-reservation activity. Although access to capital provides a means to build and maintain adequate infrastructure, 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, “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 clearly affects all tribes.

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

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.

Currently pending Congressional legislation 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) introduced S.165, the Indian Trust Asset Reform Act, during the 113th Congress. Title II of this Act would allow certain tribes to participate in a pilot program that would cede them control of their trust land and allow them to implement management strategies as they deem appropriate, subject to certain fiduciary restrictions.

Conclusion

Until the core issue of trust land is addressed, alternative strategies for increasing tribal entrepreneurship should be pursued. To increase the availability of private investment capital in Indian Country, we suggest revisions to securities laws. Already in place, Community Development Financial Institutions (CDFIs) act as incubators for entrepreneurial start-ups by providing micro-loans to 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 trust land restrictions. Further research is underway on how Native-owned CDFIs can serve as a placeholder until more comprehensive economic reforms are instituted.

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**Endnotes**


3. 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]t is 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).

4. 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).

5. 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 remotae potentiae, 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.

6 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 knowe 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).

7 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02 (2005)(1941).

8 Id. Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades.


10 See, e.g., WILLIAMS, supra note 12, at 44.

11 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 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.").

12 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.

13 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.").


15 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).


17 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.

18 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).

19 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 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).

20 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).

21 COHEN, supra note 74, at § 1.04.

22 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).

23 Prucha, Great Father, at 669

24 Mardock, supra note 22, at 22.


26 COHEN, supra note 74, at § 1.04.

27 COHEN, supra note 74, at § 1.04.

28 Cite to Navajo case involving Peabody Coal

29 See, e.g., Brookings Institution, Institute for Governmental Research, The Problem of Indian Administration (1928) (documenting the failure of federal Indian policy during the allotment period).


31 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).


supra note 74, at § 1.07.
35 COHEN, supra note 74, at § 21.03[1].
36 PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES 7 (1984).
37 Id.
38 Id.
39 Id., Part Two, p. 31
40 Morgan, Lance, Ending the curse of trust, Indian Country Today, March 23, 2005
41 Id.
42 Board of Governors of the Federal Reserve System 2012 summary
43 Id, p. ___
46 Id.