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INDIAN TRIBAL BUSINESSES AND THE OFF-RESERVATION MARKET

by
Matthew L.M. Fletcher*

American Indian tribes once operated regional trade centers, with broad geographical impact. With the arrival of European traders and settlers, this system began to erode, and later, the treaty and reservation system effectively eliminated the regional Indian economic market. Under the policies of measured separatism and assimilation, American Indians had no broad geographic power. Recently, as the policy of self-determination has taken hold, Indian tribes have begun to assert their economic power through federal government contracts, casino gaming, and trade agreements with foreign governments. This Article argues that this rising involvement has caused a backlash, and that holdover American government policy favoring assimilation and dependence threatens to frustrate emerging tribal participation in the broader economy.

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I. INTRODUCTION

The region where the City of Detroit now rests, as well as the key areas around Sault Ste. Marie and St. Ignace in Michigan's Upper Peninsula, used to be, centuries ago, major trading markets for the Anishinaabek, the Haudenosaunee people, and other Algonkian peoples. A permanent community of Indian people from all around lived near these centers and thrived off of the marketplace, while most Indians who traded there would travel to the market periodically from their homelands.¹ There are places like this all over North America, such as Chaco Canyon in New Mexico.²

The markets changed as French, English, and Spanish traders appeared. In Detroit, it appears that the French and English built forts and took control of the market, but the market remained.³ Indian people adapted to the new market conditions and, in the Great Lakes and elsewhere, the Europeans and Indians forged a fur trade that, for a time, dominated the economic landscape.⁴

However, the Indian presence in a regional market all but ended after the treaty and reservation system took hold. In many instances, Indians could not leave their reservation lands. In Michigan, if an Indian family left its allotment to travel to a market, the land wouldn't belong to the family anymore when they returned due to fraud and theft by white land speculators.⁵ In the Dakota Territory, the United States Army built a fence around the reservation to keep Indians in and whites out.⁶ All over, economic and political discrimination all but destroyed Indian participation in regional markets.

Charles Wilkinson coined the term "measured separatism" to describe aspects of this policy.⁷ In general, both Indian tribes and the

¹ See, e.g., W. VERNON KINIETZ, *THE INDIANS OF THE WESTERN GREAT LAKES, 1615-1760*, 229-31 (Ann Arbor Paperbacks 1965) (1940).

² See, e.g., DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* 25 (1992); Colin Renfrew, *Production and Consumption in a Sacred Economy: The Material Correlates of High Devotional Expression at Chaco Canyon*, 66 *AM. ANTIQUITY* 14, 16 (2001).

³ See, e.g., CHARLES E. CLELAND, *rites of conquest: THE HISTORY AND CULTURE OF MICHIGAN'S NATIVE AMERICANS* 114-18 (1992); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815*, 100, 148-49 (1991).

⁴ See generally Bruce M. White, *The Woman Who Married a Beaver: Trade Patterns and Gender Roles in the Ojibwa Fur Trade*, 46 *ETHNOHISTORY* 109, 111, 121 (1999).

⁵ See, e.g., JAMES A. CLIFTON, GEORGE L. CORNELL & JAMES M. MCCLURKEN, *PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI AND OJIBWAY OF MICHIGAN* 34-35 (1986); Bruce A. Rubenstein, *Justice Denied: Indian Land Frauds in Michigan, 1855-1900*, 2 *OLD NORTHWEST* 131, 134-35 (1976).

⁶ See, e.g., PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 15 (Karal Ann Marling & Erika Doss eds., 2004).

⁷ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987).

United States pursued measured separatism during the treaty and reservation era of the mid-18th century. Indians wanted to be left alone, and the United States wanted to avoid bloody conflict between Indian people and white settlers and speculators. In theory, measured separatism would serve Indians well because they needed a space in which to protect themselves from being overwhelmed by non-Indians.

Of course, measured separatism was a goal and not a reality. American Indian policy shifted to assimilation almost as soon as the ink on Indian treaties dried.⁸ Various means of assimilating Indian people—allotment, boarding schools, law-and-order codes, urban relocation, termination, forced-fee patents, and many, many others—came and went over the course of a century.⁹ Interestingly, it appears that while American policy had some success in “assimilating” or “civilizing” Indian people, often damaging Indian cultures in irreparable ways, it had almost no success whatsoever in restoring Indian participation (and assimilation) into the American economy.

Now, tribal self-determination is American Indian policy.¹⁰ The goals of measured separatism can become close to legal and political reality in many parts of Indian Country, with many Indian communities deciding for themselves how and when to pursue separatism or openness. Self-determination opens many doors for Indian communities to enter a political, social, and economic world many of these communities have not seen in centuries. The primary document of American Indian policy that now governs tribal sovereignty remains the Indian Reorganization Act (IRA), which expressly gives Indian tribes the option to organize into political units *and* economic units.¹¹ And, at least since the 1970s, Congressional policy has supported tribal economic development as a means of raising tribal governmental revenue.¹²

Some Indian tribes have gone far from home to realize this federal policy. A few Alaskan native corporations taking advantage of the Small Business Administration’s Business Development Program have generated hundreds of millions of dollars by winning and performing Defense Department, Homeland Security, and other federal agency contracts.¹³ Some Indian tribes have made millions at home by exploiting

⁸ See *id.* at 19.

⁹ See generally 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 611–1084 (1984).

¹⁰ See THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 18–23 (2008).

¹¹ See 25 U.S.C. §§ 476–477 (2000).

¹² See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 144–47 (2006).

¹³ See Duane Champagne & Carole E. Goldberg, *Federal Contracting Support for Alaska Natives’ Integration into the Market Economy*, UCLA Native Nations Law & Policy Center 2–3 (Sept. 13, 2007), http://www.law.ucla.edu/docs/uclanativenationswhite_paper_8a_9_13_07.pdf.

a market for on-reservation casino gaming created by state law and the Indian Gaming Regulatory Act (IGRA).¹⁴ In recent years, tribes that do not enjoy a non-Indian gaming market have attempted to tap into gaming markets far from their current homelands, without much success.¹⁵ Some tribes, notably the Navajo Nation, have taken significant steps into the global economy by entering into trade agreements with foreign nations.¹⁶

A backlash is developing against these new tribal economies and business opportunities. Suddenly, American commentators that would otherwise promote economic activity across state and national boundary lines want tribal businesses to stay home. Even the tribes' trustee, the same that once encouraged tribes to start tribal businesses, is putting the brakes on when it comes to the off-reservation market. The Department of Interior has made a unilateral decision that it will not approve applications for off-reservation Indian gaming except in extremely narrow circumstances.¹⁷ Of note, the Department of Interior has concluded that Indian gaming operations will not assist Indian communities unless they help to reduce the on-reservation unemployment rate.¹⁸ This rationale for denying tribal access to the off-reservation market is little more than a resurrection of the worst aspects of both measured separatism *and* assimilation. In international trade, we would call these rules protectionist. However, simple economics teaches us that commercial activity goes where the markets are—and for many Indian tribes, the markets are off-reservation.

Tribal economies once encompassed whole regions of North America. Measured separatism, for all its short-term advantages, more or less put an end to broad geographic tribal economic activity. It has taken many years for tribal economies to reconstitute themselves, and many tribes are just barely getting off the ground. Sadly, just as some tribes are enjoying the fruits of an off-reservation market, it appears that the efforts of other tribes to participate in a global economy will be opposed, and perhaps thwarted, by American Indian policy.

¹⁴ See, e.g., STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING & TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 1–12 (2005).

¹⁵ See, e.g., Posting of Kate E. Fort to Turtle Talk, BMIC and Sault Ste. Marie Tribe Bills Defeated in the House, <http://turtletalk.wordpress.com/2008/06/25/bmic-and-sault-ste-marie-tribe-bills-defeated-in-the-house/> (June 25, 2008); Deb Price, *U.S. House Rejects 2 Michigan Casinos*, DETNEWS.COM, June 26, 2008, <http://detnews.com/apps/pbcs.dll/article?AID=/20080626/POLITICS/806260369>.

¹⁶ Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1109 (2008).

¹⁷ See Memorandum from Carl Artman, Assistant Sec'y, Bureau of Indian Affairs, to Regional Dirs., Bureau of Indian Affairs (Jan. 3, 2008), *available at* <http://turtletalk.files.wordpress.com/2008/01/artman0103081.pdf> [hereinafter Artman Guidance]; see also Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008) (to be codified at 25 C.F.R. pt. 292).

¹⁸ See Artman Guidance, *supra* note 17, at 3–4.

II. A HISTORICAL SURVEY OF TRIBAL ECONOMIES

A. *Pre-Contact Local Economies and Regional Trading Centers in Indian North America*

It is important to recall that American Indian communities often engaged in local and regional trade before contact with European nations and people. Roads traveled by foot by the Michigan Anishinaabek between the northern lower peninsula and major trade centers in what is now Detroit, Grand Rapids, and Saginaw still existed not long ago. One of the Three Fires Confederacy—the Odawa people—often were known best as regional traders, traveling by canoe to markets that reached far up the St. Lawrence River to the east and into the Northern Plains to the west.¹⁹

In general, Indian traders living near rivers, major lakes, and seas could and did travel great distances to visit other communities and engage in trade. In Chaco Canyon, New Mexico, for example, researchers have unearthed evidence that the communities there grew and developed as trading centers, with people living there for no other reason than to facilitate trade.²⁰ There is evidence of similar trading centers all over the North American continent.²¹

B. *Post-Contact Adaptations to Tribal Economies*

After contact but before the American reservation system began to dominate American Indian law and policy, tribal economies continued to operate. The newest political and economic players—the Europeans—brought great and terrible change to the Indigenous peoples of this country. Indian communities reacted and adapted in various ways to the new players; sometimes to their advantage, sometimes not.

Consider two examples. In the Great Lakes, Indian people reacted to the arrival of the French by participating in the French demand for furs by acting as the major supplier of valuable furs.²² Great Lakes Indians often stopped their long-standing economic activities in order to pursue the fur trade and its rewards. Indian cultures changed forever, in both good and bad ways. One impact was that Indian hunters nearly rendered some animals extinct.²³

¹⁹ See CLIFTON ET AL., *supra* note 5, at 11.

²⁰ See Renfrew, *supra* note 2, at 16.

²¹ See, e.g., ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 13 (1970) (eastern North America); Alan Kolata, *In the Realm of the Four Quarters, in AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS* 215, 221 (Alvin M. Josephy, Jr., ed. 1991) (Andean trading).

²² See CLIFTON ET AL., *supra* note 5, at 14–16.

²³ See, e.g., Jeanne Kay, *Native Americans in the Fur Trade and Wildlife Depletion*, 9 ENVTL. REV. 118 (1985).

In the Great Plains, the arrival of the horse and then later modern weaponry—both results of contact with Europeans—pushed the Lakota people toward hunting the bison in a manner much different than before. Some Great Plains Indian cultures moved more toward following the bison herds, until they became far more dependent on these animals than before. As the bison headed toward extinction, the Lakota and other bison hunters did as well.²⁴ Other tribal economies changed as well, in widely varying ways.

C. *Early Federal Indian Policy and Tribal Economies*

Through the Indian Commerce Clause, the Framers of the Constitution elevated commerce with Indian tribes to be the primary means of regulating affairs (calling it “intercourse”) between Americans and Indians.²⁵ The Trade and Intercourse Acts, enacted and reenacted from the First Congress until made permanent in 1834, established the primacy of trade as the means with which to deal with Indian affairs.²⁶ The first presidents, especially Washington and Jefferson, sought to exert a form of control over Indian people and tribes through trade—with trading posts being a key element.²⁷ Of course, the overriding American Indian policy was to acquire lands and resources from Indian tribes (as opposed to Indian people) at the lowest cost possible.²⁸

Early American policy sought to pursue these twin goals—peaceful property acquisition and control over Indian people through trade—mostly through treaty negotiations. The Americans implemented and enforced Indian treaties in the Southeast and Great Lakes regions, for example, using tools of commerce.²⁹ This affected tribal economies in fundamental ways. Treaty provisions sought to keep Indians contained on smaller and smaller plots of land and regions. Southeast tribes sometimes took to farming, and in the case of the Cherokee Nation they were successful.³⁰ Northeast tribes that traded with the Americans were not so successful in maintaining anything resembling a successful tribal economy, subject as they were to ongoing depredations of the American traders.³¹

²⁴ See Craig S. Galbraith & Curt H. Stiles, *Expectations of Indian Reservation Gaming: Entrepreneurial Activity Within a Context of Traditional Land Tenure and Wealth Acquisition*, 8 J. DEV. ENTREPRENEURSHIP 93, 104–05 (2003).

²⁵ U.S. CONST. art. I, § 8.

²⁶ Act of July 22, 1790, 1 Stat. 137 (1790).

²⁷ See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 89–114 (1984).

²⁸ See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 68–69 (2005).

²⁹ See 1 PRUCHA, *supra* note 27, at 115–34.

³⁰ See, e.g., David M. Wishart, *Evidence of Surplus Production in the Cherokee Nation Prior to Removal*, 55 J. ECON. HIST. 120, 136–37 (1995).

³¹ Cf. 1 PRUCHA, *supra* note 27, at 266–68.

D. “Measured Separatism” and the Reservation System

Charles Wilkinson coined the term “measured separatism” to describe much of federal Indian law and policy throughout American history. Like any generalization, it has limitations, but it tends to describe what Americans and Indians sought in many, many treaties and agreements. In part, but perhaps less so than much of federal Indian law and policy, measured separatism was an economic plan. Under this concept, both Americans and Indians likely presumed that shared economic activities would be extremely limited. Indians would have hoped for the opportunity to be left alone to pursue economic, political, and social activities without the interference of American citizens and others.³² Americans would have hoped to keep the Indians away from their ongoing pursuit of expansion and economic growth.

Of course, measured separatism never lasted long. There would never be enough resources and space to satisfy the overwhelming numbers of American people and businesses, creating demand for Indian land and resources preserved in treaty negotiations as soon as the ink dried on them, if not earlier. In fact, it appears that non-Indians not present at the treaty meetings often assumed that the execution and ratification of an Indian treaty meant that the reservation land itself would be open for public settlement.³³

Moreover, measured separatism did not bode well for reservation economies. Great Lakes tribes retained their on *and* off-reservation hunting, fishing, and gathering rights, but still were forced to enter the local labor market.³⁴ As with so many other Indians in the East during the first century of the United States, the tribal economy and the subsistence culture was destroyed. In the West, Great Plains Indians, often forced to live on worthless land, literally fenced in, often depended entirely on American military rations guaranteed by treaty.³⁵

Other reservation economies flourished, only to be undermined by federal administrative action. Felix Cohen’s famous rendition of the ways that the Bureau of Indian Affairs employees destroyed a successful cattle ranching operation at Blackfeet is but one example.³⁶ Other examples include Bureau activities to use reservation water supplies to benefit non-

³² See WILKINSON, *supra* note 7, at 16.

³³ See Richard White, Ethnohistorical Report on the Grand Traverse Ottawas 107 (1979) (unpublished manuscript, available at <http://turtletalk.files.wordpress.com/2008/09/white-ethno-report-pages-56-195.pdf>).

³⁴ E.g., James M. McClurken, *Wage Labor in Two Michigan Ottawa Communities*, in NATIVE AMERICANS AND WAGE LABOR: ETHNOHISTORICAL PERSPECTIVES 66–99 (Alice Littlefield & Martha C. Knack eds., 1996).

³⁵ See John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 50–52 (2001).

³⁶ Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 368–69 (1953).

Indians over the intended beneficiaries (the Indians) and simple corruption in land tenure and use.³⁷

E. Land Tenure, Allotment, and the Indian Reorganization Act

After the establishment of Indian reservations, Congress turned to a land tenure system called “allotment” to destroy the large mass of tribal property owned communally. This was a flawed system, to be sure, but an economic system. Measured separatism alone, in the view of Congress and the Indian administration, might not create conditions allowing for the establishment of a self-sufficient tribal reservation economy. Moreover, there remained additional demands on Indian lands.

Allotment, simply described, was the transfer of tribal communally-owned real property to personal Indian and non-Indian ownership.³⁸ The stated policy was to teach Indians how to own land and to live off of that land, either through agriculture or the development of its natural resources.³⁹ It failed to do so. The administration of allotment disfavored most Indians in terms of the lands they could choose to settle, guaranteeing from the outset that many Indians would not be able to generate much income from the lands.⁴⁰ Moreover, the underlying premise of forcing people to engage in the homesteading of land guaranteed a significant percentage of failure—homesteaders throughout American history encountered far more failure than success, regardless of race.⁴¹

Allotment also signaled a shift in who the American government considered the primary tribal representative—from Indian tribe to individual Indian. In fact, allotment, by eradicating much of the communal reservation land, undermined whatever remained of tribal government authority or even tribal governments themselves. One example of this paradigm shift from dealing with Indian nations to dealing with Indian people could have been the 1871 Act that purported to foreclose additional treaty-making;⁴² however, the federal government

³⁷ *E.g.*, *Scholder v. United States*, 428 F.2d 1123, 1130 (9th Cir. 1970).

³⁸ *See generally* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 608–11 (2006); Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 64–69 (2005).

³⁹ *See* THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 10, at 112; Henry L. Dawes, *Defense of the Dawes Act*, in AMERICANIZING THE AMERICAN INDIANS 100, 101 (Francis Paul Prucha ed., 1973).

⁴⁰ *See History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, (statement of Delos Sacket Otis), *excerpted in* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 166, 169–70 (5th ed. 2004).

⁴¹ *See generally* Dan Fulton, *Failure on the Plains*, 51 AGRIC. HIST. 51 (1977); Gary D. Libecap & Zeynep Kocabiyik Hansen, “Rain Follows the Plow” and Dryfarming Doctrine: *The Climate Information Problem and Homestead Failure in the Upper Great Plains, 1890–1925*, 62 J. ECON. HIST. 86, 113 (2002).

⁴² 25 U.S.C. § 71 (2000).

continued making agreements with Indian tribes and then ratifying many of them as Acts of Congress.⁴³ Regardless, by reducing tribal governance over large portions of land, tribal governments dropped off the map in some places. Congress even eliminated some tribal governments; most famously, those of the Five Civilized Tribes.⁴⁴

The Indian Reorganization Act restored tribal governments to the primary Indian actors in federal Indian law and policy. Allotment was an unprecedented disaster of federal Indian law and policy, and Congress sought to stop the bleeding. Sections 16 and 17 are the core of the IRA in this context. Section 16 authorized Indian tribes to organize as constitutional governments, in a sort of municipality model of governance.⁴⁵ Section 17, authorizing tribes to form federal economic development corporations, also was a major shift, in that it implicitly recognized that many Indian tribal governments would not have a stable tax base from which to draw upon for government revenue. Section 17 authorized Indian tribes to become businesses, separate from the government itself, creating a vehicle with the purpose of generating revenue for the government.⁴⁶ It is not clear if Congress intended Section 17 corporate business activities to be relegated to on-reservation activity alone, or if Congress assumed tribal corporations would move off-reservation.⁴⁷ In any event, Congress and the Internal Revenue Service continue to treat Section 17 corporate income as exempt from federal (and state) taxes, likely because of the federal policy encouraging tribal business development.⁴⁸

The model of tribal government *qua* tribal business endures in the modern era as well. The most explicit Congressional statements of policy supporting this model are found in the Indian Gaming Regulatory Act,⁴⁹ the Tribal Tax Status Act,⁵⁰ and other federal tribal economic development-related statutes dating from the 1970s and later.⁵¹

⁴³ See George William Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 247 (1977).

⁴⁴ Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 8 (2007).

⁴⁵ 25 U.S.C. § 476 (2000).

⁴⁶ *Id.* § 477.

⁴⁷ Cf. ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 263 (2000) (noting a dearth of legislative history on Section 17).

⁴⁸ See 26 U.S.C. § 7871(a); Rev. Rul. 94-16, 1994-1 C.B. 19.

⁴⁹ 25 U.S.C. § 2701-2702.

⁵⁰ *Id.* § 7871(a).

⁵¹ Fletcher, *supra* note 12, at 145-46.

III. MODERN INDIAN AFFAIRS: GLOBAL COMMERCE OR PROTECTIONISM

The rise of tribal self-determination from the 1970s to the present has restored some of the luster of measured separatism. Now Indian people and communities have options—and are engaging in the progressive process of nation-building. With the rise of tribal self-governance, assisted greatly by tribal economic development, Indian people living in urban areas far from their homelands have more opportunities if they return. Indian children are more likely to be educated at home while having more opportunities to leave to attend universities, and graduate, and professional schools as they grow up. Indian governments now have the authority and the wherewithal to reintroduce the notion of measured separatism into their strategic planning, if they so choose.

Some tribes, such as the Mashantucket Pequot, have the ability and resources to maintain the personal privacy of tribal members and to keep internal governmental decision-making secure.⁵² Other tribes have maintained a more measured separatism over time. For example, some of the desert Southwest tribes and pueblos have been able to reinforce their separatism, while also encouraging a thriving non-Indian tourist and gaming trade.⁵³ Unlike the measured separatism of the treaty era, which often led to the creation of literal barriers between Indians and non-Indians, modern measured separatism often allows tribes to maintain their own private communities while they engage in sophisticated commercial and political activities involving non-Indians. Each tribe, in theory, is free to craft its own relationship with non-Indians.

Some non-Indians have long opposed the very presence of Indian tribes in the United States. Many American citizens only grudgingly accept local, state, and federal government taxation, regulations, and authority. These citizens often refuse to accept any form of tribal government authority. Many non-Indians have opposed the continuing treaty rights of Indian tribes and Indian people. Even more oppose these rights when they extend outside of Indian Country. Since Congress long ago authorized and encouraged Indian tribes to seek out opportunities to create economic growth as a means of funding Indian Country's government services, recognizing tax breaks and regulatory immunities that tribal businesses sometimes enjoy, many non-Indians have opposed tribal businesses. When tribal businesses maintain their operations within Indian Country, opponents have argued that these businesses have unfair competitive advantages. Opponents sometimes link these advantages to

⁵² See STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 106–10 (2005).

⁵³ See generally Angela A. Gonzales, Thomas A. Lyson & K. Whitney Mauer, *What Does a Casino Mean to a Tribe? Assessing the Impact of Casino Development on Indian Reservations in Arizona and New Mexico*, 44 SOC. SCI. J. 405 (2007).

race as a rhetorical means of denouncing them. But when tribal businesses exploit off-reservation markets, opposition commentary becomes much more vociferous.

The two most recent examples of opposition to off-reservation tribal business operations are in the areas of Indian gaming and federal government contracting. Opposition to off-reservation gaming has taken the form of a backlash, in the words of Senator McCain,⁵⁴ with opponents accusing tribes and their business partners of “reservation shopping” for purposes of exploiting urban, non-Indian markets.⁵⁵ Opposition to tribal corporations that engage in federal contracting under the Small Business Administration’s business development program accuse tribal businesses of exploiting race-based economic opportunities far from their homelands.⁵⁶

The common denominator of these arguments against off-reservation tribal business operations is the resurrection of the form that measured separation took during treaty times—the physical distance or barrier between Indians and non-Indians. In sum, this argument suggests that Indians can engage in any kind of business operations they like, so long as they do so only within their current land base.

In the context of off-reservation gaming, the Assistant Secretary of Interior issued a “guidance” in the form of a public memorandum to the Bureau of Indian Affairs limiting the discretion of the Bureau to take land into trust for the purpose of off-reservation gaming.⁵⁷ It was unsurprising for the Assistant Secretary to order the Bureau to take a harder look at tribal off-reservation gaming proposals in the current political climate and administration, but the rationale—that Indian people will not benefit, and may even suffer, from the expansion of off-reservation gaming—is simply incorrect as a matter of law, history, and reality.

⁵⁴ 151 CONG. REC. S13390 (daily ed. Nov. 18, 2005) (statement of Sen. McCain).

⁵⁵ See generally Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 66–71 (2007).

⁵⁶ See Patience Wait, *Tribal Companies’ Edge Stirring a Backlash?*, GOV’T COMPUTER NEWS, Jan. 24, 2005, http://www.gcn.com/print/24_2/34876-1.html?topic=procurement#.

⁵⁷ See Artman Guidance, *supra* note 17; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,354 (May 20, 2008) (to be codified at 25 C.F.R. pt. 292).

IV. THE DEVELOPMENT AND SURVIVAL OF TRIBAL ECONOMIES IN THE OFF-RESERVATION MARKET

A. *Reconciling Federal Indian Law and Policy with Modern Tribal Economic Development Realities*

The recent guidance issued in the form of a letter from the Assistant Secretary of Indian Affairs⁵⁸—and the Final Rule adopted thereafter⁵⁹—indicates that the federal government’s view is that, at least in the context of Indian gaming, the off-reservation market more than approximately 25 miles beyond current reservations’ boundaries is all but closed. This is unsurprising, given that federal officials have long argued that the framers of the Indian Gaming Regulatory Act never would have assumed Indian tribes would be so persistent in seeking off-reservation gaming opportunities. But the stated public policy behind the limit is not tied to federal Indian gaming policy—it is linked to the notion of measured separatism. In part, the Artman guidance appears to assume that the Termination Era economic policy favoring urban relocation of reservation Indians is an anathema and is usually considered a failure, but not one on the level of, say, allotment or boarding school-based education policy. The government in the guidance equates off-reservation gaming in some small way with urban relocation in implying that reservation Indians will go to where the opportunities are—and in the context of off-reservation gaming, they will leave the reservation. The government, invoking the bad memories of urban relocation, suggests that this is a reason to deny off-reservation gaming proposals.

Reservation Indian life and opportunity has long been a focus (off and on) of federal and tribal policymakers. Felix Cohen wrote in 1939 that making the reservation livable was a key ingredient in the IRA and in maintaining a successful federal Indian policy.⁶⁰ But Cohen, the primary drafter of the original version of the IRA, also wanted Indian tribes to take advantage of whatever economic opportunities came along, perhaps even those outside of Indian Country. But he kept his own counsel on the question of the off-reservation market.

The problem in both the IRA and IGRA is Congressional silence. Congress didn’t say in 1934 or in 1988 whether it had an opinion on tribal business activities in the off-reservation market. Legislative history and the subjective intent of the framers of the legislation aside, the statutory text is utterly silent. How do we proceed?

Well, we could proceed by ignoring federal Indian law and policy in the first instance. We are talking about businesses, often federally

⁵⁸ Artman Guidance, *supra* note 17.

⁵⁹ Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,354.

⁶⁰ See Felix S. Cohen, *How Long Will Indian Constitutions Last?*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 222, 225 (Lucy Kramer Cohen ed., Archon Books 1970) (1960).

chartered corporations, not just governments. They have limitations, including a paucity of adequate capital and financing opportunities, tribal government politics and inexperience, and usually a poor home economic market. Any business in that situation has no option but to look elsewhere. It is axiomatic.

But that's not what will happen as a matter of reality, both legally and politically. Tribal businesses have powerful political and economic opponents at all levels of government and elsewhere. Federal and state courts are deeply concerned that tribal businesses may be exploiting market exemptions, operating on anything but a level playing field. Tribal businesses, in the end, will find it extraordinarily hard to enter and compete in the off-reservation market under these circumstances.

B. A Schumpeterian Warning?

Recent commentators on Indian gaming in California worry that the rise of the tribal gaming industry has frightening parallels to the rise and devastating fall of the bison trade in the Great Plains after the introduction of the horse. Relying on dated anthropology, perhaps, these commentators noted that the Great Plains Indians did not hunt the buffalo to the extent that the Indian communities became dependent on the animal until after the use of horses and, later, guns became more prevalent.⁶¹ Had the American military and settlers not quickened the pace dramatically, according to this research, the Great Plains Indians could have hunted the buffalo to extinction or something close to it eventually.

This version of history may or may not be true. What is relevant is the warning. The commentators that raise the story applied a Schumpeterian economic development analysis to Indian gaming.⁶² Schumpeter noted that economic development, in general, arises when a great disruption occurs.⁶³ It could be the invention of a new gadget like the cotton gin or the discovery of massive gold or oil deposits in a region (these are examples of the kinds of disruptions that led to American economic growth at the expense of Indian people and others). Schumpeter posits that economies are circular, that all the goods, services, and money with which to transact those services are rotating in a sort of zero sum game.⁶⁴ Economic development occurs when a player in the economic circle invests some of its capital in a new economic activity or opportunity encouraged or created by the disruption (to the player's immediate short-term disadvantage), and has success. Value is generated in an inherent or intrinsic manner, and it spreads to others, creating extrinsic

⁶¹ See Galbraith & Stiles, *supra* note 24, at 104–05.

⁶² *Id.* at 106.

⁶³ See JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 65–67 (Redvers Opie trans., Harvard Univ. Press 1968) (1934).

⁶⁴ *Id.* at 61–62.

value as well. Contrarily, development does not necessarily occur when the disruption creates a temporary windfall for a player, negating the import of the new investment. The overall value of the economic circle does not necessarily grow, but wealth or value merely shifts to one player from other players. Often this is at the expense of others, for example, others who were attempting to exploit a market that suddenly dried up to the benefit of another player. The buffalo story offers an example of this scenario.

The commentators did not argue that Indian gaming is destined for doom, but they had a difficult time finding evidence of increased overall economic growth. They did find some increased small business activity from tribal members and drew positive conclusions from that evidence, but acknowledged that the evidence was thin.⁶⁵ At one point, they noted that Indian gaming appeared to be very similar to a mere windfall, like an oil strike.⁶⁶

So then, is the gaming industry not an engine of economic development for Indian tribes in the same way that it was in Las Vegas, Monaco, and other successful gaming communities? Is it just rearranging wealth on a temporary basis without creating new wealth?

Surely there is evidence that Indian gaming creates some new wealth, here and there. Any Indian tribe or tribal gaming advocacy group that has funded economic research into the benefits of Indian gaming will be able to demonstrate enormous wealth transfers from non-Indians to Indians (Indian tribes, at least). These studies will also employ “multipliers” to assert that there must be extrinsic benefits, too. Non-Indians and Indians alike stop accepting unemployment benefits or even come off welfare when they begin working at the new tribal casino; commercial activity (mostly services) increases in the area of the casino, plus vendors offer direct goods and services to the casino itself. Casino employees make more money, spend it, and send some of it to state and federal (and sometimes tribal) governments in the form of taxes.⁶⁷ But one could find reverse multipliers in the areas vacated by commerce that lose when the tribal casino opens, not to mention the increase in gambling addiction and (arguably) the increase in crime attendant to casinos.⁶⁸ Some argue vehemently that gaming is a wash at best; or an economic and social cancer at worst.

⁶⁵ See Galbraith & Stiles, *supra* note 24, at 108.

⁶⁶ *Id.* at 108–09.

⁶⁷ See generally Brief of Amici Curiae Grand Traverse Band of Ottawa and Chippewa Indians et al. at 11–26, *Taxpayers of Mich. Against Casinos v. State*, 685 N.W.2d 221 (Mich. 2004) (No. 122830), available at <http://courts.michigan.gov/supremecourt/Clerk/03-04/122830/122830-Amicus-GrTraverse.pdf> (discussing the various benefits of Indian gaming).

⁶⁸ See generally James P. Hill, *The New Buffalo: A Comparative Examination of Tribal Casino Gaming in Michigan, 1993–2003* (Nov. 5, 2007) (unpublished manuscript), available at <http://turtletalk.files.wordpress.com/2008/07/casino->

But for Indian gaming to generate significant and sustainable economic development there must be more. And that is one of the reasons Indian tribes and their business partners are looking to expand into the off-reservation market. The question then becomes—would tapping into the off-reservation market constitute real Schumpeterian economic development?

Galbraith and Stiles worry that it is not.⁶⁹ In the first instance, the market for Indian gaming is intertwined with politics. As Kevin Washburn noted, there would be no Indian gaming market if each individual state banned all forms of gambling within its borders.⁷⁰ IGRA exists because of this circumstance. Instead, states took political action in the 1980s to protect non-Indian gaming interests already present within many states, rather than flatly prohibiting all gaming. Now, it is clear that most states (rhetoric aside) simply want a greater and greater cut of Indian gaming proceeds, rather than seeking to eliminate it. Many have even licensed additional non-Indian gaming operations. The contours of the Indian gaming market on both a local and the national level are driven by politics. This is a weak link in the chain to demonstrating sustainable, Schumpeterian economic development.

C. *The Off-Reservation Market*

The Schumpeterian model of economic development may have useful import for analyzing tribal economies. Schumpeter taught that economies are circular. But his theory assumes that the circle is inclusive. However, Congress and Indian people often intended federal Indian law and policy, at various times and circumstances, to close the circle; keeping reservation economies (and societies) separate, in part, from the rest of the American (and global) economy.

Although the circle was never really closed, that often was the intent. And reservation economies were and are stilted by the legal and political isolation (not to mention geography). The wealth of the closed reservation economy circle did not grow horizontally or vertically. It is only in recent years—perhaps the last decade or more—that reservation economies have begun to integrate with the outside. This is a function of at least two important developments in federal Indian law and policy: (1) Indian gaming, and (2) increased self-governance over reservation natural resources. Finally, there is something valuable on-reservation that draws non-Indians *and* encourages non-Indians to invest or spend within Indian Country.

It is fair to say that these developments (Schumpeterian disruptions) are not going to generate true Schumpeterian economic development

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⁶⁹ See Galbraith & Stiles, *supra* note 24, at 108–09.

⁷⁰ See Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L. J. 285, 286 (2003–2004).

without more. In many ways, these disruptions open the door to the off-reservation market, but there must be some form of investment in new opportunities, creating new disruptions that tribal interests can exploit.

It is easy to say, as every commentator has since the beginning, that tribes must diversify from their reliance on gaming and natural resources. I agree with that proposition, of course.

That brings us to the beginning. The current crisis in Indian gaming is the so-called Artman Guidance, an informal administrative ruling seeking to restrict off-reservation gaming, and the Final Rule that followed in May 2008.⁷¹ Dozens of tribes with off-reservation gaming proposals in varying stages of development have sought to counter this move—a long time in the works, frankly—with legal and political action.⁷² Surely the government's argument as to why it is moving to restrict off-reservation gaming is grounded in federal Indian law and policy—selectively grounded, of course. The government's failings here are clear. It is a patent restoration of measured separatism at a time when tribal economies are expanding into the off-reservation market. It is also a tortured reading of the IGRA and its legislative history.⁷³

But the guidance is an opportunity for close scrutiny of tribal economies in the context of the off-reservation market. In short, the question is: why do Indian tribes want to go off-reservation?

The answer is found in the increasing economic irrationality of measured separatism. Using Schumpeterian terms, measured separatism created a closed circle of economic activity in Indian Country, which can be measured by capital and the value of resources within the circle. Within the circle now, using principles of federal Indian law, there are certain advantages to tribal business people. State regulation and taxation may be preempted or limited. Tribal business laws and regulatory environments might contain additional advantages. But it should be remembered that these factors derive in large part from measured separatism, a closed circle. There is extremely limited Schumpeterian value in a closed circle. Money flows around, *but it does not grow*. A strong argument, perhaps not dispositive, can be made that on-reservation tribal economic development, be it gaming or resource development, is nothing much more than moving money around within

⁷¹ Artman Guidance, *supra* note 17; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,354 (May 20, 2008) (to be codified at 25 C.F.R. pt. 292).

⁷² See Complaint, Menominee Indian Tribe of Wisconsin v. Dept. of Interior, No. 1:08-cv-00950-WCG (E.D. Wis. Nov. 7, 2008), *available at* <http://turtletalk.files.wordpress.com/2008/11/menominee-v-doi-complaint.pdf>; St. Croix Chippewa Indians of Wisconsin v. Kempthorne, No. 1:07-cv-02210-RJL (D.D.C. Sept. 30, 2008), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2007cv2210-48.

⁷³ For a compelling critique of the Artman Guidance, see Posting of Bryan Newland to Turtle Talk, Department of Interior Changes Fee-to-Trust Process, <http://turtletalk.wordpress.com/2008/01/08/department-of-interior-changes-fee-to-trust-process/> (Jan. 8, 2008).

the circle, money already located within Indian Country. In some circumstances, namely resource development, the economic development historically has been a terrible drain of capital away from Indian Country, and only in recent decades has this drain slowed.⁷⁴

The economic success stories highlighted over the years by the Harvard Project on American Indian Economic Development demonstrate many critical things. But perhaps the most important, although often hidden and implicit, is that Indian business interests do not necessarily look first to the advantages and contours of federal Indian law when developing their business models. They look to the market first. That's where the money is. Federal Indian law, with its significant basis in measured separatism, is not designed to encourage the importation of outside capital. Successful tribal businesses bring in outside capital, and also go to where the capital is located. Thus, it is unsurprising that tribal businesses like gaming operations make efforts to go where the better markets are located; that is, off-reservation.

Federal government pronouncements like the Artman Guidance, to be codified in 25 C.F.R. Part 292's territorial limitation, create yet another closed circle, just one slightly larger than before. Indian tribes are right to rally against rules like this one, but they must remember that these kinds of rules derive from measured separatism. And they demonstrate that federal Indian law and the economic development derived from its principles, limits tribal business opportunities. There is something there, and it should be tapped, but it has limits.

V. CONCLUSION

The pre-American trading centers of the Great Lakes—Sault Ste. Marie, Michilimackinac, and Detroit—developed as natural manifestations of economic activity involving the Indigenous peoples of the region, as well as the French, the British, and lastly the Americans. In many ways, during that period, the Indian people controlled these markets. As history turned against the Indians, the Europeans acquired control of these markets. The federal Indian law and policy manifestation of this control can be explained in the phrase “measured separatism.” While measured separatism had value for Indian and American communities for a time, as well as serious disadvantages, the need for Indian law controls over the market has receded significantly.

The recent limitations on off-reservation gaming are manifestations of this measured separatism. These controls should be a call for tribal business interests to drop some of their reliance on federal Indian law, which creates some economic advantages, and re-enter the larger economic world.

⁷⁴ See generally Judith V. Royster, *Tribal Economic Development and Mineral Resources: Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008).