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ECONOMIC DEVELOPMENT OF INDIAN LANDS

*Roger L. Tuttle**

IF anything be true of the United States in the second half of the Twentieth Century, it is the rise of humanism and social consciousness on the part of most Americans. The near-universal test applied today to one's personal or group relationships is whether justice is served. The salient examples of the fruit of this concern are the achievements which have been made toward bringing "first class citizenship" to the Negro-American through school desegregation, establishment of uniform nondiscriminatory voting requirements, abolition of separate rest rooms and waiting rooms, and the opening of housing and transportation facilities equally to all. The growing trend for some time in contemporary American society has been a similar interest in the "rights" of other disadvantaged persons and minority groups such as the Mexican-Americans, Puerto Ricans and Oriental-Americans. However, until only very recently one minority group, perhaps the most deserving of all, had been largely ignored. This group is the native American Indian.

In order for any minority group to enjoy the full import of its "rights" in our success-oriented society, it must first obtain economic self-sufficiency. The ability or "right" to develop economically has been denied the Indians due largely to the super-paternalistic attitude imposed by the Federal Government throughout the history of this country. The largest single factor contributing to this situation is the artificial restraint placed on property ownership and development of Indian lands. Until these restraints are removed, the Indians will continue to be shackled and prevented from establishing the place in American society which has been so long denied them. This article will explore the basis of the American Indians' economic servitude and will suggest some appropriate remedies to alleviate the Indians' harsh economic plight.

JURISDICTIONAL DICHOTOMY

It is essential to recognize the fact that most American Indians in the United States live on reservations and thus are subject to the jurisdiction of their tribal governments and not the government of the state in which

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the reservation is situated.¹ The classic rule is that states have no jurisdiction over reservation Indians in the absence of an explicit grant by Congress since Federal power is exclusive in this area. At least Congress has consistently acted upon this assumption—such as when Congress enacted broad statutes in 1834 organizing a Department of Indian Affairs and regulating trade with Indians.² It has been said that Congress from an early date developed a policy “calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any state ready to assume the burdens that go with it *as soon as* the educational and economic *status of the Indians permits* the change without disadvantage to them.”³

So far only six states have gained jurisdiction under Federal law over the Indian reservations within their borders.⁴ Congress has passed a statute authorizing all states to extend their civil and criminal jurisdiction to include reservation Indians by official acts, with tribal consent,⁵ but as of the date of this article no state has so acted.

The Indian who remains on the reservation will be “protected” from the full impact of society, while the Indian living off the reservation takes his chances as any other American. This is not to say, however, that the reservation Indian is completely free of outside control; he is, at least, subject to the plenary authority of Congress.⁶ Yet, Congressional power has been exercised only to a limited extent and thus, pragmatically, the tribal governments exercise the most important power over reservation Indians. From the standpoint of this article the paramount power that the tribal government exercises over its constituents, since most of the wealth is communally owned or controlled, is the power to determine the use and development of the wealth.⁷ The Federal Government’s present Indian

¹ See *Williams v. Lee*, 358 U.S. 217 (1958).

² *Id.* at 220.

³ *Id.* at 220 (emphasis added).

⁴ Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin have been given jurisdiction over the Indians by Federal law. Criminal jurisdiction was granted by 18 U.S.C. § 1162 (1964) and the civil jurisdiction by 28 U.S.C. § 1360 (1964).

⁵ The states were put in a position whereby with some affirmative action on their part they could gain jurisdiction, but without more the Indians still remain exempt. See 25 U.S.C. § 1321 (Supp. V, 1970) concerning criminal jurisdiction. See also 25 U.S.C. § 1322 (Supp. V, 1970) dealing with civil jurisdiction.

⁶ See *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965). See generally *Worcester v. Georgia*, 31 U.S. 214 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 178 (1831).

⁷ COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN, *THE INDIAN: AMERICA’S UNFINISHED BUSINESS* 34, 73-79 (W. Brophy &

policy recognizes as legitimate the preservation of tribes as self-governing and culturally autonomous units,⁸ although this policy has fluctuated radically between protection of tribal identity, assimilation, and annihilation. Hence, it is safe to say that the Indian tribes today are self-governing units within the United States, free from state control; but Indian tribes are not to be classified as sovereign nations or Federal territories.⁹

CLASSIFICATION OF INDIAN LANDS

The major resource which the Indians possess is their land. For them to reach the goal of economic self-sufficiency, they must be free to develop and utilize this land to its maximum potential. In order to better understand the barriers to such progress, it must be noted that there are two distinct types of Indian reservation land, each having its own peculiar problems. This land, the boundaries of which have been set by Treaty, Act of Congress, Executive Order or Purchase,¹⁰ is for the most part owned in common for the benefit of the whole tribe, and it has been "restricted" to that use with respect to persons outside the reservation. However, some of the reservation land has been "allotted" to individual Indians in severalty.¹¹ For the sake of clarity in this article, tribal lands owned in common will be hereafter referred to as "restricted tribal" lands, and the lands set aside for individual Indians will be referred to as "allotted individual" lands.

RESTRICTED TRIBAL LANDS

Although "Indian Country" once comprised most of the United States, much of this land was lost through conquest or inequitable treaty. "Indian

S. Aberle eds. 1966); UNITED STATES SOLICITOR GENERAL FOR THE DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW (1958).

⁸ See generally 25 U.S.C. § 476 (1964).

⁹ See Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74 (1961).

¹⁰ Formerly, the Indians owned all the land west of the Mississippi River except that small portion on which their title had been extinguished. See *Ex parte Crow Dog*, 109 U.S. 556, at 560 (1883). After Statehood was achieved by the territories, Indian land included only those parcels of land specifically designated by law. See, e.g., 25 U.S.C. § 463(a) (1964).

¹¹ Until 1934 the Indian could receive land in severalty, but title to this land would be held by the United States in trust for the Indians. See 25 U.S.C. § 331 (1964). In 1934 Congress prohibited further allotments in severalty to individual Indians unless the tribe voted to accept this prohibition. See 25 U.S.C. §§ 461, 478 (1964).

Country” was defined in the first section of the Indian Intercourse Act of 1834 as being

. . . [a]ll that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished . . .¹²

Of course, the Indians have lost title to most of this land since 1834, and tribal land is now restricted to lands expressly set aside for their exclusive occupancy.

Restricted tribal land may be defined as real property in which the Indian tribe has a legally enforceable interest.¹³ The land is held by all members of the tribe as tenants in common, with the tribal council or other governing body acting as managing trustee for the whole tribe.¹⁴ Each Indian is an owner in his own right, but he does not take as an heir, purchaser, or grantee. When he dies, his rights in the restricted tribal land do not descend;¹⁵ if he leaves the reservation, his rights terminate. If he wants to dispose of it, he has nothing to convey. Yet, otherwise, he has rights in the land as perfect as any other person, and his children will enjoy all he enjoyed—not as heirs, but as communal owners. Thus, no conveyance could be made by any of the tribal members less than all, including even children of the tribe or incompetents. But, because of the legal disability of children and incompetents, it would still be impossible to secure an indefeasible fee simple title to restricted tribal lands even if you had obtained the signature of *every* member of the tribe. As a result of this situation and the status of the Indians as wards of the Sovereign, adverse possession cannot run against the tribe.¹⁶

Restricted tribal lands may be used or leased for a number of purposes,

¹² Act of June 30, 1834, ch. 61, § 1, 4 Stat. 729.

¹³ The land that has been set aside for them is theirs and no one can dispossess them. If some adverse party takes possession of their land, the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, is authorized to bring an action of ejectment for the Indians. *See generally* 25 U.S.C. § 2 (1964). The Indians may not be parties plaintiff themselves but the United States Attorney has been empowered to represent them in all suits. *See* 25 U.S.C. § 175 (1964).

¹⁴ *See* 25 U.S.C. § 677(h) (1964). *See, e.g.*, 16 NAVAJO TRIBAL CODE §§ 201, 202 (1970).

¹⁵ *See, e.g.*, 25 U.S.C. § 677(g) (1964).

¹⁶ *See* 25 U.S.C. § 194 (1964).

primarily related to gaining income for the tribe, if consistent with the rules and regulations of the Secretary of the Interior.¹⁷ Such leases or permitted usages may be made to individual Indians, to groups of Indians, or even to non-Indian entities. Such tribal lands may be used for mining; oil and gas exploration, development and storage; grazing; farming; and for public, religious, educational, recreational, residential, business and other specified purposes. Generally, these leases are not to exceed twenty-five years, except for leases of land on certain enumerated reservations which are limited to ninety-nine years. However, the leases for public, religious, educational, recreational, residential and business purposes may be renewed for an additional term not to exceed twenty-five years if both parties agree to the renewal.¹⁸

From a practical standpoint the biggest problem in the development of Indian restricted tribal lands under Federal law is the securing of adequate funds. In virtually all land development throughout the United States (off reservations) the common practice is for the developer to either buy the raw acreage and then mortgage it to secure construction and development funds, or to lease the land from the owner and then hypothecate the leasehold. In dealing with Indians this practice is rarely possible because few lenders are willing to hazard a loan on security property which cannot be foreclosed—which is true of restricted tribal lands. This situation exists because mortgage foreclosure is an action in rem and the security property lies beyond the jurisdiction of civil process of the courts of the state in which the reservation is situated.¹⁹ Since Indian tribes are not states, the Fourteenth Amendment limitations do not apply even when the actions of the tribes are legislative or judicial in character.²⁰ Likewise, many other restraints or guaranties under the Federal Constitution which protect personal liberty and property rights do not apply to actions of Indian tribes.²¹

Recent efforts to ameliorate this restrictive situation with Indian lands

¹⁷ 25 U.S.C. §§ 393-403(c) (1964).

¹⁸ 25 U.S.C. § 415 (1964).

¹⁹ See generally *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). These cases deal with in personam jurisdiction, but civil and criminal jurisdiction of the states over Indians have been called branches off the same tree. Using this same analogy, in personam and in rem jurisdiction may also fall under the same rules. See *Sigana v. Bailey*, 282 Minn. 367, 164 N.W.2d 886 (1969).

²⁰ See *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958).

²¹ *Id.*

have seen the formation of tribal corporations²² and the attempt to lease and mortgage leaseholds of restricted tribal lands (for a period not to exceed ten years) under provisions of a corporate charter with the approval of the Department of the Interior.²³ However, once all the requirements are met and approvals secured, the ultimate lender still faces doubtful foreclosability in the event the Indian corporate borrower, or its lessee, gets into financial difficulty.²⁴ It is also doubtful that state (or local) judicial officers could serve process on the reservation or evict the occupants from the foreclosed premises.²⁵ It should be recalled at this point that state courts (except the courts of the six states which have gained jurisdiction under Federal law) have neither civil nor criminal jurisdiction over the Indians, and so it seems that the security property lies beyond the jurisdiction of civil process of the courts of the state in which the reservation is situated.²⁶

Use of the Federal courts, on the basis of diversity of citizenship, does not appear to be a solution in view of the fact that a Federal corporation (if an Indian tribal corporation can be so considered) generally is not regarded as a citizen of any state so as to confer upon Federal courts the necessary jurisdiction.²⁷ Assuming for the sake of argument, however, that a Federal corporation such as the Federal National Mortgage Association (under the FNMA Charter Act) is localized in the District of Columbia, still the Federal court would not have jurisdiction on the diversity basis because the state court has been held to have no jurisdiction over the subject matter.²⁸

Thus it appears that there are only two alternatives: one, to bring foreclosure in the tribal courts of the appropriate tribe;²⁹ the other, to require

²² 25 U.S.C. § 477 (1964).

²³ The Indians have the authority to incorporate but their corporations may not be given the power to sell or lease reservation land for a period exceeding ten years. See 25 U.S.C. § 477 (1964). The business committee along with the representatives of the half-blood members of the tribe may perform these functions, however, if they obtain prior approval from the Secretary of the Interior, which approval is readily obtained. See 25 U.S.C. § 677(h) (1964); 25 C.F.R. §§ 131.2, 131.3 (1970).

²⁴ In a default situation it is most probable that the state courts would deny jurisdiction. See generally *Williams v. Lee*, 358 U.S. 217 (1959); *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Morgan v. Colorado River Indian Tribe*, 7 Ariz. App. 92, 436 P.2d 484 (1968).

²⁵ See generally *Sigana v. Bailey*, 282 Minn. 367, 164 N.W.2d 886 (1969).

²⁶ *Id.*

²⁷ See 54 AM. JUR. *United States Courts* § 85 (1945).

²⁸ See *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966).

²⁹ See, e.g., 7 NAVAJO TRIBAL CODE §§ 104, 133 (1969).

the tribal corporation in the indenture of mortgage to agree to submit itself to either the local, state or Federal District Court otherwise having territorial jurisdiction. The first alternative has several obvious areas of hazard: (1) Tribal courts do not operate as do other American state and Federal courts with trained legal personnel, established rules, etc.; (2) Indian custom is followed; and (3) there is no body of prior written decisions to follow as precedent. Likewise, the second alternative contains the hazard of never having been tested for conformity with Federal Constitutional criteria.

TITLE INSURANCE ON RESTRICTED TRIBAL LANDS

Most sophisticated lenders refuse to make loans on security property that is not foreclosable. Also, the "standard" policy of mortgage title insurance insures against the unenforceability or invalidity of the lien of the insured mortgage on the estate. Thus, it is believed that any title company willing to insure³⁰ would at least require the following exception in its policies insuring the mortgages of Indian leaseholds:

This policy does not insure against loss or damage by reason of: The effect or absence of any Statute or Court decision of any nature controlling the ability and rights of the named insured to secure relief in the state or Federal courts.³¹

As of December 1970, the Federal Housing Administration and the Federal National Mortgage Association, as well as the Department of Housing and Urban Development, have been willing to take policies of title insurance containing this exception without undue objection, although applications for such insurance have been a rarity.

ALLOTTED INDIVIDUAL LANDS

Allotted individual lands may be defined as real property in which the *individual* Indian has a legally enforceable interest. Two types of allotted individual lands have been created to prevent the individual Indian from improvidently disposing of or encumbering his land. One type of land is issued to the allottee by means of a patent declaring that the United

³⁰ The author's experience in the title insurance industry indicates that only two or three national companies are willing to even entertain applications for such insurance.

³¹ American Land Title Association Loan Policy, Insuring provision No. 5 (1970).

States will hold the land in trust for a designated period, usually twenty-five years, and at the expiration of this period will convey the same to the Indian, or his heirs, in fee—discharged of the trust and free and clear of all charges and encumbrances.³² The other type involves the issuance to the allottee of a patent conveying the land immediately in fee, but imposing a restraint upon alienation for a stated period (again, usually twenty-five years).³³ The restrictions on this type of patent may be removed by the issuance of a Certificate of Competency by the Secretary of the Interior to the Indian or his heirs.³⁴ In either event, once the stipulated period has passed and the individual Indian has his fee simple absolute title vested, he is then subject to the civil and criminal laws of the state in which he resides,³⁵ and he may develop, sell or encumber the land as he chooses.³⁶ However, the lapse of the stated time period does not, in and of itself, eliminate the restriction. Some affirmative action must be taken by the Indian, and the fee patent or Certificate of Competency secured by him must be recorded.

During the period of the trust or restraint on alienation, individual Indian owners are authorized, subject to approval by the Secretary of the Interior (or his designees), to execute mortgages or deeds of trust on such land.³⁷ In the Act of March 29, 1956, Congress anticipated the foreclosure problem and provided that:

For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land.³⁸

As a result, the individual Indian has a relatively free hand in dealing with his severed property, whereas the tribal unit is severely restricted.

TITLE INSURANCE ON ALLOTTED INDIVIDUAL LANDS

The insurability of individual Indian mortgages, due to the preceding facts, becomes a more easily accomplished matter. The title company must

³² 25 U.S.C. §§ 331, 348 (1964).

³³ 25 U.S.C. §§ 334, 336 (1964).

³⁴ 25 U.S.C. § 349 (1964).

³⁵ *Id.*

³⁶ 25 U.S.C. § 483 (1964).

³⁷ 25 U.S.C. § 483(a) (1964); 25 C.F.R. § 121.61 (1970).

³⁸ 25 U.S.C. § 483(a) (1964).

first determine that the land was allotted to the individual Indian and ascertain the date of the allotment. If the period of restriction has passed, then the necessary fee patent or Certificate of Competency must be secured and recorded. If not, the necessary approvals from the Secretary of the Interior must be obtained and the boundaries of the parcel of land fixed by accurate survey. Of course, state and Federal land records must be searched and the mortgage instrument properly executed and recorded. Because of the wording of the Act of March 29, 1956, no exception need be placed in the title policy concerning the individual Indian, as the case with a tribal corporation mortgage.

NEED FOR REMEDIAL LEGISLATION

Perhaps one reason that the American Indian has been largely forgotten is because he has not organized as other minority groups have done, or maybe it is because there are so few Indians in relation to other minority groups,³⁹ or perhaps remedial legislation for the Indian has not been politically expedient. In any event, the present Administration now appears to be moving to give some localized relief to Indians in Alaska, Arizona and New Mexico.

An Act was proposed during the Second Session of the 90th Congress which was designed to give the Indian tribes relief in the areas described in this article, but the bill died in committee without action.⁴⁰

On February 4, 1969, during the opening days of the 1st Session of the 91st Congress, Senator George McGovern (D-S.D.) introduced three new bills, similar in nature to the dead bill of the 90th Congress, which were referred to the Indian Affairs Subcommittee of the Senate Committee on Interior and Insular Affairs.⁴¹ However, these bills also died in committee at the close of the 91st Congress.

Among the particularly important portions of these 1969 legislative proposals was Section 3(9) of the Indian Financing Act⁴² which provided that, in conjunction with a "revolving loan" made under other provisions of the Act, title to property could be mortgaged or pledged to the lender if the property was purchased with a loan under this section. Furthermore,

³⁹ Only 280,000 Indians lived on reservations as of the 1960 Census. See COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* (W. Brophy & S. Aberle eds. 1966).

⁴⁰ S. 1816, 90th Cong., 2d Sess. (1968).

⁴¹ S. 918-920, 91st Cong., 1st Sess. (1969).

⁴² S. 918, 91st Cong., 1st Sess. (1969).

Section 4(e) of the same proposed Act provided that the lender could sell or assign the security property (which was given for a loan under the Act) to any financial institution that was subject to supervision and examination by any state, an agency of the United States, or the District of Columbia. However, the real breakthrough came in Sections 4(q), 4(r) and 4(s) of the proposed legislation where the tribes were given authority to acquire land free from any restriction on alienation, control, or use, without regard to the limitations imposed in *any other statute*, and the Secretary of the Interior, as trustee of Indian lands, was made subject to suit in any court of competent jurisdiction. Finally, under Section 6 of the Act, tribes were authorized to issue tribal bonds secured by liens on any tribal real property.

The proposed Act for the Establishment of Indian Corporate Entities⁴³ provided for the organization of tribal corporations for the purpose of carrying on business enterprises at or near reservations and for the acquisition, holding, and disposal of restricted or trust property in connection with these enterprises. This included the mortgaging of tribal lands. More important, however, was Section 6 of this Act which conferred exclusive and original jurisdiction of suits, in which tribal corporations may be a party, on the United States District Court where such a tribal corporation had its principal office, without regard to the amount in controversy or diversity of citizenship.

The proposed Act for the Resolution of Indian Fractionated Ownership Problems⁴⁴ provided for the partition in kind, or by sale, of Indian lands, including trust lands or restricted lands, under certain circumstances. The Act conferred jurisdiction on the United States District Court, where the land or any part of the land was located, to hold partition proceedings in accordance with the law of the state in which the land was situated.

If these preceding Bills had been enacted into law, almost all of the Indians' land and economic problems, as outlined herein, would have been solved. Hopefully the substance of these proposals will be resurrected by Congress and enacted into law.

CONCLUSION

Due to the historic position that the American Indian is a ward of the United States and not a citizen, severe and anachronistic restrictions on

⁴³ S. 919, 91st Cong., 1st Sess. (1969).

⁴⁴ S. 920, 91st Cong., 1st Sess. (1969).

the Indians' development into "first class citizens" still exist in the last half of the Twentieth Century. By Congressional action these unrealistic impediments to Indian economic development can be lifted for the betterment of the Indians, and in turn, to benefit all Americans.