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Indian Economic Development: An Evolving Concept of Sovereignty

JOHN C. MOHAWK*

What makes recent years particularly interesting, however, is that Indians have achieved another kind of power as well. Since the mid-1970s, as a consequence largely of Indian political action, the organizing principle of Indian policy has been "self-determination," the idea that tribes themselves should make most of the decisions which substantially affect their communities and fortunes.¹

AMERICAN Indian economic development is a relatively recent area of study. Beginning around 1968,² American Indians across the country began protesting what they termed unfair domination by the United States government through its administrative bureaucracies — the Bureau of Indian Affairs ("BIA"), the Bureau of Land Management, and a host of smaller, less well-known agencies which had regulated Indian land, water and lives for well over a century. The nature and extent of federal (and in some cases state) domination over Indian communities was so complete that Indians had practically no real power of ownership over their assets and no authority or ability to mobilize capital and labor — the primary ingredients which make development possible.

The history of Indian economic development begins, therefore, with the Indian movement for sovereignty, which included the occupation of Alcatraz Island, the struggle for Indian fishing rights on the Columbia River, the Pit River Indians' struggle for land rights, the Trail of Broken Treaties, the occupation of Wounded Knee in 1973, and a number of other events. The result of these years of turmoil was a widespread consensus in the Indian country that power over policy decisions involving Indian resources and development directions must be wrested away from the non-Indian bureaucracies and relocated among the Indian peoples

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1. S. CORNELL, *AMERICAN INDIANS, AMERICAN DREAMS, AND THE MEANING OF SUCCESS 15* (The Harvard Project on American Indian Economic Development, May 1987).

2. Author Vine Deloria, Jr. traces the origins of the Indian movement to the Poor Peoples' march organized by Martin Luther King in 1968. The march preceded a bridge blockage at Cornwall Island (near Massena, New York) by Mohawks, the founding of *Akwesasne Notes*, and the founding of the American Indian Movement ("AIM") in Minneapolis the same year. See V. DELORIA JR., *BEHIND THE TRAIL OF BROKEN TREATIES* 33-41 (1974).

and communities.³

Court decisions involving the status of Indians to make decisions over their own lives reveal the courts' belief that Indians have no political or economic power to control their destiny. In an early case involving logs cut by Indians on an Indian reservation and sold to a non-Indian, the Supreme Court ruled that the logs belonged not to the Indians but to the United States government and that the right of occupancy did not extend to an ownership of assets.⁴ In *Cherokee Nation v. Georgia*⁵ and again in *Worcester v. Georgia*,⁶ Chief Justice John Marshall defined Indian sovereignty in the context of federalism and jurisdiction but ultimately spoke, as evident in his opinions, to the real concern of all parties at the time: land.

Eventually the federal courts found that the U.S. Congress possessed plenary power in Indian affairs,⁷ that the U.S. government owned the Indian reservations, and at one point even had the power to eliminate Indian tribes and nations.⁸ In the course of this period (roughly 1789 to 1968), there arose a huge federal bureaucracy, the BIA, which was designated to oversee Indian affairs. The power the BIA assumed over Indian lives cannot be overestimated:

The Bureau, unique among federal agencies, is the federal, state and local government of the Indians, and supplants or dominates the private sector as well. It is realtor, banker, teacher, social worker; it runs the employment service, vocational and job training program, contract office, chamber of commerce, highway authority, housing agency, police department, conservation service, water works, power company, telephone company, planning office; it is land developer, patron of the arts, ambassador from and to the outside world, and also guardian, protector and spokesman.⁹

There could be no Indian economic development during the period from 1789 to 1968 because, by definition, Indians had no power to organ-

3. These are major elements, though by no means the only elements, which Indians have argued, demonstrated, and fought for in the years since 1968. For several views of the problems of Indian management of resources, see ANTHROPOLOGY RESOURCE CENTER, NATIVE AMERICANS AND ENERGY RESOURCE DEVELOPMENT II (1978); see also Mohawk, *BIA Senate Hearing: Witch Hunt for a Straw Man*, DAYBREAK MAG., Spring 1989, at 26, 27.

4. *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873).

5. 30 U.S. (5 Pet.) 1 (1831).

6. 31 U.S. (6 Pet.) 515 (1832).

7. Established in *United States v. Kagama*, 118 U.S. 375 (1886). See also *United States v. Sandoval*, 231 U.S. 28 (1913). See generally Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984).

8. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *The Termination Era*, in CASES AND MATERIALS ON FEDERAL INDIAN LAW 130-51 (1986).

9. E. CAHN, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 7 (1969).

ize their communities (virtually all that power resided in the BIA), Indians had no recognized or recognizable ownership of their reservation (which the courts claimed belonged to the United States), and in most cases Indians had no access to any resources, local or external, human or material, from which to build economic growth. In 1969, Cahn and Hearne reported that:

the Indian cannot use what is his — money, land, or treaty rights — without first securing approval. Individual Indians constantly report they cannot even find out what land is theirs, or what money is in their own private accounts.¹⁰

The result of this long period of enforced social and economic stagnation is that Indian communities are among the poorest in the United States, exhibiting exorbitant unemployment rates and the social ills associated with third world underdevelopment.¹¹ The event in the twentieth century which some people interpret as an effort to reverse the policy of total powerlessness imposed on Indians in Indian country was passage of the 1934 Indian Reorganization Act (the "IRA").¹² The IRA undoubtedly made things better for some people and worse for others, but in any case, by 1968 Indian communities remained the poorest communities in the United States. Subsequent changes in that status have largely occurred since 1968 and have been little influenced by the IRA. Indian activism, not federal policy, has been the primary force for change.

There is today, however, something of a revolution in Indian country:

The essential thrust of this revolution is the effective transfer of *de facto* control and ownership of American Indian reservations from the Federal Government and the Bureau of Indian Affairs (BIA) to the tribes themselves. The economic consequence of the transfer is the deregulation of broad classes of economic activity on Indian reservations. This change, largely the result of Indians' own aggressive assertion of their rights to self-determination and self-government, has significantly unraveled the historic (not to mention demeaning) status of Indians as official dependents of the Federal Government.¹³

The American Indian movement of the 1960's and 1970's established a

10. *Id.* at 117.

11. See McNALLY, ECONOMIC WELFARE IN INDIAN COUNTRY: A CONSIDERATION OF HISTORY, 1868-1968 30 (The Harvard Project on American Indian Economic Development, May 1989).

12. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (current version at 25 U.S.C. § 476 (1988)).

13. J. KALT, THE REDEFINITION OF PROPERTY RIGHTS IN AMERICAN INDIAN RESERVATIONS: A COMPARATIVE ANALYSIS OF NATIVE AMERICAN ECONOMIC DEVELOPMENT 1 (May, 1987) (available at Harvard University Energy and Environmental Policy Center).

militancy among a younger generation of Indians who refused to continue to be addressed as wards of the BIA and refused to agree that the reservation assets of their grandfathers were somehow transferred to the hands of the United States. The 1970's and 1980's became decades of political development in Indian country which saw some communities seize control of their own resources and develop those resources with their own goals and objectives and their own control of both the nature of development and the designated beneficiaries:

. . .since 1975 reservation economic development has moved increasingly into Indian hands . . . [f]or the first time, Indian tribes are making their own strategic development decisions.¹⁴

A number of conditions preclude successful economic development on Indian reservations and require at least a short historic evaluation. Indian nations and communities differ from other Americans primarily in the group nature of the communities. Most immigrants and their descendants, although part of a distinct racial or ethnic group, exist largely as individuals in American society. The Indians exist as distinct groups (as sovereign nations) and have existed as such since time immemorial. America has a tradition of individual rights, but little tradition of group rights, and even today Indian rights are poorly defined and poorly understood.

Immigrants and settlers were largely defined by their value to society as laborers. African and African-American slaves were likewise brought to the United States (and formerly Britain's American colonies) as laborers. The Indians, however, were not valued for their labor: they were desired for their land. This value placed on the Indian by the national government created the unique relationship of the Indians to their reservations:

At the heart of Indian-white relations . . . was land. . . . Indians were removed *as groups* from lands desired by non-Indians to less desirable lands. On these lands, called reservations, and despite assimilationist policies, both the collective identity and significant aspects of indigenous institutions and culture survived.¹⁵

After the land was seized, whites wanted the Indians to vanish. Banished to often remote reservations, Indians were presumably going to languish out of the white culture's sight and mind under the tutelage of federal bureaucracies. When, during the 1960's, other ethnic groups gen-

14. S. CORNELL, *supra* note 1, at 6.

15. *Id.* at 13.

erated political, social and economic demands, their demands focused on redistribution of access to rights within American society. Among Indians, however, demands centered around control over land and policy:

. . . as one looks back over the increasingly activist Indian politics of the post-War years, what is striking is the persistent salience of goals which have little to do directly with the common American vision of success. Again and again three intimately related concerns emerge: tribal sovereignty, treaty rights, land. All have to do fundamentally with the maintenance and protection of peoplehood, of community. . . . It has been a politics of national survival.¹⁶

Economic development is a social process which involves the ability to organize, to reach for goals, and to take action to achieve those goals. Indian economic development may be less about creating wealth than it is about creating the conditions for political power in the context of socially responsible choices for the continued existence and cohesion of the Indian nation:

Economic development is not only economic. Regardless of the extent to which decision makers take non-economic issues into account, their decisions have non-economic consequences. Tribes . . . are political sovereigns making substantive decisions regarding the future configuration of their societies. . . . Economic development, then, is inherently strategic.¹⁷

Economic development in the Indian country has been a by-product of an Indian movement toward sovereignty, and sovereignty has meant being able to do what the Indian government decides to do and thus rendering the decisions of the federal courts, which had largely ignored the idea of Indian sovereignty as providing the Indians with any real political power, as close to irrelevant in the real world as possible.

Several case studies of Indian political power successfully evolving into economic power are now available. The Mescalero Apache, the Cochiti Pueblo and White Mountain Apache are Indian nations which have dramatically wrested power over their land and resources from the federal bureaucracy and moved diligently to generate employment and tribal wealth from their resources. A list of other examples, with varying degrees of solvency, include:¹⁸

— The Cherokee of Oklahoma, which own and operate an electronics manufacturing plant.

16. *Id.* at 6.

17. *Id.* at 13.

18. *Id.* at 3-4. The list in the text included a cement factory owned by the Passamoquoddy Tribe of Maine which has since been sold.

- The Quinault, Lummi, Swinomish and several other tribes in the Northwest and Alaska, which own and operate fish canneries.
- The Blackfeet of Montana, which are a major player in the market for writing instruments.
- The Oneidas of Wisconsin, the Gilas of Arizona, and several other tribes, which own and operate office and industrial parks serving major metropolitan areas.
- The Warm Springs reservation in Oregon, which owns and operates a major sawmill and a large tourist resort.
- Over 100 tribes which operate bingo casinos with seating capacities often in the thousands and jackpots approaching the millions.
- The Choctaw of Mississippi, which own and operate a factory specializing in electrical wire harnesses for the auto industry, as well as a greeting card company.

It was long an article of faith of American policy makers that the reason for the failure of the Indian to be successful in "modern" society was that Indian cultures were "backward". Policies therefore sought to acculturate the Indian, to bring him to Christianity, and therefore to fruitful economic life. All manner of acculturation was tried, from captivities such as the Bosque Redondo, to Indian agents acting as Christian missionaries, to splitting up the reservations and distributing the Indian land base to settlers.¹⁹ The new movement toward self-determination has illustrated that one of the ingredients of poverty on Indian reservations is the culture of enforced powerlessness which has historically characterized U.S. Indian policy in Indian country.

Since 1968, it has become increasingly clear that culture has much less to do with economic success than does access to political power.²⁰ Cochiti Pueblo, one of the successful Indian development stories, maintains its traditional Indian form of government. The chances for success depend on an environment of fairness and access to opportunity. Tradi-

19. See generally P. WEEKS, *THE AMERICAN INDIAN EXPERIENCE, A PROFILE: 1524 TO THE PRESENT* (1988); A. DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* (1970).

20. This is not to argue that culture has no influence on economic success, but rather that its influence has been historically overwhelmed by policies which denied Indians any opportunity to make decisions over their own lives. Indeed, a Stephen Cornell paper contained this interesting hypothesis:

Hypothesis 26: Those tribes in which indigenous groups of intellectuals — guardians of the deeper meanings of group membership, whose task in part is to think about and exemplify what it means, culturally, to be a member of the group — have survived and continue to play a major role in tribal affairs will have the potential for more powerful community mobilization and, therefore, for more effective development than those where such groups no longer significantly function.

S. CORNELL, *INDIAN RESERVATION ECONOMIC DEVELOPMENT: SOME PRELIMINARY HYPOTHESES 21* (The Harvard Project on American Indian Economic Development, Oct. 1987).

tional forms of government operated by very conservative (i.e., traditionalist) Indian policies have been successful, as have tribal business councils. The rules are the same for both: fairness within and access to opportunity give much greater chance of success. Indeed, one of the real problems in Indian country was that the IRA form of government, instituted in 1934, was simply not working for Indians because it was not designed with cultural preference in mind and was organized by non-Indians for non-Indians' purposes.

Indians are discovering that several requirements of political organizations can be woven into the fabric of their particular culture (and Indians vary greatly culturally). The first requirement for an economic development strategy to be successful is that the leadership, be they elected or appointed or otherwise, must be restrained from the activity of "rent-seeking" or other opportunistic behavior.²¹ In the jargon of Indian economic development, "rent-seeking" occurs when a public official uses the powers of his office for personal gain, either directly or indirectly, but opportunistic behavior need not be limited to individual rent seekers. Tribal councils sometimes seek to change the rules after investors have assets in place. Opportunistic behavior:

can give a party a bad reputation and raise the cost of attracting future investment dollars. Opportunistic expropriation through conscious action or unintended instability, if anticipated, can cause investors either to refuse to commit capital to reservations or to stiffen the conditions and changes under which capital is committed.²²

This same kind of behavior can go a long way to discouraging Indians from investing their resources in their own businesses and has historically discouraged people from supporting the Indian governments.

A second requirement, closely related to and perhaps indistinguishable from the first, is that there must be an independent judiciary designed and empowered to render impartial judgments in cases involving conflict between the tribal council and others. The idea that tribal councils must create independent judiciaries and subject themselves to their judgments sounds counter-sovereign (to coin a phrase), but since most people will not invest their time or money in ventures in which they

21. From Latin America to an excessively litigious U.S. Society, rent-seeking can destroy or divert resources from productive use. The key to shutting down rent-seeking lies in the creation of definitive rules of law — definitive property rights to action and resources. . . . Rules of law are fundamentally a problem of enforcement, and enforcement is a relationship between leaders and their constituents.

J. KALT, *supra* note 13, at 49-50.

22. J. KALT, *supra* note 13, at 25.

rightly fear unfair treatment in the event of a conflict, independent judiciaries are emerging as a necessary cornerstone in the evolution of effective Indian sovereignty.

Another requirement is that Indians must create institutions which can act to get the job, whatever it is, done. It is a crucial step from having a dream to acting on the dream in an organized and efficient manner. As we have seen, before such institutions can be successful in Indian country, the necessary environments must be created in the form of Indian governments conducive to proactive institutions. In some parts of the Indian country, the very prospect of sharing responsibility, creating a separate and independent judiciary, and restraining "rent-seeking" among some Indian leaders will be extremely challenging.²³

There must also be planning which allows for some economic pluralism. Currently, the number of options for growth are fairly limited: federal (the BIA does the planning and implementation), tribal (the tribe does it), entrepreneurial (individuals or small investment groups from within the community do it), and external (when investment and management are provided by external private capital). The first and last choices have become increasingly unpopular among Indian nations, partly because these choices do not enhance sovereignty and partly because Indian nationalism leans strongly against these choices in many places. There is one other possible choice: to do nothing. Doing nothing, increasingly, is not a choice at all, and culturally is a choice toward extinction. Most of the development on Indian reservations, predictably, will be that owned and operated by the Indian nations and entrepreneurial ventures of Indian members. The job of the Indian governments will be twofold. First, they will need to be able to operate with business skills, choosing how much to invest, when to invest, and what to invest in, just as other business leaders must do. In addition, they will need to make decisions around overall economic development consistent with the goals and ambitions of their people. Thus the successful Indian governments will create environments which sustain and support the kinds of entrepreneurial initiatives consistent with the goals of the group.

Indian sovereignty is being redefined according to what an Indian nation can actually do. It is no longer limited to discussions about state versus Indian nation jurisdiction, but rather around material issues and

23. The literature on the quality of Indian political life is scanty, at best. Written at the beginning of the American Indian self-determination period, an interesting book which charges election irregularities and corruption on the Rosebud Reservation in South Dakota, is R. BURNETTE, *THE TORTURED AMERICANS* (1971).

strategies designated by the Indian population and carried out by increasingly able Indian legal entities. The social implications are enormous. If Indian nations have the power to make decisions about their future, they can choose educational paths which cause their languages, history, arts and culture to survive and can therefore perpetuate the very elements which define them as distinct peoples.

EXCERPT FROM JOHN MOHAWK'S PRESENTATION AT BUFFALO
CHANGE & COMMUNITY CONFERENCE

. . . Since 1975, reservation economic development has moved increasingly into Indian hands. For the first time Indian tribes are making their own strategic development decisions.

The Indians are different from other communities in America. Other communities of people in America came to America as individuals but the Indians were always groups. They started out as groups, they were rounded up on reservations as groups, and they are in their own identity as groups. They are also demanding rights as groups and the issue of group rights is a very difficult one in American law and policy because American law and policy does not much recognize group rights.

At the heart of Indian-white relations was land. Indians were removed as groups from land desired by non-Indians to less desirable lands. On these lands, called reservations, the collective identity and significant aspects of indigenous institutions and culture survived. . . . The reservations become the place in which the Indians survive as a group and so there is a fierce determination by the Indians to maintain both the reservation and the group identity and that has been the fuel and the fire behind the Indian movement. The Indian movement has been a demand not for individual rights or access to the marketplace, but has instead been a demand by the groups for rights over their own land and their own lives without any interference from the outside. This demand is manifested more and more in the struggle for economic rights and economic development.

The Indian country is increasingly aware that economics is not in and of itself a primary goal of life, that economic development is not only economic. Regardless of the extent to which decisionmakers take non-economic issues into account, their decisions have non-economic consequences. Tribes are political sovereigns making substantial decisions regarding the future configuration of their societies. Economic development, then, is inherently strategic and in the Indian country it is very clear that groups are forcing the issues of economic development in order to gain political independence from the federal bureaucracies. And that is a really important thing. The goals, the aspirations, the dreams of American Indians are fairly consistent. They want to maintain their culture and their identity and they want to be able to make decisions for themselves about their own futures.

In the context of the reservation system you have a definable space, a definable population, and theoretically one can figure out exactly what

the options are in terms of how many trees there are, how many gallons of water—all of the things that add up to the issue of material potential are quantifiable. But in the Indian country the issue clearly has been power—the Indian country's experience has been that in order to gain economic power one has to first gain political power and one has to get recognition of rights over one's property and the rights over one's ability to make one's own decisions oneself. One also has to push the Bureau of Indian Affairs out of its counsel chambers, one has to push the federal government back, and one has to push the state governments back. Then you can make decisions. When you make decisions, that gives you economic power. Economic power then gives you more political power and bargaining space.

This is the nature of the change that is happening. Of course it is bringing great trauma to the states which have always dealt with the Indians as powerless others, and which never had to deal with Indians who made demands and had power to enforce their demands. In Western New York we see that there is significant trauma and difficulty adjusting to the newly aggressive and politically and economically aware Indians. And I think on the Indian reservation there is another problem. The Indians have to deal with the reality that American society and their societies have two personalities, and that the Indian reservations have to become able to manage businesses as a group. The Seneca nation, for example, has to be a business operation and at the same time it has to create an environment that enables people who are entrepreneurial in nature to build small businesses. So you have to have a private sector and a public sector and you have to know which is which in order for all of this to function.

There has to be new development in terms of institutions. Motivation develops economics. And what motivates people is fair treatment. When people know that there are institutions in which a fair resolution of disputes will occur, they are much more motivated to invest their time, energy, and materials into that institution than they are if they think they are going to get ripped off every time they go to City Hall. So, the issue of fairness inside institutions is becoming a big discussion in the Indian country. Of course that means that people who deal in law and policy can provide some help to Indians trying to think through the question of how you make things work in those environments.

In order for us to talk about Indian economic development, we really have to start from scratch. We have to start from point zero, talk about what development really is, what it really does, its social conse-

quences. Then we have to talk about how internally we create environments which make those desirable social consequences more likely. These are very complex issues and these are the heart and soul of democracy rights—how to figure out how to make things work in an environment in which coercion is not the major tool of movement.

Fundamentally, then, the issue of Indian economic development is very new. It is very new because Indians never had anything to develop with before—never had any power to make any decisions before. But because it is new and because Indians come from a communal background and in some ways are a step out of the American mainstream of thought, and because their environments are unique and because each unique environment has its own history and in some cases its own language and religion, Indian cultures provide interesting laboratories in American society. Things can happen in Indian cultures that could not happen anyplace else. We can view how economic development is going to evolve among Indian cultures, and maybe other people can learn from these developments.