North Dakota Law Review

Volume 52 | Number 2 Article 3

1975

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TRIBAL ADMINISTRATION OF NATURAL RESOURCE DEVELOPMENT

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I. INTRODUCTION

In an increasingly resource-conscious economy, native American communities confront promising opportunities and perplexing choices. Large reserves of untapped fossil fuels, water, timber, and fisheries remain in tribal jurisdiction.[1] Potentially even greater supplies of water are currently exploited without effective tribal consent and may be restored to tribal control.[2] Productive exploitation of this share of contemporary market power will depend upon an integrated program of economic and structural reorganization consistent with individual tribal goals. That is an ambitious generality. We can only aspire to the setting forth of what we perceive as the blueprint for quantitative and formal legal study.

II. THE STRATEGIC SIGNIFICANCE OF TRIBAL RESOURCES

The strategic quality of tribal resources today is two-fold. A changing world situation, combined with the inevitable depletion of already-developed domestic supplies, is enhancing the price of what many tribes appear to have most of: energy resources. Shortages of potable water are of growing concern, and there is reason to believe that only recession has succeeded in reprieving the country from wood-product shortages. Fish products, which are in neither exceedingly high demand nor short supply at this time, could soon prove increasingly valuable here (as they have abroad) as cheap, low-energy substitutes for fertilizer and animal protein. The inefficient management policies of existing federal forestry programs

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1. *See generally* H. HOUGH, DEVELOPMENT OF INDIAN RESOURCES (1971). As Hough observes, adequate inventories of tribal resources simply do not exist, although many individual tribes have undertaken contract surveys. The Bureau of Indian Affairs has also identified incomplete inventory as a problem. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* SUBCOMMITTEE ON ECONOMY IN GOVERNMENT OF THE JOINT ECONOMIC COMMITTEE, 91ST CONG., 1ST SESS., ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES, vol. 2, at 358 (Joint Economic Committee Print 1969) [The Committee print is a compendium of papers submitted to the Subcommittee on Economy and will hereinafter be referred to as 1969 JOINT COMM. PRINT].

2. Veeder, *Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, printed in* 1969 JOINT COMM. PRINT, vol. 2, *supra* note 1, at 331. William Veeder's bibliography would suffice as testimony to the foregoing observation. *See also* HOUGH, *supra* note 1.

and state fisheries regulation are added reasons to anticipate successful competitive marketing by tribes.[3] As a rule, wherever existing supplies are costly, either because of legal constraints or depletion, tribes with fresh reserves or an effective economic policy can expect to have a significant competitive advantage.

On the other hand, owing to relatively low "human capital," dispersed demography, and isolation from utilities and established pathways of communication and transportation, tribes cannot expect easily to attract labor-intensive secondary industries.[4] New industrial centers could be established, but only at the monumental expense of creating the market "infrastructure" from the ground up and then attracting adequate non-Indian labor to operate industry on an efficient scale. The ultimate demographic outcome could thoroughly defeat the social goal of development; i.e., the advancement of the existing Indian community.

Infrastructure costs are also prohibitive to private developers. They are ordinarily financed by means of long-term public borrowing, usually on a pledge of public credit, and by taxation. Public financing in turn requires a foundation of taxable property or other substantial revenue for debt service or security, which few tribes can now provide. Accordingly, tribes increasingly rely on federal lending and grantsmanship. However, federal agencies are unwilling to underwrite the cost of overall industrialization, perferring instead to capitalize specific industrial projects at considerably lower cost.[5] Without infrastructure development, federally-funded industry is substantially equivalent to social security. While it lasts, some employment can be generated, but there is no real groundwork for future growth (except perhaps an increase in human capital through the training incidental to employment).

It may be that most reservations are not located for efficient secondary industrialization. It may also be that tribes must simply find sources of starting capital other than federal agencies. Under either view the significance of primary industry is clear, both as a

3. Crutchfield, *Economic Objectives of Fishery Management, in* THE FISHERIES, PROBLEMS IN RESOURCE MANAGEMENT (Crutchfield ed. 1965); J. CRUTCHFIELD & G. PUNTECORVO, THE PACIFIC SALMON FISHERIES (1969). Dis-economical over-conservation of resources was attributed to the federal timber management program operated on public lands and tribal lands by Samuelson, Hirschliefer, et al. at a conference held November 23, 1974, by the College of Forest Resources, University of Washington. Publication of the papers is forthcoming.

4. *E.g.*, BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, vol. 2, *supra* note 1, at 356-7. These features are not unique to Indian communities, but also frequently characterize non-Indian communities on and near reservations. This fact exacerbates tribe-state relations through competition for federal subsidy, as for example in the revenue-sharing program.

5. Bureau records indicate that the agency has actually provided a very small share of industrialization and project funds in the past, the major portion having been provided by private lenders or from tribal revenues. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, vol. 2, *supra* note 1, at 349.

source of continuing income and as an initial source of capital for industrialization.[6]

III. LEADERSHIP-DEFICIT THINKING

Any consideration of federal Indian policy leads to the inescapable conclusion that it was intended to depopulate the reservations rather than facilitate tribal growth. Official claims notwithstanding, little progress has been made in tribal growth because the underlying theory of reservation underdevelopment is the same now as it was a century ago.

Six years ago the Bureau of Indian Affairs appraised its traditional policy as "essentially nondevelopmental" and promised to move with all dispatch from a "custodial" role of preservation, to a "stewardship" policy of prudent investment and growth.[7] The suggested dichotomy is fundamentally misleading. The Bureau has been actively exploiting tribal resources since the turn of the century, and since 1920 has been authorized to deduct a "reasonable fee" from the proceeds to pay for its own administration.[8] Even before that time, the Congress had been accustomed to liquidating tribal resources for the benefit of non-Indians,[9] as for example in the construction of railroads[10] and through sale to private developers.[11]

It is tempting to identify in the history of federal Indian policy a "savings account" theory of management. Reservation building has always been most intensive during periods of an abundance of land. Following the Revolutionary and Civil Wars, Indian territories were reserved in the great vastnesses of the west, well beyond the pale of contemporary development. However, when these reserved lands became valuable for their minerals, rights-of-way, or agriculture, the United States rapidly liquidated them by removal,[12] emi-

6. We have avoided classifying "agribusiness" as a primary industry only because it does not yet share the strategic significance of fuels, water, timber, and fisheries: prices are notoriously low and reservations offer no particular competitive advantages. However, it cannot be disregarded as an alternative because labor requirements are relatively low and the basic resource—arable and pasturable surface—is abundantly available.

7. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, vol. 2, *supra* note 1, at 336.

8. Act of February 14, 1920, ch. 75, § 1, 41 Stat. 408, 415. This extends to any lease of tribal or alloted land. The Bureau originally interpreted this to entitle it to 8% of gross receipts where continuing supervision was provided, and 3% where there was an outright sale. In 1944, 25 C.F.R. § 61.25 (now 25 C.F.R. § 141.18 (1975)) was amended to allow a 10% and 5% fee respectively. Some quantification of trends in leasing is found in HOUGH, *supra* note 1, at 117-30, 143-44.

9. *E.g.*, Federal Power Comm'n v. Tuscavova Indian Nation, 362 U.S. 99 (1960) (hydroelectric dam); United States v. Creek Nation, 305 U.S. 479 (1938) (national forest).

10. Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890); Buttz v. Northern Pac. Ry., 114 U.S. 55 (1886).

11. Tuttle v. Moore, 64 S.W. 585 (Ct. App. Indian Terr. 1901).

12. *E.g.*, Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613 (1942) (findings of fact). The justification for removing the Sioux from their Black Hills reservation, *i.e.*, that the United States could not protect them from its own citizens' desire to exploit Sioux

nent domain,[13] and allotment.[14] The General Allotment Act[15] was not undone, significantly, until the Depression. While land prices were low, the Bureau reacquired former reservation lands, simultaneously compensating non-Indian victims of the economic disaster and beginning a new cycle of federal management.[16] During the Korean War boom of the early 1950's, the policy of tribal dissolution and transfer of Indian lands to private development was reasserted. This trend significantly reversed only over the past few years.[17] In general, the long-run economic cycles of American boom and bust have been the cycles of reservation "deposits" and "withdrawals" by the federal "trustee."

The Republic originally relied exclusively upon customs and the sale of public lands for revenue, as had the colonies before the Revolution.[18] This reliance shaped the conflict between the federal government and the states over Indian jurisdiction more than any tenderness of regard for the Indians. By retaining exclusive jurisdiction over tribal territory, the United States "banked" future revenue.[19] More recently, liquidation of tribal holdings has served as an incentive to the states for accepting the transfer to them of the welfare burden of Indians, who the Congress originally believed with scientific conviction would by now have conveniently disappeared.[20]

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resources, is an echo of the arguments made to the Cherokees on the eve of their removal from Georgia and Tennessee. 1 AMERICAN STATE PAPERS, INDIAN AFFAIRS 467-77. In the Cherokee case, removal yielded lands already improved by tillage and fencing, and the construction of turnpikes, bridges, and ferries by the Nation.

13. Buttz v. Northern Pac. Ry., 119 U.S. 55 (1866).

14. *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1972); M. YOUNG, REDSKINS, RUFFLESHIRT AND REDNECKS (1961) (discusses Creek allotments during the first removal period).

15. Act of Feb. 8, 1887, ch. 119, 24 Stat. 338.

16. 25 U.S.C. §§ 461-465 (1970). These laws were introduced in 1933, the year in which U.S. land prices hit their lowest point between 1906 and the present, and at the end of a plunge that had begun in 1920. From 1920-1933, the national average price for farmland fell from $69 to $30 per acre. The years 1925-1927 were also the poorest homestead entry years since homesteading began. U.S. CENSUS, STATISTICAL HISTORY OF THE UNITED STATES 236-37, 278 (1960).

17. This of course refers to the legislation, principally Pub. L. No. 83-280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588), which followed the declaration of policy in H.R. CON. RES. 83, enacted Aug. 1, 1953, 67 Stat. B132. Pub. L. No. 83-280 was later amended to require tribal consent. Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-26).

18. Until 1845, land sales comprised at least 10% of the federal reserve. U.S. CENSUS, STATISTICAL HISTORY OF THE UNITED STATES 712-13. In this regard it is amusing to reflect on Anthony Trollope's astonishment at America's abhorrance of taxation as an alternate form of revenue. A. TROLLOPE, NORTH AMERICA (1862).

19. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), held that citizens could acquire fee land only by patent, not through Indian grantors. *See also* Chief Justice Marshall's concluding remarks in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1910) (dictum). The states contended that the *McIntosh* principle imposed a duty on the United States to extinguish Indian claims. State v. Foreman, 16 Tenn. 256 (1835); State v. Tassels, 1 Ga. Rep. Ann. (1 Dud.) 478 (1830).

Even recently, the Supreme Court has acceded to this view, distinguishing the property rights of tribal Indians and tribal Filipinos (during American trusteeship) on the basis that the purpose of the Philippine occupation was "for the benefit of the inhabitants," whereas the purpose for regulating Indians was to acquire territory. Carino v. Insular Gov't of the Philippine Islands, 212 U.S. 449, 458 (1908), *cited with approval in* Tee-Hit-Ton Indians v. United States, 384 U.S. 272, 284 n.18 (1955).

20. "The speedy extinction of the race seems rather to be hoped for than regretted, and

Cycles in the demand for Indian resources have also been reflected in the changing legal status of tribal government. No assertion of a federal power to supervise the domestic affairs of Indians was made until liquidation of reservations was undertaken in the 1880's.[21] Many early supervised tribal governments, such as those of the Osage and Navajo, were created expressly for the purpose of ratifying mineral leases.[22] The Indian Reorganization Act,[23] which provides authority for reacquisition of reservation land, also provides a general grant of governmental powers to Indian tribes, including power to control mineral leasing, but in practice tribes are generally afforded only the opportunity to veto Bureau leasing plans.[24] In specific cases this flows from statutory delegations of review power to the Interior Department.[25] In addition, most Indian Reorganization Act tribal constitutions, drafted by the Interior Department, contain express delegations of review powers to the Secretary of the Interior.[26]

"Leadership-deficit thinking" describes a theory of policy that justifies federal administration of tribal resources and simultaneously seeks to excuse the United States from responsibility for continuing Indian poverty. It is characterized by two axiomatic assertions about Indians: (1) they are anti-developmental and ignorant, and (2) these failings are the result of their cultural differentness.[27]

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they look forward to it themselves with a sort of indifference." MESSAGE FROM THE PRESIDENT TO CONGRESS, EXEC. Doc. No. 1 33rd Cong., 2d Sess. (1854). "To exterminate the aborigines of forest and the mountains is a policy that no enlightened citizen or statesman will propose or advocate. That this race . . . are destined to a speedy and final extinction, according to the laws now in force, either civil or divine, or both, seems to admit of no doubt, and is equally beyond the control or management of any human agency. All that can be expected from an enlightened and Christian government, such as ours is, is to graduate and smooth the pass-way of their final exit from the saga of human existence." REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 181 (1854).

21. *See generally* W. HAGEN, INDIAN POLICE AND JUDGES (1966).

22. *See, e.g.*, Shepardson, *Navajo Ways in Government, A Study in Political Process*, 65 AMER. ANTHROPOLOGIST pt. 2, at 3 (1963).

23. Act of June 18, 1934, ch. 576, 48 Stat. 984.

24. *See* 25 U.S.C. § 476 (1970). M3LANE, OIL AND GAS LEASING ON INDIAN LANDS (1955) is illustrative and written from the perspective of the lessee.

25. *E.g.*, 25 U.S.C. §§ 397, 398, 399, 400, 401, 402, 403a (1970).

26. *See*, Fay *Charters, Constitutions and By-Laws of Indian Tribes of North America*, Colorado State College Museum of Anthropology, Occasional Papers in Anthropology Nos. 1-16 (1967-1972).

27. According to the Bureau, traditional Indian culture suppressed acquisitiveness, competition, and technology; it was marked by a "reverent disposition toward habitat." Material wealth was not important and the "promise of payrolls . . . often does not provide the motivation needed to encourage economic growth." Sharing (the Indian "social security program") discouraged earnings. Time was devoted primarily to "contemplation." BUREAU OF INDAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 332-34, 337, 342-44. These are outrageous generalizations. Even if they described Indian communities in 1900, that is no reason to expect them to be equally true today. The very fact that Indians are demanding development assistance and complaining about Bureau "stewardship" of their resources is the clearest disproof of these assertions. To fend off Indian developmentalism, the Bureau (and environmental groups) have exploited this "grandfather" argument to convince tribes that *real* Indians do not develop their resources; they have others do it for them. *See* Barsh, *Corporations and Indians: Who's the Villian?* M.B.A. 11-13 (June 1975). The Blue Lake Amendment hearings are particularly illustrative of conditioning tribal land ownership upon non-development. *Hearings on S. 750 and H.R. 471 Before the Subcommittee on Indian Af-*

To be sure, the Bureau has been the first to admit that there are other obstacles to development, such as a lack of infrastructure, inadequate capital markets, and legal constraints. Nevertheless, emphasis in principal and practice has been directed towards the development of human capital.[28] This has the advantage of being the cheapest obstacle to overcome, but it is not necessarily conducive to tribal growth. Skilled labor tends to migrate to places where there is employment; therefore, a disproportionate emphasis on training results in depopulating the community. The Bureau has persuaded itself that "no prospective improvement in the management of resources or employment of Indians in resource use can yield the equivalent of the absorption of the ideal reservation labor force . . . through such employment at standard wage rates," implying that emigration is unavoidable and reservation poverty inevitable.[29] The "relocation" program, recently phased out in favor of less overtly coercive programs, from 1952 to 1968 offered employment assistance and special subsidies only to Indians who agreed to migrate to the nation's cities.

It can of course be argued that improving human capital will serve as an attraction to existing industries to relocate on reservations.[30] In the absence of infrastructure development, however, an industry will relocate on reservations only if the available labor force is willing to work at wages low enough to offset the costs resulting from reservation isolation.[31] This cannot be the Bureau's

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fairs of the Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess., at 127 (1970). There is also a cause-and-effect issue. To the extent that anti-development values have arisen or persisted, they may be the result of dependence, economic failure, and the repetition of anti-economic ideology by the Bureau, rather than the cause of poverty. Moreover, we believe that the Bureau mistakes a legitmate tribal policy objective of distributive equity for primitive irrationality, described in greater detail in the fifth part of this essay. *See also* L. GILBREATH, RED CAPITALISM: AN ANALYSIS OF THE NAVAJO ECONOMY (1973).

28. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 336-37, 341, 353, 354; ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE, INDIAN DEVELOPMENT PROGRAM, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra*, note 1, at 358-59. An examination of the budgets of the United States for these years indicates that, since these comments were made, Bureau expenditures for education have been at least ten times greater than for credit and business development. The Bureau's business development program itself is primarily devoted to on-the-job training.

29. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 341. Resource development may not be the final solution, but can be a stage in the growth of a diversified economy. There is a conspicuous absence of relevance to resource potential in the Bureau statement quoted from here, as also in the statements of coordinate funding agencies. *E.g.*, ECONOMIC DEVELOPMENT ADMINISTRATION DEPARTMENT OF COMMERCE, INDIAN DEVELOPMENT PROGRAM, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 356. According to HOUGH, *supra* note 1, at 11-12, 117-19, 143-44, however, agricultural and resource income have greatly exceeded business income. Mineral proceeds averaged a little over $51 million per annum, and timber proceeds $11 million per annum, in the decade ending 1966.

30. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT ECONOMIC COMM. PRINT, pt. 2, *supra* note 1, at 348-49. Indians are led into this trap by the argument that they excel in precision work, and therefore will attract precision industries. HOUGH, *supra* note 1, at 194-95, 199-200.

31. *See, e.g.*, HOUGH, *supra* note 1, at 195. Wages, of course, vary from place to place depending upon the costs of business and availability of labor. Lower-than-average wages

objective, unless it believes that sound wages are not as important as the experience of working. The leadership-deficit model suggests that the reservation continues to be a "school of civilization" in which Indians learn by doing, and then leave for more hospitable environs.[32]

This helps explain another curious practice: a disproportionate emphasis in reservation development planning on small, secondary, and tertiary industries, rather than comprehensive resource exploitation projects.[33] These small enterprises are likely to fail in the absence of industrialization or some outside source of consumer income.[34] However, organizational demands are low for these enterprises, consistent with leadership deficit thinking that Indians are incapable of advanced management. It is also cheaper to subsidize a large number of small, low-capital enterprises, than to fund a few costly major industries, and it makes it appear that more is being done. As by-products, Indians are diverted from wresting control of their natural resources from the United States and are trained for relocation in the cities. Finally, the Bureau is assured of a continuing role as educator, planner, and supervisor. Successful industry would make tribes economically self-sufficient and therefore eliminate the "need" for the continued existence of the Bureau.

The principle beneficiaries of a program of reservation subsidization that falls short of meeting infrastructure costs and establishing lasting industries are neighboring non-Indian communities.

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as such are not necessarily a danger signal. If, as the Bureau contends, tribal citizens value leisure time or reject materialism to an unusual degree. We can predict that they will each work fewer hours, their wages will be somewhat lower, and more of them will be able to work some hours. That is a rational economic choice. No one works day and night. All of us value both leisure and wealth and seek to strive for the best mix of both. Our concern here is, however, that for every dollar spent on training a dollar may not be spent on attracting business to the reservaton—or financing Indian enterprises—in order to create jobs.

32. The mataphor is attributable to United States v. Clapor, 35 F. 575 (D. Ore. 1888), where the court described tribal courts as "mere educational and disciplinary instrumentalities" and the reservation itself as being "in the nature of a school, and the Indians are gathered there . . . for the purpose of acquiring the habits, ideas, and aspirations which distinguished the civilized from the uncivilized man." This was a policy as well as a metaphor. HAGEN, *supra* note 21. It is echoed in the contemporary argument that starting Indians in small businesses is justified as educational even if they fail economically. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 355.

33. Of the nearly $9 million in E.O.A. grants and loans reviewed by HOUGH, *supra* note 1, at 263-65, about $5.5 million has been devoted to secondary tribal and private reservation industries, and less than $1 million to primary industries. In 1969 E.D.A. reported having loaned or guaranteed approximately $13 million to non-Indian secondary industries as an incentive to relocate on reservations. ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE, INDIAN DEVELOPMENT PROGRAM, *printed in* 1969 JOINT PRINT, pt. 2, *supra* note 1, at 360. The Small Business Administration operates under legal limitations which lend it an unavoidable bias towards secondary and tertiary enterprises. ECONOMIC DEVELOPMENT IN THE AMERICAN INDIAN COMMUNITY: ROLE OF THE SMALL BUSINESS ADMINISTRATION, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 398.

34. This is the fundamental error in Gilbreath's analysis of the Navajo economy. *Gilbreath, supra* note 27. He recommends retail and service industry promotion because of low capital costs and minimal management requirements. However, his own data indicate that the Navajo consumer economy cannot now support such businesses because of characteristic low, fluctuating incomes.

A large part of the development funds for tribes seems to be spent on the professional time of planners, architects, and on construction. These services must be purchased from established, typically non-Indian enterprises in surrounding communities. On-the-job training programs reduce the contribution of these non-Indian businesses to their Indian employees' wages.[35] Consequently, the subsidy is dispersed into the support of non-Indian business, and is inadequate to foster any serious threat of future Indian competition.

IV. TRUST RESPONSIBILITY IN THE BALANCE

Efforts to transfer Bureau regulatory functions to the tribes meet with the argument that such a transfer will be used to justify cessation of federal financial responsibilities to tribal communities. The use of Public Law 83-280 to terminate supervision and assistance simultaneously is still remembered. In principle, equating these two federal functions is unjustified. Although the federal government can constitutionally set conditions on the disposition of its subsidies to sub-federal governing bodies, those conditions cannot traverse the doctrine of limited powers to direct and control non-subsidized local activities.[36] Accordingly, it is appropriate to observe that the federal responsibility to subsidize tribes is the result of treaties, whereas federal supervision rests largely upon subsequent federal arrogations of power without treaty authority or revocable tribal consent and delegation. Tribes can withdraw their consent to supervision without impairing their prior legal right to services.[37]

Even supposing, however, that there is a substantial risk of simultaneous termination of supervision and assistance, it is not at all clear that tribes would be worse off without the Bureau. Indeed,

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35. *See* CATALOG OF FEDERAL DOMESTIC ASSISTANCE, INDIAN BUSINESS DEVELOPMENT PROGRAM; HOUGH, *supra* note 1, at 192-93. Another example of this is federal assistance to tribes for meeting basic needs. Indians may accept lower wages because they receive such services. Federal services to Indians may therefore be passed on as reduced costs to non-Indian business.

36. Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

37. The federal trust responsibility has been characterized by the courts as a function of the tribes' dependence on the United States, "for their daily food. . . . [F]or their political rights. . . . From their very weakness and helplessness. . . ." United States v. Kagama, 118 U.S. 375, 383-84 (1886). Thus the argument could be made that tribal emergence into full political self-regulation demonstrates an end of the condition of helplessness and therefore an end to trusteeship. The flaw in that reasoning is that the treaty provisions in themselves are not addressed to helplessness, but speak in terms of a perpetual relationship, typically arising out of a right to compensation for land rather than a privilege of pity. Moreover, the guardian-ward metaphor relied upon so heavily by the courts following *Kagama* originated in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), but was there clearly intended to refer to political dependency in the international sense, not economic dependency. Chief Justice Marshall was careful to retreat there, and again in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that federal authority ended at tribal borders. *C.f.* United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876). Subsidy without domestic assistance was typical until the 1880's, when the courts reinterpreted federal powers. Roft v. Burney, 168 U.S. 218, 221-22 (1897); *In re* Wilson, 140 U.S. 575, 577-78 (1891).

the proper question is, or should be, whether the benefits of trusteeship outweigh its diseconomies.

The Bureau is of course a conduit for all direct subsidies. But even without the Bureau, tribes would continue to be eligible for general local government assistance, *e.g.*, O.E.O., E.D.A., L.E.A.A., H.U.D. and revenue-sharing funds. In fact, the burden of providing tribal subsidies has increasingly shifted away from the Bureau to these conventional sources,[38] without a corresponding decrease in Bureau supervision. Consequently, elimination of Bureau brokerage functions would principally tend to reduce the added transaction costs borne by Indians in dealing with government agencies. These costs are the result, at least in part, of double review, delay, and conflicting jurisdiction. They reduce the quantity of funds ultimately available for distribution. To the extent that there continue to be subsidy programs unique to Indians, such as general assistance and revolving credit, it should be observed that most of them are self-replenishing loan programs that require and receive little fresh capital from Congress.

Since the Bureau can disapprove any tribal resource development contract for no reason or any reason at all, it can choose among bidders for tribal resources for reasons other than bids offered.[39] The Bureau has no incentive to maximize tribes' profits, and is therefore especially susceptible to the persuasion, pressure, and influence of bidders. Firms aspiring to develop tribal resources will consequently devote more resources to "capturing" the agency's discretionary approval, than to offering the tribe a competitive price. Once a firm has won the support of the Bureau, pressure may be brought to bear on tribal leaders not to exercise their own powers of negotiation and approval. After all, if the Bureau is prepared to back a particular firm, it is futile for the tribe to refuse to execute a contract. It will simply mean that the resource remains undeveloped, and the tribe loses income.

The costs of "capturing" the Bureau will be reflected in a lower price paid to the tribe. The successful firm obtains a monopoly on approval of development contracts. It can also use its monopoly position to limit the number of reservation jobs, thereby depressing

38. *See generally* HOUGH, *supra* note 1. *Compare* also the respective statements of the B.I.A., E.D.A., O.E.O., and S.B.A. in 1969 JOINT COMM. PRINT, *supra* note 1.

39. *E.g.*, 25 C.F.R. §§ 131.5, 131.8 (1975) with regard to general surface leasing. This power has been justified on the authority of 25 U.S.C. §§ 2, 9, 341-415 (1970). However, tribes never consented to these laws by their treaties or otherwise. In 1934, Congress authorized tribes to adopt constitutions subject to Bureau approval. 25 U.S.C. § 476 (1970). Despite assurances to Congress that this approval power would not be wielded to exact routine supervisory powers from tribes, delegations of review power typically found in I.R.A. constitutions. *Hearings on the Readjustment of Indian Affairs before the Senate Committee on Indian Affairs*, 73rd Cong., 2d Sess., at 107 (1934). *See also* United States v. Boyd, 83 F. 537 (C.C.N.C. 1893) (expansively construing the effect of 25 U.S.C. § 81 (1920)).

Indians' wages, or to charge monopoly prices to reservation consumers.[40] Tribes therefore pay dearly for the Bureau's brokerage functions.[41]

Even when it is not influenced by private interests, the Bureau often makes inefficient choices. Until 1966, for example, tribal trust funds were invested at 4 percent in safe Treasury bonds and government-sponsored railroad bonds.[42] Federal authority to control such investments is justified by the axiom of Indian ignorance, yet federal investment was dramatically risk-averse and seemingly reflective of a fear or ignorance of diversification.[43] It was not justifiable as a policy of protecting tribal funds, because it is in the tribe's interest that its broker (the agency) seek to maximize the rate of return, and, as in private brokerage, be liable in damages for its negligence or incompetence. The express purpose of trusteeship is to take the risk of loss off of the Indians and leave it in more enlightened hands. However, the Bureau's trust fund investment policy can best be understood as intended primarily to minimize the government's risk of liability for loss to the tribal beneficiaries. Tribes paid for the government's self-insurance by enjoying a lower rate of return. Moreover, trust funds were manipulated into investments that served (in principle) national, rather than tribal interests, at rates well below those ordinarily necessary to attract private capital. In this way tribes were actually taxed for the benefit of the national treasury, to the extent of the difference between their four percent and prevailing sound investment rates.

Because it is a matter of dollars, trust fund mismanagement is readily quantified. There are at present no quantitative studies evaluating risk-aversion in industrial development programs. However, the mere fact that the power to use and dispose of tribal resources ultimately rests with the Bureau indicates an inevitable diseconomy, whether or not the agency is "captured" by private in-

40. FEDERAL TRADE COMMISSION, THE TRADING POST SYSTEM IN THE NAVAJO RESERVATION (Los Angeles Regional Office 1973).

41. A substantial portion of the Bureau's budget is absorbed in administration and never reaches tribes. In 1969, the Bureau spent one dollar to produce sixty cents of Indian income. ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE, INDIAN DEVELOPMENT PROGRAM, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 360; A. SORKIN, AMERICAN INDIANS AND FEDERAL AID (1971). The Bureau doesn't charge tribes for its management functions directly, but that does not mean that this "assistance" is free. A fee is deducted from all trust proceeds. *See* note 8 *supra*. The Bureau competed with tribes for federal dollars in its annual budgets, and its mistakes reduce tribal wealth. An investment decision by an incompetent Bureau staffer can cost more to a tribe than the most expensive investment counselor's fee. The Bureau says Indians are untrained for business, but its own supervisory staff rarely have any business expertise. They learn by trial and error with the tribe's resources.

42. Sorkin, *Indian Trust Funds, printed in* 1969 JOINT COMM. PRINT, pt. 3, *supra* note 1, at 449.

43. Another example of risk-averse Bureau investment policy is its encouragement of low-capital, low-risk, and low (or zero) return recreational development. *See* Clement, How to Go Broke in the Tourist Business, *First Indian Tourism Seminar* (Univ. of Neb., July 11-13, 1973).

terests. Administrative decisionmakers have no direct stake in the outcome, unless mismanagement crosses some threshhold point at which it becomes notorious and politically embarassing, or hurts the agency itself. Then, and only then, will bureaucrats' job security be on the line.[44] The cost-saving incentive operates to encourage a more efficient use of funds within the agency rather than to encourage a more efficient distribution of funds. Superiors will want to minimize internal non-wage costs and maximize the costs of the services provided, because that combination will attract even more funds from Congress.

Like most other agencies, the Bureau can maintain and even enlarge its staff and budget by allowing its "problem" to persist. Success is suicidal for the Bureau because its "problem," unlike, say, the SEC's, is in theory supposed to go away completely some day. It is thus in its own best interest to continue gracefully to fail.

Moreover, the Bureau is established within a department generally responsive to private land development interests. In the same way that non-Indian lobbies mobilize to "capture" the Bureau, sister agencies mobilize to "capture" the Secretary of the Interior. Development choices are ultimately made by the Secretary and therefore reflect the influence of all of the agencies accountable to him. It is small wonder that as much as ten percent of all tribal territory disposed of since 1886 has been set aside as national parkland, when the National Park Service shares equal rank with the Bureau of Indian Affairs.[45] The transfer of the Indian office from the War Department to the Department of Interior (in 1849) suggests a purpose of subjugation and territorial exploitation, as opposed to trusteeship.

The Bureau has also been responsive to pressures from other departments to protect the United States from liability to Indians for its takings of their land.[46] Under these circumstances it is im-

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44. Here we take issue with Posner, *Theories of Economic Regulation*, 5 BELL JOUR. OF ECON. & MANAGEMENT SCIENCE 335 (1974). He appears to believe that advancement incentives are as strong for agency employees as wage incentives for private industrial employees. However, advancement in an ageny is predetermined by law with the highest rung fixed; wages and salaries are open-ended. Posner's suggestion that agency employment is manipulated as a springboard for private business or professional employment does not explain why bureaucrats would engage in cost-saving (how would private employers know about it?) nor does it seem to describe the life cycle of Bureau employees in our experience.

45. HOUGH, *supra* note 1, at 31.

46. Chambers, *Discharge of the Federal Trust Responsibility to Enforce Legal Claims of Indian Tribes; Case Studies of Bureaucratic Conflict of Interest, printed in* SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMMITTEE ON THE JUDICIARY, 91ST CONG., 2D SESS., STUDY OF ADMINISTRATIVE CONFLICT OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES (1970). A particularly distressing example of this kind of conflict was the Bureau's insistence that Congress reduce its appropriations for compensating the claimant in 1925. H.R. REP. No. 1466, 68 Cong., 2d Sess. (1925).

Also indicative of the conflicts in this area is the following remark made by a spokesman for the solicitor's office: "We generally do not like to be in the position of providing counsel for Indians against the United States, because, after all, we take an oath

possible to see how trusteeship as presently constituted can be lawful. It is not disputed that agencies typically respond to conflicting pressures and that this is inherent to the political decision-making process.[47] However, the Bureau is unique in that it is both the agency and, by operation of law, the representative or lobby for one of the parties. This presents a curious twist on the familiar "appearance of fairness" principle of administrative due process. At first blush it would appear that non-Indian interests have more to complain about than Indians. But this would be true only if the Bureau's decision-makers had a real interest in being biased in favor of tribes.[48] The Bureau's need to get along with its sister agencies within the Interior Department suggests the contrary.[49]

Trusteeship makes good economic sense only where the goals of the beneficiary are undisputed, and the beneficiary lacks the trustee's ability for finding suitable means to reach those goals. Like agency, trusteeship should be a voluntary arrangement, in which the beneficiary gains from the expertise of the trustee. At common law, involuntary commitment to the care of a guardian or committee required a finding that the protected person did not know the difference between profit and loss.[50] That is to say, his goals were patently irrational. If contractual capacity were to turn on how clever we were at predicting the market, we should all be in trusteeship. All investors experience loss to a greater or lesser extent.[51]

The subjectivity of value is an essential tenet of capitalism. A free market economy cannot be said to maximize aggregate satis-

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to uphold the laws of the United States and not to represent adverse interests." *Hearings on the Constitutional Rights of American Indians*, 89th Cong., 1st Sess., at 44-45 (1965).

47. *E.g.*, American Cyanamid v. FTC, 363 F.2d 757 (6th Cir. 1966), in which the Chairman of the Commission was disqualified on the basis of his prior legislative experience with the facts pending decision.

48. The rule of necessity might be applicable to the Bureau to justify partiality towards tribes, as a panel of experts no more partial than the execution of the law requires. FTC v. Cement Inst., 333 U.S. 683, 701 (1948).

49. *See, e.g.*, Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1965), in which several members of the Commission who had been interrogated by a congressional committee pending the decision were disqualified. At Roman and common law, the guardian could have no inheritance in the estate of the ward, *como agnum committere lupo* ("lest the lamb be committed to the wolf's care"). W. BLACKSTONE, 1 COMMENTARIES* 462. By that test, federal trusteeship would be fatally defective, because the United States is in effect the tribes' reversioner: under the rule of Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), tribal lands under cession become the property of the United States.

50. *See, e.g.*, BRYDALL, NON COMPOS MENTIS 1-2, 6-9 (1700). It may be appropriate here to clarify the difference between a "trustee," who has the legal title to a corpus of property, and a "guardian," who also has control over the person. Whatever it prefers to call itself, the government has consistently acted in the manner of a guardian. W. BLACKSTONE, 1 COMMENTARIES* 460.

51. In this regard Andrew Carnegie, John D. Rockefeller, Sr. and Thomas Edison would probably be amused by the conviction inherent in our Indian policy that business acumen is the product of polite education. It was Edison who remarked, upon the collapse of one of his monumental failures, "Well, it's all gone, but we had a hell of a good time spending it." M. JOSEPHSON, EDISON 379 (1963). It is probably accurate that the mentally retarded are as a class more *sui juris* and exercise greater political rights than Indians. The issue cannot reasonably be held out as competence.

faction except as a summing up of all its members' individual idiosyncratic satisfactions. Differences in preference are to be expected, and any policy that denies their legitimacy misallocates the resources of the community. The state can only interfere to the extent that individual preferences pose dangers to others.[52]

If the Bureau's role is described as that of an expert financial counselor, it ought to be explained how it is that tribes can not obtain equal or surpassing expertise by voluntary arrangements with professionals. If tribes are too irrational as a whole to choose their agents, then they must also have been unable effectively to cede all of their liberties forever to the United States. If they are too irrational to know what they really want, it should be demonstrated that the Bureau detects their true needs with more precision. If they are not demonstrably less rational than the rest of us, then federal trusteeship can have no legitimate basis.

The repeated economic failure of tribes, which bolsters an appearance of irrationality and fosters the justification for trusteeship, can be explained as the product of at least four related economic factors beyond the control of tribes and attributable to federal policy.

A. A SEPARATION OF OWNERSHIP AND CONTROL

In addition to the expenses and inefficiencies attributable to bad Bureau management, tribes bear an uncertainty cost for the existence of the Bureau even when it chooses merely to passively review tribal action.[53] The fact that the Bureau's prerogative is exercised in a particular case as a veto of tribal action is unimportant. The veto power of the Bureau merely gives tribes an opportunity to make for themselves those decisions the agency considers correct. As long as tribal and private business negotiators are aware that the final decision will be made by a third party, they will have little incentive to bargain freely. Both will respond to what they perceive to be acceptable to the reviewer. The Indians' situation is analogous to that of stockholders in a large corporation. In law and principle they are the true owners, but their effective power is so diluted by the mechanics of decision-making that they tend not to exercise what power they have. In addition, the price paid to the tribe will be reduced by the costs, especially delay costs, of comply-

52. Wisconsin v. Yoder, 406 U.S. 205 (1972); People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1969), *rev'g* 53 Misc. 2d 584, 279 N.Y.S.2d 272 (1967), *and following* People v. Havnor, 149 N.Y 197 (1896); Dowell v. City of Tulsa, 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955).

53. In 1969 the Bureau characterized itself as "increasingly supportive rather than directive," although its programs did not yet reflect full practical recognition of this change. BUREAU OF INDIAN AFFAIRS, ECONOMIC DEVELOPMENT OF INDIAN COMMUNITIES, *printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 331. Most day-to-day management of resources, however, continued to be conducted by the Bureau. HOUGH, *supra* note 1, at 21-22, 155.

ing with Bureau review procedures after and in addition to the actual contract negotiations.[54]

B. FRAGMENTARY OWNERSHIP

Even when an independent tribal decision can be made, it must contend with the fragmentation of ownership of resources left in the wake of the allotment policy. By statute,[55] lands still tribal, allotted tracts, and fee simple tracts are subject to different terms and conditions of resource leasing, taxation, and development. Checkerboarding of reservations results in high transaction costs of orchestrating different classes of ownership all pertaining to, say, the same stream or coal seam. This is complicated by a number of jurisdictional concessions made to the states by the allotment acts, such that either tribal or state laws, in addition to federal regulations, may control any one tract.[56] Integrated development requires that the tribe buy back diverse individual interests granted away in the past by the Bureau, some of which it probably cannot condemn, and at the risk of free-rider problems. Many tribes have begun comprehensive purchase-leaseback programs to prospectively consolidate their territorial jurisdiction and ownership for development purposes.[57]

Allotment also introduced a parallel system of inheritance, independent of the tribal courts. In order to appear to be scrupulously aloof, the Bureau has taken notice of nothing but degree of blood or kinship. Accordingly, undivided fractional shares accumulate as reservation population grows, and the acreage represented by each share shrinks proportionately. In 1965 the N.C.A.I. reported that 48 percent of the allotments in a sample of twelve reservations had six or more owners of undivided interests, 29 percent had more than ten owners with such interests, and 14 percent had more than twenty. Average allotment size was 240 acres.[58] Once again, trans-

54. These additional costs of transactions with tribes also reduce the quality of the technical assistance they receive. Consultants depend upon minimizing their costs to make a profit from their fee or percentage. Consultants for tribes face generally higher costs, because of duplicate negotiations and the requirement of Bureau supervision and final approval of their work. Hence, for the same percentage, a consultant will prefer to work for anyone but a tribe, if he can. Tribes must pay more, or accept poorer quality work. *See, e.g.*, the facts in Gray v. Johnson, 395 F.2d 533 (10th Cir. 1968).

Another costly burden on economic development is the requirement that tribes comply with the National Environmental Policy Act before undertaking any industrial activity. Owing to federal supervision, tribes have been deemed federal agencies for the purposes of the Act, Davis v. Morton, 335 F. Supp. 1258 (D.N.M. 1971); *cf.* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (tribal businesses not federal instrumentalities for tax purposes); Iron Crow v. Oglalla Sioux Tribe, 129 F. Supp. 15 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956) (tribal courts not federal instrumentalities for jurisdictional purposes). Elimination of ultimate federal discretion in tribal enterprises is the only means of avoiding this discriminatory burden on tribal ownership.

55. 25 U.S.C. §§ 331-415 (1970).

56. *E.g.*, 25 U.S.C. §§ 349, 357, 348a (1920).

57. HOUGH, *supra* note 1, at 38-44, details the Cheyenne River Sioux purchase-leaseback ordinances.

58. *Id.* at 48. *See also* Langore, *The Heirship Land Problem and Its Effect on the In-*

action costs in mobilizing groups of heirs to pool their rights are substantial. The long-run economic effect of allotment has therefore been to so perversely subdivide resource ownership on reservations that development is at a competitive disadvantage with off-reservation lands.

C. UNCERTAIN AUTHORITY

In addition to a lack of ultimate authority in economic matters, tribes suffer from a lack of statutory or judicial delineation of even those limited powers they can exercise. Tribes tend to be very conservative about risking an abuse of power because of their relative inability to bear the costs of legal defense. Unfortunately, most recent case law seems to suggest that tribes must take the initiative to protect what power they still possess from the states. For several years the courts have conceded some general, residual governmental powers in tribes, but have insisted upon defining it on a tribe-by-tribe, and case-by-case basis.[59] The Supreme Court has been thoroughly inconsistent. In *Williams v. Lee* it formulated the "infringement test," indicating that the states can exercise governmental functions on reservations only to the extent that they do not impair the right of the Indians to govern themselves.[60] The Court interpreted this right of self-government rather broadly, but the case was limited on its facts to civil jurisdiction. More than a decade later, in *McClanahan v. Arizona Tax Commission*, the Court seemed to contract its earlier rule, emphasizing the importance of specific laws and treaties and denying the existence of any "Platonic" principle or theory of tribal power.[61] This gave tribes no guidance whatsoever. In 1975, Mr. Justice Rehnquist in *U.S. v. Mazurie* referred again in more general terms to tribal power as if it retained some conceptual meaning for the Court.[62] But the infringement test is as much of the concept as we have seen yet. The Supreme Court has applied the infringement concept very narrowly on the facts of each case and given it no depth or structure, resulting in some bizarre applications by the lower federal courts.[63]

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dian, the Tribe, and Effective Utilization, printed in 1969 JOINT COMM. PRINT, pt. 3, *supra* note 1, at 519.

59. United States v. Mazurie, 419 U.S. 544 (1975), *rev'g* 487 F.2d 14 (1973); State *ex rel.* Merril v. Turtle, 413 F.2d 683 (9th Cir. 1969); Iron Crow v. Ogalala Sioux Tribe, 129 F. Supp. 15 (D.S.D. 1955), *aff'd*, 231 F.2d 89 (8th Cir. 1956).

60. 358 U.S. 217 (1959).

61. 411 U.S. 164 (1973). *See also* the discussion of this litigation in J. WHITE, TAKING FROM THOSE THEY FOUND HERE: AN EXAMINATION OF THE TAX EXEMPT STATUS OF THE AMERICAN INDIAN (1972).

62. 419 U.S. 544 (1975), *rev'g* 407 F.2d 14 (10th Cir. 1973).

63. *E.g.*, Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348 (D.N.M. 1974); United States v. Mazurie, 487 F.2d 14 (10th Cir. 1973), *rev'd*, 414 U.S. 544; *cf.* United States v. Blackfeet Tribe, 364 F. Supp. 192 (D. Mont. 1973).

An insidious danger in all of this is that the cost of litigating tribal powers in this way, tribe-by-tribe and power-by-power, may exceed the economic value of the exercise

Infringement has been interpreted as a "vacuum" test, because it seems to invite the states to fill any vacuum left by a non-exercise of tribal powers.[64] By the same token, tribal power vis-a-vis the federal government and its agencies might be called the "residue" test, the theory apparently being that the tribe retains all powers (from what starting point?) not assumed by another sovereign under federal laws.[65] Whether the conflict is state or federal, tribal power has always been defined by negation. It is what is *not* taken away by some other sovereignty. No one has offered any explanation of what ought to remain, and accordingly tribes do not begin with the presumption, as we believe they should, that they possess all of the regulatory powers of states.[66]

D. COSTLY CAPITAL MARKETS

The high costs borne by tribes when they enter the market in search of capital would seem at first to be a purely economic problem. However, it is in fact the direct result of unnecessary legal constraints imposed upon tribes by federal administration. The separation of ownership and control makes it costlier for tribes to negotiate for credit. Fragmentary ownership and the review power increase the costs and risks of business, and are reflected in higher costs of borrowing. Uncertainty of law impairs the security of the lender, a widespread and oft-heard complaint.[67] Credit would be much cheaper if debts could be collected with some certainty in tribal courts, even subject to uniform tribal consumer-protection legislation. Another problem is the immunity of trust land from mortgages.[68] The federal government has assumed all along that a mortgage foreclosure must be pursuant to state law, and that the mortgagee must receive a fee patent upon foreclosure. There is no ob-

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of those powers. Non-Indians could not hope for a more effective means of neutralizing tribes as economic competition.

64. WHITE, *supra* note 61.

65. Tribes retain all powers neither ceded by treaty nor abrogated by federal statute. Williams v. Lee, 358 U.S. 217 (1959); Jones v. Meeham, 175 U.S. 1 (1899).

66. Further confusion has been generated over the question whether the tribal courts have jurisdiction over non-Indians. The power of tribes to tax non-Indians has not been questioned for some time. Ogalala Sioux Tribe v. Barta, 146 F. Supp. 917 (D.S.D. 1956). At least one tribe, the Navajo, routinely exercises full jurisdiction over non-Indians. Navajo Tribe v. Orlando Helicopter Airways (Navajo Court of Appeals 1972). Symmetry seems to require that if a reservation Indian has a right to be sued in his own tribal court, Williams v. Lee, 358 U.S. 217 (1959), he can also sue a non-Indian wherever he finds him, even on reservation. This kind of jurisdiction is implied in United States v. Mazurie, 419 U.S. 544 (1975). If tribal courts lack this jurisdiction, tribes cannot enforce their commercial regulations against businesses operated by non-Indians on the reservation.

67. Creditor security is especially a problem after Kennerly v. District Court, 400 U.S. 423 (1971); *See* Mudd, *Jurisdiction and the Indian Credit Problem: Considerations for a Solution*, 33, MONT. L. REV. 307 (1972). A related credit burden that most tribes have jealously guarded and shown no inclination to discard is sovereign immunity. Dicke v. Cheyenne-Arapaho Tribes, Inc., 304 F.2d 113 (10th Cir. 1962); Morgan v. Colorado River Tribe, 103 Ariz. 425, 443 P.2d 421 (1968). Limited liability could, however, be consented to for contractual obligations alone.

68. 25 U.S.C. §§ 202, 483a (1970).

vious reason—except, perhaps, the United States' desire to protect its own interest in tribal property—why tribes should not be free to enact their own mortgage laws, limiting mortgages to less-than-fee interests (such as a mere right to use or income for a term). Of course, mortgage of less than a full fee means less credit, because the security offered is somewhat less. On the other hand, it would still offer more security and therefore lower risks and cost than the present system, without substantial prejudice to the tribe's interest in undivided control of its own lands.

These are some of the burdens upon economic development that ought to weigh against the desirability of continued federal supervision. It remains to be seen how federal supervision might be challenged in the courts.

Courts have consistently applied a notion of Indian goal-irrationality to justify both the general power of the United States to dispose of, and specific power delegated to the Bureau *to review* the disposition of tribal resources.[69] We infer this from the fact that these powers have always been discussed in the context of the supposed "dependency" of tribes and extraordinary discretion. "Plenary power" is a different concept than superior sovereignty. It implies a power to act without constitutional restraint.

"Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."[70] "Congress alone has the right to determine the manner in which this country's guardianship . . . shall be carried out."[71] The only limits placed upon this power are that it be directed at what Congress "deems necessary to promote their welfare."[72] Some have suggested that this power is no broader than those which the Constitution allows in other cases, for example with regard to the fifth amendment, but that has not been a popular view.[73]

The Secretary of Interior is invested with a broad discretion in

69. Ultimate general authority remains in Congress. Francis v. Francis, 203 U.S. 233 (1906); Romero v. United States, 24 Ct. Cl. 331 (1889). Therefore 25 U.S.C. § 2 (1970) is not a grant of general authority to the Bureau, but is only intended to comprehend specific functions. Leecy v. United States, 190 F. 289 (8th Cir. 1911), *app. dismissed*, 232 U.S. 731 (1914); *cf.* Rainbow v. Young, 161 F. 835 (8th Cir. 1908).

70. Perrin v. United States, 272 U.S. 478, 486 (1914).

71. United States v. McGowan, 302 U.S. 535, 538 (1938). *See also* Gritts v. Fisher, 224 U.S. 640, 642-43 (1912); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) state, "The power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

72. Morrison v. Work, 266 U.S. 481, 485 (1925). *See also*, United States v. Ramsey, 271 U.S. 467, 471 (1926); Perrin v. United States, 272 U.S. 478, 486 (1914).

73. United States v. Creek Nation, 295 U.S. 103, 110 (1935); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1889). *But cf.* Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937): "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." Although the United States can ignore the fifth amendment to the extent of its power to take, it is less clear that it can escape liability for just compensation. United States v. Creek Nation, *supra;* Chippewa Indians v. United States, 301 U.S. 358, 375-76 (1937).

exercising review powers.[74] Secretarial action is judicially reviewable, but apparently is subject to considerably less scrutiny than other federal agency actions.[75]

The Supreme Court has recently indicated that the review power included a fiduciary relationship with respect to property management.[76] But it only went so far as to authorize inquiries into the prudence of the Bureau's choice of means. The general social and economic ends to which the Bureau applies tribal resources remain discretionary, and noncompensable under present law.[77] This may be the greater evil.

Federal supervisory powers are subject to attack on due process grounds. Because it granted Indians citizenship in 1924, it can be argued that the United States is estopped from denying that it intended to limit itself in its dealings with them to the same extent that it is limited in its dealings with other citizens. This is not to suggest that Indians can under no circumstances be dealt with differently from others, a proposition repeatedly rejected by the courts.[78] It is to say that those differences must be shown to be reasonable, not arbitrary, and consistent with that "fundamental fairness" and "concept of ordered liberty" generally applicable to the review of federal action. Indeed, since Indian administration extends to all persons of a certain degree of Indian blood, regardless of and not limited to political allegiance to tribes, it should be subjected to the most rigorous standard applicable to racial categories.

At the very least, actions of the Bureau should be subjected to strict scrutiny, rather than the limitless discretion usually accorded them.[79] Discretion is analogous to procedural fairness. Both are functions of the extent to which the issue involves a substantial interest or right protected by the Constitution or laws of the United States. Discretion is therefore broad only in case of aliens and persons reasonably deprived of their civil rights under law such as parolees.[80] It cannot be denied that the interests at stake in Bureau

74. Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962).

75. Tooanippah v. Hickel, 397 U.S. 598 (1970); *applied in* National Indian Youth Council v. Bruce, 366 F. Supp. 313 (D. Utah 1973), *aff'd*, 485 F.2d 97 (10th Cir. 1973), *cert. den.*, 415 U.S. 946 (1973).

76. Mason v. Oklahoma, 412 U.S. 391 (1973).

77. Gila River Pima-Maricopa Indian Community v. United States, 20 Ind. Cl. Comm. 131 (1968), *aff'd*, 427 F.2d 1194 (9th Cir. 1970).

78. United States v. Nice, 241 U.S. 591 (1916), *overruling* Matter of Heff, 197 U.S. 488 (1905). In Winton v. Amos, 255 U.S. 373, 391-392 (1921), the Court emphasized the specific language of the citizen act ("shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property") and concluded: "guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it."

79. *See* notes 71-75 *supra.*

80. Jay v. Boyd, 351 U.S. 345, 354 (1956) (aliens); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir. 1963), *cert. den.*, 375 U.S. 957 (1963) (probation and parole); *cf.* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (tenure at a state college); Dixon v. Alabama State

actions are substantial. They include property interests which predated federal trusteeship and were never voluntarily relinquished, and, in whatever degree the Bureau retains control over the tribal courts or courts of Indian offenses and liberty as well. These interests are all protected by federal law, which is to say the various treaties with the Indian tribes. Although statutes can supersede treaties,[81] presumably the statutes themselves must be constitutional in their application to citizens before they can have this effect. It cannot seriously be contended that a cure in an underlying constitutional defect in a statute is effected whenever it can be shown that the statute affects a treaty.[82]

Appropriate review standards would not only provide tribes an opportunity to challenge the justification for specific Bureau actions, but would in addition call into question the inherent inefficiencies and conflicts of interest of the agency as a whole. Furthermore, if it is admitted that the agency must conform with due process, then the statutes creating and directing the agency must also be subject to fifth amendment challenge, and should be voidable except upon a showing that they are at least reasonably (if not compellingly) related to the economic and social advancement of tribes or expressly delegated to the Congress or the agency by the tribes themselves.[83]

There is a certain special constitutional significance to these challenges which arises out of the early history of the republic. One of America's most bitter grievances against Britain was the reviewability of provincial laws by the Privy Council, an executive agency of the Crown in London. Defenders of British prerogative insisted that the power was exercised for America's protection from local political abuses and lack of coordination with national (imperial) policies.[84] American colonists then, like Indians now, had no direct representation in Parliament. Consequently the danger understood by all was that Britain would rule America for Britain's welfare alone. Indeed, the typical American argument in challenge of this policy, before words came to blows, was that the colonists as subjects of the Crown could not be cut off from Magna Carta except by

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Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. den.*, 368 U.S. 930 (1961) (expulsion of student from a state university).

81. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1885); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870). *See also* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).

82. We are not aware of any case precisely in point. The cases cited in note 81 *supra*, in support of the supremacy of statutes over treaties, were all decided before general citizenship.

83. An argument could be made that *no* federal supervision of tribal property is consistent with due process requirements, as long as tribes are not independently represented in Congress, and the United States has reversionary interests in all tribal lands.

84. An excellent discussion of the British doctrine of colonial trusteeship is to be found in Burrows & Wallace, *The Ideology and Psychology of National Liberation*, 6 PERSPECTIVES IN AMERICAN HISTORY 167 (1972). *See also* A. SCHLESINGER, THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION 1763-1776 (1918), which details the economic detriments Americans perceived as arising from this policy.

their own consent. There is thus a particularly odious hypocrisy in denying the identical claims of a class of American citizens today.

Power over a political community within the federal system can arise only by its consent. It hardly needs repeating here that the underlying principle of the federal union is contractual sovereignty. Yet, as a general rule, treaties with tribes say nothing regarding a power to review their domestic affairs.[85] The Indian Reorganization Act does not give the Secretary of the Interior any regular review powers.[86] However, most of the tribal constitutions promulgated under the I.R.A. contain provisions requiring Secretarial approval.[87] In the context of these constitutions this power appears to have arisen as a delegation of power from tribe to agency, analogous to any delegation of legislative power to an executive body, and it ought accordingly to be freely revocable at the option of the tribe. A tribe constitutional provision requiring approval for any amendment must be regarded as void insofar as it may be interpreted to deprive the tribe of its power to terminate its delegation. Otherwise it would render the tribal government, and the I.R.A, wholly without meaning. A power to grant implies a power to revoke, each requiring as much sovereign authority as the other.

It is appropriate to emphasize the fact that the "dependency" of tribes must be understood as contingent. Even lunatics have a right to seek remission by a competent court. When, and according to what criteria, will tribes be accorded full political competence? Obviously, no criteria relating to political competence have ever been established, although many have been suggested or been tried experimentally.[88] If Congress remains the sole judge, history suggests that the only criterion will be demand for tribal resources. The courts have no better grounds on which to avoid this issue as a "political question" than they have to avoid the issue of discrimin-

85. An exception was the Umatillas where the tribe agreed to "engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States." Treaty of June 9, 1885, with the Walla-Walla, Cayuse, Umatilla Tribes, and Bands of Indians in Washington and Oregon Territories, art. VIII, 12 Stat. 945, *discussed in* United States v. Clapox, 35 F. 575 (D. Ore. 1888); *cf.* Treaty of June 1, 1868, with the Navajo Tribe, 15 Stat. 667, *discussed in* Williams v. Lee, 358 U.S. 217 (1959). Congress obviously knew how to specify a cession of full regulatory power when it wanted to.

86. 25 U.S.C. §§ 476-77 (1970) provide only for approval of the original incorporation and subsequent revocation or amendment.

87. Significantly, tribal constitutions differ in the scope of the review power delegated to the Secretary, and the manner in which it may be exercised. *See, e.g.*, ROSEBUD SIOUX CONSTITUTION art. 4 (specifying which tribal acts must be approved); LOWER ELWHA INDIAN COMMUNITY CONSTITUTION art. 5 (manner of review). Both of these constitutions, like many others, provide for a referendum and Secretarial approval to revoke the review power. In addition, any tribe that adopts the Bureau law and order code accepts by its terms and until it enacts its own code, 25 C.F.R. 11.74 (1975) which makes no tribal ordinance enforceable until approved.

88. *E.g.*, flat time limits pursuant to the original allotment acts; administrative findings of individual "competence" and issuance of a certificate of competence under current regulations for allottees, the states' willingness to assume the economic burdens of jurisdiction over tribes under Pub. L. No. 83-280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1970)).

ation against other racial minorities, nor should they evade their clear duty of judicial review by producing a new definition of federal power not found in the Constitution—"plenary power over Indian affairs." The judiciary is necessary as a check on the legislature precisely because a majoritarian process tends to impose the power of the state on minorities, whose only other refuge is local self-government.[89] As Wirt argued to the Supreme Court on behalf of the Cherokees almost a century and a half ago, the judiciary must be unafraid to act even when unpopular acts invite the contempt of the other two branches.[90]

V. ADVANTAGES OF TRIBAL OWNERSHIP

Tribal ownership and control of natural resource development is both a lawful and an economically preferable alternative to federal or tribal regulation of private enterprise. The demonstrated inefficiencies of federal administration have made it impossible for tribes to enjoy a satisfactory share of resource revenues. Tribal resources have served as little more than low-interest savings accounts, with the greater part of total revenue leaving the reservation as wages and profits to non-Indians. Simple solutions are not adequate to the task. Bidding up rents and royalties will increase income without stemming the outflow of wages and profits, if indeed it does not eliminate the principal existing attraction of reservation investment. Taxation would have the identical effect. Reorganizing the Bureau and disambiguating the law, together with a stronger tribal court system, may reduce significantly the costs of outside firms doing business on reservations and make it possible to bid up rents and royalties, but cash outflow will still continue.

One alternative is to invest tribal funds in secondary and tertiary industries in hopes of recapturing some of this outflow. Presumably if outside labor finds suitable opportunities to spend money on the reservation where they work, that is where they will spend it.[91] Another possibility is to invest tribal funds in human capital development, minimizing the likelihood that primary industries on reservations will need to import labor.[92] Quotas on employment of reservation citizens, if they can be negotiated without corresponding rent or royalty reductions, could also minimize the outflow of revenue due to wages. But neither possibility promises to have any effect on the revenue going to compensate outside investors.

Why shouldn't the tribes, as owners of reservation resources,

89. THE FEDERALIST No. 51 (A. Hamilton). With regard to Indians, both protections must coincide. The security of local government is illusory without judicial checks upon the power of the majority to render that government impotent.
90. PETERS, THE CASE OF THE CHEROKEE NATION 155 (1831).
91. This may be Gilbreath's argument. GILBREATH, *supra* note 27.
92. The Bureau has consistently taken this view. See notes 28 & 29 *supra*.

also become capitalists and employers? One argument often heard is that tribes are incompetent to manage such large firms. But the same might be said of the directors of many private companies, who hire experts to analyze marketing and production problems. There is no reason why tribes cannot do likewise. There is also a feeling that the current arrangement (leasing) makes development "free." After all, the tribe contributes no capital, and in fact contributes only what it has always had without expense: its resources. Selling nonrenewable resources at anything less than the maximum possible return is hardly free. It is a loss of potential income. And if the underlying reason for this attitude is an assumption that tribes cannot accumulate the capital necessary to go into business, the answer is that they can borrow private capital in the same manner as private firms, and can, in addition, participate in some federal grant and loan programs.[93] As in any business, the only relevant consideration is whether the rate of return on capital invested in development will exceed the cost to the tribe of borrowing it.

There is finally a dark hint that tribal ownership is socialistic or un-American.[94] This has a significant history all its own. From the beginning, Indians have been accused of a kind of primitive, diseconomical communism. Many early cases and observations seemed to indicate that this was the affliction from which the savages had to be saved.[95] But rather than tribes becoming more capitalistic, America has become increasingly socialized. Many means of transportation are publicly owned and operated on a theory that they could not be adequately maintained by private capital, and other industries are publicly owned purely for purposes of revenue,

93. Tribal bonds might be tax-free if used solely for financing public services or public industries flowing directly into the tribal treasury. *See* McDaniel, *Federal Income Taxation of Industrial Bonds: The Public Interest*, 1 URBAN LAWYER 157 (1969). Tribal bonds could, of course, be secured by revenue rather than land. In addition tribes might invest their trust funds in resource industries. According to Sorkin, *Indian Trust Funds, printed in* 1969 JOINT COMM. PRINT, pt. 2, *supra* note 1, at 452, these funds were invested at up to 6¼% in 1968 by the Treasury Department. That was at about the prevailing rate of interest on government bonds in that year, and rather below the return on corporate bonds. FEDERAL RESERVE BULLETIN A34 (April 1971). Sorkin attributes failure of tribes to invest these funds in their own industrialization to inexperience and the fear that they will lose revenue. It should be observed in light of the argument we are making, that a small loss in rate of return might be compensated for in new infrastructure, human capital development, and the relative efficiency of direct wage subsidies over administering the redistribution of investment income.

94. According to HOUGH, *supra* note 1, at 202, this is a reason cited by the Bureau for discouraging tribal ownership.

95. The most poignant example that comes to mind is of the successive redemption and subjugation of the Pueblos. At first the Supreme Court explained, "If the Pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal forms of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason" be deprived of their political autonomy. United States v. Joseph, 94 U.S. 614, 617-618 (1876). A generation later, the same Court recanted, "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are *nevertheless Indians in race, customs, and domestic government.* Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and

such as state liquor stores. During times of low income and high unemployment, today and forty years ago, the government turned to public employment as a means of directly subsidizing wage-earners. If tribes choose now to finance infrastructure, obtain revenue for public services, and subsidize their citizens' wages by means of public industry, they are following many established precedents. Tribes cannot be expected to be more capitalistic than the capitalists. It remains to be seen, however, whether to some extent the law requires them to be.

On the other hand, states derive more local benefit from a conventional business economy than tribes. In a diversified local economy, income recirculates. Wages from local firms return to other community enterprises as consumer spending and become wages again. Community capitalists also return income to local business in the form of consumer spending. But tribes generally have little in the way of retail or service industries; they are usually too small to support a diversified economy. Consequently reservation wages tend to be spent elsewhere, and reservation profits tend to be invesed elsewhere.

Taxing reservation business profits at a rate high enough to compensate for this outflow of wages and profits might discourage businesses from locating on the reservation in the first place. An alternative is to keep profits in the local economy by maximizing reservation (individual and tribal) ownership. Tribal ownership can offset some of the obstacles of federal supervision and increase the profitability of some resources, relative to individual Indian ownership. It can also accomplish the redistributive objectives of state and federal regulation.

A. OVERCOMING OBSTACLES

If, as we argued above, federal supervision results in a discriminatorily high cost of doing business on reservation, then tribes may prove better able to overcome this obstacle (while it lasts) than individual Indian entrepreneurs. Tribal ownership may reduce the number of costly, duplicative transactions, lower the cost of credit, and increase the security of business property rights.

Federal supervision increases the number of steps in negotiation of reservation business arrangements. Each step adds delay and

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fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people." United States v. Sandoval, 231 U.S. 28, 39 (1913) (emphasis added). (The Court was particularly offended by the Pueblos' habit of not allowing the mails through on ceremonial days, forgetting that the mails stop on another ceremonial day, Sunday, everywhere else.) Relinquishing common property was therefore a condition of freedom. *See* note 88 *supra*. "Self-sufficient" communal groups have no difficulty enjoying constitutional liberties. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

uncertainty. One way of minimizing this cost is by minimizing the number of transactions subject to Bureau review that will be necessary to develop a given resource fully. The more entrepreneurs have control of the reservation resource, the greater the number of transactions that inevitably will be involved in developing it fully. Therefore there will always be an economy of scale in consolidating a resource into a single tribal ownership.

In addition, a tribe can marshal more power to contest non-approval than its members. Falling back on its treasury, its power to tax, and its business income, the tribe is better able to retain counsel, lobby, and litigate. Tribal leaders have more political "clout" than individual Indians; their official capacity gives them more access to congressmen and the Executive office. The Bureau is more likely to exercise its veto powers over a number of private entrepreneurs than over a single tribal owner.

Because of its resources, taxing power, (albeit limited) ability to influence congressional grant and subsidy policy, and continuous corporate existence, a tribal owner offers better security for a potential commercial lender than an individual Indian. To be sure, tribes enjoy sovereign immunity, but they may waive it in particular cases. Waiver has been construed as consent to suit in state courts,[96] but the tribe could expressly require that it be sued in its own courts, or that its own substantive law be applied. As long as the tribes' courts and law offer predictability comparable to state courts, even a waiver of immunity so limited would go far to minimize the costs of uncertainty in the enforcement of its contracts.

The principle offsetting factor is the susceptibility of tribes to the National Environmental Protection Act. Although tribes may be better able to overcome other problems of federal supervision than individual entrepreneurs, this problem applies to them alone. In the balance, its effect may be small. There is, in addition, a more persuasive reason for preferring tribal ownership in the resource area which would apply even in the absence of federal supervision: greater economic efficiency.

B. EFFICIENCY

Under certain limited circumstances, the net revenue of a regulated firm may actually exceed the net revenue of private enterprise engaged in the same activities. The chief criteria are exclusion problems infrastructure (or "public goods"), externalities, and fractional ownership.

96. Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962), *distinguished in* Morgan v. Colorado River Tribe, 443 P.2d 421 (Ariz. 1968).

1. *Exclusion problems*

Some natural resources (oil, water and fisheries) are "fugaceous" —that is, they do not respect boundary lines but move freely and almost uncontrollably. It is moreover impossible to tag or identify every gallon of water or every fish. Ordinarily, the maximization of revenue is achieved by selling when prices are high and saving when they are low. But it is not feasible (or very costly) for individual owners to try to save fugaceous resources, because they have no real physical control over them. As a result, all owners or persons with access to a fugaceous resource are in a constant struggle to use it up as quickly—not necessarily as profitably—as they physically can. The total profit produced is lower, and in addition the resource tends to be depleted too quickly.[97]

If the resource cannot be divided into separate parcels, one alternative is to develop it all under a single ownership that can exclude all others. This has the advantage of efficiently allocating the resource over time, but at the risk of encouraging monopoly. Monopoly prices can be avoided, however, either through close public scrutiny, or through public ownership. If there is only a single franchise, in fact, public ownership behaves significantly like regulation, and avoids double administration. Neither solution to monopoly prices is completely satisfactory, however. A regulated company has little incentive to cut costs when these can be recovered in the rate formula. Bureaucrats managing a public firm and drawing fixed incomes similarly have little incentive to cut costs or otherwise maximize profits.[98]

These drawbacks are not applicable to tribal ownership. There is no substantial danger of monopoly pricing because the tribal firm must sell its product in a competitive, interstate market; only a negligible quantity of goods such as coal and oil would be saleable on the reservation. Furthermore, the bureaucrats in the tribal firm share in its profits because of the characteristic distribution of a part of tribal income in direct per capita payments. The small size of the tribe maximizes the incentive of profit sharing, and minimizes the risk that the tribal firm will be unresponsive to pressure from its citizens to cut costs to the extent that they rank among its consumers.[99]

97. The economics may be found in Crutchfield, *supra* note 3; J. HIRSCHLEIFER, J. DEHAVEN, & J. MILLIMAN, WATER SUPPLY: ECONOMICS, TECHNOLOGY AND POLICY (1966).

98. Here we disagree with Posner, *supra* note 44, at 338, who argues that bureaucracies are no less efficiency-motivated than private firms. In his opinion, the desire for promotion and the possibility of later stepping into private executive positions is sufficient incentive. This of course assumes that there are an adequate number of promotional levels and positions in private industry demanding similar skills and experience. The Bureau of Indian Affairs is probably one of the worst agencies for incentive going by these criteria.

99. By comparison, the states have chosen to deal with exclusion problems either by closely administering all location and production, as in the water and petroleum industries;

2. *Infrastructure*

The components of "infrastructure," such as transportation, communications, and power transmission, are characterized by steep initial costs and relatively low marginal costs. The fixed facilities (e.g., tracks, lines), once built, cost about the same to maintain regardless of how many persons use them. Moreover, their general social benefits, which can be thought of as economic articulation, are enjoyed by everyone in the community, not only those persons purchasing their services. It is therefore difficult if not impossible to obtain private financing for such a project—the investment is too great, the time until it shows a profit too long, and many if not most of its real benefits not recaputurable as revenue.[100]

Financing and operating infrastructure are frequently undertaken by local government. In the alternative, local government invests in and grants the subsidy of monopoly to a private firm, conditioned upon rate regulation. By either method, taxation and borrowing on public credit are essential sources of the necessary capital. On reservations, raising capital for infrastructure creates a vicious circle. Tribes lack adequate tax bases without industry; indeed, for many of them primary industry is or will tend to be their principle source of revenue and the only security for their creditors. At the same time, the absence of suitable infrastructure can be expected to be a cost to reservation enterprises and thereby reduce tribal revenues.

It seems logical for tribes simultaneously to develop both infrastructure and resource production. By coordinating these two facets of development, tribes can channel resource revenue directly back into upgrading infrastructure and, accordingly, maximize future returns. Many facilities useful to private resource industries can be developed into multipurpose public utilities. If coal development, for example, requires telephones, rail lines, and roads, expanding these basic services to meet domestic needs will cost less than meeting the developer's and area needs in two independent and uncoordinated systems. The relatively small size or small number of towns on most reservations means that public and private utility needs can be served by vitually the same network.

3. *Externalities*

Many resource industries have a tendency to create "externalities"—costs external to the apparent book value of the enterprise.

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or, paradoxically, by limiting production to such inefficient techniques that the resource is never in danger of depletion, characteristic of fishery management. Both are extremely costly. *See* Myers, POOLING AND UNITIZATION (1937); WATER SUPPLY, *supra* note 97; Crutchfield, *supra* note 3.

100. *See, e.g.*, Musgrave, *Provision for Social Goods, in* ANALYSIS OF THE PUBLIC ECONOMY (Margolis and Posner eds. 1965).

The most familiar externality is environmental damage. Because it may be insidious, thinly and widely spread, and tend to affect all persons whether or not they are consumers of the product, private action to remedy environmental damage is costly to mobilize and unlikely to be effective.[101] The government may intervene, but even then often in vain, because the damage may be irreversible and not compensable. In that case, public control is the only practical solution.

Since the land base of most tribes is severely limited, environmental externalities may pose an unusually serious threat. The community can little afford to lose any potentially developable surface or water. It ought therefore to be entitled to resort to more radical means to preserve its territorial security.

4. *Fractional ownership*

Finally, where a large portion of the reservation is individually owned in fractional shares, private development bears higher costs of accumulating adequate property than on state lands. Eminent domain could be justified as a cheap way of consolidating reservation property if exercised on behalf of a tribal enterprise rather than a private firm.

Any consideration of the costs of tribal resource economies must recognize that some resources, such as water, petroleum, and fisheries, not only cross ownership units within the reservation, but cross reservation boundaries into neighboring states. Consequently any attempt by a tribe to limit the rate of exploitation of these resources can be wholly frustrated by the failure of states to impose equal limits. The states could take advantage of tribes by exploiting what tribes conserve.[102]

For example, the federal interest in preserving its own prerogatives with respect to water has resulted in a special analogy to the reserve rights doctrine.[103] Under this rule a fixed quota is reserved for tribal purposes pursuant to some evaluation of future requirements. A quota cannot, however, be accurately preserved without

101. If there is no adequate, inexpensive legal remedy for the damage, those affected must organize either to settle directly with the industry or retaliate by not purchasing its product. Some of those affected will undoubtedly be "free riders" and let others bear the cost of action. Moreover, settlement costs money, and the victims of externalities are often not consumers of the goods. On a reservation, where incomes are low and the industries in issue have national markets, self-help holds little promise.

102. As recently reaffirmed by the Supreme Court in Antoine v. Washington, 420 U.S. 194 (1975), the states can impose non-discriminatory limitations on Indian treaty hunting and fishing off reservation if they bear a reasonable relationship to conservation. State regulatory authority on reservation has never been recognized. Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49, 53 (1970).

103. Winters v. United States, 207 U.S. 564, 574 (1908), *approved in* Arizona v. California, 373 U.S. 546, 598-601 (1963).

some coordinate measuring and regulating agency. In past cases there has been an unfortunate tendency for the federal "trustee" of these reserve rights to defer regulation to the interested states.[104]

The ordinary solution to this problem within the federal system is interstate compact.[105] By establishing coordinate agencies with broad supervisory powers, the states have contrived to apportion their fugaceous resources to their mutual satisfaction, with some flexibility over time, and more comprehensively than private contracts can provide. No compact power has ever been recognized in tribes as such, although a number of tribes routinely contract for services from neighboring states, under the supervision of the Bureau.

In the absence of any explicit prohibition of tribal compact, it seems appropriate for tribes to be included within the meaning of the interstate compact clause. Any other interpretation would frustrate the purpose of that provision, which can be understood as authorizing regional economic and resource planning. The alternative of repeated tribe-state adjudication of respective rights in resources on the basis of "equitable apportionment," of which states avail themselves in the absence of compact, will always be defective for want of procedures for routine enforcement.[106]

C. REDISTRIBUTION

Like taxation, regulation can be manipulated to penalize some forms of activity and motivate others.[107] When it creates a legal monopoly, regulation subsidizes the regulated firm, which in turn can be committed, in its rate structure, to provide service at above cost to disfavored enterprises and below cost to favored ones. Ideally these trade-offs will cancel one another out; otherwise the government must channel public funds into the regulated firm to underwrite its rate.

Rate structures could be used to tax private enterprises for the benefit of public (tribal) industries, unless the individual tribe's constitution forbade unequal taxes. For example, privately-owned businesses could be charged higher rates for power or water supplies by

104. *Cf.* Rees-Jones, *Problems in the Development of Mineral Resources on Indian Lands*, 7 ROCKY MT. MINERAL LAW INST. 661 (1972) (discussion of federal adoption of state pooling and unitization).

105. An illustrative review of the history and use of the compact device is found in ZIMMERMAN & WENDALL, THE INTERSTATE COMPACT SINCE 1925 (1951).

106. The process of "equitable apportionment" lacks a general theory of relative entitlement and does not therefore lend security to resource development even when its outcome is enforceable. The case of United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), now on appeal to the Ninth Circuit, is of special interest because it resulted not only in a complex apportionment of the resource (fisheries), but explicitly relies upon tribe-State cooperative administration for enforcement. No joint agency has yet been agreed upon.

107. Posner, *Taxation by Regulation*, 2 BELL JOUR. OF ECON. & MANAGEMENT SCIENCE 22 (1971).

the tribe, and tribal members could be charged rates below cost. Since the proceeds of a tribal business are distributed directly or indirectly to the tribe at large, there is little to distinguish taxing to underwrite a tribal enterprise from an ordinary tax for fiscal purposes.[108]

Tribes, like states, enjoy a rather broad discretion in choosing who shall be taxed.[109] Tax equity is never perfect. Property may be taxed whether or not the owner is able to vote in the taxing jurisdiction. However, the owner has a choice not to place his property within the jurisdiction of another government.

Government enforcement of an equitable distribution of wealth is often regarded as economic heresy. The goal of the market system is to maximize aggregate national wealth. It is assumed *ex hypothesi* that dollars will recirculate freely, so that in the last analysis everyone will benefit from them in proportion to their efforts. Accordingly any indication that tribes value the sharing of wealth has been interpreted as evidence of irrationality, backwardness, and business incompetence, and serves to justify and perpetuate trusteeship.[110]

In point of fact, tribes that seek to achieve income-leveling may have a more sophisticated utilitarian theory than their critics. Wealth is a subjective measure. It does not now and has never meant dollars to utilitarians. Dollars merely serve to make the measurement of individual preferences cheap and convenient, on the idealistic assumption that the more of them we are willing to give up for something, the more satisfaction we expect from that something. The goal of a market system is therefore not to maximize the dollars in motion, as such, but to maximize the aggregate of individual satisfactions that dollars somewhat imperfectly represent.

An individual's belief that he has obtained a fair share of his community's wealth is also of value, both to him and to the community.[111] Each person's subjective satisfaction may thus be imagined as a mix of actual material wealth and a feeling of fair share. These are to some degree proportional: the more goods an indivi-

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108. Even non-members enjoy some benefits. Law and order, fire protection, schools, power and utilities and roads are some or all of them provided by tribal governments. State taxes are "not to be presumed lacking in due process of law because of inequalities or objections, so long as arbitrary action is avoided." Wagner v. Leser, 239 U.S. 207, 216 (1915). *See also* United Air Lines v. Mahin, 410 U.S. 623, 629 (1973). The Court will not act on mere "disputable degrees of benefit" even in dealing with a use tax. Myles Salt Co. v. Board of Comm'rs, 239 U.S. 478, 485 (1916). Tribes surely must have the power to tax resident non-members if states and cities can tax the property and income of non-residents found within their jurisdiction.

109. Ogalala Sioux Tribe of the Pine River Reservation v. Barta, 146 F. Supp. 917 (D.S.D. 1956), *aff'd*, 259 F.2d 553 (8th Cir. 1958), *cert. den.*, 358 U.S. 932, was an action to collect a tribal tax on non-members. It relied on an earlier non-member tax case, Buster v. Wright, 135 F. 947 (8th Cir. 1905). Both cases involved jurisdictional issues; neither questioned the legitimacy of the taxes themselves.

110. See note 95 *supra*.

111. *See, e.g.*, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, GUIDELINES FOR PROJECT EVALUATION (1972) (especially chapter 7).

dual has, the more he considers himself to be fairly participating in the community. In the same way, the more some individuals have, the less fairly others perceive themselves as treated. Minimizing this gap is also maximizing aggregate utility. Because the value of a fair share is subjective and presumably idiosyncratic, there is no more reason to believe that maximizing it can only be achieved by absolute income-equalization, than that more conventionally defined utility can be maximized only when everyone has the same number of televisions, toasters, tea-trays, and artichokes.[112]

Minimizing the gap appears to be what many Indian communities have been doing all along.[113] It may in fact help to explain the political cohesiveness of tribes relative to industrialized non-Indian America. In the terms used above, fair share is a "good" like any other. But it is a "public" good, which is to say that people do not ordinarily buy and sell it in the marketplace. Rather, it is allocated through the political process. There is a danger here, that fair share, like other public goods, will be provided in proportion to wealth—a contradiction of purpose. Influence in the political process tends to reflect wealth as well as numbers.[114] But this danger is minimized if differences in wealth are at the outset small and the community itself is small enough so that the costs of being heard are easily met. This describes most tribes.

It is important to recognize that we are not living in an ideal world in which each individual chooses to work, and thereby to earn, as much as he pleases. This is particularly true of the reservation economy. With industries running at a very high rate of efficiency, not all persons may be able to be employed. At that point a hard choice must be made: whether to go to less efficient industries that are more labor-intensive, to cut wages and take on more labor, or to tax the employed to subsidize the unemployed. In a system of pure private enterprise, only the latter is possible. Public enterprise makes it feasible to spread the productive worth of the community directly through wages, rather than through welfare. To the extent

112. As indicated earlier, the Bureau has endorsed the view that Indian sharing is anti-develoment and retrogressive. See note 28 *supra*. Actually, it can be argued that Indian sharing is *less* of a discouragement to economic growth than taxation. Sharing is voluntary, therefore sharers must derive some individual satisfaction out of it. They obtain more satisfaction in earning a dollar to give to a relative, than earning a dollar to spend. On the contrary, taxation is coercive. Persons taxed lose satisfaction in the process, preferring to spend a dollar than pay it in taxes. Thus sharing is a positive efficiency in tribal economics and cannot explain that low motivation which we believe is more correctly attributed to discriminatory, high costs of capital and doing business imposed from without.

113. There has been little study of the private economy of Indian communities. The value of distributive equity in traditional Navajo communities is suggested by Hobson, *Navajo Acquisitive Values* 42(3), PAPERS OF THE PEABODY MUSEUM OF AMERICAN ARCHAEOLOGY AND ETHNOLOGY (1954).

114. Stigler, *Theory of Regulation*, 2 BELL. JOUR. OF ECON. AND MANAGEMENT SCIENCE 3 (1971), *discussed in* Posner, *supra* note 44, at 343.

that employment as such is satisfying, the subsidy of a dollar of wages is actually larger than the subsidy of a dollar of welfare.[115]

Any such redistribution is a maze of trade-offs. Reducing or taxing wages cuts into the incentive to work, so that there is less to go around. Switching to more labor-intensive industries cuts into revenue and so, too, leaves less to go around. This reduction in aggregate material wealth is, in a very real sense, the price a community pays for equity. That price may be high or low, depending upon the community's valuation of fair share. The more the concept of fair share tends to be esteemed, the less wage-spreading will reduce incentive, and the more spreading wage-earners will tolerate politically.

Distributive equity is not entirely foreign to our law. *Ad valorem* taxes have long been utilized to finance public services, which if privately operated would be too costly for most citizens to afford. Similarly, rate schedules in regulated industries are intricate redistributive engines, frequently levying above-cost rates against some consumers so as to be able to provide below-cost rates to others. In either case a judgment has been made that certain goods ought to be distributed on a per capita, rather than income basis. These goods might be called *necessities*. The demand for these necessities is income-inelastic—as people grow wealthier they do not significantly increase the proportion of their income devoted to these goods. In relative terms, then, everyone places the same value on them, but because of differences in income, some persons may not be able to afford them at all. Regulation or taxation can assure a minimum level of these goods to everyone.

In traditional distributive equity, the administrator chooses how the subsidy will be used by its beneficiaries. This is true whether the subsidy is in the form of direct public services, cheaper private services, or conditional cash subsidies such as food stamps. The agency responsible determines for the ultimate consumer which goods are inelastic, and in so doing may misallocate both durable and intangible resources. After all, effective efforts toward "maximizing fair share" must be based, at least in part, on an understanding that the individually perceived fairness of dollar distribution depends upon what it can be or is in fact spent on. The more the limitations, generally the less effective the redistribution in utilitarian terms, albeit conditions may be useful in achieving external objective goals such as standardized housing. Indians are already familiar with these problems; they know it as trusteeship.

115. Wage subsidies also have the advantage of eliminating duplicative administration. A welfare subsidy such as AFDC involves both a tax collection agency and a distribution agency. Tribal ownership results in some subsidy appearing directly in wages without any separate distribution administration, and the remainder paid automatically into the treasury without separate collection.

Tribal enterprise can come closer to maximizing utility. Out of revenue it provides both cash and services to tribal citizens. In small communities governed largely by consensus, the choice of which services to provide directly is more likely to reflect what is in fact generally desired. Beyond that, consumers are given the means to choose goods according to individual subjective preference. The only risk is that redistributed cash will tend to leave the reservation (as consumer spending), whereas provision of direct services by the tribe will provide additional employment on the reservation. This is in fact only partly true, because many goods simply are not going to be produced by the tribe in any event, and will always have to be purchased outside whether by consumers or by the tribe itself. On the other hand, consumer capital can be expected to attract retail and service industries to the reservation. In the long run, tribal enterprise will spur a diversification of the tribe's domestic economy. This process could be accelerated through the lending of tribal revenue to citizens of the tribe for investment in tertiary industries.

It is simply not appropriate to equate the economies of tribal ownership with those of public ownership by a state. Owing to the size of the community and the degree of political participation, there is no considerable attenuation of public control over the management. Management is or can be conducted by the people or their elected representatives to at least the same degree that it can be conducted by shareholders in a corporation. Revenue is distributed along with other tribal income and by the same process, and is therefore no more subject to political abuse than it is in the publicly held corporation. Nor is there any substantial danger of the majority abusing individual expectations in property so long as the business involves natural resources. Water, fisheries, and most subsurface rights are already tribal public domain; moreover, exploitation of most mineral resources is so extensive that it is unlikely to affect only a small fraction of voters.[116]

There are in addition two blessings of public ownership that may be peculiar to small, relatively impoverished communities. Besides draining off a share of industrial revenue, the influx of labor associated with attracting some private industries requires an expansion of public services. In all likelihood the cost of new housing and utilities could not be borne entirely by employees through taxes on wages. The tribe could provide in its leases that developers furnish their own employee facilities, but this cost would come out of tribal rents. Either way, the tribe is forced to invest in human services for non-members, and furthermore, these services once established

116. See note 126 *infra*, respecting possible due process limitations on tribal proceedings affecting individual interests in resources.

will often be useful for only a limited time. In the hydroelectric and petroleum industries, for example, only the initial construction phase is labor-intensive. In mining, labor is necessary for production, but production ceases when the resource is depleted—perhaps a generation at best in contemporary strip mining of coal. Abandoned services may be only partially salvageable. Some, such as power transmission and communications, could be integrated into the tribe's existing infrastructure, assuming that by that time further infrastructure expansion is still desirable. Housing and education, on the other hand, will continue to be useful only to the extent that tribal population has grown to fill abandoned capacity. Alternatively, if employees remain on the reservation without earning taxable wages, they become a welfare burden on the tribe.[117]

Large corporations attracted to reservations are often considerably wealthier than the tribes that host them. There is an inevitable political hazard that tribal governments will become captives of corporate interest. This is particularly true where the resource being exploited is worth more to the company than all of the existing revenue of the tribe—probably always the case of tribes with single-resource economies. If exploitation requires the commitment of corporate funds to fixed plants, the tribe may in effect hold these sunk assets for ransom, but that does not entirely alleviate the risk. The only complete solution is public ownership and control.

VI. LEGAL AUTHORITY FOR TRIBAL OWNERSHIP

It remains to be seen whether tribal ownership and the arguments that can be made for it are consistent with present law. Applicable standards are necessarily either federal or tribal.[118] Among the possible theories of federal review, three are significant: tribal privilege, due process, and federal antitrust limitations.

A. TRIBAL PRIVILEGE

Owing to their unique status within the federal system, tribes should have a greater liberty to engage in public ownership than the states. It is generally agreed that the United States Constitution does not apply to tribes automatically.[119] Some provisions have been

117. Any inefficiency arising out of the employment of less skilled reservation labor may still be less than the cost of expanding human services to new population.

118. *See* Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963). Many familiar limitations such as the prohibition against the lending of public credit are entirely state constitutional in origin.

119. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). *But cf.* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), *later distinguished in* Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969). In Williams v. Lee, 358 U.S. 217 (1959), tribal power was identified as existing "absent governing Acts of Congress."

extended to tribes in substance by statute.[120] In all other cases, the limitations tribes place upon themselves by consent (e.g., treaty) and their own constitutions must control.

The fourteenth amendment due process clause has traditionally served as the basis for constitutional challenges to state regulatory and proprietary schemes.[121] Regulation has been attacked as a taking of private property without compensation and often as a taking for private use. It is not entirely clear whether the due process provision of the Indian Civil Rights Act requires federal reviewing courts to apply conventional federal standards. The Act refers both to takings without due process of law, and to takings for public use without just compensation. However, the Act should be read in the context of earlier legislation which it does not purport to repeal, most importantly the Indian Reorganization Act. The I.R.A. authorizes tribes to organize, manage their own property, and adopt federal corporation status in addition to or in the place of tribal governmental status.[122] Since the repeal of the General Allotment Act, the emphasis has been on rebuilding the tribal domain, rather than allowing it to fragment into individual estates, a strange policy if the tribes are to have no power to develop and use their public property.[123] Federal agencies have repeatedly approved and financed tribally owned and operated businesses.[124]

Recent litigation indicates that the courts will be selective in applying traditional due process standards to tribes.[125] They are accepting cases brought under tribal constitutional provisions and requiring exhaustion of remedies, suggesting that tribal due process

120. Of greatest significance among these is 25 U.S.C. § 1302 (1970), sometimes referred to as the Indian Bill of Rights.

121. Munn v. Illinois, 94 U.S. 113 (1876), established the framework for challenges to economic regulation.

122. 25 U.S.C. §§ 476, 477 (1970). Senator Wheeler, one of the co-sponsors of these provisions, said of them that they "(seek) further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." 78 CONG. REC. 11125 (1934). 25 U.S.C. § 476 (1970) is, in our opinion, sufficient authority for tribal ownership. Federal incorporation, 25 U.S.C. § 477 (1970), is unnecessary, and a mere convenience. There is no reason to doubt the power of tribes to create within themselves agencies or authorities for the separate regulation and development of specified resources, each with corporate status of its own, as do the states. Tribes should therefore avoid the use of state incorporation for tribal ventures, which subjects their activities to state jurisdiction and laws.

123. 25 U.S.C. § 495 (1970) provides general authority to consolidate tribal resources. *See also* Squire v. Capuemau, 351 U.S. 1 (1966); Stevens v. Commissioner, 452 F.2d 741 (1971) which discuss this administrative policy.

124. *See generally*, HOUGH, *supra* note 1.

125. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971) (Indian Bill of Rights due process and equal protection "not as broad" as the fourteenth amendment); *cf* Johnson v. Lower Elwha Tribal Commissioner, ("some provisions" of the Indian Bill of Rights "may have a modified meaning"); McCardy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Lohnes v. Cloud, 366 F. Supp. 619 (D.N.D. 1973). At the very least, equal protection must be rendered consistent with the limited membership of tribes, based upon race. Daly v. United States, 483 F.2d 700 (10th Cir. 1973). *See also* Garnett Wounded Head v. Ogalala Sioux Tribe, ——F.2d—— (8th Cir. 1975) (conventional equal protection standards not applicable to tribes).

procedures be given deference, as are the procedures of states.[126] There appears to be no reason why tribes should be deemed more limited by the Indian Civil Rights Act than are the states by the Bill of Rights, and it has never been held that due process requires all of the states to have indentical procedures. Due process remains a bundle of limits appropriate to the range of activities found among the states. By extending that range, tribes may insist upon an extention of the limits.

Nowhere is this clearer than in the area of tribal ownership. As noted above, tribal control makes consistently better economic sense on reservations than among the states. Moreover, as a matter of federal law, the burden of demonstrating economic unreasonability is upon the party challenging a state (or tribal) regulatory scheme.[127]

There is authority for the proposition that government has greater powers to deal with its own property than to take or limit the use of its citizens.[128] Due process, narrowly construed, applies only when private expectations have been altered by legislation. If property is already public, then arguably no legitimate private expectations can be disturbed irrespective of the use. A mere hope to win a public franchise or privilege, for example to operate vessels on navigable waters, does not suffice to warrant compensation for denial. On the other hand, substantive and procedural due process must here be clearly distinguished. Although the public owner may dispose of its property to whom it will, the procedure for disposal presumably remains subject to attack as arbitrary, capricious, or inconsistent with express legislative goals and limitations.[129] To the extent of their ownership of resources, therefore, tribes should be immune from any substantive due process challenge provided they reasonably distri-

126. Recent cases deferring to tribal constitutional requirements and tribal procedures include: Lohnes v. Cloud, 366 F. Supp. 619 (D.N.D. 1973); Seneca Const. Rights Organ. v. George, 348 F. Supp. 51 (W.D.N.Y. 1972); Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971); Lefthand v. Crow Tribal Council, 329 F. Supp. 728 (D. Mont. 1971).

127. The State "is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it." Nebbia v. New York, 291 U.S. 502, 537 (1934). Nebbia adopted the position taken by Brandeis in his dissent to New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), that only "arbitrary or discriminatory" regulation violates the Fourteenth Amendment. In Williamson v. Lee Optical, 348 U.S. 483, 488 (1955), the Court explained that "(t)he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." In this regard it is significant that Brandeis, in his dissent to *Liebmann, supra,* at 311 approved of experimental regulatory programs in response to serious economic problems.

128. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-340 (1936). The Court described a general right of the United States pursuant to the property clause to protect its possessions, and that "the Government has no less right to the energy thus available by letting the water course over its turbines than it has to use the appropriate processes to reduce to possession other property within its control." *Id.* at 335-36. In other words, ownership implies an absolute discretion over disposal. The Court in Munn v. Illinois, 94 U.S. 113 (1876) (dictum) argued that no one can acquire "property" for due process purposes in the use of public waters, easements, or other parts of the public domain, and that any access to them is granted as a "franchise" or privilege only.

129. Goldberg v. Kelly, 397 U.S. 254 (1970).

bute the proceeds to their members, directly and in the form of services.

B. FEDERAL DUE PROCESS

Let us assume that traditional review standards will be strictly applied. A survey of federal cases indicates five general classes of permissible justifications for state regulation: the preservation of public health and safety;[130] provision of public goods ("governmental functions") such as transportation and communication;[131] control of natural monopolies—industries such as railroads that can operate at lowest cost when monopolized;[132] conservation of natural resources;[133] and correcting an inadequate supply of necessary goods (distributive equality).[134] This last justification requires some elaboration. It has been invoked in support of a wide range of public activities ranging all the way from public ownership[135] to price-supports[136] and the use of certificates of public convenience and necessity to compel geographic dispersal of firms.[137] Proposed goals for tribal enterprises, as well as the means, fall within these guidelines. The presumption of reasonability excuses the tribe from rigorously identifying what it regards as legitimate ends and means in the particular case; any or all may be involved to a greater or lesser degree.[138] In dealing with public control by the United States, the Supreme Court has even disregarded the explicit justification for a project so long as some legitimate purpose could be advanced retrospectively.[139]

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130. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

131. Munn v. Illinois, 94 U.S. 113 (1876). *See also* Allydonn Realty Corp. v. Holyoke Housing Auth., 304 Mass. 288, 23 N.E.2d 665 (1939) (urban renewal); Port Authority of St. Paul v. Fisher, 275 Minn. 157, 145 N.W.2d 560 (1966); Roe v. Kervick, 42 N.J. 191, 199 N.E.2d 834 (1964).

132. The Court in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) admitted the validity of this theory but denied that the industry regulated in that case was in fact a natural monopoly. Exemption of railroads and trucking from the antitrust laws has long been justified on this theory. States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); McLean Trucking Co. v. United States, 321 U.S. 67 (1944). *Compare* Stephenson v. Binford, 287 U.S. 251 (1932); Smith v. Cahoon, 283 U.S. 553 (1931). *See also* Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464 (1948).

133. Referred to in dictum by the Court in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

134. Here the record is the most impressive, *e.g.*, Frost v. Corp. Comm'n, 278 U.S. 515 (1929) (cotton gins); Head v. Amostery Mfg. Co., 113 U.S. 9 (1885) (grist mills); Chickash Cotton Oil Co. v. Cotton County Gin Co., 40 F.2d 846 (10th Cir. 1930) (cotton gins); State v. Edwards, 86 Me. 102, 29 A. 947 (1893) (grist mills).

135. *E.g.*, Standard Oil Co. v. City of Lincoln, 275 U.S. 504 (1927); Green v. Frazier, 253 U.S. 233 (1920); Jones v. City of Portland, 245 U.S. 217 (1917); Toebe v. City of Munising, 282 Mich. 1, 275 N.W. 744 (1937). *Lincoln*, *Portland*, and *Munising* deal with fuel. Many States impose narrower limits on public ownership. *See, e.g.*, Borgelt v. City of Minneapolis, 271 Minn. 249, 135 N.W.2d 438 (1965) (city asphalt plant lawful so long as limited to use of asphalt for city streets and no available private sources); John Wright & Assoc. v. City of Red Wing, 254 Minn. 1, 93 N.W.2d 660 (1958) (municipal movie theatre although operated at cost not a constitutional application of tax revenue).

136. Nebbia v. New York, 291 U.S. 502 (1934).

137. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

138. See note 122 *supra*.

139. Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

Even if the purpose is public, some cases in state courts have demanded a showing that private financing could not accomplish the objectives of a challenged exercise of taxation, borrowing, or eminent domain.[140] This is essentially an objective economic calculation. Albeit the immediate objective of tribal ownership is profitable resource development, the ultimate employment of the revenue will be for public goods: infrastructure and services.[141] Public goods ordinarily require public financing. Furthermore, elimination of the federal review process is necessary to bring the cost of commercial credit on reservations into line with credit costs elsewhere. This being the case, we predict that financing any activity on reservations, at least for the present, will require public (federal and tribal) funding. If tribal tax bases are too thin to support public goods, tribes will have to become entrepreneurs themselves to raise the needed funds.

The private financing rule is a special case of the more general theory that the use of public power in business is an inevitable temptation to favoritism and private windfalls. Many courts have held that an incidental private benefit is tolerable, provided the principal benefit is public.[142] But neither the special nor the general rule is properly applicable to tribal ownership. Both contemplate regulatory activities, not ownership and control. The danger exists when private property—whether discrete goods such as land or taxes—is channeled into different, private hands, and not for ultimate consumption but for re-investment and profit. Whether or not the taking is general, the application is individual or limited to a few. In theory even a subsidy to the few has some public benefit, because it will recirculate to others in the process of reinvestment. The point is, therefore, that a disproportionate share of the subsidy will remain in a few hands. That is a forbidden price to pay for redistribution.

Public ownership necessarily rebuts the private windfall argu-

140. A review of the cases on public financing are found in Mitchell v. North Carolina Indus. Dev. Finance Auth., 273 N.C. 137, 159 S.E.2d 745 (1968); Carruthers v. Port of Astoria, 249 Ore. 324, 438 P.2d 725 (Ore. 1968). On eminent domain *see, e.g.*, City & County of San Francisco v. Ross, 270 P.2d 488 (Cal. App. 1954).

141. *Cf.* Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205 (1931). The city was challenged for applying tax revenues to an advertising campaign aimed at attracting industry. The Court prohibited any further use of revenue "to the end that the proprietary activities of the city may be increased." We do not perceive any distinction between immediate expenditures of revenue on services, and reinvestment in sources of even greater revenue. The authority of government to invest tax revenue in income-generating securities pending disposition seems never to have been questioned. The only difference in *Jacksonville* was that the return on the tax investment was to be indirect—a larger future tax base—and future. Tribal ownership altogether eliminates any private gain to capitalists on revenue re-investment, but does involve speculating current public funds on future gains. *Cf.* cases cited in note 131 *supra*.

142. *E.g.*, Reingold v. Harper, 6 N.J. 182, 78 A.2d 54 (1951); *In re* Legislative Route 62214 Section 1-A, 425 Pa. 349, 229 A.2d 1 (1967); Price v. Philadelphia Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966); Hertz Driveurself Stations v. Siggins, 359 Pa. 25, 58 A.2d 464 (1948).

ment. The revenue generated by individual takings and tax funds is entirely devoted to general purposes. No private party controls its ultimate disposition. Moreover, the tribal resource base being largely public to begin with, on the whole no private party is specially burdened.

The problem arises to the extent that tribes hope to consolidate their resource bases, reacquiring interests allotted individually to tribal members or sold in fee to non-Indians. Tribes have three options. They can purchase land outright (or exchange it for tribal land, which is the same), take it outright by eminent domain, or acquire it on a purchase, leaseback arrangement. Purchase is often simply too costly. Eminent domain, while a power of many tribes pursuant to their constitutions, raises inevitable due process and compensation problems. There would be little question of public use where individual tracts are taken for public industry, since the community, as well as the condemnee in most instances, will share in the ultimate revenue of the project. But compensation cannot be avoided. The only advantage of eminent domain here as elsewhere, is that the public can avoid hold-outs and to some degree set its own price in its courts or legislature.

The reasonable price of reservation resources alone may actually be quite low. Due to fragmentation of ownership, allotments are often too small to be profitably exploited for resources and too numerous to be worthwhile accumulating by private industry. If the surface is of greater value to the allottees, then a purchase, leaseback program is a comparably low-cost technique, since only the resource interest is taken.[143]

Large fee tracts have been accumulated on some reservations by non-Indians—large enough to render their resources profitable without further consolidation. In these cases the cost of acquiring the resources may exceed the benefits of complete control, especially if the tribe legislates to control externalities and apportion all fugaceous resources between itself and the private owners. Presumably it cannot regulate so as to give its own public firm a special advantage, say, price-fixing or unequal access to transportation facilities, but can enjoy any advantages due to scale and other efficiencies. Private development could be taxed. A tribal tax on private development that exacted a like burden, dollar for dollar of gross revenue, for the support of public services would probably be lawful but

143. See note 57 *supra*. The appropriate consolidation technique varies considerably due to local allotment histories. Some tribes, such as Blackfeet and Crow, reserved some or all of their resources pursuant to individualized allotment acts, and need only condemn the surface. Others are virtually completely allotted both as to surface and subsurface. Although some allotment acts made it unlawful for non-Indians to acquire large fee tracts on reservations, *e.g.*, Act of June 4, 1920, ch. 224, 41 Stat. 751, they may be unenforceable as untimely. Dillon v. Antler Land Co., 341 F. Supp. 734 (D. Mont. 1972).

almost certainly too heavy a burden for most private businesses to bear.[144]

C. FEDERAL ANTITRUST LIMITATIONS

Tribal ownership and control of resources does not require territorial monopoly. However, exclusion problems and externalities in resource exploitation combine to make the industry potentially more efficient the more completely it controls the resource. Consequently tribes are likely to benefit economically by consolidating under a single public management all resources within their jurisdiction—as the Bureau does now.

All regulation has a tendency to advance monopoly. Limitations on entry—the requirement of certification—reduce the number of competing firms and make it cheaper and easier for them to cartelize. Sometimes this is the object of regulation, as in fixed-network industries (railroads, telephones, power transmission) where articulation of all of the competitors' services into a single system improves the value of the industry.[145] In other instances cartelization is a by-product of some other regulatory purpose. Using limitations on entry to disperse services geographically results in reducing or eliminating competition locally in areas already serviced. Price-fixing (rate regulation) then becomes a necessary added feature of the regulatory scheme, in order to prevent the enjoyment of monopoly profits by the regulated firms.[146]

Public ownership does not endanger the citizens of the public owner, because of their participation in the management process. It does, however, raise interesting interstate problems. One jurisdiction, by manipulating the prices charged by its public monopoly, could destructively compete with private enterprise in other jurisdictions, using the financial power of its governmental owner to absorb short-run losses. In its corporate capacity, the publicly-owned firm could conceivably draw on public funds to enter into ownership and control of businesses in other jurisdictions, becoming in effect a true interstate monopoly.

The products of tribal resource industries will for the most part be sold interstate, there being little demand for them on the reserva-

144. Myles Salt Co. v. Board of Comm'rs, 289 U.S. 478 (1916); Wagner v. Leser, 239 U.S. 207 (1905).

145. *E.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

146. Before the constitutionality of the New Deal regulatory programs has been generally upheld, private price-fixing was widely regarded as per se invalid. Tyson & Brother United Ticket Offices v. Banton, 273 U.S. 418 (1926); Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1922). Following Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936), statutes such as the Fair Trade Laws authorizing price-fixing agreements between merchants have been validated. However, these represent monopoly subsidies to industry, and must be carefully distinguished from the general practice of controlling the rates of regulated industries.

tion. Because of the relative size of reservations, they can be expected to have some impact on national prices, but not at the outset anything like the "concentration" that triggers antitrust prosecution. Some have advised tribes to actively engage in purchasing off-reservation realty.[147] Not only does this tempt the antitrust laws, but it seems to exceed the territorial authority of the tribe. Outside of its own territory, a tribal business agency loses its sovereign capacity and becomes an ordinary business, subject to state laws.[148]

So long as tribes do business in a relatively inefficient manner, for example, by promoting the objective of distributive equity through dis-economical expansions of the law force, we foresee few complaints from the state business lobbies. Tribal product prices will remain relatively high, partially offsetting the extent to which they increase national supply, and hence having little effect on private competitors. But if tribes take advantage of the special efficiencies of public control to undersell private producers on the national market, they could capture private business' volume and bring prices down. In economic terms, this would be a mutual blessing to tribes and the ultimate consumers of natural resources. Could it nevertheless be questioned as a use of government power to compete unfairly in interstate commerce? An effect on national prices is probably sufficient to satisfy jurisdiction for Clayton Act prosecution.[149] The question must ultimately turn on whether the effect on price is due to special privileges of government or simply to greater operating efficiency. Additionally, tribes may argue that the special federal statutory scheme recognizing and maintaining them supersedes the antitrust laws in time and intent.[150] In the Indian Reorganization

147. HOUGH, *supra* note 1, at 113-14, recommends what amounts to tribal colonization of off-reservation lands.

148. In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Supreme Court held that off-reservation enterprises are not generally immune from state taxation as federal instrumentalities. However, the Court conceded that the language and history of 25 U.S.C. § 465 (1970) indicate a special statutory property tax exemption for tribal trust holdings wherever situated. Even if *Mescalero* frees off-reservation enclaves from the property tax there is no suggestion that State regulatory jurisdiction is precluded by the trust status of these lands. The Court was explicit that it granted this one exemption only in deference to unavoidably direct language in the statute respecting taxation. Tribal enclaves must therefore expect income and use taxation, and unlimited State land-use regulation. State law will presumably also determine the lawfulness of tribal ownership. It has been suggested to us that tribes argue that mere purchase of State lands pursuant to the statute be deemed expansion of tribal sovereignty. That is precisely the outrageous pretension advanced by non-Indians since Johnson v. McIntosh, 21 U.S. (8 Wheat.) 542 (1823), to pare away tribal jurisdiction: cession of sovereignty presumed from the same of public domain. Actually, Chief Justice Marshall believed that a tribal sale without an acknowledged cession conveyed only a right to use subject to tribal law. *Id.* at 593. It is a strategic error at this time for tribes to concede, in order to gain control of off-reservation lands, their best argument for asserting complete jurisdiction over fee lands within their reservations.

149. We think this is a fair interpretation of United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949), *cited approvingly in* Gulf Oil Corp v. Copp. Paving Co., 419 U.S. 186, 195 (1974).

150. McLean Trucking Co. v. United States, 321 U.S. 67 (1944); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

Act, Congress appears to have intended that authorized tribal business activity be free from general antitrust challenges.

VII. CONCLUSION

Federal supervision of tribal economic development can be expected to prolong the relative poverty of Native American communities. More enlightened administration is not a satisfactory solution. The nature and structure of federal supervision is inherently dis-economical. On the other hand, tribal ownership of natural resource industries holds out some more meaningful promise of ability to meet tribal economic and social goals. Although superficially a radical approach, tribal ownership is fairly within the confines of contemporary economic and legal principles. Owing to the current forecast of world supply and demand, tribal initiative in this area is urgently needed.