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Native American Asset Watch:

Rethinking Asset-Building in Indian Country

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Executive Summary

It may be that Americans will have to come face to face with the loathsome idea that their invasion of the New World was never a movement of moral courage at all; rather, it was a pseudo religious and corrupt socioeconomic movement for the possession of resources.

-Elizabeth Cook-Lynn, from *Why I Can't Read Wallace Stegner and Other Essays: A Tribal Voice*

At the start of the 21st century, the most fundamental questions confronting tribes are: Who controls Native American assets? How can Native Americans regain control of their assets? How will Native American tribes develop the essential organizational, political, legal and economic infrastructure, the required expertise and capabilities in government, technology and business and the needed skilled tribal workforce to control and manage their assets? These are fundamental questions that tribes and their citizens must address as they work toward social, political and economic security for their communities. These essential questions cannot be separated from tribal sovereignty; in fact, asset-building policies or programs are likely to succeed only when viewed and created through the lens and in the context of tribes' sovereignty, cultures and traditions.

First Nations Development Institute's (First Nations) Native American Asset Watch Initiative (Asset Watch Initiative) is a comprehensive strategy for systemic economic change, which seeks to provide a range of support for efforts by Native communities to reclaim direct control of their assets and re-establish sustainable approaches to the use of land and natural resources. Under the Asset Watch Initiative, First Nations, in partnership with tribes, has researched and mapped the allocation and control of assets, and monitored and exposed the mechanisms by which Native assets are valued and turned into revenue. This process has helped to provide credible and timely information for Native communities, organizations and government entities on the current status of Native assets—information that is essential to effectively advocate for greater tribal and community control and to return to more sustainable use of those assets. Thus, the Asset Watch Initiative can inform policy development and promote sustainable, culturally compatible economic development in Native communities.

Due to the ongoing effects of past federal Indian policies, external entities continue to control American Indian assets, with the predictable and evident result that the benefits derived from American Indian assets flow mainly away from reservations. The history of oppression has broken tribal systems and diminished capacity at the personal, institutional and tribal governmental levels. For tribes to move away from the effects of colonialism toward regaining control of their assets requires an understanding of the burdens history has placed on tribes. This understanding is necessary to allow tribes to reconnect with their cultures and reconstitute their traditional techniques for managing assets, building wealth, saving for the future, investing and passing on such knowledge to new generations. Understanding history is also essential to formulating responsive tribal policies to counteract and reformulate federal policy prescriptions.

In the face of enormous odds created by the history of asset stripping and attempted destruction of tribal societies, tribes must now do the hard work of regaining control of their assets and relearning how to manage them, especially their land and natural resources. The case studies in this report describe the strategies five tribes have used to define and regain control of their assets; they lay out the hard work each undertook to create institutions and systems to manage their resources; and they show the community involvement and planning that took place to be sure their assets grow, are protected, and will be used in ways that will create economic, social and political security for future generations.

This report explores the asset stripping purpose and effects of federal Indian law and policies, discusses existing mainstream asset-building models and then proposes a model for asset-building in Indian Country. This model recognizes and incorporates tribal sovereignty as the overarching asset for tribal communities. The model provides a broad definition of assets that takes into account tribal culture and traditions. It addresses the need for tribes to create strong government and economic infrastructure. It takes into account the range of problems created by nearly two and half centuries of oppression. Asset-building theories and models that address building only individual assets fail to take these foundational assets and critical needs into account.

Key Findings

First Nations' research on asset-building strategies has been integrated with and supported by grants and technical assistance provided to grassroots community partners, and by case study analysis. Strategic grantmaking to more than 20 partner tribes and organizations has yielded perhaps as many questions as answers because of the complexities of Indian communities; however, several policy and practice implications have emerged.

Tribal Institutional Restructuring and Civic Engagement

Tribes must revise or create structure, organization and governing and regulatory systems that will eliminate government instability, build capacity to provide and maintain a healthy, predictable business environment and carry out the economic and social objectives and goals of the tribe.[1] Tribes must create forms of government that reflect their cultures and which will increase civic participation by focusing on the *obligations* as well as the *rights* of tribal citizens. Tribes have no choice in these matters if they are to endure as tribal societies.

Tribal Control of Assets

Asset-building at the tribal level is necessary in order to create an economic environment in which tribal and individual asset-building can succeed and contribute to a healthy tribal community. Asset-building at the tribal level must be geared toward the development of governmental, business and technical capacity and provide education, training and apprenticeships for members. This means tribal and federal resources must be directed at strengthening tribal government institutions and building all the skills needed for a fully functioning society. Tribes must begin to identify, track and monitor their assets and work toward control of their assets so that tribes can responsibly steward their assets for future generations. Asset-building at the tribal level must also involve tribal governments, programs, organizations and community members all participating and working towards collective goals of asset control. As the case studies demonstrate, tribes have had to initiate major systemic changes in order to exercise their sovereign right to control and effectively manage their assets.

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[1] This is especially true for tribal governments that have had tribal structures and "boilerplate" constitutions adopted under the Indian Reorganization Act of 1934. These governing structures and constitutions typically require federal approval for many tribal actions. In general, all tribes should consider their historical ways of governing, which reflected their values and culture, and ensure that their current government structure reflects and fits these values and traditions. Tribal governments may look different for every tribe in the United States; tribes have the right to decide for themselves their own form and structure of government.

Mentoring & Peer Learning Institutes

Mentoring should be supported and formalized so that tribes may receive one-on-one training and guidance from other tribes with experience in things such as: constitution reform, legislative and regulatory processes, accounting, finance and budgeting systems, integrating cultural practices with economic development and long range planning. This is all akin to what tribes, operating as intact societies, always did: control, retain, increase and leverage their assets to insure strong communities. But after 517 years of oppression, tribes need assistance in applying what they have always known to recreate systems that will make their communities healthy and economically secure.

Those tribes who have successfully rebuilt their governments, regained control of their assets and created new assets have much to offer tribes who are just starting or struggling. Tribes can be role models and mentors for one another. They can help create models that are relevant to other tribes. Peer learning institutes should be developed and supported with tribal, federal and nonprofit funding and with the purposes of helping tribes 1) restructure their governments, 2) build capacity, 3) regain control and management of their assets, especially land, water and energy resources, 4) support individual asset-building, and 5) establish accountable and transparent governing, administrative and regulatory mechanisms. Tribal sovereignty, histories and cultural beliefs and practices should guide all of these important activities.

Tribal Capacity Building

In order to have economically healthy tribal communities and support individual asset-building, tribal sovereignty must be exercised through strong tribal institutions and with laws and rules that reflect a tribe's individual history, culture and relationships with other governments. Tribal leaders must be able to lead, govern and foster economic development. Tribes and individuals must learn the importance of budgeting and saving. A workforce must be developed; tribal members must have the skills and knowledge needed at all levels of tribal society. Community engagement and grass roots support are essential. The federal government can play a role, but it must be a support role, not a "do-it-for-them" role. The case studies in this report show that those tribes who have developed needed internal expertise have greater success in regaining control of their assets and managing them effectively. Tribes' ability to administer and support asset-building programs will flow from this increased capacity.

Tribal Think Tanks to Promote Tribal Control of Assets through the Exercise of Tribal Sovereignty

The point has been made that sovereignty is tribes' most important asset, but as with any asset, it must be used wisely and well. In order for tribal sovereign authority to be exercised effectively, and for tribes to endure as sovereign nations, critical knowledge and data are needed to make decisions about tribal assets and how to best use them. Analyses are needed on the economic, social and cultural value of tribal assets, the way in which non-Indians benefit from them and how to redirect the control and benefits to tribal communities. Tribal experts have experience with these questions and issues and can write about them and share their knowledge so that other tribes may benefit. As the case studies in this report demonstrate, research directed by tribes is needed on tribal assets and asset-building in Native communities in order for tribes and tribal communities to devise strategies to regain control of their assets.

The Role of Philanthropy in Asset-Building Must Be Expanded

The role of fundraising and philanthropy, including tribal philanthropy, in tribal asset-building must be addressed. Philanthropy must be considered as an asset that will help tribes grow and create more assets. Tribal philanthropy is emerging and will play a critical role in asset-building in Indian Country.

Federal Policy

Federal policy must be changed to respond to the asset-building demands and systemic change and capacity building that is critically needed in Indian Country. Federal asset-building policy is aimed at building individual wealth. Individual asset-building must continue but it is not enough. Entrepreneurship and asset-building at the individual and even community levels can go only so far. Such asset-building efforts will be limited by lack of institutional support at the tribal level. While individuals may build assets, without a strong tribal economic environment, the benefits from these assets may still flow away from the tribal community, as they typically have, into the surrounding non-Indian communities. That is where there are businesses, services, government institutions, regulatory and dispute resolution systems in place. Such infrastructure may not be found or well supported and developed in tribal communities.

Federal policy must support tribes' control of their assets and use of tribal assets that will allow tribes to create a reservation environment in which individual assets can contribute to the tribal community. It is not enough to offer money and technical advice to tribes. The federal government needs to remove the obstacles created by past federal policy, and allow tribes to build the capacity they need to do it themselves. The federal government must find ways to support these efforts, without intrusiveness.

Conclusion

Today, despite a history of federal policy aimed at the transfer of tribal assets and wealth to mainstream America, many tribes are still asset rich. Yet, Native Americans continue to have the highest poverty rate and the highest unemployment rate in the nation. Clearly, something has been missing: distilled to its essence, the problem is that mainstream theories fail to acknowledge and address the biggest barrier to tribal asset-building— tribes do not control the use of their assets and therefore do not receive the benefits from them. Due to the history of federal Indian policy, tribes often lack the infrastructure needed to support asset management and growth. These debilitating problems must be addressed in any asset-building strategy intended to improve tribal communities.

The goal of First Nations' Native American Asset Watch Initiative and this report is to broaden and deepen the dialog and expand the research concerning how tribes can regain control of their assets, become effective managers and finally receive the benefits from their assets. Tribes must be able to use their assets to create the economic security that will strengthen tribal sovereignty and allow all the aspects of tribal societies to flourish. To insure that happens, more research is needed and more of the tribes' successes need to be shared with other tribes. This report has provided some of that research and shared some of the stories, and by doing so has tried to give direction and lay a better path to more effective asset-building in Indian Country.

Native American Asset Watch: Rethinking Asset-Building in Indian Country

Tribal control of trust assets must be the theme of tribal activities and of federal policy going forward.

-Rebecca Adamson, from *Land Rich and Dirt Poor*

Accumulating wealth—as distinct from making a big income—is key to your financial independence. It gives you control over assets, power to shape the corporate and political landscape, and the ability to ensure a prosperous future for your children and their heirs…. Wealth is used not just to pay the rent or buy groceries, but to create opportunities, to free you to pursue your dreams.

-Rev. Jesse Jackson, Sr. and Jesse Jackson, Jr., from *The Color of Wealth*

When we think of the exercising of sovereignty, we tend to focus exclusively on the role of tribal government. But being a nation, in the fullest sense, is much more encompassing. It is about members who are engaged, productive and responsible citizens; it is about strong and vital government and other institutions; it is about a healthy and vibrant economy; it is about supportive and loving families and kinship networks—all grounded in the values provided by a strong cultural foundation.

-Sherry Salway Black, former Vice President of First Nations Development Institute

I. Introduction

At the start of the 21st century, the most fundamental questions confronting tribes are: Who controls Native American assets? How can Native Americans[2] regain control of their assets? How will Native American tribes develop the essential organizational, political, legal and economic infrastructure, the required expertise and capabilities in government, technology and business, and the needed skilled tribal workforce to control and manage their assets? These are the fundamental questions that tribes and their citizens must address as they work toward social, political and economic security for their communities. These essential questions cannot be separated from tribal sovereignty; in fact, asset-building policies or programs are likely to succeed only when viewed and created through the lens and in the context of tribes' sovereignty, cultures and traditions. These things matter because the policies and belief systems of those who control American Indian assets, including land, water and other assets and resources, will shape the possibilities and limitations of Native American asset development, as well as tribal sovereignty into the future, perhaps for all time.

While there has been a significant boom in the development of strategies for asset-building in mainstream societies, there has been little research analyzing and discussing the various asset-building strategies that tribes and communities are employing to develop and control their assets.

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[2] In this report, the terms Native Americans and American Indians are used interchangeably, and are meant to include all Indian tribes, including state recognized and unrecognized tribes, as well as Alaska Natives and Native Hawaiians, in the United States. These groups may be different in terms of their relationships with the federal or state governments. Therefore, parts of this report will apply to a greater or lesser extent depending on the status of each Native American tribe, village or group. A word about these two terms. In recent decades "Native American" has become the politically correct term for "Indians" and has thus come into common usage in literature and everyday discussions. Federal laws, older documents, and literature, especially those written by Indians themselves (e.g., Vine Deloria), use the term "American Indian." This report uses the terms as used in the materials being discussed. As a result, there is not a consistent use of one term or the other throughout this report.

This begs the question of whether asset-building in Native communities should be approached the same way as in non-Indian communities. Does asset-building in Native communities mean different things when compared to asset-building in mainstream (albeit, low income) communities/society? What is the relationship between asset-building in Native communities and tribal sovereignty, tribes' most powerful asset? Through First Nations' nearly three decades of work in Indian Country,[3] it has become clear that any successful strategy must be implemented by tribes in ways that fit with the culture and traditions of the tribe. To know that does not tell us what strategies will work, or how to help tribes design and use asset-building strategies that fit their cultures. That is what this investigation was intended to uncover.

To answer these questions and conduct effective research on asset-building in Indian Country, it is necessary to start, as always, by putting tribal assets in context, especially historical context. And this investigation must look to tribes themselves for the answers.

While First Nations' history spans almost three decades, federal Indian policy has had nearly two and a half centuries of negative impact. The loss of the major portion of tribes' original assets and loss of control of the remaining assets has devastated many tribal communities, as such loss would do to any community. But tribes retain ownership, if not control, of many assets, which comprise a significant share of the United States' natural resources, including land (especially unspoiled land), water, oil, gas, forests, coal and wind. Perhaps the most important asset is tribal sovereignty and the right of tribal government to control tribal assets and use them for the benefit of tribal communities. Tribes, like any government, have the responsibility and the right to provide for the economic security, health and safety and political and cultural integrity of their members and communities.

Over the past 35 years, tribes have been slowly regaining control of their assets and growing their economies. Progress has been hampered by the continuing effects of colonialism and the laws that insured that others would benefit from Indian assets. Tribes are now in the process of recreating their governments and societal institutions, resurrecting practices that have been suppressed or forced underground. They are re-creating institutions and bodies to do the decision-making that has been taken from them for more than two hundred years.

With lessons from case studies of tribes dealing with diverse assets, this report will show the ways in which tribes are shaking a history of forced and entrenched dependency that is the result of nearly two centuries of anti-Indian federal policy and legislation, and are reestablishing control of their resources in order to develop and protect them and create new assets to secure their economic and political futures.

The report introduces First Nations' Native American Asset Watch Initiative (Asset Watch Initiative), its purpose and goals, and is an effort to draw together asset mapping, research and advocacy into a comprehensive approach to asset-building and provide shape and direction to Native communities' efforts to secure prosperity on their own terms.

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[3] The term "Indian Country" has a specific legal meaning. 18 U.S.C. 1151 defines "Indian Country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." It is generally within these areas that tribal sovereignty applies and state power is limited.

First Nations' Asset Watch Initiative is supported by its grantmaking program, which includes strategic grants to tribes and Native organizations to inform the Asset Watch Initiative. First Nations awarded more than 20 grants specifically designed for the Asset Watch Initiative; grantees' projects form the heart of the Asset Watch Initiative. The grant project profiles and their outcomes are described in Appendix 6. The projects of five of these grantees are presented in Appendices 1-5 of this report as in-depth case studies to explore grantees' strategies for asset control and asset-building.

Explored in this report is the history of federal Indian policy, which has been inconsistent at best and intentionally destructive of tribal societies at worst, and the lingering effects of colonialism on Native assets and tribes' ability to control, manage and create assets. This investigation then explores existing asset-building strategies for mainstream society and their relevance to asset-building in Native communities. Next, it presents a new model for asset-building in Indian Country. The new model borrows from existing asset-building strategies, but emphasizes the need for tribes to control their assets and the critical role of tribal sovereignty. The new model will account for the role of history, the need for tribes to exercise their sovereignty to control their resources, restructure their governments, build capacity and infrastructure and train a tribal workforce that is ready to do the asset-building at the individual and community levels. The model includes tribal peer learning institutes and one-on-one mentoring among tribes as essential elements.

The report concludes with findings, practical implications and policy recommendations drawn from our investigative research on asset-building in Native communities, identifying strategies that tribes have used to regain control of their assets and use them in ways that will insure that their communities are strong, healthy and vibrant.

A. The Native American Asset Watch Initiative

First Nations' Native American Asset Watch Initiative is a comprehensive strategy for systemic economic change, which seeks to provide a range of support for efforts by Native communities to reclaim direct control of their own assets and re-establish sustainable approaches to the use of land and natural resources. Under the Asset Watch Initiative, First Nations, in partnership with tribes, has researched and mapped the allocation and control of assets, and monitored and exposed the mechanisms by which Native assets are valued and turned into revenue. This process has helped to provide credible and timely information for Native communities, organizations and government entities on the current status of Native assets—information that is key to advocacy for greater community control and to a return to more sustainable use of those assets. Thus, the Asset Watch Initiative can inform policy development and promote sustainable, culturally compatible economic development in Native communities.

The political and cultural survival of our community partners is undeniably linked to securing comprehensive strategies for economic improvement in tandem with protection and revitalization of traditional resources and the environment as a whole. To this end, the Asset Watch Initiative has combined First Nations' expertise in asset research, public education, strategic grassroots grantmaking and technical assistance to develop tools for reclamation of assets and to nurture and model best practices in cultural and environmental preservation in Native communities.

Under this initiative, First Nations directed its research functions toward assessing the current control of Native assets by outside entities and identifying approaches for returning those assets to community control. First Nations' grantmaking and technical assistance has focused on supporting grassroots community efforts, and building the capacity of tribes and Native organizations engaged in asset

control activities. This Native American Asset Watch report is the outcome of these ongoing efforts. The report describes successful asset control strategies, defines practical advice on the implementation of those strategies by other tribes and Native organizations, highlights implications and makes policy recommendations for tribal and federal governments.

B. Why First Nations' Native American Asset Watch Initiative Is Needed

When armed with the appropriate resources, Native peoples hold the capacity and integrity to ensure the sustainable, economic, spiritual and cultural well-being of their communities.

- First Nations Development Institute

First Nations has demonstrated through its nearly three decades of work in Indian communities that tribal control of tribal assets is an essential building block to social, political and economic development. Due to the ongoing effects of past federal Indian policies, external structures, bureaucracies and entities continue to exert control over the assets of Indian nations. But tribes are no longer willing to let others dictate how and when they will use their assets. But to move from the effects of "colonialism to control" requires an understanding of the burdens history has placed on tribes.

First Nations has worked its entire existence to build strong, healthy, culturally vital Native communities throughout the United States. It has done this by pursuing its mission of assisting Native people to control their own assets and build the capacity to direct their economic futures *in ways that fit their cultures*, using tools of direct technical and financial assistance. Recognizing that the cultural lifeways of Native peoples have been deeply damaged in the past when outside entities have controlled Native communities' destinies, First Nations takes a holistic approach in addressing Native communities' desire to tap financial, natural, physical, and institutional assets, as well as human, social and cultural capital, in sustainable and appropriate ways.

Through direct assistance to tribes and Native organizations, First Nations has worked with tribes and reservation-based nonprofits to address double-digit unemployment, low life expectancy, epidemic levels of diabetes, cancer, youth suicide, destruction of Native languages and traditions, and a range of other factors that have prevented tribal communities in the United States from thriving. Over the course of years, First Nations has evaluated the models that are positively or negatively affecting the livelihood of Native communities. This approach guides First Nations' fieldwork, helping to identify effective tools and strategies to fill gaps in services and economic infrastructure, identify and address barriers, and support activities aimed at providing sustainable opportunities and community control of resources.

In the United States, Indian tribes are the single largest non-federal landholders in the country. With the exception of a very small number of tribes that have succeeded in narrow aspects of highly visible economic development, the vast majority of American Indians remain "land rich and dirt poor" (Adamson 2003). American Indians continue to live with the highest poverty rate and the highest unemployment rate in the nation, and remain the single poorest population in the United States. The over 560 federally recognized tribes in the United States today have reservations[4] that range in size from less than an acre to the 17 million acre Navajo reservation. Combined, the aggregate land base of tribes would qualify as the fourth largest land base in the United States, smaller than only the states of Alaska, Texas and California. *But while Native American tribes and individuals "own" many assets, including land, they do not control these assets, and thus do not reap the benefits or have the means to ensure sustainable use.*

[4] An "Indian Reservation" is land that has been set aside by the federal government for the use, possession and benefit of Indians. See Glossary for a more complete definition.

Today, it is widely accepted that in order to alleviate poverty in any society (whether at the community or national level), members of that society must have the ability to access, control and manage their assets. In other words, it is simply not enough to own assets—a community must have the means to ensure that those assets are put to use in a sustainable, culturally compatible manner for the betterment of both the individual and collective interests of that society. Therefore, to truly promote an asset-based approach to sustainable development as an effective strategy, one must address the ability of individuals and communities to access, control, and manage their assets.

Recent thinking by Amartya Sen, winner of the 1998 Nobel Prize in Economics, Moser and Norton and others, points to the idea that looking at sustainable development—with assets at the core—within a broader framework that includes human rights, can "form a valuable strategic entry point to address the ways in which power imbalances deny the excluded access to the assets necessary for a secure and sustainable livelihood" (Moser and Norton 26). First Nations' Asset Watch Initiative falls squarely within current thought on addressing sustainable development and human rights, but moves a step further into action that takes advantage of the traditional strengths of Native communities.

C. First Nations Development Institute's Work in Helping to Rebuild Tribal Economies from the Ground Up

Properly understood, modern American Indian history has been made by Indian leaders who seized the initiative, brought forth their grievances and proposed solutions, and, more often than not, accomplished the kind of progress they dared seek.

- Charles Wilkinson, from *Blood Struggle*

First Nations' work is to assist tribes in revising or creating structures and organizations, including governing and regulatory systems that will build tribes' capacity to provide and maintain a healthy, predictable business environment and carry out the economic and social objectives and goals of tribal government *in ways that fit with the culture and traditions of the tribe.* The tribes' ability to administer asset-building programs will flow from this increased capacity. First Nations has no magic solution, no "how to" or "one size fits all" manual. Nor does it look for solutions based on models created outside of Indian Country. First Nations' philosophy and practice is to go to the tribes and grass roots leaders and ask them what they need, find projects that will provide support to address their needs and do research based on these projects to learn what works and does not and why. The asset-building models that work may be as diverse and as numerous as the tribes themselves.

First Nations' experiences have demonstrated that one of the best ways to assist tribes is to connect them so that they can share their best practices through peer learning and mentoring. This way no one is telling tribes what they should or must do; no one is imposing a foreign culture or way of doing things that could undermine tribal institutions; instead relevant examples of success are demonstrated and shared. It may not be the ideal, because the ideal would be the intergenerational passing of knowledge within a tribe, but may be as close to ideal as Indian Country can get.

II. The Importance of History and Policy to Native American Asset-Building

A. About Indian Tribes

There are more than 560 federally recognized tribes,[5] including 229 Alaska Native tribes and villages. In addition there are many tribes not federally recognized, either because they did not seek recognition or

[5] Federally recognized tribes have a government-to-government relationship with the United States; that is, their relationship is based on the political status of tribes as sovereign nations.

because they are among the more than 100 tribes whose relationship with the federal government was terminated during the Termination Era of the 1950s. Termination is discussed in this section at II. 6. There are 322 federally recognized Indian reservations. The Navajo Nation Reservation is the largest with 17 million acres (about the size of West Virginia) located mostly in Arizona, but touching New Mexico and Utah. The Quileute Nation near LaPush, Washington has one square mile. Some tribes have no land base.

According to the 2000 census, there were 4.3 million Native Americans and Alaska Natives, 1.5 percent of the total United States population. Forty-three percent live in the West, 31 percent in the South, 17 percent in the Midwest, and 9 percent in the Northeast. The largest tribes are the Navajo Nation with 264,000 enrolled members, and the Cherokee Nation with 241,000 members. Only 29 tribes have more than 10,000 members. In Alaska, 1.9 million people are enrolled members of an American Indian Tribe or Alaska Native Village (Anderson et al. 7-8).

In general, tribes experience high levels of unemployment, high poverty levels, low per capita income and low educational levels. According to the 2000 U.S. Census, the average unemployment rate on Indian reservations was 13.6 percent, with some as high as 50 percent and above. In contrast, the overall unemployment rate for the country was 5.8 percent. The percentage of Indians living in poverty was 25.6 percent, compared to 12.38 percent for the general United States population. The per capita income for Indians was $12,893; the United States average was $21,587. Many tribes lack basic infrastructure, such as roads and sewage systems, and tribal homes often lack plumbing or electricity. The 2000 census shows that 20 percent of Native reservation households lack complete plumbing, compared to 1 percent of all United States households.

Native Americans lag behind the larger population in measures of educational attainment. While the number of Indians with post-secondary degrees has more than doubled between 1976 and 2003, only 11 percent of the American Indian/Alaska Native population had a bachelor's degree, compared with 24 percent for the total United States population (U.S. Census Bureau). Most Indian children (90 percent) attend state public schools. The other 10 percent attend BIA-funded schools (Newton 1357, 1360). Most BIA funded schools are dilapidated and inadequate in other ways. Anderson et al. suggest that "something to consider … is the way the unique legal relationship between Indian tribes and the federal government has formed the basis of both the deficits Indian students struggle with today, and the promising signs of success that are emerging" (Anderson et al. 11).

Health statistics reflect the poverty on reservations. There are higher rates of tuberculosis, alcohol abuse, cervical cancer, breast cancer, fetal alcohol syndrome, suicide and diabetes. For example, Indians are 2.9 times more likely to die from diabetes (Anderson et. al. 8). In the Gila River Indian Community diabetes affects more than half of their population over 25 (Gila River Case Study, App. 1).

The extreme poverty on reservations creates seemingly insurmountable obstacles to asset-building, and to capacity building at the individual and community levels. Building wealth and economic security seems almost hopeless on some reservations. In general, however, Indian tribes collectively possess great wealth—in land and natural resources.

The federal government holds approximately 56 million acres of land in trust[6] for individual Indians and tribes. Alaska Natives hold another 45 million acres, which were set aside under the Alaska Native Claims Settlement Act, 25 U.S.C § 1603. Many tribes hold lands in fee title as a result of historical circumstances or tribal land acquisition efforts, and these have not been systematically accounted for, so their total is not known.

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[6] "Held in trust" means the United States holds the legal title for the benefit and use of the tribes. See the Glossary for a more complete description of the "trust."

Tribes own a significant amount of land and other natural resources. In the lower 48 states, tribes own 44 million acres of range and grazing lands, 5.3 million acres of commercial forest lands, and 2.5 million acres of crop lands. Tribal lands hold 4 percent of United States' oil and gas reserves, 30 percent of coal reserves, and 40 percent of uranium deposits (Newton 965). The United States Department of the Interior has identified 93 reservations as having high wind energy potential and 118 as having high potential for biomass sources of energy (Anderson et al. 5). Many tribes in the Southwest and California have potential for solar electricity (Native Energy). While tribes own significant resources, these assets do not make tribes wealthy or economically secure. Rebecca Adamson, founder and former director and officer of First Nations Development Institute, has noted poignantly that, American Indians are "land rich, and dirt poor." She said:

> The assets of American Indian and Alaska Native tribes would make anyone else in the world wealthy. Their landholdings of almost 100 million acres, if aggregated, would form a land base larger than all states except Alaska, Texas and California. And these lands are rich in resources, with timber, range and crop land, oil and gas reserves, uranium deposits and water reserves, and a host of other tangible assets.
>
> Yet tribes are the single poorest population group in the United States, justifying the unique title "land rich, dirt poor."
>
> The problem is that tribes do not control tribal assets. To the contrary, federal policy toward Native peoples in America has always put others in control of tribal assets. Whether these others are colonial agents of usurpation, or agency superintendents, or businessmen sizing up an Indian deal, or corporations seeking advantage, or state governments demanding tribute from "their" tribes—they have all found ways to gain from tribal assets while the Native owners go without (Adamson, Indian Country Today).

B. The Asset-Stripping Purpose and Effect of Federal Indian Law and Policy

> *Why recount this history if what we are focusing on is poverty in 2005? The reason is simply because we must contemplate what the consequences of thirty years, or forty, or fifty years (or a century) of poverty and political discrimination are to a tribe, a people, community. What are the consequences of such a history? The consequences are before us: Indians are the poorest, least well-educated people in the United States not by accident nor by their own perfidy or mismanagement, but the racist ideology and philosophy that have accompanied them from the first contact and earliest treaty.*
>
> *Most reasonable economists and sociologists can assume that such racist and discriminatory policies as have been briefly described here cripple and damage people at every level of existence, mentally, physically, psychologically, politically.*
>
> -Elizabeth Cook-Lynn, from *Notebooks of Elizabeth Cook-Lynn*

Indian policy and law is anathema to many. The reservation system, where land is set aside for Indian tribes and is governed by them seems an aberration and cannot be understood or properly analyzed without an understanding of the history of federal Indian policy and the evolving, historically vacillating, relationship between the United States and the Indian tribes. Federal policy is key because Congress is said to have "plenary" (broad, almost complete) power over Indians, including the power to manage and sell Indian land and resources, determine status of tribes and even to determine who is officially an Indian for many purposes.

Over the entire history of the United States, the federal government has flip-flopped between conflicting policies and goals for Indian tribes. The United States has gone from treating tribes as independent nations and making treaties with them to denying tribes' existence as nations, with just about every other conceivable policy and treatment in effect at some point between and thereafter. There are generally recognized policy eras that mark the history of federal-tribal relations: 1) Treaty and Non-intercourse—1790-1820s, 2) Removal and Relocation—1820s-1840s, 3) Reservation—1840s-1880s, 4) Allotment and Assimilation—1880s-1920s, 5) Reorganization and Self-government—late 1920s-1940s, 6) Termination—1950s-1960s and 7) Self-determination—1960s-present (Anderson et al., Newton, Pevar). The unifying theme running through all, except perhaps the last of these eras, is the innovative ways in which the United States government has justified using Indian assets as a piggy bank for Western expansion and development.

The entire history of tribes and their relations with Europeans has been marked by non-Indians' desires to appropriate the property and resources Indians possessed, and by the creation of legal principles, some would readily call them "legal fictions," to justify the takings. The whole point of federal Indian law and policy, up until the adoption of the policy of Indian self-determination in 1970, was to 1) systematically move Indian assets into non-Indian hands, and 2) reduce Native control of assets they still owned. This section will demonstrate how each major policy era in federal-tribal relations up to the present era of self-determination was designed to, and effectively did strip away more Native assets; even in the current era of self-determination the legacy of colonialism continues to hamper tribes, their members and their communities in their ability to build and benefit from their assets or acquire new ones.

1. The Rule of Law—Does it apply in Indian Law?

> *Most if not all of the legal concepts and doctrines that describe the rights and status of Indians and their tribes derive from the events and development of American History. Forced migrations, the discovery of gold on tribal lands, the coalition of several tribes to share hunting grounds, the coming of the missionaries, and the drives for statehood in the West have all contributed to the formation of Indian legal rights. No doctrine of Indian law derives from the logical unfolding of a major legal concept.*
>
> -Vine Deloria, Jr., from *A Better Day for Indians*

More than any other American, Indians' lives are governed and affected by federal law and policy. The leading treatise on federal Indian law draws attention to this significant fact: "Law dominates Indian life in a way not duplicated in other segments of American society" (Newton xvii). Thus the "Rule of Law" can assist or wreak havoc for tribes in their efforts to control and manage their assets, including land, energy, social, cultural, spiritual and political assets. It is worthwhile therefore to consider what the Rule of Law means in Indian law.

The United States is said to be governed by the Rule of Law, the principle that no one is above the law, that all are treated as equals. This principle allows most American citizens to organize their lives and makes rights and obligations predictable. Fifty years ago, President Eisenhower established May 1 as Law Day, "a day of national dedication to the principle of government under law." In 1984 President Ronald Reagan issued this Law Day Proclamation: "Our unique experience demonstrates that law and freedom must be indivisible partners. For without law, there can be no freedom, only chaos and disorder; and without freedom, law is but a cynical veneer for injustice and oppression" (Law Day, U.S.A., 36 U.S.C. § 113 (1952)).

Does the Rule of Law apply in Indian law? Indian law has been said to be extraordinary (some synonyms for "extraordinary" are "strange," "bizarre," "amazing," "unexpected," "surprising") and "exceptional" in the "special" or "extra ordinary" senses. The American Indian Policy Review Commission, a federally commissioned body set up to review and make recommendations on federal Indian policy, reported in 1977:

> It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. This *extraordinary* body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it (Prucha 281-83, emphasis added).[7]

More recent appraisals of Indian law and its history conclude that "[T]he Supreme Court's Indian law jurisprudence has degraded into a jumble of confusion and obfuscation since the late 1980s" (Fletcher 27). In a 2004 case, an Eighth Circuit Court of Appeals judge who was reversed in the recent major Indian law case *United States v. Lara*, said the Supreme Court makes up Indian law as it goes. Indian law scholars agree that federal Indian law "is a loosely related collection of past and present acts of Congress, treaties and agreements, executive orders, administrative rulings and judicial opinions connected only by the fact that law in some haphazard form has been applied to American Indians over the course of several centuries" (Deloria and Wilkens 158).

The way in which federal Indian law fits into the broader fabric of federal law is beyond the scope of this report,[8] but it is worth noting that the Rule of Law, which keeps the rest of United States law from descending into "chaos and disorder," does not seem to exist, if it ever did, in federal Indian law. And what does this have to do with Indian assets? To understand what happens to Indian assets when the Court "makes up Indian law as it goes" requires an understanding of the history of federal Indian relations.

C. The Importance of History

> *A great need exists, and will continue to exist, for more revisionist writers. When the cumulative impact of continuous misinterpretation of historical events is surveyed and appraised we will find that much of what passes for history dealing with Indians and whites is a mythological treatment of the development of the policy disguised as history.*
>
> -Vine Deloria, Jr., from *The American Indian and the Problem of History*

The seminal Indian law treatise, *Cohen's Handbook of Federal Indian Law*, starts its very first chapter with a section on "Why History Matters." Only by understanding the history can one understand Indian law and what has happened to Indian assets. Understanding the history of Indian law is critical to understanding

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[7] This Commission issued a 258 page report after two years of study that called for major reforms in federal Indian policy, but the report caused controversy and thus ended up having a less than hoped for effect (Anderson et al.) Still, significant recommendations were implemented. One was legislation to prevent the wholesale removal of Indian children from their families and tribes, which resulted in the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-63. Another was the establishment of a Senate committee granted full legislative and oversight authority to receive and act upon the Commission's recommendations. The Senate Select Committee on Indian Affairs was established in February 1977.

[8] Fletcher provides a good discussion of this topic.

what Indians are facing in their efforts to regain control and management of the assets they still hold. To understand the asset stripping purpose and effects of federal Indian law and policy requires an understanding of developments as far back as the 16th century, to the "Discovery Doctrine," drawn from a principle of international law, which provides the theoretical underpinning for all of federal Indian law and policy (Newton 7).

1. The Doctrine of Discovery: The Law of Nations

So long as it was clearly for their (Indians) benefit.

-Franciscus de Victoria, from De India et de Belli Relectiones

Again, were we to inquire by what law or authority you set up a claim [to our land], I answer, none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you.

-Corn Tassel (Cherokee), from a speech to United States commissioners seeking a peace treaty, 1785 (qtd. in Wilkens, 2002: 19)

In simple terms, the Discovery Doctrine held that Natives are the true owners of the land and in the absence of a just war only the voluntary consent of the Natives could justify the taking of Indian land. The doctrine is credited to Franciscus de Victoria, a prominent 16th century theologian and scholar. De Victoria formulated his theory after rejecting the brutal practices of the Spanish in the New World. Spain was following time honored principles of discovery and conquest by which wars could be justly waged against "infidels" in order to conquer and gain ownership of their lands.

During the Crusades (1000s-1200s and into the 1500s), the Pope could wage war on countries where infidels violated "natural law," that is, where they did not embrace Christianity (Getches, 2005:43). European explorers adopted this theory of colonization and asserted ownership of discovered lands "not in the possession of any Christian king or prince" (Anderson et al. 17). A rich practice for alerting heathens that they may accept Christianity was set forth in the Requirimiento, a text which conquistadors were required to read to "discovered" people before any hostilities could begin. The sincerity of this practice may be judged by the manner of delivery:

> [T]he Requirement was read to trees and empty huts when no Indians were to be found. Captains muttered its theological phrases into their beard on the edge of sleeping Indian settlements, or even a league away before starting the formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains (Anderson et al. 18-19).

This practice was abhorrent to at least one missionary sent to the "Indies" in 1502, Bartolomé de las Casas, who protested the treatment of the aborigines and sparked a debate on Indian rights. Dominican scholar Franciscus de Victoria took up the debate and in a series of lectures he delivered in 1532, he rejected the justifications Spain used to control Indians and take their lands. De Victoria found it unreasonable to claim the lands of Indians who were under attack and being read their right to accept Christianity in a foreign tongue. He did find it reasonable, however, to exercise the right to carry on trade among the Natives, to preach the gospel and impose Spanish laws on "unintelligent people" with "no proper laws" … "so long as it was clearly for their benefit" (Anderson et al. 21).

The Pope followed de Victoria's suit and amended papal law to say that "said Indians and all other people who may later be discovered by Christians, are by no means deprived of their liberty or the possession of their property …" (Cohen, 1942: 151-57). Spain likewise changed its laws in 1542 to provide that, "Indians are free persons and vassals of the crown" that lawsuits among the Indians are to be decided … according to their usage and custom …" (McNickle 125-26).

Understanding the international discovery doctrine provides a context for the complex and oftentimes convoluted field of Indian law and helps explain the vacillating federal policy eras, which will be discussed below. The frequent reversals of federal Indian policy show the conflict between the ideals of the United States of equality for all and the desire for Indian assets.

D. Founding Principles of Federal Indian Law: Setting the Stage for Stripping Indian Assets

1. Treaty and Non-Intercourse Policy Period: 1790s-1820s

a. The Commerce Clause

The Discovery Doctrine provided the legal backdrop when the United States found itself faced with the task of defining its relationship with the Indians. England had staked its claim as discoverer to America, made treaties with the Indian tribes who occupied the land, fought a revolutionary war (War for Independence, 1775-1783) with the American colonies and lost. The colonies inherited England's rights, whatever they might be, but the colonies still had no central government and the legal relationship with Indians was still unsettled. When the federal government was formed, the United States continued making treaties with tribes as England and the colonies had done, thus recognizing the tribes' status as independent sovereign nations. In the Constitution, however, the United States claimed for itself the exclusive right to regulate commerce with Indian tribes, to make clear that other European nations could not conduct trade with Indians. The Commerce Clause, Art. I, § 8, cl. 3 reads: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

This clause was meant merely to clarify federal authority to regulate trade with Indian tribes, but looked at from an Indian perspective it stripped tribes, without their knowledge, of their ability to engage in commerce with non-Indians without the federal government's consent and control. Inability to control your nation's commerce with outsiders matters; no sovereign would sensibly give up such authority. Consider the controversy that still rages over the North American Free Trade Agreement, likely because political agendas often underlie such agreements. The Commerce Clause is no different, but in this case, even the drafters would not have guessed its full impact on federal/tribal relations. The language of the Commerce Clause is very limited and specific, yet it has been relied on to assert all manner of authority over Indian tribes and their lands. As Cohen's Handbook notes, "The Commerce Clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the Courts." It is cited as the basis for nearly all legislation over tribes, from protecting cultural resources to regulation of gaming (Newton 397).

b. Treaties

> *They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.*
>
> -Chief Red Cloud, Oglala Sioux (qtd. in Utley 280)

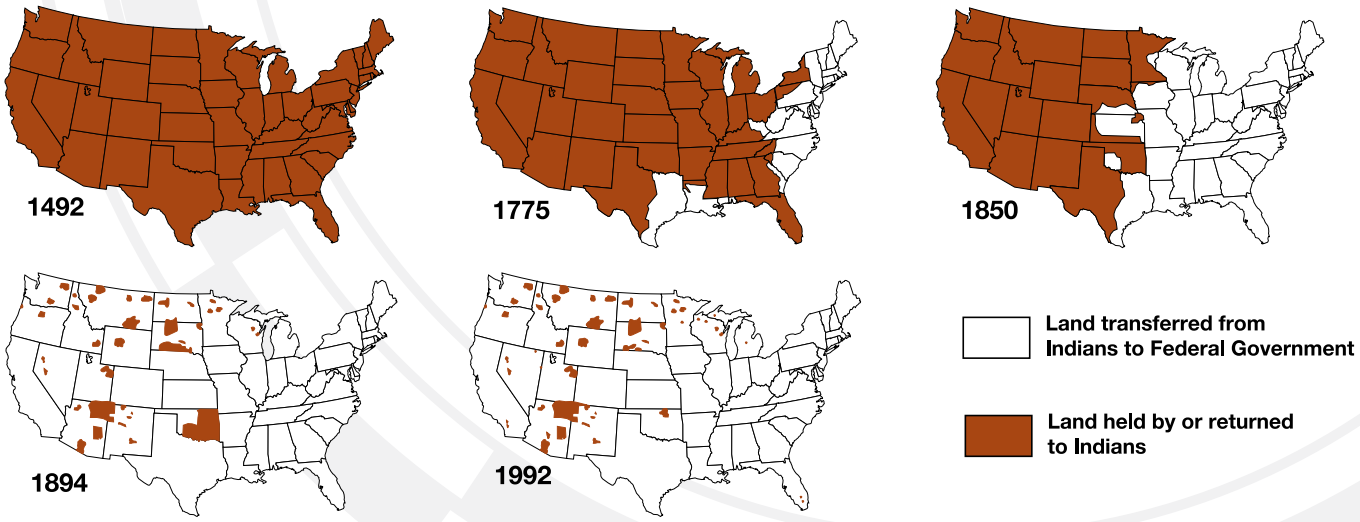
The status of the Indian nations was initially propounded by Chief Justice John Marshall when he delivered the opinion of the Court in *Worcester v. Georgia* (31 U.S. 515, (1832)). He considered the application of the words "nation" and "treaty" to the various Indian people:

> The very term "nation," so generally applied to them (Indians) means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to the Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

The Supreme Court has said that treaties are not a grant of property or sovereignty to the Indians, but a cession to the United States with a reservation of all property and rights not given up (*United States v. Winans*, 198 U.S. 371, 381 (1905)). Still it is well known that treaties were the main vehicle used to take Indian lands. The Supreme Court pointed this out bluntly, "Every schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of the land" (*Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289 (1955)).

Nearly 400 treaties were signed between the United States and tribes. Nearly every tribe has at least one treaty (Pevar 46). Treaties resulted in the loss of vast areas of traditional territories, including loss of the natural resources and wealth contained within such lands. The exact amount of land lost in total is not readily available, but any map showing Indian reservations in the United States shows what little of this formerly red continent is left to Indians (see maps below). As a point of comparison, if, as noted earlier, Indian lands now hold 4 percent of the nation's oil and gas deposits, that means that tribes were stripped of ownership of the other 96 percent of the oil and gas on their former lands. The notion that Indians could own all the oil and gas reserves in the United States when they are such a small part of the population might offend some sensibilities, but few who subscribe to capitalism object to the fact that nearly 40 percent of wealth in the United States is in the hands of 1 percent of the population or that 70 percent of the wealth is in the hands of 10 percent of the people (Phillips 207).

The following image shows the loss of Indian land after 1492.



Treaties effectively transferred most Indian lands, natural resources and other assets into the hands of non-Indians. When treaty making ended in 1871,[9] most tribes were located on reservations. Indians should have been left to govern their now small territories and their people, without interference by other governments. But the hunger for Indian lands did not abate.

2. Removal and Relocation Policy Era: 1820s-1840s

The problem for John Marshall's Supreme Court was that it had to assert colonial authority—tyrannical, imperial authority, of the kind the United States had thrown off in the revolution—while appearing not to.

-Konkle from *Writing Indian Nations*

a. Indian Title – A Tenancy at Will[10]

While the Commerce Clause addressed trade and intercourse, nothing in the Constitution addressed the status of Indian lands. Eventually, an issue of who could do what with Indian lands came before the United States Supreme Court and the Court had to finally decide the status of Indian lands in the United States and more specifically define the relationship between the tribes and the federal government. With just the Commerce Clause and the treaties that had been made for precedent, the United States Supreme Court had to decide who owned Indian lands, who had the right to buy and sell them, and whether the federal court could decide such questions. Most importantly, the Court would have to find a principle that would insure United States' authority and interest in Indian lands, especially with respect to other European countries.

The task fell to Chief Justice John Marshall. He searched for a legal doctrine, but no principle of law seemed to fit just right. He said, "Every rule which can be suggested will be found to be attended with great difficulty" (*Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823)). Maureen Konkle reflected in Writing Indian Nations that "The problem for John Marshall's Supreme Court was that it had to assert colonial authority—tyrannical, imperial authority, of the kind the United States had thrown off in the revolution—while appearing not to" (Konkle 17). Justice Marshall ultimately took a pragmatic view; he rejected the notion that discovery could be deemed a conquest in the case of the Indians, but said that the actual conditions of the Indians and the United States had to be taken into account: "The resort to some new and different rule, better adapted to the actual state of things, was unavoidable" (*Johnson v. M'Intosh*, 21 U.S. at 591). He reasoned that the country had been held under principles of conquest, that practices relating to property were those of a conqueror, and those assumptions and practices had become the law of the land. Thus, with no Rule of Law and only the rationale of a *fait accompli* on which to rest his ruling, he made the United States the owner of all Indian land, to suit the "actual state of things." As for the Indians, he concluded that "the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of the lands, but to be deemed incapable of transferring the absolute title to others" (*Johnson v. M'Intosh*, 21 U.S. at 591). Thus, the Indians became as guests, merely occupying their own lands.

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[9] Congress passed a law in 1871 prohibiting the federal government from entering into treaties with tribes.

[10] A tenancy at will is created by agreement between the tenant and the landlord, in which the tenant occupies real estate with the permission of the owner for an unspecified period of time and cannot transfer his right.

In the end, Marshall modified de Victorio's Discovery Doctrine, describing it as a principle that recognized a right in the discoverer, not the full rights of a conqueror, but the more limited right to hold and transfer title, and which recognized the right of tribes to use and occupy their lands. This right of occupancy is called "Indian Title" or "Aboriginal Title." The United States would gain full legal and beneficial title when Indians gave up their right to use and occupy the lands and the United States gained possession (*Johnson v. M'Intosh*, 21 U.S. at 574, 592, 603; Newton 970-71). The Court later decided that if the United States decided to take Indian lands and destroy Indian title, it could do so without paying just compensation (Tee-Hit-Ton 348 U.S. 277, 289 (1955)).

Under the federal Discovery Doctrine the United States became the owner of all Native lands. In one stroke of John Marshall's pen in 1823, Indians went from owning the entire North American continent to owning nothing but the right to exist on their lands as mere tenants at will. Some would say John Marshall was a pragmatist, some would call him a racist (Anderson et al. 896-97). Either way, there was scant legal authority to support the usurpation of title to every last inch of Indian lands. Chief Justice John Marshalls' whole-cloth creation of "federal Indian law" continues to pave the way for modern United States' asset-stripping policies, whether created by Congress or the federal courts.

b. Domestic Dependent Tribal Nations—"Sovereignty at Will"

> *Tribes are "domestic dependent nations…in a state of pupilage" and their "relation to the United States resembles that of a ward to his guardian."*
>
> - Chief Justice John Marshall, *Cherokee Nation v. Georgia,* 31 U.S. 515, 555 (1832)

The *Johnson v. M'Intosh* case settled title, but did not resolve the extent of federal, state or tribal *authority* over lands that Indians used and occupied. But the State of Georgia, intent on destroying the Cherokee Nation, soon forced the issue by trying to enforce its laws in Cherokee territory. Georgia had declared that it had full jurisdiction over the Cherokees (Harring 27). The Cherokee challenged Georgia's imposition of its laws, and in 1831 the Supreme Court stepped in to make clear that the federal government, not Georgia, had authority over Cherokee lands. In the process, Justice Marshall, again writing for the Court, declared that Indian tribes are "domestic dependent nations…in a state of pupilage" and their "relation to the United States resembles that of a ward to his guardian" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1832)), thus heralding the "trust" responsibility the United States has assumed for tribes and their assets. In 1832, Justice Marshall further explained that tribes were distinct political communities possessing self-governing authority within their boundaries. He said this was the meaning of treaties with tribes; the treaties had, however, placed the tribes under the protection of the United States (*Worcester v. Georgia*, 31 U.S. at 555).

The Cherokee cases made clear the relationship between the states and tribes and the federal government's supremacy in Indian affairs. Tribes had the full right to govern within their territory without intrusion of state authority. But being domestic dependent nations meant the tribes were dependent on the federal government for protection and preservation of their authority and eventually their land and natural resources. Dependent status signified a loss of a good part of tribes' sovereignty, their most important asset.

From this brief and oversimplified review of the early cases that provide the foundation for federal-tribal relationship and federal Indian law, it is apparent that tribes were stripped of their independence and significant aspects of their sovereignty. Tribes could no longer control what happened in their territory; they could no longer tell Georgia to get out; they had to rely on the United States, like children looking to their wards for protection and to tell them what to do. This "trust" has become a slippery slope that

has resulted in all forms of usurpation of Indian assets: taking of property through treaties and allotment; forbidding and suppressing tribal authority and institutions under a policy of assimilation; taking or diminishing tribal sovereign authority through federal acts and court cases; and even eliminating federal recognition of tribal existence through termination, resulting in a total loss of assets by terminated tribes. These various policies and the laws passed to implement them will be discussed briefly to show how they worked to continue to strip the assets and authority of Indian tribes and transfer the assets to non-Indians. The goal was always to protect non-Indian interests in Indian property.

c. The Trust Doctrine as a Justification for Stripping Indian Assets

We must presume that Congress acted in perfect good faith in the dealings with the Indians. …

-United States Supreme Court, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903)

The Marshall trilogy, as the *M'Intosh, Cherokee* and *Worcester* cases came to be known, foreshadowed the "trust relationship" by which the federal government has justified taking so much Indian property, transferring or otherwise using it for the benefit of non-Indians. The concept of the trust itself has been used to scrape away sovereign rights on the notion that the United States must act on behalf of tribes to protect their interests. For example, in the famous case, *Lone Wolf v. Hitchcock*, the Supreme Court said Congress could unilaterally abrogate a treaty with the Kiowa, Comanche and Kiowa-Apache to force allotment[11] of the tribes' lands and allow the sale of two million acres of "surplus" Indian land (land not needed for allotment). Non-Indians were allowed to take 13,000 homesteads of 160 acres each, amounting to two thirds of the tribes' land base. In an impressive act of denial, the Court declared that "We must presume that Congress acted in perfect good faith in the dealings with the Indians…" (*Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903)).

Most are familiar by now with the notion of the United States' trust responsibility for tribes and their property. In the past, as illustrated by the *Lone Wolf* case, the federal government's "trust" has been used as a source of power over Indian tribes. It was used to "justify laws aimed at assimilating Indians into non-Indian society" (Pevar 33). Many believe that the trust doctrine is an "euphemism" or "a term of art" that has been used to excuse the taking of Indian property and rights (Deloria and Wilkins 7). Federal interests have often clashed with tribes' interests. In such cases, the Supreme Court has upheld the federal interest to the detriment of the tribes (Pevar 37). The Court has refused to shield lands tribes considered sacred from the construction of a road in a federal area (Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 455 (1988)). In another case the Court said that where the United States has conflicting federal duties, one to represent Indian tribes and another to obtain water for a federal reclamation project, the standards of a private fiduciary cannot be controlling *(Nevada v. United States*, 463 U.S. 110, 142 (1983)).

In a current case testing the meaning of trust, involving a coal lease on Navajo lands, the federal government secretly helped Peabody Coal Company obtain a royalty rate of 12.5 percent, when the government had increased the rate to 20 percent, resulting in the underpayment of $600 million in royalties to the Navajo Nation. The Supreme Court found a breach of fiduciary duty, but said the duty was not legally enforceable (*United States v. Navajo Nation* ("Navajo III"), 537 U.S. 488 (2003)). The case was remanded and the lower court found an enforceable trust based on statutes not previously considered

[11] Allotment divided tribal land into individual parcels, with the notion that private ownership would help "civilize" the Indians. See the Glossary of Terms for a more complete definition.

(*Navajo Nation v. U.S.*, 501 F. 3rd 1327, (Fed. Cir. 2007), reh. en banc denied, Jan. 14, 2008). The United States appealed that decision and the Supreme Court heard arguments on February 23, 2009 (*United States v. Navajo Nation* (07-1410). In an editorial the day before the arguments, the *New York Times* called for the Court to affirm the trust duty and allow the Navajo to seek damages for lost royalties ("Justice for American Indians"). On April 6, 2009, the Court ruled that the Tribe could not recover from mismanagement of the trust, which resulted in lost royalties for the Tribe. Writing for the Court, Justice Antonin Scalia wrote: "None of the sources of law cited by the Federal Circuit and relied upon by the tribe provides any more sound a basis for its breach-of-trust lawsuit against the federal government" (*Navajo Nation*, 01-1410 decided April 6, 2009.)

Whatever else may be said about the "trust," it is clear that it meant a loss of power and control for tribes, and the resulting stripping away of assets. Under the "trust," tribes lost authority to control and use their lands and resources or to set prices for leases or sales. Decisions had to be made by the trustee. While every federal agency shares the trust responsibility to tribes and for their resources, the trust is implemented mainly through the Bureau of Indian Affairs (BIA). It is generally understood that Indian lands and resources have been largely mismanaged under the trust. Proceeds from use of land and resources were likewise mismanaged. This is well known. The long-running case, *Cobell v. Kempthorne*, dealing with the government's failure to account for income from individual trust lands for more than 100 years, sadly illustrates this failure of trust and the resulting stripping of Indian assets.[12] In one phase of the case, Judge James Robertson, Judge for United States District Court for the District of Columbia, had this to say in his order:

> [T]he historical statements of account contemplated by defendants' latest accounting plan will not satisfy defendants' duties rooted in and outlined by the relevant statutes and treaties [and] defined in traditional equitable terms … and (iii) that the defendants have unreasonably delayed the completion of the required accounting. Indeed, it is now clear that completion of the required accounting is an impossible task (*Cobell v. Kempthorne*, 32 F. Supp. 2d 37 (D. D.C. 2008)).

The beneficiaries of these Indian assets, many of which were non-renewable assets, such as oil and gas, have by and large been non-Indians. The assets were undervalued, leased or sold for less than their worth, income never collected or not accounted for in any understandable, meaningful or traceable way. Income was underinvested, or not invested. Land, water and other resources were not developed, because of lack of capital, or because non-Indians were using the resources and no one wished to upset the status quo.

When trust land was leased, it was usually for less than market value, with no escalation clauses, for terms as long as 99 years. There was belief that the Indian was a vanishing race and this undoubtedly influenced the terms of the leases. In fact, much of Indian policy was based on the idea that the Indians would simply disappear over a short period of time. It should come as no surprise then that people probably believed that there would not be Indians around at the end of a 99-year lease. Such long-term leases precipitated conflicts such as in Salamanca, New York and around Puget Sound, Washington where homeowners on leased tribal land never thought the leases would expire. Salamanca, a railroad town in western New York, had been illegally established on Indian land, but later received 99-year leases approved by the federal government. The Seneca Indians received total payments of $17,000 a year, with some of the 2,700

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[12] First Nations created the Inter-Tribal Monitoring Association that is largely responsibly for the organization and groundwork for the current *Cobell v. Kempthorne* trust litigation on behalf of thousands of Indian individuals and tribes.

leaseholders paying as little as $1 a year. When the leases expired the Seneca Tribe sought to increase the price to $800,000 a year for Salamanca's 1,700 leased acres, which is located inside the Seneca Reservation and the townsfolk became alarmed. ''These guys had 99 years to think about the future," Mr. Lay, the Seneca president, said. ''It's just poor planning"(The Warriors Within).[13]

The trust has been a double-edged sword, meant to protect Indian tribes, their land, resources and sovereignty, but all too often it has been a tool used against the tribes, or has been merely held as a moral, not a legal obligation (Monette 57-64). The trust has failed to prevent breaches of loyalty and breaches of a treaty. It failed to require an accounting as any other trustee would be required to provide regarding the mismanagement of funds; it failed to prevent termination and liquidation of tribal assets; and it does not provide an independent basis for the enforcement of Indian rights. The trust is supposed to be a limit on the United States' "plenary power" over tribes, but the trust has done little except to make the United States sound noble and Indian people believe their sovereign rights and resources are protected. The trust has not turned out to be an "asset" to Indian tribes.

d. Trails of Tears

> *So they all moved, the Cherokees, Choctaws, Chickasaws, Creeks, Seminoles, the Kickapoos, Wyandottes, Ottawas, Potawatomies, Winnebagos, Sac and Fox … Delawares, Shawnees, Weas, Peorias, Miamis, Kaskaskias, Piankeshaws—all went to the land beyond the Mississippi.*
>
> -D'Arcy McNickle, from *They Came Here First*
>
> *We are assured that, beyond the Mississippi, we shall be exempted from further exaction; that no State authority there can reach us; that we shall be secure and happy in these distant abodes.*
>
> -Head Men and Warriors of the Creek Nation, addressing Congress in 1832, House Document 102, 22nd Cong., 1st. Sess. (1832)

Andrew Jackson did not like treaties; he thought them absurd and irreconcilable with the principles of the federal government (McNickle 75). The frontier was pushing westward, encroaching on Indian lands and Indians and whites could not live together. Jefferson came up with the idea of removal and Jackson carried it out (McNickle 75). The Cherokee Trail of Tears may be the most well known story of removal, but between 1820 and 1850 most tribes were forced to move from their aboriginal lands west across the Mississippi to "Indian territory," most of which was to become Oklahoma (Anderson et al. 75).

Removal was devastating to tribes. They lost everything they had east of the Mississippi —their land, homes, the institutions and infrastructure of their society, their entire way of life and large numbers of their members who died on the forced marches. The Removal Act of 1830 ignored the rights Indians had under treaties and ignored the requirement of the Discovery Doctrine that they must consent to giving up their lands. In the end, removal resulted in the transfer of all the Indian lands in the East to non-Indians and moved the tribes to a land no white man thought they would ever want—a permanent Indian territory. If the story ended there, Indians would be well off, but the non-Indian push into Western lands continued unabated.

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[13] In 1990, the federal government paid $35 million and the State $25 million to compensate for 99 years of absurdly low rents. A new 40-year lease was made, with the Seneca Nation retaining its tax-free sales of cigarettes and gasoline, while the residents of Salamanca, used to paying literally $10 rents, are now obligated to pay hundreds, even thousands, each year (The Warriors Within 2006).

3. Reservation Period: 1840s-1880s—Confinement and Westward Expansion

How smooth must be the language of the whites, when they can make right look like wrong, and wrong like right.

-Black Hawk (Sauk), from *Black Hawk: An Autobiography*

During the next Indian policy period, Indians were removed to "reservations" in the West to get them out of the way of "westward expansion" by whites. Reservations were set aside through treaties until Congress ended treaty making in 1871. Then reservations were set aside by executive order or by legislation. By the 1880s most tribes had been placed on reservations, leaving the rest of the vast Western lands to the federal government. The federal government by this time was intent on settling the whole continent to the Pacific Ocean, under the shameless expansionist doctrine, Manifest Destiny. To hasten the process, Congress instituted a policy of individual land ownership, which it implemented through the Homestead Act of 1860. The act divided up former Indian lands among whites who were brave enough to try their hand at farming. This put Indians and whites in direct competition for control of land and resources.

The notion that Indians could be contained on reservations or that whites would not encroach on reserved lands was short lived. And soon a new notion was conceived that Indians should be assimilated into the larger non-Indian society. Assimilation (integration into white society) was the new policy du jour of the federal government. Acculturation was expected to follow from assimilation; Indian people were expected to change their behavior and way of thinking through contact with white people. Assimilation turned out to be the most devastating policy, destroying tribes' remaining land base, dismantling tribal institutions, forbidding social and spiritual practices and ceremonies, tearing families apart by sending children to far off boarding schools and doing untold damage to Indian society and to tribes as political bodies. No one asked the Indians. Indian assets were taken, lost, destroyed, quashed, diminished, suppressed and erased during the reservation period. These efforts and actions were only intensified in the next era.

4. Assimilation Policy Era: 1880s-1920s—Loss Of Lands, Identity, Children

a. Allotment—90 Million Acre Theft

Allotment: *"(A) mighty pulverizing engine to break up the tribal mass. It acts directly on the family and the individual."*

-President Theodore Roosevelt, Message to Congress 1901

Allotment: *"(A) bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth."*

- Senator Henry Moore Teller (Colorado) 1881, debating allotment, from *They Came Here First*

The General Allotment Act of 1887, modeled on the Homestead Act of 1862, gave individual Indians 160 acres per household of land currently owned by tribes. After a 25-year period of trust, the Indian would be granted fee title and citizenship. Indians who were to be farmers were given little more than the land. In 1888, for example, appropriations for plows, livestock and seed were less than $10 per allotment, leaving

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[14] Of 20,000 Choctaw members forcibly relocated from Mississippi, only 7,000 survived.

[15] Early reservations might be seen as little more than "refugee camps" where tribes had to depend on the delivery of food rations and issuance of government blankets for survival. After all, Indian Affairs were the responsibility of the Department of War until 1849 (Strickland 108).

allottees without the means to use their allotments (Anderson et al. 109). Tribal land not allotted was considered "surplus" and the United States sold or granted it to non-Indians. Lands lost under the surplus land program amounted to about 60 million acres (Royster 12).

Some recognized the Allotment policy as exactly what it turned out to be—another land grab. Senator Henry Teller in 1881 said allotment would "despoil the Indians of their lands and…make them vagabonds on the face of the earth" (Anderson et al. 105). Teller pressed his point:

> If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when thirty or forty years have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion, they would not be here clamoring for this at all (Anderson et al. 104).

The results of allotment were devastating to tribes, just as Senator Teller and President Roosevelt had predicted. Between 1887 and 1934 when the allotment policy was repudiated as a failure, the Indians lost two-thirds of their lands; their land holdings went from 138 million acres to 48 million acres in 50 years, a loss of approximately 5,000 acres per day. Many Indians were swindled out of their allotments or lost them to taxes after the 25-year trust period ended. Competency commissions were set up to declare Indians competent to sell their land before the 25-year period ended (Royster 7). The legacy became even more embittered: allotments have passed through generations of heirs, without wills, with the result that today most allotments have dozens, hundreds or thousands of owners, rendering use of the lands nearly impossible. Where allotments are leased, income to allottees may be as little as a few pennies a year. The BIA, the agency charged with managing these trust allotments has a name for this problem—fractionated heirship. Fractionation has rendered most allotments practically unusable by allottees. Congress has tried to ameliorate the problem, most recently in the American Indian Probate Reform Act of 2004. The Act provides for a uniform probate code for tribes who do not enact their own codes.[16] It is a start, but land consolidation will take a long time.

Many allotments were never used by the Indian allottees, so the BIA leased the lands to non-Indians for below market values and then failed to keep account of the income for more than 100 years. In 1999, BIA officials admitted that they were not able to account for nearly $2 billion that should have been deposited in Indian trust accounts (*Cobell v. Norton*, 240 F.3d at 1086). The amount will never be known because accounting records were not kept in any understandable or meaningful way. Is it reasonable to ask what would have happened if a private fiduciary were to be so careless with the funds in his care? Witness the Bernard L. Madoff investor fraud case in which Madoff ran a Ponzi scheme in which he had not conducted a transaction for investors for 13 years. He was prosecuted and is facing 150 years for fraud (Neumeister). Indians are merely asking for an accounting and are not getting it.

The final tally: in less than a lifetime, 90 million more acres of Indian land had been taken from them and placed in the hands of non-Indians. By 1989, Indians had lost 80 percent of their land wealth including associated resources, and 50 percent of all former reservation land.[17]

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[16] This report does not address the critical need for tribes to have a land records system, so that they know what is happening to lands within their jurisdictions and can act to control and benefit from land ownership. A joint research project of the NCAI Policy Research Institute and First Nations Development Institute, "Exploring the Range of Options to Expedite Land Title Processing to Strengthen Tribal Sovereignty and Promote Economic Development," not yet released, investigates what it takes for tribes to have their own land title records offices. The main benefit that tribes will gain if they establish their own LTRO is control over their tribal lands and all of the self-governance benefits that come from that control.

[17] For example, the Umatilla Reservation shrunk from 245,000 acres to 148,000 acres. The Unitah and Ouray Ute Reservation was reduced from 4 million acres to 360,000 acres.

One of the most devastating legacies of allotment is the impact on land ownership on Indian reservations. Indian reservations, once contiguous, became "checker boarded" with non-Indian inholdings sprinkled throughout. This land pattern has provided more ground to reduce tribal authority over all manner of activities related to non-Indian lands within reservations and even to reduce the boundaries of the reservations. Questions of jurisdiction began to multiply and consume the attention of tribes, states and the federal government and their judicial systems. States asserted their authority over their non-Indian citizens and Indians asserted authority over people and activities within their reservations. Treaty guarantees of protection in their territories "as long as the river flows" were viewed as old and irrelevant. The old rule of law laid down in the early cases, that tribes were distinct political entities possessing self-governing authority within their boundaries, did not fit the new state of things in Indian Country. Tribes would eventually lose the right to control the non-Indian lands and actions by non-Indians within their reservations in a series of United States Supreme Court decisions. For example, the Supreme Court has said that allotment removed or diminished some reservation boundaries, that non-Indian land within reservations is subject to state taxes, and that tribes have limited authority over non-Indians on non-Indian land on reservations (Anderson et al. 110). The Supreme Court has acknowledged the devastating effect of Allotment (*Hodel v. Irving,* 481 U.S. 704, 707 (1987)). In a curiously worded statement, United States Supreme Court Chief Justice Roberts wrote: "Thanks to the Indian General Allotment Act of 1887 ... there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes" (*Plains Commerce Bank v. Long Family Land & Cattle*, 128 S. Ct 2709, 2719 (2008)).

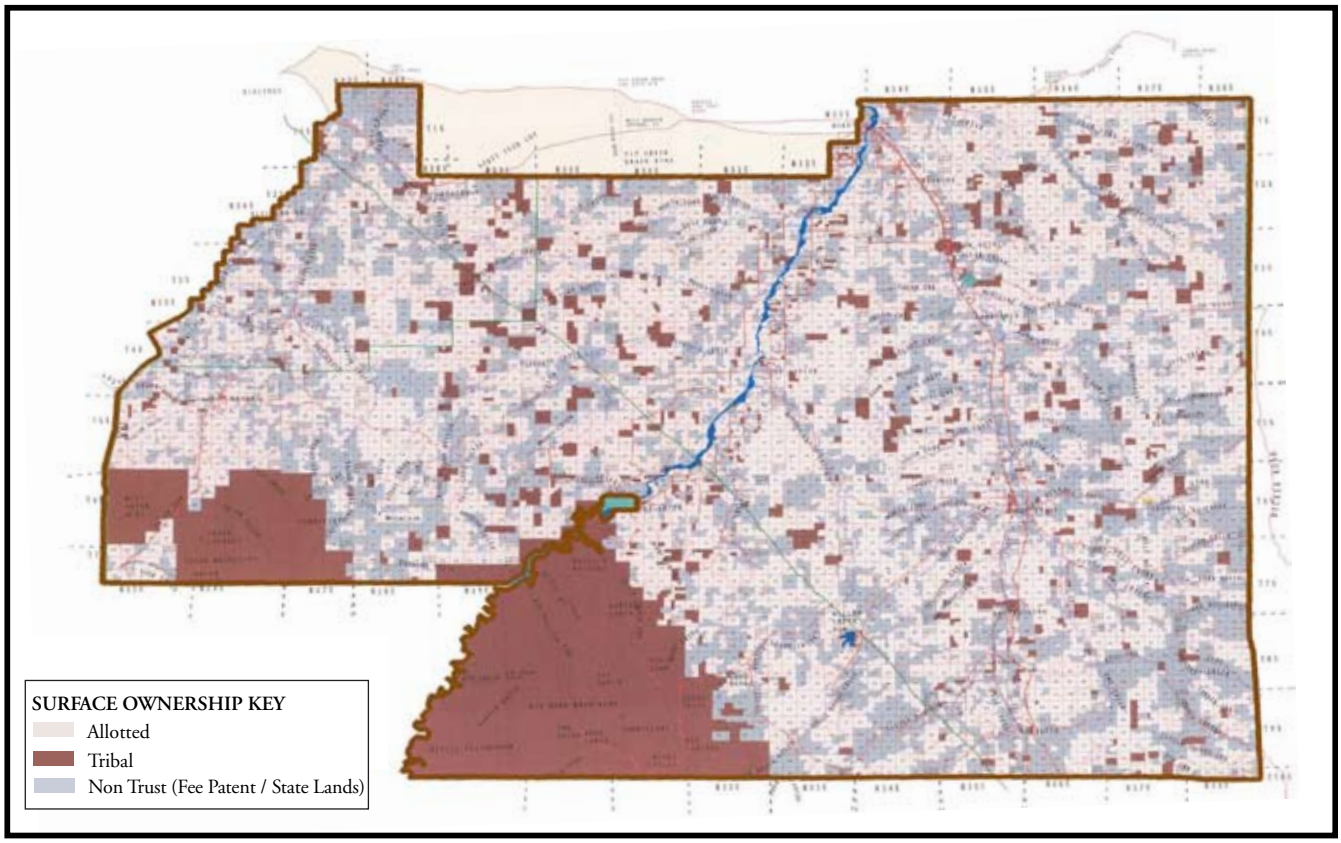

Figure 1 - Crow Indian Reservation Surface Ownership
(U.S. Bureau of Land Management, 2002)

b. Major Crimes Act—Loss Of Tribal Justice Systems

In a famous 1881 case, which arose on the Lower Brule Reservation during this assimilation period, a tribal member, Crow Dog, shot and killed another tribal member named Spotted Tail and was punished according to tribal custom. According to Brule law, the families agreed on payment of $600, eight horses and one blanket, which was promptly paid (*Ex Parte Crow Dog*, 109 U.S. 557 (1883)). The United States was offended by this "primitive sense of justice" and tried and convicted Crow Dog in the Dakota Territorial Court. Crow Dog appealed to the United States Supreme Court, which overturned the conviction. In response, Congress passed the Major Crimes Act of 1885 to provide for federal jurisdiction over murder and other major crimes in Indian Country. The Act was upheld in a case decided the next year (*United States v. Kagama*, 118 U.S. 374 (1886)).

As a result of the Major Crimes Act, tribes lost a significant part of their sovereignty – their authority to punish crimes in culturally appropriate ways. This had immeasurable repercussions on tribal society. Where tribes' justice systems had focused on healing and returning society to wholeness, the act required retribution and brutal punishment. The loss of a societal member, even one who has done wrong, caused economic loss, loss of family, loss of workforce and loss of the political and social integrity of tribal society. The ability to keep peace and order is essential to any society and each society has its own means aimed at its own ends. Nowhere is the clash of means and ends more evident than between United States' notions of punishment and justice and those of the Brule Sioux Tribe in the Crow Dog case. The loss to the Brule Tribe cannot be measured or undone, but it must be addressed by all tribes and the United States, and something done to rebuild the assets lost—that is, the sovereignty of tribes and the economic, social and political health and integrity of tribal communities.

c. Boarding Schools—Loss of Children and Ability to Transmit Culture

The assimilation policy was carried out on other fronts as well. Education of Indian children was seen as a vehicle for civilizing Indians. Captain Richard Pratt proposed and implemented the boarding school idea. His philosophy was "Kill the Indian, Save the Man." For the next few generations, Indian children were taken from their tribal communities and shipped to far away boarding schools. The boarding school experiment was considered a failure. Rather than turning Indian children into white people, children returning from school gained little acceptance in white society and found themselves alienated from their own cultures. This created cultural and generational chasms, which have damaged the ability of tribes to act as intact societies.

Like most societies, Indians consider their children to be their greatest asset. Through children, language and culture are transmitted, the history of the people is carried on, the people's stories are remembered, the accomplishments celebrated, the sorrows shared. Many Indian children did not return home for years – some never did. Boarding school graveyards contain the bodies of Indian children and the soul and spirit of Indian society that died with them. Every off-reservation school has its own graveyard (Adams 125). As a result of the boarding school experiment, Indian family bonds were broken, culture was not transmitted, languages were lost, tribal laws, mores, traditions were forgotten, generation did not learn from generation, and wounds were inflicted on students and tribal societies that still have not healed.

The loss of children means loss of culture. Again, such loss cannot be replaced, but still must be addressed by tribes and by the federal government and by every United States citizen, in order for tribes to begin to retake control of their children, their education, their tribal cultures and their future. Newspaper columnist, David Brooks, offers relevant insight into the importance of culture in his recent editorial, "Commentary: What Life Asks of Us" published in the *New York Times*:

> As we go through life, we travel through institutions—first family and school, then the institutions of a profession or a craft.
>
> Each of these institutions comes with certain rules and obligations that tell us how to do what we're supposed to do…. In the process of absorbing the rules of the institutions we inhabit, we become who we are.
>
> New generations don't invent institutional practices. These practices are passed down and evolve. So the institutionalist has a deep reverence for those who came before and built up the rules.

When one thinks of what tribal rules Indian students were forced to forget in boarding schools, what obligations in tribal society they had no chance to fulfill, the questions seem unanswerable: how can the damage to tribal institutions be measured, how can the damage be repaired?

5. Reorganization: Late 1920s-1940s—Loss of Traditional Forms of Government

Until 1930, the official government policy was to destroy tribal customs and traditions (Deloria and Lyttle, 1998: 99). In the late 1920s-1930s there was a brief policy period in which the United States realized that assimilation policies had not worked. In 1926, the Secretary of the Interior commissioned a study by the Institute for Government Research in Washington, D.C. of social and economic conditions on the reservation. In 1928, the Meriam report was issued detailing the federal government's near complete failure to provide for Indians, noting the destructive impact of allotment and the failure of boarding schools to assimilate Indian students into white society. After the Meriam Report was issued the federal government turned 180 degrees and adopted a policy to revitalize tribal governments. Tribal governments were to be resurrected however, not as traditional governments, but in the image of white governments. In this way, this apparently well-intended policy to revitalize tribal governments missed the mark in much the same way "modernization" theory of asset-building has. Modernization theory suggests that underdevelopment of nations is directly related to their beliefs: attitudes and cultural values keep them from developing. Modernization theory as applied to asset-building strategy is discussed more fully in the next section.

The Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act, embodied this new federal policy. The IRA was "the first federal Indian policy that did not have the explicit purpose of undermining the status of the Indian nations" (Porter 933). The IRA had the goal of making tribes less dependent on the federal government. The purpose of the IRA was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism" (H.R. No. 1084).

Under the IRA, tribes were encouraged to adopt constitutions, to become federally chartered corporations and to exercise their powers of self-government. The government created a constitutional model for new tribal governments that was adopted by all tribes that accepted the application of the IRA on their reservations. Common features of IRA constitutions were the requirement for BIA approval of tribal actions, lack of separation of powers and placing the majority of power in the tribal councils, including the appointment of judges. The IRA was accepted by 181 tribes and rejected by 77; however, only 96 drafted constitutions were approved by the Secretary of the Interior (Deloria and Lytle, 1983:100). Many tribes rejected the application of the IRA to their reservations, but still modeled their constitutions after the IRA blueprint.

The Reorganization Era was too short-lived to truly create strong tribal governments and reservation economies. On the plus side, the IRA repudiated allotment and boarding schools as failed policies.

Unfortunately, it did nothing to address the problems that resulted from allotment or the losses to tribal society caused by the boarding school experiment. And most who have studied the issue believe that the IRA forms of government are obstacles to self-government and self-sufficiency; much effort is being made by tribes and those who would help them to reform their tribal governments.

The belated and misguided policy to revitalize tribal governments was cut short by a new federal policy of Termination, by which the government intended to end tribal governments altogether. The government terminated hundreds of tribes before the policy was abruptly, but prudently switched to the policy of self-determination, announced by President Richard Nixon, in 1972. The termination policy era is discussed in the next section.

6. Termination Era: 1947-1961

These people shall be free.

-Senator Arthur V. Watkins, from "Termination of Federal Supervision"

[T]he Indian plays much the same role in our American Society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities reflects the rise and fall in our democratic faith.

-Felix S. Cohen, criticizing termination, from "The Erosion of Indian Rights 1950 - 1953"

a. Tribes' Assets Liquidated

In line with the Allotment and Assimilation Era philosophy that the best way to improve the economic conditions of Native peoples was to separate them from their lands and destroy tribal autonomy, the Eisenhower Administration implemented the recommendations of the 1949 "Hoover Commission" that urged termination of the tribes' trust relationship with the United States. Termination, embodied in House Concurrent Resolution 108, included the loss of federal benefits and support services and the destruction of tribal governments and their reservation status. The United States terminated the trust relationship, prohibited tribes from exercising governmental powers, called for their reservation lands and property to be liquidated and distributed to their members and granted states full jurisdiction over former reservation lands and tribal members. Termination was a policy designed to get the United States out of the "Indian business," essentially allowing it to default on treaty obligations, trust duties, moral obligations relating to Indian sovereignty, lands and resources and usurp the entirety of Indian assets.

In all, 109 tribes and bands with a total of 11,466 members were terminated; tribal assets were liquidated, including 1,362,155 acres of land, approximately 3.2 percent of Indian trust land. Ironically, tribes with large assets and natural resources were terminated or targeted for termination. The Menominee Tribe of Wisconsin, with large forests, was relatively prosperous and self-sufficient before termination. After termination, the Menominee were dependent on the federal and state governments for assistance (Lui 12). The Klamath Tribe of Oregon provides another example of a fairly well-off tribe reduced to poverty by termination when their large land holdings and forests were liquidated (Lui 63-64). The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota were slated for termination, but escaped that fate and today are working to develop their energy assets to create a secure economic future for their reservation (see Fort Berthold Case Study, App. 2).

The termination policy was abandoned because it was ill conceived; it certainly had not improved Indians' economic conditions. The tribes' liquidated assets, once distributed per capita, did not amount to riches and most of it was spent outside of former reservation communities and was gone before Indians realized how hoodwinked they had been. No financial training or investment advice was offered. It is hard to imagine that termination was anything but another grab of Indian assets, especially when self-sufficient tribes with significant natural resources were terminated.

b. Relocation

The sooner we can get the Indians into the cities the sooner we can get out of the Indian business.

- Senator Arthur V. Watkins, architect of Termination Policy, (qtd. in Anderson et al. 148)

Relocation of Indians from reservations to cities was another part of the termination policy era. Indians were given one-way assistance, including a small amount of money to find a job or get training in the cities. In seven years, between 1953 and 1960, more than 33,000 Indians were relocated under the Urban Relocation Program. Many relocated Indians, separated from their homes and families, fell into poverty and alcoholism. In the end, many returned home and the relocation policy was considered yet another failure.

c. Public Law 280—Transfer of Jurisdiction to States

As part of the "getting out of the Indian business" policy, Congress passed Public Law 280, which granted states full state criminal and civil jurisdiction over tribes still living on reservation land, an action that has had substantial long-term negative impacts, especially in the area of tribal court development. Public Law 280 gave six states, California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska, criminal and civil jurisdiction over tribal lands, and also permitted other states to acquire criminal and civil jurisdiction if they chose. Unlike the mandatory states, the optional states were able to assume jurisdiction in whole or in part. Tribes were upset about the absence of a tribal consent provision in the law and state governments were unhappy about having to assume new responsibilities without additional federal funding. As a result, amendments made in 1968 added a tribal consent requirement and authorized states to give back jurisdiction to the federal government. A number of states have, some at tribes' requests (Pecos Melton et al.).

The transfer of jurisdiction to states did not eliminate tribal court jurisdiction, but the federal government deemed tribal courts unnecessary and stopped funding them. So, as a practical matter, tribes were completely subject to the state judicial system (Pecos Melton et al.). The tragedy of Public Law 280 is that tribes subject to the act lost their authority to decide civil disputes over tribal land, resources and property and to keep law and order in their own societies in ways that were consistent with their cultures and traditions. And states, which had little understanding of the rules and needs of tribal society, and which the Supreme Court once called the tribes' "deadliest enemies" (*Lone Wolf v. Hitchcock*, 187 U.S. at 567), were free to judge Indians by state standards. This loss of jurisdiction is reminiscent of the Crow Dog case and the Major Crimes Act of 1883, discussed above.

The loss of clear tribal authority over their own lands and people may never be fully recouped. Under the present federal policy of self-determination, federal support is being provided to strengthen tribal courts. Still, after Congress opened the door, states are reluctant to give up any authority, and jurisdictional battles between tribes and states continue to rage.

d. Indian Claims Commission—Monetization of Indian Assets

I was indigenous and in one single evening they made me indigent. If you think the Indian wars are over, then think again.

-Carrie Dann, from *Just Earth*

The Indian Claims Commission (ICC) was created as a tribunal for the hearing and determination of claims against the United States that arose prior to August 13, 1946, by any Indian tribe, band or other identifiable group of Indians living in the United States. Claims not settled by 1978 were transferred to the United States Court of Claims (Indian Claims Commission Act; 60 Stat. 1049.)

The main motivation for creating the ICC was that many tribes were asserting claims against the United States and those bent on "terminating" federal guardianship of tribes wanted to deal with the Indians' legal and moral grievances against the United States once and for all. Nearly all of the 176 federally recognized tribes filed a total of 370 petitions, which the commission placed into 611 dockets. Most tribes claimed that they had received inadequate compensation for their lands taken because their assets had been undervalued. About one-third of the claims were for mismanagement of natural resources or trust funds (income earned from tribal assets and held and managed by the United States). Before it was abolished in 1978, the ICC cleared 546 dockets and made 342 awards totaling $818 million, with amounts ranging from several hundred dollars to $31.2 million. The lawyers took 10 percent, giving the incentive to seek monetary damages, and making them wealthy in the bargain (Deloria and Lytle, 1983:143).

Some tribes did not want money for their lands; they wanted their lands back. The Sioux and the Taos Pueblo rejected monetary awards. Taos eventually saw the return of 48,000 acres of their land in 1970, including their sacred Blue Lake, through an act of Congress. The land had been taken by the United States in 1906 and made part of a national forest (Taos Pueblo; Lieder 192-194). The Sioux are still waiting for the return of Paha Sapa (the Black Hills)(Anderson et al. 226). They rejected the $106 million award, made by the United States Supreme Court in 1980.

The Western Shoshone were among those tribes who did not accept compensation. In the Western Shoshone's case, there had been no formal taking. The Western Shoshone did not claim their land had been taken because they believed their lands were protected by the Treaty of Ruby Valley; they merely wanted the trespass to stop and compensation for the unauthorized use of their land. The ICC found a taking, however, and said the Western Shoshone no longer had any right to their lands; the ICC said the Tribe had lost title. The ICC "findings" stated in part "that Indian title to the … Western Shoshone land was extinguished by the gradual encroachment of settlers and others and by the acquisition, disposition, or taking of said lands by the United States for its own use and benefit or that of its citizens" (Just Earth).[20] The Western Shoshone rejected the monetary award (see Western Shoshone Defense Project Case Study, App. 3).

Although nothing in the Indian Claims Commission Act precluded it, and some tribes requested it, no land was ever returned to tribes.

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[20] Contrast the Western Shoshone's case to that of the Alabama Coushatta Tribe of Texas' case, in which the Tribe won a recent ruling, based on their ICC claim, that they still hold aboriginal title to 5.5 million acres in east Texas (*Alabama Coushatta Tribe v. U.S.*). The Alabama Coushatta Tribe had argued that the government failed to protect them in the possession of their lands from white encroachment.

Termination cost more than land, resources and dollars, even for tribes who were eventually restored. Tribal governments had been dismantled, tribal communities were destroyed; there was psychological damage from loss of homelands, loss of tribal institutions and loss of identity. Just as Justice John Marshall had wiped out Indian ownership of all discovered lands in a pen stroke, so had termination wiped out Indians' ownership of their own identity, or at least attempted to do so. Of course, Indians and tribes, although "terminated," continued to exist, but the losses were real and profound.

Termination represents a low point in federal-tribal relations. Porter called termination "the most dramatic colonization policy of all" (953). After the termination policy was abandoned, many tribes eventually gained restoration of federal recognition of their tribal status (Menominee and Klamath are two examples).

7. Self-Determination Era: 1961-Present

The conference … was organized on the premise that a group of people if properly informed of the alternatives of action is able to choose what is best for it more wisely than outside "expert advisors" or well-meaning planners. Such a principle for national planning in American Indian affairs is a novel one.

-Joan Ablon, from "The American Indian Chicago Conference"

Indians themselves initiated the era of self-determination. In June of 1961, 450 delegates from 90 tribes met at the American Indian Chicago Conference (AICC), and produced a Declaration of Purpose, which they presented to President John F. Kennedy at the White House in 1962. The Declaration of Indian Purpose covered proposals and recommendations that would reverse termination and make fundamental changes in the federal-tribal relationship related to economic development, health, welfare, housing, education, law and other topics:

> The recommendations we propose would redefine the responsibilities of the United States toward the Indian People in terms of a positive national obligation to modify or remove the conditions which produce the poverty and lack of social adjustment as these prevail as the outstanding attributes of Indian life today. Specifically, the recommendations would:
>
> (1) Abandon the so-called termination policy of the last administration by revoking House Concurrent Resolution 108 of the 83rd Congress.
>
> (2) Adopt as official policy the principle of broad educational process as the procedure best calculated to remove the disabilities which have prevented Indians from making full use of their resources (Prucha 244-245).

The 1961 conference was a seminal event in Indian history and a turning point in federal-tribal relations. The Declaration of Indian Purpose has provided guiding principles for the formulation of laws and policies affecting Indians ever since. In fact, federal Indian policy turned at that point in time, 180 degrees, from termination to self-governance and toward the policy of dealing with tribes on a government-to-government basis. The reformulation of policy has not changed things overnight, but there has been progress in the last 40 years, as is evidenced in part by the numerous laws passed since then, which were designed to implement self-determination.

"The declaration laid down the foundational components of First Nations' new model for asset-building in Native communities: recognize history and oppressive policies; address their negative effects so that Indians can benefit from their resources; include Indians in planning for developing their resources and building their economies; provide assistance for tribes to do it themselves; recognize that rebuilding will take time; do not automatically assume that tribes must commoditize or try to monetize tribal land and assets; and support tribal sovereignty and culture."

The Declaration of Indian Purpose was significant because of its insistence that Indian people be allowed to do for themselves, when they had been denied so long the opportunity or the means to do so. One then contemporary writer noted that:

> [T]he AICC served as a novel experiment in social science planning, by proving that a people so long deprived of the power of self-determination can draw up an articulate and forceful statement of belief and action *when they are provided with information and an opportunity to make intelligent choices and to determine their own future without the imposition of solutions ready-made by outsiders*, no matter how expert (Ablon, *emphasis added*).

The Declaration of Indian Purpose made in 1961 is echoed in First Nations' core belief, *"When armed with the appropriate resources, Native peoples hold the capacity and integrity to ensure the sustainable, economic, spiritual and cultural well-being of their communities."* The relevance of the declaration to asset-building strategies in Native communities could not be clearer. The declaration laid down the foundational components of First Nations' new model for asset-building in Native communities: recognize history and oppressive policies; address their negative effects so that Indians can benefit from their resources; include Indians in planning for developing their resources and building their economies; provide assistance for tribes to do it themselves; recognize that rebuilding will take time; do not automatically assume that tribes must commoditize or try to monetize tribal land and assets; and support tribal sovereignty and culture.

The shift to self-determination was aided by the federal policies of the "Great Society" and the "War on Poverty." In 1968, President Lyndon B. Johnson called for ending the termination policy of House Concurrent Resolution 108 and proposed a new goal that stressed self-determination, erased paternalism and promoted partnership and self help. (Newton 100). Richard Nixon "defined the hallmark of the new era: 'self-determination without termination'" (Anderson et al. 150).

Each successive President has issued his own policy statement. President William Clinton's actions provided the strongest defenses of tribal sovereignty through an official memorandum that required federal agencies to work with tribes on a "government-to-government" basis (April 29, 1994 Memorandum) and a Clinton executive order recognized the tribes' "right to self-government and to exercise their own sovereign power" (1998 Executive Order). President Barack Obama has promised to respect tribal sovereignty and empower Indian communities as president. He announced the creation of an Indian policy advisor position in the White House and promised to meet with tribes annually to develop a national Indian policy (Indianz.com).

Since 1970, federal law and policy has been designed to implement the policy of self-determination. "Self determination legislation has focused on three areas: furthering tribal control over government services to tribal people; increasing tribal control over natural resources and economic development; and protecting tribal culture and community" (Anderson et al. 153). A discussion of the many pieces of related legislation is beyond the scope of this report. Several sources cited herein provide detailed discussion of these laws (see Newton, Anderson et al.; Pevar).[21]

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[21] Some of the important laws passed in the Self-determination Era are: 1975 Indian Self-Determination and Education Act, 25 U.S.C. § 450 et seq.; 1978 Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq.; Tribally Controlled Community Colleges Act, 25 U.S.C. § 1801 et seq.; 1978 Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.; Indian Financing Act of 1974, 25 U.S.C. § 1415 et seq.; 1996 Native American Housing and Assistance Self-Determination Act, 25 U.S.C. § 1401 et seq.; Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.; American Indian Religious Freedom Act, 42 U.S.C. § 1996; Native American Grave Protection Act, 18 U.S.C. § 1170, 25 U.S.C. § 3001 et seq.

E. Legacy of Past Policies: Barriers to Asset-Control and Continued Stripping of Native Assets

The legacy of past federal policies cannot be erased in a day, a generation or maybe ever completely. It will take perhaps as long to re-stitch the fabric of tribal societies as it took to unravel it. The policy of self-determination is still new on the scale of time and in proportion to the damage done to tribes under past federal policies. And while the policy may have changed, the federal government still asserts plenary power and exercises a trust responsibility for tribes. These concepts are difficult to articulate and, being based on non-Native assumptions, are easily molded to the dominant societal worldview. The consequence of this flexibility has been that federal policies have vacillated dramatically and quickly, with the damaging results described here and in so many contemporary accounts of Indian history. These policies not only harmed tribes and their communities at the time they were enacted, but the inborn inconsistency has also created present barriers to tribes as they have worked to develop their own asset-building and economic development policies.

This investigation comes back to the United States Supreme Court because it continues to play a pivotal role in federal Indian law. As noted at the outset, Indian law continues to affect the daily lives of Native Americans and tribes more than for any other citizen or government. In many cases, the Court is the final arbiter of Indian rights. The Court has always maintained a forceful role in determining federal Indian law and policy, even to the point when its decisions conflict with the expressed wishes of the other two branches. Many believe the Court has intruded on the province of Congress in parsing rights in Indian law cases, so that the Court has become unmoored from its foundational beginnings and has descended into subjectivism in its Indian law decisions (Getches, 1996:1573; Anderson et al. 895-96). Complaints of "activism" in the federal courts is somewhat ironic given the free wheeling way the United States Supreme Court has dealt with issues of Indian law. Others believe the foundational principles themselves to be the problem due to their racist and colonizing intent and purpose (Williams 2005). Whatever the label, just as the United States Supreme Court pragmatically adjusted an international law principle to fit the situation in Johnson v. M'Intosh, more situations would arise that would require the fabricating skills of the Court. The principles of "trust" and the degree of tribal control and authority were likewise adjusted by the Court to meet each new situation, sometimes to the benefit of the tribes, but more often in recent times to diminish tribal sovereignty and even interfere with Congress' plenary authority over Indians.

In the past, each time a new situation arose that was not covered by existing law, it seemed the Court figured out a way to strip more authority from tribes in order to protect non-Indian interests – even within tribal lands. When the United States ignored a treaty that stood in the way of allotment and opening reservation lands to non-Indians for homesteading, the Court upheld the action as a political, not judicial question (*Lone Wolf v. Hitchcock*). If the Army Corps wanted to build a dam dividing the reservation, making it impossible for those on each side to access the other – the Court would find that Congress had delegated the authority to the Army Corps to do so (*Tuscarora Nation v. Power*). In another example, the Garrison Dam Project flooded 155,000 acres of the Fort Berthold Reservation – "The resulting reservoir split the reservation in two. Many years passed before a bridge was constructed across the lake to connect the tribal communities" (Fort Berthold Case Study, App. 2). More recent Supreme Court cases follow a similar pattern, reinforcing the concerns about the Court's subjectivism and lack of principle and substance in their decisions (Fletcher).

Perhaps the Court, like Indians, is trapped in the legacy of past Indian policy, or perhaps they are set on ending tribal sovereignty, as many believe was true under past Chief Justice William Rehnquist and may be true under Chief Justice John Roberts (see Fletcher, Getches, Williams for analyses of the Supreme Court and Indian law.)

Either way, history matters. The 1961 Declaration of Indian Purpose, drafted at the start of the Self-Determination Era, says eloquently why history matters, why money alone is not enough, what has meaning for Indians and how long it might take to restore health to Native communities:

> WE BELIEVE that the history and development of America show that the Indian has been subjected to duress, undue influence, unwarranted pressures, and policies which have produced uncertainty, frustration, and despair. Only when the public understands these conditions and is moved to take action toward the formulation and adoption of sound and consistent policies and programs will these destroying factors be removed and the Indian resume his normal growth and make his maximum contribution to modern society.
>
> Our situation cannot be relieved by appropriated funds alone, though it is equally obvious that without capital investment and funded services, solutions will be delayed. Nor will the passage of time lessen the complexities which beset a people moving toward new meaning and purpose.
>
> The answers we seek are not commodities to be purchased, neither are they evolved automatically through the passing of time.
>
> The effort to place social adjustment on a money-time interval scale which has characterized Indian administration has resulted in unwanted pressure and frustration.
>
> When Indians speak of the continent they yielded, they are not referring only to the loss of some millions of acres in real estate. They have in mind that the land supported a universe of things they knew, valued, and loved.

F. Conclusion

Starting from the Doctrine of Discovery, which the United States Supreme Court adapted to justify United States ownership of all Indian lands and tracing through time, law and policy, it becomes apparent how federal Indian law has developed to continue its original purpose to cause or approve of the stripping of Indian assets and taking away Indian control of remaining assets.

Only history can explain the development of federal Indian law and reveal how Indian law has been used to justify the appropriation of Indian assets. And once the Court made its ruling that the United States had superior rights that allowed them to own Indian property, each subsequent legal decision had to make the new facts fit within the fabric of Indian law that was being constructed to keep all the stolen pieces in place and to allow acquisition of new ones.

The Self-Determination Era is over 40 years old. Self-determination fairly cries out for tribes to do it themselves. The problem, illustrated by history, is that lost to tribes were 200 years of experience and mentorship that pass naturally from generation to generation in any society. Still, most tribes had at least threads of their culture, their institutions and ways of governing and decision-making. Some had much more and also the resources or good fortune to be able to capitalize on their self-governance opportunity. Tribes have had to undergo systemic change in order to take control of their assets and rebuild the institutions that federal policy sought to destroy.

In the next section, this report presents an analysis of asset-building strategies used in mainstream society and the usefulness of these strategies to tribes and their communities. The section then fleshes out a new model for asset-building in Native communities that is based on individual tribal traditions and value and belief systems and that emphasizes the important role of tribal sovereignty and the complex interconnections between assets that can be monetized and those that cannot.

The final section of this report examines the experiences of four tribes and one tribal organization, which have worked to regain control of tribal assets. It highlights the obstacles they faced, the steps they took to overcome the barriers, and the strategies they used to regain control and effectively manage their assets, with the goal of identifying asset-building strategies that have worked in Indian Country.

III. Toward American Indian Control of Indian Assets: An Asset-Building Framework

Finding the solution to Indian economic problems is a desperate task … As far back as we can take American history, the non-Indian has been fascinated with Indian lands and resources and has demanded that they be used in the same manner as he uses his property. Since Indians have generally resisted this alternative, unless a radical change is made in the manner in which non-Indians perceive land, no lasting economic peace can ever be achieved between Indians and the rest of American society.

-Vine Deloria, Jr. and Clifford Lytle, from *American Indians, American Justice*

A. Introduction

As this report details, the control of assets must be at the forefront of any effective strategy for developing American Indian economies. This section begins with a review of the direction and assumptions of mainstream approaches to asset-building, and moves on to explore the question of whether there is a "cultural fit" between mainstream asset-building models and asset-building in Native communities. Next, this section reviews the history of asset exploitation in Native communities and challenges traditional interpretations of the causes of underdevelopment in Indian communities. Unlike political theories of modernization and neoclassical economics, which look only forward and focus on increasing individual wealth, the investigative research of this Report leads to the conclusion that tribal-specific histories, cultural values and traditional knowledge must guide the development of asset-based development programs in Native communities.

An alternative model for promoting asset-building in Native communities that takes all this into account is fleshed out in this section. This model takes a holistic view of assets and proposes strategies that will support Native asset-building by supporting tribal sovereignty and empowering entire communities, as well as focusing on individual asset-building. The five case studies of tribes who are working to regain control of their assets detail the broad ranging asset-building strategies present in diverse Native communities. These case studies focus especially on land and natural resource assets. These resources provide the moorings for all Native assets, broadly defined as including financial, physical, natural, institutional, legal, political and cultural assets, as well as human and social capital. Lessons from these case studies inform First Nations' theory, which has been developed over time and is grounded in its fieldwork carried out over nearly three decades.

B. Asset-Building in (Mainstream) America

Since the early 1990s, the concept of asset-based development has grown in popularity within policy and program development circles. In 1991, Michael Sherraden published *Assets and the Poor*, marking the beginning of a heightened public debate on the topic of asset-building in the United States. As Sherraden argued, social welfare policies in the United States have historically focused on income maintenance, without providing the poor with real economic ladders out of poverty. At the same time, asset limitations and the lack of incentive structures for asset ownership effectively blocked the poor from working towards owning a home, starting a small business or finding other asset-based paths out of poverty. While our tax system provides asset ownership incentives to middle and higher income people through tax breaks for

homeowners or small business owners, the poor receive no such support. Only when social welfare polices provide opportunities for asset ownership to the poor will social systems in the United States truly be equitable (Boshara; Sherraden 1991).

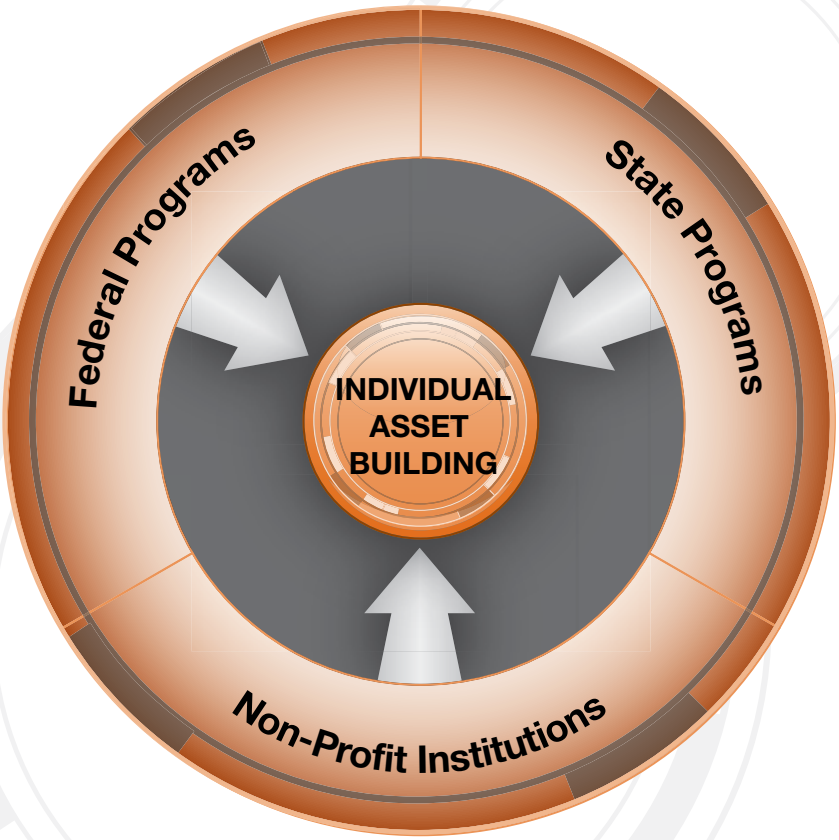
Sherraden defines asset-building as "accumulated resources that are invested for social and economic development" (Sherraden, 1991: 155). These investments can be in human, social or tangible assets, and are most often made in small business development, education and homeownership. According to leading scholars on asset development, increasing people's assets, as opposed to just their incomes, has significant economic, psychological and social benefits (Ford Foundation; Sherraden, 1991; Sherraden, 2006). Not only does small business ownership increase incomes, but it increases hope for the future, pride, and economic self-determination (Sherrard, Sanders and Sherraden). Sherraden argues that:

> People think and behave differently when they are accumulating assets, and the world responds to them differently as well. More specifically, assets improve economic stability; connect people with a viable, hopeful future; stimulate development of human and other capital; enable people to focus and specialize; provide a foundation for risk taking; yield personal, social, and political dividends; and enhance the welfare of offspring (Sherraden, 1991: 155-56).

Sherraden suggests that policies focusing on the development of asset accumulation and investment would help lift the poor from a state of dependence to independence, and provide people with choices and a vision for the future. Sherraden's book led to increased public discourse on asset-based policy and resulted in several innovative new policy outcomes, such as the inclusion of Individual Development Accounts (IDAs) in the 1996 welfare reform legislation, and the passage of the Assets for Independence Act in 1998, which provided a federal funding source for IDA programs across the nation.

Previous research has documented the positive impact of asset-building programs in helping many Americans lift themselves from poverty and develop significant assets for upward mobility (Edwards and Mason; Mills, Patterson, Orr and MeMarco). Federal and state resources, as well as significant resources from the nonprofit sector, have developed various institutional structures and incentives that support asset-building. Diagram 1 is an illustration of how the creation of these structures and institutions, plus the provision of resources and incentives, have incubated asset-building programs in mainstream society.

Diagram 1: Support Systems for Mainstream Asset Building



Mainstream asset-building programs tend to focus on individuals and helping them increase their net worth. In the model above, the structures, institutions and incentives created by advocates and practitioners of mainstream asset-building promote an overall goal of the attainment of the "American dream," defined as individual financial upward mobility in American society. Thus, this goal cannot be separated from defining what asset-building is in the mainstream American context. This strategy alone will not improve larger economic, political and social conditions in Indian Country. Entrepreneurship and asset-building at the individual and even community levels can go only so far; such asset-building efforts will be limited by lack of institutional support at the tribal level. This is in part because, while individual Indians may build assets, without a strong tribal economic environment, the benefits from these assets may still flow away from reservation economies, as they typically have, into the surrounding non-Indian communities where there are businesses, services, government institutions, regulatory and dispute resolution systems in place. Such infrastructure may not be found or well supported and developed in tribal communities.

Thus, a greater understanding of what assets mean in American Indian communities needs to be developed and understood for asset-building programs to making lasting and enduring change on American Indian homelands.

1. Examining the "Cultural Fit" of Mainstream Asset-Building Models with Native Communities

> *In so many ways, Indian people are re-examining themselves in an effort to redefine a new social structure for their people. Tribes are reordering their priorities to account for the obvious discrepancies between their goals and the goals whites have defined for them.*
>
> -Vine Deloria, Jr., from *Custer Died for Your Sins*

Many have argued that it is difficult to find a cultural fit between American Indian value systems and asset-building models that stress the development of individual assets over collective well-being. Fixico, for instance, argues that many traditional Native communities are not interested in pursuing western capitalist style economic development models that favor individual wealth building (Fixico). Others argue that certain forms of market-based economic development models are in fact traditional and appropriate for Native nations, and cite historical evidence of these types of economies in Native communities (Miller).

Some have argued that American Indian communities ascribe value to assets and wealth in ways that are different from mainstream western economic models (Hertel, Wagner, Phillips, Edwards, and Hale; Hicks, Edwards, Dennis & Finsel). Many tribes have resisted efforts to sell, mine, or otherwise monetize assets in their sacred homelands such as the Black Hills in South Dakota (Lui et al.). The Western Shoshone continue to protest what they consider an illegal sale of tribal land to the federal government by refusing to accept monetary payment by the federal government for their sacred land; the payment sits untouched in a trust account. More detail is provided in the case study below (Western Shoshone Defence Project Case Study, App. 3).

In many Native communities, asset accumulation is only appropriate if it supports traditional notions of sharing resources with the collective group and providing for others (Adamson, Black, and Dewees; Hicks et al.). Moreover, asset-building in some Native communities may focus on short-term needs, including repairing credit or purchasing a vehicle to get to work, rather than long-term goals such as starting a small business or purchasing a home.

Another issue is the fact that many Native communities lack the financial, legal, physical and societal infrastructure that is needed to support private sector economic development (Dewees and Sarkozy-Banoczy). Largely due to the history of underdevelopment and federal control of Indian affairs, many tribal governments are still working to establish the legal systems that promote private enterprise development and support the effective functioning of economic markets. In addition, because of the unique legal challenges associated with the federal control of trust land, many of the basic components of the economic and legal systems needed to support small business ownership, homeownership and other asset-building strategies are not present in many Native communities (Dewees and Sarkozy-Banoczy, Hicks et al.).

Hicks et al. identify four core issues that arise when relating mainstream asset-building principles to tribal communities:

1. Asset-building as a private-sector strategy v. underdeveloped private sector economies
2. Sharing and reciprocity v. savings and accumulation
3. Communal accumulation and use of resources v. individual accumulation
4. Mainstream v. tribal definition of assets

Hicks et al. suggest these issues must all be addressed when designing asset-building programs for Native communities. They suggest that successful asset-building programs that serve Native communities have the following characteristics:

- They involve exercising self-determination
- They involve the deliberate and balanced building of assets
- They have community leadership with vision
- They have community support
- They have dedicated resources

Overall, these authors argue that tribal governments should take a leadership role in tribal asset-building. They find that it is important for tribal governments to develop a forum for, and participate in, dialog about building assets. They also state that building assets at the individual, family and community level may lead to increased capacity for American Indian citizens and tribal governance, citing the research of the Harvard Project on American Indian Economic Development,[22] which shows that communities with greater financial, natural, interpersonal, and human assets are better able to exercise their sovereign authority (Hicks et al., Cornell and Kalt).

2. Critical Considerations in Asset-Building Strategies for Tribes

There are noteworthy differences between mainstream asset-building strategies and the asset-building strategies in Native communities. It is with some irony that practitioners and scholars of mainstream approaches to asset-building and asset-based development trace the development of United States asset-building policy to the Homestead Act of 1862 (Sherraden 1991). The Homestead Act was passed during a period of westward expansion. This policy allowed for land designated as "Indian territory," to be confiscated for white settlement and cultivation for just a $10 registration fee and five years of continuous residence (Barrington). As historian Patricia Limerick notes, the unusual justification for policies such as the Homestead Act of 1862, and other policies aimed at the acquisition of Indian assets, stemmed from the idea that Indians were not using their land and resources properly (Limerick). This justification suggested that Indians were incapable of utilizing the vast amount of assets in the newly "discovered" western hemisphere. Thus, the goal of federal policy was to take Indian assets out of the hands of Indians and place them into the hands of the new Americans for proper use. As both the Wind River Indian Reservation and Fort Berthold Reservation case studies reveal, the Homestead Act was an essential and devastating federal policy in stripping these two tribes of their natural resource assets.

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[22] Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University, founded in1987.

In addition to these historical differences, previous research by Hicks, Dewees and others, has noted that the development of asset-building programs in American Indian communities has met with significant barriers. For instance, federal and state asset-building policies do not give tribal governments the authority to directly administer or receive funds for asset-building programs, including IDA programs (Hicks et al.; Dewees, Florio; King et al.). Further, as Hicks et al. note, the lack of tribal participation in developing asset-building policies has prevented American Indian citizens and governments from having a forum to address the appropriateness of mainstream asset-building strategies within American Indian communities (Hicks et al). What this suggests is that increased dialogue and direct input from American Indians living on American Indian reservations should be a top consideration of asset-building practitioners.

Despite cultural differences, lack of Native perspectives in asset-building policy, and the need for dialogue between asset-building practitioners in mainstream and Native communities, many argue that current asset-building policies and programs have a place in the economic development plans for Native communities, if they are presented in a culturally appropriate manner (Adamson et al.; Carr, Dewees and Florio; Dewees and Sarkozy-Banoczy; Hertel et al.; Hicks et al.; King et al.; Miller). Over the past 10 years, an increasing number of Native communities have been using Individual Development Accounts (IDAs),[23] small business development centers, and community loan funds to stimulate private sector economic development in reservation-based communities (Adamson et al.; Dewees and Florio; Dewees and Sarkozy-Banoczy). This suggests that these asset-building strategies can be effective for Native communities. Practitioners of asset-building in mainstream society, however, must understand that their universalistic assumptions and approaches are not always a good fit; and therefore asset-building strategies based on these assumptions can have limited benefits. The faulty assumptions must be exposed, examined and replaced with strategies that reflect the values of the tribal communities. This should not suggest that a framework for asset-building in Native communities will be the same for all Native communities. Given the large diversity of tribes, asset-building strategies in Native communities are context and tribe specific.

While mainstream asset-building has helped lift many Americans out of poverty and put them on a path toward self-sufficiency, mainstream approaches often do not get to the heart of underdevelopment in Native communities or represent the values and goals of Native communities. Therefore, the effectiveness of asset-building programs in Native communities is dependent on the active participation of Native community members. When Native community members are active participants in the development of asset-building models and programs, they begin to develop a future orientation in the development of goals for community development, based on their own values and belief systems. Community involvement in long-term strategic planning, for example, allows tribal citizens to make choices and share their vision, and encourages political and civic participation.

Until non-Native practitioners of asset-building realize that American Indians must be included in the development of asset-building models for Indian Country, their models will continue to mirror the faulty assumptions embodied in the paternalistic policies and laws and behaviors that have dominated the field of failed federal Indian policy and significantly contributed to the continued underdevelopment of American Indian reservations. Moreover, the exclusion of American Indians from the development of programs

"[T]he exclusion of American Indians from the development of programs and models most appropriate for their communities perpetuates the stereotype that American Indians are incapable of developing their own solutions."

[23] IDAs are matched savings accounts, funded with federal or tribal dollars, under programs designed to allow individuals to accumulate savings for an education, small business, down payment on a home or other purposes defined by the program.

and models most appropriate for their communities perpetuates the stereotype that American Indians are incapable of developing their own solutions.

Any discussion of asset-building must have a broader purpose than lifting individuals out of poverty; it must also address key organizational, political, economic and legal infrastructure necessary to support asset-building programs in Native communities. Individual asset-building is only one component of an effective and complete tribal asset-building program. An effective tribal asset-building program requires an understanding of the histories of diverse Native nations and the constraints that history has placed on them. It requires an understanding of the role of federal policies and the courts in validating and accelerating the stripping of Indian assets and in maintaining the status quo, now that most Indian assets are benefiting non-Indians. It requires strategic use of tools such as litigation or formal settlement to stop or mitigate damages from the stripping or depletion of tribal assets. Finally, tribal asset-building programs must address the need to develop tribal capacity and infrastructure, leadership skills and technical expertise needed to carry out asset-building and a trained workforce. Addressing these needs must be part of any successful tribal asset-building strategy.

C. Tribes' Assets and Underdevelopment: A Historical Overview

Economists have long debated about the most appropriate theoretical framework to explain underdevelopment on American Indian reservations. The majority of economic development programs designed by mainstream economists have failed time after time, and they rarely address the history of American Indian underdevelopment (Fixico). In addition, they often dismiss the significance of economic development models that focus on tribally-driven, culturally acceptable practices.

Modernization theories, for instance, have suggested that there is a significant relationship between political and economic development. As advocates of this theory suggest, processes of political and economic development go hand-in-hand. In addition, theories of modernization argue that the underdeveloped condition of nations and peoples is directly related to beliefs, attitudes and cultural values that keep populations from developing "sophisticated" and "modern" forms of economic and political organization (Huntington, Rostow).

Other theories of development, such as those guided by neo-classical economic theory, have suggested that the lack of market investment and the presence of widespread corruption are at the heart of the underdeveloped condition of nations and peoples (Duffy and Stubben). In relation to American Indians, these theories have been relied on to suggest that the current state of underdevelopment on American Indian homelands is fundamentally related to a "dysfunction" of Indian peoples' beliefs and cultural values, rather than larger processes of colonization that continue to dictate the conditions of modern Indian life under the guise of "plenary power" and federal "trust."[24]

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[24] David E. Wilkins (2002). As Wilkins notes, the Doctrine of Plenary Power, developed in the 19th century, in federal Indian policy and law has three distinct meanings: (1) exclusive, that Congress is vested with sole authority to conduct the federal government's affairs with Indian tribes; (2) preemptive, that Congress may enact legislation which effectively precludes state governments acting in Indian-related matters; and (3) unlimited or absolute, a judiciary-created definition that maintains that the federal government has virtually boundless authority and jurisdiction over Indian tribes, their lands and their resources. The Trust Doctrine broadly entails the legal and moral duty of the federal government to assist Indian tribes in the protection of their lands, resources and cultural heritage. As many courts have maintained, the federal government is to be held to the highest standards of good faith and honesty in its dealings with Indian peoples and their rights and resources.

While some studies operating within the modernization and neoclassical frameworks have produced effective policy solutions for some tribes to pursue economic and political development (Cornell and Kalt), many Indian nations are rightly suspicious of these approaches as these frameworks say nothing about the significance of history in shaping the contemporary realities of Indian nations and the role of colonization in underdevelopment and in creating the conditions of poverty that exist today (Duffy and Stubben, Valandra). In contrast to these theories of modernization and neoclassical economic theory, First Nations believes that the history of American Indian colonization and the attendant stripping and theft of American Indian assets must be included in any discussion focused on American Indian development. It is the historical process of colonization that has shaped the current state of American Indian underdevelopment and this reality must be taken into account when designing development programs on American Indian homelands. Without understanding these historical processes, we are left with a limited interpretation of American Indian underdevelopment as well as limited possibilities for shaping a better future for tribes.

The history of American Indian colonization and underdevelopment has produced a set of societal conditions fundamentally different from those that exist in any other low-income or low-asset population in the United States. As previously noted, historically, tribal nations were not asset poor and by most definitions are not today. Prior to the arrival of European colonizers, most tribes effectively managed their land and natural resources and possessed sophisticated forms of markets, trade and accumulation for asset growth and development. The subsequent arrival of new Americans, and their need and greed for land and other American Indian assets, ushered in oppressive federal policies and wars of removal and extermination.

Today, despite a history of federal policy aimed at the transfer of tribal assets and wealth to mainstream America, resulting in the destruction of American Indian cultures, governments and capacities, many tribes are still asset rich. American Indian economic underdevelopment, however, has defied the neoclassical economic canon, which holds that assets and wealth are two sides of the same coin (Adamson, Black and Dewees). This suggests that there is something missing from mainstream economic theories, such as modernization and neo-classical theories, as they are applied to Native Americans; missing is the history of tribes, which takes into account tribal-specific histories and repressive federal law and policy that have stripped tribal assets and facilitated a transfer of asset control from tribal nations to federal and state governments, large corporations and individual Americans. Put succinctly, the fundamental problem with these mainstream theories is they do not take into account the fact that tribes have owned and continue to own vast assets, but ownership is not enough, tribes must control and manage their assets themselves. Mainstream theories fail to acknowledge and address the biggest barrier to tribal asset-building—the fact that, for the most part, *tribal nations do not control the use of their assets and therefore do not receive the benefits from them.*

1. The History of Asset Control in Native Communities

The fact that states and tribes are both sovereign governments should be better understood than it is. Everyone knows that the U.S. Constitution set up our federal system of government, but how many people know that the Constitution also recognizes the sovereignty of Indian tribes? Far too few. Hundreds of treaties, Supreme Court decisions, federal laws and executive orders have repeatedly affirmed that Indian Nations retain our fundamental and inherent powers of self-government. Most people are not aware of this because it is not taught in our schools.

-Susan Masten, former president of the National Congress of American Indians, addressing the National Governors Association, 2001

The history of tribes and federal Indian policy is well known to most tribes, but not to the general populace, mainly because this history has not been taught in schools or made readily accessible. The prior section of this report discusses in more detail how federal Indian policy has taken huge pendulum swings every 20-40 years that have by turns been aimed at extermination, removal, isolation and confinement, assimilation, revitalization, termination, self-determination and, most recently, self-governance.

Oppression and suppression of tribal governments and institutions continued up to the 1970s when President Richard Nixon formally announced a policy of self-determination for tribes. It has been only in the last 30-40 years that tribes have been able to experience decision-making power and exercise a degree of control over economic resources. Even then, many tribal governments are still largely dependent on federal grants to run tribal programs that provide essential services to the tribal communities. Under the federal doctrine of trust responsibility, federal agencies continue to control the use of tribal natural resources such as land, water, oil and gas, and income earned from these resources.

Table 1 outlines six major asset eras in American Indian history. As these periods show, many Indian assets have been stripped, depleted, capitalized and (mis)-managed by outside entities. Historically, federal bureaucracies, and later large corporations and other outside entities, have controlled and dictated conditions of Indian asset ownership, usage and development. To this day, federal agencies and the judicial systems have been reluctant to allow tribal governments to control and manage their own assets. This is true for a variety of reasons, including the federal "trust doctrine," lack of tribal infrastructure and capacity and the lack of clear definitions that explicitly outline exactly what tribes own or what they may do with their assets. Many tribes' water rights, for example, have not been quantified[25] and there is lack of a uniform understanding about what tribes can do with their water, what uses they may make and whether they can lease or sell it. Even where tribes' water rights have been quantified, through litigation, there is still uncertainty because litigation usually does not settle many of these questions. The Gila River Indian Community in Arizona and the Wind River Reservation in Wyoming both have quantified water rights, but are still struggling with these questions (see Gila River and Wind River case studies, Apps. 1 and 4). There are very complex questions that, unfortunately, often do not get decided until non-Indians are already using Indian water. In any litigation or negotiation, there is always pressure to preserve the current status quo and the status quo is that Indians do not control their assets and non-Indians are benefiting from Indian assets.

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[25] It should be noted that a tribe may decide it does not want to quantify its water rights at all, at least not through federal or state channels. Like everything else a government must decide, this decision should be based on full information and consideration of the consequences of each option.

Table 1: Six Main Asset Eras in Native American History

Asset Stewardship – an era hundreds of years ago when Native economies managed and controlled their assets, reflecting tribal environmental, technological, and cultural epistemologies for asset management, regulation and control. Early Native civilizations reflected innovative stewardship of natural resources, including land, flora, and fauna, the result of centuries of developing social organization in a "pre-modern" era. While these communities may never claim to "own" these land and natural resources in the western sense, their stewardship allowed for highly sophisticated and complex economies of asset use and accumulation to occur.
Asset Exchange – the arrival of European nations to the "New World" brought about an era of exchange where treaties were signed with Indian nations and new land ownership patterns began to be formed. Many tribes exchanged assets such as land for promised legal rights and recognition of sovereignty. Tribes signed treaties that effectively limited their land ownership to designated regions, restricting their access to many traditional and customary lands that had previously been under their exclusive control.
Asset Theft – an era in which many of the legal rights promised during the era of asset exchange never materialized or were eroded. By the early 1800s, with westward expansion by Europeans underway and increasing competition for land, treaties with Native Nations were being made, and routinely broken. Federal policies promoted Indian removal, outright theft of Indian land and resources and in some cases, outright extermination of Indians. This era also includes increasingly invasive federal polices enacted to steal Native American land, including the 1887 General Allotment Act (also know as the Dawes Act), the Homestead Act and Pacific Railway Act of 1862. Later thefts and erosion of rights occurred in the Alaska Native Claims Settlement Act of 1971, and the United States' refusal to recognize Native Hawaiian rights and status when it took possession.
Asset Extraction – an era marked by the active extraction of natural resources from Indian owned land. This included the aggressive extraction of gold, timber, coal, oil, water, uranium and many other natural resources. Indian communities rarely benefited from this asset extraction, and in fact were often left with significant, immeasurable expenses related to environmental pollution, loss of land use and destroyed ecosystems.
Asset Mismanagement – in many cases, this era overlaps with the asset extraction era. In 1830, Chief Justice Marshall stated that the relationship of tribes to the federal government was similar to that of "a ward to his guardian." As a result, the federal government, through the Bureau of Indian Affairs (BIA), was the asset manager for many tribes, and had legal responsibility to manage the coal, timber, natural gas, and other leases granted on Indian land. In addition the BIA had responsibility to manage the trust funds of revenue generated from these leases. The BIA significantly mismanaged these leases, and, some argue, to this day continues to mismanage the financial assets of tribes as well as the natural resources and other assets. The result of mismanagement has been lost revenues, over harvesting of timber and other natural resources and disrupted or destroyed ecosystems. These eras of asset theft, extraction and mismanagement have effectively rendered many Native communities impoverished. An accompanying policy of cultural and social disruption, including brutal cultural reeducation, promotion of urban migration, and BIA control of economic activities on reservations, effectively placed many rural reservation communities in a state of dependence on federal transfer payments. As a result of internal colonization, most of the traditional social, political, economic, and cultural institutions in Native communities were disrupted by the late 1950s.
Asset Restriction – the federal trust duty gave an excuse for usurping control and decision-making concerning Indian assets. Because of the "trust" Indians were deemed incompetent to manage their own property and affairs. The trust and overall federal policy with respect to resources came into conflict over resources such as water and extractive resources. Such conflicts led to a near wholesale transfer of significant Native assets under color of federal laws, such as the Allotment Act, transfer of benefits by means of undervalued sales and leases of land, minerals, forests, and by failure to act to protect Native assets from being used by non Indians. Federal neglect has been the case with most Indian water rights and resources destroyed by environmental degradation from non-Indian projects and activities, many of which were paid for, licensed or supported by federal law and policies.

It does not take an economist to tell tribes that federal policies of land and natural resource theft have devastated tribes. For example, the production of hydropower, and the construction of the Garrison Dam in 1945 along the Great Missouri River, forced thousands of American Indian families to relocate and allowed for the confiscation and flooding of hundreds of thousands of acres of treaty-protected lands possessed by the various Indian nations in North Dakota (Cook-Lynn 2007, Fort Berthold Case Study, Appendix 2). While the construction of this dam allowed for the promotion of tourism and power development for many towns in North Dakota, thousands of Indian families were devastated by this project, as entire Indian communities were flooded and families were forced to move to allotments in higher elevations on the reservation. On the Fort Berthold reservation in North Dakota, 152,360 acres of land was taken from the tribe for the construction of the dam. More than one-fourth of their reservation was flooded, forcing relocation of 325 families, or about 80 percent of the membership, and causing a loss of 94 percent of agricultural lands (Fort Berthold Case Study, App. 2).

The Fort Berthold case study (Appendix 2), shows a poignant picture that captures the emotions of the tribal chairman as he witnesses the signing of the bill that will flood the Fort Berthold Reservation. This is just one of many examples of how federal and state policies have readily excluded American Indian tribal governments and Indian peoples from participation in planning when it comes to the development of their assets and how Indian assets were used for the benefit of non-Indians with complete disregard for the impacts on tribal communities and resources. The Fort Berthold case study provides additional information about the Tribes' efforts to regain control of their assets in the wake of this devastation. Similarly, the Gila River Indian Community has historically been excluded from discussions of water development and control in Arizona. Water is critical to the lifeways of the Gila River people. Devastation from the lack of water and the inability to pursue traditional farming practices has hampered effective attempts at sustainable community development. More information is provided in the Gila River Case Study (App. 1), which shows what the Community is doing to regain control of their water resources.

Countless reports have commented on the impoverished conditions that continue to plague tribes and their communities. Some argue that these conditions are actually caused by socioeconomic problems such as high unemployment, lack of education and poor healthcare (Jorgenson). In contrast, First Nations argues that American Indian underdevelopment is caused by colonial underdevelopment, a process that has focused on developing, promoting and assuring the dependence of American Indians on the federal government (Fixico, Lui et al.). Colonialism and the resulting underdevelopment has discouraged, and in fact prevented, meaningful, culturally relevant development of American Indian leadership and tribal societies.

D. Toward Tribal Control of Assets: American Indian Tribal Asset-Building

> *Self-government is establishing something that we can safeguard for the future. It's your traditional way that you carry on your day-to-day, year-to-year business, from generation to generation.*
>
> -Saul Terry, from *Bridge River*

Currently, a new era in the history of American Indian assets is underway. Tribes are slowly regaining control of their assets, including their most important asset, tribal sovereignty. Exercising sovereignty means acting upon the inherent right of Native Americans to control their assets and use them for the benefit of tribal communities. Implicit in this is the need for tribes to develop the regulatory, administrative and technical expertise to effectively manage their assets and for tribal leaders to foster this development. Tribes, like any government, have the responsibility and the right to provide for the economic security, health, safety

and cultural integrity of their members and citizens. At issue is how asset-building can and should be done and what assistance should be provided and by whom. History has demonstrated that imposed Western societal models have not worked for tribes, whether in education or government. The many failed federal policies and numerous government reports attest to that: reservations, allotment, boarding schools, Indian Reorganization, termination, relocation, the Meriam Report (detailing failed assimilation policies), the Hoover Commission (recommending termination), the Indian Policy Review Commission (making numerous recommendations, but basically shelved because of controversy), Indian reorganization (imposing western style governments), and termination (liquidating tribal assets and ending tribal governments). Certainly, as the *Cobell* case has made clear, the federal government and its Bureau of Indian Affairs have not been managing tribal assets in a way that would be customary in a standard trustee/ward relationship – a way that would customarily protect or build additional assets (*Cobell v. Kempthorne*).

The Native American Asset Watch Initiative was launched to begin to document a new period of Indian assets in this era of American Indian self-governance and to document the promising practices emerging from this new period of asset control. Today, Indian nations are resisting efforts of outside control and exerting their fundamental sovereign rights to asset ownership while pressing forward with diverse strategies of asset-building that are directly related to economic, social and political development. The process of exerting increased control, however, is not without its complications. Federal policies still hinder asset control by American Indians, ironically largely under the trust responsibility to act in the best interest of tribes. In addition, outside entities have a continued interest in controlling, extracting, exploiting and developing Indian assets with little Indian participation. But today, in this era of tribal self-governance, tribes are poised to retake control of their assets and take charge of their political, economic and societal futures.

As the case studies in this report begin to demonstrate, tribes' asset-building strategies are diverse. As each of the profiles of tribes suggests, tribes' legal and political rights, including treaty rights and the right to self-governance, are critical. The case studies show the importance of land and other natural resources and how they relate to tribal sovereignty, culture, spirituality – all other tribal assets. The case studies demonstrate the need for community involvement and the ways in which tribes have developed technical skills and expertise to effectively manage assets, which provide the muscle for asset control, ownership, management, and protection. The tribes' stories show that they had to take actual ownership and exercise sovereign authority effectively, despite the barriers resulting from colonialism and in the face of more current attempts at co-optation and suppression, in order to control and manage their assets in ways that benefit their communities. These tribes had to engage their communities to develop strategies and mechanisms to control, manage and benefit from their assets. The tribes had to use their authority to develop codes, regulations and infrastructure in government and business to create an environment to foster development and steward their assets in ways that are consistent with tribal culture and traditions.

Because of the great diversity among tribes, asset-building may look different in every tribal community and asset-building programs may need to follow a tailored approach based on each tribe's history of asset ownership, treaty making and resistance, as well as the unique assets they may own. The key is that tribes and tribal communities themselves must control the use and management of their assets, as this affects their ability to create and define their individual political, economic and societal futures.

1. Defining American Indian Assets and Conceptualizing American Indian Economic Development

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

-Justice Hugo Black, in Tuscarora *Nation of Indians v. Power Auth. of State of NY*

A primary lesson from First Nations' experience in the last 28 years is that strengthening tribal control of tribal assets is essential to the development of tribal economies. But control cannot happen unless tribes assert their sovereignty, treaty, tenure and self-determination rights, and use their authority to direct their own economic futures *in ways that best fit their goals and their cultures.* First Nations is working to assist tribes in their efforts to increase the technical expertise and capabilities of tribal leaders and their citizens in order to develop organizational, political, legal and economic infrastructure needed to control and manage their resources. Indeed, First Nations has learned that control of assets and economic development are inextricably intertwined with self-determination for tribes. First Nations' experience has yielded several principles for asset control:

- Assets must be broadly defined in Native communities to include human, social, cultural, political and institutional assets.
- Asset control at all levels empowers people to make decisions that are aligned with their cultural worldviews.
- Asset-based development will lead to investments in people and communities that will ultimately empower effective tribal leadership and the exercise of sovereignty.
- Native control of Native assets is needed to stop ongoing asset theft and underdevelopment.

Table 2 provides identification and definition of American Indian assets. This list, developed from First Nations' 28 years of work in Indian Country, demonstrates our broad view of American Indian assets, and includes financial, physical, natural, institutional, legal, political and cultural assets as well as human and social capital. Unlike mainstream views of assets, which typically include property and investments and other monetized or financial assets, this broad and expansive view of Indian assets points to the fundamental fact that American Indians define assets differently than mainstream America. This broad typology of assets, as well as the history outlined above, suggests that American Indians must control their assets for the processes of social, political and economic development to take hold on American Indian reservations.

Table 2: Identification and Definition of American Indian Assets

Financial Assets	Most common form of a community's or individual's wealth, including: stocks, bonds, savings, trust funds and other forms of monetized investments. Financial assets are the most liquid form of assets and can be readily used or exchanged to acquire other assets.
Physical Assets	The physical infrastructure within tribal communities, such as transportation, utilities and technological systems are critical for economic activity. Although primarily important as a means to enhance the productivity of other assets, physical assets can generate income streams for a community and increase access to information and expand communication.
Natural Assets	Land and natural resources, including: oil, gas, minerals, agriculture, wildlife and forests are the assets that build the basis of economic development in Native communities and demand a form of production and use of resources that is sustainable.
Institutional Assets	The institutions and organizations within a community can attract resources to the community and recycle them there. Such institutions may include the creation of financial intermediaries, nonprofit organizations and philanthropic institutions.
Human Capital	The skills, knowledge, education and experience of people within a community are human capital. Nurturing the productivity, innovation and creativity of people is foundational to community well-being.
Cultural Assets	These refer to the customs, traditions and indigenous knowledge that are specific to the tribal community. Language is a cultural asset, as is tribal intellectual property. Cultural assets are often "intangible" elements that underpin a community. However, the material expressions of culture can generate income and other assets.
Social Capital	Social relations and networks (e.g. kinship systems) within a community can support the building and maintenance of assets, but do not themselves generate income. Leadership development, community empowerment and social justice are ways of increasing the social assets of a community.
Political Assets	The legal rights and claims that a Native community may have can support the ownership and control of economic assets. Similarly, "political" assets, such as sovereign status, tax immunity or decision-making power can create economic opportunities.

These conceptualizations of assets are directly connected to six strategies of American Indian asset-based development. These strategies are outlined and defined in Table 3. Tribal control of tribal assets is fundamental to being able to use and create assets in ways that take into consideration the complexity of the relationships between all the assets in Table 2. Thus, the control of American Indian economic assets cannot be separated from other non-monetary assets or from tribal sovereignty. When tribes and their members have the ability to control their assets, control decision-making affecting their assets, and begin to see the benefits of their assets come back to them, there will be a growing sense of security and well-being within the community. The security of having control and confidence from being empowered will free tribal communities from a survival mode of operation and allow them to plan, invest, grow, create and protect assets. The significance of land and resources and culture cannot be overstated in this process; these fundamental assets provide the basis for and continue to guide Indian lifeways, which mold the framework

for American Indian economic development. Traditional use of land and resources, including Indigenous knowledge and cultural practices, must be protected and promoted because these are the vehicles that will help tribes engage in asset-building in a modern setting.

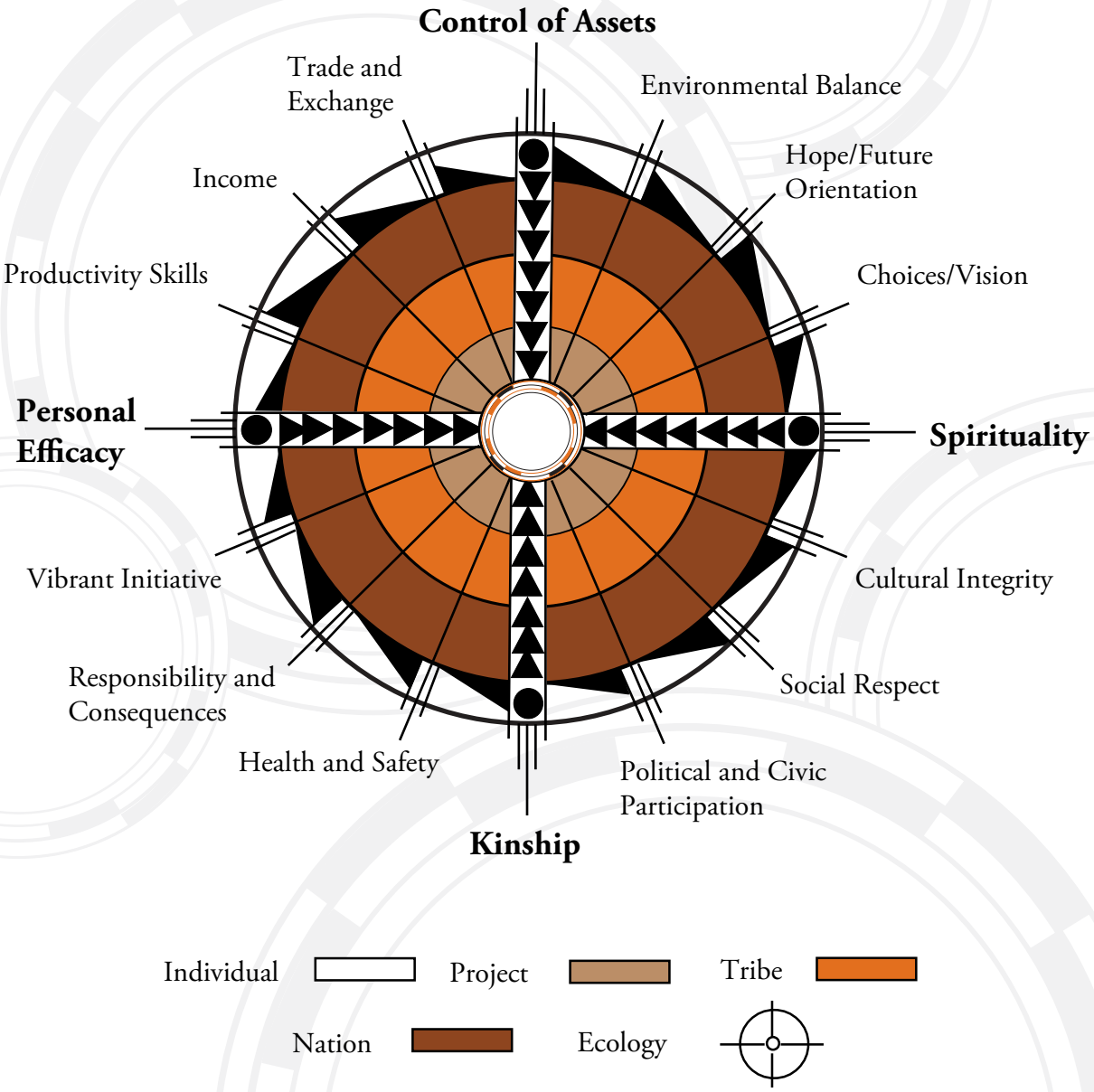
Table 3: American Indian Asset Strategies

Control	To increase the control of the asset through a variety of means, including external institutional factors (becoming more active in political and other decision-making bodies) and internal capacity factors (increasing the skills of tribal members to effectively control assets).
Utilize	To build/strengthen the ability of the community to manage and make use of the asset.
Leverage	To use the asset in such a way as to attract and generate additional resources to the asset pool.
Retain	To create or establish internal controls or regulatory structures within the community to retain assets.
Create	To originate, or bring into being, a new asset.
Increase	To expand and/or add value to an existing asset.

The role of American Indian assets in the development of sustainable social, economic and political systems is difficult to quantify. In many cases, the underlying value of American Indian assets or the processes of asset valuation cannot be captured by a simple dollar amount. Therefore, First Nations has identified 16 elements that are crucial for understanding and assessing changes in Native communities that occur as a result of changes in the control of assets. These "Elements of Development" provide a model for measuring the multi-dimensional impact for each project investment in asset-based community development (see Figure 2). These Elements of Development represent a holistic way to measure community development on Indian reservations and also provide a framework to introduce the significance of cultural and traditional tribal beliefs into the valuation of Indian assets. This cultural framework is fundamental to the vision of First Nations. Without inclusion of culturally relevant methods of development, and the complexities of the interrelationships of assets in tribal communities, the process of asset valuation is flawed.

A recent evaluation of First Nations' Native Agriculture and Food Systems Grantmaking Initiative found that the majority of grantees cited *cultural integrity and social respect* as important areas of positive community change that have resulted from the grant-funded projects (First Nations Development Institute). Not surprisingly, the evaluation showed that grantees valued the ability to maintain and protect their indigenous knowledge just as much as the ability to grow agricultural crops or manage their agricultural programs. In addition, receiving positive social recognition for their work, or social respect, was a very important outcome of these grant-funded projects. This evaluation using the Elements of Development revealed that it is important to take a holistic, multi-faceted view when assessing the outcomes of community development projects. While tribal control of tribal assets is fundamental to the process of development on reservations, this process cannot be separated from beliefs of kinship, responsibility, cultural integrity and hope and vision that are integral to all tribal assets.

Figure 2: Elements of Development



First Nations' definition of Indian assets, the outlined six strategies of asset-based development, and the Elements of Development are not revolutionary ideas. First Nations' work with various tribes, organizations and programs for nearly three decades has helped to identify these concepts. First Nations has brought these definitions and strategies to the table when doing practical work with tribes and Native communities to help them regain control of their assets and develop ways to effectively manage their resources and assets. First Nations also keeps them in the forefront when doing investigative research in Native communities. First Nations calls this "American Indian Tribal Asset-Building," in order to distinguish Native asset-building strategies from mainstream asset-building strategies.

Non-Native asset strategies fall short because they fail to appreciate and account for the complexity, interrelationship among, and broad definition of Native assets. They fail because they do not give

due regard to tribal sovereignty, to history and federal policy and the position in which this history has placed tribes and their communities. They fail to draw on the strengths of tribes and include them at the table when policies and strategies are developed. In fact, tribes, who have existed on this continent for millennia, have always known how to control, utilize, leverage, retain, create and increase their assets to maintain stable tribal societies, unlike Europeans who fled their homelands more recently because their governmental and asset-building systems did not work. In short, American Indian Tribal Asset-Building promotes and stresses the importance of Native Americans pursuing economic development activities on their own terms.

E. First Nations' Model for Asset-Building in Native Communities

Diagram 2 outlines First Nations' model of asset-based development in Native communities. As this diagram notes, tribal sovereignty is strengthened by several asset-building strategies: effective tribal government programs to support economic development, empowered individual tribal members, increased technical skills for tribal asset management and control, and tribal control of tribal assets. Tribal sovereignty is also strengthened when the community engages in the political and civic life both within and outside the tribal community. All of these factors work together to shape Native American economic development and empowerment, and are key components of the effective exercise of tribal sovereignty. Leadership, community and institutional capacity are tied to creativity and the entrepreneurial spirit that are needed to develop innovative uses of resources.

When leaders are strong, when communities are invested in their own future, when capacity is developed at the community and individual levels, tribes and their members are empowered and can take responsibility, be accountable and accept the consequences of their own choices and actions. When tribes and tribal community members are operating from a base of knowledge, training and experience and are using strategies that they define, they will gain a sense of confidence in their own abilities to control their assets in order to create secure economic and political futures for themselves.

Federal and national nonprofit organizations play an important role in this model. Their programmatic aims and resources must flow into this model to support individual asset-building within a tribal context and to support effective governance and tribal institutions. As previously noted, litigation to regain control of assets and effective political and legal strategies for tribal control and management of assets are also important. All of these factors work together to increase the capacity of tribes to control their many assets, including land, natural resources, culture and human potential.

Diagram 2: Asset-Building in Native Communities

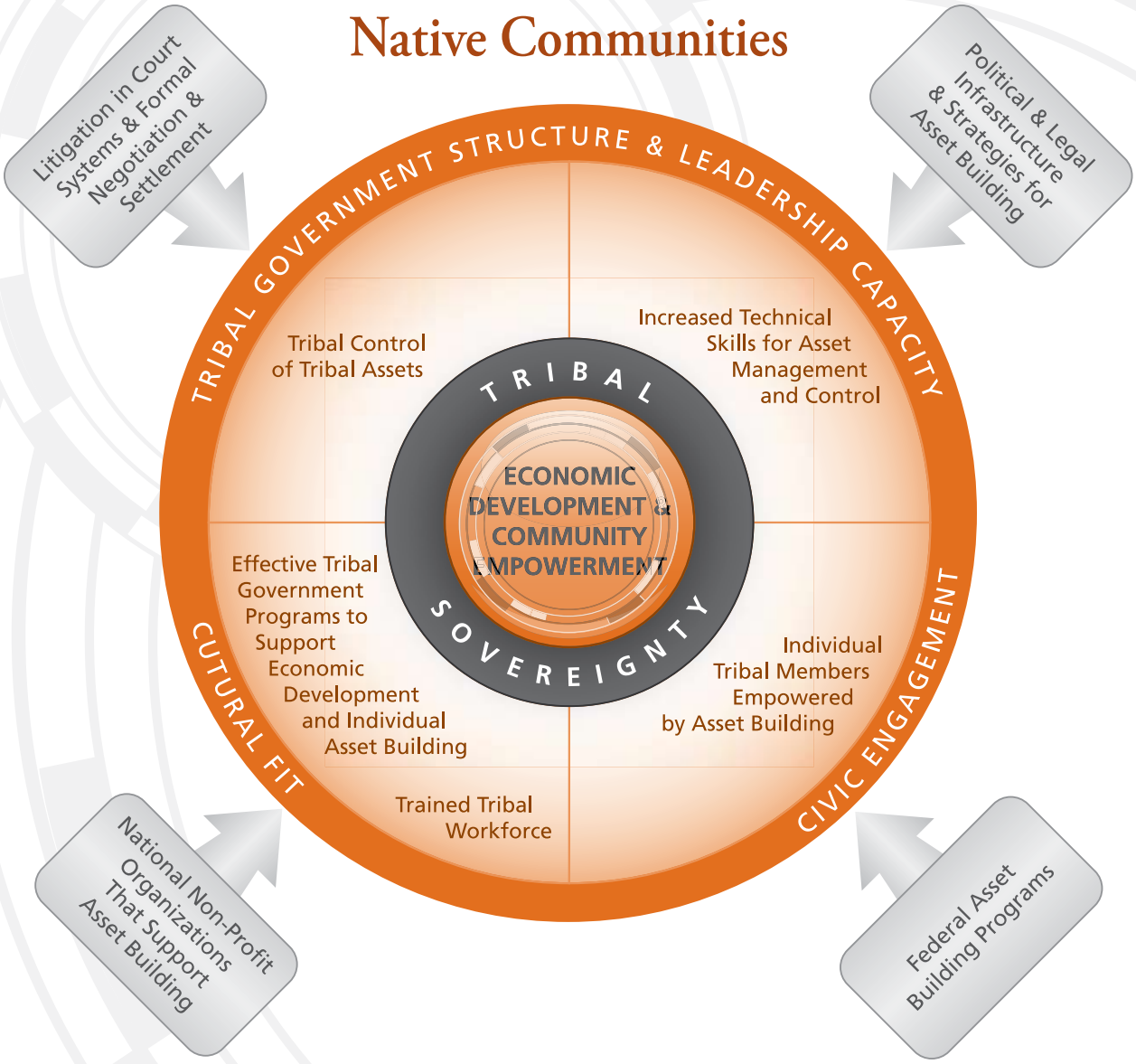


Diagram 2 is noteworthy in its difference in complexity compared to Diagram 1 (Support Systems for Mainstream Asset-Building). The focus of asset-building strategies in Native communities must involve individual and tribal strategies, and must ultimately focus on strengthening tribal sovereignty and promoting community-wide economic development.

F. Conclusion

First Nations' work under the Native American Asset Watch Initiative demonstrates the effectiveness of its model of asset-building in Native communities. Over the past three years, First Nations' work under the Asset Watch Initiative has focused on spurring economic development on American Indian reservations by empowering Native communities and promoting tribal sovereignty and tribal control of tribal assets. Through this initiative, First Nations supported 22 tribes and tribal organizations dedicated to regaining control of their assets. Similar to Hicks et al., this report finds that tribes "do recognize the importance of building assets, but must find new strategies to identify, develop, and maintain a variety of assets, at the tribal, community and individual levels, to increase chances of escaping persistent poverty, which is in large part due to asset stripping over many years" (Hicks et al. 18). In the next section, this report explores emerging practices of tribes who have participated in the Native American Asset Watch Initiative.

IV. Strategic Grantmaking: Identifying Effective Tribal Asset-Building Strategies

Grants made to tribal partners under the Asset Watch Initiative were aimed at helping tribes identify their assets, understanding and analyzing the barriers that continue to prevent tribal nations from controlling and benefiting from their assets, and documenting the successes of tribes in managing their assets. These grants supported a range of activities aimed at removing political and legal barriers and developing tribal capacity, infrastructure, technical ability and a trained workforce so that tribes can control their assets and pursue economic development activities on their own terms and in ways that fit their culture and traditions. These case studies provide the qualitative and quantitative data for First Nations' research on asset-building in Indian Country, and underpin this Report's policy conclusions and recommendations for assisting tribes in regaining control of their assets.

The case studies are intended to show what is involved in successful change in control of tribal assets. They are meant to provide a snapshot of the process each tribe/community went through to achieve the change, i.e., gain control of the assets. The studies include the historical and legal context that resulted in asset stripping and/or loss of control. They include a description of the actions individuals or groups have taken in implementing change, overcoming obstacles, and regaining and exercising control. They reflect the uniqueness of the processes and show that change is dependent on the social, political and economic context. In many cases the process was dependent on who was involved, what resources were available and what the context required, such as technical and management capabilities, or whether the system and/or community were resistant to change.

An important part of each case study is a description of how the case demonstrates successful strategies for regaining control of assets. It may be that there is no "model." A successful strategy may be simply going through the entire process in ways that are entirely unique to each tribe. One strategy or set of strategies may not work for every tribe. There may in fact be as many asset-control and asset-building strategies as there are tribes. Even using the same strategies, each tribe will have a different result or product that is unique to the tribe for social and cultural reasons. Without describing the process in each case study, however, it would be difficult to extract lessons that may help other tribes who are trying to regain control of their assets. Some or all of the elements of the strategies revealed in the cases can be used to support change elsewhere. The case studies attempt to capture the process in the following format:

1. Historical context for loss of control of asset, including legal context (applicable policy and case law);

2. The process for regaining control showing the complexity of players and mechanisms in play, including discussion of the merits of alternative approaches, such as litigation, negotiation or simply exercising control (sovereignty);

3. Contemporary significance of asset control for the tribe; and

4. The importance of the process, lessons learned and strategies for asset control.

The five case studies are found in Appendices 1 through 5. Profiles of all other First Nations' Asset Watch grantee projects are found in Appendix 6.

A. Snapshots of the Case Studies and Strategies Tribes Have Used

1. Gila River Indian Community, Office of Water Rights

Available Soon

Table 4 – Gila River Indian Community

Available Soon

Available Soon

2. Three Affiliated Tribes of the Fort Berthold Indian Reservation

Asset: Oil, Gas, Water

This case study tells the story of the Three Affiliated Tribes' efforts to regain control of their lives, community, culture, and economy through control of their natural resource assets after having suffered serious and relatively recent displacement from their ancestral homelands. The three tribes' heroic journey to this point now places them in a position to regain nearly full control of their natural resource assets, including significant water, oil, gas, and coal resources.

When 155,000 acres of their reservation was flooded for the Garrison Dam project in 1953, the Three Affiliated Tribes were forced to abandon river bottom lands and move entire communities to less hospitable uplands on the Missouri River. Some years later the areas of relocation were found to lie atop the Bakken formation, the largest oil and gas deposit in the United States, excluding Alaska, which extends beneath Lake Sakakawea, the reservoir created by the dam.

The Three Affiliated Tribes secured legislation in 1986, compensating for the loss of land, which included an interest-bearing permanent fund of $142.9 million, capitalized with excess hydropower revenues generated each year from Garrison Dam. The Tribes expend the interest each year on various water-related projects.

Under a NAAWI grant from First Nations, the Tribes began the planning process for long-term water and mineral resource control with the Ft. Berthold Energy Conference and Natural Resources Management Institute. The conference brought in tribes with experience in gaining control of their assets to tell their stories and share their successful strategies for asset management, covering diverse topics including operating a tribal energy company, budgeting and financial investment strategies, hydrology and cultural resource preservation. The Southern Ute Tribe of Colorado presented a case study of how it regained control of all its resources and diversified tribal investments to ensure long-term economic stability for the Tribe and tribal community. In the early 1990s, the Southern Ute Tribe began buying back its oil and gas leases and today owns and successfully manages all of its resources and related infrastructure, such as rights of way and transmission lines. The Tribe formed the highly successful Southern Ute Growth Fund to manage and invest the Tribe's income and

Table 5 – Three Affiliated Tribes

Goals

- Regain control of water, oil and gas resources
- Increase benefits from these resources
- Manage the resources effectively
- Strengthen tribal sovereignty
- Build tribal capacity
- Safe drinking water supply
- Protect water quality
- Develop a water quantification strategy

Strategies

- Water
  - o Seek legislation to compensate for loss of water
  - o Develop water resource use and management plan
  - o Create investment plan for permanent fund
  - o Conduct energy workshop
  - o Evaluate water and energy resources, characteristics and management requirements
  - o Develop plan for water and energy resource management
  - o Develop strategy for water rights quantification
- Oil and gas
  - o Control leasing of exploration and production
  - o Look into forming a tribal energy company
  - o Provide financial and investment education for tribal leaders and communities
  - o Form relationships with successful tribes for mentoring on leasing, forming an energy company and on allottees' rights

Results

- Goals met or in progress
- Legislation created a permanent fund
- Interest spent on developing water projects
- Technical staff hired
- Tribal staff trained
- Energy workshop held
- Evaluation of water and energy resources completed
- Water inventory done
- Resources handbook under construction
- Specialized water resources research for rights quantification strategies done

- Financial education offered in all five reservation communities
- One stop center for mineral exploration established
- Mentoring provided by Southern Ute Tribe on leasing agreements and allottee interests
- Allottee interests and goals incorporated into tribal government objectives
- Building capacity for technical, managerial, financial and administrative staff
- Fort Berthold Rural Water Department to monitor and develop drinking water systems

Obstacles

- Federal and state law and policy and federal agencies, i.e., BIA
- Outside use or theft of tribal water

Advantages

- Tribal control of water
- Responsive community
- Cultural revitalization
- Leadership with vision

assets. The result has been that in less than twenty years, the Southern Ute Tribe has recouped all the benefits that had mainly flowed away from the reservation before and has developed perhaps the most diversified economy in Indian Country, thus assuring the long-term stability and well being of the Tribe and all of its members.

From a tribal asset-building perspective, there were several encouraging outcomes of the Fort Berthold Energy Conference and Natural Resources Management Institute. The Southern Ute Indian Tribe has assisted Three Affiliated Tribes with negotiation of leases, is assisting them with plans to develop their own energy company, and has conducted follow up workshops with the Fort Berthold allottees (individual landowners). A "one-stop shopping" center for mineral exploration has been established at Ft. Berthold. After sessions on allottees' interests, the Three Affiliated Tribes incorporated allottees' goals into overall tribal government objectives, coordinated federal and private assistance to landowners, and provided for increased tribal technical assistance. A spinoff national organization was formed – the Indian Water Rights Working Group. After a presentation by the Confederated Tribes of the Umatilla Indian Reservation on how the CTUIR restructured its budgeting and finance system, the Three Affiliated Tribes identified wealth management as a need of tribal leaders and the community and asked First Nations to conduct financial education workshops for all five reservation communities, which it did during the fall of 2008. These kinds of partnerships and activities will lead to more effective asset-management and greater benefits for the Three Affiliated Tribe and tribal members.

The Three Affiliated Tribes are also focusing additional resources on the development of its internal technical, managerial, financial and administrative staff in order to provide a tribally-defined, environmentally sustainable framework for full development of the mineral resource once the exploration phase is completed. The Tribes formed the Ft. Berthold Rural Water Department with the goal of furthering the aims of tribal development by monitoring and developing drinking water systems and bringing on board a petroleum geologist. The Tribes also hired a natural resources program director.

The current focus of the Three Affiliated Tribes' work to control the water resource asset includes the development of a water management program and water code for the protection and management of surface and ground water resources with emphasis on water quality and mineral development opportunities. This includes developing tribal infrastructure and expertise to manage water resources, managing the levels of Lake Sakakawea to protect water uses, recreational values, drinking water supply

and mineral development opportunities, and developing an appropriate water rights quantification strategy for the unique circumstances at Ft. Berthold.

The Three Affiliated Tribes have spent the better part of 50 years securing compensation for lost resources and assuring ownership and development of the current resource wealth, which is significant. The Tribes have been steadily building their natural resource expertise and their understanding of the complex environment of oil and gas development and the equally complex avenues for water rights quantification. As the resources are developed and revenue generated, the Tribes will be able to move forward with many plans for community development.

The lessons from the Fort Berthold Energy Conference and Natural Resources Management Institute are clear: tribes have much to offer each other and partnerships can help tribes move toward more effective control and use of their assets. The conference demonstrated possibilities of an institute and potential of peer learning. First Nations wants to carry forward the successes of the Fort Berthold conference to create peer learning institutes and mentoring relationships among tribes. Peer learning institutes will facilitate tribes helping tribes to create strategies for regaining control of their assets and building capacity and infrastructure to manage them effectively.

3. The Western Shoshone Defense Project

Asset: Treaty of Ruby Valley, land and culture

The Western Shoshone Defense Project (WSDP) is a grassroots organization dedicated to preserving Western Shoshone treaty rights and sovereignty and promoting the preservation of cultural values. The Treaty of Ruby Valley (1863) shapes the mission, direction and goals of the organization. This case study

Table 6 – Western Shoshone Defense Project

Goals
- Map the Treaty of Ruby Valley
- Protect treaty lands and cultural resources from damage from mining
- Protect human rights of the Western Shoshone to their homelands
- Further the sovereign rights of the tribe
- Reform federal law and policy

Strategies
- Litigation and development of other legal and political strategies
- Use of international forums and tribunals
- Promotion of Western Shoshone jurisdiction within treaty lands
- Community education about legal and political strategies
- Lectures and information dissemination to raise awareness around the world
- Mapping and monitoring treaty lands and assets
- Grass roots organization

Results
- Losses in courts
- Favorable rulings and recommendations by Inter-American Commission on Human Rights (IACHR), and United Nations Committee on the Elimination of Racial Discrimination (CERD)

- Ongoing efforts to promote law and policy reform and develop other legal and political strategies for redress in both domestic and international political and legal forums.
- Cultural Programs foster traditional knowledge
- Positive, broad exposure in media and educational and commercial films

Obstacles

- Treaty abrogation
- Unfavorable court rulings
- United States ignoring international rulings and opinion

Advantages

- Refusal to accept money for their land
- Development of long-term goals and monitoring of land
- Community engagement
- Cultural revitalization
- Visionary leaders

documents the WSDP's mapping of the Treaty of Ruby Valley to identify the land, cultural and other assets within the lands outlined in the treaty. The WSDP is involved in ongoing efforts to monitor and prevent the theft and destruction of treaty lands. Monitoring their assets allows the WSDP to identify cultural assets that yet remain undisturbed by massive strip mines and provides the WSDP's cultural program the means for preserving cultural knowledge for present and future generations. All of these activities are connected to the overall goal of regaining *control* of traditional Western Shoshone treaty lands.

The Western Shoshone sought compensation for trespass to their lands in the Indian Claims Commission, but the ICC and ultimately the United States Supreme Court found that the Tribe had lost its aboriginal title due to gradual encroachment. The Tribe has refused a payment for the loss of their lands and has taken their case to the international arena. In an ironic twist, the federal government sued tribal members and ranchers, Carrie and Mary Dann, for trespassing on "federal lands," lands the Dann family has lived on and worked for generations. The Dann's story is well documented in media presentations, including news stories and films. The WSDP has organized programs and community efforts to inform their various communities about their land rights and the ongoing legal and political battles to regain control of the Tribe's assets.

The WSDP has several lessons to offer:

Their treaty is an important asset: the treaty outlines the vast amount of land and natural and physical resources owned by the Western Shoshone. The treaty also provides the foundation for strategies to promote and strengthen traditional cultural values related to Shoshone land.

Tribal grassroots organizations: the Western Shoshone experience demonstrates that tribal grassroots organizations are important vehicles for protecting treaty assets, furthering tribal sovereignty and protecting tribal traditions and culture. Organizing around these assets can be a significant motivating force in fostering community development and empowerment.

Not all Native assets can be monetized: the Western Shoshone have refused payment for violation of the Treaty of Ruby Valley. The WSDP has pressed the Tribe's message that Western Shoshone culture, language and traditions cannot be separated from the significance of land.

Diversification of Legal and Political Strategies: after the Western Shoshone Tribe lost several court battles to require the United States to recognize their inherent rights to land and sovereignty, the Western Shoshone have taken their case to the international bodies to publicize and draw attention to their cause and received favorable and forceful rulings. Though the federal government often ignores judgments and sanctions of international bodies, the international arena is an important means to draw attention and scrutiny to issues surrounding Indian assets and human rights.

Community Engagement: the WSDP's various programmatic efforts are aimed directly at engaging the various Western Shoshone communities and at strengthening and promoting cultural learning through culture camps and spiritual runs and walks to continue Western Shoshone lifeways and traditional practices. The WSDP also does this through educational sessions and conferences in Western Shoshone communities designed to educate the communities about ongoing legal and political battles as well as sustainable development.

Asset Mapping as a Strategy for Asset Control: under the Native American Asset Watch Initiative, the WSDP has engaged in geo-spatial mapping of their treaty area. This allowed involvement of the Western Shoshone communities in tracking and monitoring significant cultural assets within their treaty area. Mapping and monitoring their cultural assets within treaty areas allows the tribe to know what they own and, provides a way to document external encroachment and environmental and ecosystem destruction.

4. **Eastern Shoshone Tribe and Northern Arapaho Tribe of the Wind River Reservation (Wind River Tribes)**

Assets: Water and Oil

The history of the Eastern Shoshone Tribe and the Northern Arapaho Tribe, who are historic enemies, coming to be on one reservation affects decisions on jointly-owned natural resources. On most reservations where tribes were combined, a confederation of the tribes formed one government for the reservation, such as the case for the Confederated Tribes of the Umatilla Indian Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation. At Wind River, each tribe is separate and has its own form of government. Strategies for asset-building at Wind River take the history and dual sovereignty into account.

The Wind River Tribes have a long record of efforts to regain control over their natural resource assets. The tribes used the courts to secure payments for past damages to, theft of, and under-valuation of tribal natural resources. Their water rights adjudication marked the first steps to begin to take back control of the water resource. The resulting Big Horn Decree affirmed the Tribes' rights to 500,717 acre feet of water from the Wind River and its tributaries, about half the flow of water from the Wind River basin. This is a large amount of water, but it remains a mostly paper water right and, like Gila River Indian Community, the Wind River Tribes must work to put the water to use. A big difference is that the GRIC reached a water rights settlement which included funding to enable them to plan to put their water to use and provisions addressing what could be done with the water and how it will be administered. The Wind River Tribes' water right was adjudicated, so the amount of water was quantified, but questions of use and administration were left to be answered another day.

The Wind River Tribes have moved forward to control and manage their water in the face of enormous odds. The Tribes have developed a water code and the Wind River Water Plan, a phased program for the orderly development of the tribes' resources. The uniqueness of the plan is that it involved much more community participation than all previous efforts on water at Wind River. A 58-minute video was produced to identify the community's desires for the use of water.

Table 7 – Wind River Tribes

Goals
- Control, management and use of adjudicated water right

Strategies
- Adjudicate water rights
- Develop water code
- Community education and desired water uses
- Develop plan for orderly development of tribes' resources

Results
- Court quantified water right of more than 500,000 acre feet per year
- Water code adopted by tribes
- Water Resources Plan developed
- 58 minute video made to document community desires for uses of water

Obstacles
- No funds came with quantification to implement water uses
- Litigation quantified, but did not settle uses or regulation of water right
- Disputes with Wyoming over water uses and administration of tribal water right
- Federal refusal to recognize water code because of a moratorium on tribal water codes for tribes whose constitutions require approval by the Department of the Interior (tribes with boilerplate IRA form of constitution)
- Tribal decision-making infrastructure needs to be strengthened
- Technical staff needed
- Two tribal governments having to make one decision

Advantages
- Large award of water with potential for great benefits for the Tribes
- Strong leadership with vision, willing to set policy and create laws

Both internal and external institutional difficulties prevent the Tribes' full implementation of their water code. The internal difficulties are around staffing, funding, and the strength of the decision-making infrastructure. The external difficulties and challenges to the Tribes' control of their water are significant. Obstacles include Wyoming's continued refusal to recognize tribal water uses and its insistence on state administration of tribal water, and the Bureau of Reclamation's operation of major federal water structures in the basin, including reservoirs, and associated systems under principles of state law.

Beyond these challenges, the Wind River Tribes recognize the need to develop water leasing regulations, diversion and transfer of use rules, and to continue to develop the monitoring network to track tribal resource assets. In the next several years, the Wind River Tribes plan to implement a focused strategic plan to secure full tribal control over water. The strategies include:

- Control: the Tribes will seek to increase control over water by negotiating with the Bureau of Reclamation to store and market tribal water and seek private financing for small- to large-scale water projects identified in the Water Plan.
- Retain: the Tribes will increase tribal capacity in order to track, manage and administer water

resources and develop skills and tools to improve tribal decision-making concerning water. The Tribes will retain critical expertise for the valuation of water resources.

- Increase: tribal research conducted in the last several years has resulted in the increased awareness of the value of tribal water. The Tribes have developed data on the increased value of tribal water as it is used in the federal reclamation project. This information gives guidance as to the price the Tribes should charge for leasing water.
- Leverage: the Tribes intend to leverage their water resources to secure assistance by the federal government in water development and administration.

The Wind River and Fort Berthold case studies offer in-depth assessments of current issues in natural resource asset control, but also present an incomplete picture of the potential for effective resource control. Not all the talent in reservation communities has been tapped, nor do all tribal communities fully understand the urgent need to secure long-lasting control over tribal natural resource assets. These two case studies illustrate *works in progress*, and offer guidance for many tribes now on the cusp of securing control over resources, which have shaped their identities as people from time immemorial and will into the future. That is why the Tribes must take control: their futures are at stake.

5. Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

Asset: Finance

After experiencing significant mismanagement of their land, natural resources, and social service programs by the BIA, the leadership of the CTUIR developed strategies for controlling and managing assets. They worked to build skills and create mechanisms to manage their own affairs, going through many phases of leadership development and skill-building in order to take over control and management of their resources.

The CTUIR's "Retro-budgeting" finance system is the heart of their asset-building strategy and programs. Retro-budgeting allows the Tribes to accumulate revenues in the year they were earned and to then budget them in the succeeding year(s). The CTUIR has successfully shifted its focus to diversifying the revenue base, building wealth and preserving it. The careful financial planning has allowed the Tribes to create the following financial assets: Education Trust Fund, Burial Trust, Elder Pension Fund, Self-Sufficiency Fund, Capital Reserve and Permanent Health Care Fund. The CTUIR also makes annual commitments to new business development, long-term savings, land acquisition and reserves.

The CTUIR Board of Trustees (BOT) brought to the new budget processes a historical and cultural knowledge, an ongoing cycle of growing, gathering, preserving and utilizing resources, and has done so in a manner that provides for accountability to past, present and future generations. Diverse revenue streams are invested in a broad array of services and activities. Where needs are identified and goals established, the Board of Trustees has created institutions and invested tribal resources to address them.

The CTUIR case study shows that tribal budgeting and accounting are important to building tribal capacity and asset-building. Historically, tribes have been dependent on federal money and programs to provide governmental services. Any income earned from tribal assets was controlled by the BIA. Income from trust assets was held by the BIA and placed into accounts without proper tracking and at poor investment rates. The result has been that these assets and the benefits from them were largely lost to tribes and individual Indians. There is no way to tell what happened to the large portions of the proceeds from the many assets the government controlled and in most cases still controls. This is the lesson of the Cobell case, the long running and ongoing trust fund litigation over mismanagement of individual assets.

The point is that the old tribal accounting and budgeting was based on, and at the mercy of, the federal funding and accounting system. Tribal budgeting and accounting were always tightly constrained and necessarily reactive to federal policies and project-specific grant requirements. This did not allow for investment or long range planning. Tribes will need to revamp their accounting and budgeting processes to account for and manage revenue streams from assets and economic development outside of the federal system. This is what the CTUIR have done successfully.

The CTUIR have used their financial resources and planning to promote several goals that are essential to their ability to exercise their sovereignty and support their tribal citizens:

- Taking control of their own social and economic programs such as education, health care, natural resources management, economic development, and financial management, so that these programs can be managed according to the goals and the values of the tribes.
- Investing and preserving financial assets for long-term financial stability with an understanding that the profitability of gaming may subside.
- Using tribal funds for land acquisition to purchase reservation land and convert it to trust.

Getting to this point was not easy. The case study details missed opportunity, new starts, gradual growth of capacity and programs, and the near and long-term benefits of their asset-building strategies.

Table 8 – Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

Goals
- Plan for future – save and grow assets
- Diversify investments with income from gaming
- Provide accountability
- Depoliticize budgeting processes
- Strengthen sovereign authority
- Increase governmental capacity
- Increase skills:
  - o Tribal leadership
  - o Finances and investment
  - o Consumer money skills
- Create new social programs
- Gain economic sovereignty

Strategies
- Revamp finance system to tie revenues and integrate budget with department and program goals
- Invest in entrepreneurship
- Community engagement
- Financial education and business opportunities for tribal members

Results
- All goals attained to a fair degree and continue to be expanded

Obstacles
- Initially lack of revenue streams independent of federal funding
- Community opposition in early efforts

Advantages
- Revenue from gaming allowed planning, saving and diversification
- Leadership with vision
- Community backing – after some false starts

The actions of the CTUIR over the past 40 years represent promising practices for administering financial and other assets that other tribes may wish to learn from. Effective financial management of tribal affairs has increased accountability, income and asset diversification, wealth building and wealth preservation. It has also allowed the tribe to depoliticize the resource utilization process and promote political financial stability for the tribe. All of these actions have helped the CTUIR exercise its legal sovereign rights, but also exercise economic sovereignty and move away from dependency on federal programs and grants.

B. Making Decisions, Setting Policy and Taking Action

The case studies describe the strategies these tribes used to define and regain control of their assets. They lay out the hard work each undertook to create institutions and systems to manage their assets. They show that community involvement and planning were essential to ensure that their assets grow, are protected and will be used in ways that will create economic, social and political security for future generations. They also show that history and culture inform and guide the tribes' strategies to control their assets.

In each of the cases, tribes had to make hard *decisions* about their resources and assets; they had to articulate policies and choose between strategies, legislation, litigation, negotiation, and settlement. They had to decide what compromises to make and what *actions* to take regarding resource and asset management. The Western Shoshone case study demonstrates that when legislation, litigation, negotiation and settlement fail, and do not meet the interests of the tribe, different strategies must be developed to retain tribal control of assets.

The tribes also had to get the tribal community to understand their strategies and goals and the need for time to get things done. In some cases, as with the Confederated Tribes of the Umatilla Indian Reservation, the people were split on the ways in which to use payments for giving up land and fishing rights. If the tribal government had control of the money, what would happen, how would the community benefit? These questions must have loomed large. The CTUIR leadership had to step up, create a vision, and come up with a plan that they could explain to the people, that made sense and which would strengthen the tribe, its government and its economy, consistent with tribal values and traditions. The CTUIR was fortunate to have good leadership and an opportunity to create a revenue stream and then to diversify it. The community was willing to support the vision and plan and trust the leadership, giving up immediate gains of per capita distributions for the betterment of the entire tribal community. It took time to overcome obstacles, including inexperience in creating, managing and diversifying revenue streams. The results have been good: the economy is growing, there are new businesses and many new tribal programs that address entrepreneurship, education, health, housing, financial education, loan products and savings programs. The improvement in the tribal economy will help support individual asset-building and create a sense of security that frees people from day-to-day worries to begin to create and plan for the future.

A hard decision tribes must sometimes make is whether to monetize their assets. The Western Shoshone have said their land is not for sale, that the land defines who they are. The Gila River Indian Community and Eastern Shoshone Tribe and Northern Arapaho Tribe of Wind River must decide whether to lease or sell water they may not be able to use. This may be an especially hard decision if tribes may not be able to use their water because they do not have funds to develop water uses – sometimes even for domestic water, which most United States citizens take for granted. Selling or leasing water rights may be the only way a tribe can "use" its water. The Mandan, Hidatsa and Arikara Tribes of Ft. Berthold must look hard at their oil and gas resources, work to get the best deal, and make the best decisions about how to use and invest the proceeds from these non-renewable resources.

If a tribe decides to monetize its assets, hard questions must be addressed about the cost or benefits to tribal communities and about effects on future generations, on tribal sovereignty and on the continued existence of tribes as governments and distinct societies. This is not overstated; this is the reality tribes face, indeed any government faces, as they set policies, make decisions and take action to implement their decisions. There will be consequences flowing from any decision or action and tribal leaders will be held accountable, so the best course is to engage the tribal community at all levels of decision-making.

Strategies to regain control and effectively use assets for the benefit of tribes must be carefully weighed and crafted to meet individual tribe's needs and policy goals. Each choice means giving up other options and the advantages that may come with them. For example, the Wind River Tribes litigated their water rights and received a large quantification, but many questions as to uses and management were left unanswered or only partially answered. Because the court decided only the issue of how much water was reserved for the Wind River Reservation, no funds were included in the court order for implementation of their water right. Gila River's dual strategy of using litigation to drive settlement, a common strategy used by tribes, yielded a settlement with many of the potentially controversial questions answered and with a substantial fund to start to implement uses for their water. Each made choices, with results that are different in important ways. Still, both tribes must move on to the next phase of actually using and managing their water rights.

After an asset is secured and the right is established, tribal leaders and citizens must act to create more strategies and make many more decisions. The hard work of building capability to use and manage the asset has to be done. Government decision-making structures must be in place and secure. Policies have to be articulated and laws and rules have to be passed to implement the policies. People must trust tribal leaders' vision and the process; that trust will come when tribal members feel "ownership" through civic participation. Tribal citizens must be engaged in the political process, vote, run for office, serve on committees, boards and commissions. There must be a trained tribal workforce with all the technical and other job skills needed to manage resources and assets. The tribes must support their asset control and asset-building policies by supporting education and training to fill tribal jobs, by investing in entrepreneurship and in individual asset-building. Each of the case studies reveals layers of decision-making and decision-making bodies around each resource or asset.

In many cases, tribes and their members lack the experience and education needed to make the complex decisions about asset-management. These tribes will need help in formulating good policies and in gaining the skills to perform the activities needed to control and manage their resources and assets. Where this is the case, peer learning and mentoring can serve an important role. Tribes can learn from other tribes. The Umatilla can show other tribes what it did to revamp its finance system and describe all the benefits that flowed from improved fiscal planning. The Three Affiliated Tribes and the Wind River Tribes can talk to the Southern Ute Tribe about how it gained control of all its oil and gas resources, how it started its energy company and diversified its assets. Tribes can share details about how they gained community support for a policy and plans to implement it, how they created new laws, and administrative bodies to make decisions about resources and how they got the community involved. They can share technical knowledge and offer to train each other's staffs. The possibilities are endless. The experience at Ft. Berthold after their Energy Conference proved mentoring and peer learning can work at a very practical one-on-one level.

Below is a chart summarizing many of the challenges tribes face as they work to regain control of their assets and build a strong tribal economy and secure tribal societies. A promising and easily implemented strategy for assisting tribes in meeting these challenges is peer learning and mentoring by tribes that have experienced success in making their communities stronger.

Table 9: Challenges to Economic Development in Native Communities

Financial Infrastructure	Political/Legal Infrastructure
• Lack of individual access to credit o No banks or financial institutions on the reservation, in the village or community area, island, etc. o No access to affordable credit. o No access to credit that comes with the appropriate technical assistance. o Inability to use trust land for collateral on loans, and misunderstandings on how to make the deals work in these situations. o Lack of credit histories or poor credit. o Banks' unwillingness to lend money to residents of a Native community/ reservation due to legal challenges related to foreclosure, jurisdiction, courts, sovereignty/treaty issues. • Lack of community development financial institutions (CDFIs), business incubators or other nonprofits dedicated to entrepreneurship education and development. • Dominance of nearby urban/suburban/ border town economies. • Presence of predatory lenders.	• Tribal government not supportive of or empowering private enterprise culture. o Cumbersome legal processes related to business start-up (for-profit and nonprofit). o Extensive bureaucracy related to permitting, land leasing, titling, etc. o Lack of zoning. o Lack of vision for using larger tribal enterprises to promote small individual private business start-ups. o Individuals on tribal council have no experience with private business ownership. • No legal system on the reservation to protect private enterprise. o No UCC code, commerce code, debt or foreclosure code. o Lack of independent tribal courts. o Lack of commerce departments or similar functions. • Unsupportive BIA office o Extensive bureaucracy related to permitting, land leasing, titling. o Unsupportive BIA realty office. • Large amount of land in community in some kind of tribal trust, homeland settlement, village incorporation, etc. and/or lack of privately owned land. • Lack of tribal colleges, business centers or other institutions to provide business education.
Physical Infrastructure	**Social/Cultural Infrastructure**
• Lack of buildings to house private enterprises or inadequate space and poor quality of structure, if existing. • Existing infrastructure dominated by non-Native communities, population, businesses or incorporated areas within or nearby Native areas. • Difficulty of permitting process related to constructing or acquiring buildings or leasing or buying land.	• Lack of individual experience with money management and business management. • Cultural beliefs that prioritize the sharing of resources with family and community over individual benefit or profit. • Lack of experienced workforce, difficulty finding good employees.

• Lack of or poor telecommunications, sewer, water, electric and/or transportation infrastructure to support enterprise development. • Remote, low-population-density communities. • Deficit of new and improved housing stock for burgeoning local business sector and Native individuals who would consider moving their existing business back to tribal area(s). • Problems with trust land. o Fractionation of individual tribal trust land. o Checkerboarded land ownership structure on reservation. o Lack of ownership opportunities for trust land means business owners have no incentive to repair or maintain property.	• Perception that businesses should be owned by the tribal government for benefit of all. • Large non-Native presence on reservations that coincides with dominance of non-Native owned businesses. • No culture of formal entrepreneurship. o Few Indian-owned businesses in the community. o Lack of role models. o No chamber of commerce or other supportive organizations. o Lack of community support for Indian private business owners (perception that business owners are greedy and do not share their wealth). • Active informal economy.

V. Findings

A. Tribal Control of Assets is Essential to Building Assets and Achieving Long-Term Economic Stability.

In First Nations' nearly three decades of work in Indian Country, it has been become increasingly evident that tribal control of resources is an essential building block to social, political and economic development. Under its Asset Watch Initiative, First Nations conducted research to determine the relationship of tribal control of resources and asset-building and to identify asset-building strategies that have worked for tribes. If the federal government, states and other outside entities continue to control tribes' assets, tribes will continue to receive marginal or diminished benefits and have little authority over their assets.

Tribes that have successfully regained control of their assets are reaping the benefits from those assets. An example from the case studies demonstrates this. The Confederated Tribes of the Umatilla Indian Reservation have used income from their gaming operation to invest in government services, tribal businesses, support entrepreneurship, help individuals save to buy a house and diversify their economy in many other ways. The CTUIR restructured its budgeting and financial system to take care of current needs and to allow for investment and growth of assets. The other case studies provide other examples of tribes' work to regain control of their assets.

B. The Legacy of Past Federal Indian Policy Continues to Hamper Tribes' Ability to Control and Manage Their Assets; History Must Be Considered When Formulating Strategies to Regain Control of Tribal Assets.

Due to the ongoing effects of past federal Indian policies, external entities continue to control American Indian assets with the predictable and evident result that the benefits derived from American Indian assets flow away from reservations. The history of oppression has broken tribal systems and diminished capacity at the personal, institutional and tribal governmental levels. For tribes to move from the effects of colonialism to control requires an understanding of the burdens history has placed on tribes. Understanding the history of federal Indian policy and their own tribe's history is necessary to allow tribes to reconnect with their cultures and reconstitute their traditional techniques for managing assets, building wealth, saving for the future, investing and passing on such knowledge. History is also key to formulating responsive tribal and federal policies to counteract federal policy prescriptions.

C. Modernization and Other Mainstream Theories of Asset Development Have Failed to Protect, Preserve and Grow Indian Assets.

Prior research in Indian County, emphasizing economic theories of modernization and neo-classical economics, which reflect a "one size fits all" approach to solving the economic problems in tribal communities, may be viewed with skepticism, and with good reason. These theories tend to dismiss tribal histories as inconvenient and unessential to the current state of tribal underdevelopment. To effectively get to the heart of American Indian underdevelopment, tribal histories must play a key role in the identification of the barriers to tribes' exercise of sovereignty and control over their assets.

Assimilation/acculturation models may provide some near-term advantages and wins, but they are aimed at building individual assets, not on building tribal communities or strengthening tribal sovereignty. Over the long-term, such models may feel like more variations of the oppressive models of colonization that have already failed tribes. Tribes must consciously evaluate modernization theory, or any theory they themselves did not devise, and weigh the appropriateness for tribal communities and reservation economies.

D. Tribes' Most Important Asset is Their Sovereignty.

Tribes must exercise their inherent authority or be faced with the likelihood that federal and state governments, the courts and other bureaucracies will continue to diminish the sovereign rights of Indian nations. In order to have economically healthy tribal communities and support individual asset-building, tribal sovereignty must be exercised through strong tribal institutions, with laws and rules that reflect a tribe's individual history, culture and its relationships with other governments. The case studies show that some tribes have had to initiate major systemic changes in order to effectively exercise their sovereign right to control and effectively manage their assets.

E. Treaties are Assets that Protect Tribes' Sovereignty and Other Assets.

Treaties and sovereignty are fundamental tribal assets that go hand-in-hand. Enforcing treaties is vital to tribes' ability to exercise control over their assets. Because the federal government has abrogated most treaties with tribes, tribes are forced to continue to fight for their rights and assets, even those clearly documented in treaties. As the Western Shoshone Defense Project case study demonstrates, treaties are active documents that are essential to formulating legal and political strategies and for cultural

revitalization and community engagement. Treaties remain foundational for tribes as they continue to fight for their sovereign rights and control of assets; this is a fight tribes must win in order to continue as governments with the right to define their own societies.

F. Historically, Monetization of Tribes' Assets Has Undermined Tribal Stability and Tribal Authority.

History has taught tribes that assets that can be monetized have been and will continue to be, even when tribes do not want their assets converted to money. Loss of the underlying assets has had far reaching effects that money cannot replace. As a result of monetization of major physical assets other critical tribal assets have been suppressed or destroyed including: sovereign authority over tribal land and people, tribal government, societal institutions, culture, language, education systems, religious and cultural sites, food sources, medicinal plants, animals, forests, fish, archeological sites, sacred and cultural uses of water and other natural resources.

When the Confederated Tribes of the Umatilla Indian Reservation, like so many tribes, received monetary compensation for the taking of their assets, their land and fishing rights, they distributed all of the money per capita. Soon, not only their assets were gone, but the money was gone as well. The money provided only temporary benefits to tribal members. The Tribes received nothing that would help it to carry out its duties as a government or take measures to insure long term tribal community stability. It can well be expected that many tribes would rather have kept their property and would have if circumstances had afforded the choice.

The refusal of the Western Shoshone to accept payment for sacred lands is but one of many examples in Indian Country in which a tribe has decided not to assign a monetary value to an asset. While many in mainstream America may not understand the reasoning behind such decisions, these decisions must be respected and supported by the federal government and other entities and funding agencies.

G. Tribes Have Had to Undergo Systemic Change and Rebuild Institutional Capacity in Order to Take Control of Their Assets.

The lesson from each of the five case studies and in every grant First Nations has made under its Asset Watch Initiative is that tribes must have or develop the internal capacity to curb asset depletion and gain control of their assets. Tribes must have the essential organizational, political, legal and economic infrastructure in order to remove the barriers and foster asset-building within their communities.

The case studies in this report show that those tribes who have developed needed internal capacity and expertise have greater success in regaining control of their assets and managing them effectively. Tribes' ability to administer and support asset-building programs will flow from this increased capacity. The CTUIR created a better finance and accounting system which has allowed planning, investment and diversification, and is creating a more stable tribal economy. The Three Affiliated Tribes created a tribal natural resource department and are hiring in-house technical experts on oil and gas and water to better manage their assets. The Gila River Indian Community established a water department and created long-term plans for use of water in ways that will make the Community healthier. The Eastern Shoshone and Northern Arapaho have created an office of the Water Engineer and adopted a water code to define acceptable uses of their water and to provide rules for management.

These tribes have undertaken the long, hard, but ultimately satisfying task of making their governments stronger, building capacity and infrastructure. They have made the investment of time and money needed to build economic security for their communities.

H. Community Engagement and Grassroots Support are Essential to Asset-Building in Native Communities.

Community engagement and grassroots support are common themes through all of the case studies. Individual development must be connected to the development of the tribe and to the exercise and preservation of tribal sovereignty.

Long-term growth and sustainability may be difficult if tribal governments do not create and foster an environment that facilitates community involvement. Tribal governments and their members must share long-term vision, values and goals for effective management and use of assets, future orientation and building personal and tribal efficacy. Grassroots organizations and tribal nonprofits, such as the Western Shoshone Defense Project, can play important roles in promoting and protecting tribal sovereignty and developing strategies to utilize and control assets. When these organizations are partners in developing and implementing asset strategies, tribal and individual capacity are significantly increased.

When tribal governments work with tribal communities, communities are informed and empowered. Civic participation helps to make tribal government processes more transparent and provides a mechanism to make tribal government more accountable to their members. These community building experiences can provide important examples for other tribes wishing to engage their communities.

I. Peer Learning and Mentoring are Effective Ways to Assist Tribes in Gaining Control of Their Assets.

First Nations' investigative research has revealed that an effective way to assist tribes is to build relationships between them so that they can share their best practices through peer learning and mentoring. This way no one is telling tribes what they should do or what will work; no one is imposing a foreign culture or way of doing things that could undermine tribal institutions. Instead, relevant examples of success are demonstrated and shared. It is not the ideal, because the ideal would be the intergenerational passing of knowledge within a tribe, but it may be as close to ideal as is possible.

Many tribes have developed sophisticated methods of passing on knowledge and experience for asset control. For instance, many of the 33 tribal colleges and universities have developed and shared models and methods that promote language and culture revitalization and teaching in culturally relevant ways. Peer learning can extend the benefits of experience beyond the reservation to other tribes. Though the same mechanisms may not be directly transported, sharing and learning from other tribes with similar (though never the same) experiences can help in formulating tribal specific strategies and tools for asset control and management.

VI. Policy and Practical Implications for Asset-Building in Indian Country

Tribal Sovereignty today finds at least as much meaningful definition in the growth, development and day to day functioning of effective tribal governments as it finds in volumes of the law library. Far from being relics of a bygone era, Indian tribal powers bear the burnish of everyday use.

-Senior Judge Bruce S. Jenkins, *MacArthur v. San Juan County*

First Nations' research on asset-building strategies has been integrated with, and supported by, grants and technical assistance provided to grassroots community partners and by case study analysis. Strategic

grantmaking to more than 20 partner tribes and organizations has yielded perhaps as many questions as answers because of the complexities of Indian communities; however several *policy and practice implications* have emerged.

A. Tribal Institutional Restructuring May Be Needed.

Tribes must evaluate their governing structures and reform their governments as necessary to eliminate government instability and create a government that reflects the tribes' culture.[26] Tribes must revise or create structure, government and regulatory systems that will build their capacity to provide and maintain a healthy tribal environment and provide processes that will carry out the economic and social objectives and goals of the tribal communities.

Top down models for tribal governments and asset-building may only mimic oppressive non-Indian governments and models that have not worked for tribes. The best feature of such models may be that the federal government approves of them; at worst, such imposed government structures ignore tribes' traditional ways of governing and disempower tribes and their citizens.

B. Tribes Must Encourage and Support Civic and Political Engagement.

Tribal citizens look to tribes to provide programs and services; conversely, there should be more conversation at the tribal and community levels about the role and responsibility of citizens to the tribe and their communities; there should be focus on the obligations as well as the rights of tribal citizens. Civic and political engagement are essential and must be encouraged, even insisted upon. Tribal members must be involved in tribal affairs at all levels, serving in office, on committees and boards and engaging in community events and activities. Tribal government can create structures to allow for citizen participation or citizens can create ad hoc groups or coalitions to present their issues and provide input; a combination of efforts will likely be required.

Tribes and their members must engage in a sustained effort at all levels to create the form of government and institutions that will allow them to *do it for themselves*. To gain outside support for their efforts, tribes must continue to educate broader society, lawmakers, courts, funders, lenders, schools, states and just about anyone with whom they interact on any level, about their status and responsibilities as governments, about tribal sovereignty and the right of sovereigns to determine the rules and laws that regulate their societies.

C. Tribes Must Take Active Control of Their Assets.

Tribes must take an active approach to decisions concerning their assets and how to use them. Tribes need to map their assets, including land, energy and water, to have a full picture of their assets, their importance to the tribe, their potential uses and how to manage them effectively for the benefit of the tribe. Tribes must complete inventories of such things as leases and royalty agreements and must monitor leases and enforce compliance. Tribes must actively manage their assets in every respect and be fully involved in decisions about their assets. Tribes must do their own assessment of fair market value of leases and agreements. In fact, tribes should keep their own or duplicate sets of records, if possible.

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[26] These points have also been emphasized by others who have studied tribal economic development, such as the Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University, founded in1987, and Native Nations Institute for Leadership, Management and Policy, Udall Center for Studies in Public Policy, University of Arizona, founded in 2001.

Where tribes do not have full control of leases for trust property and resources, tribes must be at the table to influence such things as negotiation of escalation clauses, royalty sharing and buy-out terms. Tribes must refuse to be the passive recipients of BIA negotiated and controlled payments for use and extraction of tribal assets.

Tribes must take control by developing their own theories and strategies for asset-building. Modernization and other mainstream theories of development have fallen short when it comes to protecting, preserving and growing tribal assets; thus, alternative or traditional stewardship models, defined by tribes themselves, must be found. Tribes must be highly and directly involved in individual and tribal asset-building programs in order to ensure cultural fit and consistency with tribal policies.

Tribal economic development departments may wish to draw on historical strengths and traditions, including the tribes' history of commerce and asset management, to guide the development of strategies for building wealth at the tribal, community and individual levels. Development should be consistent with culture and tradition, but tribes must define what development means and requires, and closely monitor development at all stages to insure consistency with tribes' views and policies, as well as compliance with tribal laws and regulations. The tribal definition of development should be reflected in tribal laws and rules that govern and regulate such development. Community development, as well as individual development, must be connected to the development of the tribe/nation and to the preservation and exercise of tribal sovereignty.

Tribes must actively control commerce within their territories or continue to abdicate tribal authority to states, which at worst may be unfriendly and at best may not understand the tribal policies that drive tribal commercial rules and decisions. Implicit in controlling commerce is the requirement of a tribal commercial code and any other codes needed to regulate commercial activities, whether they involve building houses, disposing of sewage, regulating food preparation, transportation, zoning or any activity. The United States Supreme Court has said that tribes retain authority to regulate activity, including non-Indian activity, that "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe" *Montana v. United States*, 450 U.S 544 (1981). Tribes must give this authority meaning through strong government.

Tribes must work to make self-determination more than just the "policy du jour"; tribes must use this federal policy to revitalize their governments and create tribal economies that will be sound into the future, and thereby regain control over their own political and economic destinies.

D. Peer Learning Institutes Should Be Established and Mentoring Should Happen on a Broad Scale.

Peer Learning and mentoring should be supported and formalized so that tribes may receive one-on-one training and guidance from tribes with experience in things such as constitution reform, legislative and regulatory processes, accounting, finance and budgeting systems, integrating cultural practices with economic development and long range planning. This is all akin to what tribes, operating as intact societies, always did – control, retain, increase and leverage their assets in order to build strong tribal communities; but after 517 years of oppression, tribes need assistance in applying what they have always known to recreate systems that will make their communities healthy and economically secure.

Peer learning should be adopted as official tribal and federal policy. Successful tribes can serve as role models and mentors and provide technical assistance providers to tribes who might be just beginning to take more active control of their assets. The recent mentoring relationship between the Southern Ute Tribe and Three Affiliated Tribes concerning energy resources provides a good model to which other tribes may

look. Until tribes build sufficient internal capacity, they must seek out and acquire such "just in time" technical assistance.

Tribes can even help other tribes create individualized models and help train other tribes' technical staff. Peer learning institutes should be developed and supported with tribal and federal funding with the purposes of helping tribes 1) restructure their governments, 2) build capacity, 3) regain control and management of their assets, especially land, water and energy resources, 4) support individual asset-building, and 5) become more accountable.

E. Tribes Must Continue to Build Institutional Capacity in Order to Effectively Control Their Assets.

Tribal leaders must be able to lead, govern and create an environment that fosters economic development. Self-actualization for tribes and their members cannot be achieved until basic human needs are met, including housing, healthy diet, health care, education and jobs, in ways that fit the culture and traditions of the tribal community.

Tribal, federal and other resources must be directed at strengthening tribal government institutions and building all the skills needed for a fully functioning society. In order to build capacity tribes must invest in their human capital to close the education and skill gaps, or continue to suffer with the federal asset stewardship and management that is so often misaligned with tribal cultural values. A workforce must be developed; tribal members must have the skills and knowledge needed at all levels of tribal society. The federal government can play a role, but it must be a support role, not a "do-it-for-them" role.

Tribes and individuals must learn the importance and experience the benefits of budgeting and saving. Tribes must take advantage of every opportunity to help their communities get stronger. For example one barrier to individual and community asset-building is lack of capital and access to loans to buy a house, get training or start a business. Tribes could investigate the feasibility of institutions such as Community Development Financial Institutions (CDFIs), which can provide alternative banking services and products, including loans to help build an entrepreneurial/for-profit sector in reservation economies.

Tribes should invest resources and use their regulatory authority to foster entrepreneurial development in order to give economic and political power to tribal citizens. Individual asset-building will make tribal members less dependent on government services, which will in turn free up tribal resources for other important activities.

F. Tribes Must Decide Themselves Whether to Monetize Their Assets and Monitor the Monetization Process Closely.

Tribes need to be the decision-makers and control whether and which assets are monetized. Tribes must refuse to be the passive recipients of BIA negotiated and controlled payments for use and extraction of tribal assets. Inaction must be a conscious decision, not a default action. Waiting for the BIA to act or find the right opportunity has not worked well for tribes. Where assets have been monetized, tribes should actively monitor the use and income from the asset. Tribes must know what their assets are; they must map their assets so they know who is using, controlling, managing and benefiting from the assets. Tribes must know what laws, regulations and conditions apply to the use and management of their assets.

Tribes, their governments and economic development departments must have a complete inventory of leases and royalty agreements, know what these agreements say and know their rights under these agreements. Tribes must do their own assessment of fair market value of leases and agreements and be

familiar with all their terms and requirements. Tribes should define permissible uses and the value of their assets, whether in monetary, cultural or other terms. Tribes should adopt codes to manage and regulate use of assets. If there are barriers in their constitutions to creating needed laws and codes, then those barriers should be removed. There are many tribal codes that can serve as models. [27]

G. Tribal Think Tanks Are Needed to Promote Tribal Control of Assets Through the Exercise of Tribal Sovereignty.

The point has been made that sovereignty is tribes' most important asset, but as with any asset, it must be used wisely and well. In order for tribal authority to be exercised effectively, and for tribes to endure as sovereign nations, critical knowledge and data are needed to make decisions about tribal assets and how to best use them on grand and small scales. Analyses are needed of the economic, social and cultural value of tribal assets, the ways in which non-Indians benefit from them and how to redirect the benefits to tribal communities. Tribal experts have experience with these questions and issues and can write about these issues, talk about their experiences, as well as share their knowledge and experiences through peer learning and mentoring so that other tribes may benefit.

H. Philanthropy Should Play a Larger Role in Tribal Asset-Building.

The roles of fundraising and philanthropy, including tribal philanthropy, in tribal asset-building must be addressed. Philanthropy should be considered as an asset that will help tribes grow and create more assets. Tribal philanthropy is emerging and will play a critical role in asset-building in Indian Country.

The nonprofit sector can be a competent partner to tribal governments, assisting in performing assessment and oversight functions that that the tribes cannot do for themselves. They do not need to control every detail, but can exercise their regulatory authority over such partnerships in order to preserve tribal sovereignty. Tribes should enact their own nonprofit codes, so they do not remain at the mercy of states' nonprofit laws, which currently may exclude tribes from achieving nonprofit status. One way for tribes to do this is by establishing tribal nonprofits under the existing Internal Revenue Code § 7871, which allows tribes to form their own charitable organizations. Forming a nonprofit organization can be a good way for tribes to protect an important aspect of their tribal sovereignty by exercising choices as to which organizations and activities to fund and promote through nonprofit giving, based on tribal policies.[28]

Tribes can also work effectively with local, regional and national nonprofits such as the Indian Land Working Group, Council of Energy Resource Tribes, Native American Rights Fund and First Nations Development Institute. Such partners can assist tribes in their efforts to inventory, develop, manage and protect their assets and to maximize the benefits from them.

Mainstream philanthropy also serves a role in tribal asset-building. Mainstream philanthropy should support tribal efforts to control tribal assets by supporting the development and implementation of appropriate tribal asset-building models. Mainstream philanthropy should also support tribal nonprofits and tribal charitable organizations. Mainstream philanthropic organizations can also serve a role in supporting the development of projects that model best practices in tribal asset-building. These kinds of support will help to remove barriers and allow tribes to develop strategies and tools for successful tribal asset-building.

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[27] The HoChunk Nation, which has enjoyed economic gains, for example, has a code with ten titles, with as many as 20 sections in each title. http://ho-chunknation.com/?PageId=254 (last accessed March 20, 2009).

[28] See www.firstnations.org for information and materials on First Nations' project researching tribal charities organized under § 7871 and for its work to amend § 7871 of the Internal Revenue Code to clarify tribal charities' status as public charities.

I. Tribes' Success Stories Should Be Shared Broadly.

Tribes' successes need to be detailed and widely shared with each other, federal agencies and funding sources. Any mystery surrounding some tribes' asset-building successes needs to be revealed; success may come from no more than tribes rolling up their sleeves to do the step by step work of rebuilding tribal institutions and infrastructure needed to effectively manage their assets. Sharing the details of tribes' stories will demonstrate that tribes can do it for themselves and will show the internal and external processes tribes engaged in to regain control of their assets. Knowing how tribes worked through the maze of federal laws and regulations, how they dealt with administrative agencies, and how they wended their way through the courts may assist other tribes going through the process. Seeing how the other tribes worked to strengthen their own governments and build capacity seems far more useful than having someone tell tribes what they should do. Tribes' success stories need to see the light of day so that other tribes may learn and apply the lessons from them and create their own building blocks of success.

Tribes' stories should be shared with law and policy makers at tribal, state and federal levels to help educate them and help them formulate or reformulate policies to support effective asset-building strategies for tribes. Funders too need to know these stories so that they can make informed decisions about where the investment of their money can have the most impact for tribes.

Tribes' success stories may not rewrite history to make it more accurate and fair, but it will write tribe's stories going forward, from the perspective of tribes who once again are directing their own destinies.

J. Federal Law and Policy Must Be Changed to Support Tribal Asset-Building and to Give Full Meaning to Tribal Self-Determination.

Federal policy must be changed to respond to the asset-building demands and systemic change critically needed in Indian Country. Federal asset-building policy is focused mostly on building individual wealth. Individual asset-building must continue but it is not enough. Entrepreneurship and asset-building at the individual and even community levels can go only so far. Such asset-building efforts will be limited by lack of institutional support at the tribal level. While individuals may build assets, without a strong tribal economic environment the benefits from these assets may still flow away from the tribal community (as they typically have) into the surrounding non-Indian communities. That is where there are businesses, services, government institutions, regulatory and dispute resolution systems in place. Such infrastructure may not be found or well supported and developed in tribal communities.

Tribes must continue to insist that the United States as trustee follow the strict fiduciary standards that apply when a trustee manages assets for the benefit of another party. Tribes should also have their own fiduciary standards enacted into law. These may not bind the federal trustee, but they would send a clear message that fiduciary conduct in dealings with the tribe should not fall below a certain standard.

Federal policy must support tribes' control of their assets and use of tribal assets to strengthen tribal sovereignty and allow tribes to create a reservation environment in which individual assets can contribute to the tribal community. It is not enough to offer money and technical advice to tribes; the federal government needs to remove the obstacles created by past federal policy and allow tribes to build the capacity they need in order to do it themselves. The federal government must find ways to support these efforts, without intrusiveness.

Conclusion

Today, despite a history of federal policy aimed at the transfer of tribal assets and wealth to mainstream America, many tribes are still asset rich. Yet, tribes continue to have the highest poverty rate and the highest unemployment rate in the nation. Clearly something has been missing: distilled to its essence, the problem is that mainstream theories fail to acknowledge and address the biggest barrier to tribal asset-building—*tribes do not control the use of their assets and therefore do not receive the benefits from them.* Due to the history of federal Indian policy, tribes often lack the infrastructure needed to support asset management and growth. These debilitating problems must be addressed in any asset-building strategy intended to strengthen tribal communities.

The goal of First Nations' Native Asset Watch Initiative and this report is to broaden and deepen the dialog and expand the research concerning how tribes can regain control of their assets, become effective managers and finally receive the benefits from their assets. Tribes must be able to use their assets to create the economic security that will strengthen tribal sovereignty and allow all the aspects of tribal societies to flourish. To insure that happens, more research is needed and more of the tribes' successes need to be shared with other tribes. This report has provided some of that research and shared some of the stories, and by doing so, has tried to give direction and lay a better path to more effective asset-building in Indian Country.

Glossary of Terms

Aboriginal Title/Recognized Title/Fee Simple – "Aboriginal title," also known as Indian title, is the right to use and occupy lands, with the United States holding legal title. "Recognized title" is created when the United States formally recognizes Indian title in a treaty or other document. Taking of recognized title is compensable, aboriginal title is not. "Fee simple" or fee title signifies full ownership of the legal and beneficial title.

Alaska Natives – generally used to refer collectively to Alaska's indigenous groups including Indian, Aleut, Yupik and Inuit peoples.

Allotment – dividing tribal lands into individually held parcels under the General Allotment Act of 1887 (also known as the Dawes Act). The Act was part of the federal policy of assimilation in place from the 1880s through 1934. Tribal land not needed for allotment was thereby freed for non-Indian settlement.

American Indian/Native American/Indians – used interchangeably to refer to all Indian tribes, including state recognized and unrecognized tribes, Alaska Natives, and Native Hawaiians in the United States.

American Indian Tribes/Indian Nations – political entities, not racial groupings, broadly referring to all Indian tribes, including state recognized and unrecognized tribes, Alaska Natives, and Native Hawaiians in the United States. State recognized tribes and Native Hawaiians do not have a government-to-government relationship with the United States.

Assets – all Native assets, broadly defined as including financial, physical, natural, institutional, legal, political and cultural assets, as well as human and social capital.

Asset-building Strategies – First Nations has defined six:
control – increase control by building capacity and skills and political participation
utilize – strengthen ability to use assets
leverage – use assets in a way that attracts additional resources
retain – establish internal controls and regulatory structures to keep assets and benefits
create – use assets to create new assets
increase – expand or add value to existing assets

Federally recognized tribes – federal recognition indicates that a tribe has a government-to-government relationship with the United States, that is, their relationship is based on the political status of tribes as sovereign nations.

Indian trust property – the United States holds the legal title of many tribal and individual assets, and often actively manages the property. Breaches of trust are not always enforceable; tribes must find an enforceable right within governing statutes, and a waiver of the United States sovereign immunity, both difficult and complicated tasks.

Indian Country – 18 U.S.C. 1151 defines "Indian Country" as "(a) all Indian lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights -of-way running through the reservation, (b) all dependent Indian communities with the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the

Indian titles to which have not been extinguished, including rights-of-way running through the same. Within these areas, generally tribal sovereignty applies and state power is limited.

Indian Reservation – land set aside by the federal government for the use, possession and benefit of an Indian tribe or group of Indians. Most reservations were created by a treaty or statute passed by Congress or an executive order. Reservation is often used interchangeably with Indian Country, but Indian Country is a broader construct that includes all Indian reservations, and also dependent Indian communities and allotments held in trust located outside a reservation (Pevar 24).

Plenary power – a court created legal construct originating in the "assimilation" period that refers to the United States' near complete authority over Indian tribes, justified by the "trust" or guardian-ward relationship.

Sovereignty – the inherent authority of a society to govern itself and its relations with other sovereigns.

Tribal Sovereignty – inherent tribal authority to govern, limited in certain respects by Congress. What is not expressly limited remains in the domain of tribal sovereignty.

Trust – generally in private law, a trustee manages property of a trustee, who has equitable interest in the property. The trustee has fiduciary duties of both honest dealing (subjective good faith) and of reasonable competence as measured against good business standards.

Trust relationship – a construct of federal Indian law, under which the federal government is considered to be in the capacity of trustee of Indian tribes. The "trust" is generally thought to have originated in the case *Cherokee Nation v. Georgia*, in which the Supreme Court said, "Their relationship to the United States is that of a ward to his guardian." The Trust broadly entails the legal and moral duty of the federal government to assist Indian tribes in the protection of their lands, resources and cultural heritage. As many courts have maintained, the federal government is to be held to the highest standards of good faith and honesty in its dealings with Indian peoples and their rights and resources.

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