Testimony to the U.S. Commission on Civil Rights[*]

Briefing: "Quiet Crisis: Federal Funding and Unmet Needs In Indian Country, 2016 Update"

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My personal knowledge of American Indians began in the 1950s when I spent my summers on a ranch managed by my uncle near Browning, Montana. During those lazy days of summer, my cousin and I did the things most kids dream of—swimming and fishing in the river, shooting rifles, learning to drive tractors, and, of course, riding horses. Our equestrian skills came from our hero, Francis Calf Looking, a member of the Blackfeet tribe. Little did I know in my youth that the ranch sat in the middle of the Blackfeet Reservation; nor did I realize the poverty gap that separated my family from Francis.

Decades later my professional research returned me to those summer roots, albeit with a much different perspective than that of an adolescent boy. That perspective came when I met a member of the Salish-Kootenai Confederated Tribes living on the Flathead Reservation in Montana. For him, there was no poverty gap. When I asked him how he explained his wealth position including a beautiful home and well-tended pastures and cattle, he responded by saying, "I own this place." That was my first clue that the poverty gap, which has only grown since, is due to an institutional gap.

The link between the poverty gap and the institutional gap is due to the "absence of effective governing institutions" (Cornell and Kalt (1992, 227). This explanation falls under the rubric of "new institutional economics" and argues that institutions—formal and informal, private and collective—either encourage economic growth or stagnation depending on how they channel individual and collective behavior.

[*] This testimony is based on a forthcoming book, *Unlocking the Wealth of Indian Nations,* Terry L. Anderson, ed. (Lexington Books).

Growing interest in institutional economics has shifted attention towards the fourth explanation. The late Nobel laureate Douglass North defines institutions as “a set of rules, compliance procedures and moral and ethical behavioral norms designed to constrain the behavior of individuals in the interest of maximizing the wealth or utility of principals” (1981, 201– 02). In the case of indigenous peoples, such institutions are a combination of rules and compliance procedures that evolved over a long period prior to western contact and of rules and compliance procedures that were imposed by the westerners with whom indigenous people came in contact.

The institutional gap for Native Americans includes both a lack of property rights for Indians to most reservation land and a lack of a rule of law on most reservations, and it is that *institutional infrastructure* is as crucial as physical and educational infrastructure to “unlocking the wealth of Indian Nations.”

The problem created by the lack of property rights is captured best by Manny Jules, former chief of Kamloops Indian Band of the Shuswap Nation who said, “All we are asking for is the same right that other Canadian citizens have: the right to own property.” Without well-defined and enforced property rights to their resources, human and natural, there will be little hope for self-determination or economic development. Research examining the productivity of trust lands, both individual and tribal, documents how trusteeship thwarts investment and increases the costs of land management (see Anderson 1992 and Tierney 2005).

Anderson and Lueck (1992) were the first to systematically estimate the impact of land tenure on the productivity of agricultural land using a cross-section of large reservations. They benchmark the productivity of tribal and individual trust lands against those of fee-simple lands on reservations. When controlling for factors such as the percentage of trust lands managed by

Indian operators and whether the tribe was indigenous to the reservation area, Anderson and Lueck estimate the per-acre value of agriculture to be 85–90 per cent lower on tribal trust land and 30–40 per cent lower on individual trust land. They attribute the larger negative effect of tribal trust land to collective action problems related to communally managed land. In addition to having to overcome BIA trust constraints, agricultural land held by the tribe is subject to common-pool resource management incentives that can lead to exploitation and neglect.

Alcantara (2007) considered the effect of property rights on Canadian First Nation reserves examining customary rights, certificates of possession, and leases. As the name implies, a customary right goes to individuals or families who can demonstrate traditional occupation of a tract of reserve land. Alcantara (2007, 424) concludes that "Unfortunately, members are constrained and indeed discouraged from using their customary allotments in . . . economically productive ways because customary rights lack security of tenure. . . . they [customary rights] are creatures of band councils and are unenforceable in Canadian courts." As with trust lands in the United States, certificate of possession holders "incur a time delay in all of their land transactions" (Alcantara 2007, 425) which in turn lowers productivity. Furthermore, as with trust lands, certificates of possession as well as customary tenure lands cannot be used as collateral in the private finance market. Not surprisingly this restricts private investment on reservations and reserves.

The trusteeship problem on American Indian reservations is made all the worse by "fractionation" of individual trust interests. Indians today typically own fractional interests in individual tracts of land, but their ownership is not like shares in a company, which owners of these shares can buy and sell. Nor does ownership give economic control to an individual since there must be a consensus among all owners regarding the use of a fractionated tract of land. The number of tracts that have over 50 owners more than doubled between 1983 and 1992.

Fortunately, there are some bright spots in Indian Country created when tribes are able to break the bonds of trusteeship. Berry (2009) compares forest management on the Flathead Reservation in Montana with forest management on the neighboring Lolo National Forest. She finds that the Salish-Kootenai Confederated tribes do better fiscally with the tribes earning over $2.00 for every dollar spent and that the national forest just breaks even. On environmental dimensions, she finds that “the tribes balance timber goals for revenue production with non-timber outputs, such as fish and wildlife habitat (also see Anderson 2012).

Task 1—Assist Indian Nations in breaking the bond of trusteeship if a nation wishes to do so. Breaking that bond ultimately means the federal government must stop treating Native Americans as incompetent wards of the state and give them the full rights of every U.S. citizen including the right to own property individually and collectively free of bureaucratic constraints.

The gap created by the lack of a rule of law may be even harder to cross because it requires granting tribal governments the powers they need to provide order for a civil society, but limiting those powers so they do not result in tyranny. The inability of nations to achieve this balance explains, using the title of Daron Acemoglu and James Robinson’s book, “why nations fail.” As the chief commissioner of the First Nations Tax Commission, Manny Jules describes the task for First Nations in Canada, it is “about creating the legal, administrative and infrastructural framework necessary for markets to work on First Nation lands, creating a competitive First Nation investment climate, and using economic growth as the catalyst for greater First Nation self-reliance."

Anderson and Parker (2008) focus on the role of governance institutions in explaining variation in the economic performance of large American Indian reservations by comparing tribes with judicial systems under state authority with tribes under their own authority resulting from P.L. 280. This law, passed by Congress in 1953 and implemented during the 1950s and 1960s, required tribes on approximately one-third of the 81 largest Indian reservations in the United States to turn judicial jurisdiction over to state courts, while the other tribes retained their judicial sovereignty. They found that per-capita income for American Indians on reservations subjected to state jurisdiction grew about 30 per cent more than on reservations not subjected to such jurisdiction. More generally, their finding is consistent with other studies showing that an institutional environment that promotes stable contracting is a necessary condition for economic growth (see, e.g. North and Weingast 1989; Acemoglu et al. 2001).

In this context the funding from the federal government consistent with its fiduciary responsibility to tribes can be most important. In particular, assisting tribes in establishing governments with separation of powers and judicial systems that promote a stable rule of law should be first and foremost. For example, it would be useful for the federal government to assist the National American Indian Court Judges Association in its mission of "securing the needed increases in funding for the daily functioning of tribal justice systems." Without this institutional environment, all other investment in physical infrastructure (roads, schools, internet, etc.) will not result in real Indian Nation sovereignty and self-determination.

Task 2: Assist tribes in developing an institutional infrastructure conducive to the necessary ingredients for entrepreneurship and business development. That infrastructure

varies from tribe to tribe because it must be built on the cultural heritage of each tribe, but it ultimately must include i) a stable judiciary system; ii) separation of powers within tribal governments; iii) taxation authority enabling tribal governments to provide their own public goods; and iv) administrative procedures (e.g. adoption of Uniform Commercial Codes) under which tribal economies interface with other business, financial institutions, and state and local governments.

In summary, the federal government can help tribes most by unshackling them from the trustee-ward relationship. As Crow tribal member, Bill Yellowtail, cautions, this relationship has allowed American Indians to fall into the "victimhood" trap. In Yellowtail's words,

> Dependency has become the reality of our daily existence. Worst of all, generation by generation it becomes what sociologists term learned helplessness—an internalized sense of no personal possibility, transmitted hereditarily and reinforced by recurring circumstances of hopelessness. The manifestations are epidemic: substance abuse, violence, depression, crime, trash.

Despite generations of "learned helplessness," forward thinking Native American leaders understand the importance of self-determination both for individuals and tribes. In 1971 the late Alvin Josephy, defined self-determination as "the right of Indians to decide programs and policies for themselves, to manage their own affairs, to govern themselves, and to control their land and its resources" (quoted in Yellowtail 2006). Yellowtail (2006) clarifies what this means for individuals.

> Indian sovereignty—the autonomy of the Indian person— means re-equipping Indian people with the dignity of self-sufficiency, the right not to depend upon the white man, the government, or even the tribe. This is not a new notion. It is only a circling back to the ancient and most crucial of Indian values— an understanding that the power of the tribal community is founded upon the collective energy of strong, self-sufficient, self-initiating, entrepreneurial, independent, healthful, and therefore powerful, individual persons. Human beings. Indians.

Ultimately, following this path requires sovereignty, something that nearly all Indians say they want and nearly every politician and bureaucrat in Washington pays lip service to giving it to them. Sovereignty means having the authority to make decisions and the willingness to accept the consequences of those decisions. In the short-term, the federal government has a trust responsibility, including funding for reservation infrastructure, which it must live up to. But in the long-term, it should focus on providing the institutions that promote self-sufficiency both for tribes and individual Indians.

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