

## **Land rich and dirt poor: the story of Indian assets**

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### **Introduction**

American Indian tribes are the single largest private land holders in the United States. There are 613 federally recognized tribes with reservations that range in size from less than 100 acres to the 1.6 million acre Navajo reservation. There are 384 federally recognized tribes in the lower 48 states, and 229 Alaska Native Villages; now legally recognized as tribes. In the lower 48 states, reservation lands account for over 55.7 million acres, and if the 42 million acres of Alaska Native lands are added, the aggregate amount would qualify as the fourth largest land base in the United States, smaller than only the states of Alaska, Texas, and California. Along with the timber, grazing and crop lands, other natural resources include 5 percent of the U.S. oil and 10 percent of the gas reserves, 30 percent of the low sulphur coral reserves and 40 percent of the privately held uranium deposits.

For most people anywhere in today's world economy, such assets or major property holdings equal wealth and money. Not so for the American Indian and Alaska Native. Defying the economic canon that assets and wealth are two sides of the same economic coin, today's Native Americans have the highest poverty rate and the highest unemployment rate in the nation.<sup>1</sup> They are the single poorest population in the United States. It can be said, "tribes are land rich and dirt poor."

History now widely recognizes that the economic and political structures of colonial rule converted tribal territories into vast wastelands. Yet what history recognizes, current events for the past six decades tend to ignore: which is to say, the structural features of colonialism persist within the legislative, administrative and judicial processes that continue to govern tribal life. While each tribe in the United States has had a different experience related to treaty making, they all have had starkly similar experiences as it relates to their land, timber, wildlife, water, oil, coal, other natural resources and even intellectual and cultural property. Simply stated, U.S. government policy toward Native Americans on the whole reflects one theme: gain control of tribal assets. Federal Indian law governs the tribal assets, federal agencies administer oversight and manage the assets and any recourse that pertains to beneficiary rights or fiduciary dispensation is locked within the U.S. federal courts.

Over 100 years of congressional legislation demonstrates that a clear, consistent and aggressive pattern exists whereby tribal assets and the wealth derived from such assets have been basically used to bankroll outside political and economic interests. For example, the wholesale dispersal of over 100 million acres of Indian land from tribes to early settlers took place under the 1886 Allotment Act. More recently under the 1996 Indian Gaming Act, hundreds of millions of dollars from tribal gaming revenues has been redirected to state coffers. Those are the same states that historically refused to provide any public services to reservation communities. In this closed and unjust system based upon the concept of plenary power, Congress has systematically removed assets from tribal ownership, reduced tribal control of assets that American Indians and Alaska Natives rightfully own and redirected the benefits to outside interests.

Just as federal legislation regulating Native American tribes methodically removed or redirected their assets so that the economic benefits flow from Native populations to non-Native economies, so too has the administrative branch of

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<sup>1</sup> Youmans (2002). U.S. Census 2000.

government. The majority of assets that remain owned by tribes are by law held "in trust" by the Department of Interior in the Bureau of Indian Affairs (BIA.) Stated another way, the BIA is the self appointed asset manager for tribes. Without the right to hire or fire a high caliber asset manager, tribes watch as billions of dollars of natural resource assets are mismanaged or rather managed for the benefit of non-Native interests. Land is leased below market rates, oil prices are set by companies, and royalties are under-collected – all under the administrative oversight of a government-indemnified agency, the BIA; leaving tribes, unlike any other trust beneficiary without legal recourse. In addition, the BIA 's self proclaimed powers of trusteeship hold that tribes are "wards of the government." This means that beneficiary rights applicable under federal law (such as the Investment Advisors Act of 1940 or the Employee Retirement Income Securities Act of 1974) and the fiduciary guarantees regulating persons who have responsibility for the management of their clients assets do not apply to the federal government. Tribes are forced again to watch billions of dollars in attenuated reparations and lost income be denied by a so-called claims process that is jury rigged and discriminatory. Without control over who their primary asset manager is, the tribes' sole arbiter of fiduciary dispensation is the federal court system.

Here is an excellent explanation of how it happens:

"Deeply imbedded in United States Indian law and policy are discriminatory doctrines that deny American Indians basic security in their homelands and effective control over the use and development of their resources. At its most extreme, United States law permits the unilateral abrogation of Indian treaties and the extinguishment by political act of Congress, of all Indian communal rights, including their right to exist as self-governing indigenous nations. This unique body of law has always been strikingly inconsistent with the United States constitutional system of limited government and enumerated rights. It is also contrary to universally recognized concepts of justice and equality. American Indian and Alaska Native tribes are denied certain important constitutional rights that are accorded to all other groups in the United States. For example, the lands and resources owned by tribes "since time immemorial" – owned by aboriginal title – can be taken by the government for any reason, without compensation and without due process of law. For everyone else in the United States, property may not be taken except for public purpose, with due process of law (a day in court), and with payment of just compensation. Indian tribes and their property are subject to the unique "plenary powers" of Congress with almost no constitutional limits. No one else is subject to such unlimited government power, only Indian and Alaska Native tribes." (R.T. Coulter, Indian Law Resource Center)<sup>2</sup>

United States Indian law should first and foremost uphold basic constitutional rights and support the unique treaty obligations to uphold tribal sovereignty and self-determination. However, in addition to ignoring basic constitutional rights, federal law places American Indian and Alaska Native tribes, all their property and all their affairs, in a state of involuntary, permanent

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<sup>2</sup> Robert Timothy Coulter, Indian Law Resource Center, Washington, D.C., 2003

trusteeship, with the federal government as trustee. The doctrine of trust is not unique to U.S. Indian law. What is unique is the lack of fundamental rights and standards; the same rights and standards found within all other frameworks regulating the relationship between trustee and beneficiary. Emerging from Supreme Court treaty interpretations and rulings, this fundamental historical legal concept – “the doctrine of trust responsibility” – sets the very foundation for a federal agency to be in the business of managing tribal assets.

### **The trust responsibility**

While the doctrine of “trust responsibility” may have a stated claim to manage tribal affairs for the best interests of tribes, this doctrine has in fact been applied in a paternalistic fashion over the past 200 years. As attorney Robert Coulter of the Indian Law Resource Center, has stated: “The Bureau of Indian Affairs...has used the trust doctrine as a means to develop a paternalistic control over the day-to-day affairs of Indian tribes and individuals.”<sup>3</sup> This doctrine of the “trust responsibility” has affected American Indian tribes in two fundamental ways, most prominently by its intrusive pervasiveness as exercised by the federal agencies and the conflicting interests within said agencies. The second important question on “trust responsibility” is about the basic competency of the Department of Interior to serve as the government appointed asset manager over tribal assets.

First, “trust responsibility” for tribes resides with the BIA, and as exercised by the BIA, the role of trustee promotes federal control of Indian assets, especially land and all surface and subsurface natural resources and is all pervasive. Congress, through legislation, has given federal agencies control of the majority of tribal land and natural resources over the past six decades. Most natural resources such as coal, oil, and gas are held in trust by the federal government and managed for the tribes. Although the original purported intent of the trust responsibility was to manage tribal resources for the best interests of the tribes and of Indian people, decades of federal mismanagement have actually led to lost resources and stolen funds. The question to ask is “Who benefits from the tribes’ natural resources?”

Take energy resources as an example: include tribal oil, gas and coal reserves. In the lower 48 states (excluding Alaska and Hawaii), tribes hold about 30 percent of the nation’s coal resources, 10 percent of the natural gas resources, and 5 percent of the oil resources. According to some estimates, 10 percent of the nation’s energy resources lie within the tribal land base, not including renewable energy sources such as solar, wind, and geothermal resources.

The electric power industry is a \$280 billion dollar per year business in the United States. Coal, natural gas, and some oil is used as the fuel for this industry. If you take the 10 percent of energy resource holdings owned by the tribes mentioned above, then one could assume that the total amount of revenue generated from the tribal energy resources should be around \$28 billion per year. Yet in 1999, the annual income to the tribes was only \$.9 billion (\$900 million).

Keeping in mind that the majority of tribal natural resources are held in trust by the BIA in the Department of the Interior helps us understand. Until 1962, the Department of the Interior held that it was not legal for tribes to develop their own mineral properties. In practice, Indian mineral owners were simply leaseholders with little say over such matters as air and water pollution and preservation of sacred sites. The Council of Energy Resource Tribes analysed the issue thus:

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<sup>3</sup> American Indian Policy Review Commission: AIPRC Report to United States Senate, 1977

"It was no longer necessary to move Indians off their land or necessary to send in troops to protect trespass mining; all that was necessary was to induce the Indian landowner to sign a minerals lease, or the government to sign it on behalf of the owner. The location of roads, storage facilities, the use of timber, water, gravel, and the minerals themselves in support of the mining operations become solely the province of the lessee. Until the early 1970s, the only legal role for the Indian mineral owner was that of a passive royalty owner. Under such a scheme, tribes had no opportunity to develop their managerial, technical, or business skills but remained, under the law, wholly dependent upon the integrity of federal institution for the protection of their interests."<sup>4</sup>

Since the doctrine of trust responsibility is not unique to U.S. Indian law it is helpful to understand the regulatory framework for other such trustee beneficiary relationships. Perhaps the most common one is that of the financial markets where asset managers are vested with control over other peoples' money and wealth. Here, Congress has passed an entirely separate body of law that protects the rights, assigns specific responsibilities, assures compliance and balances competing interests between the beneficiaries and the fiduciaries. It is regulated within the Securities Exchange Commission, SEC. There are various ancillary laws and tomes of court rulings, but the principal federal statutes governing asset managers and their beneficiaries are the Investment Act of 1940 as amended ("Advisors Act") and the Employee Retirement Income Securities Act of 1974 as amended (ERISA), and most recently the Sarbanes Oxley Act of 2002. Under federal securities law it is well established that persons in the business of managing the assets of others are deemed the fiduciaries or trustees. Accordingly, the persons whose assets or money are being managed – the investment clients – are the beneficiaries.

Both the Advisors Act and ERISA assign fundamental responsibilities for protection against any conflict of interest, requiring rigorous oversight, prohibiting fraud, complying with stringent internal controls and finally offering full rights to recourse. The Sarbanes Oxley Act goes further. In the wake of the corporate scandals at Enron, World Com, and Global Crossings, Congress rapidly stepped forward to assure the citizens and shareholders alike that a highly transparent and accountable system for trustee and beneficiary interests were the rule of law.

The two most fundamental duties of a fiduciary are the duty of loyalty and the duty of care. Basically the duty of loyalty requires the trustee or fiduciary "to serve the interests of his client with undivided loyalty,"<sup>5</sup> and therefore not "put himself into a position where his own or others' interests may come in conflict with those of his [beneficiaries] clients."<sup>6</sup> Thus the trustee must, thru appropriate disclosure, inform the beneficiaries of any overlapping interests, particularly those that involve conflicting interests. The duty of care requires that fiduciaries execute all transactions in a manner most favorable to the beneficiary, and that they perform their duties with skill, attention, and prudence.<sup>7</sup> In fact, section 404(a) of ERISA goes so far as to require that a fiduciary perform its duties "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of "providing benefits to participants and beneficiaries."

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<sup>4</sup> Council of Energy Resource Tribes, First Decade , Council of Energy Resource Tribes, Denver, CO, n.d.

<sup>5</sup> Kidder, Peabody & Co., 43 S.E.C. 911, 915 (1968).

<sup>6</sup> Arleen W. Hughes, 27 S.E.C. 629, 635 (1948).

<sup>7</sup> 2 Tamar Frankel, THE REGULATION OF MONEY MANAGERS § 13.01[A][2] (2d ed. 2002 Supp.).

The problem is that tribes do not seem to have the same protections. The Department of Interior is rife with conflicting interests between Mineral and Mining Services, National Parks Services, the BIA and private business. There is no guarantee that the assets of tribes are managed in a way that assures arm's length negotiations, prohibits affiliated party transactions or transactions within related parties or assures tribal interests overrule any other interests in the trustee's decisions. Numerous examples of conflicting interests can be found such as the recent Supreme Court case addressing a coal lease negotiated for the Navajo Nation by the Department of the Interior. In 1964 the federal government arranged a lease with Peabody Coal Co. to pay the Navajo Nation 37.5 cents a ton royalty to mine Navajo coal. In a 1978 study by the Interior Department, it showed that the Navajo had received only \$2.7 million for coal, which Peabody resold for \$141 million. After the 1964 lease lapsed, Navajo leaders began pushing to renegotiate. A BIA official suggested raising the royalty to 20 percent, but while Peabody was notified of this suggestion, the Navajo were not. The Navajo claim that as a result, Peabody hired a friend of Donald Hodel, who was then the Secretary of the Interior, to lobby Hodel for a chance to negotiate a lower royalty. No one informed the Navajo of the meeting between the lobbyist and Hodel. When negotiations ended in 1987, the Navajo, under severe economic pressure, settled for a 12.5 percent royalty.

In 1993, the Navajo sued the federal government for \$600 million for breach of trust, claiming that Donald Hodel, as Secretary of the Interior during the Reagan Administration, colluded with Peabody Coal Co. to cheat the tribe out of millions of dollars in royalties. The Navajo tribes lost the case in 2002, when the Supreme Court ruled in favour of the federal government.<sup>8</sup>

More recently, some tribes have taken a more active role in managing the leases for their natural resources. Only one tribe, the Southern Ute (located in Colorado, New Mexico, and Utah) has complete control of their energy resources. Most tribes have had their energy resources leased to outside corporations, mostly owned by non-Indians. The BIA usually negotiates the leases, often without tribal input, and the corporations pay a percent of royalties to the tribes. These royalties range from 12 percent to 25 percent of total revenues earned from the resource. While this is changing, the majority of leases for tribally owned natural resources are granted to non-Indian companies. Recently many lawsuits have emerged that claim the federal government has historically mismanaged these natural resource leases, but it is unlikely that litigated compensation will ever make whole the lost wealth.

### **Courts arbitrate trust**

"Trust relationship" between tribes and the United States government means quite simply that the BIA is the self appointed asset manager for the Tribes. No one in their right mind would want the BIA to manage their assets. Yet because the tribes' trust relationship "resembles that of a ward to his guardian," it means tribes have no say over how their assets are managed, have no control over the revenues generated, and cannot fire the managers of their trusts or estates for mismanagement.

There are numerous examples of mismanagement of tribal leases. The Quinault Reservation, established in 1873, consists of many acres of high quality forest land in western Washington. Forest resources on the tribal lands have been managed since the late 1800s by the Department of Interior, which has sold timber leases and administered the revenues from the sales. In 1971, the Quinault Tribe alleged that the Secretary of the Interior mismanaged the timber lands and owed

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<sup>8</sup> Washington Post, Monday December 2, 2002.

the tribe funds for sale of timber to commercial interests. In *United States vs. Mitchell* and *United States vs. Mitchell II*, tribal members contended that they were entitled to recover money damages for the misdeeds because the Secretary's actions breached a fiduciary duty owed them by the United States as trustee under various statutes. The litigation, which began in 1971, was finally settled in 1989 for \$26 million.<sup>9</sup>

Without going into the specific details of timber production and sales and supposing the BIA forestry management started at Quinalt around the 1890s, then the Quinalt's \$26 million settlement is supposed to cover approximately 114 years of mismanagement and 18 years of attorney fees (or a standard one third contingency). Court tendency when faced with irrefutable mismanagement is to set settlement terms at the very lowest amount. Settlement almost never allows for lost interest or earnings from lost revenues to be included. Often the dollar amount is calculated in market prices at the turn of the century, the 1800s not the 20<sup>th</sup> century. In some cases the court has gone so far as to rule on behalf of the tribe but to deny any compensation based on the extraordinary costs that would be incurred for reparations.

Another case of gross mismanagement surfaced in 1983 when First Nations Development Institute was working with the Saginaw Chippewa Tribe to take their \$18 million settlement for historic land claims out from control by the BIA to invest it for the good of the tribe. It took the tribe four years and special legislation to access their own monies. But they are not alone. Today, there are over 387,000 beneficiaries in the Individual Indian Monies (IIM) accounts system. More than \$300 million are earned annually from agricultural and oil leases, mining and water rights, rights-of-way and timber sales from tribal and Indian lands that all go to the BIA Trust Department in Albuquerque, New Mexico. These monies are collected by the BIA for distribution to the owners. In addition to IIM accounts, there are some 2000 Tribal Trust Accounts, which include per capita annual payments and compensation for rights-of-way and court settlements totalling \$2.3 billion. All in all, these trusts managed by the BIA include about \$3 billion of both the IIM and Tribal Trust Accounts along with the 54 million acres of land and all the oil, gas, uranium, coal, timber, water, farming, ranching and other natural resource leases.<sup>10</sup> Unfortunately, these trusts have been severely mismanaged by the federal government and are the source of a \$137 billion lawsuit against the Department of Interior.

In 2003 the General Accounting Office (GAO) stated, "Management of Indian trust funds has long been plagued by inadequate financial management, such as poor accounting and information systems; untrained and inexperienced staff; backlogs in appraisals, determinations of ownership and record keeping; the lack of a master lease file or accounts receivable system; inadequate written policies and procedures; and poor internal controls. As a result account holders have no assurance that their account balances are accurate or that the trust assets are managed properly."

From uncovering the mismanagement of Tribal Trust Funds, it took almost ten years and eighteen GAO reports to get the Tribal Trust Fund Reform Act of 1994 passed. This legislation attempted to reform the BIA's trust role and responsibility and required the same legal and fiduciary standards as those governing other trustee beneficiary relationships along with similar protections found in such laws as the Advisors Act or ERISA. Both explicitly state that fiduciaries have a duty of

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<sup>9</sup> <http://www.usdoj.gov/osg/briefs/1982/sg.txt>; <http://www.rncclassaction.santa-fe.net/fees3e.htm>

<sup>10</sup> General Accounting Office, *Major Management Challenges and Program Risks: Department of Interior*. GAO-03-104, Government Printing Office, Washington DC, January 2003.

disclosure and reporting.<sup>11</sup> Actually, all federal securities laws have strict reporting procedures that protect beneficiaries and clients by requiring that certain information be given to the SEC. Furthermore, the Advisors Act Rule 204-2 requires that every asset manager keep records, which are routinely inspected by the SEC: journals; ledgers; bank records; bills; bank statements; trial balances; written communications; a list of discretionary accounts; written contracts; records of all transactions; and receipts. The Advisors Act requires that complete financial statements be sent to beneficiaries at least semi-annually. Tribes merely wanted the same protections as afforded other beneficiaries.

Yet nothing changed, and four years later the Native American Rights Fund sued the federal government on behalf of the beneficiaries of the Individual Indian Monies for mismanagement of the trust funds. Eloise Cobell, former consultant to First Nations Intertribal Trust Fund Task Force, became lead plaintiff in a lawsuit to 1) force the government to account for the money it owed individual allottees, and 2) force reform of the federal government's management of the trust funds. In 1999, Judge Royce C. Lamberth ruled that the government was in breach of its fiduciary role as a trustee for the Indian accounts. He ordered the program, including 12,000 backlogged probate cases, to be placed under his jurisdiction for five years so that he could ensure that the Department of Interior complied with his orders. In the spring of 2001, the Department of Interior set up a division called the Office of Historical Trust Accounting. This office issued a report in July 2002 that stated that it would cost \$2.4 billion to do an effective audit on the trust funds, and even this may not produce a usable result.<sup>12</sup> In January 2003, lawyers for the case submitted a historical analysis of the trust fund that revealed that nearly \$137.2 billion dollars may have been stolen, or misallocated since the passage of the General Allotment Act in 1887.<sup>13</sup>

Clearly, the basic principles of asset management and fiduciary standards that are followed by most Americans who own wealth are not the same principles available to Native Americans. Litigation in the Trust Fund case is ongoing, but because the damages to individual Indians is expected to be conservatively in the hundreds of millions of dollars, Congress has attempted to introduce several bills to curtail the litigation. Once again, whether it is through the courts or Congress, the concern seems to be more about limiting the amount of damages owed tribes than fixing the gross incompetencies that created the liabilities in the first place. This will continue to create more liabilities because simply stated, the technical capacity to act as a qualified fiduciary or asset manager is not within the BIA. It is impossible to see how this agency can ever comply with the standards set forth in Trust Fund Reform Act. Better choices to consider for oversight and compliance are those that currently enforce the majority of federal securities law: the Department of Treasury and the Security Exchange Commission, respectively.

### **Outside interests**

During the 1980s, in an effort to promote economic development on Indian reservations, the Reagan Administration encouraged tribes to pursue revenue-generating activities that took advantage of their tribal sovereign jurisdiction. Such income generating activities as cigarette sales and gaming that took advantage of tribes' unique legal status were promoted. As tribes began to use their governmental status as a vehicle for income-generating activities, however, courts were increasingly called upon to clarify the scope of tribal regulatory and

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<sup>11</sup> 29 U.S.C. § 1021 (2003).

<sup>12</sup> Brinkley, J. *The New York Times* Jan 7, 2003.

<sup>13</sup> Brinkley, J. *The New York Times* Jan 7, 2003.

jurisdictional authority. Eyeing profits being generated on Indian reservations, states were eager to impose taxation on tribes that were generating revenue from tobacco sales or gaming.

Tribes can operate tribally owned companies that are exempt from federal taxes, even if the company conducts business off the reservation. In addition, most tribes are not subject to state taxation, and therefore tribal business can reap significant tax savings. The origin of this legal right is an 1832 ruling by Chief Justice Marshall in *Worcester vs. Georgia*. This case declares that state laws "can have no force" on an Indian reservation without the consent of Congress.<sup>14</sup> Chief Justice Marshall referred to tribes as "distinct, independent" entities, stating:

"Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil..."

In certain cases, the rights of Indians on Indian land to refrain from state taxation have been upheld. In 1973 the Supreme Court ruled that Indians who live and work on a reservation do not have to pay state taxes.<sup>15</sup> In addition, Indians who buy goods on their reservation, regardless of whether they buy it from an Indian or non-Indian, do not have to pay state sales tax. While Indians who buy off the reservation pay all relevant state taxes the reverse is not true for non-Indians who purchase goods on the reservation. For example, in 1980, the Supreme Court ruled in *Washington vs. Colville* to allow states the authority to tax cigarette sales to non-Indians, effectively stripping tribes of a profit margin for taxing such sales. In *Rice vs. Rehner*, 1983 the Supreme Court ruled that states could regulate the sale of alcohol by requiring tribes to purchase state permits to sell packaged liquors on the reservation.

The special tax status of tribes continues to be eroded. Ironically, just as tribes are finding ways to develop business enterprises to aid in economic development on their reservation, the states and the federal government are promoting policies to require tribes to share their meager resources. Most court cases have required tribes to enter into compacts, or legal agreements, with states to negotiate payment to states as a result of tribes' commercial activities.

A case study can be found in the state of Oklahoma. Increasing pressure from the state government caused many tribes to enter into compacts to levy taxes on cigarette sales on reservations.<sup>16</sup> Today, tribes with tobacco compacts pay the state the amount of \$.0575 per pack, or a little less than 25 percent of the state excise tax at the wholesale level. The state requires \$.1725 per pack from tribes without tobacco compacts, but does not collect this amount. In 2000, tribes paid over \$8 million dollars to the state in tax on cigarette sales, accounting for 15 percent of the total \$55 million grossed by the state that year (Native Americans account for 12 percent of the population in Oklahoma).<sup>17</sup>

Another example comes from the state of Idaho. In February, 2003, the state legislature of Idaho announced their intention to impose taxation on tribal enterprises and collect cigarette taxes on the four reservations in the state. The

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<sup>14</sup> Pevar, S., *The Rights of Indians and Tribes* (3<sup>rd</sup> ed.), Southern Illinois University Press, Carbondale, 2002.

<sup>15</sup> *McClanahan V. Arizona Tax Commission* 411 us 164 (1973)

<sup>16</sup> *Oklahoma Tax Commission v. Citizen Band of Potawatomi* (1991) ruled that although states can tax sales of tobacco to non-Indians on tribal territory, they did not have the authority to enforce tax collection in Indian Country. However, after years of harassment and political negotiations, many tribes in Oklahoma decided to enter into taxation compacts with the state (Bays 2002).

<sup>17</sup> Bays 2002.

governor, battling a budget shortfall, predicted that sales taxes by tribes on all reservations could add about \$3 million to the states' revenue.<sup>18</sup>

Perhaps the biggest contemporary windfall for states, one that would be similar in today's market to the wealth derived by others from the original 100 million acre Indian land grab back in 1887, is the advent of tribal gaming. As gaming became increasingly profitable, states became more aggressive in their attempts to regulate, tax, or secure tribal gaming profits, and of course Congress complied. As tribes began to recognize the income generating power of gaming operations more and more tribes began to open casinos or other gaming operations. As a result, Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988. The purported intent was to provide a statutory basis for the operations of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. IGRA was also to provide a shield from organized crime and other corrupting influences, and it would establish federal regulatory standards for Indian gaming.<sup>19</sup> The Indian Gaming Regulatory Act specified that funds from gaming can only be used for:

- Funding tribal government operations or programs.
- Providing for the general welfare of the tribe and its members.
- Promoting economic development for the tribe.
- Donating to charitable organizations.
- Helping fund operations of local government agencies.<sup>20</sup>

The Indian Gaming Regulatory Act infringed upon tribal sovereignty, because it required tribes to enter into compacts with states before it could offer certain types of gaming, and it restricted the use of gaming funds. While the legislation clearly indicates that states do not have the right to collect taxes on Indian reservations, the state compacts that tribes must participate in often require that the tribes pay the state a large portion of its revenues. Rarely does Congress place such restrictions on state or local governments, and privately owned casinos have no such obligations.

As a result of state compacts, state governments around the nation are benefiting from revenues earned by gaming enterprises on Indian reservations. In Connecticut two gaming tribes give 25 percent of their slot machine revenue to the state on an annual basis, which amounts to no less than \$160 million per year. In Wisconsin, where 15 Class III<sup>21</sup> gaming facilities exist, tribal gaming creates just over \$68 million in payroll, and almost half of the 4,500 tribal casino employees are non-Indian. Casino employees paid more than \$380,000 in state income tax and \$2.1 million in federal income tax in 1992. A state compact required the Forest County Potawatomi to create a foundation. Thereafter, the Forest County Potawatomi Community Foundation donated a total of \$3.6 million to Milwaukee organizations in 2001, and paid more than \$44.6 million in federal, state and local taxes.<sup>22</sup> In 1998, the state of Wisconsin collected \$83 million in tax and compact payment revenues, with total gains of about 24,400 jobs and approximately \$170 million spent by gaming enterprises on goods and services from Wisconsin vendors.<sup>23</sup> In Minnesota, approximately \$62 million in taxes and payments have

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<sup>18</sup> Indian Country Today, Feb 26, 2003. "Idaho coalition fights state tax bills aimed at reservation sales."

<sup>19</sup> USC, Title 25, Chapter 29, Section 2702. See also, <http://www.millelacsobjibwe.org/facts3.html> (02/26/03)

<sup>20</sup> USC, Title 25, Chapter 29, Section 2710 ((b)(2)(b)(I – v)

<sup>21</sup> Class III gaming enterprise includes highly profitable gaming options such as slot machines and card games.

<sup>22</sup> *Generations*, Forest County Potawatomi Community 2001 Community Investment Report

<sup>23</sup> Source: <http://www.unitedtribesofwisconsin.com> (accessed 02/27/03)

been made to the state, federal and local governments.<sup>24</sup> Nationally, the total estimated impact of Indian gaming in terms of output of final goods and services was approximately \$4.4 billion in 1997.<sup>25</sup>

This push to force tribes to share gaming revenues increased as many states experienced severe budget crises in the early 2000s. In January 2003, the California state government announced that it expected gaming tribes to contribute an annual amount of \$1.5 billion dollars from their gaming revenues. Given the state budget crisis at the time, the state appeared to be using the upcoming state compact re-negotiation to extract significant funds from gaming tribes to help pay down the state's approximate \$35 billion budget deficit.<sup>26</sup> This action was especially upsetting given the state's historical lack of support for some of the poorest tribes in the nation. As of 1998, Indian gaming in California alone contributed approximately \$120 million in state and local taxes, and employed approximately 14,571 California residents, approximately 90 percent of whom were non-Indian.

If the Congressional intent of the IGRA was "to promote economic development, self-sufficiency, and strong tribal governments" then why did the legislation which overturned a century of federal Indian law basically provide the means whereby hundreds of millions of dollars in tribal wealth would get redirected from tribes to states? It is only by understanding the federal policies and actions toward American Indian tribes that led to wealth transfer from Native America to white America that we can understand why it is today that tribes are "land rich and dirt poor." That reality calls into question the American political system itself, which is under pressure to correct these ongoing injustices.

The story so far is one of political action committees, special interest groups, money and power. Votes go to the highest campaign contributor, which historically has never been a tribe. Operating in a much larger political context than specific reservations, outsiders, who include private business interests and certain government agencies, have long had vital interests in tribes' internal affairs. Private business interests include businesses that lease property from the tribe in order to gain access to their natural resources. This includes non-Indian ranchers as well as energy companies. Private business interests also include people who do not operate on the reservation but whose vested interests are affected by the activities of the tribes. These range from powerful organized interests of the energy industries to the southwest concerns who are battling with tribes over water rights, to small businessmen in border towns whose businesses promise to be adversely affected by the development of competing businesses on the reservation.

Like the allotment of the Osage reservation so that non-Indians gain access to their oil or the termination of the Klamath Tribes to sell off their timber-rich land to a paper company, federal policies toward Native Americans have methodically removed or redirected wealth from Native populations to these outside non-Native interests. This has been a primary cause of poverty and the current conditions of underdevelopment that many tribes find themselves in today. Tribes are the

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<sup>24</sup> Source: Minnesota Indian Gaming Association, <http://www.mnindiagaming.com> (accessed 02/27/03)

<sup>25</sup> Analysis Group/Economics Inc., *Economic and Fiscal Benefits of Tribal Government Gaming*, July 1, 1998, source: [http://www.cniga.com/facts/research\\_detail.php?id=8](http://www.cniga.com/facts/research_detail.php?id=8) (accessed 03/09/03)

<sup>26</sup> Anthony R. Pico, *The California Budget Crisis: What's Fair is Fair*, The San Diego Union Tribune, February 19, 2003. ([http://www.signonsandiego.com/news/uniontrib/wed/opinion/news\\_mzlel9pico.html](http://www.signonsandiego.com/news/uniontrib/wed/opinion/news_mzlel9pico.html)) (accessed 02/24/03)

See also: Josh Richman, *Splitting the Pot: Indian Casinos Could Help Ease the Budget Deficit If the State and Tribes End Up...*, Tri-Valley Herald, February 24, 2003 (<http://www.trivalleyherald.com/Stories/0,1413,86~10669~1169098,00.html>) (accessed: 02/24/03)

"miner's canary" in a political process that needs fundamental correction. This country cannot afford to hold up the rights of a few at the expense of the rest. Federal policies toward Native Americans on the whole should reflect one theme: tribal control of tribal assets.

With this as the starting point, tribes are merely asking that their assets be protected, that the wealth generated from their assets belongs in whole to the tribe, that they are afforded the same beneficiary rights as others and that the Indian doctrine of trust responsibility adhere to the same fiduciary standards found in the majority of other trustee relationships.

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Pull quotes:

Defying the economic canon that assets and wealth are two sides of the same economic coin, today's Native Americans have the highest poverty rate and the highest unemployment rate in the nation.<sup>1</sup> They are the single poorest population in the United States.

Simply stated, U.S. government policy toward Native Americans on the whole reflects one theme: control of tribal assets. Federal Indian law governs the tribal assets, federal agencies administer oversight and manage the assets and any recourse that pertains to beneficiary rights or fiduciary dispensation is locked within the U.S. federal courts.

Since the doctrine of trust responsibility is not unique to U.S. Indian law it is helpful to understand the regulatory framework for other such trustee beneficiary relationships. Perhaps the most common one is that of the financial markets where asset managers are vested with control over other peoples' money and wealth.

It is impossible to see how this agency [BIA] can ever comply with the standards set forth in Trust Fund Reform Act. Better choices to consider for oversight and compliance are those that currently enforce the majority of federal securities law: the Department of Treasury and the Security Exchange Commission, respectively.

Perhaps the biggest contemporary windfall for states, one that would be similar in today's market to the wealth derived by others from the original 100 million acre Indian land grab back in 1887, is the advent of tribal gaming.

If the Congressional intent of the IGRA was "to promote economic development, self-sufficiency, and strong tribal governments" then why did the legislation which overturned a century of federal Indian law basically provide the means whereby hundreds of millions of dollars in tribal wealth would get redirected from tribes to states?

This country cannot afford to hold up the rights of a few at the expense of the rest. Federal policies toward Native Americans on the whole should reflect one theme: tribal control of tribal assets.

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<sup>1</sup> Youmans (2002). U.S. Census 2000.