Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market

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ACCREDITED INDIANS: INCREASING THE FLOW OF PRIVATE EQUITY INTO INDIAN COUNTRY AS A DOMESTIC EMERGING MARKET

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Indian Country is America's domestic emerging market, and as in a number of emerging markets, many successful businesses in Indian Country are starving for expansion capital. The US Treasury estimates that the private equity deficit in Indian Country is $44 billion. While the handful of wealthier tribes might be logical investors in private equity funds deploying capital in Indian Country, the existing securities laws present a significant impediment. In particular, Regulation D of the Securities Act of 1933 does not treat tribes as "accredited investors," thus denying those tribes the ability to participate in the private equity market. Since there is no principled reason to exclude tribes from the list of accredited investors, this article makes the case for extending accredited investor status to tribes.

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INTRODUCTION

While discussions of emerging markets usually focus on economic development in third world countries, most Indian tribes have an economy on par with those same countries. Extensive land bases, spread out communities, and homesteads mired in one long-standing poverty cycle characterize most reservations.[1] Just as with other emerging markets, the need for economic development in Indian Country[2] remains acute and affects nearly every aspect of reservation life.

Contrary to popular belief, gaming does not provide a significant economic stimulus for most tribal economies. Most of the more than 560 federally recognized Indian tribes[3] do not have any form of gaming operations,[4] and of those that do, only a small handful generate significant revenues.[5] While a small number of tribes near major metropolitan centers have started successful gaming enterprises, hundreds of tribes have not entered the gaming industry, and many that have participated actually

[1] *Entrepreneurial Sector Is the Key to Indian Country Development*, INDIAN COUNTRY TODAY, Sept. 6, 2002, at A2.

[2] 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.

[3] *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 70 Fed. Reg. 226, 71193 (Nov.25, 2005).

[4] According to the National Indian Gaming Association, only 224 tribes have gaming operations of any kind as of 2005. *See* "An Analysis of the Economic Impact of Indian Gaming in 2005," p. 2, National Indian Gaming Association (available at http://www.indiangaming.org/NIGA_econ_impact_2005.pdf).

[5] *See* NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT, 2-10 (1999) *available at* http://govinfo.library.unt.edu/ngisc/reports/2.pdf ("The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.")

operate casinos located far from population centers.[6] Thus, the economic benefits of gaming are not universally distributed throughout Indian Country. The unemployment rate, for example, hovers around 50 percent for Indians who live on reservations, nearly ten times that for the nation as a whole. Almost one third of American Indians live in poverty.[7]

Because small business is the primary driver of much of the US economy, an increase in small business activity is a rational step towards improving employment levels and other aspects of reservation economies. Even when Indian Country businesses are initially successful, however, lack of access to expansion capital, particularly equity capital, can severely constrain their ability to grow and create jobs. The following two examples illustrate the problem.

Native American Natural Foods, of Kyle, South Dakota, has experienced both explosive growth and the frustration of capacity constraints. Their primary product, the Tanka Bar, is a bison meat and cranberry energy bar based on traditional energy food that is finding itself on shelves in stores all over the country.[8] Demand for the Tanka Bar has increased so rapidly that the company's founders, Mark Tilsen and Karlene Hunter, have been struggling to set up enough production capacity to keep up.[9]

The philosophy behind the Tanka Bar is multifaceted. Its creators aim for economic development for the Lakota Pine Ridge Reservation, restoration of traditional diet to Native American lives, assistance to bison ranchers looking for meat markets, and a brand name to become a household name, opening the way for future endeavors of Native American Natural Foods.[10] While numerous opportunities for national distribution have been offered, the Tanka Bar operation lacks adequate production capacity and cannot produce enough bars to meet existing demand.[11]

Another initially successful Indian Country business that desperately needs an equity infusion in order to expand is Sister Sky, a bath and body products business created by sisters Monica Simeon and Marina

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[6] *See* Donald L. Barlett and James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002.

[7] *See, e.g.*, NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: FINDINGS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT (ECLS-B) 3 (2005), *available at* http://nces.ed.gov/pubs2005/2005116.pdf.

[8] Daly, Dan. "Tanka Bar maker scrambles to meet soaring demand." *The Rapid City Journal*. January 19, 2008. *available at* http://www.rapidcityjournal.com/articles/2008/01/19/news/top/doc47903fee8b270243114.

[9] http://www.tanka.com

[10] Daly, *supra* at n 8.

[11] *Id*.

TurningRobe.[12] The company sells bath and body products to hotels at Native gaming resorts and operates an online products site.[13] Founded in 1999, Sister Sky's revenue in 2007 was over $550,000, up from $225,000 in 2006.[14] With so much success and good reception of their products, Sister Sky would like to expand into retail with specialty shops in casino resorts.[15]

Manufacturing and logistics, however, are two of Sister Sky's greatest challenges.[16] The company has quickly outgrown its $100,000 production line on the Spokane Reservation in Washington State, and although they might be able to self finance a new headquarters in about five years, their current capacity constraints are severely hindering their ability to grow their business and create new jobs.[17]

Sister Sky and Native American Natural Foods are just two examples of solid, well-run Indian Country businesses that are starving for private equity to meet their expansion needs. A logical source for the capital necessary to increase small business activity in Indian Country would be from the small number of tribes that have reaped significant profits from Indian gaming. Many of the wealthier tribes feel an obligation to invest back into the poorer areas of Indian Country, but historically the only mechanism of deploying capital has been through direct investment. Many tribal councils, however, have neither the necessary experience to appropriately evaluate such investments nor the time to thoroughly examine numerous direct investment opportunities. Furthermore, direct investment by only a handful of wealthy tribes will not solve the overall private equity gap in Indian Country.

The logical alternative would be for the tribe to deploy equity capital in the same way as other wealthy individuals or corporations do: investing in a private equity or venture capital fund where financial professionals can evaluate the various businesses and select the best of those opportunities in order to maximize investment returns. Such funds, which include venture capital funds, provide financing for early- and late-stage private companies. These funds raise their capital from third-party investors seeking high returns based on both the risk profiles of the companies and the near-term illiquidity of these investments.[18] Unfortunately, wealthy tribes have not been able to participate in private equity because, under Regulation D ("Reg

[12] Gray, Patricia. "Conditioning for growth." December, 3, 2007, *available at* http://www.money.cnn.com/2007/12/03/smbusiness/sister_sky.fsb

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *See* Roger Leeds and Julie Sunderland, *Private Equity Investing in Emerging Markets*, 15 J APPLIED CORP FINANCE 8 (2003).

D") of the Securities Act of 1933,[19] Indian tribes are not included in the list of "Accredited Investors."

Reg D specifies rules governing the selling of securities by private companies and exemptions from Federal and state securities registration requirements. Small Business Investment Companies and other small private equity firms regularly avail themselves of the so-called "Reg D

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[19] Rule 501(a) of Regulation D of the Securities Act of 1933 states that an "*Accredited Investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

1. Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;
2. Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
3. Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;
4. Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;
5. Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;
6. Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
7. Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii);
8. Any entity in which all of the equity owners are accredited investors."

exemption." While there are a number of pathways through which a private equity firm can avail itself of this filing exemption, as a practical business matter, the pathway most commonly followed and looked to by successful firms is to offer their securities only to accredited investors.

Rule 501(a) of Reg D defines who is or is not an accredited investor within the meaning of the Reg D exemption. Private equity funds strongly prefer to sell securities to accredited investors because only under this scenario are the companies assured of being in complete compliance with Federal and State securities laws.[20] While a private company may sell its securities to categories of investors other than accredited ones, these alternative scenarios create significant legal complexities and business risks that increase the costs of raising capital (e.g., risk premiums must be paid to investors, as well as much higher legal fees and more detailed disclosure documents).[21]

As a general rule, securities lawyers advise startup private equity funds to restrict the sale of securities (i.e., raise their "blind pool" of capital) to accredited investors, given the high risk nature of equity investments.[22] In short, a private investment firm that must raise its capital from non-accredited investors will pay higher costs for these funds.

While some of the current federal regulations and policies that harm tribal economies are a result of overt hostility towards tribes,[23] this article suggests that the exclusion of tribes from the category of accredited investor results from mere oversight, or "benign neglect." Nevertheless, the impact of this benign neglect has been devastating. Private enterprise in Indian Country is starving for capital, as the equity investment gap in Indian Country is $44 billion according to the US Treasury Department.[24] The tribes who would be the primary candidates to help remedy this situation are effectively barred from doing so. It is also logical to assume that the lack of tribal investment in Indian Country's emerging economy creates some degree of hesitation among non-Indian investors. As such, private enterprise in Indian Country is unable to get past the tipping point created by the exclusion of tribal investment capital and the concomitant reluctance of non-Indian investment capital.

I encountered this tipping point first hand in 2005 when I joined the board of Native American Capital, the first ever native-owned, Indian

[20] "Policy Briefing: Native American Tribes Require Reg D Change." Native American Capital, LP, available at http://www.sec.gov/rules/other/265-23/nac020306.pdf.

[21] *Id*.

[22] *Id*.

[23] *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N. C. L. REV. 1009 (2007)

[24] CDFI study

Country focused, private equity fund. In addition to the Reg D hurdle, the tribes wanted to follow Wall Street's lead as they began to explore private equity, but Wall Street, cognizant of the handful of wealthy tribes, repeatedly asked, "Where is the tribal investment."

Surprisingly, the regulatory change that could potentially push Indian Country past this private equity tipping point was simple and straightforward: amend Rule 501 of Reg D to include federally recognized Indian Tribes and their instrumentalities as accredited investors. The challenge, however, was to get such a proposed rule change on the agenda of the SEC. Working with my colleagues at Native American Capital, we developed a position paper that was submitted to the SEC in 2006. [25] We also began discussions with the SEC on the issue,[26] and we alerted the National Congress of American Indians (NCAI) to the need for a change. NCAI then in turn asked me to draft a "Red Paper,"[27] based in part on our original position paper, for presentation at the National Native American Economic Summit in Phoenix, Arizona in May 2007. This article is the final written evolution of those prior efforts on the Reg D issue.

The intention of the Summit was to set the Bush Administration's Indian Country agenda for its final two years. Not surprisingly, proposals that were revenue neutral or, better yet, revenue enhancing, were of particular interest. Augmenting the position paper with an economic model that showed that amending Rule 501 would actually be revenue enhancing, my proposal was one of the ones that made it to the short list of recommendations.[28]

In part because the groundwork had already been laid, the SEC quickly responded to the Summit recommendation by incorporating my proposal into a larger set of amendments to Reg D.[29] The comment period closed on October 9, 2007, with no comments opposing the inclusion of tribes as accredited investors.

While legal scholars always hope that what we write has the potential to influence policy and make a difference in the world, this article is in the unique position of having been a major factor in a significant policy change while still in working paper form. This expanded version recounts the

[25] "Policy Briefing: Native American Tribes Require Reg D Change." Native American Capital, LP, available at http://www.sec.gov/rules/other/265-23/nac020306.pdf.

[26] See email exchange between Gavin Clarkson, Joe Falkson, and Gerald J. Laporte, Chief, Office of Small Business Policy, Securities and Exchange Commission.

[27] As opposed to a White Paper. *See* Gavin Clarkson, "Capital and Finance Issues," *available at* http://www.ncai.org/ncai/econpolicy/CapitalandFinancePapers.pdf

[28] Department of Interior and National Congress of American Indians, National Native American Economic Policy Report of 2007, page 14 (*available at* http://www.ncai.org/ncai/econpolicy/Summit_Policy_Report_Fnl2007NS.pdf)

[29] 72 FR 45126, August 10, 2007

substance of the policy and economic arguments that I and others made, while also providing some additional background and context.

Part I of this article makes the argument for viewing Indian Country as an emerging market, detailing the challenges that both tribes and tribal members face when seeking to access the capital market, either for debt or for equity. For those readers unfamiliar with federal Indian law and policy, Part II of this article discusses the nature of Indian tribes and their relationship to the federal government, highlighting the origins of federal Indian policy. Part III focuses on one particular aspect of that policy, economic development, and examines the process of business formation in Indian Country, including the role of Community Development Financial Institutions ("CDFIs") in the initial startup phase of entrepreneurial development. This section also examines the role of private equity and its potential role in providing expansion capital for Indian Country businesses. This section concludes by detailing the interplay between private equity and the securities laws, focusing in part on the history of the accredited investor standard. Part IV presents the various policy and economic rationales for treating tribes as accredited investors that ultimately succeeded in bringing about the desired policy change. The article concludes with a brief exploration of related topics for future research.

I. INDIAN COUNTRY AS AN EMERGING MARKET

Extremely low socio-economic factors often burden tribal communities including low educational achievement,[30] high poverty,[31] and low per capita income.[32] The unemployment rate hovers around 50% for Indians who live on reservations, nearly ten times that for the nation as a whole. Almost one third of American Indians live in poverty.[33]

For many tribes the only source of capital to address these problems is limited to grants and other assistance from the federal government, but such funds are often insufficient to address the myriad responsibilities facing tribal governments.

Gaming activity does not provide sufficient funds to meet the needs of

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[30] RAYMOND C. ETCITTY, ADVISORY COMM. ON TAX EXEMPT AND GOV'T ENTITIES, TRIBAL ADVICE AND GUIDANCE POLICY II-7 (2004), http://ftp.qai.irs.gov/pub/irs-tege/act_rpt3_part2.pdf.

[31] The average percentage of American Indians living in poverty is 25.67%, compared 12.38% for the general population. See U.S. Census Bureau 2000.

[32] Per capital income for American Indians is $12,893.00, compared to the overall U.S. average of $21,587.00. See U.S. Census Bureau 2000.

[33] *See, e.g.*, NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: FINDINGS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT (ECLS-B) 3 (2005), *available at* http://nces.ed.gov/pubs2005/2005116.pdf.

all tribal governments. As Elsie Meeks, Executive Director of First Nations Oweesta Corporation, stated before the Senate Indian Affairs committee, "Many Americans seem to assume that Indian gaming has 'solved' the problems created by poverty in Native communities. However, … gaming has been a boon to only a small number of tribes and many Native people, regardless of income, still lack the basic resources to protect their financial future (even if their governments own profitable enterprises.)"[34]

All too many tribal governments lack the ability to provide the basic infrastructure most US citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity, and telephone services that come with a modern home. According to the US Census Bureau, approximately 20% of American Indian households on reservations lack complete plumbing facilities, compared to 1% of all US households.[35] About 1 in 5 American Indian reservation households dispose of sewage by means other than public sewer, septic tanks, or cesspool.[36] The Navajo reservation is the same size as West Virginia, yet it only has 2,000 miles of paved roads while West Virginia has 18,000 miles.[37] Investors and employers, even in the most distressed inner cities of the United States, take roads, telephones, electricity, and the like for granted. The absence of such basic infrastructure from large portions of Indian country poses a daunting barrier to tribal leaders' attempts to attract new private sector investment and jobs.

Such realities highlight the importance of stimulating economic development to create economic opportunity for tribal members. Many scholars, investors, and tribal officials charged with developing their economies are well aware that access to capital for tribes and individual Indian entrepreneurs is a significant and pressing problem. The unanswered question is one of capital formation: How do Indian Country businesses obtain the necessary capital? The answer should be to access the capital markets in the same way that non-Indian businesses do to finance their own economic activities, but as this article will demonstrate, severe impediments to a level playing field continue to plague Indian Country.

Although the primary focus of this article is increasing the flow of equity financing into Indian Country, an examination of the challenges associated with debt financing is certainly relevant. The next two sections

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[34] Testimony of Elsie M. Meeks, Oversight Hearing on Economic Development, May 10, 2006.

[35] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE HOUSING OF AMERICAN INDIAN ON RESERVATIONS - PLUMBING., (1995) (SuDoc # C3.205/8:95-9), *available at* http://www.census.gov/apsd/www/statbrief/sb95_11.pdf.

[36] *Id.*

[37] Michael J. Kurman, *Indian Investment and Employment Tax Incentives*, 41 FED. B. NEWS & J. 578 (1994).

examine those challenges, first by tribes in terms of issuing bonds, and second by individual tribal members in terms of accessing bank debt. Parts C and D then examine more fully the challenges associated with equity capital in Indian Country and the concomitant impact of the $44 billion private equity gap.

A. Tribal Bond Challenges

One possible avenue to stimulate economic development is for tribal governments to issue economic development bonds that would both directly and indirectly benefit businesses on their reservations. An earlier article[38] pointed out, however, that the Tax Code facially discriminates against tribes and makes such bonding impossible. In addition to highlighting the inability of tribes to issue economic development bonds, that article pointed out that upwards of $50 billion in capital needs go unmet each year in Indian Country. These needs occur in such vital sectors as infrastructure, community facilities, housing, and enterprise development, in part due to the restrictions imposed on tribal access to the capital markets, specifically the ability of tribal governments to issue tax-exempt debt. Section 7871 of the Internal Revenue Code requires tribal tax-free bond proceeds to be used only for "essential governmental functions," a restriction not applicable to state and municipal bonds. Section 7871(e) further limits the scope of available tax-exempt bonding to activities "customarily performed by State and local governments with general taxing powers" without providing any guidance as to when a particular activity becomes "customary" for a non-tribal government.

That article also detailed how these restrictions have severely limited tribal abilities to access the capital markets. Although American Indians make up more than 1.5% of the population, tribes issued less than 0.1% of the tax-exempt bonds between 2002 and 2004. These restrictions harm the poorer tribes the most, as the differential between tax-exempt and taxable interest rates often determines the feasibility of a project. Without access to tax-exempt rates, poorer tribes simply cannot afford the debt service required to address glaring economic and infrastructure deficiencies.

That article also demonstrated that tribal governments are victims of a disproportionate number of enforcement actions by the Internal Revenue Service ("IRS"). The IRS audits less than 1% of the tax-exempt municipal offerings each year, but direct tribal tax-exempt issuances are 30 times more likely to be audited within four years of issue than cities and states. In addition, 100% of tribal conduit issuances have been or are currently being challenged by the IRS. The ambiguity of the statute has led to a number of

[38] *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N. C. L. REV. 1009 (2007)

IRS enforcement actions that simply would not have happened had the issuer not been a tribe. In each of these cases, the tribes financed activities that had previously been routinely financed by state and local governments without any challenge from the IRS. That article concluded that tribal governments should have the same tax-exempt bonding authority as their state and local counterparts, and that expansion of tribal bonding authority would increase federal revenues. Fortunately, like this article, that body of research has had some impact, as legislation was introduced[39] to remedy these restrictions following the presentation of the research to the Senate Finance Committee[40] and subsequent publication.[41]

B. Tribal Member Debt Financing Challenges

As daunting as the challenges seem for tribal entities to obtain debt financing, the challenges are even greater for individual tribal members to obtain debt financing for their entrepreneurial ventures. The Native American Lending Study conducted by the US Treasury Department found that 86% of Indian Country communities do not have a single financial institution within their communities, and members of 15% of Indian Country communities must travel more than 100 miles to reach a bank or ATM.[42] Additionally, half of the financial institutions providing any service to Indian Country only provide ATMs and personal consumer loans, not business loans.[43]

Many banks are skeptical of doing business in Indian Country because they see it as a place where they will not be able to enforce the contracts made with tribes and members and will instead lose their money.[44] For example, 66% of non-tribally affiliated financial institutions accessible to reservations do not offer start-up business loans on or near the reservations.[45] Seventy-four percent do not offer business microloans; 71% do not offer small business loans; and 80% do not offer larger business

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[39] *See* S. 1850, Tribal Government Tax-Exempt Bond Parity Act of 2007, introduced in the 110th Congress.

[40] *Encouraging Economic Self-Determination in Indian Country: Hearing Before the Subcomm. on Long-Term Growth and Debt Reduction of the S. Comm. on Finance*, 109th Cong. 1 (2006) (statement of Gavin Clarkson, Assistant Professor, University of Michigan School of Information, School of Law and Native American Studies) *available at* http://www.senate.gov/~finance/hearings/testimony/2005test/052306testgc.pdf.

[41] *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N. C. L. REV. 1009 (2007)

[42] Native American Lending Study, p. 14

[43] Native American Lending Study, p. 14

[44] Richard J. Ansson, Jr., & Ladine Oravetz. *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Development* 11 KAN J. L. & PUB. POL'Y 441 (2001).

[45] *Id*.

loans.[46]

The lack of adequate financial institutions poses significant challenges for Indian Country businesses when they seek funding. The Native American Lending Study included a financial survey, and more than 60% of survey respondents stated that business loans were either “difficult” (37%) or “impossible” (24%) to obtain.[47] The level of difficulty increased for business loans over $100,000, with nearly 70% rating such loans as difficult or impossible to obtain. Such difficulty may be due, in part, to the fact that “low levels of home-ownership deny [tribal members] the most common form of collateral to obtain loans for purchases or small-business startups.”[48] In fact, throughout Indian Country, as of 1999 there were only 471 home mortgages.[49] The Study also found that most tribal members “wishing to start a business, purchase a home, or make another large purchase are often not able to qualify for the loans that they need.”[50]

C. Indian Country’s Equity Investment Gap

In addition to the Native American Lending Study, the Treasury Department also commissioned a companion study to examine private equity in Indian Country. That study found that Indian Country is estimated to have $10 billion in equity capital,[51] which is only 0.03% of US total equity.[52] Given the current economic conditions in Indian Country, which are substantially below average for the United States as a whole, Indian Country faces at least $10 billion equity investment gaps.[53] The gap between the current Indian Country equity level and the level that should exist based on Indian Country’s size relative to the entire United States is $44 billion.[54]

This huge private equity gap will not be filled until additional private equity sources are brought to bear, but most venture capitalists and angel investors are either unaware of or unwilling to travel to examine Indian Country venture opportunities.

The Native American Lending Study (“The Study”) found that:

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46 *Id.*
47 Native American Lending Study, p. 2.
48 Native American Lending Study, p. 31
49 Native American Lending Study, p. 31
50 Native American Lending Study, p. 31
51 CDFI Equity Study, p. 55.
52 CDFI Equity Study, p. 7.
53 CDFI Equity Study, p. 55.
54 *Id.*

> Both angel investors and venture capitalists invest locally. Location is important to 94% of angel investors, with over 90% of angels investing within a half day's travel time. Sequoia Capital, a leading venture capitalist, uses the bicycle rule. If they cannot ride their bicycle to the firm under consideration, they will not invest. Generally, their radius is between 30 minutes and a day's travel away. About 30% of venture capital investments are in the same metropolitan area as a venture capitalist's office. This is practical due to the hands-on nature of angel and venture capital investing. Venture capitalists have 5-10 portfolio companies to monitor and advise each, while angels may only have one or a few, but prefer to spend more time with them.
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> Venture capitalists will even require funded firms to relocate close to the venture capitalist's office as a condition of funding. Many international firms have moved to Silicon Valley for this reason, and firms in smaller cities in the U.S. may have trouble retaining their high-growth firms. Some venture capitalists will go further to obtain more deal flow. Net importing metro regions often receive close to half of their venture capital from venture capitalists not in their metropolitan area.
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> Both business angels and venture capitalists obtain their deal flow through a network of trusted sources, most or all of whom are local. They tend to also be networks of people who move in the same circles. As Eric Schmidt, CEO of Novell confirms that it is a myth that anyone can raise venture capital without the right contacts, “Yeah, right - anybody can raise capital for an Internet company if they know the same guys that I do.” Native Americans residing in Indian Country are not usually plugged in to these networks because of distance and operating in different social and business groups. The next best way to approach potential investors is through a deal-structurer or matchmaker who is trusted by both sides. But, again, Indian Country business people may not know these sources either for the same reasons. Investors do make some investments from `over the transom' or from people previously unknown to them. But these have to be extraordinary opportunities to catch their eye and account for less than 5% of total venture funding.[55]

The concentration of venture capital is high and is not well matched with the states with the highest concentrations of Native American firms or population. The Study found that the top 10 states for populations of Native Americans and their firms often had less than 1% of venture capital available.

Although the third-world economic conditions in most of Indian Country present daunting challenges, the economic opportunities in Indian Country suggest that investment in Indian Country’s emerging market could yield significant returns. While private equity investment is the least used

[55] *Id*. p. 31.

form of financing in Indian Country, as the next section demonstrates, Indian Country is one of the more promising domestic emerging markets.

D. The Economic Importance of Indian Country

Indian Country's population has grown 50% faster than the US population overall over the last five years and is expected to grow at double the US rate by the year 2035.[56] Native American-owned businesses proliferate at seven times the growth rate of all firms in the US and grow sales at more than double the US rate.[57] Indian-owned business revenues grew up to 55% a year from 1987-1993 and are expected to continue to grow at healthy double-digit rates. Indian Country's buying power is projected to almost double in the next decade.

Virtually all job growth in the US has come from small business during the 1990s, and minorities represent the fastest growing segment of the workforce. This rapid minority and Native American growth contrasts to the much slower annual growth rate of 5-10% for all US businesses, reinforcing the importance of Native American businesses as an engine of growth.

Further growth in Indian Country can enhance this Native American and small business growth even further. As historical sources of US economic growth become less important, it will become increasingly important to the growth of the overall US economy to stimulate domestic emerging markets. Indian Country is one of those domestic emerging markets that collectively will serve as new engines of US economic growth.

The buying power of American Indians was estimated at $35 billion in 2001.[58] Given that half of Indians live off-reservation, the Treasury Department estimates that Indian Country's buying is approximately $17 billion.[59] Revenue in Indian Country is estimated at $25 billion from Indian Country businesses and trust assets.[60] An additional $9 billion in revenue comes from the federal government,[61] resulting in $34 billion in total Indian Country revenue.

According to the Treasury Department, bridging the first $10 billion of the equity investment gap would produce an additional $16 billion in GDP for Indian Country, increasing it by 76%. The GDP increase would occur as enough equity is invested to close the gap over probably about 15-20 years.

This additional GDP would translate to approximately $10,000 more in per capita income, bridging the roughly $9,000 per person gap in income

[56] Cite
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between American Indians and the US average, and would lift more people in Indian Country out of poverty.

Bridging the equity gap should also produce roughly 600,000 new jobs created or retained over the next 15-20 years. This improvement would more than double the current level of employment in Indian Country and would employ the growing Indian Country workforce over the next 15-20 years at a level comparable to the US overall.

The Treasury Department estimates that if equity capital investment in Indian Country were increased to a level comparable to the rest of the US, the GDP benefit would increase fourfold.[62]

II. A Brief History of Tribal Law and Policy

The notions that led to the various restrictions of tribal economic development, including the omission from the list of accredited investors, are not new and trace back to the origins of the United States itself. In *Cherokee Nation v. Georgia*,[63] the first Supreme Court opinion involving an American Indian tribe,[64] Chief Justice Marshall wrote "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[65] A half century later the Supreme Court would opine that the "relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[66] Even today, Supreme Court justices find that "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."[67] The concept that so confounds both Congress and the courts is that, on one hand, Indian tribes are separate sovereigns, "domestic dependent nations"[68] that are ensconced as a "third sovereign"[69] in the federal framework. On the other hand, Congress has plenary authority over Indian tribes.[70] While the fabrication of this plenary

[62] Cite to CDFI study

[63] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[64] An earlier Supreme Court case, *Johnson v. McIntosh*, 21 US 543 (1823), dealt with the issue of who could acquire title to land from Indian tribes, but no tribe was a party to the case.

[65] *Cherokee Nation* at 14.

[66] United States v. Kagama, 118 U.S. 375, 381 (1886).

[67] United States v. Lara, 541 U.S. 193, 219 (2004).

[68] *Cherokee Nation* at 14.

[69] In the words of Justice O'Connor, "Today, in the United States, we have three types of sovereign entities – The Federal government, the states, and the Indian tribes. Each of these sovereigns … plays an important role … in this country." O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1997.

[70] *See* Felix Cohen's Handbook of American Indian Law (2005) § 1.03[1], hereinafter Cohen 2005 (Professor Clarkson was a contributing author for this most recent

authority has dubious origins,[71] the continued maintenance of such authority is justified by a legal discourse whose origins were clearly based on a negative perception of tribalism.[72]

The acknowledged existence of tribal sovereignty, however, has served to balance the exercise of that plenary authority. While each tribe has its own separate history, the struggle to maintain a separate sovereign existence is common to most tribes. The economic importance of that struggle cannot be overstated, particularly in the modern context, as the "first key to economic development is sovereignty."[73] It is important to review the origins of the federal Indian law and policy before addressing the modern context.

The legal principles that existed when Europeans first made contact with the Indians had their origins in legal theories developed to justify the

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edition of the HANDBOOK, providing material on tribal finance, tribal corporations, economic development, and intellectual property). Two earlier editions of the Handbook are also referenced in this article. Felix Cohen's original Handbook was published in 1941. The Handbook was substantially revised and reissued in 1982 [hereinafter COHEN 1982].

[71] Arguably, the Supreme Court simply made up the notion of plenary authority. In *Kagama*, the Court stated that

> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

Id. at 383–384. Unable to find a source for such plenary authority in the Constitution, the Court held that

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384–385.

[72] *See, e.g.*, Johnson v. McIntosh, 21 U.S. 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . ."); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); Worcester v. Georgia, 31 U.S. 515, 588 (1832) (discussing the "humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling"). These three cases, often referred to as the "Marshall Trilogy," form much of the foundation for federal Indian law.

[73] Steven Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 5 (1997).

Crusades.[74] As the competing European nations began to expand their empires, the papacy began to grant exclusive rights to lands as they were "discovered," including rights of sovereignty over the indigenous populations.[75] Even after England broke away from the authority of Rome, English law still supported this "Doctrine of Discovery,"[76] although the validity of the doctrine was a subject of debate among early colonial settlers.[77] Irrespective of conflicting religious interpretations of Indian

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[74] *See e.g.* Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in THE EXPANSION OF EUROPE: THE FIRST PHASE 191-192 (James Muldoon ed. 1977), ("[I]s it licit to invade a land that infidels possess or which belong to them? … [I]t is licit for the pope to [demand allegiance, and] if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the pope and not by anyone else.") *See also* Robert A. Williams, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1992), at _____ (discussing the crusading era origins of the legal doctrines which governed European land claims in the Americas).

[75] *See e.g.* "Bull 'Inter caetera Divinae' of Pope Alexander VI dividing the New Continents and granting America to Spain, May 4, 1493" *in* CHURCH AND STATE THROUGH THE CENTURIES 153-57 (Sidney Z. Ehler & John B. Morrall, trans. And eds. 1967)

> Wherefore, all things considered maturely and, as it becomes Catholic kings and prices … you have decided to subdue the said mainlands and islands, and their natives and inhabitants, … [w]ith the proviso, however, that these mainlands and islands found or to be found, discovered or to be discovered … be not actually possessed by some other Christian king or prince.

See also "Romanus Pontifex," the papal bull of Pope Nicholas V (1454) (granting Portugal the exclusive right to colonize the Canary Islands and all other parts of Africa) in CHURCH AND STATE THROUGH THE CENTURIES 153-57; Williams *supra* note 74 at _____. *See also generally* Felix S. COHEN, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L. J. 1 (1942).

[76] *See e.g.* Calvin's Case, 77 Eng. Rep. 377, 1378 (K.B. 1608)

> All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; … And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, … he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity.

This opinion was authored by Lord Chief Justice Edward Coke who, coincidentally, wrote the charter for the Virginia Company in 1606. *See* Williams *supra* note 74 at _____.

[77] *Compare* the arguments of John Winthrop (as "for the Natives in New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land

rights, practical realities shaped legal relations between the Indians and colonists.[78] The necessity of getting along with powerful and militarily capable Indian tribes[79] dictated that the settlers seek Indian consent to settle if they wished to live in peace and safety, buying lands that the Indians were willing to sell rather than displacing them by other methods. As a result, the English colonial governments acquired most of the lands by purchase from the Indians.[80] For all practical purposes, during this period "the Indians were treated as sovereigns possessing full ownership rights to the lands of America."[81]

At the outbreak of the French and Indian War in 1754, treaty making assumed a new dimension, as each of the competing European powers sought to form alliances with the various tribes. The military importance of treaty alliances would continue throughout the Revolutionary War period as well. After the war, however, a powerful group of tribes that had sided with the British during the war confronted the founding fathers. Those tribes still maintained claims to the territory between the Appalachian Mountains and the Mississippi River. George Washington detailed his proposed policy for dealing with the Indians in a letter to James Duane, the head of the Committee of Indian Affairs of the Continental Congress.

> [P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beast of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense [sic], and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[82]

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by, & soe have noe other but a naturall right to those countries.") with those of Roger Williams ("I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of Ground [and this they do] notwithstanding a sinfull opinion amongst many the Christians have right to *Heathens* Lands.") recounted in Cheister E. Eisinger, THE PURITAN'S JUSTIFICATION FOR TAKING THE LAND, 84 Essex Institute Historical Collections 135-143 (1948).

[78] *See* COHEN 1982, p. 55.

[79] *Id*. Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades.

[80] *Id*. The Dutch similarly opted to obtain land via consented purchase rather than more bellicose methods.

[81] *Id*.

[82] Letter from George Washington to James Duane (Sept. 7, 1783), in Francis Prucha,

Although many consider Washington's letter the founding document of American Indian policy,[83] its notion of Indians as "Savages" sits alongside the pragmatic necessity of treating with the Indians. As the newly formed United States began its inexorable march westward, the Indian lands usually were not taken by force but were instead ceded by treaty in return for, among other things, the establishment of a trust relationship,[84] often in specific consideration for the Indians' relinquishment of land.[85] It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.[86] From the beginning of its political existence, therefore, the United States "recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty. . . and in turn greatly contributed to that concept."[87]

For many, treating tribes as governments was clearly more a function of pragmatism than a generally held belief that tribal governments were legitimate sovereigns, and although the Indian tribes regarded treaty obligations as sacred, condescending notions of the inferiority of tribalism prompted many to question whether their provisions were binding on the

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Documents of United States Indian Policy 1-2 (2000).

[83] *See e.g.*, Robert A. Williams, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (hereinafter LOADED WEAPON), p. 44.

[84] The scope of the trust relationship is multi-faceted. "Many treaties explicitly provided for protection by the United States." COHEN 1982, at 65 n.38. *See, e.g.*, Treaty with the Creeks, Aug. 7, 1790, art. 2, 7 Stat. 35, *reprinted in* Kappler, *supra* note 92, at 25 [hereinafter "Treaty with the Creeks"]; Treaty with the Kaskaskia, Aug. 13, 1803, art. 2, 7 Stat. 78, *reprinted in* Kappler, *supra* note 92, at 67 [hereinafter "Treaty with the Kaskaskia"].

Other treaties provided the means for subsistence. *See, e.g.*, Fort Laramie Treaty, *supra* note 92 (providing for subsistence rations for the Sioux.); 1828 Treaty with the Western Cherokees, Art. 8, 7 Stat. at 313, *reprinted in* Kappler, *supra* note 92, at 290 [hereinafter "Treaty with the Western Cherokees"]; COHEN 1982, at 81 ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) . . . a just compensation for the property he may abandon.").

[85] *See, e.g.*, Treaty with the Creeks, *supra* note 84; Treaty with the Kaskaskia, *supra* note 84; Treaty with the Western Cherokees, *supra* note 84; Fort Laramie Treaty, *supra* note 92.

[86] *See, e.g.*, Treaty with the Six Nations of October 22, 1784, *reprinted in* Prucha *supra* note 92, at 4; Treaty of Fort McIntosh of January 21, 1785, *reprinted in* Prucha *supra* note 92, at 5; Fort Laramie Treaty of September 17, 1851, *reprinted in* Prucha *supra* note 92, at 84 (referring to the United States and the Sioux collectively as "the aforesaid nations").

[87] Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 2 (1994).

United States. During this time period, the legal discourse of opposition to tribal sovereignty argued that tribal Indians, "by virtue of their radical divergence from the norms and values of white society regarding use and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted."[88] Various political factions disagreed over whether tribalism could survive contact with white civilization and whether the appropriate course of action was to make the Indians assimilate into that society or to remove them beyond the reaches of that society.[89] Ultimately, notions of tribal inferiority prevailed, and Congress passed the 1830 Removal Act.[90] Several tribes in the Southeast, however, already had treaties that secured their right to remain on their ancestral homeland. In response, Georgia Governor George Gilmer declared that

> Treaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation – be fruitful, multiply, and replenish the earth, and subdue it. [The practice of purchasing land from the Indians was merely] the substitute by which humanity and expediency have imposed, in place of the sword, in arriving at the actual enjoyment of property claimed by the right of discovery, and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes.[91]

Over the next forty years, however, tribal sovereignty was nonetheless

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[88] Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in The Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 243-244 (1989). Such arguments were made by several prominent individuals, including President John Quincy Adams.

> The Indian right of possession itself stands, with regard to the greater part of the country, upon a questionable foundation. … [W]hat is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world?
>
> No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife its moral laws with its physical creation.
>
> Oration at Plymouth delivered at Plymouth Mass. December 22, 1802.

[89] *See* letter from President Jefferson to William Henry Harrison (Feb. 27, 1803) in Prucha, *supra* note ___, ___ ("[O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi").

[90] Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (1982).

[91] *Quoted in* PRUCHA, GREAT FATHER 196.

explicitly and repeatedly recognized through treaty making as tribes agreed to either remove to the west of the Mississippi or cede portions of their ancestral homeland in the face of advancing settlement.[92]

While the formal existence of the United States began at a point in time when the prevailing policy recognized tribal sovereignty through the treaty-making process, such an orientation was not permanent. Once the removal process was essentially complete, responsibility for Indian affairs, along with the authority to negotiate on a government-to-government basis with the tribes, moved from the War Department to the Interior Department,[93] although such treaties still had to be ratified by Congress. In the 1870s, however, Congress ceased making treaties with the Indians[94] and instead developed a policy of allotting tribal lands to individual Indians,[95] characterizing the allotment program as a "mighty pulverizing engine"[96] that would destroy tribalism and force Indians to assimilate into dominant society as individuals.[97] Notions of the inferiority of tribalism were again a catalyst for policy change, but implementation of the policy required recognition of tribal sovereignty. Realization of the Allotment Act required negotiations with tribal governments, and even when dismantling the

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[92] *See e.g.* Treaty of Dancing Rabbit Creek, Sept. 1830, *reprinted in* 2 Charles J. Kappler, Indian Affairs, Laws and Treaties 310 (1904) (signed by Choctaw leaders at *bok chukfi ahithac*— "the little creek where the rabbits dance"—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma); Fort Laramie Treaty, April 29, 1868, 15 Stat. 635, *reprinted in* Prucha, *supra* note 82, 109 (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation) [hereinafter "Fort Laramie Treaty"].

[93] *See* Vine Deloria, Jr. & Clifford M. Lytle, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983)

[94] Treaty making with the Indians was ended by Congress in 1871: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent, nation, or power with whom the United States may contract by treaty . . . ." Abolition of Treaty Making, 16 Stat. 544, 566 (1871), *reprinted in* Prucha, *supra* note 92, at 135.

[95] General Allotment Act of 1887, 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. *See* Robert Winston Mardock, The Reformers and the American Indians 212 (1971).

[96] In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

> [T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass [acting] directly upon the family and the individual . . . .

[97] *See* Gavin Clarkson, *Not Because They are Brown, but Because of* Ea*: Why the Good Guys Lost in* Rice v. Cayetano*, and Why They Didn't Have to Lose*, 7 Mich J. Race & L. 318, 327 (2002)

governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma, Congress still "continued [the existence of tribes and tribal governments] in full force and effect for all purposes authorized by law."[98]

If the policy objective of the Allotment Act was to improve the lives of the Indians, it was a colossal failure. By the 1930s it was clear that the United States needed to change its stance on tribal sovereignty again,[99] and Congress passed the Indian Reorganization Act of 1934 ("IRA").[100] In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt constitutions and to reestablish structures for governance.

Of particular interest was the provision in the IRA that allowed tribes to form corporations. While securities law reform was happening simultaneously, it appears that those involved in the IRA had little or no substantive interaction with those involved in the Securities Act of 1933 or the Securities Exchange Act of 1934.

Post-IRA federal treatment of the tribes was less restrictive, allowing for the popular election of tribal leaders according to tribal laws and constitutions.[101] Although Congressional policy had completely reversed itself by 1934—tribal sovereignty was now to be encouraged rather than destroyed—federal Indian policy would oscillate through one more cycle in the next half century[102] before President Nixon issued a landmark statement

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[98] Five Tribes Act, Act of April 26, 1906, ch. 1876, 34 Stat. 137.

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions for adjournment) of the tribal council or legislature of any of the said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

[99] See e.g. Institute for Govt. Research, Studies in Administration, The Problem of Indian Administration (the "*Merriam Report*," issued in 1928), documenting the failure of federal Indian policy during the allotment period.

[100] 25 U.S.C. § 461 *et seq.* (1994).

[101] RUSSEL LAWRENCE BARSH AND JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 209 (1980).

[102] The period between 1945 and 1970 is referred to as the Termination Era, and was characterized by the passage of number of statutes that "terminated" individual tribes—"these acts distributed the tribes' assets by analogy to corporate dissolution and afforded the states an opportunity to modify, merge or abolish the tribe's government functions." Barsh & Henderson, *id*., at 132. Examples of this legislative activity include Act of 13 August 1954, c. 732, 68 Stat. 718 (Klamath), Act of 3 August 1956, c. 909, 70 Stat. 963 (Ottawas).

calling for a new federal policy of "self-determination" for Indian nations.[103] By "self-determination," President Nixon sought "to strengthen the Indian's sense of autonomy without threatening his sense of community."[104] Self-determination[105] led to an increase in economic development activity, but access to capital remained an impediment.[106] President Reagan also made an American Indian policy statement on January 24, 1983, stating his support for "self determination."[107] In attempting to give definition to "self-determination," he stated:

> Instead of fostering and encouraging self-government, federal policies have, by and large, inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources and promoted dependency rather than self-sufficiency.[108]

In 1983 President Reagan established the Presidential Commission on Indian Reservation Economies. In 1984 the Commission published its Report and Recommendations again calling for a major shift in federal Indian policy.[109] The Commission promulgated recommendations in the following five categories: Development Framework, Capital Formation, Business Development, Labor Markets, and Development Incentives.[110] Pertinent to the instant inquiry, under Capital Formation, the Commission recommended private ownership or private management of tribal

[103] Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R.Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970). *See also* The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as 25 U.S.C. §§ 1451–1453). Perhaps the greatest of Nixon's contributions to Indian tribal sovereignty was Public Law 638, the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638 (1994) (codified in 25 U.S.C. §§ 450a–450), which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services.

[104] Samuel R. Cook, *What is Indian Self-Determination?*, RED INK, May 1, 1994, *available at* http://faculty.smu.edu/twalker/samrcook.htm.

[105] The key legislation of this era includes: The Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638 (codified at 25 USC §§ 450 *et seq.*); The Indian Civil Rights Act of 1968 (codified at 25 USC §§ 1301-1341); The Indian Financing Act of 1974 (codified at 25 U.S.C. § 1451); and the Indian Child Welfare Act of 1978 (codified at 25 U.S.C. §§ 1901-1963). *See generally* COHEN 1982, at 188-204.

[106] *See* COHEN 2005 §21.03

[107] PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES Part I, 7 (1984).

[108] *Id.*

[109] *Id.*

[110] *Id*, at 25.

enterprises; amending the Securities Act of 1933 to place tribes on the same footing as state and local governments; amending the Tribal Tax Status Act to provide tribes with the same tax exemptions as state and local governments; establishing an Indian Venture Capital Fund; and amending the Indian Loan Guaranty Fund and the Indian Finance Act to minimize the role of the BIA; and encouraging the private sector to invest in Indian country.[111]

Although some scholars are resistant to the notion that tribes should adapt and change in order to participate in the modern capitalist economy,[112] tribes have adapted to their environments for millennia, and the arrival of Europeans did not diminish that adaptiveness. Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans; the Plains Indians incorporated European horses into their culture; and the Choctaw claim that if the Europeans had brought aluminum foil with them, Choctaws would have been cooking with it while the other tribes were still regarding it with suspicion.[113]

The evidence from the last century of tribal economic development indicates that Indian Country can and must compete within the larger capitalist environment, and given a level playing field, they can thrive. If

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[111] *Id.* at 39-47.

[112] *See e.g.* Williams, *Documents of Barbarism*, 31 ARIZ. L. REV. at 266-68. Professor Williams criticizes the IRA and the notions of evaluating tribal corporations using westernized norms of corporate performance because such evaluations often highlight perceived differences between economic development in Indian Country and corporate America. He also takes issue with the description of tribal structures contained in the PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES (1984).:

> As illustrated by its derogatory nomenclature for describing tribal governments's differences ("social welfare driven"; "patronage system"; "dependent"), the Commission's discourse of tribal self-determination clearly devalues tribal enterprises operated by tribal governments according to tribal values...The Commission's point of reference for assigning negative values to contemporary tribalism's perceived self-determining vision of economic development is of course the dominant society's profit driven norms. Thus, if tribalism further declines in response to the federal government's failure to adequately fund its trust responsibility to Indian people, tribalism's own stubbornly held difference from the superior values of the dominant society will be blamed.

Williams, 31 ARIZ. L. REV. at 267-68.

Irrespective of whether one views capitalism as good or bad, however, the reality is that tribal nations exist within a larger capitalist system, and any assumption that tribes cannot adapt to that system runs the risk of falling into the very discourse that Williams decries.

[113] Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV 502 (2002)

the competitive landscape is stacked against Indian Country, however, those impediments are highly suspect if they continue to exist with little or no legitimate purpose, given that they suppress tribal economic development and curtail Indian Country's access to capital.

III. BUSINESS FORMATION IN INDIAN COUNTRY

Economic development is the building of a community to enable its members to rise out of poverty through the establishment of a stable economy, with small businesses, new jobs, and an entire system structured to support its people. Community development has the dual mission of causing positive social impact and achieving financial objectives. The social goal is to bring financial services to as many of the lowest income population as possible with the goal of financial self sufficiency.[114]

A. CDFIs as Catalysts for Business Formation

One of the main ways for communities to develop their economies is through the creation of Community Development Financial Institutions ("CDFIs"). In 1994 the CDFI Fund was created as part of the Department of Treasury under the Reigle Community Development and Regulatory Improvement Act of 1994.[115] The CDFI Fund is a wholly-owned governmental corporation that uses the CDFIs as an avenue to promote economic revitalization and community development.[116] Its mission is to "increase the capacity of financial institutions to provide capital, credit and financial services in underserved markets, and it is accomplished through investment in and assistance to CDFIs.[117] The CDFI Fund's creation resulted in a dramatic growth in CDFIs in the 1990s.[118]

Since 2001 Indian tribes have been part of the target market for CDFI Fund assistance.[119] In its Native American Lending Study published in 2001, the CDFI Fund investigated barriers to lending and investment in tribes.[120] The findings led the Fund to create programs and help tribes build more native CDFIs ("NCDFIs")[121] as well as to support those NCDFIs that

[114] RACHEL ROCK, ET AL., ACCION INT'L. PRINCIPLES AND PRACTICES OF MICROFINANCE GOVERNANCE. (Aug 1988).

[115] www.cdfi.org/cdfifund.asp

[116] MARCUS LAMB, ET AL., RECOMMENDATIONS FOR CDFI PERFORMANCE MEASUREMENT: IMPROVING MEASURES, INCREASING KNOWLEDGE, BUILDING CAPACITY. 2 (2002).

[117]Rules & Regulations, 68 Fed. Reg.23 (Feb 4, 2003).

[118] NATIONAL COMMUNITY CAPITAL ASSOCIATION, *supra* note 31 at 5.

[119] National Tribal Justice Resource Center, CDFI Fund Native American Initiative, http://www.tribalresourcecenter. org/resources/funding/fundingdetails.asp?59.

[120] *Id*.

[121] The Native American segment of the CDFI Fund is the Native Initiative, and its

already existed.[122] As of June 2004, 28 emerging or existing NCDFIs were certified by the CDFI Fund.[123] The Fund believed that the increase in number of CDFI institutions and the building of CDFIs' capacity were critical to improving business development in native communities around the United States.[124] In fact, CDFIs have been labeled as anchor institutions in Indian economic development.[125] NCDFIs deliver high-quality, culturally relevant business development training and technical assistance to native Americans who wish to create and build business on their reservations.[126]

Another entity, the CDFI intermediary, is often critical to the development and growth of CDFIs in many sectors. First Nations Oweesta Corporation, an affiliate of First Nations Development Institute, is the first and only NCDFI intermediary in the United States.[127] Its mission is "to enhance the capacity of Native tribes, communities and peoples to access, control, create, leverage, utilize and retain financial assets, and to provide appropriate financial capital for Native development efforts."[128] Since the mid 1980s, Oweesta has helped develop alternative financing access for native entrepreneurs, homebuyers and tribal businesses by assisting in the creation of native-based institutions that work directly with community members.[129]

While Oweesta does not yet offer loans directly to entrepreneurs,[130] the organization enables tribes to prepare their nations to receive funding and assists individuals in investing in native economic development. The corporation researches barriers to native control of an access to financial

programs include the Native American CDFI Technical Assistance (NACTA) Component of the CDFI Program, the Native American CDFI Development (NACD) Program, the Native American Technical Assistance (NATA) component of the CDFI Program, and the Native American CDFI Technical Assistance Program. The NACA and NATA programs award technical assistance (TA) and financial assistance (FA) grants to Native CDFIs and entities that can be certified as Native CDFIs at the time of the award, as well as TA grants to organizations which can become Native CDFIs within two years. The NACD Program provides TA grants to organizations which sponsor the creation of separate legal entities that will become Native CDFIs. *See* http://www.tribalresourcecenter.org/resources/funding/fundingdetails .asp?59.

[122] *Id.*

[123] *Id.* at 39.

[124] MALKIN, *at* 39.

[125] *Id.* at 52.

[126] *Id.* at 55.

[127] Electronic mail message from Stewart Sarkozy-Banoczy, Vice President and Chief Operating Officer, The First Nations Oweesta Corporation. Rapid City, S.D. (February 2008).

[128] www.oweesta.org

[129] *Id*.

[130] Sarkozy-Banoczy, *supra* n1.

assets and promotes policy favoring asset building in native communities.[131] Oweesta is also involved in creating the Oweesta collaborative, mentor network, and NCDFIs that work directly with the native entrepreneurs.[132]

Oweesta's primary focus is on the creation of NCDFIs.[133] In 1999 just two NCDFIs existed in the United States; by 2006 the number was up to 38.[134] Oweesta empowers tribes to develop their economies by educating members, giving presentations to tribal councils, and training tribal citizens in economic development.[135] Tribes are at different stages in their development, and Oweesta offers individualized support to each tribe seeking help.[136]

The Oweesta Collaborative (OC) is one of Oweesta's programs. Made up of nine partners, the project is funded to implement an entrepreneurship development system for the growth of private business on three Indian reservations, the Pine Ridge, Wind River, and Cheyenne River Indian Reservations.[137] The OC project incorporates a network of volunteer and paid professional service providers, coaches, and mentors to answer questions and give one-on-one business help to native entrepreneurs.[138]

B. Examples of CDFI Activity in Indian Country

The Lakota Fund is an NCDFI for the Oglala Lakota Nation in South Dakota.[139] Located on the Pine Ridge Indian Reservation, the Lakota Fund began in 1986 and has made over $1,000,000 in loans to nearly 300 tribal members for small business and micro-enterprise development.[140] Lakota Red Nation, owned by artist Kelly Looking Horse, is one such business.[141] Looking Horse, a drum-making specialist, began with a $500 loan from the Lakota Fund in 1999, to establish good credit.[142] From there he borrowed other small loans, repaying each one before borrowing the next, with the biggest being $5,000 in 2006.[143] Looking Horse desires to one day build a studio and crafts cooperative, but these businesses will

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131 http://oweesta.org/main/ps/research

132 Sarkozy-Banoczy, *supra* n1.

133 "Oweesta Introduces New Model for Native Community Economic Development and Offers Training Opportunities," December 6, 2007. Press Release. *Available at* http://oweesta.org/announce/need?PHP SESSID=0628584b8cba442e96901eb643014d6c.

134 www.oweesta.org

135 *Id*.

136 *Id*.

137 http://oweesta.org/oc/overview

138 *Id*.

139 www.oweesta.org/oc/oc_profiles/tlf

140 *Id*.

141 www.oweesta.org/oc/library/tlf/ss/lakrednation

142 *Id*.

143 *Id.*

require a much bigger loan.[144]

In April 2000 the Four Bands Community Fund ("FBCF") began, with the mission to enable entrepreneurs on the Cheyenne River Indian Reservation.[145] The fund offers training, business incubation, and access to capital, all to build and strengthen reservation-based businesses.[146] JTR Trips is one such business. This sporting goods store in Eagle Butte, South Dakota, was purchased by three siblings with the help of the FBCF, as well as the Small Business Administration, Small Business Development Center, and American State Bank in Pierre, South Dakota.[147] Without this assistance, the business may have been moved out of the community.[148]

Eagle Eye Espresso and Tanning, owned by Trina Lends His Horse, used the FBCF assistance to purchase a cash register and inventory.[149] Opening in 2006, Eagle Eye is a drive-up shop offering drinks, food and a stand-up tanning booth.[150] Business has been quite successful, and Lends His Horse is considering a future business expansion.[151]

The Wind River Development Fund ("WRDF") provides entrepreneurs on the Wind River Indian Reservation and businesses with small business training, counseling, and loans.[152] NATCO, Inc. is one of the businesses aided by the Fund. Floyd Addison, owner and operator, borrowed money from WRDF to purchase a new truck for his business.[153] With his truck and his business acumen, Addison landed a subcontract for a large highway construction project. His business has grown into eleven full-time jobs.[154]

Heyteyneytah, Inc. is another WRDF success story. Stan Addison has developed a unique horse-breaking method that does not use force and which he can use from his wheelchair.[155] With a small business loan from the Fund, Addison was able to rebuild some of his corrals. He now employs two fulltime and ten part-time employees.[156]

Each of these businesses has received essential supportive services—monetary and technical—from the NCDFIs which have provided

[144] *Id.*
[145] www.oweesta.org/oc/oc_profiles/fbcf
[146] *Id*.
[147] www.oweesta.org/oc/library/fbcf/ss/jtrtrips
[148] *Id*.
[149] www.oweesta.org/oc/library/fbcf/ss/trina
[150] *Id*.
[151] *Id*.
[152] http://wrdf.org/
[153] www.oweesta.org/oc/library/wrdf/ss/natco
[154] *Id*.
[155] www.oweesta.org/oc/library/wrdf/Heyteyneytah
[156] *Id*.

them. The resources of the NCDFIs are limited, however. Small loans are vital for starting and building these native enterprises. Although when the businesses thrive and outgrow themselves, bigger funding sources are needed to enable these entrepreneurs to grow their organizations according to demand.

*S*everal NCDFIs have made a tremendous difference in their local communities, but their capacity for providing expansion capital is limited. Successful Indian Country businesses cannot rely solely on CDFIs to grow their businesses, and often bank financing is either unavailable or not appropriate for business expansion.[157] In such instances, businesses need infusions of equity in order to expand.

C. The Role of Private Equity in Business Development

An investment fund is a "business entity whose only important asset is its capital and whose primary business purpose is to acquire securities or other assets in the hope that they will appreciate."[158] Such a fund is an independently managed, "dedicated pool of capital" focused on equity investment in privately-held companies expecting high growth.[159] A private equity fund is one type of investment fund.[160] Private-equity funds are usually organized as a private partnership or closely held corporation.[161]

Before a private-equity fund invests in a company, careful due diligence is done.[162] Investors play a role in screening, financing, and overseeing the companies in which they invest.[163] Often they are actively involved in the company as a board member.[164]

A private equity fund has a predetermined lifespan,[165] with the intent to complete an investment cycle in ten to thirteen years.[166] For the first five years, money is invested in the company; then it is monitored for several years.[167] Three to seven years after the original investment, the resulting

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[157] CDFI study

[158] Illig, Robert C. "What Hedge Funds Can Teach Corporate America: A Roadmap for Achieving Institutional Investor Oversight." 57 Am. U. L. Rev. 225, 268 (2007).

[159] GOMPERS, Paul A. *The Venture Capital Cycle*, MIT Press. Cambridge, MA (1999) page 11.

[160] Illig, *supra* n 37 at 269.

[161] www.nvca.org

[162] LERNER, Josh. *Venture Capital and Private Equity: A Casebook.* John Wiley & Sons, Inc. New York (2000) p. ix.

[163] *Id*. at xi.

[164] LEVIN, Jack, ed. *Structuring Venture Capital, Private Equity and Entrepreneurial Transactions.* Aspen Publishers (2007) p1-3, ¶103

[165] GOMPERS, *supra* n38 at 8.

[166] LEVIN, *supra* n. 43 at 1-3, ¶103.

[167] *Id*.

investment is sold.[168] Nearly all venture funds are crafted this way, designed to be self liquidating and ending in dissolution.[169]

Private equity funds generally raise capital from a limited number of sophisticated investors in a private placement.[170] Profits are then split among the professionals administering the private equity fund and the capital investors.[171]

D. Relevant Federal Securities Laws

One main characteristic of these funds is their avoidance of regulation under federal securities laws.[172] Because they opt for investment in private equity and not publicly traded securities, private equity firms can avoid most of the costly regulations of federal laws[173] by structuring their activities so that they fall within the scope of Reg D.[174] Thus these companies want to sell securities only to accredited investors because only then are they assured of being in complete compliance with the securities laws.[175] In contrast, selling to non-accredited investors creates "significant legal complexities and business risks which increase the costs of raising capital."[176] Hence accredited investors status is the desired category for private equity firm participation.

The notion of accredited investor is not new, as the current regime of securities regulation in the United States has its origins in the legislative aftermath of the stock market crash of 1929. Though many states had securities laws in effect at the time of the crash, these proved ineffective against the empty promises made by sellers of securities to unsuspecting investors.[177] Of the $50 billion in new securities offered in the 1920s, an estimated half, $25 billion, was lost.[178]

In response to the shattered market, Congress drew together what

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[168] *Id*.
[169] LERNER, *supra* n. 41 at 12.
[170] LEVIN, *supra* n. 43 at 1-3, ¶102
[171] *Id*.
[172] Illig, *supra* n. 37 at 269.
[173] Smith, Douglas G. "The Venture Capital Company: A Contractarian Rebuttal to the Political Theory of Corporate Finance?" 65 Tenn. L. Rev. 79, 134-35 (1997)
[174] Hurdle, Steven E., Jr. "A Blow to Public Investing: Reforming the System of Private Equity Fund Disclosures." 53 UCLA L. Rev. 239, 246 (2005).
[175] "Policy Briefing: Native American Tribes Require Reg D Change." Native American Capital, LP, available at http://www.sec.gov/rules/other/265-23/nac020306.pdf.
[176] *Id*.
[177] "House Consideration, amendment and Passage of H.R. 5480," May 5, 1933, 77 Cong. Rec. 2910-55 (1933). Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 2931. Available on HeinOnline.
[178] www.sec.gov/about/whatwedo.shtml#create.

became the Securities Act of 1933, 15 U.S.C. §77a *et seq*. The purpose of a new federal securities law, declared Representative Sam Rayburn of Texas, was "to place the owners of securities on parity, so far as is possible, with the management of the corporations, and to place the buyer on the same plane so far as available information is concerned, with the seller."[179]

To accomplish this overarching purpose, legislators drafted the securities law with two objectives in mind: to provide investors with financial and other material information about the securities being offered for sale and about the sellers of those securities, and to prohibit deceit, misrepresentation, and other fraud in the sales of securities.[180] By requiring the provision of the information, the lawmakers believed investors would be safer. "[The Securities Act] will make available to the public the information upon which the public is asked to invest its money."[181]

When considering what types of securities to regulate, Congress determined that some types did not require regulation under the new law. For example, lawmakers perceived "no practical need" for the application of the Securities Act to governmental issues of securities.[182] Governmental bonds were considered sound, and therefore to avoid unnecessary interference with the course of business, Congress exempted them from the securities law.[183] In the lawmakers' opinion, the government's securities were not in need of the oversight of the Federal Trade Commission.[184]

During the hearing before the Committee on Interstate and Foreign Commerce in the House of Representatives, other non-governmental

[179] "House Consideration, amendment and Passage of H.R. 5480," May 5, 1933, 77 Cong. Rec. 2910-55 (1933). Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 2918. Available on HeinOnline.

[180] www.sec.gov/about/whatwedo.shtml#laws

[181] "House Consideration, amendment and Passage of H.R. 5480," May 5, 1933, 77 Cong. Rec. 2910-55 (1933). Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 2912. Available on HeinOnline.

[182] "House Report No. 85, 73rd Congress, 1st Session, to accompany H.R. 5480," May 4, 1933. Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 5. Available on HeinOnline.

[183] "Hearing Before the Committee on Interstate and Foreign Commerce." House of Representatives. 73rd Congress, 1st Session on H.R. 4314. March 31, April 1, 4, 5, 1933. Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 108. Available on HeinOnline.

[184] "House Report No. 85, 73rd Congress, 1st Session, to accompany H.R. 5480," May 4, 1933. Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 14. Available on HeinOnline.

entities found themselves also exempted from the new law.[185] Railroad companies, common carriers, and public utilities already subject to federal regulation or supervision on the issue of securities were eliminated from the regulation requirements of the new securities law.[186] Likewise, securities of national banks and Federal Reserve banks were exempt because they already had adequate supervision.[187]

Nearly fifty years later[188] the federal government would define these non-governmental exempt organizations as 'accredited investors' and place them under the "safe harbor" of Regulation D of the 1933 Securities Act, added in 1982. Thus, from the very beginning, federal and state governments and their instrumentalities were exempt from the securities laws. Indian tribal governments, however, were not exempt, under any category.

While the major reforms in Indian policy that were part of the Indian Reorganization Act[189] were being developed at the same time that securities law reform was happening, it appear that those involved in the IRA had little or no substantive interaction with those involved in the Securities Act of 1933 or the Securities Exchange Act of 1934.

In the legislative history of the Securities Act of 1933, no mention is made of tribal governments as serious contenders for the list of governmental bodies exempt from federal securities regulation; nor were they considered in the non-governmental groups that were later to become accredited investors. American Indians did get brief mention in the discussion of the act's creation, albeit perversely. During the discussion in the House about the bill, Representative Sam Rayburn of Texas at one point expounded on the fortitude and ingenuity of European settlers in Virginia:

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[185] "Hearing Before the Committee on Interstate and Foreign Commerce." House of Representatives. 73rd Congress, 1st Session on H.R. 4314. March 31, April 1, 4, 5, 1933. Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 29. Available on HeinOnline.

[186] Id.

[187] "House Report No. 85, 73rd Congress, 1st Session, to accompany H.R. 5480," May 4, 1933. Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 14. Available on HeinOnline.

[188] One year after the creation of the Securities Act of 1933, Congress passed the Security Exchange Act of 1934. This act established the Securities Exchange Commission (SEC), which took the place of the Federal Trade Commission in the regulation of securities. The SEC was given the power to register, regulate and oversee brokerage firms, transfer agencies, and clearing agencies, as well as the nation's stock markets. *From* www.sec.gov/about/whatwedo.shtml#laws.

[189] *See* text accompanying footnotes 97-99 in Part II.

> The first permanent settlement of English-speaking people in Virginia was accomplished through a joint-stock company. The successors of these early Colonies, through a series of amazing adventures, have wrested a continent from the aborigines, have explored and utilized its natural resources until more than a hundred million people comprise the citizenship of this Republic. The initiative, self-reliance, inventive genius, organizing ability, and industry of the people who have occupied this continent have created a national wealth of some $300 billion.[190]

Rayburn continued with the theme of defeating the "aborigines" with another indirect reference, this time presumably to show the importance of the individual investor: "The conquest of this continent was made by individual human beings, each pursuing his own happiness in his own way."[191]

E. Relevance of State Blue Sky Laws

In addition to the federal statutory scheme, each state has its own body of securities law, dubbed "blue-sky laws."[192] Several states model their laws on one of the versions of the Uniform Securities Act, drafted by the National Conference of Commissioners on Uniform State Laws. The most recent draft of 2002 has been enacted by twelve states and the Virgin Islands.[193]

States had their securities laws in place prior to the passage of the federal Securities Act of 1933. In fact, the original intent of the federal law was not to interfere with the state blue-sky laws but to supplement them[194] and ensure their observance across interstate lines.[195] "Anything this

[190] "House Consideration, amendment and Passage of H.R. 5480," May 5, 1933, 77 Cong. Rec. 2910-55 (1933). Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page 2916. Available on HeinOnline.

[191] Id.

[192] This phrase comes from the case *Hall v Geiger-Jones Co.*, 242 U.S. 539, 550 (1917). "It originated from a depiction of the type of scheme the laws were intended to prevent; that is 'speculative schemes which have no more basis than so many feet of "blue sky."'" , quoted in Knight, Jay H. and Garrett P. Baker. "Kentucky Blue Sky Law: A Practitioner's Guide to Kentucky's Registrations and Exemptions." 34 N. Ky. L. Rev. 485, 486 (2007).

[193] www.uniformsecuritiesact.org/usa/destopdefault.aspx?tabindex=7&tabid=51.

[194] Some concern was voiced on whether such a federal law was in error, a usurpation of the reserved police powers of the state and a confusion of state and federal law that would lead to the failure of state law. (Mr. Beck, p2939). In a way, such did happen, 63 years later, with the passage of the National Securities Markets Improvement Act of 1996, which preempted much of state law.

[195] "House Consideration, amendment and Passage of H.R. 5480," May 5, 1933, 77 Cong. Rec. 2910-55 (1933). Compiled by Ellenberger, J.S. and Ellen P. Mahar. *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934.* (2001) page

congress can do to supplement the blue-sky laws of the states to protect the public in investing its money ought to be done."[196] In light of the 1929 market crash, state securities statutes were considered inadequate protection for investors.[197] Therefore the federal bill would preserve the jurisdiction of states' securities commissions to regulate within the states while itself regulating securities across state lines.[198]

Over time the state supplemental focus of the federal Securities Act changed, resulting in the National Securities Markets Improvement Act (NSMIA) of 1996. With NSMIA Congress preempted much of state securities laws with respect to federally covered securities.[199]

Federal covered securities no longer fall under the regulatory power of the states. State laws have not been rendered nullities, however. States can still investigate and enforce their antifraud and deceit laws.[200] States can still police unlawful broker/dealer conduct in securities transactions.[201] They also retain the power to require filings of documents filed with the SEC for notice purposes.[202]

Securities exempt under Regulation D of the 1933 Securities Act are federally covered, and that includes accredited investors. Therefore, securities sold to accredited investors do not fall under the regulatory powers of the states:

> Section 18(b)(4)(D) of the Securities Act of 1933 defines as federal covered securities those issued under Securities and Exchange Commission rules under section 4(2) of the Securities Act. This would include Rule 506, which uses the 'accredited investor' definition in Rule 501(a). When a transaction involves Rule 506, section 18(b)(4)(D) further provides that this paragraph does not prohibit a state from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 4(2) that are in effect on September 1, 1996.[203]

2912. Available on HeinOnline.

[196] *Id*.

[197] *Id*. at 2931.

[198] *Id*. at 2918.

[199] Uniform Securities Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/securities/2002final.htm.

[200] Official Comment, Uniform Securities Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/securities/ 2002final.htm.

[201] *Id*.

[202] *Id*.

[203] Official Comment, Uniform Securities Act, available at http://www.law.upenn.edu/bll/archives/ulc/securities/2002 final.htm.

IV. THE POLICY RATIONALES FOR TREATING TRIBES AS ACCREDITED INVESTORS

For a growing number of American Indian-sponsored venture capital and private equity firms that are seeking to raise funds from prosperous American Indian Tribes, the practical effect of tribes being defined as "non-accredited investors" is to eliminate this important source of funding. Since these private equity firms are mission-driven to reinvest their raised capital back into Indian Country business projects, the net effect of tribes being deemed non-accredited is to inhibit capital formation and investment in Indian Country.

A. Wealthier Tribes should not be Excluded from Investment Opportunities that are Limited to Accredited Investors

In general, however, not being explicitly mentioned in the list of allowable accredited investors can lead to exclusion from all sorts of investment opportunities, including private equity funds. While some tribes are poor and have simple structures, others are complex agglomerations of tribal government and tribally-owned non-profits, corporations, and limited liability companies chartered under either tribal,[204] state,[205] or federal[206] law.

Just like other entities, tribes with growing, substantial investment assets should have the ability to select from a variety of investment choices to determine the investment portfolio that best meets their needs. Large well-diversified investors have recently generated some of their best investment returns from private alternative investments such as venture capital, private equity, hedge funds, and private REITs, but participation in these investments is restricted to accredited investors. Without status as accredited investors, tribes are excluded from investing in these investment categories.

Tribes are unique in that they often embody both governmental and business elements and thus must consider financial needs over varying time horizons. Some investments demand short term liquidity, while other investments are made for the next seven generations. Many tribes have kept cash not immediately needed in low-earning, but safe investments such as Treasury bonds and certificates of deposit. Tribes not diversifying into higher earning investment portfolios are falling behind other investors and individuals on a relative basis. For those tribes with sufficiently large assets,

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[204] Cite to sample tribal business code

[205] Tribes can charter a corporation in any state, not just the state that surrounds their reservation. State chartering of a corporation, however, can present problems if the corporation wishes to act as an instrumentality of the tribe.

[206] Section 17 of the IRA created a special category of tribal corporation.

prudent portfolio diversification would include privately-placed investments as a component of overall tribal investment strategy. A few wealthy tribes have tens or hundreds of millions of dollars to invest and should be able to put a reasonable allocation into these higher-earning investments that require accredited investor status, just as other wealthy and institutional investors do. Tribes increasingly have high-caliber finance/ investment staff and external financial advisors and participate in larger and larger deals. Recently, one tribe outbid a private equity fund for a corporation in an investment greater than $1 billion.[207] If tribes can compete for investments sought by funds requiring accredited investors, then they should also be able to invest in funds requiring accredited investors.

B. Including Tribes as Accredited Investors would Enhance Federal Revenues

Given the high levels of unemployment throughout Indian Country, labor market constraints do not exist, and thus presently unemployed individuals will likely fill any jobs created by businesses backed by private equity investments. Those individuals will pay income and social security taxes, and their employers will contribute additional payroll taxes. Even without factoring in the reduction in welfare transfer payments that result from increased employment and increased per capita income, a sound economic model should clearly demonstrate the positive federal revenue impact of the increased economic activity that will result from allowing tribes to deploy capital as accredited investors via private equity funds.

Conversely, the maintenance of the current exclusion of tribes from being treated as accredited investors has a negative impact on federal tax revenues. Since these restrictions keep otherwise viable businesses from being funded with private equity, the federal treasury is missing tax revenues that would otherwise be generated in the absence of these restrictions. Sound fiscal logic and the obvious policy imperative strongly suggested that the SEC should amend Reg D to include tribes.

As an illustration, consider a fictional golf course that an Indian Country entrepreneur would like to develop.[208] If the entrepreneur can raise $5 million to develop the golf course, the ongoing operations will generate

[207] Stephanie McGillivray and Charles W. Johnson, SOAR Growth Capital LLC, *available at* http://www.sec.gov/comments/s7-18-07/s71807.shtml.

[208] A variation of this model was first presented to the Senate Finance Committee during a hearing on May 23, 2006. *See* Clarkson testimony, *supra* note 40, at 9-11. Based on information from a 2002 report from the University of Georgia, annual payroll is estimated at $1,350,000 and other operating expenses are estimated at $300,000. GA. AGRIC. EXPERIMENT STATIONS, COLL. OF AGRIC. AND ENVTL. SCIS., UNIV. OF GA., REVENUE PROFILE OF GOLF COURSES IN GEORGIA, *available at* http://pubs.caes.uga.edu/caespubs/ES-pubs/RR687.pdf.

more than $200,000 per year in federal income taxes from employees. The positive federal revenue impact would be even greater if the increased level of employment also resulted in a reduction in welfare transfer payments.

If, however, the entrepreneur cannot raise the capital from private equity sources, the project will likely not happen. The wages would not be generated, and the concomitant increase in federal revenues would never materialize. Given the number of tribes that would pursue similar projects if given expanded tax-exempt bonding authority, the lack of such authority costs the federal government millions each year.[209]

C. The Proposed SEC Rule Change

No principled reason existed to deny tribal governments the exempt status of the federal and state governments or the accredited investor status of those currently listed in Reg D. Now, seventy-five years after first designating certain bonds as exempt, more than twenty-five years after the formal creation of the "accredited investor" label, and after many months of interactions with the SEC and other federal officials, including the development and circulation of a working paper that was the precursor to this article, the SEC has determined that it is time to add Indian tribes to the list of accredited investors. In its proposed Revision of Limited Offering Exemptions in Regulation D, the SEC states:

> [W]e propose to amend the Rule 501(a)(3) list of legal entities so that it includes any corporation (including any non-profit corporation), Massachusetts or similar business trust, partnership, limited liability company, Indian tribe, labor union, governmental body or other legal entity with substantially similar legal attributes.[210]

D. Comments on the Proposed Reg D Change

During the comments period for the proposed rule change, several individuals and organizations submitted comments on the SEC's intent to include Indian tribes as accredited investors. The SEC's decision was praised as enabling tribes to participate in investment markets on equal footing with other governments,[211] and further suggestions were added.

Multiple comments cited the need for a definition of "Indian tribe" to avoid confusion and provide certainty as to which native groups would be

[209] In the Tribal Bonds article, *supra* note 23, I estimated that the annual federal tax revenue loss is more than $80 million. These figures do not include other federal revenue savings, such as those associated with reductions in federal entitlement payments resulting from increased employment levels.

[210] 72 FR 45126, August 10, 2007

[211] Stephanie McGillivray, Charles W. Johnson, SOAR Growth Capital LLC, *available at* http://www.sec.gov/comments/ s7-18-07/s71807.shtml.

included in the SEC's list.[212] One comment suggested that individually naming groups, such as Indian tribes, was too specific,[213] while another commenter was in favor of a finite, more specific list.[214]

Overall, the idea to expand the definition of accredited investor to include tribes was positively received and without opposition. I did express one concern, however, in that tribes were listed separately as an accredited investor rather than being listed as a governmental entity, which under the proposed rule changes were also included as accredited investors. In particular, I noted

> Tribal governments and their instrumentalities are, like state and local governments, in fact "governments." The Federal government has long recognized Indian tribes under both Federal statutes and long-established legal precedent. For example, the Internal Revenue Code enables Indian tribes and their governmental instrumentalities to issue tax-exempt municipal bonds. Since the proposed changes add a definition of the term "governmental body" to Rule 501(a), similar to the definition of that term that appears commonly in transactional financing, the most appropriate place to include "Indian tribes" is within the list of entities embodied in this definition. Therefore, given the nature of the proposed rule change, I would suggest including "federally recognized American Indian tribes or their instrumentalities" in the list of entities included within the definition of "governmental body" under Rule 501(a). I recommend that only "federally recognized American Indian tribes or their instrumentalities" be included. This limitation, while admittedly excluding some tribes that for reasons of history are not currently recognized by the federal government, does provide a bright line rule for clarity in the markets as to what tribal entities can be an accredited investor.
>
> In summary, "federally recognized American Indian tribes" are governmental bodies and therefore should not be specifically called out in the main text (i.e., under Rule 501(a)(3)), just as states are not called out in the main text. Instead, "federally recognized American Indian tribes and

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[212] Karen Tyler, President of North American Securities Administrators Association, Inc. and Commissioner, North Dakota Securities Department (The commission should clarify the meaning of "Indian tribes" to avoid uncertainty); Joe Garcia, President of National Congress of American Indians (create a definition of Indian tribe for federally- and state-recognized tribes); Dr. Gavin Clarkson, Assistant Professor, University of Michigan (create a definition for federally recognized tribes), *available at* http://www.sec.gov/comments/s7-18-07/s71807.shtml.

[213] Keith F. Higgins, Lawrence A. Goldman, Ellen Lieberman, ABA Section of Business law, *available at* http://www.sec. gov/comments/s7-18-07/s71807.shtml.

[214] KattenMuchinRosenman LLP, *available at* http://www.sec.gov/comments/s7-18-07/s71807.shtml.

their instrumentalities" should be included in the list of entities recognized as "governmental bodies."[215]

This point was later echoed by president Joe Garcia of the National Congress of American Indians, although NCAI took the position that state-recognized tribes should also be included.[216] In either case, the point is to emphasize that tribes are, first and foremost, governments.

V. CONCLUSION

Since there is no principled reason to exclude tribes from the list of accredited investors, this article in its prior incarnation as a working paper was instrumental in persuading the SEC to change Reg D to include tribes as accredited investors. Anticipating the finalization of this change, a number of tribes have expressed an interest in learning more about private equity, as evidenced by the inclusion of private equity as part of the agenda of a number of tribal finance conferences.[217] Once tribes are treated as accredited investors, private equity funds focused on deploying capital in Indian Country can solicit funds from wealthy tribes. Once Wall Street sees the tribes investing, they will follow with additional investment capital, and Indian Country will have moved past the private equity tipping point. Although the three private equity funds[218] that have surfaced thus far will only make a small dent in the $44 billion private equity deficit, their ability to cherry pick the best investment opportunities will in turn produce significant double-digit returns, which will in turn entice other private equity funds to consider Indian Country as a profitable emerging market.

The Reg D problem is not the only barrier to capital market access for Indian Country. I have previously written about the discrimination against tribes in terms of their tax-exempt bonding authority, but the BIA loan guarantee program is authorized to guarantee tribal bonds,[219] which would provide a similar reduction in interest rates to tax-exempt bonds, but no enabling regulations have been developed. Tribal municipal bonds, whether taxable or tax-exempt, are not exempt from securities registration,[220] while non-tribal municipal bonds are exempt. This lack of a securities registration exemption likely leads to a liquidity premium that makes it more expensive to borrow than a similarly situated non-Indian government. Access to banking services on reservation is made more difficult because of the

[215] http://www.sec.gov/comments/s7-18-07/s71807-29.htm
[216] http://www.sec.gov/comments/s7-18-07/s71807-63.pdf
[217] *See e.g.* IMN Tribal Finance, RES 2008, and NAFOA conferences.
[218] Native American Capital, Native Capital, SOAR Private Equity have all announced the formation of their initial private equity funds.
[219] *See* Indian Financing Act, 25 USC §1499
[220] *See* §3(a)(2) of Securities Act of 1933.

McFadden Act Amendments to the National Bank Act which prevents banks that want to do business in Indian Country from opening a branch without the permission of the governor of the state that encompasses the reservation. While these issues will be addressed in subsequent articles, for the moment the prospect of the change to Reg D that treats tribes as accredited investors is a significant victory.

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