CHAPTER 1

Tribal Economies

Providing governmental services is expensive. Tribes are not immune from those costs—far from it. They provide services much more akin to that of the United States than a state, county, or local government. This is an important issue for Indians and non-Indians alike.

Tribal governmental services include police and fire protection; health care facilities, doctors, and nurses; core services for the protection of children and families; road, facility, and utility maintenance; telecommunications, internet, and radio broadcasting; and any number of other administrative services. When tribes achieve economic success it raises the standard of living not only for their members, but also for the surrounding non-Indian communities. Economic success reduces tribal dependence on federal and state programs, while at the same time providing jobs to both Indians and non-Indians. Consequently, when tribes achieve economic success, everyone wins.¹

Unfortunately, unlike federal, state, and local governments, tribes do not have the luxury of using their taxing power to generate stable revenues to fund governmental services. There simply is no reliable tax base from which to draw those revenues. And tax-exempt bonds, a staple of

¹To drive this point home, D. Michael McBride III relates the story of Ottawa County, Oklahoma, in his article, Proposed Federal Gaming Rules Will Hurt Oklahoma and the Country, in Indian Gaming on page 40 (April 2008):

[F]or every 10 casino jobs created by Indian gaming in Oklahoma, 25 are created in the non-Indian community. Local leaders testified to these benefits. For example, Ottawa County, Oklahoma, is the country’s largest environmental disaster Superfund site and lost 2,000 jobs when the B.F. Goodrich plant closed in 1986. Things got so bad that a sign on Main Street once read, “the last one to leave Miami, turn out the lights.” If it were not for area tribes and their entrepreneurial spirit, leaders testified, Miami might not have survived.
state and municipal revenue generation, are not as readily available to tribes due to discriminatory provisions within the federal tax laws that fail to recognize and accommodate the unique needs of tribes. As a result, tribal services are in large part funded by revenue substantially derived from business endeavors. Casinos\textsuperscript{2}, resorts, tourism, energy, farming, logging, manufacturing, federal contracting, consulting services, you name it—they are all directed at driving the tribal economic engine and generating the dollars that allow tribes to provide basic governmental services to their members. Consequently, business is the lifeblood of a tribe. Without that, it can’t thrive.\textsuperscript{3}

\textbf{1.01 History of the Federal Government’s Role in Tribal Economic Development}

From the earliest days of the United States, the federal government entered into treaties with tribes. These treaties often involved explicit promises on the part of the federal government to protect and provide subsistence for tribes in exchange for, among other things, large tracts of

\footnote{Non-Indian businesses and practitioners may not realize this, but tribal casino operations are not “for profit” businesses in so far as net gaming revenues must be used for governmental and public purposes. 25 U.S.C. § 2710(b)(2)(B). For more casino myth busting, the reader is encouraged to read the National Indian Gaming Association’s 2004 final report concerning the economic impact of tribal government gaming, available at http://www.indiangaming.org/info/Final_Impact_Analysis.pdf. Among the facts is that gaming and ancillary businesses created almost 500,000 jobs, generated $1.6 billion in state government revenue, and generated $100 million for local governments due to local taxes and local government services agreements. Furthermore, pursuant to the Indian Gaming Regulatory Act, tribes used casino revenue to build basic community infrastructure such as schools, hospitals, and roads. Revenue is used for essential governmental services such as police and fire protection, education, health care, housing, child and elder care, and cultural preservation. By way of comparison, 78 percent of the states use lotteries to generate government revenue, whereas 65 percent of the tribes in the lower forty-eight states use gaming to generate such revenue. And tribes are charitable with the money they make. In 2003 alone, tribes gave more than $100 million to charities.}

\footnote{And non-Indian communities lose the benefits that come with a tribe’s economic success. Successful tribes are often the top or near top employer in a given community. The jobs created are filled by both non-Indian and Indian workers. Businesses tribes rely on to meet their various needs, such as cell phone purchases, copier purchases and maintenance, paper purchases, etc. are often local non-Indian owned businesses. In short, the economic impact of a successful tribe is far reaching and beneficial to Indians and non-Indians alike. This is particularly beneficial in light of the fact that most tribal communities are in rural areas of a given state—areas that typically have little opportunity for substantial economic growth absent a tribal presence in the community.}
land and cessation of warring. These agreements laid the groundwork for the government-to-government relationship between tribes and the United States that persists today and permeates all levels of federal Indian policy and tribal economics.

Despite the federal government’s promises, it wasn’t long before the government baldly broke those treaties by removing tribes from their homelands wherever white settlement encroached, the end result of which was the 1830 Removal Act. However, even during the time of removal, the United States continued to enter into treaties with tribes in recognition of tribal sovereignty.

In 1871 the U.S. Congress ended its era of treaty making. Throughout the 1880s there were efforts to eliminate Indian lands by allotting individual parcels to tribal members in fee and selling surplus lands to white settlers. This effort ultimately culminated in passage of the General Allotment Act in 1887. Its purpose, to be blunt, was to eliminate tribes and put Indians on individually owned lands so that they could become “civilized” and cultivate the lands much as the white settlers. In effect, it was a law designed to parcel out reservation lands into small farms for

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In this way our 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. The former is certainly the termination of their history most happy for themselves; but, in the whole course of this, it is essential to cultivate their love. As to their fear, we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalties to them proceed from motives of pure humanity only. Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation . . . .

Id.


7 See, e.g., Treaty with the Choctaw art. III, Sept. 27, 1830, 7 Stat. 333, reprinted in 2 Indian Treaties, supra note 15, at 310, 311 (involving removal from Mississippi and Alabama to Oklahoma).

individual ownership by tribal members to hold in fee and farm, leaving the remaining lands open to further settlement by the non-Indians, and in the process eliminating all remnants of tribal governments, society, and culture.⁹

⁹ E.g., Annual Report of the Commissioner of Indian Affairs, Nov. 27, 1851, in Documents of the United States Indian Policy 86 (Francis Paul Prucha, ed., 2d ed. 1990) (the fundamental purpose was to assist in solving the “Indian question”—that question being how to “civilize” the Indians); id. Indian Commissioner Lea (“On the general subject of the civilization of the Indians, many and diversified opinions have been put forth; but, unfortunately, like the race to which they relate, they are too wild to be of much utility. The great question, How shall the Indians be civilized? yet remains without a satisfactory answer . . . My own views are not sufficiently matured to justify me in undertaking to present them here. To do so would require elaborate detail, and swell this report beyond its proper limits. I therefore leave the subject for the present, remarking, only, that any plan for the civilization of our Indians will, in my judgment, be fatally defective, if it do not provide, in the most efficient manner, first, for their ultimate incorporation into the great body of our citizen population.”); Annual Report of the Commissioner of Indian Affairs, November 6, 1858 in Documents of the United States Indian Policy 92, 93 (Francis Paul Prucha, ed., 2d ed. 1990) (“Experience has demonstrated that at least three serious, and, to the Indians, fatal errors have, from the beginning, marked our policy towards them, viz: their removal from place to place as our population advanced; the assignment to them of too great an extent of country, to be held in common; and the allowance of large sums of money, as annuities, for the lands ceded by them. These errors, far more than the want of capacity on the part of the Indian, have been the cause of the very limited success of our constant efforts to domesticate and civilize him. By their frequent changes of position and the possession of large bodies of land in common, they have been kept in an unsettled condition and prevented from acquiring a knowledge of separate and individual property . . .”); Report of the Board of Indian Commissioners, November 23, 1869 in Documents of the United States Indian Policy 133 (Francis Paul Prucha, ed., 2d ed. 1990) (“To assert that “the Indian will not work” is as true as it would be to say that the white man will not work. In all countries there are non-working classes. The chiefs and warriors are the Indian aristocracy. They need only to be given incentives to induce them to work. Why should the Indian be expected to plant corn, fence lands, build houses, or do anything but get food from day to day, when experience has taught him that the product of his labor will be seized by the white man to-morrow? . . . The policy of collecting the Indian tribes upon small reservations contiguous to each other, and within the limits of a large reservation, eventually to become a State of the Union, and of which the small reservations will probably be the counties, seems to be the best that can be devised . . . When upon the reservation they should be taught as soon as possible the advantage of individual ownership of property; and should be given land in severalty as soon as it is desired by any of them, and the tribal relations should be discouraged. To facilitate the future allotment of the land the agricultural portions of the reservations should be surveyed as soon as it can be done without too much exciting their apprehensions. The titles should be inalienable from the family of the holder for at least two or three generations. The civilized tribes now in the Indian territory should be taxed, and made citizens of the United States as soon as possible.”); Annual Report of the Commissioner of Indian Affairs of November 1, 1874 in Documents of the United States Indian Policy 144, 145 (Francis Paul Prucha, ed., 2d ed. 1990) (“Thus it has come to pass that we have within our borders at the present time
While the purpose of the General Allotment Act was to decimate tribal nations by eliminating common ownership of their lands, thereby forcing members to become assimilated into the white culture, and while Indian lands were slashed from 138 million acres in 1887 to 48 million in 1934,\textsuperscript{10} thankfully, the policy ended by enactment of the Indian Reform Act in 1934. At that time all lands that were not distributed were held in trust

\textsuperscript{10} Cohen, supra note 4, at 138.
for tribes, and all trust lands that were not transferred to fee remained in trust. The Indian Reform Act halted the wholesale theft and loss of tribal lands and once again encouraged the exercise tribal sovereignty.

However, that respite did not last long. Tribal sovereignty was once again assaulted throughout the 1950s, a time that has come to be known as the “termination era,” when Congress aggressively sought to terminate tribes and passed a law (Public Law 280) granting several states concurrent civil and criminal jurisdiction over tribal lands. That era came to a conclusive end with the advent of what has been called the “self-determination era,” which persists to this day.

Self-determination is indubitably the most important and effective federal policy concerning tribes since the 1934 Indian Reorganization Act halted the devastation wrought by the General Allotment Act. President Johnson was the first to discuss it in 1968 when he announced a new goal for federal/tribal relations, “[a] goal that ends the old debate about ‘termination’ of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help.”

This self-determination policy really took root under President Nixon and permeates federal Indian policy to this day. In his July 8, 1970, Special Message on Indian Affairs, President Nixon laid bare the ill-conceived policies of termination and paternalism that governed federal/tribal relations of the 1950s. Modern policy could no longer lie on such perilous grounds. He offered another approach—one of self-determination. Federal policy from that point forward would encourage tribes and their members to determine their own future by giving them greater control over their daily lives, and it would do so without the threat of termination. Their sense of autonomy would be bolstered without threatening their very existence. And, most importantly, self-determination policies would make it clear that Indians could gain independence from federal control without losing federal concern and support.

It is no surprise that today’s Congress views self-determination as the most appropriate policy guiding federal tribal legislation. It is the driving factor behind the Indian Self-Determination and Education Assistance Act of 1975 whereby tribes can contract with federal agencies to administer critical programs on their reservations that impact all aspects of their lives. In 1994, the policy expanded under the Tribal Self-Governance

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12 Special Message to the Congress on Indian Affairs, 1 Pub. Papers 564 -567 (July 8, 1970).
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Act\textsuperscript{14} and even found its way into programs under the Department of Housing and Urban Development and Indian Health Services.\textsuperscript{15} In 1984, consistent with the self-determination policy, the Presidential Commission on Indian Reservation Economies issued a report and recommended the private ownership and management of tribal enterprises, leading to amendment of the Securities Act and Tribal Tax Status Act to put tribes on equal footing with state and local governments to encourage private sector investment in Indian Country.\textsuperscript{16} The importance of the self-determination policy in modern tribal economies cannot be overstated.

\[1\] The Modern Socialist State of Indian Country Economics

Despite the success of the self-determination policy, the history of the relationship between tribes and the United States, including the government-to-government relationship, has played an unintended role in hampering economic development in Indian Country by creating a socialist based economy.\textsuperscript{17} A capitalist economy is defined by private ownership of the means of production, including land and other natural resources. By contrast, a socialist economy is defined by government ownership of the primary means of production, which are distributed or otherwise used according to governmental planning. The reality of modern Indian Country is that tribes and the federal government own the primary means of production, whether it be the lands on which logging is conducted by a government-run business; a casino operated by a tribe on trust lands; a factory created, operated, and run by a tribe; or simply the tribes and federal government’s status of being the primary employer on reservations. As indicated in section 1.02, tribes have had no other choice but to actively control their means of production through creation of government-run businesses in order to generate the funds they need to provide services to their people—they simply do not have the same opportunities that states, municipalities, and the federal government have to generate revenue.

Robert J. Miller, a law professor at Lewis & Clark College and an enrolled citizen of the Eastern Shawnee Tribe of Oklahoma, has suggested that the government-to-government treatment of tribes by federal

\textsuperscript{16}Presidential Comm’n on Indian Reservation Economies, Report and Recommendation to the President of the United States (1984).
\textsuperscript{17}Robert Miller, Economic Development in Indian Country: Will Capitalism or Socialism Succeed?, 80 Or. L. Rev. 757 (2001).
and state governments has contributed to the modern socialist state of Indian Country in so far as it is the means by which they deal with tribal governments in regard to economic issues.\(^{18}\) He also convincingly argues that the Indian Reorganization Act, which ended the general allotment era, played a contributing role because it encouraged tribes, as opposed to its members, to charter corporations and operate businesses.\(^{19}\) But there can be little doubt that the most significant contributing factor has been the federal government’s trust responsibility to tribes.

The federal trust responsibility, at its foundation, stems from an old rule of European international law. That rule was used to justify one European nation’s claims over another with regard to non-European land. It is a rule of law used when European nations were invading other lands and claiming them as their own without regard to the rights of the people already living there. More particularly, it is born of a rule of law known as the Discovery Doctrine. The central tenant of this rule is that “discovery” by a European nation gave title of the lands “discovered” to that government against all other European governments, which title is perfected by possession. The doctrine wholly ignores the rights of those non-European people who already occupy the land. Needless to say, it is racist. This doctrine is the foundation on which the U.S. Supreme Court’s reasoning in *Cherokee Nation v. Georgia* is built, wherein the nature of the federal-tribal relationship, and consequently the federal trust doctrine, is established.

In 1828, the state of Georgia passed a law titled, “An act to add the territory lying within this state and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and for other purposes.”\(^{20}\) In 1831, the Cherokee Nation subpoenaed the state of Georgia and filed a bill in the U.S. Supreme Court to stop the state from applying the law. Notably, the Nation identified themselves in the bill as, “the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own.”\(^{21}\) The bill further stated, “[t]hat from time immemorial the Cherokee nation [has] composed a sovereign and independent state, and in this character [has] been repeatedly recognized, and still stand recognized by the United States, in the various treaties subsisting between [its] nation and the United States” and that it solely derived “[its] title from

\(^{18}\) *Id.* at 802.

\(^{19}\) *Id.* at 798.

\(^{20}\) *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831).

\(^{21}\) *Id.* at 1.
the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs.”

In short, the Cherokee Nation made it clear that it was an independent nation to which the state of Georgia’s laws did not apply, and because it was an independent nation, and consequently a “foreign state” under Article III of the U.S. Constitution, the Supreme Court had jurisdiction to hear its request. The result of this request was the decision in *Cherokee Nation v. Georgia.* The majority decision in Cherokee Nation, authored by Chief Justice Marshall, held that the Cherokee Nation was not a “foreign state” or independent nation. Rather, the relationship between the federal government and tribes was supposedly “unlike ... any other.”

While the Cherokee Nation was a “distinct political society,” and in this regard a “state,” it was dependent on the United States and “more correctly denominated [a] domestic dependent nation ... in a state of pupilage.” The case concluded that the Cherokee Nation’s, and consequently all tribe’s, “relation to the United States resembles that of a ward to its guardian.” This ward/guardian relationship analogy has been interpreted literally and is the source of the modern federal trust responsibility.

One result of the federal trust doctrine is that the federal government plays a major role in economic activities on reservations. They hold the “fee” to trust lands, thereby preventing alienation of those lands without consent of the secretary of the interior. This also means they have direct involvement, and ultimate approval authority, over leases of those lands and other arrangements that may impact those lands. Chapter 2 bears this out in some detail, and this is readily seen in that chapter’s graph of statutes effecting transactions. Given that major economic activity on reservations involves trust land, the federal government essentially micromanages each and every major economic venture. This also means that individual members cannot use their trust land as collateral on loans to pursue business ventures without seeking approval of the federal government, and even with approval lending institutions are not likely to grant loans because the trust nature of the property prevents it

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22 Id.
23 30 U.S. 1 (1831).
24 Id. at 10.
25 Id.
26 Id.
27 Worse yet, this micromanagement is primarily conducted through the Bureau of Indian Affairs, which was originally located in the Department of War—a fact that has not been lost on tribes and is a continual reminder of the colonialist nature of their relationship with, and treatment by, the United States.
from being adequate to secure the loan. Consequently, the transaction
cost to tribes and their members for doing business on reservations is
significantly higher than costs off-reservation.\footnote{One study has indicated that agricultural tribal trust land is 80 percent to 90 percent less pro-
ductive than privately owned land and allotted trust land is 30 percent to 40 percent less pro-
ductive. This is likely the result of BIA trusteeship’s imposition of layers of bureaucracy and
legal constraints on Indian land-use decisions. For more information, see Terry L. Anderson’s
\textit{Wall Street Journal} article, available through the Property and Environment Research
Center (PERC) Web site at http://www.perc.org/articles/article170.php. Mr. Anderson is a
professor of economics at Montana State University and the executive director of PERC.}

Needless to say, the federal government and its bureaucracies are famed for inefficiency, and
their involvement can slow business transactions to a crawl.

The need to find alternative means to generate government revenues, the
government-to-government relationship between tribes and federal and state
governments, and the federal trust responsibility have all led to extensive
government control of tribal economies. And, as is true when any govern-
ment controls the primary means of production, this has had the unintended
consequence of hindering, or at least limiting, economic development.

Adding irony to the situation is the fact tribes not only have to control
the means of production in order to generate the necessary funds to run a
government, but also tribal control of land and natural resources is criti-
cal to the tribe’s ability to govern itself.\footnote{Robert Miller, \textit{Economic Development in Indian Country: Will Capitalism or Socialism Succeed?}, 80 Or. L. Rev. at 799 (2001).} To speak broadly, federal Indian
law has devolved to the point that in order to ensure tribes’ ability to
regulate and adjudicate matters involving non-Indians within their own
reservations, tribes must actively pursue ownership of as much land and
natural resources within their reservation boundaries as possible.

Despite the socialist undertones in the relationship between tribes and
the federal government, Congress generally has encouraged tribal sover-
eignty and economic development in recent times. However, this is not
true of the U.S. Supreme Court, which has actively undermined those
efforts, as have some discriminatory federal laws.

### 1.02 Inadequate Tax Base

The modern anemic state of the tribal tax base is due in large part to rul-
ings by the U.S. Supreme Court over the last twenty years and a few select
federal laws that serve to hamstring tribes, rather than assist them.

In \textit{Atkinson Trading Company},\footnote{\textit{Atkinson Trading Co. v. Shirley}, 532 U.S. 645 (2001).} the Navajo Nation tried to impose a
tax on a non-Indian owned trading company doing business within the
reservation. The trading company was located on fee land surrounded by a sea of the Nation’s reservation lands. Although the issue should have been a no-brainer—that a tribe can tax companies doing business on its reservation just as a state can tax companies doing business within their borders (regardless of the nature of the land the business is being conducted on)—the Supreme Court thought otherwise.

Defying what appeared to be settled federal Indian law, the U.S. Supreme Court wrote that, “[an] Indian tribe’s sovereign power to tax—whatever its derivation—reaches no further than tribal land.” In other words, so long as a company is doing business on fee lands within an Indian reservation, it can do so free of tribal taxes. The upshot of the Atkinson ruling was to significantly undermine any chance tribes had in building a stable tax base to fund government services.

Federal laws that often serve to assist non-Indian governments have not been extended to serve tribes in the same or similar fashion. Tax-exempt bonds, a staple for off-reservation revenue generation, are often not a realistic option for tribes. The Internal Revenue Code mandates that a tribe’s tax free bond proceeds be used only for “essential governmental functions.” This is further limited to activities “customarily performed by State and local governments with general taxing powers.”

State and local governments also have access to tax-exempt private activity bonds to finance nonprofit corporations, first time home loans, and low income rental properties. But tribes are barred from issuing private activity bonds except to finance manufacturing facilities. While the difference between Indian and non-Indian governments are like night and day when it comes to revenue generation, the federal government assumes they are the same when it comes to tax-exempt bonds generally, and actually adds an economic hurdle for tribes with regard to the issuance of private activity bonds.

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32 Atkinson, 532 U.S. at 653.
35 Id. at § 7871(e).
36 Id. at § 7871(c)(2)-(c)(3).
37 Add to this the fact that the IRS singles out tribes for enforcement actions. Less then 1 percent of tax-exempt municipal bonds are audited each year, but tribal tax-exempt bonds are thirty times more likely to be audited then a city or state. Gavin Clarkson, Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development, 85 N.C. L. Rev. 1009, 1018 (2007).
Consequently, if tribes ever want to establish a stable source of revenue to support the significant needs of their membership, they are forced to rely on business ventures. Absent these ventures, the only other stable source of revenue is the United States federal government.

And, contrary to what many non-Indians appear to believe, casinos are not the panacea of all tribal economic ills. There are 562 federally recognized Indian tribes in the United States. However, according to the National Indian Gaming Commission, only 228 of them have gaming operations. That means roughly 60 percent of the tribes in the United States don’t even operate gaming facilities. Furthermore, the National Gambling Impact Study Commission reports that:

> [f]or the majority of tribal governments that do run gambling facilities, the revenues have been modest yet nevertheless useful. Further, not all gambling tribes benefit equally. The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for 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.

Thus, casinos are a wonderful resource for those tribes that are lucky enough to have successful operations, but the majority of tribes do not reap their benefits.

Needless to say, tribal self-sufficiency depends almost entirely on successful and stable economic development. Business is a modern necessity for tribes.

1.03 Different Cultures Require Different Institutional Structures

There are different recipes for success when it comes to tribal businesses. However, they all revolve around certain core ingredients. In the late 1980s, Harvard University founded the Harvard Project on American Indian Economic Development. The project focuses on comparative and case research concerning tribal economies, and applying that research to the benefit of tribes. The result of that research is the conclusion that tribal economic success centers on the following three factors:

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Sovereignty and self-governance are indispensable... American Indian tribes cannot succeed under de facto planning and control by another government;

[2] Sovereignty alone is not sufficient to create sustainable economic development. Economically, politically and socially successful tribes back up their sovereignty with capable institutions of self-governance. The challenge, in short, is to exercise sovereignty effectively;

[3] Capable government (both in Indian Country and elsewhere) means lying down and enforcing stable rules of the game. Without hard-to-override policies, institutions, and law that channels effort and dispute resolution into productive ends, individuals rich and poor, Indian and non-Indian, will not invest themselves and their resources in a reservation economy.

Nevertheless, another key factor the Project found was that tribes differ. Many of the 562 tribes in the United States are culturally distinct from each other. It comes as no surprise then, that what works for one tribe may not work for another. Not surprisingly, a critically important aspect of successful tribes is the creation of institutions that match the tribe’s cultural norms and understandings of how authority ought to be exercised.

This is a very important point for non-Indian businesses to understand when entering into a contractual relationship with tribes. For some tribes, cultural norms support a strong executive system where a single individual wields significant power over how matters proceed. The White Mountain Apache tribe has been identified by the Project as having this characteristic, and the success of its business ventures stems in part from the fact that it conducts business in a similar manner. Other tribes, such as the Salish and Kootenai Tribes on the Flathead Reservation, have a very different cultural norm. Historically, they have had a decentralized parliamentary democracy with a strong and independent judiciary. Consequently, institutions structured in this manner have worked well for them in their business ventures. Likewise, the Cochiti Pueblo, which is very successful in its business ventures, operates under a centuries old theocracy that suits its tribe’s cultural norms.

[42] Id. at 6.
[43] Id.
[44] At the end of each year, under the leadership of the Cacique, the chief spiritual leader of the Cochiti Pueblo appoints the top six positions of the tribal government to a one-year term.
Successful tribal institutions must therefore meet two thresholds: they must be practical and culturally legitimate.\textsuperscript{45} Legitimacy, however, does not obviate the need for successful tribal governments to separate politics from day-to-day business and program management.\textsuperscript{46}

This has obvious impacts on contractual relationships. In a strong executive setting, a contractor may find that the tribal executive or governing body will want to play a direct role in the subject matter covered under the contract. In a decentralized parliamentary setting, it may be that the governing body will play a less active role and rely significantly on the efforts of tribal staff. Whether one relationship is better than the other depends on the contractor and the tribe he or she is dealing with. While a contractor may not be used to active government involvement in business dealings, and may find such involvement frustrating, it is important for the contractor to understand that despite his or her preconceived notions, such involvement may not only be appropriate in the situation, but it may also be the best type of business relationship to have for that project given the unique culture of the tribe. Or, the situation might be reversed. A contractor who has a history of dealing with a particular tribe with a strong executive may have learned in that setting that having active involvement by the executive or tribal council was critical to maintaining ongoing support for the project. That same contractor may find himself or herself engaged in a business transaction with a different tribe but have the same expectations. However, in the new situation the contractor may find that the executive or governing body is not as active in the process as he or she is used to, and this may lead to some concerns about whether the project will have ongoing support. Such concerns may be unwarranted, however, because the cultural norms in the later example do not carry the strong executive expectation, and active involvement may actually harm the progress of the project.

For these reasons, non-Indian businesses should avoid entering into business transactions with a preconceived notion of how businesses should run, or what makes a given tribal transaction successful. Those preconceptions may well be wrong. Furthermore, and for the same reasons, non-Indian businesses that have transacted business with one tribe should not assume that what worked or did not work in the prior transaction will translate in doing business with another tribe.

\textsuperscript{45} Begay, supra note 35 at 6.