

**AFN White Paper: The Origins, Meaning and Future of Indian
Self-Determination**

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By Paul Moorehead

Introduction

The current legal and political relationship between American Indian Tribes¹ and the Federal government of the United States is among the most mature in the world.

Most indigenous communities around the world do not have recognized or enforceable legal or juridical rights, like those of America's tribal communities. In other countries, most indigenous groups with weak or non-existent governance structures rely on international organizations to protect and cultivate their rights often because the nation-state in which the group resides has not recognized and fostered the rights of that group.

As a weak and fledgling nation, the Federal government's initial course of dealing began with a strong nation-to-nation policy by engaging in treaties with Indian tribes and, in the course of the last 235 years, has evolved into a robust Federal Indian policy. While this policy has zig-zagged wildly since the nation's inception, it is relatively recently that tribal involvement and decision-making were made central to any proposal or initiative that affect their communities.

Federal Indian Policy through the Years

Federal Indian policy in the 1960s was the culmination of two hundred years of previous policies that swung widely between attempts to accommodate and co-exist with tribal communities and to warfare and genocide and right up through the early part of the decade --- termination

¹ For purposes of this article, the term "Indian tribe" will have the broad definition contained in 25 U.S.C. 450 of the Indian Self-Determination and Education Assistance Act.

of tribal institutions and assimilation of the Indian people into the American mainstream.

These inconsistent and often contradictory policies caused extreme deprivation and barriers to the development and welfare of Indian people. As the following makes clear, the Indian Self-Determination Policy that germinated in the late 1960s was the result of historical, social, and economic developments in American life.

The British Crown's Indian Policy in the Colonies

The British need for a robust and rational Indian policy in the 17th and 18th centuries was crucial not just to maintain peaceful relations between the Indians and the colonists, but to accrue leverage and military strength in their conflict with France and other European powers for control of the newly discovered North American territory and its vast wealth and resources (Allen, 1992, at 12).

In the 1600s, English law held that Indian land could only be claimed through consent by the Indians or after a “righteous war” against them and began buying land the Natives were willing to sell for a “smooth transfer of land into its possession” (Newton 2012, at 14).

Recognizing the authority Natives held over their land, the Crown entered several treaties of friendship and alliance; in 1621, King James and Massasoit and the Chief of Sachem of the Wampanoags entered a treaty of friendship and alliance. This was followed in 1679 when the Mohawk Nation and the Governor of New York entered a treaty of friendship and alliance that lasted several weeks (Newton 2012, at 14-15).

At a time of increasing tension and clashes between the English and French, the French sought and secured better relations with the Natives, including in the lucrative fur trade. The increasingly strong alliance between the French and the Indians prompted the British government to assume more control over Indian land and policy.

So, for example, in 1753, the Crown restricted settlers' powers in acquiring Indian land and ordered "all settlers on those lands to leave at once" (Newton 2012, at 16).

After the French and Indian War of 1754, the British further prohibited the colonies from engaging in Indian land transactions. The Royal Proclamation of 1763 imbued the Crown with the sole authority to purchase Indian land and explicitly reserved the land west of the Appalachians for tribal nations.

The "Doctrine of Discovery" provided additional authority to the United States derived from the European countries that "discovered" the New World and its original inhabitants and, with it, *exclusivity* in tribal relations.

Treaty making with the Indian Tribes

The process of treaty making during and after the Revolutionary War aimed to gain political alliance and friendship against America's European foes, whereas the process of treaty making in the era of American Independence aimed to revise the meaning of treaties upholding Federal obligations and protecting tribal property rights.

In the years immediately following the military victory over the British and resulting revolution, Indian tribes were treated as sovereign entities with whom the fledgling American government negotiated and entered some 380 treaties. Through both statute and treaty, the United States developed an Indian policy that suited its immediate needs, all the while planning for the expansion of the country westward.

American Independence and Federal Indian Policy

In September 1787, 12 of 13 states ratified the U.S. Constitution.

The first article in that document deals with the specific, articulated powers and authorities of the United States Congress, the branch of government the Founders thought closest to the people.

Article I, Section 8, clause 3, provides that “[t]he Congress shall have the Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....” (U.S. Constitution, Article 1, Section 8, clause 3).

The “Commerce Clause” as it is known, is the most important source of constitutional authority for congressional action in the realm of Indian affairs and the newly-assembled congresses wasted no time in using it to enact two of the earliest and most important laws relating to Indians.

In 1790, Congress passed the first of a series of *Non-Intercourse Acts* (sometimes known as the *Indian Non-Intercourse Acts*) which provides that:

No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The Act was an early expression of the prerogatives of the new nation as well as a shield to prevent illegal or unethical transfer of lands out of Indian hands.

As many scholars have observed, the Act likewise served to establish a “trust responsibility” owed to the Indians by the Federal government.

The 1790 Act gave sole authority to the Federal government to purchase Indian lands, regulate trade, and prevent non-Indian trespassing on treaty-protected land and to enforce various criminal offenses. Congress expanded the Act in 1793 with two new provisions to “promote civilization” among the Indians by distributing goods and services and to prohibit horse thieves and unscrupulous traders.

The Act was expanded again in 1796 and 1802 to include provisions for prosecuting Indians who trespassed into state or territorial lines or

committed crimes in those areas, and authorized the establishment of government-owned trading posts on treaty lands (Newton 2012, at 35-37).²

Indian Removal

After the War of 1812, a period of peace and treaty making resumed. The United States signed over 20 treaties within two years in exchange for peace and friendship, recognition and respect of former treaties, and protection under the United States.

With increasing immigration into the Eastern seaboard and the country expanding economically, Federal policy began to change radically. Congress' priority turned to pushing tribal communities off of their lands and removing them to the western regions of the country.

In 1830, Congress passed, and President Andrew Jackson signed, the *Indian Removal Act* (Pub.L.41-128, 4 Stat. 411), authorizing the President to reserve lands west of the Mississippi for the tribes residing in the southeastern part of the United States in exchange for the aboriginal lands of those tribes in Georgia, the Carolinas and nearby states.

The new policy of "Indian Removal" was vigorously enforced by President Andrew Jackson whose term in office (1829-1837) resulted in many eastern tribes being forcibly relocated to their newly-designated homes in what became known as "the Indian Territory," in modern day Oklahoma.

The Supreme Court of the United States issued seminal decisions in the 1830s reviewing treaty language that spoke to relationships between sovereigns.

Notwithstanding such treaty language, in *Cherokee Nation v. Georgia* (30 U.S. (5.Pet) 1, 1831), Chief Justice John Marshall wrote that the tribes were not independent sovereign entities but rather "domestic dependent

² The 1834 Act, currently codified at 25 U.S.C. § 177, provides: "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant the constitution."

nations” whose relationship with the United States is more akin to that of “a ward to his guardian.” *Id.* at 13.

A year later, Marshall’s Court issued *Worcester v. Georgia* (31 U.S. (6. Pet.) 515, 1831) holding that the treaty with the United States did not cede the Cherokees’ right to self-government; rather, the United States only retained the sole and exclusive power to maintain trade with the Indians.

For those Indian people who did not wish to relinquish their homes, lands and ways of life, the Federal government forcibly obliged them to do so in a forced march that became known as the “Trail of Tears.” Tens of thousands of Indians died as a result.

The Reservation Period

Following the relocation of Indian people to the Indian Territory, additional treaties were struck with tribes, often involving the cession of hundreds of thousands of acres of Indian land, and the identification of smaller reservations for these tribes. Thus, the reservation system was seen as a solution to designate permanent homelands of hugely diminished size as well as a way to discourage western-moving white settlers from overrunning Indian lands territories (Newton 2012, at 60).

The reservation system was first implemented in 1853 with California tribes when huge and valuable gold deposits were discovered on tribal lands.

By 1858, the reservation system was seen as “schools for civilization, in which Indians under the control of the agent would be groomed for assimilation” (Newton 2012, at 61).

Promotion of the reservation system would theoretically reduce the amount of land tribal nations would need to sustain their new “civilized” life and thereby could be sold to non-Indians as “surplus.”

The Civil War Interregnum

Indian tribes fought on both sides in the Civil War, and some struck treaties with the Confederacy. For instance, notably, the Five Civilized Tribes of Oklahoma negotiated an alliance with the secessionist government in exchange for protection of tribal lands and rights to self-government.³

Nonetheless, with Federal attention turned to defeating the Confederacy largely in areas east of the Mississippi, the war had negative effects on tribes at the hands of Federal Indian agents with violations of treaties, illicit land grabs, forced exiles, and general mayhem with Indian relations left to replacement volunteers, state militias, and unprofessional commanding generals.

A notorious example of this period involves the Dakota (Sioux) Tribes in Minnesota. Even though the tribes had a treaty in place promising annuities, food, supplies and succor, the Indian agent failed to fulfill these obligations, leaving the Indian people in an extremely bad state of affairs. When white settlers began to massively encroach onto Sioux lands, bloody skirmishes led to President Lincoln ordering the execution of some 38 Sioux men in the summer of 1862.

³ For a general description of the role of American Indians in the war, see "American Indians and the Civil War," Robert Sutton and John Latschar, editors, Official National Park Service Handbook.

The End of Treaty Making

In 1867, after the Civil War, the United States established the Indian Peace Commission to help facilitate an end to ongoing Indian wars in the west and to strike peace treaties with several southern Plains tribes: the Kiowas, Comanche, Apache, Cheyenne, and Arapaho. The following year, treaties were signed with the Northern Sioux, Crow, Cheyenne, Arapaho, Navajo Nation, Eastern Band Shoshones, and Nez Pearce.

In 1870, as part of a Federal spending bill, the United States declared the end of treaty making with the tribes and, henceforth, Federal-tribal relations would be governed through congressional action or presidential order.

Predictably, and despite explicit promises in the treaties, settler encroachment onto reserved Indian lands ensued leading to outbreaks of hostilities with the settlers and, ultimately, the United States Army.

At the same time, already weak tribal economies were collapsing, creating a forced dependence on the local Indian agents for food and other Federal assistance to survive. The sad fact is that Federal officials --- not tribal leaders --- were exercising control over the affairs of the tribal communities.

Allotment and the Erosion of the Tribal Land Base

With the Civil War and the Indian Wars over, Congress wasted little time making another significant shift in Indian policy by enacting the *General Allotment Act of 1887* (Pub.L.49-105, 24 Stat. 388, also known as “the *Dawes Act*”). The new Federal policy was to break up --- through an allotment of lands --- the tribal land mass and provide each adult Indian with a parcel of land for purposes of ranching and farming. Lands remaining after the allotments were made were considered “surplus,” and sold to non-Indians.

The *General Allotment Act* worked as planned: in 1881, Indian tribal trust lands totaled 156 million acres; by 1890, that had been reduced to 104

million acres; by 1900, 78 million acres; and by 1934, only 34 million acres remained in Indian ownership, with most of the acreage being considered surplus and sold to non-Indians.

In addition to the alien concept of individual land ownership, the tandem aim in Federal policy was to assimilate the Indian people into the mainstream of American life and civil society.

While the United States' responsibility for the lands remaining tribal lands and the individual allotments, the *General Allotment Act* posited the end of this Federal responsibility.

These policies failed miserably and within a short period of time, most reservation Indians were mired in poverty, despite Federal attempts to generate income to the allottees by, among other measures, authorizing the leasing of allotted lands to third parties.

Indian Reorganization

Witnessing the dire conditions of tribal communities as a result of allotment and assimilation, Congress enacted the *Snyder Act of 1921* (25 U.S.C. 13), designed to consolidate Federal programs and services and broaden opportunities for Natives.

Even with these modest efforts, the economic and social situation of most Indians was one of destitution. At the request of Hubert Work, Secretary of the Interior, a comprehensive study of Indian life was undertaken and in 1928, the report, with the formal title of "The Problem of Indian Administration," was issued.

Bearing the moniker of the study's technical director, Lewis Meriam, the report described the abject failures of allotment and assimilation and estimated that three quarters of reservation Indians had a *per capita* income of \$200. Clearly, then, separating Indians from their traditional cultures, governance and economic lives had proved disastrous and the author of this disaster was the Federal government.

Not much changed until the election of Franklin D. Roosevelt in 1932. Citing the findings of the Meriam Report --- that Indians were desperately poor, in poor health and largely uneducated --- Roosevelt and his Commissioner of Indian Affairs, John Collier, pressed for more progressive policies and legislation aimed at rehabilitating Indian tribes and revitalizing tribal communities.

Against the backdrop of the economic calamity of the Great Depression, they succeeded in convincing Congress to pass the “Indian New Deal,” including the *Leavitt Act of 1932* (to discharge or adjust debt that was assigned to Indian tribes for high-cost reservation irrigation projects, the *Leavitt Act* would discharge or adjust this debt in the best interest of Native tribes (Newton 2012, at 80)); the *Johnson-O’Malley Act of 1934* (25 U.S.C. 13-1), setting forth contracts with a state or territories for the purpose of Indian education, medical, agricultural, and social welfare assistance; and the *Indian Reorganization Act of 1934* (“IRA,” 25 U.S.C. 5129).

The IRA began to reverse the failed policies of the previous 50 years: the Act authorized the Secretary to purchase and place in trust land for tribes and Indians, to rebuild tribal governments by authorizing the establishment of tribal constitutions, and to facilitate and encourage commercial activity through the creation of Federally-chartered corporations.

Oklahoma and Alaska were initially excluded from most of the IRA provisions until 1936, when the provisions were extended to the Alaskan territory and the adoption of the *Oklahoma Indian Welfare Act of 1936* (25 U.S.C. Ch. 45A).

World War Two and Termination

As with many criticisms of Roosevelt's New Deal, the IRA was attacked as un-American, socialist and practically ineffective. More importantly, much as the nation's attention was called away during the Civil War, America's entry into and ultimate victory in World War Two sapped Federal resources for initiatives like the IRA. The magnitude of the war effort meant spending trillions of dollars and neglecting domestic programs and services that were not necessary to the effort.

In this era, Federal Indian policy sought to promote Indian self-sufficiency through termination (Case and Voluck, 2012) and the eventual dismantling of Indian tribal and Alaska Native governments. The Federal government's formal termination policy was launched in 1953, with the passage of House Concurrent Resolution 108, directing that future legislation dealing with Indians be designed "to promote the earliest practicable termination of all federal supervision and control over Indians."

House Concurrent Resolution 108 also declared that as rapidly as possible, Indians should be "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States." And further, that "[a]t the earliest time possible, [Indians] should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." H.R. Con.Res. 108, 83rd Cong. (1953).⁴

From 1953 to 1962, Congress terminated 109 Indian tribes, directing the distribution of tribal property and dissolution of their tribal governments. Federal programs and services such as education, health, welfare, housing assistance, and social programs were discontinued.

President Lyndon B. Johnson and "The Forgotten American"

⁴ Francis Paul Prucha, *The Great Father: the United States Government and the American Indians* (2 vols., Lincoln NEbr., 1984), 2: 919, 945, 1028-1029, Statement of Oklahoma Members of Congress on H.Con.Res.108, July 22, 1953, folder 69, box 1, Speeches Series, Carl Albert Collection, Carl Albert Congressional Research and Studies Center, University of Oklahoma, Norman.

For Johnson, the year 1968 was a year unlike most in American history: the civil rights movement was in full froth with protests across the country and abroad arguing for the rights of blacks and other minorities as well as women; American cities were on fire with riots; the anti-war movement and protests against America's involvement in Vietnam would bring such pressure on the incumbent president he would forego a re-election effort; and, in a span of two months, civil rights leader Martin Luther King, Jr., and presidential hopeful Robert F. Kennedy, would be assassinated.

On March 6, 1968, Johnson issued a message to Congress on his vision for the direction of Federal Indian policy.

Johnson's missive --- "The Forgotten American" --- recited the horrendous failures of previous Indian policy and the harm they caused to Indian people, acknowledged the importance of Indian contributions to the country and, in general, lamented the sad state of affairs in Indian communities: poor housing, substandard health and education, low literacy rates, and a life expectancy fully two decades lower than all other Americans.

The new goals, in Johnson's view, should be:

- An Indian standard of living equal to that of the United States as a whole;
- Freedom to remain on their homelands or relocate to towns and cities; and
- Full participation in the modern American life, with a full share of economic opportunity and social justice.

The overall theme, Johnson stressed, would be "self-help, self-development, [and] self-determination." Johnson issued a tandem document, Executive Order 11399, establishing the National Council on Indian Opportunity, which would be comprised of most Federal departments as well as eight Indian leaders.

The NCIO would “review Federal programs for Indians, make broad policy recommendations, ensure that programs reflect the needs and desires of the Indian people and, most importantly, make certain that the American Indian shares fully in all our Federal programs.”

Accelerating tribal involvement in the contours and design of community services would lead to the ultimate objective: when Indians and the Government would be full partners, not managers of endless ineffective programs and services with resulting mass dependency.

Indian Education Key to Johnson's Plan

A former teacher himself, Johnson's message stressed Indian education as a core plank in the effort to raise Indians' standards of living. At that point, more than sixty percent of Indians had less than an eighth grade education, with fully half dropping out of high school.

Johnson directed the Secretaries of Interior and Health, Education and Welfare to work with states and local educational agencies using recently enacted laws, including the *Elementary and Secondary Education Act* (20 U.S.C. 20), the *Education Professions Development Act* (20 U.S.C. 1091), the *Vocational Education Act*, and the *Higher Education Act* (20 U.S.C. 20; 1008).

Johnson also called for every four- to five-year old Indian child to be enrolled in pre-school programs by 1971; to help achieve this goal, he requested funding to ensure 10,000 Indian children benefit from the Head Start Program, as well as establish kindergartens for 4,500 Indian youngsters within a year.

For the 245 Federally-operated schools with some 50,000 Indian students enrolled, Johnson called for \$5.5 million to create a “model community school system” that would:

- Have the finest teachers, familiar with Indian history, culture and language;

- Provide an enriched curriculum with modern instructional materials and programs to teach English as a second language; and
- Serve the local Indian community as a community center for all manner of activities from adult education to social gatherings.

As to higher education, Johnson sought to encourage Indian students to pursue professional careers as doctors, nurses, engineers, managers and teachers.

Recognizing what his successor did in 1970, Johnson noted that “the young Indian of today will eventually become the bridge between two cultures, two languages and two ways of life.”

Part and parcel of this effort would be robust Federal funding for college scholarship grants as well as ensuring regular scholarships and loans are made available to Indian students.

Jobs and Community Development

Johnson’s personal experience during the Great Depression, first as a teacher, then as a Congressman from Texas, gave him profound empathy towards unemployed and destitute Americans in all communities from the southern border with Mexico, to Appalachia, to inner cities and Indian reservations.

Noting that seventy percent of Indians were either unemployed or under-employed in seasonal work, and seventy-five percent of Indian families had cash incomes below \$3,000, Johnson saw underdevelopment of Indian land and natural resources --- oil, gas, coal, uranium, timber, water --- as a main cause of the persistent poverty in tribal areas.

Vocational and job development programs administered by the Bureau of Indian Affairs (BIA) were vital, but equally important was the lack of a capital base for sound investment opportunities. Johnson also called for the enactment of the “*Indian Resources Development Act*” to provide \$500 million in loan guarantees and insurance funds, as well as direct revolving

loan funds. A nearly identical development tool would become reality six years later with the enactment of the *Indian Financing Act of 1974* (25 U.S.C. 1451).

Johnson's message was comprehensive in identifying the various programs and services that needed attention --- as well as more robust Federal funding --- including roads, community services, and housing and related water and sewer infrastructure.

On the special category of Alaska Native matters, Johnson's message was dedicated entirely to land rights of the Aleuts, Eskimos and Indians which "have never been fully or fairly decided." The message recites the history of the Alaska territory and statehood and the impacts on Native land and uncertainty of title. To help resolve these matters, Johnson called on Congress to support pending legislation that would:

- Give Alaska Natives title to the lands they occupy and need to sustain their communities;
- Provide additional authorities to use additional lands and water for hunting, trapping and fishing to maintain their traditional way of life; and
- Award Alaska Natives compensation "commensurate with the value of any lands taken from them."

Of course, Alaska Native land title and related matters were not dealt with until 1971 with the enactment of the comprehensive *Alaska Native Claims Settlement Act of 1971* (43 U.S.C. 1601).

After just five years, Johnson could claim credit for engineering the passage of major anti-poverty and civil rights laws, including the *Indian Civil Rights Act of 1968*, signed in his last year in office.

Johnson's view of a proper and effective Federal Indian policy, echoed by his successor and all presidents since 1968, has essentially been "Partnership, Not Paternalism."

“The Forgotten American” was the title of “[t]he Message to the Congress on Goals and Programs for the American Indian” sent to Congress by President Lyndon B. Johnson in March 1968, the final year of his presidency. In addition to striking new policy themes and initiatives, Johnson requested half a billion dollars for Indian education, health and medical care, jobs and economic development, community services, and other programs and services. Johnson ended his message by stating that “there can be no question that the government and the people of the United States have a responsibility to the Indians.”

In his Message, Johnson acknowledged the contributions Indians made to the country and described the shocking social and economic conditions plaguing Indian people. Johnson’s Message proposed more robust Federal funding, lauded the establishment of a National Council on Indian Opportunity⁵, and a realization that “the greatest hope for Indian progress lies in the emergence of Indian leadership and initiative in solving Indian problems.”

Foreshadowing later developments, Johnson recognized that the land rights of Alaska Natives “have never been fully or fairly defined,” and pledged his Administration’s support for legislation that was then pending in Congress to resolve land title matters, subsistence issues, and compensation for lands taken from them.

President Richard M. Nixon and the Indian Self-Determination Policy

Any fair reading of Johnson’s 1968 Message must acknowledge that in many ways it provided the foundation for President Richard M. Nixon’s efforts that began two months before the 1968 presidential election. At the

⁵ Johnson issued Executive Order 11399 “Establishing the National Council on Indian Opportunity” on March 6, 1968, the same day of his message to Congress. The NCIO was to be comprised of the Vice President of the United States (as Chairman), the Secretaries of Interior; Agriculture; Commerce; Labor; Health, Education and Welfare (now Health and Human Services); Housing and Urban Development; the Director of the Office of Economic Activity; and six Indian leaders appointed by the President for six year terms.

same time, most scholars and observers agree that the self-determination program came into full blossom during the Nixon Administration.

Even before that, in a “Statement Issued to the National Congress of American Indians” at Omaha, NE on September 27, 1968, candidate Nixon opened with the characterization of the “sad plight of the American Indian is a stain on the honor of the American people.” The statement went on to say:

The Indian people have been continuous victims of unwise and vacillating federal policies and serious and, if unintentional, mistakes...They have been treated as a colony within a nation --- to be taken care of. They should --- and they must --- be made part of the mainstream of American life.



The election results that November were close, with Nixon capturing 31.8 million votes, 32 states, and 301 electoral votes, and former Vice President Hubert Humphrey winning 31.2 million votes, 13 states, and the District of Columbia and 191 electoral votes. Alabama Governor George Wallace ran

on the “American Independent Party” getting 10 million votes, 5 states, and 46 electoral votes.⁶

The domestic front in Nixon’s first year was like that of Johnson’s last: the civil rights protests continued, but with an added element --- an incipient activism in Indian communities about their own material conditions and treatment at the hands of the Federal government.

The Vietnam War continued to rage and domestic unrest continued as one administration departed and another came to power. On the home front, with American cities ablaze and protests and riots in abundance, Nixon promised a new focus on “Law and Order.”

Nixon’s first term produced a remarkable number of social measures: many of which in those days were dubbed “ecology” achievements, including his proposal to Congress to reorganize small Federal offices dealing with the environment into the Environmental Protection Agency, the enactment of the *National Environmental Policy Act*, the *Clean Air Act*, the *Clean Water Act*, the *Endangered Species Act*, and other initiatives such as the establishment of the Office of Safety and Health Administration.

Why Nixon’s interest in developing Indian Policy?

Many have asked why Nixon saw the need to develop and pursue a bold and progressive new Federal Indian policy. Some ascribe it to the need to appeal to racial minorities on the campaign trail; others to the endearing relationship he enjoyed with his Whittier College school football coach Chief Wallace Newman, a Cherokee Indian.⁷

An observer opined that Nixon showed sympathy for Native people, whom he considered “a safe minority to help.” Because the Indian movement was just getting underway during the late 1960s, Native Americans proved receptive to presidential gestures. Since they

⁶ Wallace, not Nixon, won the so-called “solid south,” of Arkansas, Louisiana, Alabama, Mississippi, and Georgia.

⁷ Nixon to John D. Erlichman, Nov. 30, 1970, box 12, H.R. Haldeman Files, Contested Documents File; Nixon Materials; Bradley H. Patterson, Jr. interview with A. James Reichley, Nov. 11, 1977, Ford Library.

numbered fewer than 1 million, their problems seemed more manageable than those of blacks.”⁸

It is also certainly true that he was aided and guided by a bipartisan group of White House advisors, including Arthur Burns, White House Counselor; Bob Robertson, Vice President Agnew’s staff; John Ehrlichman, Domestic Policy Adviser; Daniel Patrick Moynihan, former Democratic Senator from New York; Leonard Garment, Special Consultant to the President; Brad Patterson, Executive Assistant to Garment; and Barbara Greene (“Bobbie”) Kilberg, White House Fellow Adviser, among others.

In his interview upon his exit from service in the White House in 1974, Patterson described the oversized role Garment played in the development of Nixon’s Indian policy. Patterson also noted that while the issue of settling Alaska Native land claims was not a part of the July 1970 Message, it was a matter that involved him, Garment, congressional leaders and Alaska Native leaders, resulting in a congressional settlement in 1971.

“I think in Indian affairs one of the things we are proudest of is our role in the President’s message of July 8, 1970.”⁹

As chairman of the NCIO, Vice President Spiro Agnew urged vigorous policy to transfer program authority to those tribes that wish to manage them, consistent with Nixon’s policy of “New Federalism” seeking to transfer authority from the Federal government to state and local governments.¹⁰

Many Indian people were also critical in the development of the Nixon policy: LaDonna Harris, Alvin Josephy, Charles Lohah, Ernie Stevens, Sr., Sandy McNabb, Rose Crow-Flies-High, and Laura Bergt.¹¹

⁸ Alcatraz, Wounded Knee and Beyond: The Nixon and Ford Administrations Respond to Native American Protest, Dean. J. Kotlowski, *Pacific Historic Review*, Vol. 72, No. 2 (May 2003), University of California Press, pp. 221-227.

⁹ Interview with Bradley H. Patterson, Jr. conducted by Terry Good in Room 182 of the Old Executive Office Building on September 10, 1974.

¹⁰ Spiro Agnew to Nixon, box 67, Bradley H. Patterson, Jr., Nixon Materials.

¹¹ Brad Patterson, remarks before the Senate Committee on Indian Affairs, January 11, 1999.

With perhaps the best perspective on the origin of Nixon's Indian policy is Leonard Garment:

"We were asked in 1969 by the President to formulate a comprehensive program to deal with the various problems of Indian life. For a period of 10 months members of the White House staff, working with representatives of tribes and individual Indian scholars, and other persons in the Federal Government, worked to prepare legislation that would accompany the message. These dealt with Indian anxieties about termination, the problem of exclusion from the management of Indian education, economic development, Indian health, problems of physical isolation associated with reservation life, cultural issues then symbolized by the effort to restore Blue Lake to the Taos Pueblo Tribe, a sacred shrine seized by Secretary Gifford Pinchot in 1906, as part of the extension of the national forest preserve. All of these came together in the message that was delivered to the Congress in July 1970, and Congress enacted a large part of the package of proposed legislation."¹²

Nixon Issues the Special Message

In July 1970, President Richard M. Nixon issued his "Special Message to Congress on Indian Affairs," rejecting the failed policies of forced termination and stifling paternalism, and advocating for a coherent strategy in lieu of piecemeal reforms.

¹² Leonard Garment testimony before the Senate Committee on Indian Affairs on a Hearing to Reorganize the Bureau of Indian Affairs (1992).

“But most importantly” the Message went on “we have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can best be fulfilled.”



But the Message was much more than a recitation of the sad history of America’s treatment to tribes and their members, it laid out the rationale for a more enlightened policy that emphasized tribally-determined priorities and decision-making.

For Nixon, the “oppressed and brutalized” condition of American Indians was the result of two main factors: deprivation of their lands and no opportunity to control their own destiny.

Stating that “[it] is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people.”

This would be rectified by “break[ing] effectively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”

Indian Determination without Termination

President Nixon believed the policy of termination was wrong, because it was built on flawed premises: (1) that the Federal trusteeship was taken on as an act of generosity towards a disadvantaged people; (2) as a result, the trusteeship can be unilaterally ended at the whim of the trustee; (3) as a practical matter it failed to encourage self-sufficiency and, in fact, resulted in a worse material condition for Indians than before; and (4) the paradoxical effect on those tribes that were not terminated in which the mere threat of termination causes an extreme form of dependence on a Federal government that has become extremely paternalistic in its interactions with the tribal communities.

A BIA document entitled “The American Indian and the Bureau of Indian Affairs – 1969: A Study, With Recommendations,” (the “1969 Report”) tracks the impact of termination on tribal communities from 1953.

“Policies and programs within the Bureau of Indian Affairs were halted, reversed, or redesigned to hasten the tribes to termination. All tribes felt the threat and became immobilized: ready or not, they faced the prospect of being turned over to the states, most if not all, of which could not or would not assume the services, protective responsibilities and other obligations which the federal government had originally assumed by

treaties and various agreements in the past and which the tribes still urgently required.¹³

Through both the Kennedy and Johnson administrations and into the Nixon administration, the primary harm of this policy “was the inculcation among the Indians of what has been called a ‘termination psychosis,’ an almost ineradicable suspicion of the government’s motives for every policy, program, or action concerning the Indians.”¹⁴

So, not only was unilateral termination legally and politically questionable and practically disastrous, it caused trauma and generations of Indian people to be skeptical of any proposed action or initiative proffered by the Federal government.

Nixon’s View of the Federal Trust Responsibility

Nixon saw the trust relationship as one of mutual agreement and obligations created by treaty, formal and informal agreements, statutes, and other specific commitments, with Indians providing tens of millions of acres of land and a willingness to live peacefully on Federal reservations. In exchange, the United States agreed to provide a full panoply of health, housing, education and other services with the goal of “allow[ing] Indian communities to enjoy a standard of living comparable to that of other Americans.”

Using terms to describe the relationship such as “trusteeship,” “responsibility,” and “special relationship,” the Message stressed that the Federal commitments remain unfulfilled and “continue to carry immense moral and legal force.”

Accordingly, Nixon’s first request to the Congress was a formal renunciation of termination by adopting a fresh Concurrent Resolution repealing House Concurrent Resolution 108. Such a measure would affirm

¹³ “The American Indian and the Bureau of Indian Affairs – 1969: A Study, With Recommendations.”

¹⁴ *Id* at 2.

the right of Indian tribal and Alaska Native governments. It would also commit the United States to carry out its treaty and trusteeship obligations, and “guarantee” that when Indian groups wished to assume control over Federal programs and services, they could do so and with an assurance of Federal financial support.

The proposed resolution would, most importantly, affirm that the Federal-tribal relationship “cannot be abridged without the consent of the Indians.”

Specific Proposals to Fulfill the Federal Trust Responsibility

The policy Nixon unveiled relied on two pillars: strong tribal governments and viable tribal economies. The challenge on the first score was how to breathe life and autonomy back into tribal governments the United States had literally spent decades trying to destroy.

Having made the case for rejecting termination, Nixon’s platform went on to lay out nine areas of endeavor to achieve these two goals.

1. The Right to Control and Operate Federal Programs

For at least a century, most Indians were passive recipients of Federal goods, services and programs --- designed and developed in Washington, D.C. and delivered locally by Indian agents. In addition to high levels of inefficiency and corruption, the quality of the services was sub-par.

Nixon proposed deferring to the tribes whether or not they wished to assume administrative responsibility for services administered by the Federal government. To achieve this, the Message laid out a voluntary program under which a tribe or group of tribes could take over programs managed by the Department of the Interior and the Department of Health, Education and Welfare “whenever the tribal council or comparable community governing group voted to do so.”

The transfer of functions and administration would be carried out via negotiations between the Federal agencies and the requesting tribe or tribes. Technical assistance to aid interested tribes would be made

available and the ultimate agreement authorizing tribal program management would include the right to retrocede the functions back to the government.

Arrangements such as these arguably brought other benefits, such as the creation of an “Indian civil service” that would be comprised of Indian people or outside experts, including Federal employees familiar with the programs.

This proposal was the centerpiece of the Message, but was not signed into law until years later by President Gerald R. Ford in 1975 as the *Indian Self-Determination and Education Assistance Act* (“ISDEAA,” Pub. L. 93-638).

Since then, Indian tribes, tribal consortia and Alaska Native non-profit corporations, have made great use of the ISDEAA since its enactment: currently nearly sixty percent of all programs and services of the BIA and the Indian Health Service, worth billions of dollars in contracts annually, are contracted out by tribal entities.

The ISDEAA has been amended several times since 1975 to include the *Tribal Self Governance Act of 1987* (25 U.S.C. 5301 et seq.), as well as amendments to the core statute to broaden the array of contractible services in the Department of the Interior and the Indian Health Service, but also to other programs in the Department of Health and Human Services traditionally inaccessible to tribes. The principles of tribal planning, management and administration contained in the ISDEAA are also evident in recent statutes dealing with housing and road and highway construction.

In 2000, Congress made Tribal self-governance for Indian health care programs and services permanent and launched demonstration projects for other programs and services in the Department of Health and Human Services.

2. Land Restoration for Traditional Purposes: Taos Pueblo and the Blue Lake Lands

From time immemorial until 1906, the Taos Pueblo used lands near Blue Lake, New Mexico for traditional and religious purposes when, in that year, the United States Government appropriated some 48,000 acres to establish a national forest. The Indian Claims Commission later determined the taking was without compensation and this, combined with the importance Nixon placed on protecting the Indians' traditions and faith, led him to endorse then-pending legislation to return these lands to the Taos Pueblo.



That bill --- the "*Blue Lake Restoration Act*" --- was signed into law in December 1970, where Nixon welcomed the caciques and other leaders of the Taos and other Pueblos to the White House for a signing ceremony. (See Pub.L. 91-550.)

3. Indian Education

The quality of education for Indian children had not changed much since President Johnson's "Forgotten Man" document was issued two years earlier and Nixon zeroed in on the appalling statistics, e.g., drop-out rates twice the national average, and an educational attainment for Indians under Federal supervision of less than six years.

At that time, there were 221,000 Indians of school age; 50,000 attended BIA schools and some 141,000 attended nearby public schools. Just as he thought Indian control and management of BIA and Indian Health Service programs would bring better results than if left in Federal hands, so too with Indian schools. The Navajo Nation had already assumed responsibility for several schools --- in the Ramah Navajo Community and the Rough Rock and Black Water Schools in Arizona --- and Nixon saw great opportunity and promise in extending principles of self-determination to Indian schools.

A tribally-managed school initiative would be hammered out by a special subcommittee of the NCIO, which would provide technical advice to tribes wishing to establish school boards, and conduct a nationwide review of the status of Indian education and report annually on its findings. The subcommittee would not be acting in perpetuity, but would have as its objective, the "actual transfer of Indian education to Indian communities."

Nixon also recognized the large group of Indian students in public schools that are eligible for Federal aid through the *Johnson-O'Malley Act*, thus acknowledging that responsibility for an Indian student's education was not limited to just a tribally managed or federally managed school, but could exist in a public school by an Indian student's choice.

4. Economic Development

While the right to manage and control Federal programs was the centerpiece of the new policy, Nixon recognized that “[e]conomic deprivation is among the most serious of Indian problems.”

To encourage the establishment of “economic infrastructure,” Nixon proposed the “*Indian Financing Act of 1970*,” to (1) broaden the existing Revolving Loan Fund to finance project development and triple authorized funding for it; and (2) provide Federal guarantees, loan insurance and interest subsidies to loans made by private banks.

Understanding that lenders and investors prefer certainty in projects that involve leased land and that land is the most valuable asset most Indian tribes have, Nixon urged Congress to authorize all tribes --- in their discretion --- to enter long-term leases of up to 99 years.

It would be years before Congress entertained requests by tribes for authority to negotiate and lease their land to third parties without the prior review and approval of the Secretary.¹⁵

5. Indian Health

As was the case in the realm of Indian education, the health status of Indians did not measurably improve between 1968 and 1970. In categories such as life expectancy, infant mortality, tuberculosis and suicide, Indians remained far behind all other Americans.

Noting that quality health care often is a function of financial resources, Nixon proposed significant increases to the Indian health budget. While hoping tribes might wish to assume control over hospitals and clinics, the Message cited it “unbelievable” that in the United States at that time there were only 30 physicians and 400 nurses of Indian descent. Clearly, then,

¹⁵ Ultimately, Congress responded to these and other similar requests. See, for example, the *Navajo Leasing Act of 2001*, the *Indian Tribal Energy Development and Self-Determination Act of 2005*, and the *Helping Expedite and Advance Responsible Tribal Homeownership Act of 2010 (HEARTH Act of 2010)*.

more needed to be done to attract, train and retain health care professionals.

The Nixon Message covered other areas of import to Native communities such as Federal support for urban Indians; conflicts of interest in litigation against or involving the United States and the creation of an Indian Trust Counsel Authority; the establishment of an Assistant Secretary for Indian and Territorial Affairs at DOI; and funding increases for existing and continuing programs.

The Alaska Native Claims Settlement Act (1971)

In addition to the highly symbolic return of the Blue Lake lands, the other major land-related accomplishment early in Nixon's first term was sweeping legislation involving resolution of the land claims of Alaska Natives. After comprehensive congressional committee consideration, a bill was signed into law in December 1971, the *Alaska Native Claims Settlement Act* (ANSCA, 43 USC 1601 et seq.). ANSCA extinguished aboriginal claims over approximately 365 million acres of land in exchange for Native corporations receiving some 45.7 million acres and nearly \$ 1 billion.¹⁶

Rejecting what it saw as a failed reservation system in the Lower 48, ANSCA resulted in the establishment of 13 regional, state-chartered Alaska Regional Corporations which issued stock to those Natives residing in the respective regions.¹⁷ ANSCA lands were not held in trust or subject to permanent protection and Alaska Natives became shareholders in regional and village corporations.

Lands that were granted to corporations in the original ANSCA were for capital and economic development and the lands were selected intended for economic potential.¹⁸ ANSCA also provided \$925 million to Alaska Natives intended to provide capital for Alaska Natives to address extreme

¹⁶ Case and Voluck, 2012.

¹⁷ Case and Voluck, 2012.

¹⁸ House Report No. 92-523, as seen in Case and Voluck, 2012.

poverty and to provide economic resources for Natives to help themselves.¹⁹ The money was deposited into the Alaska Native Fund and was distributed to regional and village shareholders and individuals that were not village shareholders.²⁰

The Trust Responsibility of the United States to Indian Tribes

Throughout the decades, the trust responsibility has been explicitly stated to include various areas and topics extending beyond Federal protections for tribal land and natural resources to include robust efforts to provide Federal programs and services such as health care, housing and education as well as efforts to promote enduring economic development in tribal communities.

The specific obligations the United States undertook are clearly part of the responsibility as is the fact that the tribes ceded hundreds of millions of acres in exchange for goods, services, and promises of future Federal action.

Indian Education as part of the Trust Responsibility

In 1990, the *Native American Languages Act* was established and extended the trust relationship to include the survival of Native American languages. The law was enacted to provide culturally appropriate gifted and talented centers for American Samoan, Guamanian and Alaska Native children.

In 1992, the Higher Education Amendments of 1992 bill was enacted and included Alaska Natives as part of the trust responsibility.

In 2002, the Education Amendments of 1978 were amended to raise academic standards in BIA schools, as part of President George W. Bush's initiative the "No Child Left Behind Act." The amendments establish findings that included language on the trust responsibility extending to the education of Indian children.

¹⁹ Ibid, Case and Voluck, 2012.

²⁰ Case and Voluck, 2012.

In addition to these congressional actions, in recent years various Presidents have issued Indian education-specific orders and memoranda explicitly laying out the rationale for a trust responsibility to Natives in the field of education.

For example, President William J. Clinton issued Executive Order 13021 (“Tribal Colleges and Universities”) stating:

“By the authority vested in me as President by the Constitution and laws of the United States of America, in reaffirmation of the special relationship of the Federal Government to American Indians and Alaska Natives, and, for the purposes of helping to: (a) ensure that tribal colleges and universities are more fully recognized as accredited institutions, have access to the opportunities afforded other institutions, and have Federal resources committed to them on a continuing basis; (b) establish a mechanism that will increase accessibility of Federal resources for tribal colleges and universities in tribal communities; (c) promote access to high-quality educational opportunity for economically disadvantaged students; (d) promote the preservation and the revitalization of American Indian and Alaska Native languages and cultural traditions; (e) explore innovative approaches to better link tribal colleges with early childhood, elementary, and secondary education programs; and (f) support the National Education Goals (20 U.S.C. 5812), it is hereby ordered as follows;”

Likewise, President Clinton’s subsequent Executive Order 13096 (“American Indian and Alaska Native Education”) provides that:

“Section 1. Goals. The Federal Government has a special, historic responsibility for the education of American Indian and Alaska Native students. Improving educational achievement and academic progress for American Indian and Alaska Native students is vital to the national goal of preparing every student for responsible citizenship, continued learning, and productive employment.”

Continuing with his own Executive Order 13270, President George W. Bush articulated as follows:

“Section 1. Policy. There is a unique relationship between the United States and Indian tribes, and a special relationship between the United States and Alaska Native entities. It is the policy of the Federal Government that this Nation’s commitment to educational excellence and opportunity must extend as well to the tribal colleges and universities (tribal colleges) that serve Indian tribes and Alaska Native entities.”

Following up on that Order, President Bush issued Executive Order 13336 (“Establishing the American Indian and Alaska Native Education, Interagency Working Group”) which provides:

“By the authority vested in me as President by the Constitution and the laws of the United States of America, and to recognize the unique educational and culturally related academic needs of American Indian and Alaska Native students consistent with the unique political and legal relationship of the Federal Government with tribal governments, it is hereby ordered as follows: Section 1. Purpose. The United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of the United States, treaties, and Federal statutes. This Administration is committed to continuing to work with these Federally-recognized tribal governments on a government-to-government basis, and supports tribal sovereignty and self-determination.”

Most recently, President Barack H. Obama issued Executive Order 13592 (“Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities”) which provides:

“Section 1. Policy. The United States has a unique political and legal relationship with the federally recognized American Indian and

Alaska Native (AI/AN) tribes across the country, as set forth in the Constitution of the United States, treaties, Executive Orders, and court decisions. For centuries, the Federal Government's relationship with these tribes has been guided by a trust responsibility – a long-standing commitment on the part of our Government to protect the unique rights and ensure the well-being of our Nation's tribes, while respecting their tribal sovereignty. In recognition of that special commitment – and in fulfillment of the solemn obligations it entails – Federal agencies must help improve educational opportunities provided to all AI/AN students, including students attending public schools in cities and in rural areas, students attending schools operated and funded by the Department of the Interior's Bureau of Indian Education (BIE), and students attending postsecondary institutions, including Tribal Colleges and Universities (TCUs)."

Indian Economic Development as part of the Trust Responsibility

Enacted in the final year of the Nixon presidency, the *Indian Financing Act of 1974* (25 U.S.C.1451) was designed to provide capital to Indian tribes to develop Indian resources, human as well as capital, to (1) be responsible for the utilization and management of their own resources, and (2) "enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."

Echoing the Nixon Message from 1970, the Act established an Indian Revolving Loan Fund for loans to both individual Indians and tribes as well. The Act also includes loan guaranty and loan insurance elements, as well as interest subsidies and business assistance grants. The Act remains one of the key Federal financing tools used by tribes to great effect.

While not specifically included in the 1970 Message, the Nixon Administration did acknowledge the large and largely untapped energy resources over, on and under Indian lands. In 1982, the *Indian Mineral Development Act of 1982*, was enacted to authorize tribes more authority over the leasing of their lands to third parties.

Congress followed up in the realm of Indian energy development with the *Indian Tribal Energy Development and Self Determination Act of 2005* (25 U.S.C. 3501) and amendments thereto in 2018.

In 1988, the *Indian Gaming Regulatory Act* (IGRA) was enacted in response to State requests to Congress for a greater role in regulating Indian gaming in the wake of *California vs. Cabazon Band of Mission Indians* (1987). The trust responsibility is discussed in the statute in regard to the Secretary of the Interior disapproving a gaming compact because it violates the trust obligations of the United States to Indians. The IGRA is largely tied to Indian lands held in trust, but the obligation of the Secretary of the Interior considering the trust responsibility for disapproving a contract can expand beyond Indian lands.

In 1996, the *Native American Housing Assistance and Self-Determination Act* (NAHASDA) was enacted to include Native Americans in block grant funding models promoted by the Clinton Administration. The findings section of NAHASDA expands the trust responsibility to protect and support Indian tribes and Indian people in social, and economic situations.

In 2000, the *Native American Business Development, Trade Promotion, and Tourism Act* was enacted to respond to assisting Indian tribes with economic development opportunities. While the language in the *Native American Business Development, Trade Promotion, and Tourism Act* does not specifically use “Trust Responsibility,” it refers to a special relationship as well as to the 1970 Nixon Special Message to Congress on Indian Affairs.

Continuity in Support for Indian Self-determination

One year after Nixon’s resignation of the presidency in 1974, Congress passed, and President Gerald R. Ford signed into law, the *Indian Self-Determination and Education Act*.

Likewise, every president from Ford to Trump issued some form of executive communication --- whether via Executive Order or Presidential

Memorandum --- affirming the enduring validity of Indian self-determination and its underlying principles.

- President Barack H. Obama, Presidential Memorandum on Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies. November 5, 2009. Accessed here: <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>
- President William J. Clinton, Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies. April 29, 1994. Accessed here: <https://www.govinfo.gov/content/pkg/FR-1994-05-04/html/94-10877.htm>
- President George H. W. Bush, Presidential Memorandum on Government-to-Government Relationship With Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies. September 23, 2004. Accessed here: <https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>
- President George H. W. Bush, Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments. June 14, 1991. Accessed here: <https://www.govinfo.gov/content/pkg/PPP-1991-book1/pdf/PPP-1991-book1-doc-pg662.pdf>
- President Ronald W. Reagan, Policy Statement on American Indian Policy. January 24, 1983. Accessed here: <http://www.schlosserlawfiles.com/consult/reagan83.pdf>
- President Joseph R. Biden, Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. January 26, 2021. Accessed here: <https://www.whitehouse.gov/briefing-room/presidential->

The Effect of the Indian Self-Determination Policy

My firm belief is that the two long-term goals of Nixon's policy were (1) to devolve Federal programs and services to be managed by tribes in order to cultivate an Indian civil service that would be capable of operating independent of the Federal government; and (2) to create the conditions and incentives to rehabilitate tribal economies that not only manage Federal funds, programs and services, but generate and manage tribal revenues and funds.

For 50 years, tribal leaders, Congress, and presidents of both parties have worked together to help tribes achieve the twin goals of strong tribal governments and vigorous tribal economies. Along the way, tribes have developed mature, sophisticated tribal governments that provide world class programs and services to their members and surrounding communities as well as economies that are often the largest employers in their regions.

These program improvements occurred as the governments closest to the Indian people --- the tribes themselves --- know best the needs of their members and are best suited to address them. At the same time, most tribes have made great strides in strengthening their economies through gaming, farming and ranching, energy and natural resource development, tourism, Federal contracting and even major motion picture production!

The Future of Indian Self-Determination: Considerations for Action

Unfinished Business – Indian Self-Determination Phase Two

Despite major advances in law, policy and standards of living in tribal communities, much remains to be done in governance and economic and community development. The reality is the tribal renaissance of the last five decades has occurred in an uneven fashion with large pockets of Indian Country still mired in poverty and related social pathologies. The

COVID-19 crisis revealed to an astonished America that many hundreds of thousands of their own countrymen lack access to reliable and clean water supplies and lack even the most modest of a health care delivery system.

With the benefit of five decades of hindsight, then, what can and ought to be considered to expand the frontier of Indian Self-Determination policy?

Expanding Self-Determination Contracting and Compacting

Since 1970, tribal design, management and delivery of Federal programs has brought immeasurable improvement to the standard of living in most tribal communities: the material conditions of Indian people are markedly improved as a result.

First, one initiative that should take place is a renewed emphasis on tribal contracting and compacting --- and not for its own sake. The jury is in and the fact is, tribes and tribal organizations do a much better job managing Federal funds and administering programs and services. At one point in time, tribes provided their members with all the goods and services their members required. Through both deliberate policy prescription and benign neglect, the United States rendered tribal governments incapable of doing so until the policy changes of the early 1970s.

One goal should be to boldly expand ISDEAA and tribal self-governance contracting and tribal self-governance compacting from their modest beginnings in the mid-1970s, to a more robust out-sourcing effort. Some tribes have assumed the full array of Federal programs through contracts and compacts, and the recent actions of Congress in providing full contract support cost to these tribes will almost certainly encourage other tribes to enter the contracting arena. At the same time, self-governance programs have been established in the Department of Transportation and should be expanded to any Federal programs and services tribes might wish to manage.

Remove remaining restrictions to tribal management of their own land

Second, are the many legal and regulatory restrictions to development on tribal lands. Tribal leaders and their counsel spend a good deal of time

identifying, amending or repealing uneconomic or anachronistic provisions in Federal law that frustrate or prevent altogether economic development projects on tribal lands.

Some are “rifle-shot” amendments to specific sections of the U.S. Code such as the recent repeal of an 1834 law prohibiting the establishment of alcohol manufacturing facilities on Indian lands. The rationale for the law was to prevent non-Indians from doing so to avoid taxes on the production of alcohol. In 2019, an Indian tribe and its investment partner succeeded in getting Congress to enact Federal legislation to permit the construction and operation of the largest craft distillery west of the Mississippi River, on or off Indian lands.

More broadly, because of the need for Federal review and approval of most transactions involving tribal trust land, there are often such delays in permitting and approving leases and other business documents that investment opportunities to tribes are lost. Responding to a request from the Navajo Nation, Congress approved a modest but important new law --- the *Navajo Tribal Trust Land Leasing Act of 1999* (25 U.S.C. 415) --- that authorizes the Navajo Nation to negotiate and enter surface leases of Navajo tribal trust lands with third parties without the prior review or approval of the Secretary of the Interior. This authority was expanded in 2018 with the enactment of the *Indian Tribal Energy Development and Self-Determination Act Amendments* (Pub.L.115-325, 25 U.S.C. 3101, note).

A decade later, again at the request of Indian tribes and tribal organizations, Congress enacted the *Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012* (“the HEARTH Act,” 25 U.S.C. 415) which made the *Navajo Tribal Trust Land Leasing Act of 1999* model potentially applicable to any interested tribes.

Another example is the evolution of Federal laws dealing with Indian energy resources from the *Indian Mineral Leasing Act* (1935), to the *Indian Mineral Development Act* (1982), to the *Indian Tribal Energy Development and Self-Determination Act* (2005) whereby, if a tribe wishes, it may negotiate and enter leases, rights of way and other business documents with third parties for the development of their on-reservation energy resources without the prior review and approval of the Secretary of the Interior.

A Modern Review of Legal, Policy and Regulatory Obstacles to Development

Third, it has been nearly 40 years since a comprehensive review of how legal, regulatory, policy and tax barriers inhibit capital formation, job creation, and tribal economic development.

It has not been since January 14, 1983, when President Ronald Reagan issued Executive Order 12401, establishing the “Presidential Commission on Indian Reservation Economies” to identify obstacles to Indian reservation economic development and to promote the development of a healthy private sector on Indian reservations, that such an effort has been considered.

After 16 regional consultation sessions hearing from tribal leaders, business consultants and others regarding barriers to development, a “Report and Recommendations to the President of the United States” was issued in November 1984. The Report addressed tribal, BIA, Federal, and state and local government obstacles to reservation development, including Federal budgets, tax matters, securities registration, trust management, capital and loan guarantees, wage rate regulation, labor relations and right to work laws, and all manner of other factors.

Tribes also need to advocate for tax incentives to foster a private philanthropic network to support economic development, education, and community volunteer organizations. Tribal governments also need to create tribal governments that are able to interact with the federal government and support long-term strategies that address the capacity building each tribal government would like to address. Without strategically engaging with the federal government, a tribal government will internally create their own disjointed efforts or miss utilizing the abundance of government funding and opportunities available to tribal governments.

The truth is that much has happened in Indian Country since 1984, mostly positive, resulting in marked improvement in the social and economic indicators typically used to gauge well-being.

Nonetheless, barriers and challenges remain and rather than rely on Congress and congressional committees to address barriers in a piecemeal fashion, it is time for another serious, dedicated review to these and other factors determining the standard of living of the Indian people.

One alternative is a return to Reagan's Presidential Commission model, updated appropriately in terms of structure, participation and issue focus. Launching such an effort would provide an open and candid forum to speak to the issues of the day preventing more effective tribal governance and more fully developed tribal economies.

The reality is Congress, at the request of the tribes, enacted the *Indian Tribal Regulatory Reform and Business Development on Indian Lands Authority* (Pub. L. 106-447, 25 U.S.C. 4301, note (2000)). This law recounts the laudable developments of the 1970-2000 period, but determines that nonetheless, "the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to (1) encourage investment from outside sources that do not originate with the Indian tribes; and (2) facilitate economic development on Indian lands."

A 21-member "Regulatory Reform and Business Development on Indian Lands Authority" would be established with a core mission of facilitating "the identification and subsequent removal of obstacles to investment, business development, and the creation of wealth with respect to the economies of Native American communities."

The only required action by the Congress would be in appropriating a modest sum to fund the Authority's activities.

Final Thoughts

There are many areas of endeavor related to the expansion and strengthening of Indian self-determination. In many ways, the Policy has become a Rorschach Test of the extent and contours of the Federal obligations in general, and trust responsibility in particular, and what needs to be done to address them.

Some focus on program management such as education and control of schools, others on creating viable tribal economies through sustainable development, and still others on the most fundamental questions of the appropriate decision-makers regarding activities on Indian lands in the era of Indian self-determination.

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