

Indigenous Land Management in the United States: Context, Cases, Lessons

A Report to the Assembly of First Nations

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Stephen Cornell and Miriam Jorgensen

1. Introduction

The Assembly of First Nations (AFN) is seeking ways to support First Nations' economic development. Among its concerns are the status and management of First Nations' lands. The Indian Act, bureaucratic processes, the capacities of First Nations themselves, and other factors currently limit the ability of First Nations to add lands to reserves or to use their lands more effectively in productive and self-determined economic activity.

As it confronts these issues, AFN has been interested in how Indigenous land-management issues are being addressed by Native nations in the United States. What is the status of Indigenous lands in the U.S.? Do Native nations in the U.S. face similar challenges to those facing First Nations? Are Native nations in the U.S. engaged in practices that might offer ideas or lessons for First Nations?

There are substantial historical, legal, and political differences between the situations of Native nations in Canada and the U.S. But there also are substantial similarities. In both countries, land has been a pivotal issue—in many ways *the* pivotal issue—in the history of Indigenous-non-Indigenous relations. In both countries, despite massive land loss, Native nations retain remnant land bases with varying potential for economic development. In both countries, Native nations fiercely defend their remaining lands, seek to expand them, and are determined to exercise greater control over what happens on those lands.

This report addresses the status of Native lands in the U.S. It is divided into two parts. Part 1, "Overview of the U.S. Context," reviews the history of Indigenous lands and provides an overview of current Indian land tenure and jurisdiction. Part 2, "Meeting the Land Management Challenge," specifies the primary challenges facing Native nations in the U.S. as they attempt to manage their lands in ways that meet their own objectives and summarizes some of the innovative practices currently in use or being developed by American Indian nations. It identifies what we believe are key features of those practices. It also summarizes some of the relevant research on the relationship between control of Native lands and socioeconomic outcomes. Finally, it offers some recommendations based on the U.S. experience.

Part I. Overview of the U.S. Context

2. The History of Native Lands in the U.S.

Land has long been the centerpiece of relations between Native nations and the United States. To a substantial degree, those relations developed around the demand of the U.S. and its precursor colonial powers for access to Indigenous lands and the efforts of Native nations to retain, protect, and control their lands. Today, land issues remain central to the political agendas of Native nations and to their relations with other governments. While jurisdictional matters tend to dominate these issues today—who decides what happens on lands still in Indian hands?—the preservation and expansion of the land base remain critical goals for most American Indian nations.

These goals are understandable. American Indian nations, like First Nations in Canada, suffered massive losses of land in the course of European invasion and settlement and the subsequent growth of the United States. These losses took place, for the most part, through three primary processes: land cessions as aspects of treaty-making between Indian nations and the United States, post-treaty-making legislative and executive actions by the U.S. government, and the General Allotment Act of 1887.

Treaty-making, often under duress, took place across the continent, from before the establishment of the American Republic until Congress ended the practice of making treaties with Indian tribes in 1871. Most treaties, and more of them as time went on, involved massive transfers of land to the United States. Particularly in the eastern parts of the country, these treaties nearly eliminated the Indigenous land base and forced many Indian nations to move west to lands already occupied and used by other nations. After 1871, Congressional decisions and Presidential actions continued these processes, unilaterally imposing land transfers and population movements on Indian nations and further reducing lands that treaties had promised would remain in Indian hands forever.

By the 1880s, the Indigenous land base had been radically reduced; most lands had passed out of Indigenous control. But pressure on the remaining lands continued. In 1887, Congress passed the General Allotment Act (also known as the Dawes Act after Senator Henry Dawes, author of the law). This legislation set out to dismantle the remaining tribal estate by breaking it up into allotments assigned to individual Indians. Allotments ranged in most cases from 80 to 160 acres, with larger pieces assigned to heads of households, smaller ones to individual Indians or to children. Allotments would first be under federal supervision but eventually

would transfer to fee simple ownership. Once all Indians on a reservation had received allotments, unallotted lands—designated as “surplus”—would be opened to Euro-American settlement.

Allotment served two distinct sets of interests. As the “surplus” provision suggests, it was a response to continuing and apparently insatiable Euro-American demands for Indian lands. The higher the quality of remaining lands, the more intense was the demand. But it also was viewed by reformers—and had been since colonial times—as a key to “civilizing” Indians. By encouraging individualized private property and turning Indians into farmers, it would facilitate both Christianization and assimilation into the American mainstream.

Over widespread Indian objections and resistance, allotment quickly became the core element in late 19th-century federal Indian policy (some tribal lands had been allotted earlier). But it was implemented unevenly across Indian lands. The result was that some reservations experienced extensive allotment (e.g., White Earth, Quinault) while others had almost no allotted lands at all (e.g., Northern Cheyenne, Red Lake; in each case, nearly the entire reservation is tribally held). While allotment remained federal policy until the 1930s, allotment efforts tapered off in most areas of the country in the early decades of the 20th century.

Allotment’s effects were catastrophic. Between 1887 and allotment’s end, Indian nations lost 90 million acres of land—more than 60 percent of the remaining Indigenous land base—either through the “surplus” land provisions of the legislation itself or through tax foreclosures on fee simple lands, the sale of individual allotments, and fraud (Kickingbird and Ducheneaux 1973, Washburn 1975, Banner 2005). Far from increasing, Indian farming actually declined in the aftermath of allotment (Carlson 1981), and the policy left large numbers of Indians landless and indigent (Meriam and Associates 1928, U.S. National Resources Board 1935, Harper 1943).¹

¹ Banner (2005, p. 287) writes, “ Everywhere allotment was tried in the nineteenth century, however, from New Zealand to the western United States, the initial optimism about allotment turned sour among the people closest to it, white or native. In each of these places, allotment made most of its ostensible indigenous beneficiaries poorer. The winners were primarily white settlers and land speculators. By the end of the process, the only humanitarians still optimistic were the ones farthest away, the urban intellectuals who continued to tout the virtues of the generalities long after the ugly details were widely known. In this sense, the allotment of indigenous people’s land was to the nineteenth and early twentieth centuries something like what Soviet-style communism would be to the middle of the twentieth—a system that sounded much better in theory than it worked in practice, and so a system that retained the confidence of far-off progressive intellectuals much longer than it retained the support of those who had to endure it themselves.”

By the 1930s, with growing evidence of allotment's devastating effects on its supposed beneficiaries, federal policy changed. A massive federal report on reservation poverty criticized the allotment policy (Meriam and Associates 1928), while a group of Progressive-era reformers urged a policy about-face. In 1934, the Indian Reorganization Act (IRA) formally ended the policy of allotment, authorized the Secretary of the Interior² to acquire additional lands for tribes, and promoted the idea of reservation-based, tribal economic development. It reversed the emphasis on individual property rights and supported the idea that the tribal future lay in continued tribal ownership and use of lands.

Federal policy deviated from this position in the 1950s and 1960s, when a combination of political views supported ending the reservation system altogether. On the right, tribal land holdings and economic development smacked of socialism; on the left, reservations were race-based rural ghettos from which Indians needed to be rescued. The result was a policy known as "termination," referring to the termination of federal services to Indians and the break-up of the reservation system, piece by piece, with tribal assets distributed among individual tribal citizens. Assimilation would surely follow (Wilkinson and Biggs 1977, Koppes 1977).

A number of Indian nations were "terminated," but once again, the policy backfired. In perhaps the most prominent instance, that of the Menominee Tribe, termination's results were unambiguous: it "accelerated Indian land loss, deepening poverty and economic chaos, and increased—not diminished—public expenditures as state and federal governments were forced to pick up the pieces" (Cornell 1988, p. 124). The Menominee case was by no means atypical, and by 1970, the termination policy, too, had been formally abandoned as the federal government moved toward a policy of tribal self-determination.

More recent assaults on Indian lands have been less likely to propose wholesale policy solutions, although such proposals are seldom far below the surface of debate. For example, a movement for the abrogation of Indian treaties and the end of the reservation system continues to bubble along in several regions of the country, occasionally bursting to the surface in state and local political contests or in conflicts over natural resources (see, for example, Bobo and Tuan 2006), and the rhetoric favoring private property rights in the administration of President Ronald Reagan led to some fears among tribes of a return to the termination policy (see Castile 2006). But for the most part, at the national policy level the Indian self-determination era that began in the 1970s has treated land as a critical tribal asset over which tribes should have substantial control. Instead, continuing assaults have largely

² The Department of the Interior is the federal department with primary responsibility for Indian affairs. Much of that responsibility is exercised through the department's Bureau of Indian Affairs (BIA).

taken place either in the courts, chipping away at tribal jurisdiction over their remaining lands, or on individual reservations, chipping away at the lands themselves through imposed easements for pipelines or highways, through takings for national parks, dam construction, or other purposes, or through diminishment.³

There also have been additions to the Indian land base. The Indian Reorganization Act of 1934 allowed additions to “trust” lands (see below), both within and outside reservation boundaries, for economic purposes and as compensation for past takings. Under this legislation, Native nations can acquire land themselves and ask that it be put into trust; alternatively, the federal government can acquire land for tribes and place it into trust. In either case, additions to trust lands require the approval of the Secretary of Interior or the Congress.⁴ Since the 1930s, both the federal government and a number of Native nations have taken steps to restore at least some lost lands. With some exceptions, this has happened through the purchase of lands by either tribes or the federal government.

In 1946, Congress established the Indian Claims Commission to hear Indian claims against the U.S. Over the years, the Commission adjudicated numerous tribal claims for lost lands but offered in return only monetary compensation, not land restoration.

There are at least three points to note about the outcomes of this history.

A great many Native nations retained at least some lands—if only a fraction of their original holdings—either within their homelands or in territories to which they were forced to move. Today, the majority of these lands are known as Indian reservations: lands reserved to Indian nations.

At ground level, the legacy, in addition to land loss, is diversity in land holdings across Indian nations and, in many cases, complexity in the status of the lands that remain

³ Diminishment is an important example of this chipping away at Indigenous lands. In a number of instances—examples include the Uintah Indian Reservation, homeland of the Northern Ute, and the Yankton Sioux Indian Reservation, homeland of the Ihanktonwan Dakota Oyate—U.S. courts have determined that non-Indians hold fee simple title to so much land within the external boundaries of the reservation that the land no longer should be considered Indian land and that the boundaries of the reservation should no longer apply. In other words, sufficient long-term settlement by non-Indians in and of itself reduced the land base over which a tribe had authority. Shoemaker (2003) comments, “The development seems to be something of presumptive state jurisdiction, with the question of who governs where in Indian Country determined largely by who owns what.... The introduction of non-Indian settlers in Indian Country, as well as the reduced land mass itself, ultimately provided justification for the modern judicial divestiture of the tribes’ inherent rights to govern.”

⁴ However, in 2009, in *Carcieri v. Salazar*, the U.S. Supreme Court ruled that the federal government could not take lands into trust for tribes that gained federal recognition after 1934.

within reservation boundaries. Variation in the original treaty processes, in allotment, and in termination meant that some tribes today have significant land resources, others have almost none, and others hold lands under complex mixtures of tenure. For example, the allotment policy was unevenly applied across Indian lands. Where it was applied, most tribes immediately lost massive amounts of land. Over time, additional allotted lands were lost to foreclosures, fraud, and sale, so that parts of Indian Country are parcel-by-parcel patchworks of Indian and non-Indian lands. In other cases, allotted lands became fragmented among multiple owners as they were passed down through several generations, hindering productive land use.

American Indian nations' rights in reserved lands were reduced to use and occupancy, not outright ownership. In 1823, in *Johnson v. McIntosh*, the U.S. Supreme Court held that only the U.S. government, by virtue of the Doctrine of Discovery, could hold title to and sell Indian lands.⁵ What Indian nations hold is beneficial title—the tribe and its citizens have the right to occupy the land and the right to any benefit the land produces.

3. Indian Land Tenure Today

“Indian land” includes three kinds of land:

Trust land. With some important exceptions, most on-reservation lands are held “in trust” by the federal government. This means that the U.S. government is the owner of the land but holds it on behalf of Indian nations or individuals—the “beneficial owners”—and bears the obligation to manage it for the benefit of those nations or individuals. In essence, the U.S. Secretary of the Interior serves as trustee with a fiduciary duty to oversee these lands. There are about 56 million acres of trust land in the lower 48 states of the U.S. About 45 million acres of this is tribal trust land; the remainder is individual trust land.

The primary advantage of trust land is that the status exempts the land from state taxation and regulation. In a sense, trust status protects tribes against states, which generally have been hostile to tribal interests. The disadvantages of putting land into trust include

⁵ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). Getches, Wilkinson, and Williams (2005, p. 2) note that the military power of Indian nations meant that “the United States’ policy of negotiating land cessions in treaties and agreements, with certain promises and rights in return, was born of necessity and convenience. It drew on an age-old theory of the colonizing nations of Europe that arrogated to Christian ‘discoverers’ the right to extend their dominion and sovereignty over aboriginal peoples. One of the ingredients of the process, however, was treatment of tribes as political entities to the extent necessary to procure their consent to cession of their right to occupy the land.... It put the colonizing nation and its successors in the position of the exclusive purchaser of Indian title (as against other Europeans) and it limited that ‘title’ to the right of occupancy.”

restrictions that limit its use and transferability. For example, trust land cannot be sold or used as collateral for a loan without the approval of the federal government; many other uses likewise require federal approval. It also is difficult to put land into trust where municipalities and states resist the land's removal from their jurisdiction and tax base, as is frequently the case where tribes have sought to add lands distant from existing reservations to their trust holdings. More often than not, however, tribes have felt that the advantages of trust status outweigh the disadvantages.

Restricted fee lands. These lands are also known as fee patent lands or deeded lands. Tribes can hold title to these lands directly, but there are still restrictions on alienation and encumbrance; it cannot be sold, for example, without federal approval. Tribal citizens also can hold title to non-trust Indian land. Unlike tribes, they can do with it as they wish. Much allotted land that remains in Indian possession is non-trust Indian land.

Fee simple land. Native nations can own lands in fee simple, and many of them do, frequently outside reservation boundaries. These are private lands that are treated similarly to private lands held by non-Indians; there are no restrictions on alienation or encumbrance. The U.S. government generally does not view these lands as Indian lands because acquisition and regulation occur outside its Indian-related purview. Tribes, on the other hand, tend to view these lands as Indian land because they are owned by Native nations. We accept the tribal view here.⁶

These three kinds of land are found in various combinations among Native nations in the U.S. On some reservations, nearly all land is tribal trust land. On others, there is a mix of tribal and individual trust lands, restricted fee lands, and private (fee simple) lands, with some of the last in the hands of tribal citizens, some in the hands of non-Natives. On still others, the nation may hold almost no land at all. Where land tenures are diverse, coherent land management

⁶ "Indian country" is another term often heard in discussions of Indian lands. According to Getches, Wilkinson, and Williams (2005, pp. 457-58), the term Indian country "defines the geographic area in which tribal and federal laws normally apply and state laws normally do not apply." According to the U.S. Code, it includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. government... (b) all dependent Indian communities within the borders of the United States... and (c) all Indian allotments, the Indian titles to which have not been extinguished..." (18 U.S.C. Section 1151). Pevar (2002, pp. 21-23) comments that "land located outside a reservation is Indian country if it has been set aside by the federal government for the use, occupancy, or benefit of Indians and the land is under the superintendence of the federal government.... Should a tribe purchase land outside the reservation, it normally will not be considered to qualify as Indian country unless the tribe succeeds in having the land converted by the Secretary of the Interior into trust status.... To summarize, all land within an Indian reservation is Indian country, even land owned by a non-Indian. In addition, dependent Indian communities are considered Indian country, and so are trust and restricted Indian allotments outside a reservation."

becomes an exceedingly difficult task, complicating development initiatives and the effective exercise of self-government.

Where land is collectively held—that is, held by the Native nation—individual tribal citizens can still acquire rights of use to particular parcels according to the laws (including customary laws) of that nation. “When land is communally held by the tribe, individual members may simply share in the enjoyment of the entire property without having any claim at all to an identifiable piece of land. In practice, however, tribal members usually require some method of knowing that it is permissible for them to erect a residence on a given spot, to graze stock in a particular area, or to engage in other activities requiring a relatively fixed location. This need is customarily met by the tribe’s conferring a license upon the individual to use particular land. That license may go by many names, but it is commonly referred to as an ‘assignment.’ The terms of assignments may vary greatly in duration and scope” and may or may not be renewable or inheritable, although the tendency is for them to be both (Canby 2009, pp. 359-60).

4. Native Nations’ Jurisdiction over Land

Ownership is not the same as either *de jure* or *de facto* jurisdiction. This is particularly the case where there is a distinction between the owner of trust land (the U.S. government) and the beneficial owner of that land (the tribe or the tribal citizen). A map of diverse Indian land tenures does not necessarily indicate who is calling the shots about land management and use.

So who calls the shots on Indian land? Despite the recurrent exercise of sometimes violent external power over Indian nations in the course of U.S. history, the U.S. government recognizes that those nations retain a substantial degree of sovereignty: the right to control their own affairs. This right has often been ignored in practice; the U.S. government repeatedly has imposed its own decisions and administrative procedures on Indian nations. But the treaty process, Congressional legislation, and a string of decisions in the U.S. Supreme Court have affirmed that “tribes retain important powers of self-government within Indian country” (Getches, Wilkinson, and Williams 2005, p. 3). To some extent, tribes resemble states, with “powers of self-taxation as well as the ability to levy fees and taxes (such as severance taxes) on the export of tribal resources. In addition, most tribes have... the capacities to institute regulation of intratribal commerce and relations, adopt rules of property transfer and inheritance, and establish legislatures, courts, and police forces” (Kalt and Cornell 1994, p. 124).

Land, however—perhaps understandably, given its centrality in relations between Native nations and the United States—is a particularly complicated matter. The U.S. government exercises ultimate authority over trust lands and substantial authority over restricted fee lands. In addition to sale and encumbrance, for example, leasing of such lands, whether for farming, grazing, mining, industrial development, residential development or other purposes likewise requires federal approval, and leases are subject to cancellation by the Secretary of the Interior. Easements and rights of way across trust lands require federal approval (they also typically require tribal approval). In fact, federal statute provides that any contract or agreement made by a tribe involving its lands must have Secretarial approval.

Over the last few decades, a series of U.S. Supreme Court decisions have further limited tribal jurisdiction over tribal lands. For example, in 1989, in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, the court limited the power of tribes to impose their own zoning laws on non-Indian owners of land within Indian Country. In 2001, in *Atkinson Trading Co. v. Shirley*, the court ruled that tribes lack the power to impose taxes on non-Indian owners of land within reservation boundaries despite tribal provisions of governmental services to those owners. Also in 2001, in *Nevada v. Hicks*, the court further limited tribal jurisdiction over non-citizens of the tribe, finding that that tribal courts lack jurisdiction over state law enforcement officials entering tribal lands in the course of investigations of crimes occurring outside those lands.

These decisions and others since the 1980s represent a significant narrowing of tribal jurisdiction, particularly over non-Indian land within Indian Country. These limitations are severe. But in practice, at least since the late 1970s and the shift to a federal policy of tribal self-determination, the U.S. government has tended—with important exceptions—to defer to Indian nations that assert control over their lands, leading to at least some divergence between law and policy. Policy has not defied law, but within the boundaries of evolving law it has tended to support tribes that wish to assert decision-making power over much of what happens on their lands, particularly in relation to economic development. While court decisions have moved in one direction, the politics of Indian affairs—thanks largely to aggressive tribal assertions of rights to govern themselves and their lands—has moved in the other. As a legal matter, the ultimate authority on Indian lands is the U.S. government. But U.S. government practice is to place much of that authority in the hands of Native nations.

Thus, for example, Indian nations can—and in many cases do—regulate land-use, environmental impacts and water quality, extractive resource development, the placement and nature of business activity through zoning and permitting processes, the development of physical infrastructure, hunting and fishing, conveyance and probate within the social boundaries of the nation, and other activities and functions on their lands. They do so at times

jointly with federal agencies, at times on their own (see, for example, Grogan 2011 on extractive resources). Many tribes even exercise a degree of jurisdiction on off-reservation non-Indian lands because of legislated, treaty-based, or human rights-supported access to sacred sites, traditional hunting and fishing territories, ceded lands, mobile resources such as water and wildlife, and so forth.

Nonetheless, jurisdictional complexity makes land management a complicated task for many Native nations, “giving rise to considerable uncertainty and conflict” and hampering “investment decision making, law enforcement, and resource management.... (Harvard Project on American Indian Economic Development 2008, p. 101).

5. Practical Land Management

Land management practices vary among Native nations in the U.S., reflecting cultural differences, the land tenure and jurisdiction variations noted above, and other aspects of tribal histories. Many nations’ land-use systems are combinations of customary practices that predate the reservation, interventions by federal officials during the years of Bureau of Indian Affairs control, and recent attempts by tribal governments to assert greater managerial control over tribally held reservations lands.

In general, where Native nations have significant bodies of tribally held trust land, tribal-citizen land use follows an assignment system of one kind or another. However, the relationship between assignment and land use may operate in either direction. That is, some individuals or families may have been living on or using a parcel of land for some time—perhaps for generations—and only enter the assignment system when they have to deal with the nation’s government in the process of securing utilities or other land related services. Others may be seeking access to land they have not previously used and enter the assignment system in order to obtain it. In a typical case, a tribal citizen or family applies to the nation for the use of a specific parcel of land. If the application is successful, the land is assigned to that citizen or family.

Variation within this pattern is substantial. In some systems, that citizen or family, once assigned the land, not only can use it to live on or for other purposes but also can assign or transfer the land to another tribal citizen. In the case of the Penobscot Nation, for example, citizens can obtain a land assignment for a fee, paid to the Nation. The citizen can then transfer or even lease his or her assigned land to another tribal citizen (but not to anyone who is not a citizen of the Nation), provided that in doing so both lessor and lessee follow all provisions of the Penobscot Nation Land Laws.

Other systems may depart dramatically from this basic pattern. The Hopi Tribe, for example, has a large reservation in northern Arizona, nearly all of which is tribal trust land. But the Hopi tribal government controls only a small portion of these lands. The Tribe is a confederation of twelve villages that operate with substantial autonomy in most matters. Land use generally is controlled at the village or even sub-village level under arrangements that long predate the establishment of either the reservation or a central tribal government. Families, clans, or village governments decide what happens on these lands. Trust status limits what can be done in terms of encumbrance or sale outside the Hopi Tribe, but within that broad set of constraints, land-use is a highly localized matter. Even the tribal government has to obtain local permission before it can alter the use of these lands.

Most Native nations with substantial tribal lands have administrative departments of various kinds dedicated to the management of those lands. For example, the Confederated Salish and Kootenai Tribes have, among other things, a Tribal Natural Resources Department and a Tribal Lands Department. The latter includes four major programs: Permitting and Leasing, Land Planning, Land Services (Acquisition, Exchanges, Easements), and a Titles and Records Office. The Hoopa Valley Indian Tribe has a Natural Resources Department that includes Tribal Forestry, Tribal Fisheries, and a Tribal Environmental Protection Agency. Many such programs depend on federal funds while others are self-supporting, depending on the tribe's income and strategic choices.

Some of these land management programs are stellar operations that outperform non-Native agencies. For example, beginning in 1982 and aided by a small amount of money from the Bureau of Indian Affairs and by a U.S. Supreme Court decision that affirmed the right of American Indian tribes to assert full jurisdiction over hunting and fishing on reservation lands, the Jicarilla Apache Tribe established one of the most respected fish and wildlife programs in the U.S. Today that program is not only self-supporting but has become a source of revenue for the Tribe, marketing outstanding hunting and fishing opportunities to outdoor enthusiasts from across North America. The Tribe has restored an endangered trout population and significantly increased the size of its mule deer and elk populations. Careful management has helped the reservation “produce more trophy mule deer than any other comparably sized area in North America... In 1990 the Tribe completed the United States’ first-ever eradication of brucellosis from a captive elk herd” (Harvard Project on American Indian Economic Development 1999, p. 18). The Tribe’s comprehensive game and fish code—one of the most rigorous in Indian Country—is strictly enforced by tribal rangers and the Jicarilla Tribal Court.

Yet for many nations, the lack of an adequate administrative infrastructure to manage assignment and individual trust land title records remains a particular problem. In the first instance—assignments of tribal land—tribal fees for assignments have typically been low and non-renewable, providing almost no flow of funds to support administrative management of assignments. As a result, in some communities, multiple parties have received assignments to the same plot of land. In the second case—individual trust land title records—the BIA is the fiduciary record keeper but historically has been slow to respond to inquiries about title status. Recently, and despite the BIA's fiduciary responsibilities as a trustee, some Native nations have reclaimed authority over these land title status records. Some limited resources to establish these new tribal administrative offices have been available from the federal government, but in general, tribes have had to bear significant start up expenses (see more on Saginaw Chippewa and Morongo below).

To summarize Part I: While Native nations in the United States continue to hold significant bodies of land, they hold them under diverse and often complex systems of tenure. Recent court decisions have limited Native nations' *de jure* jurisdiction over these lands, but policy has tended to support *de facto* jurisdiction. While the tension between these two—*de jure* jurisdiction and *de facto*—remains unresolved, Native nations have moved in recent decades to exercise and expand such jurisdiction as they have and use it to manage their lands for a wide array of purposes.

Part II. Meeting the Land Management Challenge

6. Four Tasks

Within this historical and contemporary U.S. context, Native nations wishing to enhance their ability to control what happens on their lands face a major challenge. We think this challenge can be usefully conceived as having four primary tasks or components (these may also be useful categories for thinking about First Nation lands in Canada):

The Restoration Task: How does a Native nation restore its land base? Rebuilding the Indigenous land base has been a long-established priority for many Native nations. It is happening today both through legal action and through outright purchase. Legal action typically involves tribal claims that lands were improperly or illegally taken through fraud, incompetence, or mistakes. Where such claims have succeeded, the federal preference has been to compensate nations for those losses instead of actually returning lands, but in some cases lands have been returned to Native nations.

Alternatively, nations with the means to do so (largely as a result of land claims settlements or with discretionary revenues from economic development initiatives) are now purchasing lands both on- and off-reservation at an unprecedented pace. Not all tribes are doing this, but it has been especially important for those whose lands were heavily allotted or where non-Native land-holdings within reservation boundaries are extensive. In such cases, the focus typically is on consolidating tribal lands, partly for economic purposes and partly to strengthen tribal jurisdiction and facilitate more effective tribal regulation of what happens on those lands. Other nations are buying back lands that were lost in the treaty process, in particular lands of high cultural significance such as sacred sites.

In most cases, tribes acquiring lands are asking the federal government to take those lands into trust status, thus avoiding state taxation and regulation and facilitating certain uses, such as gaming, that are restricted to Indian Country. But trust status is not invariably the tribal objective. Some nations have purchased lands and then held them intentionally in fee simple, treating them as economic investments, using them to secure loans, or setting them aside for other purposes that would be undermined by trust status. Thus, for example, in recent years both the Hopi Tribe and the Navajo Nation have purchased valuable lands close to their reservations and held them in fee simple as economic investments.

The Political Task: How does the nation establish decision-making authority over that land base? While Congress retains ultimate authority over Indian lands and recent court decisions have undermined some tribal powers, since the 1960s Native nations have been aggressively trying to expand their jurisdiction over what happens on their lands. Some have done so through the legislative process and the courts, seeking to expand their rights of self-government through formal federal actions. Others have done so by enacting or exercising self-governing powers without seeking prior permission or justification: passing their own laws, developing their own capacities to carry out governmental functions, finding places where jurisdiction is ambiguous or uncertain and filling them with their own governmental actions, creating track records of capable performance, and so forth—what some have identified as the Nike approach: “Just do it.”

They have found support for this latter tactic in the federal self-determination policy that has prevailed to one degree or another since the 1970s. Opposition has come in the courts and in challenges from some states and other jurisdictions, and tribes have faced their own capacity challenges in effectively exercising the authorities they wish to claim (see below).

But for a number of tribes, the careful, deliberate, and capable exercise of authority has turned out to be an effective pathway to its eventual recognition.

This last point, however, is crucial. The success of the “just do it” approach depends heavily on developing capable governing institutions that make and implement decisions through accountable and transparent processes. Tribal governments that assert political authority but then turn out to be incompetent, capricious, or abusive in their use of that authority quickly undermine their claims to decision-making power (see the discussion of the Capacity Task, below).

Intergovernmental agreements, not only with the federal government but with states, counties, municipalities, and other Native nations, are another technique used by tribes to expand jurisdiction over land. Many aspects of land management involve trans-boundary resources, impacts, or movement—for example, rivers and streams, watersheds, wildlife, toxic wastes, major transportation routes, etc.—where effective management requires trans-jurisdictional collaboration. In such situations, the ability to interact and cooperate effectively with other governments is an essential land-management asset. Tribes also have used intergovernmental agreements to achieve varying degrees of management control over parks, wildlife refuges, archeological sites, and other off-reservation resources that are important to them culturally or economically.

The Strategic Task: What values is the nation trying to support, and what does that mean for land-use planning? Coherent and effective management of a land base requires clarity on the purposes of land management and use. What does the nation hope to realize or achieve through its own land stewardship? What values or activities is it trying to promote? Subsistence economic activity? The maintenance of certain cultural practices or understandings? Environmental health? Family wealth? All of the above—and more? Some objectives may be quite specific: for example, home ownership by the nation’s citizens, ease of conveyance among those citizens, the allowance (or not) of non-Native ownership or occupancy within the nation’s jurisdiction, protection of sacred sites, and so forth.

Determining priorities among possible uses, deciding what will be permissible and what will not, figuring out the relative importance of sometimes conflicting goals within the tribal community—these are fundamentally strategic decisions that go beyond selecting lands for specific purposes. They have to do with long-term consequences and the kind of community the nation is trying to build (“What will be here for the children?”). They also have to take into account such factors as trans-boundary resources that involve other

jurisdictions that sometimes have different goals, possible tensions between traditional use and development needs, kinship-land linkages, funding challenges, and the like.

One illustrative example of this kind of long-term strategic thinking: In recent years some Indigenous leaders in the U.S. have argued for an end to the trust land system and the restrictions it places on the ability of American Indian nations to use their lands effectively for economic development (see, for example, Morgan 2005). They have argued that reservations should be treated as equivalent to states, with tribes exercising jurisdiction over and law-making power within reservation lands but with those lands freed from the restrictions on sale and encumbrance that accompany trust status. Under this arrangement, reservation lands would enter the open market, could be bought and sold by anyone—including non-citizens of the Native nation—and could be used to secure loans. But owners of that land, Indian or not, would remain subject to that nation's laws.

This would address certain of the hurdles that trust status imposes on the economic uses of some Indian lands, and for that reason has received a good deal of attention. But it is not clear that all Native nations would welcome it, as it might complicate the achievement of other goals. One can imagine, for example, that some tribal citizens would be willing to sacrifice some of the potential market value of their lands on behalf of maintaining kinship- or culture-based communities or preserving marketable resources for other purposes. They might not support an open market for reservation land, even with the assurance of continued tribal jurisdiction over that land, believing that such a market might lead eventually to the dilution of community and culture. One could also imagine a Native nation (especially one with a history of diminishment, see footnote 3) eschewing this strategy because it was not convinced that after several generations, the federal government would continue to respect tribal jurisdiction over non-trust land.

We do not see any particular position on this issue as necessarily right or wrong; such issues raise strategic questions that individual Native nations have to answer for themselves. The point is that strategic thinking requires tribal communities and decision-makers to carefully evaluate long-term strategies against long-term community goals—and to be able to establish such goals in the first place.

The Capacity Task: Is the nation capable of making and effectively implementing decisions in support of its strategic priorities? Creating a strategic plan for land management is one thing; implementing it is another. Both require not only clear and effective decision-making processes but the ability to support those decisions with

appropriate policy, responsible implementation, and consistent enforcement. In short, they require capable government.

Much of this capacity is institutional: A Native nation should have a robust system of overall governance. Research carried out over the last two decades shows that the success of Indigenous nations in achieving their goals—economic, political, social, cultural—depends to a substantial degree on their systems of governance. In other words, tribes' success depends on the rules and mechanisms they put in place for making and implementing decisions, resolving disputes, and exercising authority. As nations build capable governing institutions, they increase their capacity to achieve their goals. (These research results are reported in numerous places, but see, for example, Cornell and Kalt 1992, 2000, 2007; Jorgensen 2000, 2007; Troster et al. 2008. See also Section 8 below.)

These findings apply to land management just as they do to other areas of Indigenous jurisdiction. A fair and reliable mechanism for resolving disputes over land use (whether those disputes are internal to the nation or between the nation and outsiders), non-politicized permitting processes, the ability to track and support activities such as conveyance and probate, the ability to negotiate with other governments and deliver on negotiated commitments, the ability to sustain such activities and agreements across transitions in Indigenous leadership, and so forth—such capacities are essential to the sustainable and productive management of land assets.

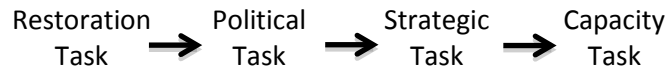
The capacity task also refers to human capital, or to the knowledge and skills of individuals. This is especially the case as the technical requirements of certain land-related activities rise, as (for example) in wildlife management, the maintenance of water quality, or the development of energy resources, or where cultural issues impinge not only on strategic decisions but on how those decisions are implemented.

Finally, the necessary capacities of Native nations are also financial. A nation must find the financial resources to do what it wants to do—including the resources necessary to acquire and develop land. In the past, much financing has depended on federal funds only and has been constrained by federal policy and by policy gaps. Recently, however, federal policy innovations have combined with new financial instruments and approaches engineered by Native nations and non-governmental organizations to ease the financing challenge (see Section 7 below for some discussion of such instruments and approaches).

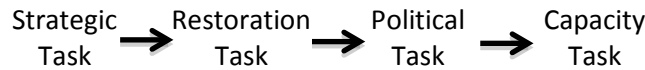
There is an implicit suggestion in this presentation of the land management challenge that these four tasks constitute a logical sequence: first you restore the land, then you establish

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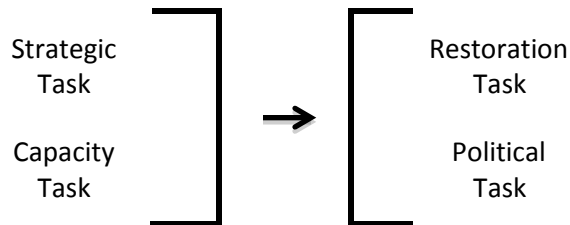
your authority over it, engage strategic considerations, and manage the land to achieve those strategic ends. The following diagram captures the sequence:



In some cases, however, this may not be the best way to proceed. For example, restoration raises its own strategic questions. What lands does the nation want to restore to its possession and/or control? Answers to this question may lead to still other strategic questions. For example, a nation may decide to reclaim its traditional territory—but what if available lands exceed the nation’s financial capacity? Then the nation is faced with the need to choose among a set of possible additions to its land base, and it needs some way of evaluating the relative cultural, ecological, economic, and other merits of these possible additions. Such considerations place the strategic task ahead of the other tasks:



But addressing the strategic task may also raise capacity issues. Does the nation have the ability to evaluate alternative pieces of land and their fit or lack of fit with the nation’s strategic goals so that its strategic decisions are sound? Once land moves back into the hands of the nation, does the nation have the institutional and technical capacity to effectively assert political control over the lands it has? In short, the nation may need to address both strategic and capacity issues before it moves to the restoration and political phases of the process:



Native nations may choose different ways of approaching these four components of the land management challenge. But regardless of the approach in a particular situation, sustainably successful land management in most cases will need to consider all four. In that sense, planning for land management needs to be comprehensive, addressing not only the acquisition of land but the nation’s ability to manage land assets effectively in service of the nation’s goals.

An overall land acquisition and management strategy that effectively addresses these four components can have enormous benefits for Native nations (see Section 8 below summarizing research on the links among Indigenous self-determination, land, and economy). That in and of itself is ample reason for Native nations to develop such a strategy.

Importantly, however, it also can yield benefits for the larger community. A 2008 report from Northern Arizona University and the Grand Canyon Trust notes, for example, that the increase in the sovereignty of American Indian nations—essentially, in their effective control of their lands—over the last few decades “has led to rapid development of capacity in the management of natural resources, often resulting in well-managed and restored forests, fisheries, native plant communities and wildlife populations. In some cases the tribal agency workforce and expenditures on natural resource issues exceed those of their state and federal partners. In the Pacific Northwest, many salmon runs have increased under science-based co-management programs, and captive breeding and reintroduction programs led by tribes have been instrumental in the recovery of endangered species” (p. 9).

We believe a powerful argument can be made that supporting Indigenous land acquisition and management strategies can reduce jurisdictional conflicts, reduce litigation, and lead to more coherent and productive management outcomes to the benefit not only of Native nations but of the larger community as well.

7. U.S. Responses to the Land Management Challenge: Best-Practice Cases

Native nations and organizations in the U.S., sometimes in conjunction with local, state, or federal governments, sometimes on their own, have been developing a number of approaches to the land management challenge. Here we discuss some of their approaches and innovations.

The *California Fee-to-Trust Consortium* is an institutional mechanism created by several Native nations to speed up the process by which tribal land purchases can be established as trust lands and therefore become available for certain kinds of development and other uses. [Restoration]

The Indigenous peoples of what is now California experienced some of the most devastating land losses of any U.S. Indian tribes, with an estimated 8.5 million acres removed from Indigenous control. In recent decades, as Native nations in California have regained recognition and other rights, a number of them have been buying land and then working together to develop effective strategies for transitioning the land to trust status.

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In the late 1990s, frustrated by the fact that it could take a decade or more for the BIA to move fee land into trust status, a group of tribes developed the California Fee-to-Trust Consortium. Consortium members, which now number nearly 70 tribes from all over California, contribute funding to pay for dedicated fee-to-trust BIA employees who work exclusively on these issues. Funds also have supported joint BIA-tribal efforts to develop a standard application package to streamline the process, training programs in best practices so that tribes can submit quality applications, and extensive outreach and education to neighboring, non-Native stakeholders to teach them about the history of land alienation and about land's importance to the fabric of tribal life.

Everyone recognizes the irony of Native nations having to help fund an activity—fee-to-trust transfers—that is an obligation of the federal government. But these nations believe that the pragmatic need to rebuild their land bases takes precedence over (low-return) efforts to force the federal government to invest more in the trust process. While not every tribe successfully moves newly acquired land from fee to trust status, the process has been simplified and shortened and is now more likely to be successful.

The ***Land Enterprise of the Yakama Nation*** provides an institutional vehicle for stemming land loss and pursuing land repurchase. Established as a tribal business, the enterprise is commissioned to purchase land and selectively develop it in order to generate adequate revenue for further land purchases. [Restoration]

The Yakama Nation in Washington State has a 1.4 million-acre reservation. However, only 90,000 acres within the reservation boundary are held in trust. Most of the remaining land is owned by non-Indians or by individual Indian allottees as a result of the federal allotment policy initiated in the late 19th century. In 1950, determined to address this issue, the nation founded the Yakama Nation Land Enterprise (YNLE) to purchase land that fits the nation's strategic objectives when it becomes available, and to develop the lands it purchases for the benefit of the nation

In its first three decades, YNLE was supported by long-term low-interest loans from the U.S. Department of Agriculture and from capital supplied by the Yakama Nation itself. Since 1983, however, the organization has been completely self-sustaining. Today, profits from YNLE's development projects annually yield \$3 million to \$6 million for further land purchases.

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The benefits to the tribe are substantial. Having multiple owners within a reservation boundary—including a substantial number of non-Indian landholders—increases jurisdictional complexity and encourages jurisdictional disputes. As the nation brings some of these lands back into tribal ownership, it mitigates these concerns. At the same time, tribal ownership contributes to tribal asset building. Besides generating income for further land development and purchase, YNLE's operations have made it possible for the tribal government to expand its tourism-related businesses, agriculture, and housing, and to protect culturally significant lands.

The **Hopi Land Team** is a response by the Hopi Tribe to a settlement with the U.S. government that has allowed the tribe, for the first time, to initiate a substantial land-purchase program. [Restoration, Strategic]

The Hopi Tribe has a reservation in a remote region of northern Arizona. While the reservation is within the traditional Hopi homeland, significant portions of that homeland lie outside reservation boundaries. The return of these lands, lost to the U.S. government and to non-Native settlers in the nineteenth century, is a primary and long-held tribal goal. In 1996, under the terms of a settlement with the U.S., the Hopi Tribe received a substantial budget for land purchases, including the right to take newly purchased lands into trust. While not all the lands the tribe desires are available, this settlement gave the tribe an opportunity to expand its holdings, including securing some traditional sites.

In response to this opportunity, the tribe created the Hopi Land Team in 1998, consolidating a number of committees, task forces, and land-related functions and appointing tribal councilors with expertise on land issues as members. The Land Team was tasked with developing a land acquisition plan that would serve multiple goals: regain traditional lands, support Hopi culture, build a sustainable tribal economy, provide jobs for Hopi citizens, and raise revenues for tribal and village governments.

Today, the Land Team provides the tribe with leadership on land purchases, land uses, development strategy, and litigation strategy and does so with considerable sophistication. One seller backed out of a deal upon learning that the buyer was the Hopi Tribe; the Land Team then created a separate corporation to carry out the purchases. In another case, when a non-Native community objected to the possible conversion of U.S. Forest land to tribal trust land, “the Team found alternative sites to purchase and sponsored a series of community meetings in nearby towns to build and restore good relationships” (Harvard Project on American Indian Economic Development 2005, p. 59). When Homolovi State Park, an off-reservation archeological site of significance to the Hopi, faced possible closure

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for budgetary and other reasons, the Land Team initiated a relationship with the State of Arizona to improve the park and to facilitate Hopi purchases of surrounding lands that contain additional cultural sites, traditional foods, and eagle nesting areas. The Land Team also has purchased some lands for their economic value (off-reservation commercial properties, for example) and for increasing water rights and access. Some of the new lands were held in fee simple to facilitate business development, which might have been hindered in some cases by trust status.

In the 1970s the ***Confederated Salish and Kootenai Tribes of the Flathead Reservation*** moved quickly to take advantage of the Indian Self-Determination and Education Assistance Act and take over management of their lands and natural resources from the U.S. government—to their substantial benefit. [Political, Capacity]

The Confederated Salish and Kootenai Tribes (CSKT) occupy a 1.3 million-acre reservation in northwestern Montana. Their lands include substantial forests and grasslands, superb wildlife habitat, approximately half of Flathead Lake, riparian areas, and portions of the Mission Mountains. Much of the reservation is checkerboarded with Indian and non-Indian ownership, and tribal citizens are a minority population within their own reservation. These facts complicate reservation land management. To make matters more difficult, from the mid-1930s onward the U.S. government—attempting to exercise its role as trustee—managed CSKT lands, but in many cases federal managers *mismanaged* the land and squandered CSKT resources.

For years, CSKT tried to regain the right to manage its own resources, setting up institutional infrastructures wherever they could. For example, in the late 1960s, CSKT established its own Tribal Realty Office to issue home site leases. Soon after, it created its own forestry enterprise and undertook reforestation efforts on its lands. In 1975, when the Indian Self-Determination and Education Assistance Act allowed Indian nations to contract with the Bureau of Indian Affairs to manage Indian-related programs themselves, CSKT was one of the first and most vigorous tribes in seizing this opportunity. Over time, tribal government took over nearly every federal function on the reservation, from health care to the provision of electrical power.

Among CSKT's key targets was management of its lands. It established its own Tribal Lands Department with responsibility for coordinating natural-resource-related activities. This Department now handles land transactions, including appraisals, permits, easements, purchases, wills, and probates. It handles both fee-to-trust and trust-to-fee transfers. It handles agricultural planning, processes hundreds of farm leases, handles all title

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management, and even manages the distribution of payments to individual Indian owners of trust land. Today, it employs 35 specialists in real estate and land management.

CSKT also established a Forestry Department, taking over all forestry operations from the BIA. This department is now the lead decision-maker in all forestry decisions on CSKT lands. Every ten years, the department puts together a comprehensive forestry management plan and is known for its ecosystem-based and sustainable forestry management.

CSKT's Natural Resources Department handles environmental quality issues on CSKT's lands, manages fish and wildlife populations, and oversees recreational activities on wildlands within the reservation boundary. It is involved with species restoration and works with the State of Montana and U.S. Fish and Wildlife Service to coordinate management decisions where other jurisdictions are appropriately involved.

CSKT's combination of assertions of tribal control, careful building of institutional and technical capacity, and commitment to the long-term resource stewardship have made it a leader among Native nations in land and natural-resource management. Its operations consistently outperform those of the federal government (see, for example, Berry 2009).

The Ak-Chin Indian Community established a **Community Council Task Force** to review all development plans for lands surrounding its reservation and to work with developers and neighboring governments to reduce harms to Ak-Chin lands and interests. [Political]

The Ak-Chin Indian Community comprises fewer than 1,000 citizens living on a 21,000-acre reservation 36 miles south of Phoenix, Arizona, now America's sixth largest city. Ak-Chin is a predominantly agricultural community and, until recently, was surrounded by open space and farmland. But the growth of Phoenix and its neighboring communities has increasingly surrounded the reservation with housing developments and their associated infrastructures.

The Ak-Chin Indian Community Council Task Force, which is tasked with monitoring and addressing the impact of development adjacent to reservation lands, was created in response to these encroaching developments. A planned wastewater treatment plant threatened two of four washes that cross the reservation; the plant had the potential to alter seasonal flows of water, negatively affect species that depend on the water, and compromise cultural activities. The community mobilized, sending elders to public meetings and establishing the Task Force. The Task Force insisted on the state's adherence to existing state laws involving environmental quality and tribal consultation and achieved

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an early win: The treatment plant was built, but in a way that mitigates and manages its impacts.

Task Force members are selected for their cultural, technical, or legal expertise. They have authority to review proposals, exchange information, and clarify issues. They then make recommendations to the Community Council, which has ultimate decision-making authority for the nation. In addition to advocacy and education, a key role for the Task Force has been to provide city, county, and state governments, developers, and others with a contact point for development-related interactions with the Community and with formal processes for addressing development issues affecting the reservation. Today, collaboration and consultation between surrounding governments, the Community, private developers, and others is routine and expected by all parties.

The *Lac Courte Oreilles Band of Lake Superior Chippewa* collaborate with the Wisconsin Department of Natural Resources and the U.S. Forest Service in a joint agency management plan for the Chippewa Flowage, a dam impoundment that flooded Lac Courte Oreilles lands. [Political]

In 1921, despite strenuous objections by the Lac Courte Oreille (LCO) Band of Lake Superior Chippewa, the U.S. government allowed a power company to build a dam on the Chippewa River in Wisconsin, flooding a huge portion of LCO lands for purposes of power generation. The resulting 15,000-acre Chippewa Flowage—Wisconsin’s third largest lake—destroyed nearly all of a 25,000-pound annual wild rice crop that was the foundation of the tribe’s economy. It covered tribal burial grounds, other sacred sites, and a village, forcing tribal citizens to relocate their homes.

In 1970, when the power company applied for relicensing, LCO fought for and regained rights to manage some of the acreage around the Flowage. In 1988, it set out to regain authority over the entire Flowage. In 2000, after twelve years of difficult negotiations with the Wisconsin Department of Natural Resources and the U.S. Forest Service, these two agencies and LCO signed the Joint Agency Management Plan for the Chippewa Flowage. The Plan provides for joint management of the majority of the Flowage shoreline and most of more than 200 islands within the Flowage. It outlines the roles and responsibilities of each of the three participating governments, the goals of the plan, and overall management objectives and policies for the Flowage. It also provides mechanisms for addressing issues that might arise that were not anticipated in the Plan itself. Representatives of the three governments meet to discuss pending decisions and work toward consensus on Flowage policies. The Plan is not consultative; instead, it provides for

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genuinely joint decision-making. This means, among other things, that decisions tend to reflect not only economic and environmental considerations but cultural ones as well.

Mutual recognition of shared interests and shared jurisdiction was a key to success in negotiations and continues to provide a foundation for collaboration. For example, all three governments share an interest in maintaining the wilderness quality of the region (about 90 percent of the shoreline and all but one island are undeveloped). On the jurisdiction front, LCO came to recognize that its own goals could only be achieved through intergovernmental relationships. The flooding of LCO lands had left a bitter legacy—still acutely felt—that might have prevented any collaboration with governments that LCO held responsible for stealing Chippewa land and desecrating the graves of Chippewa ancestors. Nonetheless, the tribe realized that it could reclaim a decision-making role in Flowage management only by reaching out to the other governments involved. LCO's willingness to acknowledge the jurisdiction of other governments encouraged those governments, in turn, to recognize the jurisdiction properly held by the tribe.

Finally, the Plan's success also results from its formal institutionalization. LCO refused to rely on informal understandings as a basis of cooperation in land management. The tribe insisted instead on a formally adopted Plan that recognizes the sovereign rights of each of the three governments and that all three governments commit to.

The *Great Lakes Indian Fish and Wildlife Commission* works on behalf of 11 Ojibwe nations to protect their off-reservation treaty rights and regulate both Indian and non-Indian land and resource use in the ceded territory. [Political]

When Ojibwe leaders were forced to sell vast tracts of land United States in the 1800s, they negotiated to retain the use of these ceded lands for subsistence, cultural, and other purposes essential to Ojibwe life. Over time, however, state governments began to ignore these agreements, and state game and fish officers began to cite tribal citizens for violating state conservation laws. Finally, in a 1983 decision in *Lac Courte Oreilles v. Voight*, the US Court of Appeals affirmed the rights of the Ojibwe bands to regulate their own citizens within the ceded territory.

In 1984, 11 Ojibwe tribes in the Lake Superior region of Minnesota, Wisconsin, and Michigan formed the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) to protect and enforce these treaty rights. GLIFWC is a tribally chartered intertribal agency with more than 60 permanent and seasonal staff. Experts employed by the agency work throughout

the region, focusing on biological management, law enforcement, intergovernmental affairs, development and planning, and public information.

In the early 1990s, GLIFWC negotiated a Memorandum of Understanding (MOU) with the U.S. Forest Service to clarify how treaty rights should best be acknowledged, interpreted, and implemented. Besides resolving various legal ambiguities, the MOU fostered a government-to-government relationship between equals that today smooths communication and brings good faith to ongoing negotiations. Another contributing factor to GLIFWC's success is its commitment to creating and vigorously enforcing its own regulations regarding the tribal citizens' use of treaty resources—actions that in turn inspire public trust and respect for tribal self-management. GLIFWC is the manifestation of Ojibwe authority over ceded land; through it, Ojibwe nations and citizens are able to exercise the full extent of their rights to traditional territory.

For more than a century, the ***Menominee Nation's forestry operations*** have emphasized sustained-yield, integrated-use practices that reflect the nation's goals and their cultural understanding of the forest. [Strategic]

The Menominee Nation has a 235,000-acre reservation in Wisconsin, much of which is forested, a remnant of the vast forests that were cleared in the nineteenth and early twentieth centuries for farmland. The Menominee have long depended on their forest for multiple resources, both cultural and economic. After the establishment of the reservation in 1854, the Menominees fought for the authority to cut and sell their trees to support their people; at the same time they also struggled, with mixed success, to protect their forest from non-Menominee cutters, including private timber companies and government officials who sought to clear the land for agriculture.

At the heart of these fights was not only long-standing Menominee subsistence activity but also the Menominee belief system, including respect for trees and “the idea that the entire forest has spirit” (Trospen 2007, p. 135). These beliefs formed the basis of the Menominee approach to forestry, which emphasized sustained-yield practices and forest protection.

In 1908, the U.S. Congress passed legislation that incorporated some of these practices, assuring the Menominees a sustainable timber cut and authorizing a tribal timber mill that quickly became the basis of the tribe's economy. But, as Trospen (2007, p. 135) explains, the 1908 legislation inaugurated “a period of struggle about the proper size of the annual cut and the correct harvesting practices. Most federal officials advocated clear cutting; the Menominee were concerned about regeneration and the continued productivity of the

forest.”⁷ Conflict over forest policy eventually ended up in court. In 1935 the Menominee Nation sued the federal government for mismanagement of the forest and finally won their case in 1951, receiving \$7,650,000 in damages.

Within only a few years, the Menominees found themselves again in a struggle to control their forest and their future. They were one of the first targets of the U.S. government’s termination policy that proposed to end the reservation system and terminate federal jurisdiction and responsibility for tribes. Between the late 1950s and the early 1970s, the Menominee Tribe was terminated, the reservation became a county, the nation’s economy collapsed, the Tribe organized to restore federal recognition and finally, after a long and bitter fight, achieved it with passage of the Menominee Restoration Act of 1973 (Shames 1972, Peroff 1982).

Today, the restored Menominee Nation manages the forest itself. Its forestry operation not only employs much of the Nation’s labor force but also reflects Menominee beliefs. Menominee forestry practices include “cutting at a rate consistent with a concept of long term sustainability, maintenance of a large and old growing stock, selection cutting (also known as uneven aged management), long term monitoring, and subordination of the [tribal] mill’s goals to the goals of forest management,” which include forest and habitat diversity in addition to optimization of economic value (Trospen, p. 136). According to Menominee Tribal Enterprises, “...there is more standing saw timber volume (1.7 billion board feet) now, than there was in 1854 (estimated at 1.2 billion board feet). During this same period, over 2.25 billion board feet have been harvested from the same acreage.”⁸ Meanwhile, Menominee timber practices and forest stewardship, once unusual and under attack, have become famous and emulated.⁹

⁷ Divergence between federal and tribal forest management goals has been a problem for a number of tribes in the United States. In 1993, a survey by the Intertribal Timber Council found a major gap between the goals of Bureau of Indian Affairs forestry officials and those of tribal citizens. “For example, tribal members value resource protection most. Yet BIA forestry employees place relatively less emphasis on these goals and more on the forest’s economic benefits.... Tribal members emphasize that an integrative, holistic approach be taken in managing all forest resources, recognizing a multiplicity of use and values. Through funding, staffing, and approach, the BIA has tended to emphasize commercial timber production” (Indian Forest Management Assessment Team 1993, p. ES-4). However, a follow-up survey in 2003 indicated that “The... gap between the visions that Indians express for their forests and the way, in terms of direction, they are managed, is narrowing. This is due to greater tribal participation in forest management and greater alignment between tribal and BIA approaches to management” (Indian Forest Management Assessment Team 2003, p. 4).

⁸ http://www.mtewood.com/History/Forestry/Menominee_forest_background.html, accessed December 17, 2011.

⁹ MTE was the first U.S. timber company to achieve Green Cross Certification, enabling them to obtain premium prices for their sustainably-produced lumber. See Huff and Pecore (1995, p. 7).

The Confederated Tribes of the Umatilla Indian Reservation's Cultural Resources Protection Program exercises tribal jurisdiction over on- and off-reservation cultural patrimony, encompassing both artifacts and sacred sites. [Political, Strategic]

In 1805, the Lewis and Clark expedition looted a sacred site on lands belonging to one of the three tribes that make up the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). In the nearly 200 years since, the tribes have fought—often unsuccessfully—to protect their sacred sites and artifacts. Finally, in 1987, the tribes created the Cultural Resources Protection Program (CRPP) to counter federal indifference to, and public ignorance of, the importance of protecting its patrimony.

Several strategies contributed to the growth, sustainability, and success of the CRPP. First, CTUIR sent several tribal members to train in archeological practices and then hired them to work for the CRPP. Starting with two part-time employees, the CRPP now has a full-time staff of 15, including a medicine man who can perform appropriate ceremonies if a burial site is found or disturbed. Second, knowing it lacked sufficient financial resources to fund the program out of pocket, the CTUIR tasked the CRPP with bidding on cultural protection projects for outside clients. Not only did this provide income to reinvest in the CRPP, it strengthened employees' skills and enhanced the program's reputation. Third, rather than simply fighting the non-Indian community, the tribes worked hard to teach federal, state and other government employees, western academics, and the public about Indian cultural values and practices.

Today, the CRPP's staff consults with a number of tribes and tribal businesses, dozens of federal, state and county government agencies, and scores of private businesses and educational institutions. In so doing, the tribes have influenced public policy for their own and other Indian nations. Today, state and federal employees as well as others must obtain permission before working on reservation lands.

The Yavapai-Apache Nation, having acquired several new parcels of land, entered into a community-based, structured strategic process designed to guide decision-making on the use of both long-held and newly acquired lands. [Strategic]

The Yavapai-Apache Nation enjoys a promising economic location. Approximately 100 miles north of Phoenix, Arizona, the Nation's lands straddle a major interstate highway and include significant tourist attractions. The Nation has done well in the gaming industry, drawing patrons to its casino and hotel complex just off Interstate 17.

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One of the Nation's long-term goals has been to expand its land base and buy back portions of its traditional territory. In the late 1990s and early 2000s, the Nation was able to use gaming revenues to purchase a number of parcels of land in the region. Some of these lands were within or near the town of Camp Verde, Arizona; others had agricultural or recreational potential. However, the Nation had no comprehensive plan for the use of these lands. Consequently, the Nation's legislature—the tribal council—found itself facing a barrage of proposals from various Yavapai Apache government departments, from entrepreneurs, and from others for the use of these parcels of land, including proposals for new housing, community learning centers, business development, and so forth.

In the early 2000s, wrestling with conflicting land-use proposals and ideas, the Nation's council decided to launch a strategic planning process that could produce a set of guidelines for land-use decisions. This was not to be a council-centered process; they wanted to include the community at large in the land-use discussion.

Over a period of some months, using an outside facilitator, the Nation carried out a structured discussion not simply of land use but of the Nation's future more generally. In the first stage of the process, more than 75 Yavapai-Apache citizens took part in a two-day session that identified key long-term goals for the Nation, established shared priorities and concerns that citizens thought should be considered in long-term planning, and carried out a SWOT analysis of the Nation's overall situation. Subsequent discussions produced land-use proposals that were then measured against the identified long-term goals and opportunities. While final decisions about land use were placed in the hands of the Nation's council, the process yielded a set of guidelines that reflected a community-based vision of the Yavapai-Apache Nation's future.

After years of land-use-related conflict with surrounding Skagit County, the ***Swinomish Indian Tribal Community*** sat down with the county and produced a Cooperative Land Use Program that serves the interests of both governments. [Political, Strategic, Capacity]

The Swinomish Indian Tribal Community (SITC) has a 7,000-acre reservation located on Puget Sound approximately 80 miles north of Seattle. The reservation, which lies entirely within Skagit County, is highly checkerboarded. Not only do non-Indians own 46 percent of the land and lease an additional 20 percent under long-term residential leases from individual Indian landowners, but much of the non-Indian owned land is scattered and non-contiguous.

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For years, the Community and Skagit County had a tense and often litigious relationship, largely owing to jurisdictional conflicts over zoning, permitting, and other land-use issues. In 1986 the two governments, tired of jurisdictional confusion, conflict, and the prospects of costly litigation, and with the help of a regional non-profit that served as a facilitator, sat down together to discuss their land-use concerns. The result, after extensive discussions, was the creation of the nine-member Planning Advisory Board composed of four tribal appointees, four county appointees, and a neutral facilitator.

This board set out to create a joint land-use planning process that both governments could accept and use. Before it began, however, board members attended educational sessions on federal Indian policy and law, tribal governance, consensus-based negotiation, and cultural issues including the importance of land to tribal peoples. In 1996, these efforts led to the Swinomish Cooperative Land Use Program, which is still in place today.

The Program specifies a common set of land-use standards and lays out a common permitting process for both Swinomish and Skagit County lands. It requires joint review of land-related proposals (which can first be submitted to either government; the recipient government then shares the proposal with its counterpart); provides mechanisms for dispute resolution; and affirms that cooperative problem-solving is the preferred method of doing business. The shared set of standards and shared procedures mean that any plan that meets SITC criteria will also meet Skagit County criteria, and vice-versa.

The Program has resulted in less conflict over land use, faster processing of land-use proposals, an improved environment for development both on and off Swinomish lands, better protection of environmentally and culturally sensitive lands, and an atmosphere of mutual respect between the two governments. In a region with a rapidly growing population, the Program also has brought much-needed coherence and transparency to regional land-use planning.

The Program has had a further effect as well. SITC has been asked to participate in other regional policy discussions from which it once was excluded, and it has instituted more than a dozen other agreements with federal, state, and local governments in areas ranging from public health to environmental protection. As a senior tribal official said, “We learned through this process that it was possible to use intergovernmental relationships to our advantage. Now we do it all the time” (personal communication).

Land Title Processes at the *Saginaw Chippewa Tribe* and the *Morongo Band of Mission Indians* have substantially shortened the time it takes to obtain Title Status Reports on tribal trust land. [Political, Capacity]

Among other things, land is potential residential space. But on most reservations, Indian housing is inadequate in both quality and quantity, and Indian home ownership on reservations is rare. But a growing number of Native nations have been interested not simply in better housing for their populations but in supporting home ownership by tribal citizens.¹⁰

Among the challenges facing home ownership on many reservations with trust land is the difficulty of obtaining a Title Status Report (TSR) on a particular piece of land. “A TSR takes the place of a title commitment for land that is held in trust [by the federal government].... The TSR is a necessary precursor to issuing a mortgage for a property on trust land” (Edwards, Morris, and Red Thunder 2009, p. 7).

The process of obtaining a TSR relies on land records held by land title records offices maintained by the federal Bureau of Indian Affairs (BIA). Such offices are often under-resourced and overwhelmed, both by the amount of work to be done and by the complexities of title on many Indian lands, particularly where the legacy of allotment continues to produce highly fractionated lands. As a result, obtaining a TSR can take anywhere from a few months to more than a year. This has had crippling effects not only on home ownership but on economic development as investors are discouraged by the process and the time involved.

It turns out, however, that the TSR process is dependent on BIA land title records offices only because that is where the records are and no alternative process is available. Several Native nations have seized the opportunity this represents and have set out to establish their own land title records offices and take over the TSR process themselves. For example, in 2000 the Saginaw Chippewa Tribe, located in Michigan, obtained all existing records pertaining to its trust lands from the BIA and established the Saginaw Chippewa Land Title and Records Office. The tribe now maintains its own trust land records and carries out the TSR process. Under BIA management, it generally had taken six months or more—in some

¹⁰ The Chickasaw Nation’s Chuka Chukmasi (Beautiful Home) program and the White Mountain Apache Tribe’s Apache Dawn program are two examples of innovative work being done by Native nations to assist their citizens in developing family assets through home ownership. See <http://hpaied.org/images/resources/publibrary/Chuka%20Chukmasi%20Home%20Loan%20Program.pdf>, and http://wmahousingauthority.org/site/cpage.asp?cpage_id=180020212&sec_id=180007661.

cases, several years—to obtain land title documents. Today, Saginaw’s land records office, with a minimal staff, can produce title records within days and often within 24 hours. This has transformed the process, accelerated home ownership, and opened up new economic development opportunities (Harvard Project on American Indian Economic Development 2006).

In 2003, the Morongo Band of Mission Indians, located in southern California, also took over realty and land records functions from the BIA. By bringing these records and the TSR process in-house, the Band—like the Saginaw Chippewa Tribe—has dramatically cut the time it takes to get a TSR. The result has been increased home purchases, land purchases, and leasehold mortgages within the Morongo reservation, as well as enhanced tribal self-government (Edwards, Morris, and Red Thunder 2009).

This strategy, which several other nations have adopted as well, depends on both BIA cooperation and tribal administrative capacity, and it is driven by the peculiarities of federal trust lands. But it has a broader significance as well, demonstrating the land-related advantages of capable tribal self-government. As both decision-making power and administrative capacity move into the hands of Native nations, they often outperform colonial governments, increasing the prospects for economic development on Native lands and wealth-creation for Native citizens.

The Tulalip Tribes created a political subdivision, Quil Ceda Village, that functions as a tribally chartered municipality on tribal lands. Independent from central tribal government, the village’s leadership can zone, develop land, and sign leases, leading to more efficient and more respectful land use development. [Political, Strategic, Capacity]

The Tulalip Tribes have a population of about 4,000 citizens living on a 22,000-acre reservation in the state of Washington. Interstate 5, a major north-south highway, lies along the reservation’s eastern border, making the reservation accessible both to Seattle, thirty minutes’ driving time to the south, and to the Canadian border, 90 minutes to the north. In 1992 the Tulalip Tribes entered the gaming business; thanks to their location, they have done very well. A nation once known for deeply entrenched poverty has become a financial force in the region.

In 1998, concerned that they had become too dependent on gaming revenues, the Tribes began to look for ways to diversify their economy and take additional advantage of their Interstate 5 frontage and access. The eventual result was Quil Ceda Village—officially the Consolidated Borough of Quil Ceda Village. Occupying 2,000 acres of land abutting

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Interstate 5, the Village is a municipal corporation chartered by the Tulalip Tribes under their own constitutional authority. The Borough charter specifies Village purposes: “To provide responsible local government to the Consolidated Borough of Quil Ceda Village consistent with the needs of the area of development within its borders... and to provide the persons and enterprises located within the Village and the people of the Tulalip Indian Reservation with the opportunity to organize their human and natural resources to provide for their economic security and to provide for the health, safety and general welfare of the people of the Village and the Reservation.”¹¹

The Village includes the tribe’s casino, a business park, a major retail center with a Wal-Mart, a Home Depot, and numerous smaller stores, and a separate premium outlet mall with 100 high-end vendors. In August of 2011, the Village broke ground for a Cabela’s outdoor outfitter’s outlet, scheduled to open in April of 2012, the first Cabela’s located on an Indian reservation. Within its boundaries the Village has invested in a biomass energy plant, a cultural center, wetland restoration, and a set of parks and trails. Using gaming revenues, the Tribes built a new freeway off-ramp to improve access to the Village, which now draws thousands of shoppers daily.

What makes this development interesting, however, is that in 2001, the U.S. Bureau of Indian Affairs approved Quil Ceda Village’s status as a municipality, and the U.S. Internal Revenue Service (IRS) granted it status as the first IRS-recognized tribal political subdivision in the nation and the only federal city other than Washington, DC.

Quil Ceda Village functions like many other municipalities. It has a council-manager form of government, with substantial powers vested in the council to manage the Village as it sees fit. According to the Borough charter, “Pursuant to the provisions of and subject only to the limitations imposed by the constitution and laws of the Tulalip Tribes of Washington and by this charter, all powers of the Village shall be vested in Village council... which shall enact local legislation, approve budgets, determine policies, and appoint the Village manager and such other officers deemed necessary and proper for the orderly government and administration of the affairs of the Village, as prescribed by the constitution, applicable laws, and ordinances hereafter adopted by the Village.”¹²

As this makes clear, while Quil Ceda Village is a political subdivision of the Tulalip Tribes, it operates independently in many policy areas, streamlining processes such as zoning and

¹¹ Ibid.

¹² <http://www.quilcedavillage.org/article1.asp>, accessed December 17, 2011.

permitting within Village boundaries. Such processes are often complex and politicized on other reservations, hampering business development. While the Village began by negotiating with local, off-reservation communities for water, power, and law enforcement, it now delivers these services itself, providing tenants with road maintenance, sewer and water, and police, fire, and emergency services. The Village collects municipal taxes, rents, and other fees that it uses to improve infrastructure and for other purposes, and it returns significant revenues to the Tulalip Tribes. The local Marysville Chamber of Commerce recently renamed itself the Greater Marysville Tulalip Chamber of Commerce in recognition of the tribes' growing importance to the region. To date, it is the only U.S. chamber of commerce to partner with an American Indian nation.

The Kayenta Township of the Navajo Nation exercises substantial authority over land-use within its prescribed area and represents another unusual path to sub-national reservation economic and business development. [Political, Strategic, Capacity]

The town of Kayenta lies near the center of the vast Navajo Nation. Not only is Kayenta located at the meeting of two trans-reservation highways, but it also is a gateway to Monument Valley, an iconic and popular tourist destination.

Despite its advantageous location, for years Kayenta was unable to capitalize on its tourism opportunities. Infrastructure that could support business development was largely absent; zoning was non-existent; grazing rights vested in families tied up lands that had commercial potential; and the Navajo Nation's lengthy, cumbersome, and highly centralized land-use regulations, permitting processes, and other bureaucratic burdens discouraged business investment.

In 1985, after years of frustration with the lack of local control over decisions affecting economic development, the citizens of Kayenta persuaded the Navajo Nation to engage in an experiment. Local government at Navajo is vested in a system of districts known as chapters, but the chapters have little power. Kayenta proposed that the Nation establish a township—a new political subdivision of the Nation located within the larger boundaries of the local chapter—that could focus on business development within the town.

The Nation agreed. It designated Kayenta as a township, funded a planning program to develop the township, and let the program use more than 3,600 acres of trust land. While it took time to resolve conflicts over grazing rights on some land under the township's control, by the early 1990s Kayenta Township had been established as a legal entity with the power to manage business development within township boundaries, including the

power to lease township land to businesses. In 1996, the Navajo Nation's Council authorized the Kayenta Retail Sales Tax Project, allowing the township to establish and collect sales taxes, and in 2003 granted Kayenta Township permanent status, recognizing it as "Kayenta's authoritative municipality."¹³ In 2005, the Kayenta Township Commission passed a resolution "Enacting the Home Rule Ordinance, Chapter 1 of the Kayenta Township Code of Ordinances." The resolution states, "Now that the Navajo Nation Council has statutorily established the Township as a permanent municipal home-rule government constituting a political subdivision of the Navajo Nation, there is a need to enact an ordinance that will independently provide the basic functions, authorities and structures of the Township premised upon the principle that the Township may perform any function and exercise any power not denied by or inconsistent with the general laws of the Nation."¹⁴

The Township's primary governing body is the five-member Kayenta Township Commission. Commissioners are elected by Township citizens to four-year, staggered terms. A Town Manager implements Commission decisions and ordinances. Exercising substantial authority within the township boundaries, the Commission has established a set of ordinances and municipal codes that, among other things, have clarified and regularized business development, instituted a system of zoning that has eliminated haphazard co-location of businesses and residences and concentrates business development along the highway corridors, and streamlined business permitting processes. In the late 1990s, the Commission instituted a 2.5% sales tax, raised to 5% in 2002. Tax revenues remain in the community and are used for infrastructure development and to leverage external investment. Improvements on behalf of community needs include solid waste facilities, development of roads, airport improvements, a women's shelter, recreation areas, and other projects.

One of the major changes the Commission made was to simplify the cumbersome process of obtaining a site lease for a business. Before 1996, "business land leases required a recommendation by the local chapter, tribal administrative review and recommendation, approval by the Tribal Council's Economic Development Committee, the signature of the Navajo Nation President, and finally, review and approval from the BIA Area Office" (Harvard Project on American Indian Economic Development 1999, p. 15). Under the

¹³ <http://www.kayentatownship.net/townshiphistory.html>, accessed December 17, 2011.

¹⁴ This resolution and Township ordinances can be found at <http://www.kayentatownship.net/ordinances.html>, accessed December 17, 2011. See especially Chapter 1 of the Kayenta Township Code of Ordinances: Home Rule. Section 1-106 lays out the authorities of the Township.

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Township, leases require only Commission approval, the Navajo Nation President's signature, and BIA approval as trustee. This has reduced the time involved in business start-ups, attracting more entrepreneurs to Kayenta. Meanwhile, lease income goes into Township coffers.

Today, the relationship between the township and the local Kayenta Chapter of the Navajo Nation is a government-to-government relationship somewhat like that between a town and a county. Township and Chapter cooperate on issues that involve both; the town has no authority outside its boundaries but is the primary governing body within them. Meanwhile, the central Navajo Nation government is much less involved in local decision-making than it has been in the past, freeing the township to act quickly in response to local needs and concerns.

Local self-government has not been problem-free, and the learning curve has sometimes been steep. But the overall result has been transformative as business activity has expanded, bringing jobs and income to township residents. Kayenta is currently developing a new comprehensive plan for continued development, addressing redevelopment, infill, and smart growth and is engaged with the Arizona Department of Transportation in a regional transportation needs study focused on improving the transfer of people and goods in this remote region.

Purchase of Off-Reservation Lands for Non-Trust Purposes Some Native nations have purchased lands and related facilities for economic or political purposes that have nothing to do with additions to the reservation or the trust land base. In such cases, they have held the land in fee simple, thus maximizing their land-use options. [Restoration, Political, Strategic]

The ***Passamaquoddy Tribe*** in the state of Maine offers one example. In 1983, the Tribe purchased the Dragon Cement plant, the largest such plant in the region, as part of its economic development strategy. Treating the purchase as a business investment, the nation decided not to put the land into trust. This had short-term economic costs, obligating the nation to pay state and local taxes on the facility and its profits. But the nation focused on sound management of the business and enterprise growth. The plant's value rapidly increased, and five years after purchasing it, the nation sold the plant for triple the purchase price, bringing the nation far more money than it had spent on taxes and other business costs. Such a sale would have been unlikely, if not impossible, had the land been put into trust.

Another example comes from the ***Gila River Indian Community***, located on the outskirts of Phoenix, Arizona. The Community purchased a portion of Williams Air Force Base, a large parcel of former U.S. government land in the Phoenix region but several miles north of the nation's reservation. Other major landowners of the former Air Force base include Phoenix-Mesa Gateway Airport, Arizona State University, and Maricopa Community College. One of the Community's goals is to be a significant political player in regional decision-making, particularly economic development decision-making. By purchasing part of the base itself, the Community gained a formal role and a stronger voice—and made progress toward its larger goal.

New Financial Instruments and Approaches for Land Purchase Acquiring and developing lands requires financing. Lack of finance often has limited Native nations' abilities to acquire lands or to develop the lands they own or control. The U.S. government has not been a reliable source of funds for land purchase, and most tribes have been able to acquire lands only after generating sufficient revenues of their own. In recent years, several organizations have emerged that attempt to address the problem of financing tribal land purchases. [Restoration, Capacity]

Among them are these:

The Indian Land Tenure Foundation is an Indian-run non-profit organization that assists Indian nations in regaining ownership and control of their homelands, educates Indian landowners about land ownership and management, and develops financial models that help Indians better use and manage their land assets.

The Indian Land Capital Company is an Indian owned and managed Community Development Financial Institution that provides Native nations with low-cost loans specifically for land acquisition. Because it treats Native nations not as corporations or businesses but as sovereigns, it is able to make loans at lower costs and with fewer lending barriers than traditional mainstream financial institutions—essentially it is able to make unsecured loans to governments as opposed to secured loans to corporate entities or individuals. It thus acknowledges the sovereignty of Native nations and allows tribal borrowers to act quickly and retain greater control and flexibility in the financing, acquisition, and management of restored or new lands.

Increasingly, ***Tax Exempt Bonds*** may become an important finance mechanism for tribal land purchases, although Congress, the federal Internal Revenue Service, and tribes are still working to clarify eligibility and permissible uses of these municipal bond-like instruments.

Grossly, a bond must be used for a clear governmental purpose—it's unclear whether economic development is included—and be tied to a reliable income stream, such as casino income. This may exclude many tribal land purchases.

Federal Programs and Policies that Support Home Ownership as a Land-Use Option As noted above, many Native nations would like to increase home ownership on their reservations. For individuals and families, home purchases on tribal land remain a reasonable means of asset accumulation. For a tribe, increased home ownership can transform a low-income enclave into a vibrant mixed-income community. Nonetheless, home ownership on reservations has been slow to take hold because the typical collateral for a home loan—land—is unavailable when land is held in trust. Several federal policies developed over the last thirty years are helping ease this impasse and, in so doing, provide more opportunities for home ownership as a true tribal land-use option. [Capacity]

The ***Section 184 Loan Guarantee Program***, created by the Housing and Community Development Act of 1992, guarantees private-sector home mortgage loans made to eligible borrowers for homes located on Indian land. This program takes advantage of the fact that, while tribal trust land cannot be mortgaged and BIA approval is required to place a lien on individual Indian trust land, a collateralizable interest may still exist in an Indian land parcel. Specifically, if a tribal citizen leases a parcel of tribal trust or restricted fee land for a fixed term, or if there are any improvements (housing, outbuildings) on tribal or individual Indian trust land, the time remaining in the lease and the improvements can serve as collateral. In other words, in the event of a foreclosure, the home and the leasehold are the assets foreclosed. If an individual Indian seeks a loan, she may use improvements on the land or the land itself (under protected conditions) as collateral.

Financial institutions could offer mortgage loans against these assets, but most have not done so, in part because of other concerns about tribal jurisdiction. Critically, disputes arising from the loan and any foreclosure proceedings would be heard in tribal court, and banks typically have been unwilling to bear the risk of politicized court outcomes. Thus, to make its citizens eligible to participate in the Section 184 program, tribes have to meet a legal infrastructure standard (encompassing housing code and judicial enforcement requirements).¹⁵ This certification, together with the 100 percent mortgage guarantee

¹⁵ In order to participate in the HUD Section 184 Loan Guarantee Program, a tribe with tribal court jurisdiction trust property needs to have the following in place: foreclosure procedures, eviction procedures, and procedures giving HUD first lien priority or otherwise guaranteeing that the loan will be satisfied ahead of most other property debts. Eligibility also requires that a tribe ensure that HUD and/or private lenders have access to tribal lands for the purpose of servicing and evaluating guaranteed properties; ensure that an acceptable lease is in

provided by the U.S. Department of Housing and Urban Development (HUD), gives banks the confidence they need to issue mortgage loans. As of 2010, the program had guaranteed more than 12,000 loans to individuals, tribes, and tribal housing entities, working in partnership with a growing number of national and regional private-sector lenders.¹⁶

Significantly, the Section 184 program has unique provisions to protect individual Indian trust land used to secure a mortgage loan. In the first place, in order to receive such a mortgage, both HUD and the BIA must approve the loan application. Then, should the borrower default, the lender “can only pursue liquidation of the loan after offering to transfer the loan to an eligible tribal member, the tribe or the Indian Housing Authority serving the tribe. In the event of a foreclosure, the lender or HUD cannot sell the property to anyone but an eligible tribal member, the tribe or the housing authority serving the tribe. Thus the unique status of the trust land is protected.”¹⁷

Native Community Finance Development Institutions (NCDFIs) grew out of the recommendations of the U.S. Department of Treasury Community Development Financial Institution Fund’s 2001 *Native American Lending Study*. The study determined that Indian Country was significantly under resourced in terms of debt-based capital. Few loans were made for home ownership or business purposes. Going beyond the model of a community development corporation, US Treasury invested in the creation—through training, technical support, capitalization loans, and operating capital grants and loans—of tribal community-based institutions capable of developing, lending to, and then supporting eligible tribal-citizen borrowers. A decade later, some 60 NCDFIs are making loans that are helping tribes and tribal citizens make their land more valuable through lending for home purchase, home repair, business start up, and business expansion.

Fractionation and Probate The fractionation of Indian lands as a result of the General Allotment Act of 1887 (see Part I above) has become a massive problem for Native nations and citizens, who lose the productive potential of fractionated lands, and for the U.S. government,

place on tribal trust land (if relevant to the loan); and understand that if eviction and foreclosure procedures are not enforced, the Department will cease making new loan guarantees within the tribe's area of jurisdiction. See http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184/faq, accessed December 20, 2011.

¹⁶ http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184, accessed December 20, 2011.

¹⁷ http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184/faq, retrieved December 20, 2011.

which absorbs enormous costs in the administration of those lands (for some illustrative facts, see the opening paragraphs of Nash 2011). The U.S. has made several attempts to solve this problem—for example, the Indian Land Consolidation Act of 1983, subsequently amended in 2000, and most recently, the American Indian Probate Reform Act of 2004. [Political, Capacity]

The primary purpose of the **American Indian Probate Reform Act** (AIPRA) is to allow small interests in land (less than 5%) to pass exclusively to single heirs when there is no will involved. The law also provides flexibility for individuals and tribes to consolidate and acquire interests in land during the probate process. It allows a tribe or a co-owner to request the sale of a fractionated parcel of land for the purposes of making that parcel whole under one owner. Except in Alaska and for the Five Civilized Tribes and the Osage Nation, it also “creates a uniform probate code for all reservations across the United States. The Act applies to all individually owned trust lands unless a tribe has its own probate code....” (U.S. Department of Agriculture 2009, p. 1).

The phrase “unless a tribe has its own probate code” in the above quote is important, as it explicitly allows Native nations to determine for themselves how to handle probate (although all provisions for individually held trust land must be approved by the U.S. Secretary of the Interior). Some tribes have adopted the uniform probate code that AIPRA provides. Others have adopted the probate codes of the states in which they are located. The Penobscot Nation, for example, uses the probate code of the State of Maine, but it has reserved the right of the Penobscot Nation Tribal Court to use its own discretion in allowing for the inclusion of traditional perspectives and practices when dealing with probate cases, should that be the wish of the parties involved.

However, several tribes have taken advantage of the provisions of AIPRA to develop comprehensive probate codes of their own. Examples include the Confederated Tribes of the Umatilla Indian Reservation, the Lummi Nation, the Oglala Sioux Tribe, and the Chitimacha Nation.

The Chitimacha code adopts much of the AIPRA’s uniform probate code but modifies it in certain ways to reflect the nation’s needs and preferences. For example, the Chitimacha code allows for oral wills, providing that a will “is valid as an oral will under Chitimacha custom, if all children, whether residing in testator’s home or not, and testator’s spouse, if alive, are present at the announcement of the oral will and agree that the testator orally made known the testator’s last testament before them.” According to the Tribal Court Clearinghouse, while few states allow for oral wills, a growing number of tribes are

authorizing them in keeping with tribal custom. The Chitimacha code also includes restrictions on inheritance of Chitimacha lands by non-Indians.¹⁸

The AIPRA has its own limitations as a solution to the fractionation problem. For example, it retains the Indian Land Consolidation Act's provision that the automatic passage of an undivided interest in land to a single heir applies only where there is no will and the undivided interest is less than 5%. While this addresses some of the worst cases of fractionation, it does nothing about undivided interests greater than 5%, thus leaving the process of fractionation itself to continue.

Finally, the administration of probate is a complex process and often subject to disputes. For Native nations that wish to bring probate under their own control as part of an effort to better manage their lands, success requires not only thoughtful decisions about code models and provisions but robust administrative and judicial capacities as well.

8. Self-Determination, Land, and Economy: What the Research Says

The body of research exploring relationships among Indigenous self-determination, land management and use, and economic development in the U.S. is small. Nonetheless, a number of studies offer important insights into these relationships. In this section we review the studies that seem most relevant to AFN's interests.

These studies emphasize at least three features of the relationship among Indigenous self-determination, land management and use, and economic development. First, decision-making authority matters: Overall, those nations with genuine decision-making authority over what happens on their lands, including what happens to their natural resources, do better than those that don't. This has to do with accountability. Second, institutional and managerial or technical capacities matter: Effective use of Native nations' lands depends in part on such foundational factors as the rule of law and on sheer management and technical skills. Third, the idea that policy should promote, as a priority, the privatization and individualization of Native nations' land-holding does not stand up to close scrutiny.

Decision-making authority. Commercial timber on Indian lands in the U.S. typically is managed in one of two ways. Either the Bureau of Indian Affairs manages tribal forests through its forestry division, or Native nations take over management of their forests

¹⁸ These details of the Chitimacha code are taken from the Tribal Court Clearinghouse of the Tribal Law and Policy Institute, accessed at http://www.tribal-institute.org/codes/part_ten.htm, December 10, 2011.

themselves. Krepps and Caves (1994) compared the economic performance of these two different management regimes, measuring price returns in each against a benchmark of national forest price returns for a comparable timber bundle. Across a large sample of Native nations with timber resources, they found that forest lands managed directly by Native nations tended to yield higher price returns against the benchmark than tribal forest lands managed by the BIA. Their explanation is that when the owner of the land (the Native nation) is also the manager of the land, it will manage the land to yield or protect what it values, whether profits or something else. When someone else (the BIA) manages the land, it has no incentive to pursue any particular value as it has nothing to gain from doing so.

Berry (2009) reported similar results in her comparison of returns obtained in forestry operations run by the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) in Montana with returns obtained by the U.S. Forest Service on adjacent Lolo National Forest lands. Her data were for the years 1998 to 2005. In each of those years, CSKT's timber operations' revenues per million board feet of timber exceeded those on the Lolo National Forest, and by a significant margin. Says Berry, "Because the tribes depend on the forest for income, they have an incentive to promote the productivity of this resource, while keeping costs low. The Forest Service lacks such an incentive. Most Forest Service timber revenues are sent to the general treasury; national forest management is funded primarily by Congressional appropriations. Without a connection between budgets and revenues, there is little motivation to operate efficiently, or to ensure the continued productivity of the forest."

In a series of papers, Kalt and Cornell (1994), Cornell and Kalt (2000, 2007, 2010) and Cornell, Jorgensen, and Kalt (forthcoming) showed that Native nations' effective decision-making control over how development-related resources are used—including natural resources—is one of the key factors shaping development outcomes on Indigenous lands. The control factor appears to be more important than the quantity factor. That is to say, nations that have large natural resource endowments but lack effective control over what happens to those resources are likely to do worse than nations with less substantial endowments but more authority over how they are used. The point, again, is accountability. Over the long run, Native nations will make better decisions about land and natural-resource use than outsiders will because their own welfare and futures are at stake. Over time, they adjust their decisions to maximize what they value. Outside decision-makers lack comparable incentives either to identify a community's strategic objectives or to adjust their decisions in ways that increase valued returns in service to those objectives. While decision-making authority alone is insufficient for achieving better

outcomes—capacity issues, for example, can limit Native nations’ abilities to turn authority into success (see the following subsection)—it appears to be a necessary foundation for sustainable development.

Governmental and managerial capacity. Starting from Krepps and Caves’s work on forestry (see above), Jorgensen (2000) showed that returns on tribally managed forest lands could be enhanced even more by capable governing institutions, in particular the presence of an independent dispute resolution mechanism such as a tribal judiciary. Essentially, she identified the consistent rule of law as a key element in maximizing forest returns. In other words, not only do Native nations, in the aggregate, outperform federal forest managers, but those nations that pay close attention to establishing capable institutions of governance do even better.

Grogan (2011) examined the extraction of energy resources on tribal lands in the U.S. with a focus on coal, oil, and gas. She found that capacity played a significant role in outcomes of energy-resource production for Native nations. Those nations that were doing best at reaping the rewards of energy production on their lands were those with robust governing institutions of their own and significant hired or in-house technical knowledge of energy production and markets.

These industry-specific analyses corroborate the more general conclusions of the extended research program of the Harvard Project on American Indian Economic Development and its partner research program at the University of Arizona’s Native Nations Institute. In work underway since the late 1980s, these research programs have found that assertions of tribal jurisdiction have limited impact on economic and social outcomes unless they are accompanied by the development of effective tribal governing systems (see, for example, Cornell and Kalt 1992, 2000, 2007; Cornell, Jorgensen, and Kalt forthcoming; Cornell, Jorgensen, Rainie, and Starks forthcoming; Grant and Taylor 2007; Jorgensen 2000, 2007).

Such systems have to be able to: provide stability in the rules by which decisions are made and benefits are distributed; implement decisions effectively and fairly; strictly limit the influence of tribal politics on day-to-day enterprise and program management; insulate dispute resolution processes from political interference by elected leadership; mobilize community resources on behalf of community goals instead of allowing them to be dissipated in factional fights over the distribution of jobs, houses, and other goods; and so forth. Effective land management, like the other fundamental activities of Native nations, depends to a substantial degree on the presence of governing systems that can

consistently carry out these functions. Without such systems, jurisdiction is toothless, and Native nations may squander and lose the very rights they have long sought to secure.

This does not mean that tribal governing systems must replicate mainstream governance practices. On the contrary, there is ample evidence in these same studies of Native nations that consistently carry out needed functions using governing systems with deep Indigenous roots or that are variable composites of traditional, mainstream, and newly developed technologies of governance. What matters is that such systems have legitimacy with the people being governed—that is, that they resonate with community ideas about how authority should be organized and exercised—and that they actually work.

Such systems can have powerful effects, trumping other variables that often are perceived as crucial to successful economic development. For example, while it is clear that location can be a powerful predictor of economic success—having ready access to major markets is hugely advantageous to economic development—nations with superb locations but dysfunctional governing systems do poorly in development, while nations with unpromising locations but capable and effective governing systems can do well. The effective, fair, and reliable rule of law can attract financial and human capital to otherwise unpromising circumstances, while the absence of such things can drive financial and human capital away, yielding results far inferior to what locational, natural resource, educational, or financial circumstances suggest could be achieved.

Property rights regimes. There is a long-standing view within political economics that private property rights regimes outperform alternatives in their support for economic development. This has led some to argue that a necessary part of the solution to persistent poverty on Indigenous lands is the break-up of the tribal estate into individually held pieces of private property (see, for example, Koppisch 2011).

While there is substantial research support from multiple settings for the idea that privatization can contribute significantly to development success, the idea that it is a *necessary* component of such success is difficult to defend in view of contrary evidence from Indigenous and other cases. For example, Anderson and Lueck (1992) attempted to explain why tribally held lands had significantly poorer agricultural production than private (fee simple) lands within 39 reservations in the western U.S. They posited that it had to do primarily with the nature of property rights and that private ownership of lands led to more productive land use, arguing in effect against tribal land holdings. However, they failed to adequately control for land quality and for the effects of allotment (see the discussion of the U.S. allotment policy in Part 1 above). Allotment began first on

reservations that were determined by the U.S. government to have the best agricultural opportunities and, in many cases, to be closest to non-Native communities. As a result, on many of the reservations in the Anderson and Lueck sample, the highest quality allotted land was also the land most likely to end up as fee simple land in non-Indian hands, leaving tribes with the least productive lands (Carlson 1981).¹⁹ In short, we believe it would be a mistake to conclude from Anderson and Lueck's work that private (fee simple) lands are more likely to be productive than tribally held lands, once other factors are controlled.

Akee (2009) provides evidence that further undermines the Anderson and Lueck findings. Akee compared economic returns to residential development in two settings: on collectively held tribal lands on the Agua Caliente Indian Reservation in southern California and on privately held lands in the city of Palm Springs. Agua Caliente and Palm Springs lands are intermixed in a checkerboard fashion, facilitating a systematic comparison between two different systems of land holding. Despite common assumptions that privately held land yields higher returns than collectively held lands, Akee found no significant difference in returns across these two settings, a finding that challenges the assumption that privatization and individualization of tribal lands is a necessary key to lifting Indigenous communities out of poverty. Akee (personal communication) also reports evidence that returns to commercial uses likewise show little difference across these settings.

Does this mean that privatization is a bad idea? No, and some Native nations may well choose it as part of a land-management and development strategy (although they should consider carefully the long-term risks and the institutional requirements if such risks are to be mitigated²⁰). Instead, the evidence simply means that strategic land-use planning in Native nations should not assume that economic activity on privately held lands must outperform economic activity on collectively held lands. The evidence indicates that collectively held lands can be productive as well, and that the primary obstacle to sustainable economic development on Indian lands is *not* communal land tenure.

¹⁹ A question also exists of whether Anderson and Lueck's econometric specification was, in fact, an identity.

²⁰ See, for example, the discussion of the U.S. allotment policy in Part I above. Allotment was an attempt, in part, to promote economic development on Indian lands through privatization of the tribal land base. Trans-generationally, however, it led to the movement of massive quantities of land out of Indian possession and, through the process of diminishment (see footnote 3 above), to the loss in some cases of tribal jurisdiction.

9. Where's the Action? Analysis of Land Management Activity Today

Looking across the sweep of Indian Country land management activities prominent today, a few key areas of activity are making an important difference for Indian nations as they work to consolidate and steward their lands. The following list highlights interesting and distinctive action areas (all gleaned from the best-practice cases):

Land purchase. Tribes are shifting from an *ad hoc* approach to purchase (reacting to the random flow of properties to the market) to a proactive, planned approach. Some tribes now have land purchase teams and programs to prioritize the acquisition of certain types of parcels so that their limited land purchase dollars are put to the best use given tribal citizens' interests and the nation's needs. For instance, a Native nation with a strategic land purchase plan is better able to assess possible purchases in terms of cultural, political, and economic goals. (For example: Yakama Nation, Hopi Tribe, Gila River Indian Community.)

Comprehensive land use planning. Even when tribes have limited opportunities to purchase new lands, similar thinking has led an increasing number of tribal governments to pursue land-use plans to better protect current lands, enhance land quality, and where appropriate, create opportunities for higher-value land use. While strategic and comprehensive approaches are not yet the norm, they are effectively replacing outmoded and/or BIA approaches in exemplar communities. (For example: Yavapai Apache Nation, Tulalip Tribes.)

Intergovernmental collaboration. Tribal land use planning cannot help but implicate other jurisdictions. Because of trans-boundary resources, because it is their Aboriginal territory, because the tribe has treaty rights, etc., off-reservation land management issues become tribal concerns. The interesting action is occurring where, absent a land purchase, tribes have reacquired substantial land management authority. Often, this is a result of collaboration rather than confrontation. Even where treaty and moral rights to land and related resources are well known, pragmatic approaches have tended to result in more power for the nation than battles over rights.

One useful approach may be to remind other governmental and organizational players of the Native nation's stature in the mix of land management players: Tribes are not new entrants to regional land oversight but have many generations of experience and

knowledge.²¹ Nor are they, in most cases, transient owners who want to extract something from the land quickly, sell it, and move on. They may buy land for market purposes, but when it comes to reservation lands, most Native nations are demonstrably engaged in land stewardship for the very long term. This makes them ideal partners where sustainability, integrated resource use, landscape-scale or ecosystem-based management, or other long-term priorities are in play.

Institutionalizing intergovernmental cooperation through memoranda of understanding or more robust legal agreements may also be helpful, as the process of negotiating and writing down an agreement helps assure that the collaboration is serious, transparent, and enduring. (For example: Great Lakes Indian Fish and Wildlife Commission, Swinomish Indian Tribal Community, Lac Courte Oreilles Band of Lake Superior Chippewa.)

Tribal management. Tribes are taking back land and resource management authority as a way to express their sovereignty. But there also have been self-determination and efficacy results from tribal management, which have tended to be equally important reasons for self-management. To wit, tribal decision-makers manage the resource in ways they see fit and in response to values they hold, and often, their work produces outcomes that eclipse results realized under external management. Among tribal nations most active on the “take over” front, there in fact seems to be a convergence of attitudes and arguments against federal management and in favor of tribal control: “We don’t want to depend on the federal government for revenues,” “We don’t think federal management is healthy for our lands,” “We should be managing our own lands,” “We should be implementing our nation’s values for this land and these resources,” “We can do it better,” “We have a track record of doing this better,” and so on.

Notably, however, these arguments win the day only when tribes also develop the technical, administrative, and financial capacity for self-government. There is much action on this secondary front. (For example: Saginaw Chippewa Tribe, Jicarilla Apache Tribe, Confederated Salish and Kootenai Tribes.)

Innovation and creativity. Critical action also is taking place as tribes and Native organizations engineer completely new ways of doing things. Tribes are responding with innovation rather than accepting either federal or other mainstream assumptions about

²¹ For example, the Saginaw Chippewa Tribe’s Eagle Valley Outfitters business uses the slogan, “10,000 years of outdoor experience.” A similar “senior partner” stance might be taken in engagements with other governments in cross-jurisdictional land management discussions.

how development, change, and management must occur. Tribes and Native organizations have developed new approaches to clearing reservation land title, negotiating for trust land status, making loans to sovereign tribal governments, creating dispute resolution systems able to hear disagreements about land, establishing entirely new political subdivisions with regulatory authority, and so on. (See, for example: Morongo Band of Mission Indians, Indian Land Capital Company, Navajo Nation.)

In sum, the action is on the fronts of strategy, assumption of responsibility, collaboration, capacity building, and innovation. Leading nations are working in these areas to strengthen land management and secure a more prosperous and self-determined future.

10. Recommendations

It is not easy to make recommendations to the Assembly of First Nations based on these materials. While we have worked closely with a number of First Nations in Canada on governance and development issues, we can claim no particular expertise on First Nations land management or on the issues that First Nations currently face as they address land management and land tenure challenges. Without such expertise, it is difficult to identify the most useful lessons or insights from the U.S. experience. However, several things strike us as important points to consider.

Recommendation 1. First Nations should engage in comprehensive land-use planning. For a long time, land-use planning among Native nations in the U.S. was a haphazard affair. Land-use decisions were more often responses to immediate crises or opportunities than reflections of strategic thinking about future needs or priorities.

Recently, that has begun to change. As American Indian nations have gained increased governing power and, in some cases, increased resources with which to govern—in effect, as they have increased their capacity to shape the future according to their own designs—they have realized the necessity of more holistic, deliberate, and long-term thinking about their lands and how they use them.

Whether First Nations are pursuing additions to reserve or simply trying to do a better job of managing existing reserve or off-reserve lands, planning needs to consider the purposes of existing or desired lands (including Aboriginal land outside reserves), the values (economic, social, political, and cultural) of different land parcels, and how these parcels together fit (or don't fit) the long-term vision of the nation's future. It also needs to take into account the requirements of effective use: If the nation wishes to use a piece of land

in a particular way, what institutional, technical, financial, cultural, or other capacities or knowledge will need to be in place? What other investments will the nation need to make in order to realize its land vision?

While such comprehensive plans, once made, may take a long time to realize, and some may encounter obstacles that prevent their realization altogether, they are still important. Part of the point of such planning is to give coherence and purpose to short-term decision-making. With such plans in place, it becomes easier to judge the value of new opportunities or alternative solutions to immediate land-related problems. Of course, it also makes sense to periodically revisit comprehensive land-use plans as circumstances and resources change.

Recommendation 2. Look for openings in the current system of land management where First Nations can expand their own land-management activity. The realization of comprehensive land-use plans can take a long time, particularly where such plans involve additions to reserve. But in the meanwhile, there are almost always areas where Native nations can assert greater control over what's happening on their lands (both on-reserve and within their larger Aboriginal territory). What land-related activities currently in the hands of provincial or Canadian governments might usefully be taken over by First Nations?

As described in Section 7 above, the Morongo Band of Mission Indians and the Saginaw Band of Chippewa took over the administration of land titles from the Bureau of Indian Affairs. These were acts of self-government on their part, made possible by an opening in the law. In the long run, both nations hope to achieve complete control over their lands, but in the short run, they moved to take advantage of the opportunities they saw to enhance their governmental power, bring more of the land management process under their control, and demonstrate their capabilities.

A First Nations leader once pointed out to us that “one of the underappreciated aspects of the Indian Act is that it is silent on so many things.” Each silence may be an opportunity. Where there are silences on land management, can First Nations fill those silences with their own governance initiatives?

Recommendation 3. Invest in capacity building and pay particular attention to building institutional capacity—the ability to govern well. There is a tendency on the part of Native nations to view land management as primarily a political problem: how to wrest control of Indigenous lands from other governments. But this is only the beginning. The

real task is to figure out how to use that control, once achieved, to produce sustainable results for the nation.

This places a spotlight on the governmental and managerial capacities of Native nations. As we emphasized in Section 6 above, these capacities have multiple components: institutional, technical, and financial. Of these, the institutional capacity component is easily the most important.

In saying this, we do not mean to dismiss technical and financial components. But without capable governing institutions, technical expertise and financial resources will be hard to come by or retain. Unless Native nations govern well—create stability in the rules of the game, keep internal politics in its place, resolve disputes promptly and fairly, make decisions and effectively deliver on those decisions—they will have difficulty attracting financial capital or recruiting and keeping skilled personnel. The institutional component comes first. If that is adequately addressed, the other components follow.

This holds a message for both First Nations and for provincial and Canadian governments: Invest in creating capable First Nation governments that both reflect their own peoples' beliefs about how authority should be organized and exercised and are capable of sustained, efficient, and effective governance. This is no easy task. It is not a matter of sending First Nations citizens off to management programs in universities. It is a matter of working closely with First Nations to rebuild Indigenous governing systems that are products not of Indian Act pedantry but of a serious commitment to arm First Nations with the governing tools they need to realize the futures they desire.

This is directly relevant to land management. Relatively speaking, land-use planning is the easy part. Thoughtful planning takes work and expertise, but the real challenge comes with implementation—which ultimately is what matters. As one tribal chairman in the U.S. once said to us, “the best defense of sovereignty is to exercise it effectively.”

The U.S. evidence repeatedly makes this point: capable performance is one of the strongest arguments for Indigenous control over lands and related resources. From the Saginaw Chippewa's Title Status Reports to the Menominee Nation's forestry operations to the Kayenta Township's sensible business development policies, the demonstration that Indigenous nations are at least as skilled as other entities at land stewardship, administration, and decision-making strengthens their power over their lands. When the Red Lake Band of Chippewa discovered that the walleye—a fish that had sustained them for centuries—was in danger of disappearing from Red Lake, they led a multi-governmental

effort that successfully restored the walleye to commercial fishing levels in an unexpectedly short time. Their initiative, resourcefulness, and managerial performance hugely increased their credibility as resource managers.

In short: capable performance enhances future possibilities.

Recommendation 4. Focus on intergovernmental relationships. Both additions to reserve and successful land management typically involve intergovernmental relationships. Building collaborative relationships with other governments, particularly in a context of historical hostility, is a difficult process, and we have no silver bullets to offer. But we know it can be done. We've seen several features of successful relationships in the U.S.

- **Search for common ground.** Economic benefit is one potential place to start. Successful Native nations tend to spin off benefits to nearby communities. Among other things, they buy goods, employ people, attract tourists, and reduce burdens on taxpayers as more and more of their citizens exit the welfare rolls. Economic success in First Nations is in everybody's interest. Show it with numbers.

But the economy is not the only place to look. One Native nation in the U.S. and a small, adjacent city, at odds over land-use, finally began talking to each other when, one night, in a facilitated conversation, individuals from the two sides realized that they both wanted their kids to grow up knowing and appreciating the land. That simple realization provided a starting point for a conversation about how the two might work together to make such a future possible.

- **Be willing to accept that some issues may not be resolved.** This same tribal/city conversation hit a potential dead end over the issue of sovereignty. Each side claimed to have jurisdiction over the issues at stake, and neither was willing to give in. But, again with help from outside facilitation, they decided to leave that issue unresolved and instead to manage it: to find ways to work together that forced neither side to abandon what each saw as a critical principle. That decision in turn pushed them to seek joint decision-making mechanisms through which they could achieve shared goals and find ways to compromise where goals differed.
- **Outside facilitation may help.** As the previous two points suggest, it may be easier to initiate a productive conversation when someone else—a neutral party—manages the process.

- **Recognize the role of staff in intergovernmental relationships.** Leaders often formalize relationships, but front-line staff are typically the ones who build those relationships and make them work. One of the senior officials of the Swinomish Indian Community remarked that the trust necessary to the long-term success of the Community's relationship with Skagit County was built by the front-line staff of the two governments—the planners and technicians and field managers—who dealt repeatedly with each other. They came to respect each other's views and skills, and that respect eventually infused the larger relationship.
- **If you want real change, put concrete mechanisms in place.** Don't depend on education, cultural sensitivity training, or improved communication to get things done. Getting people to better understand each other may help everyone feel better, but it seldom alters underlying relationships or patterns of conflicting interests. Put real mechanisms in place. In one conflict we're familiar with over prejudicial law enforcement, the two conflicting parties invested heavily in better understanding. But it wasn't until they put together a joint commission designed to work together to alter law enforcement practices that substantive change took place.
- **Explore the use of international human rights law to assert a role in decisions over off-reserve lands.** What vestigial rights do First Nations have over territory they don't own any more? Is there a human rights case to be made? What obligations do First Nations' neighbor governments have to consult with First Nations and their free, prior, and informed consent? Such arguments may be more effective in Canada than in the U.S., as Canada has a particular reputation to protect.
- **Collaborate with other First Nations.** Each First Nation may have a weak position and a minor voice when dealing on its own with the province or with Canada. But joint arguments gain visibility and power. Collaboration also may yield sharing around what works and how, so that First Nations do not have to re-invent the wheel in terms of advocacy ideas, educational materials, negotiation techniques, and so on.

Recommendation 5. Look for success stories, and use them. There are several ways to argue for Indigenous peoples' right not only to hold land but to control how those lands are used and what happens on them. There is a moral argument. In many cases, there also is a legal argument. But there is a results argument as well.

When Quil Ceda Village returns profits to the Tulalip Tribes, making the Tribes less dependent on federal funds, it is at the same time making an argument for Tulalip's right

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to manage its lands as it sees fit. When the Jicarilla Apache Tribe restores an endangered trout population and outperforms the State of New Mexico in managing mule deer and elk populations, it is at the same time making an argument for its right to manage tribal lands as it thinks best. When the Swinomish Indian Tribal Community joins forces with Skagit County to create a joint land-use planning and regulatory process that reduces litigation and simplifies development, it is at the same time making an argument for its right to manage its lands as it sees fit. As noted in recommendation 2 above, performance matters.

But many such arguments never make it into the policy debate, which tends to focus not on what works in Indigenous communities but instead on what doesn't. It should be a priority for AFN or some other Indigenous organization to collect stories of First Nations' successes in land management and find ways to bring those stories—to bring the results of empowerment and capable governance—into the policy discussion where they can provide compelling evidence for policy change.

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