

Statement of Commissioner Peter Kirsanow

Introduction

There is one overriding lesson that readers can take away from this report: Socialism doesn't work.¹

Indian reservations are an experiment in socialism in the American context—education, housing, food, and healthcare are theoretically all provided. Program mismanagement by both the federal government and tribes is endemic.² Programs are organized to benefit the tribes rather than

¹ This is not an accident of history or due to Native American culture. The tribes became victims of an 85-year experiment in socialism. See William J. Lawrence, "In Defense of Indian Rights," in *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY*, Abigail Thernstrom and Stephan Thernstrom, ed., 2002, at 395 [hereinafter Lawrence, *Indian Rights*], https://www.hoover.org/sites/default/files/uploads/documents/0817998721_391.pdf.

In 1993, John Collier became commissioner of the BIA under President Franklin D. Roosevelt. Collier initiated a new federal Indian policy called the "Indian New Deal," which became law as the 1934 Wheeler-Howard Act, also known as the Indian Reorganization Act. Collier admired Chinese communism, which he saw as a model for society. He wanted to implement these communist ideals on American Indian reservations, including communal ownership of property and central control of economic, political, and cultural activities. Many of these key aspects of the Indian Reorganization Act are still in effect on reservations today.

² See, e.g., "Final Evaluation Report—Indian Affairs Offices' Poor Recordkeeping and Coordination Threaten Impact of Tiwahe Initiative," Report No. 2017-ER-018, Office of the Inspector General, Dep't of the Interior, September 28, 2018 (finding that Tiwahe Initiative funds were incorrectly distributed. Some tribes were underfunded by tens of thousands of dollars, and others were overfunded, due to "inaccurate recordkeeping," inconsistent application of the formula used to calculate funding amounts for the distribution," "offices failure to communicate with each other," and "absence of policy at either office to manage major distributions like Tiwahe"), https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_OSG_092818.pdf.

See also "Audit of Contract Nos. R11AV60120 and R12AV60002 Between the Bureau of Reclamation and the Crow Tribe," Report No. 2017-FIN-040, Office of the Inspector General, Dep't of the Interior, September 28, 2018, at 1, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_USBRCrowTribe_Public_0.pdf.

We tested \$13,835,511 of the \$20,999,510 in interim costs the Tribe claimed under the contracts between October 1, 2014, and March 31, 2017, and determined that they Tribe did not track and report its use of Federal funds in accordance with contract terms, applicable Federal laws and regulations, and USBR guidelines.

Id. at 6.

[T]he Tribe's inventory of equipment it purchased under the contracts was incomplete. The Tribe's inventory listed 28 pieces of equipment, including a semi-trailer truck, pickup trucks, SUVs, dump trucks, trailers, and ATVs. While onsite during our fieldwork, we did our own inventory and could not locate five pickup trucks, two trailers, and one SUV. Tribal employees stated that they did not know where the equipment was. We are therefore questioning the \$246,000 the Tribe claimed for the purchase of this equipment.

Id. at 9.

During our audit, the USBR informed us that the Treasury had sent the Tribe its 2017 annual funding for the contracts—\$12,772,000—but the Tribe transferred only \$8,000,000 from its operations

individuals who happen to be tribal members. Individual initiative is squelched by bureaucratic red tape. The result is the pockets of poverty and despair that dot the American landscape.

The report and its findings and recommendations discuss at great length the poverty on reservations, the lack of infrastructure on reservations, the lack of funding for the Indian Health Service, and on and on. These are all serious needs. But the fact is there simply is not enough money and competent management to solve these problems. What the Commission majority wants is for the federal government to pump enough money into Indian Country to maintain a middle-class standard of living—but with the government paying for housing, food, health care, infrastructure, education, and everything else. This is impossible.

For Americans who do not live on reservations, including the many individuals of Native American descent who live off the reservations and do not rely on government benefits, maintaining a middle-class life with housing, food, roads, education, and healthcare is the result of their own employment and taxes from multiple levels of government.³ Food, housing, and healthcare are the result of a decent job, and education and roads are primarily paid for by state and local taxes (and therefore by the job). It is simply impossible for the federal government alone to take the place of an employer and state and local government. This isn't because the federal government is (today) acting in bad faith. When the treaties were signed in the 19th century, standards of living (for everyone) were much lower. The government could promise to provide food and perhaps some education and medical care, and doing so was feasible, even if those

account to the special tribal bank accounts. It kept the remaining \$4,772,000 in the operations account and used it to pay business expenses unrelated to the contracts.

See also “The Wind River Tribes Misapplied Federal Funds for the Tribal Transportation Program,” Report No. 2017-FIN-042, Office of the Inspector General, U.S. Dep’t of the Interior, July 12, 2018, at 4, https://www.doi.gov/sites/doi.gov/files/FinalAudit_JBCWindRiver_Public_0.pdf.

For example, in 2014, the Wind River Tribes submitted, and BIA’s Department Transportation approved, a request for \$4,063,533 to construct the Lenore Bridge. A temporary bridge, designed for 2 years of use, was put in place in December 2014. The Wind River Tribes awarded the Reiman Corporation a \$2,568,757 contract to build the Lenore Bridge, and the BIA allocated \$1,007,996 in the 2015 Tribal Transportation Program funds to complete approaches to the bridge. In August 2016, prior to constructing the approaches, the Wind River Tribes ran out of funding and did not have a new tribal transportation plan to continue transportation projects.

³ For example, the average total healthcare cost (which includes both health care costs and health insurance) for a family of four in 2018 is \$28,166. *See* Guy Boulton, *You’ll be shocked at how much health insurance costs for a family of four*, USA TODAY, June 6, 2018, <https://www.usatoday.com/story/money/business/2018/06/06/health-care-costs-price-family-four/676046002/>. On the other hand, the Indian Health Service serves approximately 2.2 million people. In fiscal year 2017, the IHS received \$4.7 billion. *See* “Indian Health Service, FY 2018 President’s Budget to Congress,” Department of Health and Human Services, at CJ-1, https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2018CongressionalJustification.pdf.

This works out to approximately \$2136 per person per year. The government would have to more than triple the funding for the IHS to even begin to approach the levels of funding in the private market. This is unlikely to happen. Again, I am not saying it is fair that the government promised in treaties 150 years ago to provide health care to Indians and is doing an abysmal job today. But this situation will be solved by the government, particularly with Medicare rapidly heading toward insolvency. The best thing Native Americans can do is to conclude that the government is not going to fix this problem, get a job with health insurance, or get Medicaid.

promises were often broken. But expecting the federal government to turn Black Mesa, Arizona into Peoria, Arizona is a task of an entirely different magnitude.

Furthermore, expecting the federal government (or, for that matter, the tribe) to provide everything necessary for subsistence saps the spirit. Panelist Terry Anderson wrote in his testimony:

[T]he federal government can help tribes most by unshackling them from the trustee-ward relationship. As Crow tribal member, Bill Yellowtail, cautions, this relationship has allowed American Indians to fall into the “victimhood” trap. In Yellowtail’s words: “Dependency has become the reality of our daily existence. Worst of all, generation by generation it becomes what sociologists term learned helplessness—an internalized sense of no personal possibility, transmitted hereditarily and reinforced by recurring circumstances of hopelessness. The manifestations are epidemic: substance abuse, violence, depression, crime, trash.”⁴

I. Reduce Fractionation and Convert Property to Fee Simple

One of the biggest problems facing Native Americans on reservations is that many do not have meaningful property rights. Much reservation land that was held in trust for individuals was inherited by all the heirs of the owner. This phenomenon is known as “fractionation,” and often results in hundreds of individuals owning indivisible parcels of land. This causes coordination problems that makes it extremely difficult and time-consuming to put the land to productive use.⁵ And when land is in trust, it is very difficult to obtain financing from a bank, because it is difficult for the bank to foreclose on land if the borrower defaults.⁶

⁴ Terry L. Anderson, Written Statement for the Quiet Crisis: Federal Funding and Unmet Needs In Indian Country, 2016 Update Briefing before the U.S. Commission on Civil Rights, at 6, https://static1.squarespace.com/static/58d583e717bffcff8f786cc/t/59e0cbf137c58166361d8196/1507904497896/Anderson_Testimony-USCCR_2-12-16.pdf.

⁵ “Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands,” Dep’t of the Interior, July 31, 2017, <https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation>.

Fractionation affects nearly 11 million acres of land across Indian Country, preventing beneficial uses of significant resources and creating an overly complicated land tenure status where single tracts of land, like those at Navajo Nation, have more than 1,200 landowners. When tracts have multiple owners, it is difficult to obtain the required approvals for leases or other uses of these lands. As a result, many tracts are unoccupied and unavailable for any purpose.

⁶ Terry L. Anderson and Dean Luek, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J. OF L. AND ECON., Vol. 2, 427, at 436 (1992) [hereinafter Anderson and Luek, *Land Tenure*], <https://www.jstor.org/stable/725547>.

While individual-trust lands can be mortgaged, encumbrance restrictions limit the use of land as collateral. A mortgagee of individual-trust land receives an “assignment of income” rather than a claim against a deed. This means that, if an Indian borrower defaults, the mortgagee has a claim on the income from the property and therefore may be able to say how the property is used, but obtaining title to the land is very difficult. Since foreclosure proceedings typically go through tribal courts, uncertainty for the mortgage holder is increased. This effectively raises the costs of capital on individual Indian trust land.

The report discusses federal efforts to take land into trust for tribes.⁷ This is unlikely to improve the lives of Native Americans. Some research indicates that holding lands in trust—whether individual or tribal—dramatically reduces the productivity of the land.⁸ Terry Anderson and Dean Lueck estimated that “the per-acre value of agricultural output is 85–90 percent lower on tribal-trust land than on fee-simple land and 30–40 percent lower on individual trust-land than on fee-simple land.”⁹

Perhaps a better alternative is for the government to buy back fractionated land, convert it to fee simple land, and allow individuals to purchase it. This would allow Native Americans (and others) to own the land outright, and also make it easier for individuals who already own reservation land and use it for farming or ranching to extend and consolidate their holdings.¹⁰

See also Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 338 (2008).

Even the courts below recognized that the Longs' discrimination claim was a “novel” one. It arose “directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,” including the Lakota “sense of justice, fair play and decency to others.” The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. (citations omitted)

⁷ Report at n. 974–976.

⁸ See Terry L. Anderson and Dominic P. Parker, *Economic development lessons from and for North American Indian economies*, 53 THE AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS, 105, 121 (2009) [hereinafter Anderson and Parker, *American Indian economies*], <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8489.2007.00426.x>.

Considering these BIA constraints on land use, Trosper argues that the lower output chosen by Indian ranchers on the Northern Cheyenne is actually profit-maximising. According to his estimates, Indian ranchers are as productive as non-Indians operating nearby ranches when accounting for the different—in a sense exogenously determined—input ratios used. Because the implication is that Indian ranch managers are at least as technically competent as non-Indians, Trosper concludes by noting that the effects of land tenure should be examined further.

Anderson and Lueck (1992) take up this challenge by estimating the impact of land tenure on the productivity of agricultural land using a cross-section of large reservations. They benchmark the productivity of tribal and individual trust lands against those of fee-simple lands on reservations. When controlling for factors such as the percentage of trust lands managed by Indian operators and whether the tribe was indigenous to the reservation area, Anderson and Lueck estimate the per-acre value of agriculture to be 85–90 per cent lower on tribal trust land and 30–40 per cent lower on individual trust land. They attribute the larger negative effect of tribal trust land to collective action problems related to communally managed land. In addition to having to overcome BIA trust constraints, agricultural land held by the tribe is subject to common-pool resource management incentives that can lead to exploitation and neglect.

⁹ Anderson and Lueck, *Land Tenure*, at 436.

¹⁰ Anderson and Lueck, *Land Tenure* note 6, at 436.

Higher contracting costs also reduce agricultural productivity by keeping leases of Indian land smaller than optimal. This “scale effect” results because allotments under the Dawes Act were generally smaller than today’s optimal size of agricultural organization. . . . If the costs of contracting were zero, initial allotment size would make no difference because leasing could be used to achieve the optimal farm size. The BIA’s supervision and approval of leasing and land-use plans combined

The report quotes Dante Desiderio, who expressed his opposition to private ownership because “it hasn’t played out too well for Indian Country.”¹¹ Desiderio did not elaborate upon his statement. Perhaps he fears that if lands are privatized, individuals who own land will sell it to non-Indian buyers, thus diluting the power of the tribe.¹² Perhaps. But everyone else in America has the right to alienate property that belongs to them. Land may be a Native American’s only asset, as it sometimes is for other Americans. If that person wants to sell that land so he can buy a house, or send his daughter to college, or finance a move off the reservation, that should be his choice. Many Native Americans would doubtless decide to continue to live in the reservation area, but they would be able to sell or lease their land far more efficiently than they can now. There is no reason tribes could not maintain their culture while members own their land in fee simple. The Midwestern and Eastern United States are dotted with Amish and Mennonite communities that maintain a traditional way of life without government support or interference. The federal government has no free-standing interest in preserving tribal lands in perpetuity, but rather in the welfare of Native Americans. No one will *force* these individuals to sell their land. The federal government should not treat Native Americans as if they are eternally minors, and neither should the tribes.

II. The Interests of Tribes and the Interests of Individual Native Americans are Not Identical Nor Coextensive

The report assumes that the interests of tribes and the interests of individual Native Americans are identical. This is unlikely to be true. For one thing, the interests of Indian and non-Indian peoples are far more commingled than is popularly portrayed. According to the 2010 Census, 77 percent of people who live in American Indian areas¹³ and 68 percent of people who live in Alaska native village statistical areas did not identify as American Indian or Alaska Native either alone or in combination.¹⁴ On the other hand, the majority of people who identified as American Indian or Alaska Native did not live in American Indian or Alaska native village statistical areas.¹⁵ Furthermore, almost half of those who reported having Native American/Alaska Native ancestry also reported having ancestry of another race—predominantly white.¹⁶ And “the multiple race-American Indian and Alaska Native population grew at a considerably faster rate (39 percent) than

with the fractionation problem, however, make the costs of such contracting systematically higher for trust lands. Thus, a corollary is that trust farms will be smaller than fee-simple farms.

¹¹ Report at n. 991.

¹² Report at n. 990. “[T]here is concern among advocates that privatization of lands can undermine cultural preservation of tribal lands, and protecting the tribal lands can contribute to greater prosperity in Indian Country.”

¹³ Defined as “federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.” See Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, “The American Indian and Alaska Native Population: 2010”, January 2012, at Table 5, <https://www.census.gov/history/pdf/c2010br-10.pdf>.

¹⁴ *Id.* at 13–14.

¹⁵ *Id.* at 12–13.

¹⁶ *Id.* at 4 (“Of the given OMB race groups, the American Indian and Alaska Native population had the second-largest percentage (44 percent) reporting more than one race. The Native Hawaiian and Other Pacific Islander population had the largest percentage (56 percent) reporting more than one race.”)

the American Indian and Alaska Native alone population (18 percent) from 2000 to 2010.”¹⁷ All of this is to say that the interests of Native and non-Native Americans are inextricably intertwined. Millions of us are related to each other by blood or marriage, and we live amongst each other on and off Indian land.

Second, the interests of individual Native Americans can be subordinated to the interests of the tribe. This problem is encapsulated in a 1976 Supreme Court opinion:

Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. ***Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.*** [emphasis added]¹⁸

There are several problems with the federal government’s decision to treat Native Americans as a people apart. The first problem, aptly illustrated by the above quote, is that by depriving Indians of access to forums that are available to non-Indians, the government treats Indians differently than it treats other Americans. Denying an American access to a forum on the basis of race because it may benefit some other person of the same race or the racial group to which he belongs is wrong.

Another problem is that both Indians and non-Indians can find themselves deprived of rights in order to further tribal interests. An example of this is when a mother wishes to place her child (who has Indian ancestry) for adoption with a non-Indian family, and the government allows the father or the tribe to interfere with the adoption, when a non-Indian father would not have such a right.¹⁹ For that matter, even Native American parents or other relatives who wish their child to be adopted by a non-Native American family can find themselves thwarted by the tribe.²⁰

¹⁷ *Id.* at 4.

¹⁸ *Fisher v. District Court of Sixteenth Judicial District of Montana*, in and for Rosebud County, 424 U.S. 382, 390–91 (1976).

¹⁹ See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 646 (2013) (“It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”).

²⁰ Timothy Sandefur, *Escaping the ICWA Penalty Box*, Goldwater Institute, August 9, 2017, <https://goldwaterinstitute.org/article/escaping-the-icwa-penalty-box-in-defense-of-equal-protection-for-indian-children/>.

Once a child qualifies as “an Indian child” under ICWA, the tribe’s authority with regard to that child is in many ways equal or even superior to the rights of the parents. Thus, even if parents wish to block application of ICWA, they are often unable to do so, and tribes can override the expressed wishes of parents. In *Mississippi Band of Choctaw Indians v. Holyfield*, Indian parents chose to leave the reservation before giving birth, and signed voluntary consent forms agreeing to have their child adopted by a non-Indian couple. Nevertheless, the tribe successfully moved to have the adoption order vacated for noncompliance with ICWA. The Supreme Court concluded that ICWA “was not meant to be defeated by the actions of individual members,” because the statute protects “not solely

Another problem with assuming that the interests of tribes and the interests of Native Americans are identical is that the tribes are sometimes run for the benefit of prominent people in the tribe and not for the benefit of the average tribal member. Tribal mismanagement of funds is not uncommon. In 2018, the Department of the Interior's Inspector General found that the Crow Tribe did not properly manage its use of Federal funds and that its use of Federal funds was not properly overseen by the Bureau of Reclamation. The problems included missing equipment that had been purchased with federal funds. "While onsite during our fieldwork, we did our own inventory and could not locate five pickup trucks, two trailers, and one SUV. Tribal employees stated that they did not know where the equipment was."²¹ Additionally:

Instead of setting up the Treasury's electronic payment system so that funds would be transferred directly into the special tribal bank accounts as required, the Tribe set up the transfers to go into its operations account. From that account it could transfer money into the special tribal bank accounts without USBR approval. The funds had been transferred in this way since the Tribe set up the transfers in 2011 and 2012, but the USBR never discovered the error because it never reviewed the transfers to verify that they were set up correctly.

During our audit, the USBR informed us that the Treasury had sent the Tribe its 2017 annual funding for the contracts—\$12,772,000—but the Tribe transferred only \$8,000,000 from its operations account to the special tribal bank accounts. It kept the remaining \$4,772,000 in the operations account and used it to pay business expenses unrelated to the contracts. This was a misuse of the funds, as the Tribe spent them without first modifying the contracts to include the business expenses. Therefore, we are questioning this \$4,772,000 as unallowable.²²

Next door in Wyoming, on the Wind River Indian Reservation, there was similarly severe financial mismanagement by the Northern Arapaho and Eastern Shoshone tribes. And yet again, BIA failed in its duty to oversee the use of federal funds.

For example, in 2014, the Wind River Tribes submitted, and BIA's Department of Transportation approved, a request for \$4,063,533 to construct the Lenore Bridge. A temporary bridge, designed for 2 years of use, was put in place in December 2014. The Wind River Tribes awarded the Reiman Corporation a \$2,568,757 contract to build the Lenore Bridge, and the BIA allocated \$1,007,996 in the 2015 Tribal Transportation Program funds to complete approaches to the bridge. In August 2016, prior to constructing the approaches for the Lenore Bridge, the Wind

. . . Indian children and families, but also . . . tribes themselves." In short, ICWA empowers tribal governments in ways that supersede the judgment of parents when the two come into conflict. As one Indian law expert says, "The purpose of ICWA . . . is ultimately to maintain the survival of the tribe through the retention of its members."

²¹ "Audit of Contract Nos. R11AV60120 and R12AV60002 Between the Bureau of Reclamation and the Crow Tribe," Report No. 2017-FIN-040, Office of the Inspector General, Dep't of the Interior, September 28, 2018, 1, 6, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_USBRCrowTribe_Public_0.pdf.

²² *Id.* at 9.

River Tribes ran out of funding and did not have a new tribal transportation plan to continue transportation projects.

In February 2017, the Reiman Corporation contacted BIA regarding \$863,034 in unpaid invoices related to the construction of the Lenore Bridge. The Tribes did not allocate expenses for Lenore Bridge in their accounting system; the bridge cost over \$4 million but the Tribes' accounting system only reflected \$864,964 in costs.²³

As William J. Lawrence, who was the owner and publisher of the Native American Press/Ojibwe News, wrote:

Today, the biggest exploiters and abusers of Indian people are tribal governments, in part because there is no guaranteed or enforceable separation of powers in tribal governments. Many of the largest and best-known American Indian tribes have rampant, continuous, and on-going problems with corruption, abuse, violence, or discord. There is a lack of oversight and controls in tribal governments. Most tribes do not give their members audited financial statements of tribal funds or casino funds, which on many reservations may represent tens or even hundreds of thousands of dollars per tribal member. It is literally impossible for tribal members to find out where all the money is going.

The underlying problem is that true democracy does not exist on Indian reservations. Tribal elections are often not free and fair elections, and typically they are not monitored by any third party. And true democracy includes more than just the presence of an election process. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, due process, and protection of the basic liberties of speech, assembly, press, and property. None of these exist on most Indian reservations.

Tribal chief executives and tribal councils possess near-dictatorial control over tribal members. Not only do they control the tribal court, police, and flow of money, but they also control which tribal members get homes, jobs, and health care services, and under the Indian Child Welfare Act, they can claim more control over children who are enrolled members than the children's own family, especially non-Indian family members. If they live on a reservation, Indian people who speak up run the risk of losing their homes, jobs, health care, and other services, making internal government reform even more difficult.²⁴

And as Naomi Schaefer Riley wrote, in addition to the numerous patronage jobs that serve to dampen any internal political opposition by tribal members, "[T]he machinations of tribal government, unlike most federal and state governing institutions, often take place behind closed

²³ "The Wind River Tribes Misapplied Federal Funds for the Tribal Transportation Program," Report No. 2017-FIN-042, Office of the Inspector General, U.S. Dep't of the Interior, July 12, 2018, at 4, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_JBCWindRiver_Public_0.pdf.

²⁴ Lawrence, *Indian Rights*, *supra* note 1, at 397–98.

doors, with little transparency. Many newspapers on reservations are funded by the tribal government and, as such, are subject to tribal leaders' whims."²⁵

The Commission encountered a problem with this report that it did not even know it encountered—namely, lack of everyday familiarity with reservations and ordinary Native Americans. The people who testified before the Commission and who meet with Commission members when they visit reservations are those who are most invested in the current system. This is not to say they are ill-intentioned, or that they have nothing to contribute to the conversation. That is not the case. But people who are not tribal leaders and would like to sell their land and move, or who drive for hours to take their elderly relative to a community hospital rather than an IHS hospital, or who have moved off the reservation (or never lived on it) may have different views and perspectives.

The federal government should be trying to further the interests of individual Native Americans, not tribes.

III. Economic and Educational Struggles are Not Primarily Due to Lack of Funding

a. Many Native Americans Would Likely Benefit From Leaving Reservations

Observers have commented that many reservations are like Third World nations. One of the quickest ways for a person in a Third World nation to improve his standard of living is to move to the United States. If you are a poor person in Honduras, you may still be a poor person in the United States, but being a poor person in the United States is vastly better than being a poor person in Honduras. This is so self-evident that we are constantly intercepting and deporting people from Third World countries who are in the United States illegally. Native Americans who live on reservations literally live in the middle of the United States. Because they are U.S. citizens, they can work legally and are eligible for various government benefits. In short, in most cases, being poor off the reservation is better than being poor on the reservation. And once you have a job, you don't have to remain poor forever.

Several studies from the United States and Canada (which has a reserve system that is similar to our reservation system) support the proposition that living on the reservation has a deleterious effect on an individual's economic prospects.

Leaving the reservation may weaken an individual's ties to his tribe, and if many individuals leave the reservation, the tribe as an entity may decline. But the welfare of individuals is more important than the welfare of the tribe. For example, Robert Gitter and Patricia Reagan studied the wages and employment of American Indian men using data from the National Longitudinal Surveys of Youth 1979. They write:

Our most striking finding is that proximity to a reservation, either as an older child or as an adult, deters employment only among Indians. The effect is large and statistically significant. . . . Our data show that Indians are almost 10 percentage points less likely to be employed than the representative cross-section sample. Further, we find that the problems are even more acute for American Indians who

²⁵ Naomi Schaefer Riley, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* (2016), at 65.

currently reside in a county with a reservation or who resided in such a county at age 14. Controlling for other factors, American Indian males who currently reside in a county with a reservation are between 11 and 14 percentage points less likely to be employed than those who resided elsewhere. . . . We also present results suggesting that the effect of having resided in a county with a reservation at age 14 reduces employment rates of Indian adults by 5–10 percentage points.²⁶

Residing near a reservation or having done so in the past did not reduce the likelihood that non-Indian men would be employed. In fact, non-Indian men who lived near reservations were slightly more likely to be employed than were non-Indian men who lived elsewhere.²⁷

Similarly, two studies of Aboriginal peoples in Canada found that both Aboriginal heritage and living on a reserve were negatively correlated with earnings. George and Kuhn found that a large wage gap between off-reserve Aboriginal individuals and whites persisted even after controlling for important observable factors such as education.²⁸ Interestingly, “George and Kuhn also find evidence that higher levels of education did not improve the wage earnings of full-time employees living on reservations.”²⁹ A study by Kuhn and Sweetman analogized Aboriginals to immigrants “in order to study the role of assimilation into mainstream culture.” Their research yielded interesting results:

Kuhn and Sweetman generate three key findings with their cross-section data. These findings provide compelling support for the assimilation hypothesis when evaluated in unison. First, the employment rates and wages of multiple-origin Aboriginals [individuals of more than one ethnicity] living off reserves and not in territories are higher than those of single-origin Aboriginals living in comparable areas. Especially for males, these gaps are large and persist after controlling for geographical location, age, and education and training. Second, employment rates and wages for single-origin Aboriginals on reserves are significantly lower than those of single-origin Aboriginals living off reserves and these gaps are also robust to all controls. Third, non-Aboriginal males in the remote northern territories are paid wage premiums that far exceed those earned by male Aboriginals living in the territories such that the wage differential between Aboriginals and non-Aboriginals is highest in the remote North-west. Considered together, these results imply the cultural autonomy maintained by some indigenous people helps to explain why this ethnic group as a whole fails to perform better economically.³⁰

b. Education Disparities Are Not Due to Lack of Funding

²⁶ Robert J. Gitter and Patricia B. Reagan, *Reservation Wages: An Analysis of the Effects of Reservations on the Employment of American Indian Men*, 92 AM. ECON. REV. 1160, 1167–68 (2002), <https://go.owu.edu/~rjgitter/Reservation%20Wages.pdf>.

²⁷ *Id.* at 1162.

²⁸ Anderson and Parker, *American Indian economies*, at 117.

²⁹ *Id.* at 117–18.

³⁰ *Id.* at 117–18.

Report Finding III.D states that the Bureau of Indian Education is underfunded. Finding VIII discusses the poor educational performance of Native American students. It is interesting, given our recent report on school funding, that the Findings do not provide a per-pupil breakdown of expenditures. I am happy to provide this information.

Look at Appendix E of the report, which tabulates education spending. In 2018, the BIE spent \$885,461,000 on tribal education, and \$132,353,000 on education construction.³¹ That is more than *one billion dollars* spent on education for children on reservations in *one year*. The Department of Education spent an additional \$163,818,000 in 2018 on “Indian Student Education,” which includes “Grants to local educational agencies,” “Special programs for Indian children,” and “National activities.”³² In short, in one year the federal government alone spent almost \$1.2 billion on educating Native American children.

You can only get a sense of the scale of the funding if you examine the number of students in BIE schools. The BIE “serves” approximately 48,800 students and has approximately 4,500 employees.³³ If we look at the amount of money spent by BIE, not counting any money spent by the Department of Education on BIE schools in 2018, we see that the government spent \$1.01 billion on BIE schools in 2018.³⁴ This means that the government spent almost \$21,000 per BIE student in 2018 (not counting Department of Education funds) in contrast to the average of \$11,066 (which includes federal, state, and local funding) spent on an average American student who does not attend a BIE school.³⁵

BIE schools likely cost somewhat more to operate because many reservations are isolated, which may require spending more on infrastructure and staff than a suburban school district would. But when the government is annually spending \$10,000 more per pupil than is spent on non-BIE pupils, it is highly unlikely lack of money is the reason Native American student performance is lackluster.

BIE does not even competently perform basic administrative duties. Earlier this year, the Inspector General for the Department of the Interior issued a report determining that BIE has not been completing required background checks on “employees, contractors, and volunteers who have regular contact with children at Indian education facilities.”³⁶ “In response to an inquiry of this review, in March 2017, the Security Office made a data call outside of its information system and found that nearly 20 percent of contractors and volunteers (77 of 415) had no background check

³¹ Report Appendix E: Funding for Native American Education.

³² *Id.*

³³ “Work at the New Bureau of Indian Education: Inspire the Next Generation,” Bureau of Indian Education, <https://bie.edu/Jobs/index.htm>.

³⁴ “Indian Education, Fiscal Year 2019 Budget Request,” Dep’t of Education, at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

³⁵ *Public Education Funding In An Era of Increasing Concentration of Poverty and Resegregation*, U.S. Commission on Civil Rights, 2018, at 6, <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>.

³⁶ “The Bureau of Indian Education Is Not Ensuring That Background Checks At Indian Education Facilities Are Complete,” Office of the Inspector General, Dep’t of the Interior, February 2018, https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_BIEBackgroundChecks_Public.pdf.

on file.”³⁷ Many tribally-controlled schools also had not completed required background checks, and this was a recurring problem for a number of schools.³⁸

Despite this funding disparity, the NAEP scores of Native American students are lower than those of non-Native American students.³⁹ The Department of Education gives grants to schools to try to improve the educational outcomes of American Indian and Alaska Native students. Most of the awards go to local education agencies that have significant numbers of AI/AN students, rather than tribes or BIE schools.⁴⁰ As the report notes, AI/AN students who are in local schools perform better than students who are in BIE schools.⁴¹ So the educational outcomes from LEA grants are likely to be on the high end of Native American student achievement. Even so, the grants seem to barely move the needle. In this 2019 budget justification, the Department of Education reported the following outcomes⁴²:

Measure: The percentage of American Indian and Alaska Native students in grade 4 who score at or above the basic level in reading on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	54%	49%	67%
2013	56	51	68
2015	58	52	69
2017	60		
2019	62		

Measure: The percentage of American Indian and Alaska Native students in grade 8 who score at or above the basic level in reading on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	65%	65%	76%
2013	67	62	78
2015	69	63	76
2017	71		
2019	73		

³⁷ *Id.* at 11.

³⁸ *Id.* at 8–9.

³⁹ GAO, *Indian Affairs: Better Management and Accountability Needed*, *supra* note 592, at 6–7.f

⁴⁰ “Indian Education: Fiscal Year 2019 Budget Request,” Dep’t of Ed., at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

⁴¹ Report at Figure 3.1.

⁴² All data taken from “Indian Education: Fiscal Year 2019 Budget Request,” Dep’t of Ed., at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

Measure: The percentage of American Indian and Alaska Native students in grade 4 who score at or above the basic level in math on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	74%	68%	82%
2013	76	68	83
2015	78	69	82
2017	80		
2019	82		

Measure: The percentage of American Indian and Alaska Native students in grade 8 who score at or above the basic level in math on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	59%	55%	73%
2013	61	59	74
2015	63	57	71
2017	65		
2019	67		

As evidenced by the scores above, American students generally are not performing well, but the scores of Native American students are significantly lower in every category and in every year. The grant program appears to have almost no effect, as scores remain essentially flat. 2017 NAEP scores are now available (they were not available when ED submitted its budget request) and the mathematics scores of AI/AN students in fourth and eighth grade are unchanged from 2015.⁴³ The average score for fourth-graders in 2015 was 227, and it remains 227 in 2017. The average score for eighth-graders in 2015 was 267 and remains 267 in 2017. Reading scores for fourth-graders were essentially unchanged, dropping 3 points from 205 to 202⁴⁴, and reading scores for eighth-graders were also essentially unchanged, ticking up a point from 252 to 253.⁴⁵ Unless there is a dramatic improvement in the 2019 NAEP scores of AI/AN students, the LEA grant program will have to be pronounced a failure.

The report parrots the talking points of advocacy groups such as the National Indian Education Association and the National Congress of American Indians (NCAI) in regard to tribal education

⁴³ “National Student Group Scores and Score Gaps,” NAEP Mathematics Report Card, Grade 4, https://www.nationsreportcard.gov/math_2017/#nation/gaps?grade=4; “National Student Group Scores and Score Gaps,” NAEP Mathematics Report Card, Grade 8, https://www.nationsreportcard.gov/math_2017/#nation/gaps?grade=8.

⁴⁴ “National Student Group Scores and Score Gaps,” NAEP Reading Report Card, Grade 4, https://www.nationsreportcard.gov/reading_2017/#nation/gaps?grade=4

⁴⁵ “National Student Group Scores and Score Gaps,” NAEP Reading Report Card, Grade 8, https://www.nationsreportcard.gov/reading_2017/#nation/gaps?grade=8

departments (TED).⁴⁶ Tribal education departments may be a worthwhile initiative, but some of the supposed benefits, such as “Movement to incorporate Native American language and culture into schools and curricula” seem questionable at best. Finding VII.H. states in part, “ESSA also provides funding for Native American English Language Learner (ELL) programs, but researchers have found these programs are ineffectively structured to accommodate the needs of some Native students who do not speak Native languages but learned English from family members who were ELLs.” If there are enough Native American students to justify having ELL programs specifically for them, and if there are significant numbers of students who struggle with English because they learned English from relatives who were ELLs, the last thing the government should be encouraging is additional incorporation of native languages at school. Students need to be fluent in standard American English if they are to have any hope of being able to pursue higher education or a career. Speaking Navajo or Mohawk has intrinsic value, but it does not prepare someone to succeed off the reservation, or even in positions that require interaction with people who are not members of the same tribe. A lack of fluency in English isolates individuals on the reservation and makes them more dependent upon tribal leaders.

⁴⁶ Report at n. 608–614.

IV. Criminal Justice⁴⁷

Crime in Indian country is a serious problem. It is worth noting, however, that the report only includes statements from tribal officials about crimes committed by non-Indians that harm Indians. Maybe everything is as one-sided as Barry Thompson and Harold Frazier say.⁴⁸ But it is possible that non-Indians who live in border communities have complaints of their own.⁴⁹ It is also very likely that relations between Indians, tribal governments, non-Indians, and state governments vary widely from place to place.⁵⁰

⁴⁷ Report at n. 76.

⁴⁸ Report at n. 144–47.

⁴⁹ See Paul Hammel, *Dry for a year, Whiteclay has cleaned up. But some alcohol problems have moved elsewhere*, OMAHA WORLD-HERALD, May 1, 2018, https://www.omaha.com/news/nebraska/dry-for-a-year-whiteclay-has-cleaned-up-but-some/article_ccf057c7-d9f1-5661-aaad-23b8ccd15b74.html.

Monday marks the one-year anniversary of the closing of the four beer-only liquor stores in Whiteclay. The one or two dozen street people who used to openly drink, urinate, and pass out along the road are gone, and traffic from the Pine Ridge Indian Reservation, just across the border in South Dakota, has been reduced from a stream to a trickle.

See also Michelle McManimon, *Alcohol drives Flagstaff's high Native American arrest rate, but recovery possible*, ARIZONA DAILY SUN, November 13, 2016, https://azdailysun.com/news/local/crime-and-courts/alcohol-drives-flagstaff-s-high-native-american-arrest-rate-but/article_65b08bcf-d0ad-5050-894d-1599518bc345.html.

Flagstaff Police Chief Kevin Treadway attributes the high arrest rate to what he calls the city's "vulnerable population," which essentially means chronic street alcoholics.

"The serial inebriate and homeless issue is not unique to Flagstaff but it's common in many border towns and that population here is over-represented by the Native American race," Treadway said. "It's uncomfortable for me to say that. . . ."

Navajo Nation Human Rights Commission Policy Analyst Rodney L. Tahe said other border towns report a similar trend in part because rural reservation residents tend to gather in the nearby cities to shop, work, and access services. . . .

FPD and the Navajo Nation Human Rights Commission have each received a small number of formal complaints alleging racial profiling or bias by FPD against Native Americans and neither agency has found them to be substantiated. . . .

Between 2011 and 2015, FPD officers gave 15 percent of the department's traffic citations to Native Americans and 79 percent to Caucasians. In contrast, Native American suspects accounted for half the shoplifting arrests, almost half the public consumption and disorderly conduct arrests, and more than half of the assault and aggravated assault arrests. In most cases, Treadway said, the police are responding to calls for help.

"We do not get to choose the race of the people we come into contact with," he said.

See also Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, THE ATLANTIC, July 19, 2017 ("Some of the suspects in last year's killings [on the Pine Ridge Reservation] had evaded outstanding county or city warrants by staying on Pine Ridge."), <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/>.

⁵⁰ McManimon, *supra* note 49.

"I tell everyone that, for me, Flagstaff (Police Department) is the bar that everyone needs to meet because of the amount of effort they have put into all the programs they have done," said [Navajo Nation Human Rights Commission Policy Analyst Rodney L. Tahe], who praised FPD's cultural

The report notes that Public Law 280 transferred criminal jurisdiction from some crimes to states from the federal government.⁵¹ According to the report, “this transfer of criminal jurisdiction over Indian Country from the federal government to various state governments occurred without the consent of tribal governments and national Indian organizations”.⁵² Despite the report’s disapproval, the transfer of jurisdiction and resulting stability in the legal system may have actually benefited the tribes. Terry Anderson and Dominic Parker write:

[Public Law 280] was passed by Congress in 1953 and implemented during the 1950s and 1960s, requiring some tribes to turn judicial jurisdiction over to the states in which they reside. This Act left approximately one-third of the 81 largest Indian reservations in the United States under the judicial jurisdiction of state courts, which the other tribes retained their judicial sovereignty. Anderson and Parker argue that P.L. 280 created a natural experiment to examine the effect of a stable contracting environment because it was not imposed on those reservations best suited for future growth but rather for their ‘lawlessness,’ to use the description of the U.S. Congress. Using data for 1969 to 1999, they find that per capita income for American Indians on reservations subjected to state jurisdiction grew about 30 percent more than on reservations not subjected to such jurisdiction. This finding is robust to controls for resource endowments, geographical isolation, education levels, acculturation, land tenure, and economic conditions in surrounding regions. More generally, their finding is consistent with the hypothesis advanced in the development literature that stable contracting over time and space is a necessary condition for economic growth[.]⁵³

Everyone agrees that jurisdictional confusion in Indian country is one reason it is difficult to enforce the law in those areas.⁵⁴ Some commentators argue that tribes should therefore be given greater jurisdiction and enforcement authority over individuals on tribal land, both tribal members and non-members.⁵⁵ For reasons discussed below, this is constitutionally suspect.

The report notes that some tribes would like the power to try non-Indians for offenses committed on tribal land.⁵⁶ There are several reasons I do not support such a change. First, the United States and the states are the ultimate sovereigns. Everyone within the borders of the United States is subject to the laws of the nation and of the states. Tribes are different. For one thing, membership

awareness training, Citizen Liaison Committee and transparency in producing records so the commission can investigate complaints.

⁵¹ Report at n.151–152.

⁵² Report at n. 154.

⁵³ Anderson and Parker, *American Indian economies*, at 123.

⁵⁴ Report at n. 157–161.

⁵⁵ Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. IND. L. REV. 253 (2017), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1077&context=ailr>

⁵⁶ Report at n. 142.

in a tribe is by definition a matter of descent.⁵⁷ A person who is not descended from a tribe cannot become a member of that tribe. In short, non-Indian individuals can find themselves being tried by an entirely different political and judicial system to which they do not and cannot belong, whereas Indians are citizens of both the tribe and the United States. Even if tribes attempt to include non-Indians on tribal court juries, the problem remains that non-Indians cannot vote for laws or representatives.

Conclusion

Congress has long been concerned about the welfare of Native Americans, particularly those on reservations. Unfortunately, over the past several decades, Congress has tended to pursue policies that, at best, enhance the power of tribes at the expense of individual Indians.

The Commission majority is convinced that the most important thing Congress can do for Native Americans is to give the tribes more money. This has been tried for decades with little success. The best thing Congress can do for Indians and non-Indians is to reform the laws to treat Indians the same as non-Indians—no better and no worse.

⁵⁷ “Genealogy,” Division of Tribal Government Services, Dep’t of the Interior, <https://www.bia.gov/bia/ois/tgs/genealogy>.

Once you’ve determined what tribe you are claiming heritage from contact the tribe, using the Tribal Leaders Director to locate a phone number and address, to ascertain if you are eligible for enrollment in the tribe. Each tribe establishes their own requirements for enrollment in the tribe. The Bureau of Indian Affairs will issue a Certificate [D]egree of Indian Blood (CDIB) that shows your blood quantum and tribal affiliation.