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## Assessing Political Economy in Native American Nations

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# Assessing Political Economy in Native American Nations

## **Cover Page Footnote**

W. Gregory Guedel, Ph.D. is an attorney with the law firm of Hobbs Straus Dean & Walker LLP, and his legal practice focuses on strengthening economic development, governmental institutions, and community resources within Native American nations. Dr. Guedel is a member of the American Bar Association Committee on Native American Concerns and served as Chair for nine years, and is the author of the book *Strategies and Methods for Tribal Economic Development: Building Sustainable Prosperity in Native American Communities*.

ASSESSING POLITICAL ECONOMY IN NATIVE AMERICAN  
NATIONS

*W. Gregory Guedel, Ph.D., JD*

CONTENTS

I. INTRODUCTION .....4

II. CRITIQUE OF AGGREGATE ECONOMIC INDICATORS TO EVALUATE  
NATIVE AMERICAN SOCIO-ECONOMIC DEVELOPMENT .....6

*A. Development Disparities between Native American Nations* ....6

*B. The Evolution of Native American Development Theory* .....8

*C. Emerging Conceptions of Tribal Sovereignty* .....11

        1. Reclaiming the Mantle–Vine Deloria, Jr. ....13

        2. Rejecting the Premise–Taiaiake Alfred .....15

        3. Seeking a “Third Space”–Kevin Bruyneel .....17

        4. Synthesizing Sovereignty Conceptions–Process and  
            Innovation .....19

*D. From Sovereignty to Governance: Formal and Informal  
        Institutions*.....21

        1. Informal Institutions: Cooperation and Competition .....25

        2. Institutional Dynamics in Native American Nations .....26

III. AN ALTERNATIVE METHODOLOGY: QUALITATIVELY ASSESSING  
THE RELATIVE STATE OF A TRIBE’S FORMAL INSTITUTIONAL  
DEVELOPMENT AND INFORMAL INSTITUTIONAL DYNAMICS .....29

*A. Assessing Political Economies: Institutions and Tribal  
        Economic Development* .....30

        1. Defining “Economic Development” in the Tribal  
            Context .....30

        2. A New Analytical Approach–Institutional Relativity  
            within Native American Nations .....33

        3. Structural Conditions for Native American Political  
            Economy .....37

        4. Case Study Sample Selection: Coast Salish Nations .....39

*B. Applying the Political Economy Assessment to Coast Salish  
        Nations* .....41

        1. Comparative Historical Context of Socio-Political  
            Institutions .....43

*a. Jamestown S’Klallam Socio-Political History* .....43

*b. Snoqualmie Socio-Political History* .....47

2. Comparative Assessment of Contemporary Political Economies.....	52
a. <i>Jamestown S’Klallam Tribe: Advanced Formal Institutional Development &amp; Cooperative Informal Institutions</i> .....	53
b. <i>Snoqualmie Tribe: Advanced Formal Institutional Development &amp; Competitive Informal Institutions</i>	56
3. Case Study Outcomes and Assessments .....	60
a. <i>From Assessment to Progress: Pathways for Strengthening Tribal Institutions and Citizen Cooperation</i> .....	63
IV. CONCLUSION .....	69
APPENDICES.....	71
A. <i>Sovereignty, Development and Human Security—a Colloquium on United States and Native American Relations</i> .....	71
B. <i>Program Schedule</i> .....	73
C. <i>Development Strategies for Tribal Nations Vincent G. Logan (Osage), United States Special Trustee for American Indians</i> .....	78
1. Historical Context for Tribal Development .....	78
2. Institutional Development.....	79
3. Access to Capital and Credit.....	79
4. Professional Training .....	80
5. Capital Investment .....	80
6. Small Business Development .....	81
D. <i>Self-Determination and National Identity—Jamestown S’Klallam Tribal Chairman W. Ron Allen</i> .....	82
1. Sovereign Philosophy and Collective Support .....	83
2. Citizenship Policies.....	83
3. Preparation for Advancement .....	84
4. Per Capita Revenue Sharing .....	84
5. Next-Generation Leadership.....	85
E. <i>Strengthening Tribal Governance and Institutions—Quinault Indian Nation President Fawn R. Sharp</i> .....	87
1. Institutional Philosophy .....	88
2. Addressing Citizen Concerns.....	88
3. Departmental Accountability .....	89
4. Governmental Administration .....	89

*F. Sovereignty and Justice–Tribal Law and Court Systems*  
*Professor and Squaxin Island Tribal member Ron Whitener*  
.....91

1. Personal Legal Security .....91

2. Mitigating Recidivism .....92

3. Domestic Violence Protection .....93

4. Family Law and Child Protection .....94

5. Protecting Vulnerable Adults.....95

6. Economic Legal Security .....95

7. Business Codes .....96

8. Zoning and Land Use.....96

9. Protection of Wealth .....97

*G. Sovereignty and Strategic Economic Development–Glen*  
*Gobin: Tulalip Tribal Vice Chairman, Quil Ceda Village,*  
*and Lisa M. Koop (Moravian of the Thames Band, Delaware*  
*Nation), Tulalip Tribe Office of Reservation Attorney .....98*

# ASSESSING POLITICAL ECONOMY IN NATIVE AMERICAN NATIONS

*W. Gregory Guedel, Ph.D., JD\**

## I. INTRODUCTION

The need for broad-based advancement in the development of tribal political economies is evident from aggregate statistics regarding the quality of life for Native Americans. Compared to the United States population as a whole, Native Americans lag behind the average for basic economic well-being. For example, the median household income of Native Americans in 2012 was \$35,310; the United States national average was \$51,371.<sup>1</sup> Nearly one-third of Native Americans live in poverty, the highest rate for any racial group in the United States, and nearly double the national average.<sup>2</sup> The percentage of Native Americans living in overcrowded housing, defined as more than one occupant per room in the household, has been twice as high as the United States average since 1990. For some tribes, such as the Navajo Nation, the percentage is chronically 10 times as high.<sup>3</sup> The percentage of Native American households without a complete kitchen and/or plumbing is many times higher than the national average; for some tribes the percentage is 20 times higher.<sup>4</sup> The significant and chronic disparity in economic advancement between the Native American population and the United States average is illustrated by the following graph of unemployment rates, reflecting the progression prior to, during, and after the recent “Great Recession.”

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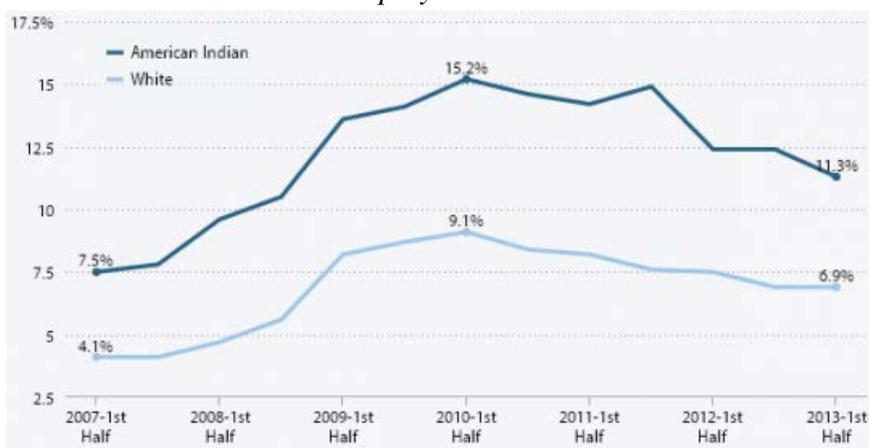
<sup>1</sup> US Census Release CB13-29, Feb. 2013.

<sup>2</sup> Suzanne Macartney, et al., *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011*; UNITED STATES CENSUS BUREAU, REP. ACSBR, 11-17, (2013), <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

<sup>3</sup> RANDALL K.Q. AKEE & JONATHAN B. TAYLOR, THE TAYLOR POLICY GROUP, INC., *SOCIAL AND ECONOMIC CHANGE ON AMERICAN INDIAN RESERVATIONS: A DATABOOK OF THE US CENSUSES AND THE AMERICAN COMMUNITY SURVEY 1990-2010*, 51 (2014).

<sup>4</sup> *Id.* at 53-54.

### United States National Unemployment Rate



**Note:** "American Indian" refers to individuals identifying as American Indian or Alaska Native alone or in combination with another racial category.

**Source:** EPI analysis of basic monthly Current Population Survey micro data.<sup>5</sup>

While the need to address the aggregate lag in tribal development indicators is clear, seeking solutions mandates an understanding of the individualized circumstances of Native American nations. Although the collective national statistics indicate substantial socio-economic development challenges among the 566 federally recognized tribes, these empirical indicators do not manifest uniformly within all Native American nations. To help identify pathways for progress, this paper first describes a theory of development disparities between Native American nations in terms of contemporary economic indicators. Next, the paper offers an alternative methodological approach for evaluating Native American socio-economic development, which utilizes a qualitative assessment of the relative state of a tribe's formal institutional development and informal institutional dynamics. The paper then applies this methodology to a case study. Finally, the paper suggests guidelines for tribes to use in order to maximize the methodology and achieve a close, cooperative relationship between formal and informal tribal institutions.

<sup>5</sup> Algernon Austin, *Issue Brief #372: High Unemployment Means Native Americans are Still Waiting for Economic Recovery*, ECON. POL'Y INST. 2 (2013).

## II. CRITIQUE OF AGGREGATE ECONOMIC INDICATORS TO EVALUATE NATIVE AMERICAN SOCIO-ECONOMIC DEVELOPMENT

While the collective national statistics indicate a substantial socio-economic development gap between Americans and Native Americans generally, these indicators fail to explain uniform trends within individual Native American nations. To understand the prescriptive deficiency of the purely economic framework for analyzing development within Native American nations, it is important to evaluate the development disparities between individual tribes, to examine the evolution of Native American development theory, to explore various conceptions of sovereignty among tribal thought leaders, and to show how these conceptions of sovereignty lead to a conception of development theory that weighs the relative development of tribal formal institutions and cooperation with informal tribal institutions. By examining tribal development in this context, tribal leaders and lawmakers can understand the deficiencies of relying on traditional economic indicators to assess tribal development.

### *A. Development Disparities between Native American Nations*

While certain tribes experience rates of poverty and unemployment several times higher than the average in the United States, other tribes have substantially reduced or eliminated these conditions. Even among tribes located in the same region and participating in similar primary economic activities, the socio-economic development outcomes they experience can vary tremendously. A prime example is found among the tribes located in the coastal region of the Pacific Northwest. A recent study examined the amount of revenue certain tribes earned from casino gaming as compared to their poverty rates for the period of 2000 to 2010.<sup>6</sup>

During that period, the tribes in the study earned \$19 billion in revenue from their gaming operations during 2000-10. From an

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<sup>6</sup> Guedel, W. Gregory. *Sovereignty, Economic Development, and Human Security in Native American Nations*, 3 AM. INDIAN L. J. 17 (2014).

economic perspective, the infusion of new capital provided by tribal gaming would be expected to produce broad-based poverty reduction, with corresponding reductions in the individual and collective poverty percentages for tribes.<sup>7</sup> Collectively, however, the results of the study demonstrated the opposite:

- In 2000, the median poverty rate for the study tribes was 25%, which is slightly below the 25.7% rate for all tribes in the United States. Ten years and \$19 billion later, the median poverty rate for the study tribes had increased to 29% - four percentage points higher than the beginning of the decade, placing the study tribes two percentage points higher than the 2010 United States national average for all tribes of 27%.
- The combined total population of the study tribes increased by 5,848 people during the decade. The combined total population below the poverty level during the period increased by 3,700, nearly two-thirds of the total population increase.
- Poverty outcomes varied widely among the study tribes, with some experiencing a 50% or greater reduction and others experiencing a 100% or greater increase. Certain tribes with very similar population size, geography, and economic resources experienced starkly different poverty outcomes over the decade; one tribe in the study reduced its poverty rate from 31.4% to 12.4% during this period, while another saw poverty increase from 33.7% to 53.8%.
- The standard deviation and standard error of tribal poverty rates from the mean increased by 32%, indicating that the differences in poverty outcomes between the study tribes grew notably during the period; for example, the performance gap between the successful and struggling tribes became significantly greater.

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<sup>7</sup> Dean Karlan & Jonathan Morduch, *Access to Finance*, in 5 HANDBOOK OF DEV. ECON. 1 (Dani Rodrik & Mark Rosenzweig eds., 2009).

- There was an inverse correlation between per capita payments and poverty reduction. Per capita tribes significantly less likely to have achieved poverty reduction during this period than tribes that did not issue per capita payments to members.

When examining such disparities in development performance between similarly-situated tribes, a fundamental question arises: Why are some Native American nations developing more successfully than others? Aggregate statistics are clearly insufficient at answering this question. As such, it is important to understand how Native American development theory evolved.

*B. The Evolution of Native American Development Theory.*

The development paradigm for Native American nations is inextricably linked to and impacted by the hegemonic power of the United States government; over the past 250 years the conception of national development for Native American tribes can be viewed as having come full-circle. The British colonial government recognized and engaged with tribes as nations, a practice initially continued by the subsequent United States government.<sup>8</sup> The character and status of tribes as nations was implicitly recognized by the United States in federal laws, such as the Commerce Clause, and explicitly recognized through the practice of establishing formal

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<sup>8</sup> VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS*, 5 (1999) (“Since the English had been substantially dependent upon the Indians, particularly the Iroquois Confederacy, in defeating the French, they wisely recognized the national status of the major Indian tribes of the interior...”). *Cf.*, *A Proclamation*, 25 J. OF THE CONTINENTAL CONG. 602 (1783) (explaining that the federal United States government has the sole power to regulate trade with Indian tribes); Indian Nonintercourse Acts, (codified in Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138; Act of Mar. 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, Pub. L. No. 4-30, § 12, 1 Stat. 469, 472; Act of Mar. 3, 1799, Pub. L. No. 5-46, § 12, 1 Stat. 743, 746; Act of Mar. 30, 1802, Pub. L. No. 7-13, § 12, 2 Stat. 139, 143; & Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006), granting Congress and the federal government the sole authority to deal with Indian tribes).

relations with tribes through treaties, a form of agreement reserved for dealings with the governments of other nations.<sup>9</sup> This early conception embodied a vision of peaceful coexistence, wherein Native American nations would be free to pursue self-determined development pathways for their political economies.<sup>10</sup>

The inexorable westward expansion of American settlements through the nineteenth century altered the relationship between the United States and tribes. By the time the United States had imposed its legal jurisdiction out to the Pacific coast territories, the nominal concept of coexistence had been replaced by a new *realpolitik*, wherein Native American nations were geographically and politically subsumed within United States governance. What followed was an exceptionally brutal United States policy of “termination” toward Native American nations, with their sovereignty and nationhood being rejected entirely. Through the General Allotment Act, American policy created, in the words of President Theodore Roosevelt, “a mighty pulverizing engine to break up the tribal mass.”<sup>11</sup> Moreover, federally-funded education institutions and boarding schools pursued a culturally genocidal philosophy toward Native American youth, which embraced the motto “all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”<sup>12</sup>

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<sup>9</sup> The Commerce Clause gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” UNITED STATES CONST. art. I, § 8, cl. 3.

<sup>10</sup> *The reply of the President of the United States to the Speech of the Cornplanter, Half-Town, and Great-Tree, Chiefs and Councillors of the Seneca Nation of Indians* (1790), in 1 AMERICAN ST. PAPERS, INDIAN AFFAIRS, 142-143 (1832). (“...[t]he general Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding. Here, then, is the security for the remainder of your lands.”) <https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&Page=142>.

<sup>11</sup> Theodore Roosevelt, President of the United States of America, First Ann. Message to Congress (Dec. 3, 1901) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=29542> (last visited Jan. 23, 2017)).

<sup>12</sup> Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in OFFICIAL REPORT OF THE NINETEENTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTION (1892), 46-59, reprinted in AMERICANIZING THE AMERICAN

Under the comprehensive socio-political assault of what was rapidly becoming the most powerful nation in the world, the imperative dynamic for Native American tribes shifted from organic self-directed development to sheer survival. The forcible taking of their land base, the uncompensated appropriation of their natural resources, and the resulting curtailment of their traditional economic activities made the advancement of a tribal political economy virtually impossible, and indigenous nations within the United States worked desperately to maintain even a basic sense of unity for over a century.<sup>13</sup>

By the 1970s, a paradigm shift began in United States' policy that brought the conception of tribes as nations back to the fore. President Nixon heralded the new approach by stating, “[i]n my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency.”<sup>14</sup> This re-acknowledgement of tribal sovereignty culminated in the passage of the Indian Self-Determination and Education Assistance Act of 1975, which recognized that “prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities” and sought to provide tribes “the full opportunity to develop leadership skills crucial to the realization of self-government...responsive to the true needs of Indian communities.”<sup>15</sup> In 2003, the United States Commission on Civil Rights concluded that “[s]elf-determination ultimately requires that Indian nations govern their own resources. To the extent possible,

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INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN 1880-1900, 260-61 (Francis Paul Prucha ed., 1973).

<sup>13</sup> See CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

<sup>14</sup> President Richard Nixon, Special Message to the Congress on Indian Affairs. (July 8, 1970) (transcript *available at* <http://www.presidency.ucsb.edu/ws/?pid=2573> (last visited Jan. 23, 2017)).

<sup>15</sup> Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450, Pub. L. No. 93-638, §2(A)(1), 88 Stat. 2203 (1975) (current version at 25 U.S.C. §5301(a)(1) (2015)).

programs for Native Americans should be managed and controlled by Native Americans.”<sup>16</sup>

Recent advocacy has also advanced the indigenous sovereignty agenda in international dialogue. The 2008 United Nations (UN) Declaration on the Rights of Indigenous Peoples posits “that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”<sup>17</sup> Although initially resistant, the United States became a signatory to the Declaration in 2012 and thereby officially endorsed its tenets. This philosophy has been further strengthened in recent years by the Obama administration’s annual Tribal Nations Conference, which emphasizes the government-to-government relationship between the United States and Native American nations.<sup>18</sup>

### *C. Emerging Conceptions of Tribal Sovereignty*

While the return of United States policy to recognition of tribal sovereignty restores the opportunity for self-directed development among Native American nations, centuries of externally-imposed stagnation raise the question of how tribes should conceive and pursue sovereignty in furtherance of their economic and community development goals. One particular challenge within this endeavor is addressing the amorphous nature of the term “sovereignty” itself. As University of Colorado Law Professor and former Native American Rights Fund attorney Charles Wilkinson has noted, “sovereignty carries with it an aura that transcends technical

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<sup>16</sup> U.S. Commission on Civil Rights July 2003 Report: “A Quiet Crisis – Federal Funding and Unmet Needs in Indian Country,” <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

<sup>17</sup> UNITED NATIONS, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2 (2008), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>18</sup> Press Release, Office of the Press Sec’y, Fact Sheet: The 7th Annual White House Tribal Nations Conference (Nov. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/05/fact-sheet-7th-annual-white-house-tribal-nations-conference>.

considerations of political science and law. Designation as a sovereign . . . implies a kind of dignity and respectability beyond its literal meaning.”<sup>19</sup> In pursuit of some foundational characteristics of sovereignty, University of Minnesota Professor and Lumbee scholar, David E. Wilkins, identifies some practical powers of a tribal sovereign:

. . . the power to adopt its own form of government; to define the conditions of citizenship/membership in the nation; to regulate the domestic relations of the nations’ citizens/members; to prescribe rules of inheritance with respect to all personal property and all interest in real property; to levy dues, fees, or taxes upon citizen/members and noncitizens/nonmembers; to remove or to exclude nonmembers of the tribe; to administer justice; and to prescribe the duties and regulate the conduct of federal employees.<sup>20</sup>

Yet beyond the practical activities of governance, sovereignty is also imbued with significant cultural connotations. Government and culture are not separate ideas; each is manifested in and reflective of the other.<sup>21</sup> In the context of Native American nations, Wilkinson posits that “[s]overeigns – and perhaps only sovereigns – can perpetuate the unique communal cultures of land-based aboriginal people.”<sup>22</sup> Similarly, Wilkins has stated that tribal sovereignty “can be said to consist more of continued cultural integrity than of

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<sup>19</sup> CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 55 (1987).

<sup>20</sup> DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE UNITED STATES SUPREME COURT: THE MASKING OF JUSTICE* 20 (1997).

<sup>21</sup> See Amanda J. Cobb, *Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations*, 46 AM. STUD. 115-132 (Fall 2005/Spring 2006).

<sup>22</sup> WILKINSON, *supra* note 14, at 239.

political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty.”<sup>23</sup>

With both practical governance and cultural imperatives at stake, what then is the “proper” conception of sovereignty for Native American nations – or does such a conception even exist? Emerging from the political disembodiment of the termination era, indigenous scholars and thought leaders have advocated for a wide array of approaches in pursuit of a new vision of Native American sovereignty. The theories of Vine Deloria, Jr., Taiaiake Alfred, and Kevin Bruyneel highlight the range of varying (and sometimes competing) philosophies of sovereignty in contemporary tribal communities.

### 1. Reclaiming the Mantle – Vine Deloria, Jr.

Vine Deloria, Jr. is credited with having popularized the term “tribal sovereignty” in his 1969 book *Custer Died for Your Sins*. His work advances a core theoretical basis for the sovereignty of Native American nations: “Tribes are preexisting sovereigns whose existence is not beholden to the (US/state) Constitutions or to the federal or state governments.”<sup>24</sup> In his view, tribal sovereignty should, therefore, be on par with the sovereignty of other internationally recognized nation-states, with the same practical scope of powers and protections for governance. Deloria saw the formal possession and exercise of national sovereignty as essential for tribal communities, arguing that “[i]t is absolutely vital to the continuance of any semblance of society for the recognition of groups as groups to be acknowledged.”<sup>25</sup> Sovereignty was not only crucial for the sake of effective governance within Native American nations, but was also to “assuage the needs of a spiritual tradition

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<sup>23</sup> WILKINS, *supra* note 21, at 20. (quoting Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS 27 (Roxanne Dubbar Ortiz ed., 1979).

<sup>24</sup> VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 26 (1999).

<sup>25</sup> Scott Richard Lyons, *Rhetorical Sovereignty: What do American Indians want from Writing?*, 51 C. COMPOSITION AND COMM. 456 (2000)

that remains very strong within most tribes and that needs to express itself in ways familiar to the people.”<sup>26</sup> Deloria also viewed the assertion of sovereignty by tribal governments as a means of strengthening the local institutions that serve tribal citizens, although he acknowledged this could lead to tribal institutions imitating outside structures and thereby becoming less “distinctively Indian.”<sup>27</sup>

Many indigenous scholars have been inspired by Deloria’s approaches and have theorized sovereignty in terms he established. For example, Osage scholar Robert Warrior has written expansively on Deloria’s conceptualization of sovereignty:

The path of sovereignty, [Deloria] says, is the path to freedom. That freedom, though, is not one that can be immediately defined and lived. Rather, the challenge is to articulate what sort of freedom as it emerges through the experience of the group to exercise the sovereignty which they recognize in themselves . . . Through this process-centered definition of sovereignty, Deloria is able to avoid making a declaration as to what contemporary American Indian communities are or are not. Instead, Deloria recognizes that American Indians have to go through a process of building community and that that process will define the future.<sup>28</sup>

Interestingly, Deloria himself seemed to become increasingly disillusioned with the discussion of tribal sovereignty during the course of his work – perhaps from sensing that more was being discussed than accomplished. In his later writings, he perceived that “the definition of *sovereignty* covers a multitude of sins, having lost its political moorings, and now is adrift on the currents of individual

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<sup>26</sup> VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 14 (1984).

<sup>27</sup> *Id.*

<sup>28</sup> Robert Allen Warrior, *Tribal Secrets: Recovering American Indian Intellectual Traditions*, 91 (Minneapolis: University of Minnesota Press, 1995).

fancy.” In reference to tribal leaders and fellow scholars, he argued that “this generation is doing nothing for the people that come. They keep themselves in a little intellectual ghetto and throw around big words like ‘sovereignty’ and think they are doing something. Not likely.”<sup>29</sup> Ultimately, Deloria’s concepts embody and advocate for a pragmatic approach in the assertion of tribal sovereignty within the hegemonic construct of relations with United States: “In effect the tribes are pressing for complete independence from federal domination while retaining the maximum federal protection of the land base and services. With that goal, tribes shift back and forth to take advantage of every opportunity.”<sup>30</sup>

## 2. Rejecting the Premise—Taiaiake Alfred

In stark contrast to Deloria’s push for tribes to reestablish full political and cultural sovereignty, Mohawk scholar Taiaiake Alfred has declared the sovereignty concept itself to be anathema to the self-actualization of indigenous peoples. Alfred argues that “sovereignty is an exclusionary concept rooted in an adversarial and coercive Western notion of power,” and is therefore counter to the cultural roots of Native American societies.<sup>31</sup> He has asserted that “as long as sovereignty remains the goal of indigenous politics . . . native communities will occupy a dependent and reactionary position relative to the state.”<sup>32</sup> Speaking to tribal conceptions of self-determination, he states that “a paradigm bounded by the vocabulary, logic, and institutions of ‘sovereignty’ will be blind to the reality of a persistent intent to maintain the colonial oppression of indigenous nations.”<sup>33</sup> He, in turn, has advocated for tribal

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<sup>29</sup> Vine Deloria Jr., *No More Free Rides*, in *NATIVE AMERICAN LITERATURE: BOUNDARIES AND SOVEREIGNTIES* 287 (Kathryn Shanley ed. 2001).

<sup>30</sup> VINE DELORIA, JR., *WE TALK, YOU LISTEN; NEW TRIBES, NEW TURF* (New York: Macmillan, 1970).

<sup>31</sup> TAIAlAKE ALFRED, *PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO* 59 (New York: Oxford University Press, 1999).

<sup>32</sup> *Id.*

<sup>33</sup> Taiaiake Alfred, *Sovereignty*, in *A COMPANION TO AM. INDIAN HIST.* 466 (Philip Joseph Deloria & Neal Salisbury eds. 2002).

leaders and scholars to “transcend the mentality that supports the colonization of indigenous nations, beginning with the rejection of the term and notion of indigenous ‘sovereignty.’”<sup>34</sup>

One of Alfred’s fundamental concerns is that “[s]overeignty today . . . is conceived as a wholly political-legal concept,” which does not account for the cultural heritage and priorities of indigenous communities.<sup>35</sup> A core problem is that Western sovereignty embodies a sense of inherent tension and conflict between nations, notably with regard to the demarcation of physical and legal borders, which Alfred views as elements of an exclusively European discourse.<sup>36</sup> He puts forward a distinct world view that highlights the contradiction he perceives between Western conflict-orientation and the original nature of indigenous life: “Before their near destruction by Europeans, many indigenous societies achieved sovereignty-free regimes of conscience and justice that allowed for the harmonious coexistence of humans and nature for hundreds of generations.”<sup>37</sup>

Alfred suggests that for tribes, the “focus is not on opposing external power, but instead on actualizing [their] own power and preserving intellectual independence.”<sup>38</sup> In his view, the conception of sovereignty has limited the ways people are able to think, suggesting always a conceptual and definitional problem centered on the accommodation of indigenous peoples within a “legitimate” framework of governance by the settler state. He sees the inherent conflict in this framework as irreconcilable, and condemns the entire conceptual debate by asserting that “sovereignty can only exist in the fabrication of a truth that excludes the indigenous voice.”<sup>39</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> ALFRED, *Peace, Power, Righteousness: An Indigenous Manifesto*, 67.

<sup>36</sup> Taiaiake Alfred, *Sovereignty*, in *SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION* (Joanne Barker ed., Lincoln: University of Nebraska Press, 2006).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

### 3. Seeking a “Third Space”—Kevin Bruyneel

The fact that Native American nations exist within the territory and legal sovereignty of the United States limits tribal sovereignty. Tribes and their peoples may be seen as living simultaneously in two worlds: the established hegemonic political realm of the United States, and their own socio-political realm as surviving antecedents of the hegemon. Within this construct, scholar Kevin Bruyneel envisions a trans-temporal “third space” of conceptual sovereignty for tribes which “can open up realms of political maneuverability for indigenous people.”<sup>40</sup>

According to University of Oregon Professor Alexander Murphy, by constituting and accepting “sovereignty as a territorial ideal . . . the modern territorial state has co-opted our spatial imaginations.”<sup>41</sup> Bruyneel views this co-optation as a false choice, and advocates for a decolonization of spatial imaginations to reveal forms of political space that cannot simply be mapped onto the boundary lines of the international state system. He writes:

It is in this regard that indigenous politics can inform and be informed by the reconsiderations of sovereignty occurring more generally because they refuse to say simply Yes or No to state sovereignty, but instead imagine a postcolonial supplemental remapping of sovereign relationships that can include but will not be dictated to or contained by state boundaries.<sup>42</sup>

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<sup>40</sup> KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF UNITED STATES-INDIGENOUS RELATIONS* 229 (1997).

<sup>41</sup> Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* 87, 107 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

<sup>42</sup> KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* 222 (1997).

Bruyneel suggests that the third space also provides a conceptualization of anti-statist autonomy that can be an alternative to the diametrically opposed positions that either see state sovereignty as the exclusive source of legitimate political space or seek a political world that has somehow moved beyond state sovereignty altogether.

Bruyneel observes indigenous politics, in its many forms, as refusing to be contained by the limits of the boundaries of the settler-state. He sees these refusals demonstrating that “indigenous political identity, agency, and autonomy reside in postcolonial time and space, always already across the temporal and spatial boundaries marked out by the settler-state and the colonialist political culture.”<sup>43</sup> Through this postcolonial vision, indigenous political actors and institutions can recognize that settler-state boundaries are just one way to map a people’s relationship to time and space in North America, and they can seek out a third space of sovereignty as a politically and discursively locatable alternative.

In addition, Bruyneel’s analysis identifies a “colonial ambivalence” expressed by the United States in its relationship with indigenous people, manifested in a lack of uniform and consistent governmental policies toward tribes. Within this ambivalence and lack of consistency, Bruyneel sees space for political maneuverability for indigenous people to pursue increased self-determination in the hegemonic United States/tribal relationship. This maneuverability is possible because the hegemon’s ambivalence is also directed inward toward itself, manifested in things such as governmental apologies for historical actions and the extension of federal legal protections to tribal trust lands. Tribal leaders can capitalize on this ambivalence by conceiving and advocating for United States policies that will provide increased political autonomy for tribes. “In this regard, one thing that indigenous politics tends to do – possibly more than any other form of political resistance – is challenge American presumptions about the coherence of the collective bonds and sense of temporal and spatial belonging that purport to confer legitimacy

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<sup>43</sup> *Id.* at 221.

on United States colonial rule or sovereignty.”<sup>44</sup> For Bruyneel, tribal sovereignty has less to do with establishing territorial spaces than with establishing spaces of consciousness that allow for the full expression of an indigenous nation’s socio-political philosophies and traditions.

#### 4. Synthesizing Sovereignty Conceptions—Process and Innovation

With hundreds of Native American nations experiencing their own unique historical and structural conditions, it is not surprising to find diverse philosophies on the nature and role of sovereignty across these societies. Rather than attempting to identify a single definition of Native American sovereignty that could attain universal applicability, indigenous scholars are increasingly seeking to describe guiding principles through which individual nations can express their own culturally-appropriate visions. Robert Warrior gives particular attention to sovereignty as an active process of building community, rather than as an end-state in itself. In his view, sovereignty is “a decision we make in our minds, in our hearts, and in our bodies – to be sovereign and to find out what that means in the process.”<sup>45</sup> University of Michigan Professor Scott Lyons further described tribal sovereignty as a process within a particular narrative structure:

Sovereignty is the guiding story in our pursuit of self-determination, the general strategy by which we aim to best recover our losses from the ravages of colonization: our lands, our languages, our cultures, our self-respect. For indigenous people everywhere, sovereignty is an ideal principle, the beacon by which we seek the paths to agency and power and community renewal. Attacks on sovereignty are attacks on what it enables us to pursue; the pursuit of

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<sup>44</sup> *Id.* at 229.

<sup>45</sup> Warrior, *supra* note 29, at 123.

sovereignty is an attempt to revive not our past, but our possibilities.<sup>46</sup>

Even fierce critics of the tribal sovereignty “project” have acknowledged the transformational power of this conceptual reimagining, with Taiaiake Alfred observing that:

[I]n the political sphere, Native societies are abandoning institutions and values which were imposed on them by force or through the insidious operation of assimilation programs . . . [and] Native political thinkers have been as innovative as the most creative artists in re-orienting traditional forms to suit a new political reality.”<sup>47</sup>

Warrior identifies this as part of an extended process of establishing “intellectual sovereignty,” and asserts that “it is now critical for American Indian intellectuals committed to sovereignty to realize that we too must struggle for sovereignty, intellectual sovereignty, and allow the definition and articulation of what that means to emerge as we critically reflect on that struggle.”<sup>48</sup> These definitions and articulations will necessarily vary as they emerge within different nations, which is the natural outcome of each nation’s own pursuit of its right to self-determination.

Native American nations are combining emerging conceptions of tribal sovereignty with new approaches to development. The concepts of sovereignty and development are closely connected and synergistic. In 1990, Stephen Cornell and Joseph Kalt argued that increasing access to development capital for Native communities is most often facilitated by successful political development by tribal governments. In 1998, on a structural level, Diane Duffy and Jerry

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<sup>46</sup> Lyons, *supra* note 26, at 447, 449.

<sup>47</sup> TAIAlAKE ALFRED, *HEEDING THE VOICES OF OUR ANCESTORS: KAHNAWAKE MOHAWK POLITICS AND THE RISE OF NATIVE NATIONALISM* 7 (New York: Oxford University Press, 1995) (*available at* [https://taiaiake.files.wordpress.com/2015/01/heeding\\_the\\_voices-1.pdf](https://taiaiake.files.wordpress.com/2015/01/heeding_the_voices-1.pdf)).

<sup>48</sup> Warrior, *supra* note 29, at 97-98.

Stubben proposed a model that emphasized the self-direction of tribal development projects and elevates “communal or tribal concerns above efficiency, routinization, secularity, and if need be, over profits.” In 2007, Cornell and Miriam Jorgenson emphasized the need for tribal governments to “establish priorities, set goals, and address the economic and cultural needs of their citizens” in their development programs. Operationalizing this potential for tribal nations requires reformulation of the concepts on the tribes’ own terms; identifying pathways to implement them to meet their own community needs; and vigorously asserting their powers to facilitate change consistent with community values – an approach that is adopted in this paper.

*D. From Sovereignty to Governance: Formal and Informal Institutions*

If sovereignty is viewed as an intangible right to govern, institutions are the practical means for actually exercising the right to govern. In the formation of tribal governance systems, it is natural that leaders and policy analysts endeavor to design optimal rules to govern and manage economic resources for the nation by prioritizing top-down direction from formal institutions. Formal institutions, such as constitutions, legal codes, and corresponding departments of delegated authority, are fundamental to providing an efficient structure for economic development, by stating official procedures and requirements for undertaking activities and resolving uncertainties.<sup>49</sup> In the Native American context, formal institutions are crucial for tribal governments to access capital and move forward with imperative development initiatives. For example, the federal Housing and Urban Development (HUD) Title VI Loan Guarantee Program offers millions of dollars of financing support for tribes to develop on-reservation housing for their members, but only to those tribes that have an established a Tribal

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<sup>49</sup> See DARON ACEMOGLU & JAMES ROBINSON, COMMISSION ON GROWTH AND DEV., WORKING PAPER NO. 10: THE ROLE OF INSTITUTIONS IN GROWTH AND DEVELOPMENT 3-4, 28-29 (2008).

Housing Authority and Indian Housing Plan.<sup>50</sup> Formal institutions are crucial both for the governance of tribal activities and resources and for engaging with outside partners to facilitate tribal development programs.

Political theory historically treated formal institutions as determining, ordering, or modifying individual motives, and as acting autonomously in terms of institutional needs. In contrast, contemporary theorists increasingly argue that political activity within a nation is best understood as the aggregate consequences of behavior comprehensible at the individual or group level.<sup>51</sup> Research led by political economist Elinor Ostrom, for example, has highlighted limitations in the reliance upon formal institutions for governance, and has revealed that national governmental agencies are frequently unsuccessful in their efforts to design effective rules to regulate important common-pool resources.<sup>52</sup> Specifically, the effectiveness of formal institutions is undermined when citizens are implicitly told, or otherwise believe, that they will not receive the benefits of adopting a long-term, community oriented view toward economic resources. When resource control policies instituted by national governments are viewed by citizens as less effective and efficient than control by those directly affected, a competitive dynamic arises that can be destabilizing (and in some cases disastrous) for the nation's development potential.<sup>53</sup>

This dynamic reflects the fact that every nation embodies two institutional paradigms: formal and informal. While formal institutions for governing, such as a constitution or court, are readily evident to any observer, there are often many self-organized governance systems people adhere to within a nation that are "invisible" even to their own national officials.<sup>54</sup> These "informal"

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<sup>50</sup> Guedel, *Strategies and Methods for Tribal Economic Development*, *supra* note \*, at 87-88.

<sup>51</sup> See James G. March & Johan P. Olsen, *The New Institutionalism: Organization Factors in Political Life*, 78 *THE AM. POL. SCI. REV.* 734-749 (1984).

<sup>52</sup> Elinor Ostrom, *Coping with Tragedies of the Commons*, 2 *ANN. REV. OF POL. SCI.*, 493-535 (1999).

<sup>53</sup> *Id.* at 501.

<sup>54</sup> *Id.* at 496.

institutions manifest in socially shared rules (usually unwritten) that are created, communicated, and enforced outside of officially sanctioned channels. An exclusive focus on official formal rules is therefore insufficient, as informal institutions ranging from bureaucratic and legislative norms to clientelism and patrimonialism often have a profound and systematic effect on political outcomes.<sup>55</sup> Neglecting to analyze informal institutions within a political economy risks missing many of the prime incentives and constraints that underlie political behavior.<sup>56</sup>

Understanding the nature and roles of informal institutions is crucial to any analysis of a nation's political economy. Informal institutions emerge independently of (and frequently predate) formal institutional structures. Although they generally coexist and interact with formal rules, informal institutions are created in response to incentives that are unrelated to those rules.<sup>57</sup> Many social groups seek to counter perceived threats to their socio-economic resources by developing and maintaining self-governing institutions that operate outside of or as a supplement to the official national government. For example, while a tribal government may create the formal institution of a tribal court to resolve disputes, certain clan or family groups within the tribe may view the court as controlled by or biased toward rival social groups, and they will instead seek dispute resolution through informal means such as mediation by elders.

The development of informal institutions is catalyzed by the practical reality that human beings are adept at devising ways of evading governance rules, and differentials in power within national groups can allow some to ignore the rules of formal institutions or to reshape the rules in their own interest.<sup>58</sup> Informal institutions are often the primary rule makers in nations with weak formal governance and economic institutions. In these instances,

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<sup>55</sup> Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 *PERSP. ON POL.*, 725-740 (2004).

<sup>56</sup> *Id.* at 725.

<sup>57</sup> *Id.*

<sup>58</sup> Thomas Dietz, Elinor Ostrom & Paul C. Stern, *The Struggle to Govern the Commons*, 302 *SCIENCE* 1907-1912 (Dec. 2003).

“traditional” institutions such as customs and kinship-based norms restricted to members of the same ethnicity or religion offer more reliable mechanisms than formal institutions for allocating resources and enforcing agreements.<sup>59</sup> In contrast to the explicit requirements and processes stated by formal institutions, informal institutions often use strategies for achieving compliance that rely on participants’ commitment to unwritten rules and subtle social sanctions.<sup>60</sup>

Ostrom’s work confirms that every form of institutional decision making has limits, and no single formal or informal structure will be capable of addressing every issue and need of the citizenry. This highlights the importance of understanding the “polycentric” governance systems that overlap to regulate conflict resolution, knowledge acquisition, systems monitoring, and the management and allocation of common-pool resources.<sup>61</sup> Polycentric governance systems are not directed by a single center, but are more global in scope and reflect an evolutionary process where people make selections among combinations of institutional attributes, retaining the combinations that are successful in a particular environment.<sup>62</sup> Polycentric governance typically manifests as a complex adaptive system composed of a large number of active elements, whose interactions produce outcomes that are not easy to predict. The pioneer of genetic algorithms John Henry Holland described complex adaptive systems as “systems composed of interacting agents described in terms of rules. These agents adapt by changing their rules as experience accumulates.”<sup>63</sup> Complex adaptive systems “exhibit coherence under change, via conditional action and anticipation, and they do so without central

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<sup>59</sup> Stephen Nicholas and Elizabeth Maitland, *How Business Interacts with Informal Institutions*, in *INFORMAL INSTITUTIONS: HOW SOCIAL NORMS HELP OR HINDER DEVELOPMENT*, (OECD Report, 2007).

<sup>60</sup> Dietz, et al., *supra* note 59.

<sup>61</sup> Ostrom, *supra* note 53, at 525.

<sup>62</sup> *Id.* at 528.

<sup>63</sup> JOHN H. HOLLAND, *HIDDEN ORDER: HOW ADAPTATION BUILDS COMPLEXITY*, 10 (1995).

direction.”<sup>64</sup> It is therefore necessary for national leaders and policy analysts to understand both the historical and currently prevailing relation dynamics between formal and informal institutions within a governance system in order to adapt to emerging changes in citizen views of institutional legitimacy, and cope more effectively with issues of resource allocation within a nation.

### 1. Informal Institutions: Cooperation and Competition.

Beyond recognizing the existence of informal institutions within a nation, leaders and policy makers must correctly assess how those institutions operate relative to each other and to the formal institutions of governance. Citizens of a nation regularly face choices in which the maximization of their own short-term interests will produce outcomes that leave groups of their fellow citizens, and/or the nation as a whole, worse off than other feasible alternatives.<sup>65</sup> What choices are actually made in such situations is typically impacted by the nature and strength of the informal institutions to which citizens respond, and the relative level of cooperation and competition embodied therein.

It is important to recognize the unseen but crucial link between informal institutions and a triangle of trust, reciprocity, and reputation.<sup>66</sup> These elements, in turn, affect levels of cooperation and competitiveness within a nation, and the resulting net benefits realized by citizens. A key element in the cooperation/competition dynamic is the level of trust among citizens. Trust is the expectation of one person about the actions of others that affects the first person's choice, when an action must be taken before the actions of others are known.<sup>67</sup> In the context of socio-political interactions or the allocation of economic resources, trust affects whether an individual is willing to initiate cooperation in the expectation that it

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<sup>64</sup> *Id.* at 38-39.

<sup>65</sup> Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 *THE AM. POL. SCI. REV.* 1 (1998).

<sup>66</sup> *Id.* at 13.

<sup>67</sup> Partha S. Dasgupta, K.G. Mäler, and A. Vercelli, *THE ECONOMICS OF TRANSNATIONAL COMMONS* 5 (Oxford: Clarendon Press, 1997).

will be reciprocated.<sup>68</sup> If initial levels of cooperation within the citizenry are moderately high, individuals tend to develop trust in one another and adopt reciprocity norms that are mutually beneficial; when one person is helped by another, that person feels motivated to respond in kind and return the support in the future.<sup>69</sup> As more individuals use reciprocity norms, gaining a reputation for being trustworthy is viewed as a worthwhile personal “investment,” and levels of trust, reciprocity, and reputations for being trustworthy within the nation become positively reinforcing.<sup>70</sup> Conversely, a decrease in any one of these elements can lead to a downward spiral, where trust evaporates and the citizenry experiences an increasing dynamic of competitive self-interest.

## 2. Institutional Dynamics in Native American Nations.

Informal institutions are of great prevalence and significance within Native American nations, and are manifested in many forms. Some reflect social groupings such as family and clan affiliations that are antecedents of the current formal government of the tribe. In some instances, there are even tribes-within-a-tribe, created by the historical amalgamation of indigenous peoples within a given locality during the treaty process with the United States.<sup>71</sup> Other informal institutions reflect cultural heritage and customs, such as the roles of elders, healers, spiritual leaders, and peacemakers in guiding community behaviors. Although “informal” in the sense that they are not officially integrated into the formal governance

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<sup>68</sup> Ostrom, *supra* note 66, at 12.

<sup>69</sup> Craig D. Parks, Jeff Joireman & Paul A. M. Van Lange, *Cooperation, Trust, and Antagonism: How Public Goods are Promoted*, 14 PSYCHOL. SCI. IN THE PUB. INT. 119-165 (2013).

<sup>70</sup> Ostrom, *supra* note 66.

<sup>71</sup> For example, the Tulalip Tribes in western Washington were created by the Treaty of Point Elliott in 1855, which combined the previously distinct Snohomish, Skykomish, and Snoqualmie tribes. Although members of the Tulalip Tribes identify themselves as Tulalip officially and for external purposes, internally there is also broad understanding of the original heritage tribes from which individual members and their families are descended. See Margaret Riddle, *Tulalip Tribes*, HISTORYLINK.ORG (Nov. 27, 2008), <http://www.historylink.org/File/8852>.

structure of the nation, such institutions often possess universal recognition among the citizens and command profound respect and allegiance from their adherents.<sup>72</sup>

Stephen Cornell and fellow researchers at the Harvard Project for American Indian Economic Development have applied institutional analysis to the unique socio-political constructs of Native American nations, in an effort to identify positive dynamics that can produce improved economic development outcomes. The broad conclusion from their work is that connecting formal and informal institutions in an appropriate “cultural match” is essential for creating legitimate governance systems. The crucial issue is the degree of match or mismatch between formal governing institutions and the prevailing community ideas regarding the appropriate form and organization of political power.<sup>73</sup> These “indigenous ideas” may stem from ancestral traditions and/or arise from the nation’s more contemporary experience, and are the philosophical underpinnings of the informal institutions within the community. The Harvard Project scholars have described correlations between the relational status of formal and informal institutions and the economic performance of Native American nations. Where cultural match is high, economic development tends to be more successful. Where cultural match is low, the legitimacy of tribal government also tends to be low; governing institutions, consequently, are less effective, and economic development falters.<sup>74</sup>

The crucial element of cultural match is that formal governance institutions must be viewed by citizens as *their* institutions, not someone else’s.<sup>75</sup> If citizens view the organization of authority as

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<sup>72</sup> ALEXANDRE MARC, ET AL., *THE WORLD BANK, SOCIETAL DYNAMICS AND FRAGILITY: ENGAGING SOCIETIES IN RESPONDING TO FRAGILE SITUATIONS* 90-92 (2013).

<sup>73</sup> Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Indians—One Works, the Other Doesn’t*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 1-33 (Miriam Jorgenson ed., 2007).

<sup>74</sup> *Id.*

<sup>75</sup> Manley A. Begay, Jr., et al., *Development, Governance, Culture: What are they and what do they have to do with Rebuilding Native Nations?*, in *REBUILDING*

somehow violating their values or the principles of governance, those formal institutions will likely be ignored or undermined by the people they are intended to govern.<sup>76</sup> Where governance departs from the community's ideas of what is politically appropriate, people are unlikely to support or respect that government and its decisions.<sup>77</sup> The community will not try to protect the system, and if they lose in disputes resolved by their formal authorities, they will be more likely to feel unfairly treated.<sup>78</sup> If citizens think governmental authority is illegitimate and is only being used for the benefit of those in power, they are more likely to act on behalf of their own interest or that of their faction.<sup>79</sup> This lack of trust creates a competitive environment within the tribe, the likely consequences of which include instability in policies and programs, abuse of power, and recurrent internal conflict.<sup>80</sup>

Governmental actions through formal institutions help determine whether cultural match and cooperation within the citizenry is achieved.<sup>81</sup> A government that allows political factionalism to stall needed changes will lose citizen confidence. A government in which the basic rules for how things are done change every time a new administration takes office will lose opportunities, as potential development partners and skilled citizens decide to invest their energies elsewhere.<sup>82</sup> A close and clear connection between a formal institution and a community priority or social value can help diminish incentives for unproductive political intervention. If the stated purpose of a formal institution is to accomplish an important community priority or advance a

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NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 34-55 (Miriam Jorgenson ed., 2007).

<sup>76</sup> MARC ET AL., *supra* note 73, at 90.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 92.

<sup>79</sup> *Id.*

<sup>80</sup> Begay et al., *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> Stephen Cornell, *Remaking the Tools of Governance: Colonial Legacies, Indigenous Solution*, in REBUILDING NATIVE NATIONS 72 (Miriam Jorgenson ed., 2007).

significant societal value, it is more difficult for elected leaders and citizens alike to undermine the management of the entity through self-interest, as doing so would compromise progress toward the communal priority or value.<sup>83</sup> Leaders should thus seek to bring the respective duties, norms, and rules of the nation's formal and informal institutions into alignment, thereby enhancing cooperation through cultural match.<sup>84</sup>

The world of diverse Native communities will naturally contain diverse structures, strategies, and outcomes for the relationships between formal and informal institutions. With 566 federally recognized Native American nations and the accompanying plethora of differing structural conditions, it is impossible to identify one particular "right" model for achieving cooperative and productive institutional dynamics.<sup>85</sup> The evidence gathered from research undertaken by the Harvard Project and others demonstrates that no single pathway will work for every nation; rather, there are multiple pathways to institutional stability and positive community development.<sup>86</sup> Indeed, even within individual tribes, there needs to be a flexibility and responsiveness built into the concepts and operations of formal governance. Institutions must be designed to adapt to changing community standards, scale, and social systems. Fixed rules based on static conceptions of the current state of knowledge are likely to lose effectiveness over time, compared to institutions that expect and plan for potentially high consequence future developments and allow for change.<sup>87</sup>

### III. AN ALTERNATIVE METHODOLOGY: QUALITATIVELY ASSESSING THE RELATIVE STATE OF A TRIBE'S FORMAL INSTITUTIONAL DEVELOPMENT AND INFORMAL INSTITUTIONAL DYNAMICS

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<sup>83</sup> Kenneth Grant & Jonathan Taylor, *Managing the Boundary between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises*, in *REBUILDING NATIVE NATIONS* 187-188 (Miriam Jorgenson ed., 2007).

<sup>84</sup> Cornell, *supra* note 83, at 71-73.

<sup>85</sup> *Id.* at 59.

<sup>86</sup> *Id.* at 59.

<sup>87</sup> Dietz, et al., *supra* note 59, at 1910.

Standard aggregate economic indicators do not incorporate complex cultural issues such as tribal conceptions of sovereignty and the historically adversarial relationship between the United States federal government and Native American tribes. Because of this, such indicators are insufficient at diagnosing development disparities between tribes and prescribing solutions to improve development. The economic analysis fails to consider the cultural fit between formal and informal tribal institutions. As such, a new methodology, which qualitatively assesses the relationship between a tribe's development of formal institutions and the cooperative dynamic with informal institutions, is necessary to understand how best to guide a tribe toward improved socio-economic development.

*A. Assessing Political Economies: Institutions and Tribal Economic Development*

Before launching new development initiatives, tribal leaders need to assess the institutional balance within their nations and gauge the readiness of the people to support the effort. Development programs that are beyond the functional capabilities of the tribe's formal institutions, and/or are inconsistent with the priorities of the informal institutions to which a critical mass of the citizenry adhere, are unlikely to realize the desired progress and outcomes. To assist with this analysis, this paper builds upon the previous institutional analysis summarized above and presents a new approach to assessing tribal political economy, focused on institutional balance as the key dynamic for a tribe's economic development. This approach immediately prompts a basic question of definition: what does "economic development" mean? The question is particularly apropos in the context of Native American nations, which do not quantify their economic activity with traditional metrics such as national income or GDP, nor publish detailed statistics regarding their economic performance.

1. Defining "Economic Development" in the Tribal Context

Most tribes do not publish the volume of economic data that is studied under standard Western academic definitions of economic development, so use of those traditional definitions is unlikely to create a particularly revealing or relevant assessment for Native American development. An alternate approach is to utilize a more holistic, qualitative definition of economic development that is better attuned to the needs and circumstances of Native American communities. Harvard Professor Amartya Sen argues that economic development requires increasing the capabilities of economic agents so that they can realize their full potential to participate in economic and social life.<sup>88</sup> The United States Economic Development Administration defines economic development as “the expansion of capacities that contribute to the advancement of society through the realization of individual, firm and community potential.”<sup>89</sup> Drawing the concept out to a temporal plane, the 1987 report of the World Commission on Environment and Development presented a modified and expanded concept called “sustainable development,” defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>90</sup> The global conception of development has gradually migrated toward an understanding that sustainable development—development that promotes prosperity and economic opportunity, greater social well-being, and protection of the environment—offers the best path forward for improving the lives of people everywhere.<sup>91</sup>

As global organizations have increased their awareness of and focus on the issues and needs of indigenous peoples, new ideas regarding economic development in tribal communities are

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<sup>88</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, 6-11 (New York: Knopf, 2000).

<sup>89</sup> Feldman, et al., UNITED STATES ECONOMIC DEVELOPMENT ADMINISTRATION, *ECONOMIC DEVELOPMENT: A DEFINITION AND MODEL FOR INVESTMENT 1* (2014) (<https://www.eda.gov/tools/files/research-reports/investment-definition-model.pdf>).

<sup>90</sup> UNITED NATIONS WORLD COMM’N ON ENV’T AND DEV., *OUR COMMON FUTURE* 41 (1987) (<http://www.un-documents.net/our-common-future.pdf>).

<sup>91</sup> *Promote Sustainable Development*, UN.ORG, <http://www.un.org/en/sections/what-we-do/promote-sustainable-development/index.html> (last visited Oct. 20, 2016).

beginning to emerge. In 2007, the UN produced the Declaration on the Rights of Indigenous Peoples, which among many provisions advocates for “control by indigenous peoples over developments affecting them and their lands, territories, and resources [enabling] them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”<sup>92</sup> Utilizing salient elements of Article 20 and Article 21 of the UN Declaration, this paper adopts a two-part qualitative definition of “economic development” for Native American nations:

- 1) The ability of a Native American nation to maintain and develop its political, economic, and social systems and institutions, to be secure in the enjoyment of its own means of subsistence and development, and for its people to engage freely in their traditional and contemporary economic activities; and
  
- 2) The ability of the nation’s people to improve their economic and social conditions, including education, employment, health, housing, and community infrastructure.<sup>93</sup>

Employing this definition for tribal economic development, the next step in the assessment process is to analyze the existing potential for consistent economic progress within a given nation’s political economy. Economic potential may be viewed as the realistic capacity of a nation to improve the quality of life of its members through the pursuit of new development goals. Consistency may be viewed as the progress and pace of a nation’s achievement of its development goals over time. An underlying variable in the analysis of economic potential is the self-directed and individualized nature of a given tribe’s development goals, which

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<sup>92</sup> UNITED NATIONS *supra* note 18 at 2 (2008).

<sup>93</sup> *Id.* at 8-9.

will reflect the tribe's own unique conditions and needs. Thus the economic development potential of a given tribe is not measured relative to other tribes using standard comparative metrics such as GDP, but instead should be assessed on a qualitative basis to determine whether it has the institutional structures and social dynamics necessary to obtain the desired development outcomes. The consistency in progress toward development goals will primarily reflect the relative cooperative/competitive dynamic of the tribe's informal institutions. When cooperation is the prevailing dynamic among a tribe's people, the likelihood of consistent progress in development programs is higher. When competition is endemic among the citizenry, the uncoordinated pursuit of factional self-interest will likely hamper advancement toward national goals.

## 2. A New Analytical Approach—Institutional Relativity within Native American Nations

A starting point for effectively assessing Native American political economy is to challenge the traditional epistemology wherein tribal economic development is analyzed based on participation in specific commercial activities such as casino gaming or selling tax-free liquor and tobacco. Instead, assessments should be founded on the understanding that economic growth potential is determined by the relative levels of development and alignment between formal and informal institutions within the nation. This presents tribal political economy as holistic and relational, in contrast to Western research approaches that typically seek to isolate and compartmentalize economic activities as separate from societal dynamics. This new approach recognizes the fact that tribal governance is polycentric, manifests as a complex adaptive system composed of a large number of active elements, and that the outcomes of governmental actions cannot be effectively predicted by examining formal institutions in isolation. The assessment process emphasizes an understanding of the interaction between social and institutional relationships within tribal communities, as opposed to their specific economic activities.

Working from this theory, tribal political economy can be assessed by the relative state of a tribe's formal institutional development and informal institutional dynamics. In applying this

analysis, certain definitions are utilized. **Formal Institutional Development** is a fundamental catalyst for economic development and, in this context, is manifested in a combination of the official structural and functional characteristics of the tribal government. Tribes that reemerged following the end of the “termination era” in the 1970s have great variance in their respective level of formal institutional development, ranging from nascent systems providing only a basic structure for governance to highly advanced regimes that are capable of undertaking complex and innovative economic projects.<sup>94</sup> There are various indicators of advanced levels of formal institutional development within tribal governments, including but not limited to:

- Well-defined governance structures, with consistent election and leadership protocols.
- Detailed legal codes, particularly related to commerce and control of resources.
- An experienced and empowered tribal court and/or mediated dispute resolution system.
- Tribal economic enterprises organized and operated with contemporary business best-practices, accountable to government but with operational independence.
- Educational systems/support for tribal members, including tribal K-12 schools, scholarship programs for higher education, and continuing education programs for adults.<sup>95</sup>

Informal Institutional Dynamics reflect the degree to which a tribe’s informal institutions are cooperative or competitive with the formal institutions—and also the degree to which these informal

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<sup>94</sup> See MIRIAM JORGENSON & JONATHAN TAYLOR, HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT REPORT: “WHAT DETERMINES INDIAN ECONOMIC SUCCESS? EVIDENCE FROM TRIBAL AND INDIVIDUAL INDIAN ENTERPRISES 4, (June 2000) (*available at* <http://www.hpaied.org/sites/default/files/publications/WhatDeterminesIndianEconomicSuccess.pdf> (last visited Jan. 23, 2017))

<sup>95</sup> See *What Can Tribes Do: Strategies and Institutions in American Indian Economic Development*, 6, 9-10 (Los Angeles: UCLA American Indian Studies Center 1992).

institutions and the people within them compete or cooperate with each other. The level of informal cooperation or competition is a real and significant dynamic within tribal nations, but the underlying sentiments of tribal members toward their institutions (and each other) can be difficult to measure empirically. Cooperative dynamics within informal institutions are reflected in actions that indicate citizens view their formal and informal institutions as beneficial and fair, including:

- Broad and frequent citizen participation in governance activities such as voting and general council meetings, facilitated by accessible mass communications (e.g. social media).
- Citizens submitting disputes to their tribal courts, mediators, and peacemakers for conflict resolution, thereby seeking to resolve their problems within the tribal systems.
- Merit-based employment and institutional position appointments, with selections made irrespective of personal family/clan affiliations.
- Regular social gatherings that promote the inclusion of and participation by all ethnic and ancestral heritage groups within the tribe.

Competitive dynamics within informal institutions take many forms, which individually and in combination reflect a lack of trust among the citizens toward each other and/or the institutions that purport to serve their collective interests. Examples of competitive dynamics found within tribal communities include:

- Attempted banishment, disenfranchisement, and/or disenrollment of tribal members, often based on rival family or clan affiliations.
- Tribal members invoking United States institutions such as the Bureau of Indian Affairs and federal courts to resolve disputes, rather than utilizing their own Tribal Court or other conflict resolution mechanisms.

- Frequent member allegations of corruption by tribal officials, often indicated by lawsuits being initiated by tribal members against the tribal government and elected leaders.
- Faction-based leadership and tribal resource allocations, with position appointments or other benefits steered toward tribal members who belong or adhere to the same informal institutions as the officials empowered to distribute these public goods.

A tribe that exhibits cooperative dynamics within its informal institutions will not embody homogenous perspectives or a lack of disagreements among tribal members. Rather, cooperative dynamics indicate that tribal members view their institutions as credible, and that members feel it is worthwhile to work within and through those institutions in pursuit of collective goals and to resolve disputes. Consistent with Ostrom's findings, the key determinant in the relative cooperation or competition within a system will be the level of trust tribal members feel toward their institutions, which sets their expectations as to whether the actions of the institutions will reflect equitable reciprocity toward the citizens.<sup>96</sup> A high level of citizen trust in their institutions likely reflects the achievement of Cornell's "cultural match" within the governance system, and will tend to produce a cooperative environment where institutions are utilized and function appropriately for the common good.<sup>97</sup>

It is important to recognize that the dynamics of a tribe's political economy are not static. As complex adaptive systems, tribes can and will experience changes in the structure, function, and priorities of their formal and informal institutions, often corresponding with changes of leadership within those institutions and/or demographic changes within the populace. Improvements in the functionality of formal institutions may catalyze and/or result from more cooperative dynamics among tribe's informal institutions. Conversely, if the cultural match between the tribe's

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<sup>96</sup> Ostrom, *supra* note 53, at 493-94.

<sup>97</sup> Cornell, *supra* note 83, at 73.

formal and informal institutions erodes over time, citizens may lose trust in the equity and reciprocity of their institutions and resort to actions imbued with competitive self-interest. The assessment of political economy is therefore a means of taking a “snapshot” of a tribe’s institutional balance at a given time, and offers an analytical process for tribal leaders to apply regularly in assessing the potential of the nation to successfully undertake new development endeavors.

### 3. Structural Conditions for Native American Political Economy

One aspect of the research design for the political economy assessment is to compare nations with similar structural conditions, so that differences in development performance are more likely attributable to differing policy actions of the tribal governments. If the major structural conditions related to development for a group of tribes are substantially similar, but one or more tribes in the group are realizing greater developmental gains than the others, it may indicate the more rapidly-progressing tribes have implemented distinct political and/or socio-economic policies that have proven advantageous. Once studied, such policies may be replicable to some degree by the other similarly-situated tribes to help advance their respective development agendas.

When utilizing this assessment process to compare development performance between tribes, the study sample should be comprised of tribes with substantially similar structural conditions in four primary areas:

- 1) **Geography.** Tribes in a sample study should have broadly similar physical geography (located in the same region, similar climate, etc.), and economic geography (proximity to transportation infrastructure, natural resource availability, etc.). For example, attempting to compare the political economy of a tribal nation located in the Aleutian Islands relative to another located in Florida introduces too many environmental variables to provide a useful study.

2) **Access to Markets.** Tribes being assessed together should all be located within a reasonable proximity to the same population center (or equivalent centers) that offer a market and/or customer base for the tribal economy. The tribes should also have equivalent legal status for conducting economic activity within the market, e.g. state/tribal compacts for casino gaming or tax-advantaged retail sales. If the tribes being compared do not have the same legal status relative to the market, a comparison can still be valid if the differing status is the result of a tribal policy decision or deficiency.

3) **Treaty Rights.** Treaties with the United States are a foundational element of a tribe's political economy, as the treaties set the terms for a tribe's activities within its most important political and economic relationship. The 566 current federally recognized tribes entered into treaties with the United States at many different times and under many different historical circumstances. As a result, there is a vast array of differing tribal rights among these documents, producing significant differences in the scope and powers of a tribe's political economy. Tribes within a study sample should have broadly similar treaty rights, placing them on an equal footing for relations with federal and state governments.

4) **Cultural Tradition.** The diversity of tribal history, culture, and traditions exceeds even their geographic diversity, and the social heritage of a tribe is often a driver of governmental priorities for the political economy. Comparing tribes with similar traditions related to leadership, values, and related socio-economic activities (e.g. fishing, arts, trading)

helps mitigate confounding factors of a sociological nature.

An example of a group of tribes that form an appropriate study sample for comparative analysis of political economies can be found in the Coast Salish nations of the Pacific Northwest.

#### 4. Case Study Sample Selection: Coast Salish Nations

The term “Coast Salish” is a generalized cultural and ethnographic designation for the numerous tribal communities in the Pacific coastal areas of Oregon, Washington, and British Columbia and whose peoples speak one of the various languages/dialects within the Salishan language family.<sup>98</sup> Archaeological evidence indicates the Coast Salish peoples may have inhabited the region as far back as 9000 B.C.<sup>99</sup>

The Coast Salish nations located in the Puget Sound area of Washington state offer an ideal sample population for comparative assessment of tribal political economies. They possess substantial commonality of the key structural conditions needed for a comparative assessment:

1) **Geography.** The Coast Salish tribes selected for this initial study are located in the Puget Sound region within a 100-mile radius of Seattle, and share substantially similar physical geography and climate conditions. Their proximity to road/rail/air/sea transport, communications systems, and other basic economic infrastructure are likewise substantially similar and are generally of high functionality.

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<sup>98</sup> See *Coast Salish Art*, UNIVERSITY OF WASHINGTON BURKE MUSEUM, <http://www.burkemuseum.org/coastsalishart> (last visited Oct 18, 2016).

<sup>99</sup> *Coast Salish*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Coast\\_Salish](http://www.newworldencyclopedia.org/entry/Coast_Salish) (last visited Oct. 20, 2016).

Through location and treaty rights, the tribes have access to natural resources including fish, wild game, and timber in areas beyond their actual reservations.

2) **Access to Markets.** The Puget Sound-area Coast Salish tribes are located within an hour's drive of the metropolitan areas of Seattle or Tacoma, the first and third largest cities in Washington. The federally-recognized tribes have individually and collectively negotiated economic compacts with the State of Washington, providing the legal basis for the tribes to offer reduced-tax retail goods and casino gaming to the market population.<sup>100</sup>

3) **Treaty Rights.** The Coast Salish tribes in this study (or their nominal predecessor nations) were joint signatories to either the Treaty of Point Elliott or the Treaty of Point No Point in 1855, which were negotiated simultaneously by Washington Territory Governor Isaac Stevens and provide an essentially identical legal framework for the tribes' relationship with the United States.<sup>101</sup>

4) **Cultural Tradition.** The historical socio-economic activities of the Coast Salish nations in the Puget Sound area reflect a commonality deriving from their environment and shared ethnographic heritage. They have traditionally sustained their communities by fishing, hunting game animals, and gathering wild plants for food and

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<sup>100</sup> *E.g., Gaming Compacts*, UNITED STATES DEPARTMENT OF THE INTERIOR, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Washington> (last visited Oct. 20, 2016).

<sup>101</sup> *Treaty of Point Elliott, 1855*, WASHINGTON STATE GOVERNOR'S OFFICE OF INDIAN AFFAIRS, <http://www.goia.wa.gov/treaties/treaties/pointelliott.htm> (last visited Oct 20, 2016); *Treaty of Point No Point, 1855*, HISTORYLINK.ORG (Jan. 15, 2004), <http://www.historylink.org/File/5637>.

medicinal purposes. Their peoples lived communally in longhouses for large extended families and tribal groups. Nearly all of the Puget Sound Salish people lived near rivers, lakes or the ocean, and their primary means of transportation for economic and social activities was by water.<sup>102</sup>

This commonality of structural conditions contrasts starkly with the economic development indicators among the Puget Sound-area tribes. While some tribes have substantially reduced (or even eliminated) on-reservation poverty since the year 2000, others in close physical proximity have seen their poverty levels increase dramatically.<sup>103</sup> This economic performance differential exists even among tribes engaged in the same primary economic activity of casino gaming. For this group of tribes with similar structural conditions yet very different economic development outcomes, the political economy assessment process provides a framework for a qualitative analysis of the tribes' respective levels of formal institutional development and the prevailing dynamics among their informal institutions.

*B. Applying the Political Economy Assessment to Coast Salish Nations*

To illustrate the analytical approach of the comparative assessment of tribal political economies, an example of the differing institutional balance and corresponding impact on economic indicators among tribes with similar structural conditions can be found in two Coast Salish nations: the Jamestown S'Klallam and the Snoqualmie. In addition to meeting the four general comparison group criteria described above, these two tribes are very similar in size for population and territory, and both obtained federal recognition and established their governance in the post-termination

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<sup>102</sup> *Classroom-Based Assessment Unit for Enduring Cultures: Puget Salish People of King County and Washington*, NORTHWEST HERITAGE RESOURCES, [http://www.northwestheritageresources.org/Essays/Puget\\_Salish\\_essay.pdf](http://www.northwestheritageresources.org/Essays/Puget_Salish_essay.pdf).

<sup>103</sup> Guedel, *supra* note 7, at 37-38.

era.<sup>104</sup> The Jamestown S’Klallam and Snoqualmie are Class III gaming tribes, and a primary economic resource for both is the significant cash revenue generated by their respective casinos.

The Jamestown S’Klallam Tribe obtained federal recognition in 1981, resulting in the recognition of the Tribe's Treaty rights and its authority to operate and negotiate as a sovereign nation in government-to-government dealings.<sup>105</sup> During the recognition process, the Tribal community worked to crystalize the goals and visions for their government and community. The outcome of this process was the development of a clear strategic plan and documentation of the community's goals.<sup>106</sup> From the Region 1 statistics for on-reservation poverty, the Jamestown S’Klallam Tribe stands out as the premier success story, being the only tribe to have eliminated poverty and kept it at zero for the entire ten-year period of 2000-2010.<sup>107</sup> This positive outcome on a key economic and human security indicator reflects the tribe’s broader success in the development of its institutions, with resultant gains in other economic performance indicators.

The Snoqualmie Tribe’s recent history is similar to that of the Jamestown S’Klallam in terms of a square-one start. After being part of the amalgamated Tulalip Tribes following the Treaty of Point Elliott in 1855, the Snoqualmie achieved separate federal recognition in 1999 and began governance as an independent

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<sup>104</sup> ROBERT H. RUBY, JOHN A. BROWN & CARY C COLLINS, A GUIDE TO THE INDIAN TRIBES OF THE PACIFIC NORTHWEST 132, 306-308 (3d ed. 2010) (Jamestown S’Klallam tribal membership was listed at 530 members while the Snoqualmie tribal membership was listed at 650 according to 2008 census figures).

<sup>105</sup> See OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, JCT V001 D005, RECOMMENDATION AND SUMMARY OF EVIDENCE FOR PROPOSED FINDING FOR FEDERAL ACKNOWLEDGMENT OF THE JAMESTOWN BAND OF CLALLAM INDIANS OF WASHINGTON PURSUANT TO 25 CFR 54, (1980), available at <http://www.indianz.com/adc20/Jct/V001/D005.PDF>.

<sup>106</sup> BUREAU OF INDIAN AFFAIRS, UNITED STATES DEP’T OF THE INTERIOR, TRIBAL-STATE COMPACT FOR CLASS III GAMING BETWEEN THE JAMESTOWN S’KLALLAM TRIBE AND THE STATE OF WASHINGTON, 1-8 (1993), <http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038572.pdf> (last visited May 13, 2016).

<sup>107</sup> Guedel, *supra* note 7, at 36.

nation.<sup>108</sup> The Snoqualmie Tribe arguably has more favorable economic geography than the Jamestown S’Klallam, having obtained an initial land allocation close to the interstate-ninety freeway less than thirty miles from downtown Seattle, and the tribe constructed its casino on land conveniently accessible to the large population of the greater King County area. In 2008, the tribe opened the 60 million dollar, 170,000-square-foot Snoqualmie Casino on fifty-six acres of tribal land, which features five restaurants, a special events center, and employs nearly 900 staff.<sup>109</sup>

### 1. Comparative Historical Context of Socio-Political Institutions

To illuminate the progression of institutional development for the Jamestown S’Klallam and Snoqualmie tribes, it is useful to examine the historical context of their respective socio-political structures and dynamics leading up to their formal federal recognition by the United States.<sup>110</sup>

#### *a. Jamestown S’Klallam Socio-Political History*

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<sup>108</sup> See OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, SNQ V001 D007, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION FOR FEDERAL ACKNOWLEDGEMENT OF THE SNOQUALMIE TRIBAL ORGANIZATION, (1997), *available at* <http://www.indianz.com/adc20/Snq/V001/D007.PDF>.

<sup>109</sup> Peter Blecha, *Snoqualmie Casino Holds Grand Opening on November 6, 2008* (Aug. 31, 2010) [www.historylink.org/File/9548](http://www.historylink.org/File/9548).

<sup>110</sup> See generally OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, *supra* note 106; OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, *supra* note 109. During the multi-year process of applying for federal recognition, tribes submit an extensive record of anthropological, ethnographic, and socio-political information regarding the history of their peoples and communities. When federal recognition is acknowledged by the United States, a final report is issued by the Department of Interior Office of Federal Acknowledgement that describes the basis of recognition as demonstrated by the tribe. These reports contain a wealth of information from numerous sources and provide the official historical record as accepted by the tribe and the United States. The historical context information in Section VII regarding the Jamestown S’Klallam and Snoqualmie Tribes is derived from these previously cited reports.

The Jamestown S’Klallam are descendants of the tribe first recorded as *Nu-Sklaim* or *Nuxclaiyem*, then later as Clallam or S’Klallam meaning “Strong People”.<sup>111</sup> Jamestown is one of three surviving S’Klallam bands, Lower Elwha and Port Gamble being the other two. The Jamestown S’Klallam are descended from village groups that were part of the S’Klallam tribe, a Salish cultural and linguistic group. The earliest known European contact with the S’Klallam was by Spanish/Peruvian explorer Manuel Quimper Benitez del Pino in 1790, soon to be followed by British explorer George Vancouver’s expedition in 1792, which visited villages near the present Jamestown location.<sup>112</sup> Hudson’s Bay Company’s trading posts were established at Victoria, across the Puget Sound, and at Nisqually in the 1830’s. The S’Klallam and other Olympic Peninsula tribes were actively engaged in trading with whites at this time.<sup>113</sup> Although the S’Klallam were signatories to the Treaty of Point No Point in 1855, they did not initially have an identified tribal land base recognized by the United States. By 1874, a band of S’Klallam under the leadership of Lord Jim Balch, whose father had signed the Treaty of Point No Point, raised enough money to pay \$500 in gold coin for a 210-acre tract of land near Dungeness, Washington Territory.<sup>114</sup> The Jamestown S’Klallam population at this time was about one hundred people, and the tribe supported itself by farming, fishing, crab-harvesting, and working in the surrounding pulp mills.<sup>115</sup>

The S’Klallam were a clearly defined social and cultural unit, whose component villages were closely linked by language, intermarriage, and other cooperative social ties. The basic political unit was the winter village, which could consist of as many as ten houses owned by families linked by marriage and territorial bonds, with up to fifty people altogether in the unit.<sup>116</sup> S’Klallam society

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<sup>111</sup> RUBY ET AL., *supra* note 105, at 35.

<sup>112</sup> *Id.* at 35-36.

<sup>113</sup> JAMESTOWN S’KLALLAM DETERMINATION, *supra* note 106, at 10.

<sup>114</sup> *Id.* at 67.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 9.

was stratified into nobles, commoners, and slaves, with the nobles controlling the major resources.<sup>117</sup> Leadership of a village was often divided according to task, with different leaders for fishing, commerce, and ceremonial activities, and specific leaders appointed to deal with outsiders.<sup>118</sup> Some leaders, particularly those associated with control over fishing resources, were considerably more prominent within the community.<sup>119</sup>

Historians considered the residents of the traditional Jamestown territory to be well-integrated into the tribe. Given that the Jamestown territory was rather small, some families in the region who never resided in the villages were still active enough to be considered part of the “core” of the tribe. These members existed from the time Jamestown territory was founded and participated to some degree in tribal affairs, including holding leadership positions.<sup>120</sup> By the 20<sup>th</sup> century there were also a substantial number of members living outside the Jamestown area whose contacts with the tribe ranged from fairly frequent attendance at meetings to very little, including many of the younger members of some of the families who were of low blood degree or married to non-Indians.<sup>121</sup> Such members and their spouses were well accepted by most in the tribe. By the 1970s, around the “core” of the Jamestown community was a fairly large number of members whose affiliation was primarily a matter of family ties, formal membership, and attendance at organized functions, but not of close contact with each other across family lines outside of organized contexts like official meetings.<sup>122</sup> Although not in close contact with each other or actively involved in tribal affairs, most of the “non-core” members could trace ancestral connections to the core families of the tribe.<sup>123</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 23.

<sup>121</sup> *Id.* at 23-24.

<sup>122</sup> *Id.* at 24.

<sup>123</sup> *Id.*

The Jamestown S’Klallam have exhibited a very high degree of social continuity throughout their history, with most of the original family lines still represented in contemporary times. There is a consistent group of families listed on membership rolls, with many of the main families residing within the traditional Jamestown territory.<sup>124</sup> At the time of federal recognition, no Jamestown S’Klallam members were enrolled in any other tribes, indicating the members’ singular attachment to the Jamestown social community.<sup>125</sup> Traditional social and ceremonial gatherings are carried forward in tribal “clambakes,” which are held for funerals, weddings, and in honor of individuals who are important to the community.<sup>126</sup> These events are characterized by large-scale participation, communal food sharing, and a sense that these are community functions that members are expected to attend. These gatherings are self-consciously viewed by community members as a survival of older ways and are in fact consistent with earlier social patterns. S’Klallam members place a high priority on the education of their children, with significant pre-and-post-recognition resources being utilized to create schools and provide learning programs for young members.<sup>127</sup> Prior to federal recognition and the attainment of a formal land base, the tribe’s day school served as the primary point of contact between the Jamestown S’Klallam and the United States Bureau of Indian Affairs.<sup>128</sup>

Jamestown S’Klallam’s pre-recognition political structure remained remarkably consistent over generations. The tribe had definite leadership chosen by its members and acknowledged by the United States from the time the formal community territory was delineated at Jamestown in 1874.<sup>129</sup> Until 1910, a chief and an informal group of leading members governed; after 1910, an elected

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<sup>124</sup> *Id.* at 28.

<sup>125</sup> *Id.* at 2.

<sup>126</sup> *Id.* at 24.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 3.

<sup>129</sup> *Id.* at 4.

chairman and council governed.<sup>130</sup> These institutions functioned on a continuing basis until the tribe's constitution and by-laws adopted in 1975, and the United States government acknowledged and dealt with the tribe's self-designated leadership throughout the 20<sup>th</sup> century.<sup>131</sup>

There was no noted opposition to the Jamestown S'Klallam's application to the United States for federal recognition. Indeed, the neighboring Port Gamble S'Klallam, Lower Elwha S'Klallam tribes, and the Skokomish tribes (each of which was already federally recognized) officially supported the Jamestown petition for acknowledgment.<sup>132</sup> The Jamestown S'Klallam Tribe was federally recognized by the United States in 1981.<sup>133</sup>

#### *b. Snoqualmie Socio-Political History*

The people of the Snoqualmie Tribe are the descendants of the community known as *S-Dukwalbixw* or "People of the Moon".<sup>134</sup> The pre-contact Snoqualmie peoples lived in two main villages in what is now the Snoqualmie River Valley between Puget Sound and the Cascade Mountains: one village at the mouth of the Tolt River, and the other at the base of Snoqualmie Falls.<sup>135</sup> The Snoqualmie traded with other local tribes, including the S'Klallam and Snohomish, but in contrast to the S'Klallam, the early relations between the Snoqualmie and white settlers were often combative.<sup>136</sup> In 1849, for example, Snoqualmie members launched an attack on the Hudson's Bay Company's Fort Nisqually and killed an American settler, after which two captured Snoqualmie raiders were tried by a settlers' court and hanged.<sup>137</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 3.

<sup>133</sup> *Id.* at 2.

<sup>134</sup> RUBY ET AL., *supra* note 105, at 306.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

Following the Treaty of Point Elliott in 1855, the Snoqualmie and Snohomish tribes were expected, under the treaty, to move from their ancestral lands to the newly formed Tulalip Reservation, located in present-day Snohomish County.<sup>138</sup> While many Snoqualmie members did relocate there, a significant band did not because the reservation had insufficient land to grant people the amount specified in the treaty. Anthropological and historical evidence indicates that between 1855 and the 1930's, there had been distinct off-reservation Snoqualmie settlements and off-reservation leaders, but the evidence does not indicate that the on-and-off-reservation Snoqualmie peoples constituted two different tribes prior to the 1930s.<sup>139</sup> Instead, there was a process of evolution and reorganization, which, by the mid-1930's, resulted in a separate off-reservation band after other Snoqualmie peoples integrated into tribal communities organized under the Indian Reorganization Act.<sup>140</sup>

Until the 1930s, the government dealt with the Snoqualmie peoples living both on and off-reservation as a single political entity.<sup>141</sup> In 1928, an off-reservation Snoqualmie leader named Jerry Kanim was elected head of the tribal business council—instituted by the federal Indian Service to deal with matters affecting Snoqualmie interests on the Tulalip Reservation.<sup>142</sup> Subsequently, the United States began to recognize the Snoqualmie community living on the Tulalip Reservation as a distinct entity from the off-reservation Snoqualmie community. Beginning in 1929, a separate council was established on the Tulalip Reservation to represent the interests of all of the peoples residing there, while the federal government dealt separately with Jerry Kanim as the leader of an off-reservation based Snoqualmie tribe.<sup>143</sup> In 1930, the United States formed a

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<sup>138</sup> OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP'T OF THE INTERIOR, *supra* note 106, at 42.

<sup>139</sup> *Id.* at 43-43, 48.

<sup>140</sup> *Id.* at 43.

<sup>141</sup> *Id.* at 41.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

reservation-only business committee, which was drawn from all of the tribes of the Tulalip reservation.<sup>144</sup> This committee explicitly excluded off-reservation Indians in its representation, a limitation that was hotly debated by the tribal members, but reservation-only councils soon became standard on the other reservations in the region.<sup>145</sup>

These reservation-only councils were formed by the United States in response to new federal regulations concerning the leasing of Indian lands, which were interpreted by the Indian Service as requiring the limitation to reservation Indians.<sup>146</sup> After the reservation-only business council was organized for the Tulalip Reservation and before the reservation government was organized under the Indian Reorganization Act, there was thus a clear identification of a separate, off-reservation Snoqualmie band in 1934. In response to a questionnaire from the National Resources Board regarding tribal groups within the region, federal Tulalip Agency Superintendent Oscar Upchurch stated that there was “an important band of Snoqualmie Indians under the leadership of Jerry Kanim,” and noted that a number of these Snoqualmie “were not enrolled at any agency and have no land.”<sup>147</sup> As a solution to this situation, Upchurch proposed the establishment of a small reservation for the band within the Snoqualmie National Forest – a suggestion that was not implemented by the United States.<sup>148</sup> In 1936, the residents of the Tulalip Reservation combined from the Snohomish, Snoqualmie, and Skykomish tribes were organized as a tribal government under the Indian Reorganization Act.<sup>149</sup> However, the federal government continued to deal with the off-reservation Snoqualmie under the leadership of Jerry Kanim as a separate political unit, and representatives of the United States

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<sup>144</sup> *Id.* at 46.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, *supra* note 106, at 46.

<sup>148</sup> *Id.* at 47.

<sup>149</sup> The Indian Reorganization Act, 25 U.S.C. § 5101 (1934).

expressed the intent that, at some point in the future, “a reservation sufficient to assure them a home should in equity be secured for them.”<sup>150</sup>

Historical evidence indicates that Jerry Kanim was a strong leader for the off-reservation Snoqualmie, and that his leadership provided the foundation and the reference point for subsequent leaders. After his death in 1956, there was a decline in off-reservation Snoqualmie socio-political activity, which ultimately resulted in the loss of federal acknowledgement and regular dealings with the United States.<sup>151</sup> Some of the changes occurring after Jerry Kanim’s death appear due to a transition to a younger, less traditional leadership, while others appear connected to social dynamics based on family groupings. After Jerry Kanim’s death, prominent off-reservation Snoqualmie leaders Ed Davis and Kiutus Tecumseh refused to take over the chief’s position because they were not from the Kanim family line.<sup>152</sup> The Snoqualmie reportedly refused to make Kanim’s daughter chief because the position traditionally had not been held by women.<sup>153</sup> Anthropologists view these actions as evidence that the off-reservation Snoqualmie members were following a cultural tradition, derived from Coast Salish culture, of drawing leadership from specific family lines.<sup>154</sup> Interestingly, during this period approximately twenty percent of the off-reservation Snoqualmie were enrolled in other federally recognized tribes, including the Lummi, Muckleshoot, Nooksack, Sauk-Suiattle, Suquamish, Tulalip, and Upper Skagit—in part due to the Snoqualmie’s lack of land and other communal resources, and which impacted the tribe’s ability to maintain connections with, and loyalty among, its people.<sup>155</sup>

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<sup>150</sup> OFFICE OF FED. ACKNOWLEDGMENT, UNITED STATES DEP’T OF THE INTERIOR, *supra* note 106, at 49.

<sup>151</sup> *Id.* at 14.

<sup>152</sup> *Id.* at 85.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 167.

Strong family line groupings are socially defined and well-known throughout the membership of the Snoqualmie, and thus significantly define social relationships. These kinship groupings are understood and identified as the major families making up the tribe.<sup>156</sup> They have a clear social definition which ascribes particular characteristics and histories to each family group. Historical evidence demonstrates recurring political conflict within the Snoqualmie in the 1960s and 1970s over significant issues, such as maintenance of tradition in the style of governance, the chairman's role versus the council's role, and how to approach fishing rights.<sup>157</sup> There is substantial information for the modern community showing processes of political conflict and transition in the election or ouster of Snoqualmie leaders and the political role of family-line groupings within the tribe.<sup>158</sup> A political structure in which family-line groupings play a major role has existed for decades, and family-line groupings are instrumental in lining up political support for and against candidates for tribal leadership positions.<sup>159</sup>

Prior to federal recognition, family conflicts were seen as a characteristic feature of Snoqualmie General Council meetings, with existing conflicts between families coming out during the meetings.<sup>160</sup> Snoqualmie leaders frequently commented on this dynamic and expressed concern that if more constructive methods of resolving social issues were not found, the tribe "will be pulled apart."<sup>161</sup> Family line conflicts led to the re-institution of the office of chief in 1986. Former Snoqualmie Chairman Andy de los Angeles stated that during his first term from 1984 to 1990, he was "getting into a lot of social issues, and having to be like a judge/jury kind of situation about family squabbles, basically community

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<sup>156</sup> *Id.* at 80.

<sup>157</sup> *Id.* at 15.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 108.

<sup>161</sup> *Id.*

issues . . .”<sup>162</sup> He concluded that such problems were better dealt with by someone other than the chairman. The position of chief was reinstated for this purpose; it was different in form and entailed less political authority than it had under Jerry Kanim, with the Chief now dealing primarily with social issues that were bothering members of the community.<sup>163</sup>

One particular aspect of Snoqualmie pre-recognition institutions that manifested during the federal recognition process (and continues to the present day) is the banishment of tribal members. During the 1980s and 1990s, when the Snoqualmie Tribe’s application for federal recognition was being considered by the United States, more than a dozen members (including two former chairmen and members of their families) were banished by the tribe.<sup>164</sup> The Snoqualmie Tribe’s application to the United States for federal recognition argued that the Snoqualmie people had, in fact, been incorporated into the Tulalip Tribes’ socio-political community over the nearly 150 years since the establishment of the Tulalip reservation under the Treaty of Point Elliott; this was vigorously contested by the Tulalip Tribes.<sup>165</sup> The Tulalip Tribes asserted that the off-reservation Snoqualmie tribe was only a voluntary organization formed solely for the purposes of pursuing land and other claims against the United States Government.<sup>166</sup> To demonstrate this, Tulalip cited a 1961 Western Washington Agency federal report stating that the Snoqualmie had no constitution or charter and was not organized formally for “self-government.” It went on to conclude that the main object of the off-reservation Snoqualmie tribe was “to press its suit” to obtain control over land and other economic resources.<sup>167</sup> The Snoqualmie Tribe received

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<sup>162</sup> *Id.* at 109.

<sup>163</sup> *Id.* at 107-08.

<sup>164</sup> *Id.* at 162.

<sup>165</sup> *Id.* at 7–9.

<sup>166</sup> *Id.* at 13.

<sup>167</sup> *Id.* at 14.

federal recognition by the United States in 1999, despite the internal membership conflict and the opposition of the Tulalip Tribes.<sup>168</sup>

## 2. Comparative Assessment of Contemporary Political Economies

While the Jamestown S'Klallam and the Snoqualmie tribes each have their own unique socio-political histories, they also possess the broad similarity of geography, access to markets, treaty rights, and cultural traditions necessary for a viable political economy study group. They presently exhibit similar structural conditions and equivalent primary economic activities, making them appropriate case studies for comparison of institutional and economic performance. Utilizing the institutional assessment process, the contemporary political economies of the Jamestown S'Klallam and Snoqualmie tribes can be compared by examining indicators of their respective formal institutional development, informal institutional dynamics, and contemporaneous economic performance indicators. Applying the theories and assessment process described in this paper, differences in the economic development outcomes between the two tribes can be expected to correlate with: a) differences in the level of their formal institutional development, b) differences in the relative cooperative/competitive dynamics of their informal institutions, or c) a combination of both. Assessment of these criteria is based on indicators of the tribes' respective formal institutional development, informal institutional dynamics, and economic performance.<sup>169</sup>

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<sup>168</sup> *About the Snoqualmie Indian Tribe*, WWW.SNOQUALMIETRIBE.US, <http://www.snoqualmietribe.us/about> (last visited Nov. 10, 2016).

<sup>169</sup> The empirical information utilized to assess the institutional balance of the tribes, as detailed below, was obtained from publicly-available source material and data regarding tribal activities and performance, internal tribal documents, legal filings by tribes and tribal members, and interviews with tribal leaders and subject matter experts. This qualitative data should be viewed as a provisional mapping of extant conditions within these tribes as of the time of this writing. Future research is expected to reveal additional factors that impact the institutional balance and resulting outcomes within the tribes' polycentric complex adaptive systems of governance.

*a. Jamestown S’Klallam Tribe: Advanced Formal Institutional  
Development & Cooperative Informal Institutions*

In comparison with other Coast Salish tribes (and even the adjacent non-tribal municipalities), the development of formal institutions for governance at Jamestown S’Klallam is highly advanced. Political and administrative authority is exercised through a stable and detailed organizational structure with clear lines of responsibility and accountability, from elected officials and C-Level departmental officers all the way down to assistant librarians.<sup>170</sup> The tribe’s legal codes are extensive in subject matter coverage, highly detailed, and reflective of a balance of contemporary best-practices and long-standing traditions for governance.<sup>171</sup> The tribe maintains a ten-year comprehensive plan with specific forward-looking goals for governance, public health, education, and cultural awareness.<sup>172</sup> The tribe has established an economic development agency that is organizationally and operationally separate from the tribal council, which provides the tribe’s business managers with the ability to exercise independent professional authority over economic activities without interference from other socio-political institutions.<sup>173</sup> The tribe’s laws and regulations require regular reporting of governmental and economic activity, with extensive information accessible both to members and outside parties.<sup>174</sup> The fact that Jamestown S’Klallam leaders have

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<sup>170</sup> *Tribal Governmental Organizational Chart*, JAMESTOWN S’KLALLAM TRIBE, [http://www.jamestowntribe.org/programs/organizational\\_chart\\_2013.pdf](http://www.jamestowntribe.org/programs/organizational_chart_2013.pdf) (last visited Nov. 11, 2016).

<sup>171</sup> See Jamestown S’Klallam Tribal Code, §§ 1.01, *et seq.*, [http://www.jamestowntribe.org/govdocs/gov\\_code.htm](http://www.jamestowntribe.org/govdocs/gov_code.htm).

<sup>172</sup> *Jamestown S’Klallam Tribal Comprehensive Plan, 2005-2015*, JAMESTOWN S’KLALLAM TRIBE, <http://www.jamestowntribe.org/govdocs/mastcompplanfinal8-27-08.pdf> (last visited Nov. 11, 2016).

<sup>173</sup> *Tribal Programs*, JAMESTOWN S’KLALLAM TRIBE, [http://www.jamestowntribe.org/programs/eda\\_main.htm](http://www.jamestowntribe.org/programs/eda_main.htm) (last visited Nov. 11, 2016).

<sup>174</sup> *Reports, Publications & Newsletter Archives*, JAMESTOWN S’KLALLAM TRIBE, [http://www.jamestowntribe.org/announce/annce\\_newsletter.htm](http://www.jamestowntribe.org/announce/annce_newsletter.htm) (last visited Nov. 11, 2016).

been repeatedly elected to leadership positions in inter-tribal organizations, such as the National Congress of American Indians and National Indian Gaming Association, reflects broad recognition of the tribe's exemplary institutional achievements.<sup>175</sup>

The indicators of informal institutional dynamics within the Jamestown S'Klallam community reflect a high degree of cultural match and citizen cooperation. The tribe exhibits extensive transparency in its governmental and socio-political processes, with key documents and performance information readily accessible by internet for all members.<sup>176</sup> Regular general citizenship meetings provide all members with a forum to discuss community issues and request governmental action on community priorities. The tribal members and institutions regularly utilize both official and informal social media resources to connect community members and share information regarding tribal activities.<sup>177</sup> Tribal agencies maintain extensive financial investment in direct services for members such as medical care, community facilities, and child and elder programs.<sup>178</sup> The tribe considers it a high priority to compile extensive and accessible records of the history and culture of the tribal community and make them available to the public through museums and archives.<sup>179</sup> The tribe also provides extensive information to citizens on the activities of government and the progress on community initiatives through annual reports.<sup>180</sup>

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<sup>175</sup> *Jamestown S'Klallam Tribal Council*, JAMESTOWN S'KLALLAM TRIBE, [http://www.jamestowntribe.org/main/main\\_council.htm](http://www.jamestowntribe.org/main/main_council.htm) (last visited Nov. 11, 2016).

<sup>176</sup> *See* JAMESTOWN S'KLALLAM TRIBE, [HTTP://WWW.JAMESTOWNTRIBE.ORG/](http://www.jamestowntribe.org/) (last visited Nov. 11, 2016).

<sup>177</sup> *See* Jamestown S'Klallam Tribe, FACEBOOK <https://www.facebook.com/JamestownSKlallamTribe> (last visited Jan. 23, 2017).

<sup>178</sup> *Social & Community Services Department*, JAMESTOWN S'KLALLAM TRIBE, [http://www.jamestowntribe.org/programs/scs/scs\\_main.htm](http://www.jamestowntribe.org/programs/scs/scs_main.htm) (last visited Nov. 11, 2016).

<sup>179</sup> *House of Seven Generations Museum*, JAMESTOWN S'KLALLAM TRIBE, <http://www.tribalmuseum.jamestowntribe.org/> (last visited Nov. 11, 2016).

<sup>180</sup> *See e.g., Jamestown S'Klallam Tribe 2012 Report to Tribal Citizens*, JAMESTOWN S'KLALLAM TRIBE, [http://www.jamestowntribe.org/announce/publications/2012\\_Annual\\_Report.pdf](http://www.jamestowntribe.org/announce/publications/2012_Annual_Report.pdf) (last visited Nov. 11, 2016).

The institutional dynamics at Jamestown S’Klallam correlate with exceptionally positive economic performance indicators. The tribe has sustained a zero-poverty rate for members living on the reservation – the only Coast Salish nation (and one of the few tribes anywhere in the United States) to achieve this status.<sup>181</sup> The tribe’s economic development agency demonstrates regular profitability in its business operations, and reinvests revenue into acquisitions that have expanded tribe’s economic base beyond gaming into enterprises including construction, Internet technology, communications, and retail services.<sup>182</sup> The tribe has also successfully undertaken the development of modern primary health care facilities that profitably serve both tribal and non-tribal community members.<sup>183</sup> The economic strength of Jamestown S’Klallam has enabled the creation of unique and mutually-beneficial partnerships with the surrounding non-tribal community, exemplified by the tribe’s construction of a new \$1.5 million fire and emergency response station for Clallam County.<sup>184</sup> In keeping with its recognized tradition of prioritizing education, the tribe’s successful economic activities enable it to provide full funding of university education for members.<sup>185</sup>

The development success of the Jamestown S’Klallam might best be demonstrated by the astonishing rapidity in which it has been achieved. When the tribe received federal recognition from the United States in 1981, it had no land and no established resource base for economic development. Within one generation the

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<sup>181</sup> W. Gregory Guedel, *Sovereignty, Economic Development, and Human Security in Native American Nations*, 3 AM. INDIAN L. J. 17 (2014).

<sup>182</sup> See *Economic Development Authority*, JAMESTOWN S’KLALLAM TRIBE [http://www.jamestowntribe.org/programs/eda\\_main.htm](http://www.jamestowntribe.org/programs/eda_main.htm) (last visited Nov. 11, 2016); See also Charlie Bermant, *Jamestown S’Klallam Tribe Buys Wireless Division of Port Townsend’s Intellicheck Mobilisa*, PENINSULA DAILY NEWS, Sept. 2, 2015, <http://www.peninsuladailynews.com/article/20150903/NEWS/309039986>.

<sup>183</sup> *Health and Human Services*, JAMESTOWN S’KLALLAM TRIBE, [http://www.jamestowntribe.org/programs/hhs/hhs\\_clinic.htm](http://www.jamestowntribe.org/programs/hhs/hhs_clinic.htm) (last visited Nov. 11, 2016).

<sup>184</sup> RUBY ET AL., *supra* note 105, at 132.

<sup>185</sup> *Id.* at 133.

Jamestown S’Klallam Tribe has become a model of self-determination and social advancement, and its leaders are recognized by tribes regionally and nationally for excellence in governance and human security. The combination of advanced institutional development and cooperative dynamics among the citizenry have allowed the Jamestown S’Klallam to surmount the early challenges associated with restored recognition following the termination era and to create a consistent basis for sustained future economic growth.

*b. Snoqualmie Tribe: Advanced Formal Institutional Development  
& Competitive Informal Institutions*

The development of formal institutions for governance at Snoqualmie is also highly advanced, on par with Jamestown S’Klallam. The tribe has enacted an extensive set of tribal legal codes that address a comprehensive range of governance, economic development, and human security matters.<sup>186</sup> To help ensure the efficient functioning of governmental agencies, the Snoqualmie Tribe established an independent audit committee and charged it with providing oversight of financial reporting and legal compliance of tribal departments.<sup>187</sup> The tribe implements law enforcement through a self-managed tribal court and community corrections department.<sup>188</sup> In furtherance of its economic development goals, the Snoqualmie Tribe created programs for promoting broad-based economic security, including the Employment Rights Ordinance and Workers Compensation Act.<sup>189</sup>

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<sup>186</sup> Snoqualmie Tribal Codes, <http://www.snoqualmietribe.us/TribalCodes> (last visited May 13, 2016).

<sup>187</sup> Snoqualmie Tribal Council Act 14.2 – The Snoqualmie Tribal Audit Committee, [http://www.snoqualmietribe.us/sites/default/files/audit\\_committee\\_act.14.2.codified.pdf](http://www.snoqualmietribe.us/sites/default/files/audit_committee_act.14.2.codified.pdf) (last visited May 13, 2016).

<sup>188</sup> *Tribal Court*, SNOQUALMIE TRIBE, <http://www.snoqualmietribe.us/TribalCourt> (last visited Nov. 11, 2016).

<sup>189</sup> Snoqualmie Tribal Council Act 5.2 – Workers Compensation Claims, [http://www.snoqualmietribe.us/sites/default/files/workers\\_comp\\_act.5.2.codified.2.27.12.pdf](http://www.snoqualmietribe.us/sites/default/files/workers_comp_act.5.2.codified.2.27.12.pdf) (last visited May 13, 2016).

In contrast to Jamestown S’Klallam, the indicators of informal institutional dynamics within the Snoqualmie community reflect a low degree of cultural match and often intense competition among citizens. Snoqualmie has become known locally and nationally for the repeated banishment and attempted disenrollment of former elected leaders and family groups within the Tribe.<sup>190</sup> There are chronic disputes and litigation among members regarding the legitimacy of their ancestry and blood quantum to qualify for tribal membership and the attendant benefit entitlements.<sup>191</sup> Tribal members do not appear to accept the legitimacy of the tribal court or other informal tribal mechanisms for resolving disputes, and regularly seek legal redress against each other and the tribal government in external venues such as federal courts.<sup>192</sup> Informal social media resources reflect significant member discontent and confusion regarding the operation of the tribe’s formal institutions, with members posting comments such as “Election Rigged” and “Do we still have an enrollment committee?”<sup>193</sup>

The institutional dynamics at Snoqualmie correlate with uneven and often disappointing economic performance indicators. The Tribe does not provide poverty data to the United States Census, and in general, any data on the progression of economic experiences of Snoqualmie tribal members is scarce.<sup>194</sup> The tribe’s economy is almost entirely reliant upon revenue from gaming and related services, but revenues from casino operations are substantially

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<sup>190</sup> “Snoqualmie Tribe ‘In Turmoil’ – and in Debt.” GGB News, Vol. 7, No. 37, (October 5, 2009).

<sup>191</sup> Matthew Halverson, *Bad Blood*, SEATTLE MET MAGAZINE, Dec. 2012, <http://www.seattlemet.com/articles/2012/12/17/bad-blood-january-2013>.

<sup>192</sup> See Greg Guedel, *Snoqualmie Members Overturn Banishment in Federal Court*, NATIVE AMERICAN LEGAL UPDATE, (May 1, 2009), <http://www.nativelegalupdate.com/2009/05/articles/snoqualmie-members-overtu-rn-banishment-in-federal-court/>.

<sup>193</sup> See Snoqualmie Constitution & Federal Recognition–General Council Page, FACEBOOK, <https://www.facebook.com/snoqualmietribalconstitution> (last visited May 28, 2015).

<sup>194</sup> POVERTY STATUS IN THE PAST 12 MONTHS; 2010-2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, UNITED STATES CENSUS BUREAU, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S1701&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S1701&prodType=table).

lower than initially projected levels.<sup>195</sup> Internal issues have further diminished the profitability of tribal business enterprises, with disputes over management and transparency in the tribe's gaming and hospitality operations recently resulting in a fourteen million buyout of the casino CEO's contract.<sup>196</sup> The tribe's economic departments are regularly subjected to interventions from the tribal council that alter the direction and priorities of economic actions, including the removal of business administrators for evidently political reasons.<sup>197</sup> Failed investments, including the complete loss of \$1.5 million in capital for a proposed casino project in Fiji, have characterized the tribe's most externally-visible attempts at expanding its economic base.<sup>198</sup> The Snoqualmie tribe has an often-contentious relationship with its neighboring non-tribal municipalities, exemplified by the termination of sewer services to the tribal casino by the local city following a protracted utility payments dispute.<sup>199</sup> The disputes have negatively impacted the tribe's economic performance.

In 1999, following federal recognition, the Snoqualmie Tribe rapidly built a system of governance institutions that is comparable to that of the Jamestown S'Klallam in scope and sophistication. However, cooperation among the tribe's informal institutions has been undermined by exceptionally vehement disputes among tribal members. The severity and longevity of these disputes reflect a lack

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<sup>195</sup> Lynda Mapes, *Big Payoff Eluding Troubled Tribe*, THE SEATTLE TIMES, Sept. 26, 2009,

<http://www.seattletimes.com/seattle-news/big-payoff-eluding-troubled-tribe/>.

<sup>196</sup> ICTMN STAFF, *Tribal Council Fight Leads to \$14 Million Buyout of Snoqualmie Casino CEO*, INDIAN COUNTRY TODAY MEDIA NETWORK, Feb. 24, 2011,

<http://indiancountrytodaymedianetwork.com/2011/02/24/tribal-council-fight-leads-14-million-buyout-snoqualmie-casino-ceo-19463>.

<sup>197</sup> Lynda Mapes, *Snoqualmie Tribe Gives Casino Plan Another Look*, THE SEATTLE TIMES, Mar. 18, 2013,

<http://www.seattletimes.com/seattle-news/snoqualmie-tribe-gives-casino-plan-another-look/>.

<sup>198</sup> Shanal Sivan, *Casino License Revoked*, FIGI BROADCASTING CORP., Feb. 10, 2015, <http://www.fbc.com.fj/fiji/26766/casino-licence-revoked->.

<sup>199</sup> *Snoqualmie Tribe Sues City for Discrimination*, SNOQUALMIE VALLEY RECORD, Dec. 16, 2015, <http://www.valleyrecord.com/news/361485131.html>.

of commitment to using institutions, which appear well conceived. The level of social discord within the Snoqualmie Tribe became so destructive that in 2012, the Bureau of Indian Affairs suspended federal funding to the tribe and threatened to initiate a “federal takeover” of the tribe’s governmental affairs.<sup>200</sup> A clear result of the competitive dynamic among the citizens and their informal institutions is the loss of economic potential for the Snoqualmie Tribe, manifested in the direct loss of revenue from failed business operations.

### 3. Case Study Outcomes and Assessments

The most favorable combination of internal conditions for economic growth is for a tribe to achieve advanced formal institutional development and cooperative dynamics among its informal institutions and between its members. The qualitative data utilized in this assessment indicates advanced levels of formal institutional development for both Jamestown S’Klallam and Snoqualmie, significantly different dynamics in their respective informal institutions, and a notable divide between their contemporaneous economic performance outcomes as detailed above. Jamestown S’Klallam exhibits consistent positive outcomes in tribal economic endeavors—so much so that it has been called an “Indian economic miracle” by outside observers.<sup>201</sup> Conversely, Snoqualmie has encountered numerous difficulties in establishing positive outcomes and sustained progress in its economic development activities. The primary difference between these outcomes appears to be the distinctly different cooperative/competitive dynamics among the informal institutions

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<sup>200</sup> Lynda Mapes, *Stalemate puts Snoqualmie Tribe at Risk of Federal Takeover*, THE SEATTLE TIMES, May 27, 2012, <http://www.seattletimes.com/seattle-news/stalemate-puts-snoqualmie-tribe-at-risk-of-federal-takeover/>.

<sup>201</sup> “Indianernes økonomiske mirakelkur”, *Horisont*. DR TV (Jan. 4, 2016) <https://www.dr.dk/tv/se/horisont/horisont-7/horisont-2016-01-04>.

within the tribes, with Jamestown S’Klallam exhibiting broad cooperation and Snoqualmie exhibiting intense competition.

One apparent root cause for the difference in institutional dynamics between the tribes is an inherent source of institutional conflict built into the Snoqualmie tribe’s system of governance, wherein a key formal institution can be usurped to advance the interests of competitive informal groups. Section 3 of the Constitution of the Snoqualmie Tribe of Indians states:

Snoqualmie Tribal membership is a privilege that may be revoked by the General Council for cause as determined by the acts and resolutions of the tribe. The General Council may impose a penalty of full or partial banishment against any enrolled member for good cause in accord with Snoqualmie Tribal tradition or the acts and resolutions of the tribe.<sup>202</sup>

The factors or behaviors that would constitute “good cause” for banishment or disenrollment are not specified. Also undefined are the tenets of the informal institution of “Snoqualmie Tribal tradition” that can be utilized as grounds to remove a member from the community. In practice, the disenfranchisement of Snoqualmie tribal members has not been consistent in either substance or procedure. For some cases, a select group of the membership will vote to remove someone; in others, the nine-member Tribal Council decides the matter.<sup>203</sup> In virtually all cases, those who lose their membership have no formal opportunity to face their accusers or contest the issues with which they are charged.<sup>204</sup> Informal institutional groups advance their own agenda and subvert formal institutions by stripping tribal members of their citizenship (and

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<sup>202</sup> CONST. OF THE SNOQUALMIE TRIBE OF INDIANS, art. II, § 3, <http://www.snoqualmietribe.us/sites/default/files/linkedfiles/constitution.pdf>.

<sup>203</sup> Halverson, *supra* note 192.

<sup>204</sup> CONST. OF THE JAMESTOWN S’KLALLAM TRIBE OF INDIANS, art. II, § 4, <http://www.jamestowntribe.org/govdocs/10-11-14%20Tribal%20Constitution.pdf> (Section 4 of the Constitution of the Jamestown S’Klallam Tribe of Indians provides that “any person who may lose their tribal citizenship is entitled to a hearing before the Tribal Council and to adequate notice of such hearing”).

attendant political rights and economic entitlements) through the partisan application of Section 3 of the Snoqualmie Tribal Constitution. A genealogist who surveyed the Snoqualmie membership described the resultant prevailing dynamic within the tribe: “There isn’t anyone you can trust. The problem is that every one of these people that you’re going to talk to has an agenda. *Every. Last. One* of them.”<sup>205</sup>

For tribes where informal institutions exhibit competitive dynamics, one factor that contributes to negative economic performance is that competitive dynamics themselves consume crucial economic resources. Socio-political infighting absorbs people’s time, energy, creativity, opportunities, and oftentimes capital that could be used more productively for the nation in other economic applications. It is therefore to be expected that competitive institutional dynamics will correlate with reduced economic performance indicators, making the enhancement of trust and cooperation among the citizenry a key priority for tribal leaders to include in their economic development strategies.

Two leadership vignettes from the Jamestown S’Klallam and Snoqualmie tribes illustrate alternative practical manifestations of this concept. In a 2008 interview, Jamestown S’Klallam Chair W. Ron Allen stated: “The ability of tribes to become more self-reliant based on business opportunity has emerged in the last 10 years. Now we are addressing generations of need in our communities, providing housing opportunities, jobs, health care, and education for our people.”<sup>206</sup> That same year the Snoqualmie Tribal Council passed a resolution summarily banishing nine of its tribal members, including the former chairman and previous members of the Tribal Council and their relatives, for alleged “treasonous crimes” that included saying a prayer that offended the current tribal leadership.<sup>207</sup> These respective leadership approaches reflect vastly different levels of trust and cultural match within and among the

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<sup>205</sup> Halverson, *supra* note 192.

<sup>206</sup> RUBY ET AL., *supra* note 105, at 133.

<sup>207</sup> Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian tribes and Tribal Members*, TRIAL AM. INDIAN L. J. 41, 46, (2012).

tribes' populations and their institutions, with the cooperative reciprocity of the Jamestown S'Klallam standing in stark contrast to the competitive interests prevailing within Snoqualmie. Upon reviewing the competitive discord within the latter, anthropologist Jay Miller stated: "There are disputes like this in many tribes, but nothing like what's going on among the Snoqualmie. It's over the top. Incredibly over the top."<sup>208</sup>

The sampling model utilized above to assess political economies of Coast Salish nations can be replicated and applied to analyze selected tribal groups throughout the United States to compare their relative development levels, such as the remainder of the Coast Salish nations, the thirty-nine similarly-situated tribes in Oklahoma, the Plains tribes in the Upper Midwest, and other groupings of tribes with similar structural conditions. The ultimate goal of research regarding tribal political economy should be to contribute to the self-determination of tribal communities as controlled by the communities themselves.<sup>209</sup> For policy analysts and scholars, political economy assessments can provide instructive analysis of institutional structures and dynamics that are producing significant increases in economic development indicators for selected tribes. For tribal leaders, conducting an assessment of their own nation can assist in formulating policies and priorities designed to facilitate the optimum combination of advanced formal institutional development and strong cooperative dynamics among informal institutions, thereby enhancing the tribe's economic growth potential.

*a. From Assessment to Progress: Pathways for Strengthening Tribal Institutions and Citizen Cooperation*

After the members of a nation have assessed the relative state of their institutions and social dynamics and identified areas of need,

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<sup>208</sup> Halverson, *supra* note 192.

<sup>209</sup> Lester-Irabinna Rigney, *Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and Its Principles*, 14 WICAZO SA REVIEW 2, 109-121 (Fall Edition, 1999).

the natural next question is: “How can we do better?” A commonly-heard response in tribal development discussions is “strengthen your sovereignty”, implying an inherent cause-and-effect connection between enhancing a tribal government’s control of resources and improved outcomes for the political economy. Yet, with the differing conceptions of sovereignty espoused by previously discussed indigenous thought leaders such as Deloria, Alfred, and Bruyneel, and with tribes such as the Jamestown S’Klallam and Snoqualmie operating from an equal foundation of sovereignty but realizing dramatically different outcomes, it is clear that sovereignty alone is not the answer. Instead, sovereignty should be understood as a necessary-but-not-sufficient condition for improving the outcomes of a tribal political economy. The power of sovereignty as a catalyst for positive development must be harnessed and applied through effective formal institutions possessing a close cultural match to the informal institutional dynamics within a tribal community. Tribal leaders therefore need to identify practical methods for creating high-functioning institutions that appropriately reflect the values and goals of the people they serve.

For decades, tribes have received development policy recommendations from numerous external sources that, while well-intended, do not reflect or apply to their particular conditions. What is needed is guidance from people who have lived and been leaders in Native American nations, and who have on-the-ground experience with successful development activities. To help obtain and promulgate this guidance, the author hosted a Colloquium focused on Native American sovereignty, development, and human security in May 2015 through the University of Washington’s Jackson School of International Studies.<sup>210</sup> The goal of the colloquium was to provide a forum in which top-level tribal leaders could discuss effective guidance on tribal development. The colloquium presentations described innovative programs and

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<sup>210</sup> See *Sovereignty, Development and Human Security: A Colloquium on United States and Native American Relations*, Program Description, app. b (May 28-29, 2015); See *Sovereignty, Development and Human Security: A Colloquium on United States and Native American Relations*, Program Schedule, app. b (May 28-29, 2015).

strategies for enhancing institutional development and social cooperation within tribal communities.<sup>211</sup>

The colloquium presentations yielded substantial wisdom and practical guidance for Native American development initiatives, illuminating pathways forward for institutional development and enhancing cooperation in tribal communities. Special Trustee Logan highlighted the breadth and fundamental nature of both formal and informal institutions within Native American nations, including institutions centered upon traditional culture, language, and religion.<sup>212</sup> Emphasizing the importance of continual dialogue regarding the performance and interaction of tribal institutions, he stated: “We talk about it because institutions provide individuals opportunities. They also provide choice, so the young Native American right out of the tribal community has choices...The abundance of choice with young Native Americans is the key to building and creating opportunity.”<sup>213</sup>

The presentation by Chairman W. Ron Allen of the Jamestown S’Klallam focused on self-determination and national identity, and discussed pathways for Native American nations to conceptualize and assert their sovereignty for the benefit of their people.<sup>214</sup> He recognized the establishment of sound governance institutions as being of foremost importance: “One of the challenges we have in Indian Country is to examine: is your governmental infrastructure in place before you can even advance your agenda of

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<sup>211</sup> Expanded summaries of selected presentations from the Colloquium are provided in the Appendices, and video recordings and presentation materials for the full Colloquium are accessible at no charge via this website: <http://www.foster.com/resources/events/sovereignty,-development-and-human-security-a-coll?search=colloquium>.

<sup>212</sup> Vincent G. Logan, Special Tr. for Am. Indians, United States Dep’t of Interior, Development Strategies for Tribal Nations Presentation at the University of Washington’s Colloquium: United States and Native American Relations app. c (May 28-29, 2015).

<sup>213</sup> *Id.*

<sup>214</sup> W. Ron Allen, Chairman, Jamestown S’Klallam Tribe, Self Determination and National Identity Presentation at the University of Washington’s Colloquium: United States and Native American Relations app. d (May 28-29, 2015).

self-determination, self-governance, self-reliance, or however you want to characterize your goals for your people?”<sup>215</sup>

Of corresponding importance is establishing the people’s trust in their governing institutions. Chairman Allen noted that for members of the Jamestown S’Klallam, any governmental taking of a person’s rights or property is always preceded by formal due process and the right to appeal the government’s decision. This form of institutional reciprocity is built into the entire breadth of formal governance. “To us, that’s an important element to the integrity of our governmental infrastructure.”<sup>216</sup> Acknowledging the practical changes in the complex adaptive systems of tribal governance over time, Chairman Allen emphasized the ultimate responsibility of tribal leaders to build trust and positive reciprocity with the citizens they represent: “Now you have to be more accountable to the people, because it’s their resources you’re managing.”<sup>217</sup>

President Fawn Sharp of the Quinault Indian Nation provided a succinct political philosophy that embodies the essence of Cornell’s cultural match for tribal institutions: “When you have a body of law, it should reflect the people. Legislative hearings should be regular, routine, and should be based on the current pulse of where your community stands.”<sup>218</sup> The governmental departments at Quinault have citizen participation formalized in their standard operations. “We have a public comment period, so tribal members that are concerned about fisheries, housing, or healthcare know they can come in on a regular basis to provide public comment and their questions are answered.”<sup>219</sup> To ensure the consistent alignment between the nation’s formal institutions and the priorities of the citizens and their informal institutions, Quinault provides direct and readily-accessible methods for tribal members to provide feedback

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Fawn R. Sharp, President, Quinault Indian Nation, Strengthening Tribal Governance and Institutions Presentation at the University of Washington’s Colloquium: United States and Native American Relations app. e (May 28-29, 2015).

<sup>219</sup> *Id.*

on governmental activities. Particular attention is paid to allegations of governmental misconduct. “We created a very simple form [for citizens] - state the policy, state the facts that violated the policy – and we conduct a basic oversight hearing to pursue fact finding. If there’s a need for corrective action, it’s in writing, it’s very clear, it’s very specific.”<sup>220</sup> This transparent method of investigating citizen concerns helps ensure formal institutions at Quinault stay in sync with their informal counterparts.

University of Washington School of Law Professor Ron Whitener, who also serves as Chief Judge for the Tulalip Tribal Court, spoke of the importance of independence and cultural match to align the priorities of formal and informal institutions within tribes.<sup>221</sup> This is particularly crucial for a nation’s legal and law enforcement systems, which have the power to impose the rules of the government upon the lives of the citizens. Tribal governments should develop the capacity to rely primarily on their own tribal law enforcement and probation services, rather than federal or state agencies. Utilizing the tribe’s own personnel provides distinct advantages to the community, including tribal officers who are local to those they are protecting and have more extensive and detailed knowledge of local family ties and dynamics.<sup>222</sup>

To enhance a tribe’s economic development potential, Professor Whitener emphasized the basic and critical step tribal governments can take to establish a legal environment conducive to economic growth. Key provisions in a tribal business code that should apply equally to tribal members and non-members include allowing specific due process before any takings of property or rights; providing ample notice of intent of a taking to the affected parties; giving a full opportunity for impacted parties to be heard prior to a decision; and having legal decisions issued by an impartial but

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<sup>220</sup> *Id.*

<sup>221</sup> Ron Whitener, Executive Director, University of Washington’s Native American Law Center, Sovereignty and Justice–Tribal Law and Court Systems Presentation at the University of Washington’s Colloquium: United States and Native American Relations app. f (May 28-29, 2015).

<sup>222</sup> *Id.*

culturally and community-informed judge.<sup>223</sup> These provisions enhance cultural match with citizens by eliminating opaque and arbitrary governmental decisions that impact the allocation of economic resources. Professor Whitener stated that having clear regulations for business organization and transactions are critical for enhancing economic activity, and tribal sovereignty offers tribal governments the opportunity to expand their development potential by enacting economic codes that are more efficient and advantageous for business than the surrounding state, county, or local regimes.<sup>224</sup>

Advanced formal institutions and cooperative informal institutions can be transformational for tribal economic development. Tulalip Tribal Attorney Lisa M. Koop and Glen Gobin, Vice Chairman of Quil Ceda Village, presented the extraordinary story of the Tulalip Tribes' creation of the Consolidated Borough of Quil Ceda Village (the "Village").<sup>225</sup> The Village is a separately chartered political subdivision of the Tulalip Tribes and one of only two "federal cities" in the United States – the other being Washington D.C. This represents the advancement of a Native American nation's formal political and economic institutions to an entirely new level, so much so that the United States government subsequently passed a specific federal law acknowledging and supporting Tulalip's accomplishment. Following the enactment of the federal Tulalip Leasing Act, 25 U.S.C. §415(b), the Tulalip Tribes have built the Village from vacant land into a thriving reservation economy that in 2014 generated nearly \$400 million in revenue and \$40 million in tax receipts.<sup>226</sup>

The Village is a retail and entertainment destination located adjacent to Interstate 5, approximately forty-five minutes north of

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Lisa M. Koop, Tribal Attorney, Tulalip Tribes, Glen Gobin, Vice Chairman, Quil Ceda Village, Sovereignty and Strategic Economic Development Presentation at the University of Washington's Colloquium: United States and Native American Relations app. g (May 28-29, 2015).

<sup>226</sup> See Appendix G.

Seattle. Over one hundred and sixty businesses operate in the Village, including Cabela's, Home Depot, Wal-Mart, Olive Garden, Coach, Calvin Klein, and Polo – all on tribally-governed land. The Village attracts approximately 60,000 visitors each day, and employs approximately 7,000 tribal citizens.<sup>227</sup> The complex is now a growth engine for the entire regional economy and has spurred substantial economic development on nearby off-reservation lands, with the attendant tax revenues benefitting numerous Snohomish County social programs.<sup>228</sup>

The Tulalip Tribes' creation of the Consolidated Borough of Quil Ceda Village represents a triumph of sustainable economic development for a Native American nation. It is a foremost model for building a comprehensive formal institutional structure for achieving development potential, and cohesively combines governance, legal codes, strategic planning, and economic facilitation. The Village also provides an exceptional level of cultural match between the nation's institutions and citizen priorities, providing gainful employment for tribal members and substantial revenue for funding cultural and social programs. Indeed, it was the mutual trust and cooperation of the Tulalip people that made the Village possible in the first place. Long-time Tulalip Tribal Attorney Michael Taylor, one of the architects of the legal structure underlying the Village, described the philosophical impetus within the tribal community for undertaking the effort: "They were ready - ready to make a positive change."<sup>229</sup>

#### CONCLUSION

The primary priority for a Native American nation in developing its political economy should be advancing the capabilities of its formal governance institutions and strengthening the cooperative

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<sup>227</sup> *Id.*

<sup>228</sup> John Wolcott, *Quil Ceda Village has Blockbuster Potential*, SNOHOMISH COUNTY BUSINESS JOURNAL (May, 2003), <http://www.heraldbusinessjournal.com/archive/tulalip03/quilcedavillage-tulalip03.htm>.

<sup>229</sup> *See supra* note 218.

dynamic within and among its informal institutions. Without high-functioning formal institutions that are supported by the citizens, the potential development benefits of even high-revenue activities such as casino gaming will be significantly constrained. Conversely, tribal nations with advanced formal institutions and strong trust and cooperation among their citizens have increased potential for sustainable development of their political economies, even in the face of structural challenges such as geographic isolation or lack of resources.

The shared experience and wisdom of tribal leaders during the University of Washington Tribal Development Colloquium offers specific guidance for tribal governments seeking to strengthen the institutional and social fabric of their nations. Their recommendations include implementation of:

- A culture of sovereignty awareness within tribal government, driven to protect the rights and traditions of the tribe and its members.
- Governmental policies and priorities that reflect the specific needs and aspirations of tribal citizens, rather than the pursuit of conventional-wisdom economic activities.
- Systems for government-citizen interactions based on transparency and participation.
- Legal codes that embody both contemporary technical expertise and traditional values.
- Dispute resolution methods that are culturally appropriate and fundamentally fair.
- Support for grass-roots cultural activity on the reservation.

The building of tribal formal institutions, coupled with cooperative informal institutions, is the key to economic development success for tribes. The formal and informal institutional actions listed above will enhance the ability of a Native

American nation to maintain and improve its political and socio-economic systems, and help achieve security in its own means of sustainable development. With a political economy built upon that foundation, a tribal nation can support the efforts of its citizens to improve their individual economic and social conditions, including education, employment, health, housing, and other human security elements that improve quality of life.

**APPENDICES***Appendix A: Sovereignty, Development and Human Security-A  
Colloquium on United States and Native American Relations***May 28 - 29, 2015****The University of Washington Intellectual House:  
“wəłəb?altx”****<http://www.washington.edu/diversity/tribal-relations/intellectual-house/>****SPONSORS:**

UW Department of American Indian Studies

Foster Pepper PLLC

UW Jackson School of International Studies

UW Native American Law Center

Northwest Indian Bar Association

WSBA Indian Law Section

Center for Indigenous Research and Justice

Tribal Law and Policy Institute

American Bar Association Section of Individual Rights and  
Responsibilities**PROGRAM DESCRIPTION:**

The United States and Native American nations have a treaty-based, government-to-government relationship with a unique political and legal dynamic of mutual sovereignty. Tribes retain their sovereign status as nations that existed prior to European contact, but limitations have been placed on their sovereignty by the United States Government through armed conflict, treaties, and unilateral policies. Today, numerous areas of human security for Native American communities continue to be significantly impacted by federal agencies, but key indicators of human security for Native Americans such as poverty, employment, and public health have chronically and significantly lagged United States national averages. As a result, many Native American tribal governments are seeking to enhance and exert their sovereignty to obtain greater control over policies and resources affecting governance, economic

development, human rights, cultural heritage, environmental protection, and conditions of health and social justice. This colloquium features recognized experts presenting in-depth information and current perspectives on United States-Tribal relations, their evolving sovereignty balance, and innovative strategies and program for enhancing Native American development and human security. The colloquium program provides topical lectures and panel discussions, with Question & Answer, and networking opportunities throughout the program. An evening reception for speakers and attendees to continue dialogue followed Day One of the program.

Video recordings and presentation materials for the full colloquium are accessible on-line at no charge via this website: **<http://www.foster.com/resources/events/sovereignty,-development-and-human-security-a-coll?search=colloquium>**

## Appendix B: Program Schedule

<b>DAY 1: TRIBAL SOVEREIGNTY, GOVERNANCE, AND DEVELOPMENT</b>		
<b>9:00</b>	<p><b>Opening Blessing</b></p> <p><b>Program Introduction</b></p>	<p>Roger Fernandes (Lower Elwha S’Klallam)</p> <p>Greg Guedel, UW JSIS and Foster Pepper PLLC</p>
<b>9:30</b>	<p><b>Native American Development and US/Tribal Relations</b></p> <p>The United States Special Trustee for American Indians will discuss the continuing challenges and emerging opportunities for effective partnership between the US and Native American nations to facilitate Tribal economic and human security development.</p>	<p>Vince Logan (Osage), US Special Trustee for American Indians; Tyler Fish (Cherokee, Muscogee (Creek)) Special Counsel, US Dept. of the Interior</p>
<b>11:00</b>	<p><b>Self-Determination and National Identity</b></p> <p>This session will focus on the ways Tribal nations conceptualize and assert their sovereignty in external political relationships and for the benefit of their people.</p>	<p>W. Ron Allen, Chairman, Jamestown S’Klallam Tribe</p>
<b>12:30</b>	<b>Lunch</b>	
<b>1:30</b>	<b>Strengthening Tribal Governance and Institutions</b>	<p>Fawn Sharp, President,</p>

	Sovereignty is implemented through Tribal institutions; this session will explore methods for improving the ability of Tribal governing agencies to meet the needs of the people they serve.	Quinault Indian Nation and Affiliated tribes of Northwest Indians; Prof. Laura Evans, UW Evans School of Public Affairs
<b>3:00</b>	<b>Sovereignty and Justice–Tribal Law and Court Systems</b> US policy has significantly limited Tribal sovereignty in law enforcement and jurisdiction, which has resulted in crime rates and related social issues far exceeding the US average. This session will describe how Tribal governments are increasing the control and effectiveness of their legal systems and creating culturally-appropriate judicial and rehabilitation systems.	Prof. Ron Whitener (Squaxin Island), Center for Indigenous Research & Justice and Judge, Tulalip Tribes; Jerry Gardner (Cherokee), Executive Director, Tribal Law and Policy Institute
<b>4:30</b>	<b>Program Adjourns</b>	
<b>5:30</b>	<b>Reception</b>	

<b>DAY 2: ENHANCING NATIVE AMERICAN HUMAN SECURITY</b>		
<b>9:00</b>	<p><b>Political Economy and Human Security in Native American Nations</b></p> <p>This session will discuss how the complex and multi-faceted challenges confronting Tribal communities require both collaborative and locally-designed solutions.</p>	<p>Greg Guedel UW JSIS, Foster Pepper PLLC</p>
<b>9:45</b>	<p><b>Sovereignty and Strategic Economic Development</b></p> <p>The leaders behind the creation of Quilceda Village, the Tulalip Tribes' unique economic development zone and the only "federal city" in the US outside of Washington DC, will describe the conception and implementation of this revolutionary Tribal business development engine.</p>	<p>Glen Gobin (Tulalip) Vice Chairman, Quil Ceda Village; Lisa M. Koop (Moravian of the Thames Band, Delaware Nation) General Counsel, Tulalip Tribes</p>
<b>11:15</b>	<p><b>Establishing a Sovereign Financial System</b></p> <p>This session will describe the landmark effort to create new Tribal Banking Code and Tribal Banking Commission, which will allow Native American nations to access development capital and participate in global commerce under their own sovereign regulatory regime.</p>	<p>J.D. Colbert (Muscogee (Creek)/ Chickasaw) Chair of Economic Development for the Muscogee Creek Nation</p>
<b>11:45</b>	<b>Lunch</b>	
<b>1:00</b>	<b>Pathways for Enhancing Native American Education</b>	<p>Prof. Eric Eberhard,</p>

	<p>This session will highlight the innovative approaches educators are pursuing to attract Native students into college and graduate school and provide them with the tools for academic and professional success.</p>	<p>Seattle University School of Law</p>
<b>1:30</b>	<p><b>Improving Public Health in Native Communities</b></p> <p>The majority of Native Americans reside in urban areas, which presents significant challenges for accessing health services. This session will examine the Indian Health Care Improvement Act and the efforts of the Seattle Indian Health Board over the years to develop a health clinic and programs to serve urban Native Americans.</p>	<p>Ralph Forquera (Juaneño Band of California Mission Indians) Executive Director for the Seattle Indian Health Board and Director of the Urban Indian Health Institute; Millie Kennedy (Tsimshian) Northwest Justice Project; Aren Sparck (Cup'ik), Seattle Indian Health Board</p>
<b>2:30</b>	<p><b>Human Rights and Governmental Ethics</b></p> <p>Discrimination, marginalization, and violence are regular threats to the human security of urban Native Americans. This session explores how governmental agencies can improve the recognition and protection of human rights.</p>	<p>Chris Stearns (Navajo), Seattle Human Rights Commission</p>

<b>3:30</b>	<p><b>Protecting Cultural Heritage and Traditions</b></p> <p>The creation of “Tribal art” is a multi-billion-dollar industry, but much of the trade is in works that are misappropriated from Native cultures. Leaders of the new Washington Indian Arts and Crafts Committee will describe their approach for certifying the authenticity of indigenous artworks and protecting the intellectual property of Native artists.</p>	<p>Jeffrey Smith (Makah), Washington Indian Arts and Crafts Committee; Brian Rowe National Technology Assistance Project Coordinator, Northwest Justice Project</p>
<b>4:30</b>	<b>Program Adjourns</b>	

*Appendix C: Development Strategies for Tribal Nations Vincent G. Logan (Osage), United States Special Trustee for American Indians*

Vincent G. Logan (Osage) was sworn in as the Special Trustee for American Indians on July 7, 2014. Prior to joining the Department of the Interior as the Special Trustee, he served as President of the tribal investment consulting firm The Nations Group, LLC, as a private banker at Merrill Lynch, as a corporate finance attorney at the law firm of Schulte, Roth & Zabel in New York, and as legal counsel in the Antitrust Division of the UNITED STATES Department of Justice.

As an investment professional, a mentor for Native American attorneys, and a member of the Osage Nation, Special Trustee Logan has dedicated his asset management expertise, legal experience, and extensive network of professional relationships to improving development in tribal communities. As UNITED STATES Special Trustee, his office manages Indian beneficiaries' financial assets and is responsible for coordinating reform efforts to improve trust asset management and beneficiary services throughout the federal government. The assets under Special Trustee Logan's supervision consist of 55 million surface acres of land, 57 million acres of subsurface minerals estates, and approximately \$4.9 billion in funds held in trust by the United States for individual Native Americans, tribes and Alaska Natives.

Special Trustee Logan's Colloquium presentation addresses a broad range of historical and current contexts and issues for Native American economies, and highlighted specific areas of need and opportunity for tribal development, sections of which are quoted here:<sup>230</sup>

### 1. Historical Context for Tribal Development

“Let's think about where we were pre-European contact. I think about the term ‘wealth

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<sup>230</sup> *Native American Colloquium: Native American Development and U.S./Tribal Relations*, Foster Pepper PLLC Videos, YOUTUBE, (Jun. 2015) <https://www.youtube.com/watch?v=H9Ru4hVsyJM&feature=youtu.be>.

accumulation'. I've had this discussion a number of times with friends and colleagues about whether or not Native America had wealth accumulation. Many people have told me their opinion that wealth accumulation comes from Europe. It wasn't part of our culture. In fact, I always point out that wealth accumulation - they might be talking about money in the bank, but when I think about wealth accumulation, I think about seeds and grains and furs. There was wealth built on this continent long before the Europeans came here. There was trade, commerce, all documented. So wealth accumulation is not new to us, it did not come from Europe."

## 2. Institutional Development

"I think that as we go forward, people need to look at their tribe and maybe a restructuring of their institutions...Although we talk about institution building, part of it is about the bigger picture of economic development. I focus on the financial institutions, but that's just part of the background. We have cultural institutions, we have language, we have religious institutions in Indian Country - we have the need for more institutions. Why do we talk about it so much? We talk about it because institutions provide individuals opportunities. They also provide choice. So the young Native American right out of the tribal community has choices... The abundance of choice with young Native Americans is the key to building and creating opportunity."

## 3. Access to Capital and Credit

"When we talk about economic development, I always tell all the people that I work with: credit is how the world was built. We are not going to get very far unless we have access to credit."

“The number of laws, regulations, and codes across Indian Country - it’s deep, it’s complex and involves lots of lawyers. We’re missing, however, the business underwriting pieces of that. It’s difficult to get that to move forward.”

#### 4. Professional Training

“I see a shortage of Native American financial professionals. I can tell you that in my experience working with tribes in the private sector and in my role today, we had such a shortage of investment, credit, underwriting professionals, that it’s really one of the barriers we always talk about. Why is that? I think about that all the time, particularly when it comes to accredited professionals, CFAs. We have how many CFAs in the Native American tribes? Three, four...six? That’s shocking to me. That is something we have to work on. Is this because we didn’t experience the industrial age, is this the result of that? I don’t know. But the shortage of credit professionals is very telling.”

#### 5. Capital Investment

“I want to talk a little bit about liquidity here. The White House estimates that Indian Country has liquidity in the last few years of about 3.4 billion dollars, in my office we guesstimate about 4 billion dollars. That’s defined as the tribal settlements, the Cobell settlement, the Keepseagle settlement, now the Land Buy-Back program. I’d say somewhere about 3.5 billion dollars in direct payments to tribes and tribal individuals. My question to Indian Country is: what would the data indicate for us as to new businesses starting? What would the data indicate as to new financial institutions that started or

perhaps financial networks getting started in our area? I think the problem is the answer is very few. The issue is capital flight. This is a well-documented condition in World War II reconstruction era Germany and Japan, and continuing on to Korea. One of the concerns there was whether the dollar that went into the economy stayed. What we're seeing would be 3.4 billion dollars - people are questioning how much has stayed in Indian Country? How much went back out directly - some of it that same afternoon? We know this issue. With the settlements...we have another opportunity, a golden opportunity to create businesses and economic development and wealth."

#### 6. Small Business Development

"A friend told me an interesting story. He works for the tribe in economic development...and he pointed out to me that he couldn't get a haircut on the reservation. The inability to get a haircut. Look at your communities. Look around you. Do you have to go outside of your community to get a haircut? I would say that in many places in Indian Country, that is true... This is the idea of investing in ourselves in Indian Country - it is something that, it's not new. We already have the capability. I know one thing, when I talk to tribal people, many of them tell me they do own businesses. They own the casino. And I point out to them: if you think you own that casino, try to borrow against your interests. The answer is no, you don't own that casino. The tribe owns that casino. What businesses do you own? What businesses do people own on the reservation?"

*Appendix D: Self-Determination and National Identity-Jamestown  
S’Klallam Tribal Chairman W. Ron Allen*

W. Ron Allen has served as Tribal Council Chairman of the Jamestown S’Klallam Tribe since 1977 and as Chief Executive Officer since 1982. He is a member of the Tribe’s Art Board, Hunting/Fishing Committee, Tribal Gaming Commission, and the UNITED STATES Canada/Pacific Salmon Commission. He served four years as President of the National Congress of American Indians, two years as NCAI First Vice President, ten years as NCAI Treasurer, and is currently President of the Washington Indian Gaming Association.

The Jamestown S’Klallam present an extraordinary success story of Tribal economic and community development. Upon obtaining federal recognition in 1981, the Tribe had no land base or other established economic resources, and its full-time organizational staff was comprised of two people. From this “square one” starting point, within one generation the Tribe had created a professional operational structure that is now the model for the national Self-Governance Demonstration Project, and built an economic base that has eliminated on-reservation poverty.<sup>231</sup> Chairman Allen’s leadership from the Tribe’s federal recognition to today provides a unique continuity of experience on how a Native American nation—starting with only the will of its people—can establish high-functioning institutions that serve and enhance the social cooperation and human security of its members.

Chairman Allen’s Colloquium presentation on “Self-Determination and National Identity” provides insights and guidance on numerous crucial areas of Native American development, with particular emphasis on key institutional dynamics, some of which are quoted here:<sup>232</sup>

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<sup>231</sup> See Tribal Self-Determination Act Contracts, Pub L. No. 103-413, 108 Stat. 4250 (1994); See also Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (2000).

<sup>232</sup> *Native American Colloquium: Self-Determination and National Identity*, Foster Pepper PLLC Videos, YOUTUBE, (Jun. 2015)  
<https://www.youtube.com/watch?v=yYTEsJuqYp0&feature=youtu.be>

### 1. Sovereign Philosophy and Collective Support

“You’re a government. Your people are citizens, they’re not members of an association. They’re citizens of a nation. If you believe you’re sovereign, then act like you’re sovereign.”

“It doesn’t matter your size, because sovereignty is sovereignty. If you’re a tribe that represents 350,000 people, that’s sovereignty. If you’re a tribe that represents 50 people, that’s sovereignty. You’re defending the same sovereignty – if one loses their sovereignty, then the others lose their sovereignty.”

“Tribes want our sister tribes to be successful. And so if a tribe doesn’t have a lot of resources and they say: How did you build that, could you give us a design, could you give us the business plan? -- they would, more often than not. They’d say: ‘Here, borrow it, make it’.”

### 2. Citizenship Policies

“Back in the late 80s, we moved from 1/4-blood to 1/8-blood, and then that tripled our numbers. Back then we were developing our governmental infrastructure, which includes the ordinances and committees with jurisdiction over enrollment. When they looked at it, they realized we had enrolled people who weren’t qualified to be enrolled, and we actually had to de-enroll probably a half-dozen people because they didn’t qualify. It was awkward, it was very sensitive, it was very passionate – but we had to do it. It wasn’t for political reasons. For us, the enrollment process is a very sensitive issue. We spend a lot of energy on our rules and due processes and due diligence. So if somebody is applying and we go through our process in terms of ‘do they

qualify' based on close social and economic ties...If the answer is 'No', then we want them to have an appeal process. To us, that's an important element to the integrity of our governmental infrastructure."

### 3. Preparation for Advancement

"One of the challenges we have in Indian Country is to examine: is your governmental infrastructure in place before you can even advance your agenda of self-determination, self-governance, self-reliance, or however you want to characterize your goals for your people? Well, you can always start with your Constitution and fundamental governing documents for your tribe...within those governmental infrastructures you have to have your operations in order. You are exercising your jurisdiction as a sovereign nation. So what is your land use law and codes? Do you have policies in place with regard to every matter that we deal with? As we as nations exercise more authority over our citizens, whether it's civil or whether it's criminal, are our laws and codes and ordinances in place? Have we done our homework? And if not, are we going back to do our homework with regard to it and educate our reservations so that they understand what their responsibilities are, so that you can function as a government? And then that allows you to move forward with regard to all these services and all of these expectations that the tribal community holds."

### 4. Per Capita Revenue Sharing

"It's always been a concern to me...as I watch different tribes and how creative they are with regard to economic development. The issue of per capita is something that has caused me a great deal of concern, and many of my colleagues. Now some

people would say: Don't touch that, don't talk about that – per capita is what we're entitled to. I would make the case - and I'm not against per capita - but what I am saying is where does it fit into your priorities? Have you taken care of all the essentials in the community before you even cross that threshold? That's my feeling. If per capita becomes the priority, then your ability to take care of future generations - the seven generations concept - is curtailed. Your politics is changed by per capita. How much money will you put in my pocket before I vote for you? I want you to put money in my pocket, plus I want you to take care of my education. I want you to put money in my pocket, plus I want you to take care of my healthcare. You can't have both. Tribes' ability to have disposable revenue to advance their agenda and maintain their responsibilities as a community is relative to that. Is it in balance?"

#### 5. Next-Generation Leadership:

“Success breeds higher expectations...what are tribes doing to develop their own makers of their success, and ways to determine whether or not they're effectively making progress? Are they making progress or are they losing ground? New leadership has to emerge, they have to know exactly who you are and what you're about. Their roots aren't necessarily the same as the roots of the previous generation. They have to be accountable to the people. And that's one of the things about governments: now you have to be more accountable to the people because it's their resources that you're managing. A good question for [leaders] to examine with our tribes, with different kinds of measurements, is to examine how well that they're

performing and how well they're meeting their goals or their objectives."

*Appendix E: Strengthening Tribal Governance and  
Institutions-Quinault Indian Nation President Fawn R. Sharp*

Fawn R. Sharp is the President of the Quinault Indian Nation in Taholah, Washington. Her prior positions included serving as the Nation's Managing Attorney and lead counsel; Administrative Law Judge for the Washington State Department of Revenue; Quinault Tribal Court Judge, and Counsel for the law firm of Phillips, Krause & Brown.

Beyond her service with the Quinault Nation, President Sharp has held numerous leadership positions in both tribal and non-tribal institutions and organizations. She was appointed by Washington State Governor Gary Locke to serve as Trustee for Grays Harbor College, has served as an elected Governor and Trustee of the Washington State Bar Association, is a Founding Member for the National Intertribal Tax Alliance, and is the current President of The Affiliated Tribes of Northwest Indians.

Under President Sharp's leadership, the Quinault Nation has created and participated in numerous innovative programs to enhance the development opportunities and quality of life for its citizens, including:

- Hosting events for the United Nations Permanent Forum on Indigenous Issues;
- Early participation in the Cobell Settlement Land Buy-Back program;
- Establishing an international carbon credits access platform;
- Partnering with NASA for on-reservation global climate tracking stations.

The foundation for these advanced activities is the Nation's strong and consistent system of tribal institutions, which are recognized nationally and internationally as a model for efficient and effective governance.

President Sharp's Colloquium presentation "Strengthening Tribal Governance and Institutions" gives details on the philosophy underlying the Quinault Nation's institutional structure, and how political and administrative processes are designed to maximize credibility and functionality, some of which are quoted here:<sup>233</sup>

### 1. Institutional Philosophy

"When you have a body of law, it should reflect the people. Legislative hearings should be regular, routine, and should be based on the current pulse of where your community stands – and how we can legislate laws and policy to make the governing structure stronger. It's for the public. We reached out to 200 tribal citizens for our strategic plan, and it's my goal to ensure citizens have a role in the planning and decision making and the oversight piece – the full cycle of governance."

### 2. Addressing Citizen Concerns

"There's a process and procedure for how to engage the Council if things appear to be 'going south'. We've learned that if we don't have that process, that mechanism, then things lead up to the Tribal Council level...pretty soon they're on the floor of the General Council...sometimes it's the subject of a petition. It gets ugly, it takes on a life of its own - we don't like that. So we created internal processes to ensure that we can effectively govern through our legislative body to provide oversight."

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<sup>233</sup> Native American Colloquium: Strengthening Tribal Governance and Institutions, Foster Pepper PLLC Videos, YOUTUBE, (Jun. 2015) <https://www.youtube.com/watch?v=3yyKWNjqtek&feature=youtu.be>.

“We ensure there’s a bright line between Tribal Council and administrative staff. When we have citizen complaints that staff aren’t following the laws, we don’t pick up the phone and give orders or directions to staff, we conduct an oversight hearing. We created a very simple form [for citizens] - state the policy, state the facts that violated the policy – and we conduct a basic oversight hearing to pursue fact finding. If there’s a need for corrective action, it’s in writing, it’s very clear, it’s very specific.”

### 3. Departmental Accountability

“On a quarterly basis, we conduct regular oversight hearings. We have a performance section for each department. We have a financial section – are you staying within budget? If you’re above budget, what’s the justification? We have a public comment period, so tribal members that are concerned about fisheries, housing, or healthcare know they can come in on a regular basis to provide public comment and their questions are answered.”

“We also have both staff and elected officials in the [oversight hearing] room at the same time. Otherwise tribal citizens will be sent to staff, to Councils...they feel like they are in a revolving door. So having everyone in the room at the same time is something we’ve done to strengthen our legislative body.”

### 4. Governmental Administration:

“One recommendation that will really strengthen tribal nations is an administrative body of law. A tribe that has a regular, consistent body of administrative procedures like the Administrative

Procedures Act.<sup>234</sup> We have codes and we have staff procedures, but there's no comprehensive body of law from which we can provide consistency. For resolving disputes among our various departments – we have 27 Committees, Commissions, and Boards; we have employees in six different Departments – a lot of their administrative procedures are ad hoc. There are vacuums in some departments. So we are adopting an administrative procedures act and an administrative law judge and a system for resolving disputes within the administrative structure. It's another measure to insulate the administrative body from the political body.”

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<sup>234</sup> Administrative Procedure Act, 5 U.S.C., Subchapter II (2004).

*Appendix F: Sovereignty and Justice-Tribal Law and Court Systems*  
*Professor and Squaxin Island Tribal member Ron Whitener*

Professor Ron Whitener (Squaxin Island) is the Executive Director of the University of Washington’s Native American Law Center and Director of the Tribal Court Public Defense Clinic, serves as Chief Judge of the Tulalip Tribal Court, and is President of the Center for Indigenous Research and Justice. In 2011, President Obama honored Professor Whitener as a “Champion of Change” for his leadership in closing the justice gap within American society.

A 1994 graduate of the UW School of Law, Professor Whitener worked first as a tribal attorney for the Squaxin Island Tribe where he represented the tribal government in treaty rights defense, gaming and enterprises, and infrastructure development. He later worked at the Northwest Justice Project's Native American Unit in Seattle, and headed the Indian Law Clinic at the UW School of Law. In 2008 he was awarded a MacArthur Foundation Models for Change grant to identify strong programs and areas of need for Washington State tribal juvenile justice programs.

Professor Whitener’s Colloquium presentation identifies specific areas where tribal governments can enact policies and legislate codes to strengthen their legal systems. He highlights two conceptual sectors for building capacity and functionality within a tribal legal system: (1) “personal legal security”, which enhances the nation’s ability to effectively handle social concerns, and (2) “economic legal security”, which strengthens a nation’s ability to produce sustainable economic growth. Key sections from Professor Whitener’s presentation are provided here:<sup>235</sup>

### 1. Personal Legal Security

Criminal Law Codes and Systems: Tribal governments should develop the capacity to rely primarily on their own tribal law enforcement and probation services, rather than federal or state

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<sup>235</sup> Native American Colloquium: Sovereignty and Justice - Tribal Law and Court Systems, Foster Pepper PLLC Videos, YOUTUBE, (Jun. 2015)  
<https://www.youtube.com/watch?v=WJUKZqnJkA&feature=youtu.be>

agencies. Utilizing the tribe's own personnel provides distinct advantages to the community:

- Tribal officers are local to those they are protecting;
- More extensive and detailed knowledge of local family ties and dynamics; and,
- Greater understanding of best responses to “frequent flyers”.

Tribal criminal codes should be reflective of cultural and community priorities:

- Tribal codes can allow alternatives to incarceration for non-violent crimes;
- Treatment and sober living requirements can be built into the resolution options;
- Provide for community accountability for individual actions;
- Tribes can provide right to counsel for low-income defendants;
- Protect against governmental over-reach by federal/state agencies; and,
- Help eliminate bias against Native American defendants in a non-tribal judicial system.

## 2. Mitigating Recidivism

With the United States currently incarcerating the largest prison population in the world, many of whom have multiple convictions over time, tribes have an interest in developing systems that can help at-risk individuals find constructive life actions and stay clear of legal troubles. Numerous initiatives have proven beneficial in tribal communities, including:

- Access to treatment for chemical dependency, mental health, and medical issues;
- Counseling and treatment for domestic violence and sexually aggressive behaviors;

- Life skills training for obtaining employment and managing health/welfare issues; and,
- Harm reduction oversight, including regular review of personal coping strategies.

### 3. Domestic Violence Protection

Tribal communities are plagued by domestic violence at a far higher rate than the United States average, and the extreme rates of abuse against Native American women spurred the federal government to renew and expand the Violence Against Women Act in 2013.<sup>236</sup> Tribal governments can help reduce domestic violence by empowering and encouraging their courts to utilize preventative tools that have proven effective, including:

1) Domestic Violence Protection Orders, which provide legal protection and physical security measures to safeguard family members from violence by other family members. Enabling Tribal Courts to issue DV protection orders backed up by Tribal Police enforcement increases the security and efficiency of domestic violence prevention, and:

- Allows local and faster law enforcement response;
- Leverages local law enforcement familiarity with the community; and,
- Enables the legal system to work with the DV advocacy system to maximize protections.

2) Anti-Harassment/Restraining Orders, which provide legal protection and physical security measures to safeguard tribal citizens from violence/harassment within non-intimate/non-family relationships. The ability of tribal members to obtain legal protection such as no-contact orders can help reduce community violence by:

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<sup>236</sup> Fact Sheet: The Violence Against Women Act, [https://www.whitehouse.gov/sites/default/files/docs/vawa\\_factsheet.pdf](https://www.whitehouse.gov/sites/default/files/docs/vawa_factsheet.pdf) (last visited Oct. 15, 2016).

- Heading off festering disputes and allowing a cool-down period; and,
- Leveraging local law enforcement community knowledge to take preventative actions (e.g. monitoring community gatherings where abusers might contact victims).

To be effective, these legal protections must also be readily accessible to tribal members who likely do not have the financial means to retain attorneys to petition the Tribal court to issue an order. Tribal governments and/or Tribal Courts must therefore provide simple and affordable methods for citizens to obtain the protection they need, and should consider creating and widely publicizing a dedicated advocacy office that provides low/no cost access to the Tribal Court to obtain protection orders.

#### 4. Family Law and Child Protection

Family law is a formal institution that relates directly to primary informal institutions within a tribe, and tribal communities have the same broad and constant need for an effective family law system as any other population. The horrific legacy of the boarding and forced adoptions of Native children illustrates the critical need for effective tribal systems for dealing with inter-family legal issues, particularly regarding the welfare of children. Establishing comprehensive family law and child protection codes is a fundamental responsibility for tribal governments, and offers many advantages for their citizens:

- Allows divorce in courts knowledgeable about tribal trust property issues;
- Tribal Courts have more direct knowledge of the parties and family dynamics;
- Opportunities for traditional peacemaking (assuming no domestic violence);
- Tribal courts can order long-term relative guardianships over termination of parental rights;

- Can use tribal social services to increase assistance to parents and support reunification; and,
- Enables parents to regain custody from guardianships after establishing parental fitness.

### 5. Protecting Vulnerable Adults

Just as children need legal protection from neglect and abuse, so too do elderly adults who may be partially or completely reliant upon the care of others for their life needs. As the population of elderly citizens continues to grow, tribal governments and courts need to institute legal codes and processes - again with ready access for low-income members - to:

- Improve access to family support systems for elderly and disabled adults;
- Utilize familiarity with the parties and family dynamics to provide appropriate care structures;
- Engage tribal services to maintain vulnerable adults in the least restrictive environment;
- Help maximize resources from the Indian Health Service and tribal agencies; and,
- Encourage family involvement in their elders' lives.

### 6. Economic Legal Security

**Takings Protections:** A significant barrier to economic growth in Native American nations is a lack of understanding, both outside and within the tribal community, of how tribal sovereignty impacts economic rights and the conduct of business on the reservation. A basic and crucial step tribal governments can take to establish a legal environment conducive to economic growth is to enact property takings protections within their Tribal Code, along the lines of those set forth in the Fifth Amendment to the US Constitution. Key provisions that should apply equally to tribal members and non-members include:

- Allowing specific due process before any takings of property or rights;
- Providing ample notice of intent of a taking to the affected parties;
- Giving a full opportunity for impacted parties to be heard prior to decision;
- Decisions issued by an impartial but culturally and community-informed judge.

### 7. Business Codes

Having clear regulations for business organization and transactions are critical for enhancing economic activity, and tribal sovereignty offers tribal governments the opportunity to enact codes that are more efficient and advantageous for business than the surrounding state/county/local regime. Important code elements for fostering economic activity include:

- Contract litigation/mediation provisions, designed to resolve disputes fairly and quickly;
- Recourse for tort claims, with damages limits linked to insurance coverage maximums;
- Systems for permitting of commercial activities under tribal law; and,
- Tribal Uniform Commercial Codes, setting processes for credit and security.

### 8. Zoning and Land Use

The confusing “checkerboard” of on-reservation property status (trust land, non-trust tribal land, fractionated allotments, private fee simple parcels, etc.) creates a challenge for land-based business activities. Tribal governments can help alleviate the confusion and promote beneficial growth by enacting land use regulations that clarify where/how business can be conducted and:

- Provide consolidation of similar business activities in appropriate locations;

- Protect personal security by limiting commercial activity in residential areas; and,
- Enhance security for outside interests to do business on-reservation.

### 9. Protection of Wealth

An important driver for economic development is the ability to maximize the utility of available wealth, be it monetary, land, or other resources. In tribal nations, much wealth has been effectively frozen by an inability of members to access collective resources like tribally-owned real property, or leverage trust payment or other income for capitalization of business activities. Tribes can unlock the development power of trust-asset wealth by enacting codes that offer:

- Increased flexibility to use individual trust resources, e.g. land and resource royalties;
- Supervised permission to leverage tribal trust lands for business and community use;
- The ability to use per-capita payments as collateral for business loans from the tribe.

*Appendix G: Sovereignty and Strategic Economic Development—  
Glen Gobin: Tulalip Tribal Vice Chairman, Quil Ceda Village, and  
Lisa M. Koop (Moravian of the Thames Band, Delaware Nation),  
Tulalip Tribe Office of Reservation Attorney*

Lisa M. Koop, Tulalip Tribal Attorney, and Glen Gobin, Vice Chairman of Quil Ceda Village together presented the extraordinary story of the Tulalip Tribes' creation of the Consolidated Borough of Quil Ceda Village (the "Village").<sup>237</sup> The Village is a separately chartered political subdivision of the Tulalip Tribes and one of only two "federal cities" in the United States – the other being Washington D.C.<sup>238</sup> Following the enactment of the federal Tulalip Leasing Act, the Tulalip Tribes have built the Village from vacant land into a thriving reservation economy that in 2014 generated nearly four hundred million dollars in revenue and forty million dollars in tax receipts.<sup>239</sup>

The Village is a regional retail and entertainment destination located adjacent to Interstate 5, approximately forty-five minutes north of Seattle. Over one hundred and sixty businesses operate in the Village, including Cabela's, Home Depot, Wal-Mart, Olive Garden, Coach, Calvin Klein, and Polo – all on tribally-governed land. The Village attracts approximately 60,000 visitors each day, and employs approximately 7,000 tribal citizens. The Village is an economic boon to the entire Snohomish County economy and has spurred substantial economic development on nearby off-reservation lands, including a shopping mall and hotel, with attendant tax revenues.

In the mid-1990s, Tulalip began to devise a master plan to diversify Tulalip's economy, to attract visitors to the reservation, to provide a tax base to generate revenues for services, and to create employment for tribal members. In 2000, the Tribes chartered the

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<sup>237</sup> Native American Colloquium: Sovereignty and Strategic Economic Development, Foster Pepper PLLC Videos, YOUTUBE, (Jun. 2015) <https://www.youtube.com/watch?v=Ek5lovOnIr0&feature=youtu.be>.

<sup>238</sup> *About Us*, QUIL CEDA VILLAGE, <http://www.quilcedavillage.com/AboutUs> (last visited Oct. 15, 2016).

<sup>239</sup> *Id.*

Consolidated Borough of Quil Ceda Village, a municipal corporation comprising 2,163 acres of trust lands.<sup>240</sup> The Tribes' governing body delegated to the Village Council broad governmental powers, including the power to levy taxes. Through this ground-up institutional development initiative, the Tulalip Tribes transformed a vacant parcel of tribal trust lands into a self-governing municipality and economic engine that is organized, financed, managed, and serviced exclusively by the Tribes and the Village.

To create the infrastructure to support economic development, the Tribes designed and constructed roads, sidewalks, and parking areas; traffic control, signage, and lighting; an electrical substation and electrical lines; freshwater, wastewater, and storm-water systems; water reservoirs and pumping stations; a state-of-the-art sewage treatment facility; fire hydrants and an irrigation system; natural gas lines; and data and telecommunications lines. The Tribes managed and completed these projects without an outside developer, instead using tribal staff, employing dozens of tribal members and their businesses, and investing tens of millions of dollars in tribal funds leveraged with a general government operations loan guaranteed by the Bureau of Indian Affairs.

Under tribal laws approved by the Secretary of the Interior, Tulalip comprehensively regulates all aspects of the leasing of trust lands within the Village, including the permitted uses of leased lands; lease and rental payment procedures; rental rates, including appraisals and formulas for calculating and adjusting rates; performance bond, insurance, and indemnification requirements; lease duration; mandatory lease provisions; assignment, encumbrance, and subleasing; administration fees; ownership of improvements; dispute resolution and tribal court jurisdiction; environmental review and protection, including water and air pollution; and taxation.<sup>241</sup> Village lessees are subject to comprehensive tribal codes that support economic activity by regulating, *inter alia*, land use and zoning; building and

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<sup>240</sup> *Id.*

<sup>241</sup> Tulalip Tribal Codes, Title 1 *et seq.*, (2016)  
<http://www.codepublishing.com/wa/Tulalip>.

construction; business licensing; building and fire safety inspections; traffic; signage; right to work; tribal and Indian hiring and contracting preference; rights of way and easements; health and safety; food service; sanitation; liquor sales; noise and animal control; solicitation; civil and environmental infractions; transient accommodation; and tort liability.<sup>242</sup>

The Tribes and the Village also provide all tribal and many federal government services within the Village. These services include full-time police protection by tribal officers who hold general peace officer authority under State law and are cross-deputized as Snohomish County officers; traffic control; parking; fire protection; emergency medical and 911 services; food safety and health inspections; water supply and transmission services; sewer, storm-water, and wastewater services; garbage and debris collection and disposal; road and sidewalk maintenance and snow removal; landscaping and maintenance of common areas; pest control; phone, internet, and cable television services; utility services and maintenance; and a civil court system for the resolution of disputes arising within the Village.

The Tulalip Tribes' creation of the Consolidated Borough of Quil Ceda Village represents a triumph of sustainable development for a Native American nation. It is a foremost model for building a comprehensive institutional structure for achieving development potential, and cohesively combines governance, legal codes, strategic planning, and economic facilitation. The Village also provides an exceptional level of cultural match between the nation's institutions and citizen priorities, providing gainful employment for tribal members and substantial cash for funding cultural and social programs. Indeed, it was the mutual trust and cooperation of the Tulalip people that made the Village possible in the first place. Long-time Tulalip Tribal Attorney Michael Taylor, one of the architects of the legal structure underlying the Village, described the philosophical impetus within the tribal community for undertaking the effort: "They were ready - ready to make a positive change."

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<sup>242</sup> *Ordinances*, QUIL CEDA VILLAGE, [http://www.quilcedavillage.org/qcv\\_ordinances.asp](http://www.quilcedavillage.org/qcv_ordinances.asp) (last visited Oct. 15, 2016).