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MORTGAGE LENDING ON TRIBAL LANDS: FEDERAL FAIR LENDING PROTECTIONS, PUBLIC-PRIVATE PARTNERSHIPS, AND TRIBAL SOLUTIONS FOR INCREASING ACCESS TO MORTGAGE CREDIT ON TRIBAL LANDS

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MORTGAGE LENDING ON TRIBAL LANDS: FEDERAL FAIR LENDING PROTECTIONS, PUBLIC-PRIVATE PARTNERSHIPS, AND TRIBAL SOLUTIONS FOR INCREASING ACCESS TO MORTGAGE CREDIT ON TRIBAL LANDS.

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I. Introduction

Of the 5.2 million American Indians and Alaska Natives,[2] approximately 60% live on or near reservation land.[3] According to the Federal Reserve, there is a "strong and unmet demand for homeownership" among this population.[4] In 2016, just 52.9% of all Natives were homeowners, while 75.0% report a strong desire to own their home.[5] Additionally, concerns about chronic housing shortages, quality of available housing, and overcrowded living conditions on tribal lands suggest additional demand for new investments in private homes in Indian Country.[6] According to the National Congress of American Indians:

> "[t]he ability of a tribal nation to fully exercise its sovereignty in order to achieve social, cultural, and economic prosperity depends to a large degree on the ability of the individuals and families who make up that nation to achieve self-sufficiency. Homeownership represents a vital pathway in that pursuit, yet across Indian Country it is underutilized, poorly resourced, and not fully understood."[7]

Furthermore, federal law requires mortgage lenders to lend without regard to a person's race, national origin, or a variety of other protected characteristics.[8] Lenders are held to this standard under Title VII, the Equal Credit Opportunity Act (ECOA), and the Fair Housing Act (FHA). As will be discussed below, these laws were designed to enable access to credit regardless of a person's race, whether through disparate treatment or disparate impact. However, tribal governments have largely failed to establish standing in order to bring these cases in federal court, and the federal agencies responsible for enforcing these laws have done little to encourage lenders to follow them.

Alongside the ECOA and FHA are a variety of mortgage regulations, many created in the wake of the 2007-2008 financial crisis, designed to reduce risk in the mortgage market. One of the causes of the crisis was rampant lending by banks to consumers who could not afford to repay their loans.[9] While this concept may seem counterintuitive (why would a bank intentionally make

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[2] A note on terminology: the terms 'American Indian' and 'Native American' are used interchangeably. See *What is the correct terminology: American Indian, Indian, Native American, or Native?*, National Museum of the American Indian, https://americanindian.si.edu/nk360/faq/did-you-know [https://perma.cc/8RXT-ER6P] (last visited Nov. 20, 2020).

[3] Ed. Patrice H. Kunesh, *Tribal Leaders Handbook on Homeownership*, Center for Indian Country Development, (2018) at 3, https://www.minneapolisfed.org/~/media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en [https://perma.cc/73R9-GZNL].

[4] *Id*. At 4-5.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 10.

[8] *See* 12 C.F.R. Part 1002 - Equal Credit Opportunity Act (Regulation B), *available at* https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/ [https://perma.cc/ZN4E-WPTE].

[9] Erin Coghlan, Lisa McCorkell, and Sara Hinkley, *What Really Caused the Great Recession?*, Univ, of Cal. Berkeley Inst. for Res. on Lab. and Employment (Sept. 19, 2018), https://irle.berkeley.edu/what-really-caused-the-great-recession/ [https://perma.cc/A99U-TNFG].

a loan that it knows will not be repaid?), the secondary market for mortgages allowed banks to package mortgages into so-called "mortgage backed securities," which were sold to investors.[10] The originating banks were able to realize their profits, while passing on the risks (and ultimately the losses) to investors, who previously relied on mortgages as a safe investment.[11]

In order to prevent a future crisis, Congress created the Consumer Financial Protection Bureau (CFPB) ("the Bureau"), as a part of the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act.[12] The CFPB began enacting mortgage rules shortly thereafter that required numerous safeguards like assessing a borrower's "ability to repay" the loan and ensuring that mortgages were secured by an appropriate lien on the property.[13] These, and other federal regulations that came before them, are critical to ensuring the stability of the housing market and the broader economy – their importance cannot be overstated. However, one secondary effect is the difficulty these rules created for lending on tribal lands.

While a lien could theoretically be placed on a home on tribal land, it is the enforcement of that lien that is problematic.

> [T]he laws of tribal sovereignty as it has developed in the federal courts and by federal statutes, executive orders and treaties over the last two centuries . . . tribes cannot be sued absent their express consent or a waiver of their immunity . . . The confusion is compounded by the variety of ways in which land in Indian Country may be owned or held, and the nature of the particular tribal, federal or state interests that may be involved. In brief, it is often difficult for a nontribal entity to know with whom it is dealing, with whom it is best to deal, and with what it is dealing.[14]

To begin to understand the issues surrounding fair lending to consumers residing on tribal lands, it is important to understand several different, and extremely niche, areas of law, including 1) federal fair lending laws; 2) mortgage regulation and the secondary market; and 3) constitutional jurisprudence as it relates to tribal sovereignty. These three areas of law have great potential to contradict each other and finding a way to conform with all three requires a broad knowledge base. This presents another obstacle to lenders who are interested in serving tribal customers; only the most sophisticated lenders will be able to understand how to do so while complying with such a complex web of rules.

Much of the tribal land in the U.S. cannot be repossessed, and therefore prevents lenders from adequately securing a mortgage loan with a lien – if a consumer defaults the lender may not have any recourse. While lenders face legitimate obstacles to lending on tribal land, choosing to

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[10] *Id.*
[11] *Id.*
[12] Pub.L. 111–203, July 21, 2010.
[13] *What is a Qualified Mortgage?*, CONSUMER FINANCIAL PROTECTION BUREAU (Aug. 1, 2017), https://www.consumerfinance.gov/ask-cfpb/what-is-a-qualified-mortgage-en-1789/ [https://perma.cc/B4RZ-GBY7].
[14] Sue Woodrow, *Tribal sovereign immunity: An obstacle for non-Indians doing business in Indian Country?*, FEDERAL RESERVE BANK OF MINNEAPOLIS (July 1, 1998) https://www.minneapolisfed.org/article/1998/tribal-sovereign-immunity-an-obstacle-for-nonindians-doing-business-in-indian-country [https://perma.cc/7X44-DLK5].

avoid lending on tribal lands altogether could result in a disparate impact (discussed in greater detail below) for Native Americans / American Indians.

This paper seeks to outline the obstacles for lenders, borrowers, regulators, and tribal governments; to present the solutions implemented through public-private partnerships and independently by tribal governments to work around these obstacles; and to weigh the benefits and drawbacks of such approaches for each group of stakeholders.

II. MORTGAGE LENDING

A. The Mortgage Market

The social and economic benefits of homeownership are broadly valued in the United States. Nationally, more than 65% of Americans own their homes.[15] Homeowners' median net worth in the U.S. is eighty times that of renters' median net worth. [16] Home equity is the largest portion of most Americans' net worth, representing more than one third of total wealth.[17] However, many of these benefits are realized at different levels in different demographic groups. For example, approximately three-quarters of non-Hispanic White families own their homes (74% at the end of 2019), compared to 44% of African Americans, 48% of Hispanics, and 58% of other racial and ethnic groups.[18] The U.S. Census Bureau estimated homeownership rates for Native Americans / American Indians at approximately 53% as of 2016 – more than 20% less than the rate for non-Hispanic White families. [19] [20]

Given the economic advantages of home ownership, it is easy to understand how lower rates of home ownership for an entire racial group can have lasting intergenerational impacts, including preventing the accumulation of wealth and access to education. It is therefore important to ask what is causing the difference in home ownership rates. Do entire racial groups hold a preference to rent rather than own? Are there purely economic barriers to homeownership? If these barriers are indeed purely economic, what could be causing them? Are certain groups intrinsically less capable of accumulating the wealth necessary to purchase a home or could broader and systemic discrimination be a factor?

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[15] *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019*, U.S. CENSUS BUREAU (Jan. 30, 2020), *available at* https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/YA26-FM55].
[16] Jonathan Eggleston and Donald Hays, *Many U.S. Households Do Not Have Biggest Contributors to Wealth: Home Equity and Retirement Accounts*, U.S. CENSUS BUREAU (Aug. 27, 2019), https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html [https://perma.cc/CUY2-H3CL].
[17] Jonathan Eggleston and Robert Munk, *Net Worth of Households: 2015*, U.S. CENSUS BUREAU, May 2019, *available at* https://www.census.gov/content/dam/Census/library/publications/2019/demo/P70BR-164.pdf [https://perma.cc/CN2L-QCTV].
[18] *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019*, U.S. CENSUS BUREAU, Jan. 30, 2020, *available at* https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/HS8G-6FB3].
[19] *Supra* note 3 at 4-5.
[20] *Securing Homeownership for Native Americans*, PROSPERITY NOW (Nov. 6, 2018), https://prosperitynow.org/blog/securing-homeownership-native-americans [https://perma.cc/R4A3-D5WV].

B. The Role of the Secondary Market

Very few people can afford to buy a home outright and most will rely on mortgage financing to do so (86% of homebuyers financed their home purchases in 2019).[21] Most home financing is done through mortgages, in which a bank or other lender places a lien on the property, using the land and structure as collateral until the loan has been paid in full. This lien allows the bank to take possession of a property if the homeowner fails to pay the loan.[22]

In the U.S. the majority of loans are sold to a government-sponsored enterprise (GSE) or other investors within a year of being originated.[23] A GSE is a type of financial services corporation created by Congress and designed to ensure a constant flow of credit to targeted sectors of the economy. [24] This structure helps markets operate more efficiently by reducing the risk to investors and other suppliers of capital.[25] Well known GSEs include the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac").[26]

To streamline this process and ensure consistent liquidity in the mortgage market, federal regulators have developed guidelines for "conforming" mortgage loans and "qualified mortgages" (QM).[27] These two concepts share some overlapping characteristics but the intricacies of how they work together is beyond the comprehension of all but a handful of experts. To make a loan that can easily be sold on the secondary market, lenders will generally try to comply with both requirements.

1. Conforming Loans

A conforming loan is one that can be bought by the GSEs and other investors with minimal scrutiny of underwriting standards and supporting documentation.[28] [29] Conforming loans generally have to comply with certain loan limits, loan terms, fee limits, and other underwriting criteria.[30]

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[21] *2019 Profile of Home Buyers and Sellers*, NAT'L ASS'N OF REALTORS, Nov. 7, 2019, *available at* https://www.nar.realtor/sites/default/files/documents/2019-profile-of-home-buyers-and-sellers-highlights-11-07-2019.pdf [https://perma.cc/FW2F-UJYU].
[22] See, e.g., Dock David Treece, *Liens: What They Are And How They Work*, FORBES (Sept. 22, 2020), https://www.forbes.com/advisor/mortgages/liens-what-they-are-and-how-they-work/ [https://perma.cc/64WQ-CA3K].
[23] N. Eric Weiss and Katie Jones, *An Overview of the Housing Finance System in the United States*, CONGRESSIONAL RESEARCH SERVICE, (Jan. 18, 2017), *available at* https://fas.org/sgp/crs/misc/R42995.pdf [https://perma.cc/R42B-ZGJB].
[24] *Id.*
[25] *Id.*
[26] Lemke, Lins and Picard, Mortgage-Backed Securities, Chapters 1 and 2 (Thomson West, 2013 ed.).
[27] N. Eric Weiss and Katie Jones, *An Overview of the Housing Finance System in the United States*, CONGRESSIONAL RESEARCH SERVICE (Jan. 18, 2017), *available at* https://fas.org/sgp/crs/misc/R42995.pdf.
[28] *Id.*
[29] Alena Savchenko, *Conforming vs. Non-conforming Loans: Which Is Best for You?* PENNYMAC LOAN SERVICES LLC (Dec. 10, 2019), https://www.pennymacusa.com/blog/conforming-vs-non-conforming-loans [https://perma.cc/V326-GN5A].
[30] *Id.*

One major advantage of a conforming loan for the consumer is a lower interest rate.[31] While it is possible for a financial institution to make a non-conforming loan, the interest rate is likely to be higher (and therefore more expensive for the consumer) and it will be harder for the lender to sell the loan on the secondary market.[32] This means that if a lender decides to make one of these loans, they need to be prepared to "hold the loan in portfolio" and therefore remain liable for the risk of the consumer defaulting on the loan.[33]

2. Qualified Mortgages under the Truth in Lending Act (Regulation Z)

A qualified mortgage is defined by the Ability to Repay/Qualified Mortgage (ATR/QM) rule, part of Regulation Z[34] (also called the Truth in Lending Act (TILA)).[35] [36] The purpose of the QM rule is to ". . . promote the informed use of consumer credit by requiring disclosures about its terms and cost . . . [and] prohibit[] certain acts or practices in connection with credit secured by a dwelling . . ."[37] Specifically, the CFPB's QM regulation requires lenders to verify a borrowers' ability to repay, and includes safe harbor protection for loans with certain features, including a maximum 43% debt-to-income (DTI) limit.[38] The rule also included a provision that allowed all mortgages backed by Fannie and Freddie to get QM status, even with a higher DTI ratio.[39] [40] This concept has been referred to as the "QM patch" (which allows mortgages backed by the GSEs to get QM status) and although it was set to expire in January 2021,[41] the patch has been extended.[42]

One of the requirements for these types of loans is a lien on real property that would allow the lender (or servicer) to take possession of the property in event of foreclosure on the loan.[43] [44]

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[31] *Id.*
[32] *Id.*
[33] Kimberly Rotter, *Is a Portfolio Mortgage Right for You?*, U.S. NEWS, July 16, 2018, https://loans.usnews.com/is-a-portfolio-mortgage-right-for-you.
[34] 12 C.F.R. § 1026.
[35] *Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, CFPB, Jan. 30, 2013, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/ability-repay-and-qualified-mortgage-standards-under-truth-lending-act-regulation-z/ [https://perma.cc/5835-R637].
[36] *Ability to repay and qualified mortgages (ATR/QM)*, CFPB, https://www.consumerfinance.gov/policy-compliance/guidance/mortgage-resources/ability-repay-qualified-mortgage-rule/ [https://perma.cc/CT8N-CSXE].
[37] 12 C.F.R. § 1026.1(b) (2017).
[38] Hannah Lang, *CFPB to extend 'qualified mortgage' exemption for GSEs, report says*, AMERICAN BANKER, Jan. 21, 2020, https://www.americanbanker.com/news/cfpb-to-extend-qualified-mortgage-exemption-for-gses-report-says [https://perma.cc/TRW2-Z45W].
[39] *Id.*
[40] *Basic guide for lenders - What is a Qualified Mortgage?* CFPB, Oct. 2013, *available at* https://files.consumerfinance.gov/f/201310_cfpb_qm-guide-for-lenders.pdf [https://perma.cc/3T84-6XLH].
[41] *Supra* note 37.
[42] *Consumer Financial Protection Bureau Issues Final Rule Extending the GSE Patch*, CFPB (Oct. 20, 2020), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-final-rule-extending-the-gse-patch/ [https://perma.cc/G6B6-BG9L].
[43] *See* 12 C.F.R. § 1026.35(a)(1)(i), Comments 38(t)(5)(ix)-1, 34(a)(3)-2 (2017).
[44] Karan Kaul & Laurie Goodman, *What, If Anything, Should Replace the QM GSE Patch?*, URBAN INSTITUTE , (Aug. 2018), https://www.urban.org/sites/default/files/publication/98949/qualified_mortgage_rule.pdf [https://perma.cc/KQ2E-AAES].

Ensuring that a mortgage loan is secured by a valid lien on real property provides a legal "safe harbor" for these lenders in the event of foreclosure.[45]

III. LEGAL CONSIDERATIONS LENDING ON TRIBAL LANDS

A. Land Ownership of Tribal Lands

The roots of the challenges to ownership of tribal lands in the U.S. are deep. The issue entered American jurisprudence in 1823 with the United States Supreme Court's landmark decision in *Johnson v. M'Intosh*.[46] In this case, two private landowners purchased land, one from the Piankeshaw Native American tribes and one from the U.S. federal government.[47] While the landowners represented to the court that the parcels overlapped, in reality there was no overlap, and the parties were merely seeking an opinion from the court.[48]

After reviewing the transfer of land title from the tribes to the British Crown and subsequent independence of the American colonies from the British Crown, the Supreme Court settled the matter by holding that:

> 1) private citizens could not purchase lands from Native Americans ("A title to lands, under grants to private individuals, made by Indian tribes or nations . . . cannot be recognised in the Courts of the United States.");[49] and
> 2) that tribal lands could only be purchased through the U.S. federal government ("Nature of the Indian title, as subordinate to the absolute ultimate title of the government.").[50]

Justice Marshall's opinion laid the foundations of the doctrine of aboriginal title[51] in United States law, holding that such title is inalienable, except in cases of "just war" and subject to the

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[45] *Id.*
[46] Johnson v. M'Intosh, 1823 WL 2465, 21 U.S. 543, (U.S.,1823).
[47] *Id.* at 543.
[48] Eric Kades, *Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, at 1092-1093 (2000), *available at* https://scholarship.law.upenn.edu/penn_law_review/vol148/iss4/2 [https://perma.cc/9KDV-9EJ3]. "Mapping the United Companies" claims alongside M'Intosh's purchases, as enumerated in the district court records, shows that the litigants' land claims did not overlap. Hence, there was no real 'case or controversy,' and M'Intosh, like another leading early Supreme Court land case, Fletcher v. Peck, appears to have been a sham. . . . M'Intosh did not contest a single fact alleged in the complaint, jurisdictional or otherwise. Perhaps he participated in framing the complaint, which became the stipulated facts of the case. Neither the district court nor the Supreme Court questioned any of these facts. Everyone involved, it seems, wanted a decision on the legal question of the validity of private purchases from the Native Americans."
[49] *Supra* note 46 at 562.
[50] *Id*.
[51] "Aboriginal title/native title is a term referring to the proprietary, customary law interests in land of indigenous communities or 'first nations', employed mainly in common law jurisdictions such as Canada, the US, Australia, and New Zealand." *See* Hanri Mostert, *Aboriginal Title*, OXFORD PUBLIC INT'L LAW, *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1886 [https://perma.cc/2SML-EHTD] (last accessed Feb. 29, 2020).

right of Indians to occupy the land ("subject only to the Indian right of occupancy").[52] This principle remains good law in most common law jurisdictions today.[53]

According to the U.S. Department of Interior, "Native American land ownership involves a complex patchwork of titles, restrictions, obligations, statutes, and regulations."[54] Legally, title to Native American lands can be held in a variety of ways, including 1) trust land / allotments, "in which the federal government holds legal title, but the beneficial interest remains with the individual or tribe;" and 2) "Fee land purchased by tribes, in which the tribe acquires legal title under specific statutory authority."[55] Most Native American land (about 80%), more than 56 million acres, is held in trust by the U.S. government for the many tribes that live on that land.[56] [57] A further 18-19% of tribal land is held in trust for individual Native Americans, while the remaining lands are held in fee simple, similar to lands off the reservation. [58]

B. Tribal Sovereignty and the Federal Government

The foundations of this land ownership arrangement date back to the U.S. Constitution itself, specifically the Commerce Clause, which states that the United States Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[59] In a series of Supreme Court decisions, known as the Marshall Trilogy, which included *Johnson v. M'Intosh* (1823),[60] described above, as well as *Cherokee Nation v. Georgia* (1831),[61] and *Worcester v. Georgia* (1832),[62] former Supreme Court Justice John Marshall established several important principles of Native American law:[63]

1) Established "federal primacy" over Indian lands, meaning that the federal government, but not state governments or private parties, could exert control over those lands;
2) Excluded state law from Indian country; and

[52] *Supra* note 48.
[53] Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, WILLIAM & MARY L. SCH. SCHOLARSHIP REPOSITORY, FACULTY PUBL'N, 67-116 (2001), *available at* https://scholarship.law.wm.edu/facpubs/50 [https://perma.cc/BZ9R-8E6Q].
[54] *Native American Ownership and Governance of Natural Resources*, U.S. DEPARTMENT OF THE INTERIOR, NATURAL RESOURCES REVENUE DATA, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ [https://perma.cc/Z74F-QTWT] (last visited Feb. 29, 2020).
[55] *Id.*
[56] *Id.*
[57] Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 439–40 (2001), *available at* https://www-jstor-org.proxy.seattleu.edu/stable/27895300.
[58] *Id.*
[59] U.S. Const. Art. I, § 8, Cl. 3.
[60] 21 U.S. 543 (1823).
[61] 30 U.S. 1 (1831).
[62] 31 U.S. 515 (1832).
[63] Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A., HUMAN RIGHTS MAGAZINE, Vol. 40, No. 4 (Oct. 1, 2014) https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/JTJ6-6GE8].

3) Recognized the ability of tribes to govern themselves.[64]

Marshall described the relationship between the federal government and the tribes, in *Cherokee Nation v. Georgia,* as follows:

> The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.[65]

In 1886, Justice Miller expanded upon this view in *U.S. v. Kagama*, holding that:

> The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' . . . But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.[66]

As a general matter, beginning in 1886, the Supreme Court did in fact hold that the federal government had plenary power over the tribes and their members, expanding upon the ward / guardian relationship described in *Cherokee Nation v. Georgia* .[67]

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[64] *Id.*

[65] Cherokee Nation v. State of Ga., 30 U.S. 1, 2, 1831 WL 3974, at *10 (U.S.,1831)

[66] U.S. v. Kagama, 6 S.Ct. 1109, 1111–12, 118 U.S. 375, 378–80 (U.S. 1886).

[67] *See* Irene K. Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs--A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117, available at https://digitalcommons.law.ou.edu/ailr/vol10/iss1/4 (*citing* Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197, 209 (1976)).

1. General Allotment Act of 1887 (The Dawes Act)

In an effort to break up native reservations, Congress established allotment as a national policy.[68] While this practice started in the 1700s, it did not become widespread until the passage of the General Allotment Act of 1887, also known as the Dawes Act.[69] Under the Dawes Act, the federal government allotted a specified amount of land (usually 80 or 160 acres) to each tribal member.[70] These allotments were intended to be held in trust for the benefit of their native residents for a specified period of time, generally twenty-five years, after which time the government would remove the trust status and issue the allottee fee simple title to the land.[71]

Whether contemplated or not, after the termination of the trust the land became subject to state and local taxation.[72] The costs of this taxation forced many Native Americans off of their land after the trusts were terminated;[73] in 1887, the year the Dawes Act was passed, tribal members held 138 million acres of land, while in 1934, they owned only 48 million acres.[74] The federal government ended the allotment policy in 1934 and extended the trust period indefinitely.[75] Today, allotments are still held in trust by the federal government for the beneficial Native American owner. However, the allotment policy substantially reduced the total acreage owned by native peoples and left behind a checkerboard of land ownership on many reservations. [76]

Furthermore, as the original recipients of allotments died, their land was divided among their descendants, with each receiving only a fractional share of the whole ("fractionation").[77] Ownership of allotted lands has continued to divide over multiple generations and today, individual parcels can have more than 100 co-owners.[78] This fractionation continues to limit economic development on reservation land and can divide lease income among co-owners so that individuals receive just a few cents per share, as well as complicating title to the land in the case of securing the property as collateral for a loan.[79]

2. Indian Reorganization Act of 1934

The allotment era ended in 1934 because of the Indian Reorganization Act (IRA).[80] The IRA allowed the Secretary of the Interior to return unallotted / surplus lands to tribal ownership

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68 *Supra* note 62.
69 *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, NAT. RESOURCES REVENUE DATA, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ [https://perma.cc/5VQG-8ZM3] (last visited Feb. 29, 2020).
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.* "Furthermore, non-allotted lands were often declared "surplus land" by the federal government, which opened them to homesteaders, thereby accelerating the loss of Native American land to non-Native Americans."
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*

and incentivized tribes to adopt governance structures and constitutions akin to those found in state and local governments across the U.S.[81] Most federally-recognized tribes were organized under the IRA and while the act's specific impacts varied from tribe to tribe, it marked a national shift toward federal promotion of tribal self-government.

3. Modern Caselaw

Supreme Court jurisprudence into the 1980s and beyond acknowledged increased tribal sovereignty in many areas, ranging from taxation to criminal prosecution.[82] The more modern caselaw on the topic is well illustrated by Justice Thomas's 2013 analysis of the meaning of the commerce clause as it relates to Indian tribes in *Adoptive Couple v. Baby Girl*:

> The Indian Commerce Clause contains an additional textual limitation relevant to this case: Congress is given the power to regulate Commerce "with the Indian tribes." The Clause does not give Congress the power to regulate commerce with all Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions— "commerce"—taking place with established Indian communities— "tribes." That power is far from "plenary."[83]

However, the most recent caselaw has marked a movement away from tribal sovereignty: "The Court routinely, though not always, has reversed presumptions favoring tribal interests and federal interests favoring Indian tribes. From the beginning of the Rehnquist Court to the current term of the Roberts Court, tribal interests have prevailed on less than one-quarter of the cases."[84] In *Cass County v. Leech Lake Band of Chippewa Indians*, for example, the Court held that states could tax on-reservation land owned by the tribe, in direct opposition to the Marshall doctrine of more than 150 years prior.[85] The inconsistency in this area of law could be one explanation why businesses are wary of operating on tribal lands. In addition to the niche expertise required, this area of law continues to change, increasing the risk of doing business on tribal lands.

The history of tribal land ownership provides a critical backdrop for understanding the complexities of mortgage lending on tribal lands, specifically, for understanding two major legal obstacles to mortgage lending on tribal lands.[86] First, the land is rarely "owned" (being held in fee simple) by the person taking out the mortgage loan or living in the house because most tribal lands are held in trust by the federal government.[87] Second, tribal sovereignty means that property on

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[81] *Id.*
[82] *Supra* note 62.
[83] Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).
[84] *Id.*
[85] Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998).
[86] Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 439–40 (2001).
[87] *Id.*

these lands is governed by sovereign tribes.[88] Adding these considerations on top of an already complex mortgage transaction causes lenders to be uncertain about their ability to recover on outstanding or unpaid mortgage balances that are secured by liens on tribal land and caused lenders to be hesitant about making such loans.[89]

IV. FEDERAL REGULATION OF THE MORTGAGE MARKET

The mortgage market in the United States is regulated primarily at the federal level (with some patchwork regulation by the states for certain types of lenders).[90] Even before the financial crisis, there were a large number of federal mortgage regulations in place.[91] However, after the financial crisis, the Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act") to prevent a future crisis through "the strongest consumer protections in history."[92] Within a few years of its creation, the Bureau had published several mortgage lending rules that would change the way the mortgage industry operated, including stronger underwriting requirements that reduced the risks for both lenders and borrowers.[93] (The importance of these rules for stabilizing the mortgage market cannot be overstated and nothing in this article is intended to minimize the critical nature of these rules for preventing a future financial crisis. However, there can be unintended consequences and there remains room to improve upon these rules by minimizing their impact on economically vulnerable populations.)

A. The Equal Credit Opportunity Act (ECOA)

As discussed in the introduction, all lenders (not only mortgage lenders) are required by federal law to lend without regard to a person's race, national origin, or a variety of other protected characteristics.[94] The ECOA has an interesting history that started in an effort to promote gender equality, and was later expanded to cover a broader list of protected groups:

> The Equal Credit Opportunity Act was implemented in 1976 to prevent the discriminatory practice of forcing married women to obtain their spouse's guarantee

[88] *Id.*
[89] *Id.*
[90] Lisa Goetz, *Who Regulates Mortgage Lenders?*, INVESTOPEDIA (Nov. 8, 2019), https://www.investopedia.com/ask/answers/081716/who-regulates-mortgage-lenders.asp [https://perma.cc/5UMR-HLBD].
[91] Michael Calhoun, *Lessons from the financial crisis: The central importance of a sustainable, affordable and inclusive housing market*, BROOKINGS (Sept. 5, 2018), https://www.brookings.edu/research/lessons-from-the-financial-crisis-the-central-importance-of-a-sustainable-affordable-and-inclusive-housing-market/ [https://perma.cc/FU9H-BKYP].
[92] Chris Arnold, *How the Consumer Financial Protection Bureau Came into Creation*, NATIONAL PUBLIC RADIO (NPR), ALL THINGS CONSIDERED (Nov. 28, 2017), https://www.npr.org/2017/11/28/567057893/how-the-consumer-financial-protection-bureau-came-into-creation [https://perma.cc/84YE-XX5P].
[93] *CFPB Lays Out Implementation Plan for New Mortgage Rules*, CONSUMER FIN. PROTECTION BUREAU (Feb. 13, 2013), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/ [https://perma.cc/65FD-TURD].
[94] *See* 12 C.F.R. PART 1002 - EQUAL CREDIT OPPORTUNITY ACT (REGULATION B) (2018).

> on any loan that they wished to receive. Prior to the enactment of the Equal Credit Opportunity Act, it was a common practice for creditors to refuse to consider married women for individual credit. Indeed, despite the woman's credit history or income, she was not extended credit without her husband's signature on the note. As a result, married women were unable to purchase the most essential items. The purchase of an automobile, a refrigerator, or even something as simple as a dress was often impossible without the consent and cooperation of her husband. In order to eradicate this type of discrimination, Congress enacted 12 C.F.R. § 202 (hereinafter "Regulation B").[95]

Today, the Equal Credit Opportunity Act (ECOA) makes it "illegal for a creditor to discriminate in any aspect of credit transaction based on certain characteristics."[96] In addition, the Fair Housing Act (FHA) makes any discrimination in home financing illegal.[97] Under the ECOA and the FHA, it is illegal to: 1) refuse a consumer credit if they qualify for it; 2) discourage a consumer from applying for credit; 3) offer a consumer credit on terms that are less favorable, like a higher interest rate, than terms offered to someone with similar qualifications; or 4) close a consumer's account – if such actions are on the basis of: 1) race or color; 2) religion; 3) national origin; 4) sex (including gender)[98]; 5) marital status; 6) age (as long as the consumer is old enough to enter into a contract); 7) receipt of income from any public assistance program; or 8) exercising in good faith your rights under the Consumer Credit Protection Act.[99]

Lenders are held to this standard under both Title VII and the Equal Credit Opportunity Act and can be subject to suit under disparate treatment and disparate impact standards.[100] Under a disparate treatment standard, lenders may not treat consumers differently based on a protected characteristic.[101] Under a disparate impact standard, lenders violate the law if their actions result in an adverse impact on a particular protected class group, even if their treatment of all consumers is the same.[102] To the extent that creditors can prove that a practice is vital to the financial

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[95] Ami L. DiLorenzo, *Regulation B: How Lenders Can Fight Back Against the Affirmative Use of Regulation B*, UNIV. OF MIAMI BUS. LAW REV., Vol. 8: 215, *available at* https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1162&context=umblr [https://perma.cc/P86D-JK3T].
[96] *What protections do I have against credit discrimination?*, U.S. CONSUMER FINANCIAL PROTECTION BUREAU, https://www.consumerfinance.gov/fair-lending/ [https://perma.cc/R3FC-B7SN] (last visited Mar. 1, 2020).
[97] *Id.*
[98] *Id.* ("Currently, the law supports arguments that the prohibition against sex discrimination also affords broad protection from discrimination based on a consumer's gender identity and sexual orientation.")
[99] *Id.*
[100] *CFPB Consumer Laws and Regulations, Equal Credit Opportunity Act (ECOA)*, CONSUMER FIN. PROTECTION BUREAU (CFPB), June 2013, *available at* https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf [https://perma.cc/7K75-SYDQ] (last visited Feb. 25, 2020).
[101] 12 C.F.R. Part 1002 Supp. I Sec. 1002.4(a)-1; 12 CFR Part 1002 Supp. I Sec. 1002.4(a)-1. "Disparate treatment" may be "overt" (when the creditor openly discriminates on a prohibited basis) or it may be found through comparing the treatment of applicants who receive different treatment for no discernable reason other than a prohibited basis. In the latter case, it is not necessary that the creditor acts with any specific intent to discriminate.
[102] 12 C.F.R. Part 1002 Supp. I Sec. 1002.6(a)-2. (Disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member of a protected class unless it meets a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact.)

soundness of its operations, despite producing an adverse impact to protected class consumers (as in the case of using credit scores), they may still be found to comply with the ECOA.[103]

ECOA claims can be brought in three different manners: 1) by private parties; 2) through legal actions filed by the federal government; and 3) through administrative actions by federal agencies.[104] Failure to comply with Regulation B can subject a financial institution to civil liability for actual and punitive damages in individual or class actions.[105] Liability for punitive damages can be as much as $10,000 in individual actions and the lesser of $500,000 or 1% of the creditor's net worth in class actions.[106]

Federal enforcement of the ECOA is accomplished through a patchwork of jurisdictional designations among the Department of Justice (DOJ), Consumer Financial Protection Bureau (CFPB), Comptroller of the Currency (OCC) (part of the Department of the Treasury), Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and the Federal Trade Commission (FTC).[107] Although all of these federal agencies have jurisdiction to bring ECOA claims, enforcement is primarily conducted through the CFPB. The CFPB has the broadest jurisdiction, including over "[b]anks, savings associations, and credit unions with total assets of over $10 billion and their affiliates [and] mortgage brokers, mortgage originators, mortgage servicers, lenders offering private educational loans, and payday lenders regardless of size."[108] The CFPB must also refer "pattern or practice violations" (repeated or systematic violations) to the DOJ.[109]

While, in theory, a tribal government could bring a case under the ECOA, these suits have yet to be successful. For example, in *Navajo Nation v. Wells Fargo*, the Federal Court for the District of New Mexico dismissed the tribe's causes of action under the ECOA on the ground that they related to violations of individual tribal members' rights and "Plaintiff does not have standing in its *parens patriae* capacity to bring claims that involve injuries to purely private interests."[110] [111] The Navajo Nation appealed to the Tenth Circuit Court of Appeals, which held that "tribe did not allege injury to quasi-sovereign interest that was sufficiently concrete to create actual

[103] *Fair Lending Implications of Credit Scoring Systems*, FDIC SUPERVISORY INSIGHTS, (2005), *available at* https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum05/sisummer05-article3.pdf [https://perma.cc/X4KT-PQX4].
[104] Walter Gorman (Deputy Chief, General Litigation Section, Civil Rights Division, U.S. Department of Justice), *Enforcement of the Equal Credit Opportunity Act*, THE BUSINESS LAWYER Vol. 37, No. 4 (July 1982), pp. 1335-1350.
[105] *Closing the Gap: A Guide to Equal Opportunity Lending*, FED. RESERVE BANK OF BOSTON (1996).
[106] *Id.*
[107] *The Equal Credit Opportunity Act*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (Nov. 8, 2017), https://www.justice.gov/crt/equal-credit-opportunity-act-3 [https://perma.cc/9WZP-EQWR].
[108] *Id.*
[109] *Id.*
[110] Navajo Nation v. Wells Fargo, 2018 WL 4608245 (D.N.M. 2018).
[111] *Indian Nations Law Update – October 2018*, THE NATIONAL L. REV., Oct. 22, 2018, https://www.natlawreview.com/article/indian-nations-law-update-october-2018 [https://perma.cc/HN2J-AK58] (last visited Feb. 25, 2020).

controversy, and thus, tribe lacked standing in its *parens patriae* capacity to maintain claims for violations of the Equal Credit Opportunity Act (ECOA) . . ."[112]

The doctrine of *parens patriae* "refers to the 'right of a State to sue ... to prevent or repair harm to its "quasi-sovereign" interests.'"[113] "When a state litigates common public rights [under the doctrine of *parens patriae*], the citizens of that state are represented in such litigation by the state and are bound by the judgment."[114] But in this case, Wells Fargo successfully argued that the Nation's *parens patriae* claims belonged to the individual tribal members and that the Nation lacked standing to raise them. The Court noted:

> Under the ECOA, an "aggrieved applicant" may bring a claim for monetary damages and equitable and declaratory relief. *See* 15 U.S.C. § 1691e(a)–(c). An "applicant" is "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit[.]" 15 U.S.C. § 1691a(b).[115]

To summarize, the Court used the language of the ECOA to hold that a tribe cannot sue on its members' behalf because only the applicants themselves have the standing to bring a claim.

B. The Fair Housing Act (FHA)

While this article is focused on the role of the ECOA, it is worth mentioning that mortgage borrowers are protected by many different federal statutes, laws, and executive orders that all govern different aspects of a mortgage transaction, including the Fair Housing Act (FHA).[116] The FHA is both narrower and broader than the ECOA. The FHA is narrower than the ECOA in the sense that the ECOA governs all types of credit transactions (auto loans, credit cards, student loans, payday loans, etc.), while the FHA covers only residential (mortgage) lending.[117] [118] The FHA is broader than the ECOA because it includes all aspects of housing discrimination, even those unrelated to accessing credit, for example, renting an apartment or seeking housing assistance.[119]

Additionally, the ECOA and the FHA cover different protected characteristics. The ECOA protects consumers from discrimination on nine prohibited bases: 1) race, 2) color, 3) religion, 4)

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[112] Navajo Nation v. Wells Fargo & Company, 344 F.Supp.3d 1292 (D.N.M., 2018).
[113] BP Am., Inc. v. Oklahoma, 613 F.3d 1029, 1031 (10th Cir. 2010) (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 258, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972)).
[114] Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1469-1470 (C.A.10 (Colo.),1993).
[115] Navajo Nation v. Wells Fargo & Company, 344 F.Supp.3d 1292, 1309 (D.N.M., 2018).
[116] *Fair Housing and Related Laws*, HUD, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_and_related_law [https://perma.cc/LNB5-NA6B].
[117] *Housing Discrimination under the Fair Housing Act*, HUD, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [https://perma.cc/4BEN-D765].
[118] Susan Dyer, *Chart Highlights Difference Between Equal Credit Opportunity Act and Fair Housing Act as They Apply to Discrimination*, HEARTLAND CREDIT UNION ASSOC., May 22, 2017, https://heartlandcua.org/node/3423.
[119] *Id.*

national origin, 5) sex, 6) marital status, 7) age, 8) receipt of public assistance, and 9) exercising rights under the Consumer Protection Act.[120] The FHA covers seven prohibited bases, including: 1) race, 2) color, 3) national origin, 4) religion, 5) sex, 6) familial status, and 7) disability/handicap.[121]

The FHA is enforced by HUD and the DOJ.[122] DOJ has sued mortgage lenders under both the ECOA and the FHA when they have imposed more stringent underwriting standards on home loans or made loans on less favorable terms for borrowers based on their race/ethnicity, including for discrimination against Native Americans.[123]

One of the most recent actions taken to protect Native Americans and borrowers on tribal lands under the FHA was a 2018 conciliation agreement between HUD (on behalf of two complainant borrowers), a mortgage lender, and an appraiser.[124] Two complainants attempted to refinance their homes located on tribal lands and alleged discrimination on the part of the lender and the appraisal company after the denied to complete the transaction. Specifically, the conciliation described the situation as follows:

> The Complainants owned their homes on American Indian Reservations in fee simple. They applied to refinance their primary residences with fixed-rate mortgage loans from Respondent loanDepot. Respondent loanDepot processed the loan applications in the normal course of business until Respondent loanDepot closed the loan application files because the homes were located on an American Indian Reservation. . . . Respondents deny having intentionally discriminated against Complainants, but agree to settle the claims in the underlying actions by entering into this Conciliation Agreement (hereinafter "Agreement"). Respondent loanDepot asserts it regularly makes credit available on American Indian Reservations in the normal course of business, but intends, in part through operation of this Conciliation Agreement, to expand its lending on American Indian Reservations by expending significant resources to provide and loan subsidies to qualified borrowers on American Indian Reservations, as well as robust financial support to community groups that support American Indian consumers.[125]

Under the terms of the agreement, loanDepot.com agreed to pay each of the two complainants $30,000 ($60,000 total) and fund a loan subsidy program with $40,000 to benefit prospective borrowers on American Indian Reservations. LoanDepot.com also agreed to provide $240,000 to "support outreach programs that improve housing conditions, teach financial literacy, and provide homeownership education to American Indians on and around reservations." In

[120] 12 CFR § 1002.2(z).
[121] U.S. DEPT. OF JUSTICE, THE FAIR HOUSING ACT (2017), https://www.justice.gov/crt/fair-housing-act-1 [https://perma.cc/G5MC-APE5].
[122] *Id.*
[123] *Id.*
[124] FHEO Title VIII Case Nos.: 08-17-5267-8 & 08-18-6949-8, *available at* https://www.hud.gov/sites/dfiles/FHEO/documents/18CA.pdf [https://perma.cc/6Z4X-W5KN].
[125] *Id.* at 2-3.

addition, loanDepot.com agreed to revise its policies regarding the underwriting of home mortgage loans on land located within the boundaries of American Indian reservations to ensure that its policies are consistent with the requirements of the Fair Housing Act.[126] Appraisal Management Services of America, Inc., agreed to "revise its policies regarding appraisals for mortgages on homes located on American Indian reservations and no longer contract with appraisers who refuse to conduct appraisals on reservations."[127]

As the language of the ECOA and the FHA indicate, and as this matter shows, these regulations provide strong incentives for lenders to lend to American Indians regardless of where their homes are located.

As this article will examine more closely below, it is important to understand the parameters and purpose of the ECOA and the FHA when weighing this defense in the context of mortgage lending on tribal lands. Would the risks to lenders of making a mortgage loan on tribal land held in trust be so irresponsibly risky to the financial institution as to justify the potential negative disparate impact on Native Americans? How much is expected of lenders to attempt to overcome these obstacles? How much is this issue incumbent on the federal government to address further to make it easier for private lenders? Should the federal government be stepping in to provide loans directly?

V. THE ROLE OF MANUFACTURED HOUSING

Native Americans (American Indians and Alaska Native populations, AIAN) living in tribal areas generally face more economic hardships and housing problems than those living outside of them.[128] A report published by HUD found significant disparities in both the rates and terms of homeownership for AIAN populations, as compared to non-Hispanic white borrowers.[129] AIAN borrowers were also more likely to have higher interest rates and to live in manufactured housing ("mobile homes") or recreational vehicles (RVs).[130] During the reporting period, between 2006 - 2010, 13% of AIAN households lived in mobile homes and RVs, almost twice the rate of non-AIAN households.[131]

Because manufactured housing, mobile homes, and RVs are considered chattel (personal property, like a car or a TV, rather than "real property" / real estate), interest rates are often substantially higher.[132] Interest rates on chattel loans for people living in these types of housing

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[126] *Id.* at 5-9.
[127] *Id.*
[128] Kathryn L.S. Pettit et al., *Continuity and Change: Demographic, Socioeconomic, and Housing Conditions of American Indians and Alaska Natives*, U.S. DEPT. OF HOUSING AND URBAN DEV., OFF. OF POL'Y DEV. AND RSCH, (2014), https://www.huduser.gov/portal/publications/pdf/housing_conditions.pdf [https://perma.cc/WWF7-NFG4].
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] CFPB, *MANUFACTURED-HOUSING CONSUMER FINANCE IN THE U.S.*, Sept. 2014, p. 6, https://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf [https://perma.cc/Z9FU-D569].

are often 50 and 500 basis points more expensive than real property loans.[133] (In reality, manufactured housing loan interest rates can and often do eclipse 15%.)[134]

For example, if current interest rates were around three percent (as they are at the time of writing), a person borrowing $200,000 to buy a house would end up paying back that $200,000 principal plus $103,555 in interest over a thirty-year loan period, so $303,555 in total.[135] In contrast, the same person, borrowing $200,000 to buy a manufactured home, mobile home, or RV, could be paying an interest rate closer to 8 percent (500 basis points higher) and would end up paying $328,310 in interest, therefore $528,310 total by the time the loan was paid in full.[136] In fact, with that disparity in interest rates alone, a person would only be able to spend approximately $115,000 on a mobile home to end up paying the same total amount as a person spending $200,000 on a conventional site-built house secured by a lien.[137]

According to the CFPB,

> Chattel loans generally have lesser consumer protections than mortgages. About sixty eight percent of all manufactured-housing purchase loans (chattel as well as real property loans) reported under the Home Mortgage Disclosure Act in 2012 met the definition of a "higher-priced mortgage loan" (HPML), a definition developed to identify a set of loans that might be considered subprime. By comparison, only three percent of loans for site-built homes were HPMLs. Even within the set of HPMLs, manufactured-home loans tend to have higher rates.[138]

Additionally, while manufactured housing builders claim that the lifespan of a mobile or manufactured home is comparable to that of a site-built home,[139] older mobile homes were not even designed to last through the end of a thirty year mortgage loan.[140] And, according to a joint investigation by The Seattle Times and Center for Public Integrity, this problem seems to persist in newer manufactured homes as well: "In general, owners have difficulty refinancing or selling their mobile homes because few lenders offer such loans. One big reason: Homes are overpriced or depreciate so quickly that they generally are worth less than what the borrower owes, even after years of monthly payments."[141] Adding insult to injury, "mobile homes may be overpriced from the start . . . [w]hen [one of the nation's largest manufactured housing lenders] was required to

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133 *Id.*
134 Mike Baker and Daniel Wagner, *The mobile-home trap: How a Warren Buffett empire preys on the poor*, SEATTLE TIMES, Feb. 1, 2016.
135 *Amortization Schedule Calculator*, BANKRATE, https://www.bankrate.com/calculators/mortgages/amortization-calculator.aspx [https://perma.cc/S7W4-BQ75].
136 *Id.*
137 *Id.*
138 *Manufactured-housing consumer finance in the United States*, *supra* note 131.
139 Tony Guerra, *The Durability of Manufactured Homes*, SFGATE, https://homeguides.sfgate.com/durability-manufactured-homes-58990.html [https://perma.cc/VTD2-EW96].
140 *Aging Mobile Homes Burden Owners With Huge Power Bills and Mold*, PBS (2013), https://www.pbs.org/newshour/nation/aging-mobile-homes-burden-the-grid-and-their-owners [https://perma.cc/7XD5-U34Y].
141 BAKER & WAGNER, *supra* note 133.

obtain appraisals before finalizing a loan, company officials wrote, the home was determined to be worth less than the sales price about 30 percent of the time."[142]

According to HUD, "Housing affordability continues to be a major problem among AIAN households; between 2006 and 2010, nearly four out of ten AIAN households spent more than thirty percent of their income on housing and nearly two out of ten households devoted more than fifty percent of their income to housing costs."[143] Manufactured housing may be a significant contributor to this problem.

VI. Discussion

Having understood how mortgage lending works and some of the complexities of tribal land ownership, it is possible to begin to consider how all of these pieces fit together. If mortgage lenders might actually be facing a greater risk of losing their investment in a foreclosure situation, and yet they are required to lend regardless of race, national origin, religion, etc., could there be a conflict? By refusing to lend on tribal land, even with the risks involved, are lenders violating the ECOA? How far do lenders need to go to attempt to lend equitably on tribal lands (as they do on non-tribal lands)?

A. What are the challenges facing lenders, borrowers, and tribal governments?

1. Challenges for Lenders

The main obstacle for mortgage lenders working on tribal land is the land ownership structure.[144] As discussed earlier, the majority of tribal and reservation lands are owned in trust by the federal government.[145] Because mortgages must be secured with collateral, generally by a lien on the property, this ownership structure protects borrowers on tribal lands but prevents mortgage lenders from collecting on remaining mortgage debts in the event of foreclosure because the property cannot be resold by the financial institution.[146] According to HUD, "land held in trust for a tribe cannot be mortgaged, and land held in trust for an individual must receive approval from the Bureau of Indian Affairs (BIA) before a lien is placed on the property."[147] According to HUD,"[w]ithout the ability to mortgage and foreclose on a home or place a lien on individual trust property, lenders were not willing to make home loans to individual Native Americans."[148]

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142 *Id.*
143 *Id.*
144 *Section 184 Frequently Asked Questions (FAQs)*, U.S. Dep't of Housing and Urban Dev., https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/faq [https://perma.cc/66SU-4GGG] (last visited Feb. 29, 2020).
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*

2. Challenges for Borrowers

a. Lack of lenders offering loans on Tribal Lands

Closely tied to the risk for lenders (their inability to recapture lost mortgage payments in the event of a foreclosure) is the risk that consumers living on tribal lands will be unable to secure mortgage financing. This risk is the result of a lack of knowledge and risk aversion on the part of lenders; offering loans on tribal lands presents greater risks without necessarily creating additional incentives for financial institutions. Additionally, lending on tribal lands triggers numerous issues of tribal law that most lenders are unlikely to be familiar with.

Considering the provisions of the ECOA listed above, it is easy to see how these market factors could result in reduced lending on tribal land and, therefore, to Native Americans more broadly. Of the 5.2 million American Indians and Alaska Natives, approximately sixty percent live on or near reservation land,[149] meaning that the effect is quite broad. If lenders are unable or unwilling to make mortgage loans on tribal lands, millions of Native Americans could be denied the benefits of homeownership.

In order to assess whether this disparity constitutes disparate treatment or disparate impact discrimination under the ECOA, it would be important to understand more about the credit profiles of the people seeking mortgage credit. (Refusing to lend to someone because they pose an unacceptable credit risk is not discriminatory.) A 2015 study using a privately acquired credit profile dataset attempted to conduct this analysis and found that:

> . . . our knowledge about credit on reservations remains highly incomplete. Data on consumer credit conditions on reservations are particularly scarce . . . we find that the effect of an area’s location vis-a` -vis a reservation often loses significance, a result suggesting that it is not the reservation border per se that matters for credit outcomes. We also show that other block group level socio-economic variables, such as unemployment and even income and education, are not consistently statistically significant predictors of credit outcomes within reservations. While non-conclusive, **these results are consistent with the hypothesis that there is racial discrimination in the consumer credit markets in Indian Country.** (emphasis added)[150]

There is a major opportunity for the federal agencies responsible for enforcing fair lending laws, which often have access to large amounts of non-public information, and greater resources than independent researchers, to look into this matter further to assess whether the limited lending occurring on tribal lands is a warranted side effect of other socioeconomic problems or a symptom of more widespread discrimination.

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[149] TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP, *supra* Note 3.
[150] Valentina Dimitrova-Grajzl et al., *Consumer credit on American Indian reservations*, ECON. SYSTEMS 39 (2015) 518-540, http://dx.doi.org/10.1016/j.ecosys.2015.01.005 0939-3625/.

b. Complexity of working with tribal governments

Later in this article, we will discuss some of the approaches that tribes have implemented to solve these issues. However, one commonality of these approaches is that they involve more parties than a conventional mortgage transaction. Rather than simply working with a single mortgage lender or broker, and perhaps a realtor, a consumer seeking credit on tribal land will need to be savvy and patient enough to include many other stakeholders, including tribal leadership and sometimes the federal government. These additional layers mean that consumers living on tribal land will need to plan further ahead than a traditional home buyer/mortgage borrower, that they will need to be savvy enough to understand these highly specialized programs, and that they will lose the privacy of working solely and directly with a lender. These challenges will be discussed in further detail below in the discussions of each individual solution.

3. Challenges for Tribal Governments

a. Discretion about when to exercise sovereign immunity

Although tribes are formally afforded sovereign immunity over the activities occurring on tribal lands, tribal governments are often cautious about deciding when to enforce these rights. Tribal governments may actually have a preference of not asserting their sovereign immunity, especially in conflicts with businesses or other commercial contexts, because it can make outside parties wary of contracting with them. Tribal governments must weigh the potential for harm that could occur as a result of entering into a contract with a non-tribal entity with the harm of not being able to enter into such a contract at all. Is it better for the tribe and its membership to take a risk and benefit from outside capital, or to avoid risking the loss of tribal land and sovereignty? This is a question without a clear answer; an impossible question that every tribal government is forced to answer as it seeks to increase the prosperity of its members.

b. Lack of available funding

As the figures previously discussed indicate, the need for additional mortgage financing for American Indians, particularly those living on tribal lands, is immense. While tackling a number of expensive social challenges associated with poverty, tribal governments must make difficult decisions about how best to allocate funding. Tribal leaders are often responsible for administering many different social programs, including education, childcare, elder care, healthcare, housing, substance abuse, domestic violence prevention, and more. Each dollar allocated to subsidize the cost of owning a home is a dollar that cannot be spent in other areas, many of which may be more urgent or acute.

4. Challenges for Regulators

a. History of interference with tribal sovereignty

Regulators are similarly wary of becoming entangled in issues of tribal sovereignty. Very few employees of the federal government identify as Native Americans or tribal members and worry about how their actions could be perceived if they had the ultimate effect of harming the interests of tribal governments. The federal government, in particular, has a long history of harmful interference, and civil servants today rightly consider the potential for harm before getting involved.

If tribes choose to use tribal assets as collateral for loans, they risk losing them if their membership defaults or find themselves unable to pay their loan. Tribal leaders have continued to fight the many forces seeking to deprive them of their lands.

b. Lack of staff expertise in tribal law and issues

In part because of the lack of American Indian representation in the federal workforce,[151] making up just 1.7% of all federal positions, there is a vacuum of experts on issues affecting tribal residents and governments. Federal Indian law and tribal law are niche areas of study with very few non-native practitioners. These practitioners are more often in demand by the tribes themselves as they engage in contracts and commercial opportunities with non-tribal members.

5. Conflicts of Law

One reason that all parties are wary of addressing these issues head on is the inevitable conflict of law that exists in issues of tribal land and sovereignty. Tribal governments are intended to be their own sovereigns but are also subject to the hard-to-predict exercise of sovereignty by the federal government. Federal courts have not been predictable on these issues. Because tribal questions must be raised in federal court, as opposed to state court,[152] the cost of litigating them is substantial and requires expert lawyers. The stakes are immense when it comes to the potential for further loss of tribal lands.

Much like the practice of international law, tribal law is complex, slow, expensive, and often not settled until a case is denied or decided by the Supreme Court. This process can take years and cost hundreds of thousands of dollars. The risk of litigation alone is enough is keep many private operators away from even trying to operate on tribal land.

With all of these obstacles, it quickly becomes understandable why mortgage lending on tribal land can be so challenging. The next section will provide several case studies for how

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[151] *Diversity and Inclusion: Federal Workforce at a Glance*, OPM, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/federal-workforce-at-a-glance/.

[152] See, e.g., Brandon Byers, *Federal Question Jurisdiction and Indian Tribes: The Second Circuit Closes the Courthouse Doors in New York v. Shinnecock Indian Nation*, UNIV. OF CINCINNATI L.REV., Vol. 82, Iss. 3, 2014, *available at* https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1233&context=uclr [https://perma.cc/9RC6-8T2U].

mortgage lending on tribal lands is currently accomplished – some showing more promise than others.

VII. CURRENT PRACTICES

A. Federal Public-Private Partnerships

For many of the reasons described above, federal solutions are limited and imprecise. By definition, federal involvement in the process of mortgage lending on tribal lands has been one-size-fits-all. However, the diversity of the 574 federally recognized tribes means that it is rare for one program to appropriately address the needs of all tribes.

1. Section 184 Indian Home Loan Guarantee Program

Congress established the Section 184 Indian Home Loan Guarantee Program, in 1992, "to facilitate homeownership and increase access to capital in Native American Communities."[153] This program is jointly administered by the United States Department of Housing and Urban Development (HUD) and the Bureau of Indian Affairs (BIA), part of the United States Department of the Interior.

HUD's 184 program is funded through Congressional appropriation and receives between $1.4M and $2M annually.[154] When distributed over the approximately two thousand loans it guarantees per year, this works out to a per-loan cost of approximately $700.[155] Since the inception of the program in 1992, HUD has obligated funds to guarantee approximately 46,000 loans with a cumulative loan level of $7.7 billion.[156]

This program uses a legal fiction to circumvent the complexities of foreclosure on tribal land. For a typical mortgage, the person taking out the mortgage owns the land in fee simple, the highest possible ownership interest, meaning that no one else can claim primary title to the land. If the borrower fails to pay their mortgage and enters foreclosure, the bank / financer can sell the property to pay off the rest of the mortgage. For a home on tribal land, however, the person living in the home is unlikely to own the land; nearly 80% of tribal lands are held in trust by the federal government, for the benefit of the tribal members. Therefore, if a person living on tribal land were to default on their mortgage, the lender would not be able to sell the property because they do not hold title to the land; the lender would stand to lose any outstanding mortgage balance.

Under the Section 184 program, however, the borrower leases the land property from the tribe on a lease approved by BIA and HUD to create a leasehold estate.[157] The mortgage lien is

[153] *Section 184 Indian Home Loan Guarantee Program*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 [https://perma.cc/3W4M-YBTM] (last visited Feb. 29, 2020).
[154] *FY 2021 Congressional Justifications - Indian Housing Loan Guarantee Fund (Section 184)*, HUD, OFFICE OF PUBLIC AND INDIAN HOUSING, *available at* https://www.hud.gov/sites/dfiles/CFO/documents/14_FY21CJ_IHLGF.pdf [https://perma.cc/6RMS-P42H].
[155] *Id.*
[156] *Id.*
[157] *Id.*

placed on the physical structure of the home and the leasehold estate so that only those can be foreclosed, but the land will remain in trust for the tribe regardless of foreclosure.[158]

> For a home loan on individual or "allotted" trust land, both HUD and the BIA must approve the loan applicant. In the event of a default by a borrower on a 184 guaranteed loan on either tribal or individual trust land, the lender or HUD can only pursue liquidation of the loan after offering to transfer the loan to an eligible tribal member, the tribe or the Indian Housing Authority serving the tribe. In the event of a foreclosure, the lender or HUD can not [SIC] sell the property to anyone but an eligible tribal member, the tribe or the housing authority serving the tribe. Thus the unique status of the trust land is protected.[159]

More than 185 tribes and Alaskan villages have been approved for HUD's Section 184 loan guarantee program.[160]

While this program offers a tidy solution to the land ownership issue, it creates tremendous complexity for borrowers. Before even submitting a mortgage application to BIA for review, a borrower must comply with seven separate steps involving a back-and-forth exchange between the federal government and their mortgage lender.[161] The government manual for implementing this process outlines several dozen further steps over many pages that must all work successfully in order for the mortgage to go through.[162] Anyone with experience working with the federal government will be able to understand that each step presents an opportunity for failure and the likelihood of so many steps with so many stakeholders working smoothly on the first try is likely to be small.

Furthermore, the program is restricted to certain states and has an extremely limited list of participating lenders.[163] While consumers off of tribal lands have access to literally thousands of lenders,[164] consumers seeking to use the Section 184 program to buy a house on tribal land have to choose from fewer than 125 lenders, many of which lend only in one state.[165] While, in theory, this program should allow borrowers on tribal land to access the mortgage products that other

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158 *Id.*

159 *Id.*

160 Steve Barbier, *Mortgage-financed homeownership in Indian Country*, NAVAJO-HOPI OBSERVER, Apr. 7, 2006, https://www.nhonews.com/news/2006/apr/07/mortgage-financed-homeownership-in-indian-country/ [https://perma.cc/Y9J4-6LKM].

161 *Indian Affairs Mortgage Handbook 51 IAM 4-H*, BUREAU OF INDIAN AFFAIRS, Issued Jul. 15, 2019, *available at* https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/52%20IAM%204-H%20Indian%20Affairs%20Mortgage%20Handbook__FINAL_SIGNED_cleanedup%20w%20footer_508.pdf [https://perma.cc/59QJ-KG39] (last visited Mar. 1, 2020).

162 *Id.*

163 *Section 184 State Lending Authority*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/sites/dfiles/PIH/documents/SEC184LENDER.pdf [https://perma.cc/XJ47-RJBW] (last visited Mar. 1, 2020).

164 *See Mortgage Data (HMDA)*, U.S. CONSUMER FINANCIAL PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/hmda/ [https://perma.cc/PY6C-HX6J] (last visited Mar. 1, 2020).

165 Barbier, *supra* note 159. Section *184 State Lending Authority*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/sites/dfiles/PIH/documents/SEC184LENDER.pdf [https://perma.cc/W7M6-59GR] (last visited Mar. 1, 2020).

borrowers have access to, the barriers to doing so are enormous. Tribal consumers have fewer choices in who they can borrow from and many additional hurdles in order to succeed.

That said, improvements continue to be made to this program. For example, the Department of Interior's Bureau of Indian Affairs, the Department of Agriculture's Rural Development, and HUD's Office of Native American Programs have been working together to shorten the timeframe for the title search reports (TSRs) required to process a Section 184 loan.[166] While this may seem like a small technical fix, backlogs at Bureau of Indian Affairs offices could add up to twelve months to the home buying process as a result of the TSR process, so improving this particular pain point could make homeownership attainable up to a year sooner.[167] In several models, tribes have contracted with BIA to assume part of the title search and recordation process.[168] The Saginaw-Chippewa Tribe, in Michigan, reports that setting up its own tribal leasehold recording office has contributed to its ability to sell $60 million in loans to Fannie Mae.[169] The Confederated Salish and Kootenai Tribes in Montana, which have also assumed title search and recordation functions from the BIA, receive 10 to 15 title search requests per day and having control over this function has helped them originate 70 Section 184 loans over a two-year period.[170]

The Section 184 Program has greatly expanded the supply of mortgage credit to Native borrowers.[171] Loans under this program have grown from less than 600 per year before 2005, to over 4,000 loans in 2015, and an aggregate total of more than 6,000 as of 2017.[172] However, most of this growth has bypassed tribal lands held in trust, the areas arguably most in need of such financing, resulting in 93% of HUD 184 loans being made on fee land in recent years.[173] According to the Federal Reserve, "developing trust lands for homeownership remains a serious challenge and involves a lengthy and often burdensome process that reduces the appeal of lending on tribal trust land, even with the federal guarantee."[174]

2. Other Federal Programs

The majority of the large-scale efforts to increase mortgage capital on tribal lands, have been the result of efforts by the federal government, through a variety of programs hosted by a number of different agencies. These programs are well-funded but lack the efficiency of the solutions offered by tribal governments.

Between 1995 and 2005, the HUD section 184 loan guarantee program (discussed above) made 2,796 loans to individuals and tribal housing authorities for more than $296 million.[175] Of the

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[166] *Id*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Tribal Leaders Handbook on Homeownership*, *supra* note 3.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Barbier, *supra* note 159.

total, 914 (33%) were loans on tribal trust land.[176] In 1996, the Native American Housing and Self-Determination Act (NAHASDA) consolidated a number of Indian housing programs into an Indian housing block grant (IHBG).[177] This grant provides a range of affordable housing activities on Indian reservations and Indian areas with funding of approximately $600 million a year.[178]

The Department of Agriculture provides section 502 loans, which can be used to help low-income households purchase homes. Between 1999 and 2005, 2,935 section 502 direct and guaranteed loans were provided on trust and allotted lands between, totaling $233.1 million. [179] The Veterans Administration, through the pilot Native American Veterans Direct Home Loan Program, has made 480 direct loans since 1993, all on trust land.[180]

Between 1995 and 20015, Fannie Mae, through the Native American Conventional Lending Initiative (NACLI), purchased loans covering 11,804 single-family homes on tribal lands (including properties on tribal trust, allotted land, and fee simple lands) totaling nearly $1.1 billion.[181] (These totals include HUD 184, FHA 248, USDA 502, and conventional loans.)

B. *Tribal Solutions and Native CDFIs*

While federal solutions are generally well-funded but often too blunt to accommodate all tribal communities and borrowers, community development financial institutions (CDFIs) often find themselves in the opposite situation. CDFIs are non-profit entities that seek to aid in the development of local communities, and there are dozens of native CDFIs that are currently or have the potential to serve as emissaries of mortgage lending on tribal land.[182]

1. The Menominee

The Menominee are a relatively small tribe of 8,720 members, located in Wisconsin.[183] The Menominee Reservation is located on 235,524 acres, approximately 357.96 square miles, and contains roughly 223,500 acres of heavily forested lands.[184] Approximately 98% of the land is held in trust and 2% is held in fee simple.[185]

Four separate loan programs are administered by the Menominee tribal government: (1) The Menominee Loan Fund, which provides a means for eligible applicants to obtain financing for personal items and purposes; (2) The Revolving Loan Fund, which provides a means for eligible applicants to obtain financing for business purposes; (3) The HUD/CDBG Home

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Certified Native CDFIs*, BUREAU OF INDIAN AFFAIRS, 2018, *available at* https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/CertifiedNativeCDFIs%202018.pdf [https://perma.cc/Z64E-2UYQ].
[183] *Menominee Indian Tribe of Wisconsin*, WISCONSIN DEP'T OF PUB. INSTRUCTION, https://dpi.wi.gov/amind/tribalnationswi/menominee [https://perma.cc/WC3Y-AWJL] (last visited Mar. 1, 2020).
[184] *Id.*
[185] *Id.*

Improvement Loan, which provides a means for eligible applicants to obtain financing for repairs and renovations to the home they own; and (4) The Housing Down payment Loan Fund, which provides a means for eligible applicants to obtain financing for the down payment required with the purchase of a single family residence.[186]

Furthermore, Menominee tribal members have access to the Wisconsin Native Loan Fund (WINLF). WINLF is a "non-profit 501(c)(3) United States Treasury Department Certified community development financial institution (CDFI), created to provide tribal members with alternative financing and financial services on Wisconsin Indian Reservations."[187] "WINLF has the mission . . . to elevate tribal members towards building capacity for individuals and families to help them become economically stronger . . . to retain money in the community and teach people to become more self- reliant and economically independent."[188] WINLF provides access to home improvement loans, down payment assistance, home purchase loans, debt consolidation, and micro business loans.[189]

WINLF has closed 396 loans on nine reservations and deployed $2,407,849 in loan capital to tribal members in Wisconsin.[190] Compare this to the HUD 184 program's per-loan cost: while HUD only needs to secure the loans with an origination fee (less than one thousand dollars per loan), this CDFI is expending more than six thousand dollars per loan. The CDFI model is more direct, but also more expensive.

The Menominee tribe offers a strong example of a CDFI / direct lending model that tribes with the resources could consider deploying. This model provides an advantage to consumers living on tribal lands because it allows them to work with a single entity to secure mortgage financing despite living on land that does not provide sufficient collateral for a conventional mortgage lender.

While the direct lender / CDFI model may be the best option from the perspective of borrowers living on tribal land, it requires a tribe to have the resources of cash on hand or access to financing, as well as the financial knowledge and sophistication to run such an organization. It forces tribes with limited resources to choose between members for transactions that have tremendous implications for their long-term financial wellbeing.

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186 *Lending & Tribal Taxes*, THE MENOMINEE INDIAN TRIBE OF WISCONSIN, 2020, https://www.menominee-nsn.gov/GovernmentPages/Department.aspx?departmentID=3400 [https://perma.cc/7JWB-SVLH] (last visited Mar. 1, 2020).

187 *About Us*, WISCONSIN NATIVE LOAN FUND, 2018, http://winlf.org/history.php [https://perma.cc/D6UJ-ZG7A] (last visited Mar. 1, 2020).

188 *Services - Lending*, WISCONSIN NATIVE LOAN FUND, 2018, http://winlf.org/lending.php [https://perma.cc/D6UJ-ZG7A] (last visited Mar. 1, 2020).

189 *Id.*

190 *Id.*

2. The Navajo Nation

The Navajo Nation faces the same challenges to mortgage lending and home ownership outlined previously in this article, principally, the inability to obtain a mortgage because a lien cannot be placed on the land.[191]

> [M]any Navajo live in inadequate homes that lack basic amenities such as plumbing. Navajo homeowners often occupy very basic mobile homes that they find less than adequate. They cite creaky, unstable floor panels and thin walls, which provide poor insulation and wind resistance, among other problems . . . Navajo in all income groups have to wait many years to find affordable housing because housing of all types is limited . . . Unable to qualify for government-subsidized housing and denied mortgages on the reservation, many have been forced to leave the reservation or to opt for temporary housing . . . Although powerful motivations exist for developing a mortgage financed homeownership market on the Navajo Nation, no conventional home mortgages had been granted on the reservation through 1994. Even through mid-1998, fewer than fifteen mortgages had been completed. The numbers clearly imply that mortgage lending on the Navajo reservation faces potent obstacles.[192]

In response, the tribe passed the Navajo Master Area Land Lease Act, which designated specific tracts of land on the Navajo reservation as Master Land Lease (MLL) areas, each with a separate entity having oversight of the leasing activities for that area.[193] Solving the lien issue, MLL area land could be used as collateral for either commercial or housing development, and it reserved the right of first refusal in the case of foreclosure to the Navajo tribal government.[194]

The Navajo Deed of Trust Act, the precursor to the section 200c lease, was created by the Navajo in collaboration with Fannie Mae and the BIA.[195] "With a section 200c lease, Navajo tribal members [could] get exclusive rights to a one-acre property for a sixty-five-year period."[196] The section 200c leasehold serves as sufficient collateral for a mortgage because it allows the bank to foreclose on both the home and the lease.[197] The newer section 200c lease was approved by the Navajo Nation and Fannie Mae for use with mortgage loans.[198]

> While the above changes, especially the section 200c homesite lease, have been heralded as a breakthrough in the legal logjam that has kept banks from granting mortgages on the Navajo Nation, problems do remain. For both individual and

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191 *Id.*
192 Yair Listokin, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. L. 433, 439–40 (2001), https://www-jstor-org.proxy.seattleu.edu/stable/27895300 (last visited Mar. 1, 2020).
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*

> tribal trust lands, obtaining a homesite lease requires considerable effort in acquiring approval from tribal authorities (and relevant individuals in the case of individual trust land). Additionally, using the section 200c lease as security for a mortgage loan requires Navajo Nation and BIA approval, and obtaining approval can be a tedious process . . .
>
> The second major legal obstacle to lending on Indian reservations relates to tribal sovereignty. If foreclosure and eviction become necessary, the process is subject not to federal or state law, but rather to the laws of the sovereign tribes and to the jurisdiction of tribal courts. Many banks perceive tribal foreclosure and eviction laws as insufficient protection for their capital. Furthermore, even if laws are in place, lenders might be reluctant to press their claims in tribal courts because they are unfamiliar with this venue.[199]

More recently, the Navajo Partnership for Housing (NPH) was incorporated, on April 19, 1996, in Window Rock, Arizona, the seat of Navajo tribal government.[200] NPH is a nonprofit housing partnership operating to create homeownership opportunities on the Navajo Nation by improving access to private mortgage capital.[201] The Partnership focuses on fostering homeownership for middle-income Navajo.[202] To improve access to capital, build Native capacity for homeownership, and remove legal barriers, the NPH began working with other non-tribal community groups.[203]

> In Arizona, for example, the Navajo Partnership for Housing (NPH) helped pilot the Presidential Initiative One-Stop Mortgage Center, a joint project of the U.S. Treasury Department and the [United States] Department of Housing and Urban Development. Since its inception, NPH, with financial support from their partner the Navajo Housing Authority, has helped more than 209 Navajo families purchase or rehabilitate homes by packaging or originating 323 loans and grants totaling approximately $17.9 million, primarily on Tribal Trust Land.
>
> In Oklahoma, Little Dixie Community Action Agency provides technical assistance to nonprofits and tribal housing authorities through a Rural Development Self-Help technical assistance contract with the [United States] Agriculture Department. Little Dixie is currently working with the Oglala Sioux Tribe Partnership for Housing, the Creek Nation, and the Cherokee Nation to promote mortgage-based homeownership through the Self-Help Model. [204]

More broadly, tribes, federal agencies, GSEs, financial institutions, Indian housing authorities and nonprofit organizations have all made concerted efforts to promote access to mortgage credit on

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[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] Barbier, *supra* note 159.
[204] *Id.*

tribal lands.[205] These efforts have resulted in the cooperative development of several special loan products to meet the needs of homebuyers on tribal lands.

C. Other Options

1. Manufactured Housing

Manufactured housing is a commonly used alternative option for borrowers on tribal land. Manufactured housing avoids the land ownership issues discussed above because the loan is secured by the housing structure itself (rather than the land).[206] These loans fall into the category of "chattel loans," alongside auto loans and loans for other personal property, such as furniture or electronics.[207] Because the value of most personal property (as compared to real property) decreases over time, interest rates for chattel loans are generally higher than those for real estate. Additionally, because many borrowers seeking credit to cover the cost of a manufactured home have lower incomes, many of these loans are offered at sub-prime rates, often eclipsing mortgage rates by a factor of four.[208]

> [Manufactured homes are a] widely used form of affordable housing in Indian Country - about 17 [%] of reservation households currently reside in a manufactured home, on par with the rate in rural America generally, and close to half of the American Indians who borrowed to buy a home on reservation land in 2016 secured their loan with a manufactured home.[209]

These homes provide a significant cost savings over traditional site-built homes – "[e]xcluding land, a 1,700 square-foot structure, for example, could be built for about $86,000 in a factory (assuming two-section construction) as opposed to about $171,000 on-site."[210]

However, cost is not the only consideration in buying a home. Many consumers have found that these homes do not last as long as the terms on their loans, and all consumers will find that manufactured homes do not appreciate at the same rate as traditional site-built homes.[211] Despite these significant downsides, buying a manufactured home may still be one of the best options available to people living on tribal land because they require fewer steps (and less time) to acquire,

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[205] *Id.*
[206] *Chapter 11: Manufactured Homes: An Affordable Ownership Option, Tribal Leaders Handbook on Homeownership*, FEDERAL RESERVE BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-homeownership/manufactured-homes-an-affordable-ownership-option [https://perma.cc/6L9G-RXZJ] (last visited Mar. 1, 2020).
[207] *Id.*
[208] Mike Baker and Daniel Wagner, *The mobile-home trap: How a Warren Buffett empire preys on the poor*, SEATTLE TIMES, Feb. 1, 2016.
[209] *Chapter 11: Manufactured Homes: An Affordable Ownership Option, Tribal Leaders Handbook on Homeownership, supra* note 205.
[210] *Id.*
[211] *Id.*

involve fewer stakeholders, and give the consumer a sense of agency that they may lack in more complicated transactions that require the aid of their tribal government, several agencies of the federal government, and a lender selected from a limited list.

VIII. A WAY FORWARD

As these examples have shown, the current options available to lenders and consumers living on tribal lands are limited. Federal programs often have good funding but offer solutions that are too blunt and complex for the diversity of consumers on tribal lands. Native CDFIs and other locally administered programs may be more precisely targeted, but often lack funding.

While HUD receives ample funding for its 184 program each year and is able to help thousands of borrowers per year achieve homeownership, it is still limited in its reach to native consumers located on tribal land. It offers reduced consumer choices in terms of the number of lenders and requires new homeowners to work back and forth with their lender and the federal government, often for more than a year. When compared to the month that the same process takes for a home purchased off of tribal land, this delay creates considerable obstacles and costs to homeownership on tribal lands.

Native-owned CDFIs and other community-run programs are much more targeted and precise; able to address the pain points specific to each community and to operate with greater speed and efficiency. However, they often lack the funding to have the type of broad impact that federal programs can achieve.

Manufactured housing offers an entirely private, free-market alternative that allows consumers living on tribal land to obtain rapid access to inexpensive housing, though often with outsize financing costs and questionable long-term outcomes. While manufactured housing does not require a mortgage to be secured by land and is therefore more accessible to consumers living on tribal lands held in trust, the interest rates for chattel loans often soar to many times that of a conventional mortgage. Furthermore, while the manufactured housing industry continues to improve upon the quality of manufactured homes, consumers can still find themselves paying down a mortgage for a manufactured home that has aged more rapidly than was promised. On a per square foot basis, a manufactured home may also not be any less expensive than a site-built home with a mortgage secured by the land and dwelling.

The variety of currently available options means the native consumers and consumers living on tribal land are able, at least in theory, to secure some type of home ownership. In practice, however, these options remain far more limited, and expensive, than those for consumers living outside of tribal lands.

As identified earlier, demand for homeownership on tribal lands and among native consumers is no lower than for any other consumer group. Consumers living on tribal lands are no less capable or deserving of the opportunity for owning their own homes and building intergenerational wealth. It would be hard to argue that the money does not exist to fund this opportunity, but it is clear that finding the correct channels to route this funding has been a challenge.

Further solutions will require both ‘carrots’ and ‘sticks;’ the federal government could offer incentives to private lenders and CDFIs to operate more robustly on tribal land but may also need to punish those who fail to offer equitable access to credit. While HUD’s 184 program has shown some success, the large and clunky federal scale operations create delay and undoubtedly cause increased expense. Native CDFIs circumvent these issues, but often lack the funding given to federal agencies. One avenue for further investigation might be to route federal funding for tribal lending programs through Native owned CDFIs, which understand the needs of native consumers and consumers living on tribal lands in a way that the federal government never will.

There are many ways to move money allocated in the federal budget, most of which require willpower and political capital to get budget items through Congressional appropriations. One way to do this would be to offer low interest loans, earmarked for mortgages, administered by CDFIs. These loans could be used in a variety of ways, covering everything from down payment assistance to establishing some way to secure the mortgage. Native CDFIs in particular are in a strong position to understand what their neighbors need in order to obtain mortgage financing.

The federal government could also expand access to mortgage credit on tribal land by more vigorously enforcing the protections offered by the ECOA and the FHA. Current federal enforcement in this area, as discussed above, is extremely limited. With greater understanding of the obstacles of fair lending on tribal lands, federal agencies have the opportunity to provide clearer guidance for both lenders and borrowers about how to obtain mortgage financing for properties located on tribal lands. Once lenders have clear guidance and time to gain broader experience in this market, federal regulators could use the enforcement “stick” to ensure that consumers living on tribal land are not being subjected to widespread credit discrimination. If, after a discretionary period, lenders are still avoiding lending to consumers living on tribal land, the appropriate agencies could open investigations. As these options illustrate, the federal government has a broad toolkit of incentives that it can use to increase access to mortgage credit on tribal lands.

IX. CONCLUSION

Lending on tribal lands presents challenges for borrowers, tribes, and government regulators. The complexity of mortgage banking on tribal lands makes compliance with fair lending laws particularly challenging to follow, and laws at the state and federal levels often conflict in this area.

State and federal governments generally have insufficient personnel and funding with devoted to tribal lending, which prevents them from better regulating these issues. Additionally, a long history of government interference with tribal sovereignty further complicates these issues and makes fair lending enforcement a fraught area.

Numerous options, both public and private, have attempted to address these obstacles. Federal programs have provided solid funding and given private lenders the confidence to make loans to native borrowers but have fallen short of meeting the demand for loans on tribal land. Native CDFIs and other tribally governed programs have been able to satisfy more targeted needs but have often lacked sufficient funding to reach the majority of consumers seeking to become homeowners. By bridging the gap between these two solutions, both groups can empower native consumers and consumers living on tribal lands to become homeowners and build the intergenerational wealth associated with homeownership.

By encouraging proven lenders, particularly native CDFIs, with subsidized lending programs backed by the federal government, combined with vigorous enforcement of federal fair lending laws, the federal government can continue to improve rates of homeownership and economic prosperity on tribal land and beyond.