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A Book Review:
Reservation “Capitalism:”
Economic Development in Indian Country
(Praeger 2012)
By Robert J. Miller, Associate Professor of Law
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Douglas Nash*

The concept of economic development sounds deceptively simple. Build a product. Sell consumer goods. Provide a service. Advertise. Generate income that can be used, in turn, to buy goods and services from others. In reality, economic development generally, and the development of an economy specifically, is far from simple. This is especially true in Indian Country.¹ Why is it so difficult? It requires little analysis to see the reasons. Indian reservations were often selected in locations that would serve to confine and isolate the tribal members that inhabited them and, in many instances, they are still isolated. Far from population centers, the population base that feeds businesses in cities and along interstate highways often does not exist on or near reservations. Because of the absence of jobs, which constitute a key part of any economy, it is not uncommon to find that the populations on Indian reservations have incomes that are far—sometimes very far—below the national average. Disposable income may be unheard of. A subsistence level of existence does not include money for nonessential goods and services.

Certainly, not all reservations are in this financial predicament. Some tribes have been fortunate enough to inhabit reservations that are demographically advantageous for purposes of developing and operating

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¹ “Indian Country” is defined in as including “all land within any Indian reservation,” “all Indian allotments,” and all dependent Indian communities.” 18 U.S.C. § 1151 (1949). Although the definition in the statute is for federal criminal purposes, this definition is commonly utilized to describe areas under tribal and federal jurisdiction.

successful business ventures. That is, they are close to major population centers and are readily accessible to their potential customers. However, that is not true of the majority of reservations that exist in the United States. Most are rural in nature and some are isolated. Typically, it is these geographically isolated tribes for whom economic development is critical to their viability as governmental, cultural, and social entities. While the impediments to economic development can often be readily identified, the differences that abound among these and all reservations make any recommendations for remedial action difficult at best.

Professor Miller takes on this challenging task in *Reservation "Capitalism: Economic Development in Indian Country."*² His work is comprehensive, well researched, and practical. He guides readers through a complex subject with well-defined chapters that flow logically, beginning with an introduction that describes what the book is, and is not, about. In chapter 2, "Historic American Indian Economies and Property Rights," he provides a description of several tribal economies and dispels some of the myths that have surrounded tribal and individual Indian concepts of property rights. Chapter 3, "Euro American Impacts on American Indian Economies," describes the profound impacts that new material items introduced by explorers and settlers, as well as their needs and demand for products, had on tribal economics. In chapter 4, "Current Economic Activity in Indian Country," Professor Miller looks at several specific reservations and describes the sources and levels of economic development currently in place. Recognizing the significant impact that gaming has had on reservation economies, chapter 5 is devoted to Indian gaming. Turning to the development of current economies, chapter 6, "Attracting Investments," is a guide for what tribes can do to make reservations an attractive, comfortable, and safe place for businesses to locate and expand. Chapter 7, "Indian Entrepreneurship," addresses the obstacles and opportunities that

² ROBERT J. MILLER, RESERVATION "CAPITALISM" ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (Praeger 2012).

individual Indian entrepreneurs face when developing business enterprises on reservations. The potential that exists when all of the factors discussed in the previous chapters is addressed in chapter 8, “Creating Reservation Economies.” This review provides an overview of Professor Miller’s comprehensive discussion of economic development in Indian country. It is highly recommended to anyone with an interest in economic development in Indian country—whether tribal leader, tribal economic development staff, Indian entrepreneur, off-reservation business developer or investor.

THE HISTORY

There is no doubt that all Indian tribes at one time had tribal economies. Indian tribes were governmental entities exercising inherent powers of self-government long before there existed a United States of America. They provided all of the services, regulation, and control necessary for their economic, political, cultural, religious, and physical survival. From a legal standpoint, tribes’ status as sovereigns was recognized and confirmed by their entry into treaties with foreign governments well before there were any treaties between Indian tribes and the United States.³ Appropriately, Professor Miller asserts that it is imperative that the pre- and early contact structures of tribal economies and individual economic endeavors be understood as a prelude to looking at economic development in the present time. This requires an examining indigenous economic activities and tracing the impact of different events upon tribal economies from early aboriginal history to the present.

Professor Miller provides historic background on such tribal economies, noting with examples the various functions of early tribal structures. Non-economic functions include public works projects, managing food production, distribution of water, and other similar activities. From an economic standpoint, he provides examples of ways that tribes controlled

³ See *Worcester v. Georgia*, 31 U.S. 515, 517 (1832).

trade and trade routes, participated in tribal markets, and established price controls for goods sold—all supporting his conclusion that tribes understood very well economic principles, including trade, manufacturing, and free market concepts. He further notes tribes' ready adaptation to the presence of foreign settlers and their enthusiastic acceptance of new goods and items introduced by Europeans and early American settlers. In addition, tribes welcomed the new market for tribal goods offered by the new, foreign population.

Early in his book, Professor Miller addresses the widely accepted concept that tribal groups were totally communal and that individuals did not own property in the same way that Anglo American property concepts dictated. Through the use of specific examples, he shows that this concept was not entirely true. Goods such as clothing, weapons, housing, and tools were manufactured by individuals for their own use, and they generally owned them on an individual basis.

Land division presents a unique situation and is likely the reason that the idea of communal property ownership within tribes arose. Professor Miller states, “[g]enerally, Indians personally owned all their possessions, except for land.”⁴ However, tribal members typically had usufructuary rights⁵—that is, the right to utilize land owned by someone else. While not known by that title in aboriginal tribal times, under today's legal concepts, usufructuary rights are property rights. For example, individuals or family groups had specific locations where they exercised hunting, fishing, and gathering activities to the exclusion of others and often held the right to pass these rights on to descendants—all as part of the tribal structure governing property rights. Likewise, to the extent a tribal group engaged in farming activities, work would be done by individuals or families on tribal lands,

⁴ MILLER, *supra* note 2, at 15.

⁵ *See id.* at 12 (“A right to use lands that belong to another is called usufructuary rights. Under Anglo-American property law, and also under tribal property rights systems, usufructuary rights are private property.”).

and the resulting crops were owned by the individuals and individual housing structures would necessarily be placed on tribally owned lands.

Professor Miller describes wealth accumulation as a very common practice. It may have arisen from possession of a surplus in foodstuffs, tools or weapons that may have been maintained, stored, or traded for other desirable goods at tribal markets. In addition, traditional forms of currency such as wampum or dentalia shells were collected and displayed as evidence of an individual's economic situation. Accumulated wealth was not just stored. The act of giving away property was described as one of the most visible demonstrations of accumulated wealth, and it was common among many tribes. The practice of giving away personal property is one that is continued today among many tribes—often in connection with funerals and name-giving ceremonies.⁶

Special discussion is devoted to the uniquely important role horses played within tribal communities, including some distinctive rules that applied to them as property having multiple values.

CURRENT ECONOMIC DEVELOPMENT IN INDIAN COUNTRY

Professor Miller next turns to current economic development activities in Indian country to provide foundation for discussions about creating and expanding economic development. Of basic importance are land division and ownership. There are 56 million acres of land held in trust in the lower forty-eight states for tribes and individuals, although many own land in fee simple as well. In addition, there are 44 million acres of land owned by Alaska Native Corporations. After years of losing tribal land ownership through outright theft, both official and unofficial, treaties, removal, and the allotment process, many tribes are now focusing on reacquiring those lands.

⁶ Suzanne J. Crawford & Dennis F. Kelley, *AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA* 344 (ABC-CLIO 2005) (“Giveaway Ceremonies constitute a central part of American Indian ritual and ceremonialism. Very few ceremonial events take place that do not entail some sort of giveaway.”).

While it is an infuriating process for tribes to have to purchase lands within their own reservations, the importance of a land base to economic development as well as political, cultural, and even jurisdictional functions is well recognized by tribes.

The author first provides an overview of the economic activities currently in existence. Certain statistical information is significant, especially considering the amount of natural resources that Indian tribes and people own and control relative to the entire population of the United States. For example, 6.3 million acres of timber land are currently in Indian ownership, generating \$290 million of revenue between 2001–2004.⁷ The jobs that the Indian timber industry creates are equally significant, increasing both revenue and jobs for those tribes (of which there are several) who own lumber mills and mill both their own timber and that owned by others. The significance of timber is underscored by the existence of the Intertribal Timber Council, which has sixty tribal members and is focused on advancing tribal timber interests and management. Professor Miller makes an important point in noting that the growing success of tribal timber and other resource-based businesses coincides with tribal assumption of management of the enterprises. The opportunity for tribes to assume management from the Bureau of Indian Affairs (BIA) was facilitated with the passage of the Indian Self-Determination Act in 1968,⁸ which allowed tribes to take over the programs operated by the BIA and receive the funds that supported those programs as well. Most tribes that have achieved a high level of financial success have assumed most of those functions formerly provided by the BIA. While perhaps a good concept, this process does not provide tribes with adequate management funds, and it is often necessary for tribes to directly finance these programs. For example, Professor Miller

⁷ MILLER, *supra* note 2, at 50.

⁸ The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 25 U.S.C. § 450 (1974).

points out that federal support for tribal timber management amounted to \$2.58 per acre, which was far below the federal support for national forests, which at the same time was \$9.51 per acre.

Other areas of current economic activity in Indian country include minerals, land leasing, manufacturing, agriculture, ranching, and grazing. Professor Miller also describes tourism, intertribal and international business, fishing, water, and housing. Each of these activities is more prominent on some reservations than others, and not all are present on any one reservation.

Readers are then given a close look at what three different tribes have done to develop their tribal economies: the Confederated Tribes of the Umatilla Indian Reservation in northeastern Oregon, the Eastern Shawnee Tribe in northeastern Oklahoma (where Professor Miller is an enrolled tribal member), and the Hoopa Valley Tribe in northern California. Each tribe has taken a different path, yet each has been successful. Based upon Miller's analysis, it is evident that these tribes have prime opportunity to build upon the successes with even more diverse methods of economic development.

Special emphasis is given to Indian gaming, and appropriately so. Gaming has always been an important part of Indian history and culture. Traditional games, such as the stick game,⁹ and events like horse racing were important aspects of entertainment, especially at multi-tribal trading events. In recent times, gaming has become a springboard to financial success for many tribes. However, the general public often holds the view that all Indian tribes have an abundance of money as a result of gaming, and that is not the case. Professor Miller provides factual background on this

⁹ The stick (or bone) game is one that is prevalent among many tribes and which pre-dates recorded history. It is a game of two teams utilizing marked sticks or bones—one team hiding and one team guessing their location—all to the accompaniment of music, drums, and singing. Stick game tournaments are common on many reservations, and betting can be substantial. *See* Stewart Culin, *GAMES OF THE NORTH AMERICAN INDIAN* 73 (Dover Publ'ns 1975) (1907).

point. He notes that gaming has undoubtedly been the single largest source of economic development in Indian country, generating annual revenues as high as \$26.7 billion, yet 50 percent of that income was generated by only twenty tribes. Consistent with the basic attributes of successful businesses, these tribes are located close to major population centers. It may come as a surprise to many that not all tribes have gaming facilities. In fact, less than half of the 565 federally recognized tribes in the United States have gaming enterprises.

The success that has been achieved through gaming has not come easily or cheaply for tribes. Professor Miller traces the historic and complex litigation that was necessary to overcome challenges to the establishment of gaming on reservations by states and state officials.¹⁰ That litigation finally opened the doors for tribes to engage in gaming activities that state laws permitted. However, such activities were regulated under certain conditions, and states sought other avenues by which they might have some measure of control over the expansion of Indian gaming while reaping the financial benefits that were sure to follow. The result was the Indian Gaming Regulatory Act (IGRA) passed by Congress in 1988.¹¹ Professor Miller describes the evolution of this law and then guides readers through the complexities of this Act. It is worthwhile to note that although the Act was passed in the name of tribal economic development and self-sufficiency, it requires tribes to enter into agreements with states in order to participate in what the Act defines as Class III gaming. It also provides an avenue by which states can receive a share of tribal gaming revenues and limits how tribal revenues may be spent; five expenditures are allowed, including “[funding] operations of local government agencies,” such as law

¹⁰ *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹¹ The Indian Gaming Regulation Act of 1988, Pub.L. No. 100-497, 25 U.S.C. §§ 2701–2721 (1988).

enforcement and emergency services.¹² The passage of the Act did not end the litigation necessary to develop and operate tribal gaming facilities. The key cases that followed passage of IGRA were as complex and as important as the cases that preceded it, and are described in full measure by Professor Miller.¹³

He then turns to an analysis of the positive and negative effects of Indian gaming as we know it today. The positive effects are perhaps obvious in Indian country and supported by a wealth of statistical information. The revenues generated have provided the means to diversify tribal business ventures and support tribal programs. In some instances, tribal revenues are shared with tribal members either regularly or periodically, thus raising the standard of living for many individuals. Tribes have been exceptionally generous to neighboring non-Indian communities, and have made many charitable contributions to schools, law enforcement agencies, hospitals, and other causes. The absence of any comparable revenue sharing flowing from state and local governments or from state or non-Indian operated gaming enterprises is immediately obvious and striking.

Beyond revenue, the jobs created by Indian gaming are of huge significance in many respects. Professor Miller notes that, traditionally, unemployment among Indian tribes has ranged as high as 70–90 percent. For those tribes that operate gaming facilities, unemployment has virtually been eliminated. This is a benefit that flows even to those tribes whose gaming operations are not producing staggering revenues. Many facilities are operated on a twenty-four-hour per day basis, thus requiring many employees for all aspects of a casino. Typically, there are more jobs available than there are tribal members seeking employment at these

¹² *Id.* at § 2710.

¹³ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Rumsey Indian Rancheria v. Wilson*, 417 F.3d 421 (9th Cir. 1994), *amended*, 64 F.3d 1250 (9th Cir. 1994) and 99 F.3d 321 (9th Cir. 1996); *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008).

facilities, resulting in a significant number of non-Indians being employed by tribal gaming operations. In addition, many goods and services are required to operate gaming facilities.

The financial impact of revenue, jobs, taxes paid, the recirculation of individual income, and goods and services purchased was estimated to be over \$60 billion dollars in 2005.

Professor Miller also describes the negative effects wrought by tribal gaming. The first is a concern that gaming has a negative impact on tribal culture. While tribes have long engaged in gaming, it has not had the prominence it has today. Views of tribal members and leaders are provided on this issue. From these perspectives, it becomes clear that any cultural adjustments made by tribes and individuals will be well worth the changes, especially in light of the importance of the economic opportunity provided by gaming: to recover from decades of poverty that resulted from failed federal policies towards tribes. After all, tribal ceremonies will continue. Individuals may have jobs within casinos rather than pursuing a subsistence existence, but Indian culture was not built or dependent upon a culture of poverty. New prosperity does not require the loss of that culture. As a tribal chairman quoted by Professor Miller wryly stated, “We had tried poverty for 200 years, so we decided to try something else.”¹⁴

One of the more unusual and unfortunate impacts of tribal gaming is the battle over tribal membership. For tribes that distribute gaming revenues on an individual basis, fewer members within the tribe means larger incomes for those who are members. This has resulted in some political battles in which one faction within a tribe will gain power and find a reason to terminate or deny enrollment to others outside of that faction. This has typically occurred within small tribes and some newly recognized by the federal government.

¹⁴ MILLER, *supra* note 2, at 4.

Gaming addictions are also noted as one of the negative impacts of gaming, both for tribal members and non-Indians. Tribes are cognizant of this potential problem, and the steps that many have taken to address it are identified.

While acknowledging the potential negative impacts of gaming, Professor Miller aptly notes that tribes are aware of these consequences and outlines strategies undertaken by tribes in addressing them. He opines correctly that it is better for a nation, people, and culture to deal with the consequences and benefits of too much economic activity than to have to deal with the consequences of not enough or no economic activity.

CONSIDERATIONS FOR TRIBES, INDIVIDUALS, AND NON-TRIBAL BUSINESSES

Upon that detailed background, Professor Miller then turns to what is the central lesson of his book. He provides a comprehensive itemization of factors that tribes, investors, and Indian entrepreneurs should take into consideration when seeking to develop businesses on reservations. For tribes, it is a matter of how to attract outside and tribal member businesses. For non-Indian businesses and companies, and individual Indian business people, it is a list of things to be aware of.

Professor Miller again emphasizes that approaches to business and economic development are tribal decisions. A tribe may decide that it does not want any non-tribal businesses operating on its reservation—and that is a choice available to it. However, if a tribe does want to attract non-tribal businesses, the most basic need identified by Professor Miller is that it must provide a business-friendly environment. Such an environment is necessary to attract people and companies before they are willing to invest money, time, expertise, and labor in a business operating within an Indian reservation.

A business-friendly environment is another one of those concepts that sounds simple, but as Professor Miller points out, it is not. He provides a

long list of topics and issues that are of importance to tribes if they are to provide a business-friendly environment and to non-tribal businesses considering establishing a business on a reservation. Most of these topics, it seems, center around tribal laws and tribal courts. Professor Miller concludes that a competent and independent tribal court—one that exists within a tribal structure that provides separation of powers—is central to attracting businesses. He supports that conclusion by pointing to a study conducted by the Harvard Project on American Indian Economic Development in 1989¹⁵ that showed a correlation between independent tribal court systems and the number of jobs on reservations. The likelihood of a non-tribal, on-reservation business becoming a party to a lawsuit before a tribal court is high. It may be a lawsuit involving the tribe as the opposing party, or it may involve other parties in cases addressing contract or tort issues, or perhaps labor and employment cases may also arise. No entity will knowingly subject its business to having those kind of critical cases put before an unfair or biased court system. The limited presence of outside businesses thus results in less opportunities for employment amongst tribal members

Unfortunately, tribes have been guilty of fostering this negative image. For example, tribal councils legislatively overturn tribal court decisions; tribal courts demonstrate a bias in favor of tribal members; non-attorney judges are appointed; and court operations become politicized. Tribal laws and policies can remedy these and other issues, which are critical to business investors. The implementation of tribal court procedures, perhaps patterned after the Federal Rules of Civil Procedure, would raise investor comfort levels with tribal courts. Likewise, strong tribal laws or policies with regard to separation of powers and impairment of contracts would underscore the business-friendly environment and the independence of the tribal court system from tribal council influence.

¹⁵ MILLER, *supra* note 2, at 106–7.

Another example demonstrates yet another consideration that is of import to both the tribe and potential business and investors. Businesses will be aware of a tribe's sovereign immunity from suit and, when developing any contractual relationship, will seek at least a partial waiver of that immunity to ensure that they have an avenue of relief if needed. Today, most tribes engage in many contractual relationships and are well aware of the interest of other parties in being able to enforce those contracts. Most have developed language for those contracts that provides a limited waiver allowing for enforcement of the contract, but is less than a full waiver of sovereign immunity.

A tribe's tort claim process will be a consideration for businesses that will necessarily involve a waiver of sovereign immunity. Potential investors will view the absence of a tribal tort claim process as a negative factor for obvious reasons. Many tribes have addressed this by enacting tribal tort claims acts, which, much like federal and state tort claims laws, define a process by which tort claims may be brought and may limit the nature and amount of damages that may be recovered.¹⁶

Professor Miller provides a number of other considerations that could readily serve as a checklist for tribes seeking to attract business and for non-tribal businesses, both Indian and non-Indian when considering the prospect of establishing any kind of business on a reservation.

Moreover, Indian entrepreneurs face special challenges in developing businesses, which Professor Miller discusses in detail. The first, and perhaps ultimately the most important, is the question of whether Indian-owned businesses conflict with tribal culture and social structure. Some have espoused this view,¹⁷ but Professor Miller draws upon observations from a number of prominent tribal leaders in search for an answer. For example, a former chairman of the Navajo Nation said, "Traditional Navajo

¹⁶ See, e.g., Tulalip Tribal Ordinance 122.

¹⁷ MILLER, *supra* note 2, at 115.

values do not include poverty.”¹⁸ Similarly, the former chairman of the Confederated Tribes of the Umatilla Indian Reservation explained that Indian business “is not about rejecting culture,” but instead, “it builds sovereignty.”¹⁹ Professor Miller reaches a convincing conclusion in pointing out that successful business development on reservations is not just a matter of economic well-being; it contributes to physical, mental, and societal health as well. It becomes clear that reservation communities that have developed functional economies are consequently better off overall than those that have not.

BUILDING RESERVATION ECONOMIES

The true crux of Professor Miller’s research and analysis comes in his discussion of creating reservation economies. He offers a substantial list of options, ideas, and suggestions that is, in the first place, built upon a history that began with Indian tribes and people being economically self-sufficient in early days. This history then plunged into an era of poverty as a result of a variety of federal policies designed to confine and weaken tribes. Ultimately, it extends to the modern era, where there has been a new resurgence as a result of Indian gaming.

The ultimate goal in creating a reservation economy is to have enough people and businesses within a reservation community so that money spent is re-circulated within that community. Where there are no businesses, individuals must go outside their reservations to purchase goods and services. This economic “leaking” takes dollars from the reservation and into circulation in off-reservation communities and economies. The multiplier effect within an established economy causes a dollar to recirculate five to seven times within a community. Thus, a dollar spent at a grocery store might be spent by the store owner at a local gas station, whose owner might spend it at a local restaurant, and so on. The creation of this

¹⁸ MILLER, *supra* note 2, at 4.

¹⁹ *Id.* at 12.

kind of economy on the reservation yields the multitude of benefits identified as resulting from a healthy economy, and does not, as Professor Miller's interviews and research confirms, sacrifice tribal culture or values.

As noted at the outset, building a tribal economy is not a simple process. Professor Miller makes two things clear in his analysis. First, building a tribal economy must be an intentional, planned process. Economies are not developed accidentally, especially in Indian country, where many factors militate against successful economic development. Second, the tribe is key to the process in several respects. It will be the tribe that has to plan and implement the process to develop a reservation economy. Most likely, the tribal government is the largest employer on most reservations, and as such, serves as the entity responsible for providing a base for economic development. Through tribal laws and policies, tribes can develop and encourage individual business ventures, both Indian and non-Indian. Finally, tribes themselves can initiate business ventures upon which other, individual ventures can be established. Professor Miller notes that the Harvard Project on American Indian Economic Development has identified three keys to creating successful tribal economies:

- Tribes have to exercise sovereignty;
- Tribes must have strong institutions to assist and regulate businesses; and
- Cultural issues are important.²⁰

Each of these three concepts and how they contribute to economic development are discussed.

This leads to the discussion about the role of tribal, federal, and state governments as well as the role of individual Indians. As expected, the tribe plays the largest role. Professor Miller provides a number of steps tribes could take in this process: establishing an independent court system; enacting business-favorable laws such as a tribal version of key sections of

²⁰ MILLER, *supra* note 2, at 140–42.

the Uniform Commercial Code; having a non-interference policy; utilizing tax benefits as an attraction to new businesses; and building an attractive infrastructure to support businesses and homes, among other things. He then offers a number of strategies upon which economies can be structured: housing development, banking, rural partnerships, intertribal business and investment, utilization of Small Business Administration and Department of Defense preferences, and encouragement of entrepreneurship.

Individual Indians are essential to the process as well—for they are, in large part, the economy. They are the developers and owners of businesses as well as the consumers—the purchasers of goods and services within the community. They are the ones who will re-circulate the dollars spent, once there are sufficient businesses in place on their reservation.

CONCLUSION

A subtle message carried in Professor Miller's book and supported by his interviews of tribal leaders, the Harvard Project personnel and economic experts, as well as his own analysis, is that after decades of failed federal economic development programs, tribal economies began to grow and succeed when tribes and tribal people were in charge. That pattern is a truism that will continue in the future. Gaming has provided many tribes with an unprecedented number of jobs and positive cash flow, providing some tribes the opportunity to diversify their businesses. Professor Miller's work is critical because now is the time when tribes need to plan and implement economic development strategies that include fostering individual businesses. There is much that tribes can do to encourage their members to become part of a local economy. Professor Miller's book is a timely, realistic, and practical work that should be studied closely by tribes as well as individuals—Indian and non-Indian—who have an interest in operating a business in Indian country. It provides a positive and hopeful prognosis for the economic well being of Indian tribes and their members.