

Indian Tribes in Idaho: Opportunities and Challenges In the Times of Self-Determination

by Abelardo Rodriguez

“[Idaho Indian tribes’] combined activities significantly impact local and state economies. Total Indian gaming and non-gaming businesses create more jobs and economic activity than about half of the 44 counties in Idaho. These businesses are among the largest employers in their regions in terms of economic impacts.”

—Quoting from Peterson and DiNoto (2002)

Introduction

The purpose of this bulletin is to provide an overview of the Indian Tribes in the state of Idaho, their regulatory framework in relation to federal, state, and local governments, and recent progress made by tribes in the era of self-determination.

Because tribes are so important socially and economically to their regions and the state, this publication is meant to help policy makers and citizens better understand federal regulatory complexities that tribes face.

Indian Tribes in Idaho

Five Indian reservations in the State of Idaho are home to federally recognized tribes. These reservations comprise almost two million acres in trust:

- Coeur d’Alene (Benewah and Kootenai Counties), 345,000 acres;
- Kootenai (Boundary County), 13 acres;
- Nez Perce (Clearwater, Idaho, Latah, Lewis, and Nez Perce Counties), 770,453 acres;
- Shoshone-Bannock of the Fort Hall Indian Reservation (Bannock, Bingham, Caribou, and Power Counties), 521,519 acres; and
- Shoshone-Paiute of the Duck Valley Indian Reservation (Owyhee County in Idaho and Humboldt County in Nevada), 289,819 acres.

These tribes are sovereign nations with self-determining government entities. Native American land, also known as Indian Country, has been heavily fragmented since the implementation of the General Allotment Act in 1887, which led to the parceling of lands within reservation boundaries to individual tribal members. Lands were distributed in parcels of 80 to 160 acres. Lands that were not distributed were deemed “surplus” and were opened for homesteading, thereafter being regarded as “fee,” or privately held lands, creating a checkerboard of land ownership within reservation boundaries. The level of fragmentation varies with the degree of implementation of this act on various reservations.

Numbers of Indians living in Idaho can seem confusing based on whether numbers indicate Indians living on tribal lands or anywhere in Idaho. According to the U.S. Census Bureau, 8,069 Native Americans lived on Idaho tribal lands in 2000 (Coeur d’Alene, 1,251; Kootenai, 71; Nez Perce, 2,010; Fort Hall, 3,648; and Duck Valley, 998¹).

In 2000 the U. S. Census Bureau counted 14,845 American Indians alone² living in the state of Idaho (i.e., including individuals living outside of the reservation) and counted 26,745 American Indians alone or in any racial combination residing in Idaho. Idaho’s tribal enrollment in 2005 was 10,808 (U.S. Department of Interior)³ and it includes individuals affiliated with tribes in Idaho.

Local governments are supported by taxes collected locally, and therefore are responsible to local taxpayers. County commissioners and county employees serve

resident people in their counties. At the municipal level, townspeople are served by their mayors and city employees.

The sovereign nations of Native American populations are served by their tribal councils, which have jurisdiction over natural resources, health and education services, law enforcement, economic development projects, cultural and social functions, and other essential regulatory activities.

Land use planning on trust land (tribal) is under the jurisdiction of tribal governments; in contrast, land use planning on private, non-Indian-owned land is generally under county jurisdiction. In some cases, tribes have environmental jurisdiction over all lands within reservation boundaries.

In the case of water quality (Clean Water Act), for example, some tribes have been granted authority to assert jurisdiction over all waters within the reservation boundary.⁴ However, the governance of the towns located on the private land falls under the jurisdiction of the counties.

The interaction between tribal and non-tribal governments and citizens has been complex and conflicted for the last two centuries. The governance of the Indian tribes and its interaction with federal, state, and local governments deserves elaboration.

Federal Indian Law, the Indian Tribe, Indian Identity, and Governance⁵

Federal Indian Law covers issues related to the status of Indian tribes and their special relationship to the federal government through U.S. Law. This complex tangle of congressional acts and case law defines the relationships between tribes and the federal government as the first instance, and the states as a second instance. Within reservation boundaries, tribes have the ability to make and enforce their own codes and laws. Because of the complexity of this area of law, states have limited jurisdiction over tribal members in some areas but not in others.

¹ It is not possible to determine the Idaho proportion of people in the Duck Valley. http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-format=US-14&-mt_name=DEC_2000_SF1_U_GCTPH1_US14&-CONTEXT=gct.

² "Indian alone" counts people who consider themselves only Indian, with no other racial affiliation.

³ Population and enrollment figures are from different sources and years. The 2010 population data for Idaho reservations are expected by mid-2010.

⁴ The Clean Water Act authorizes EPA to treat an Indian tribe as a state for certain purposes of the act, including setting and enforcing water quality standards; 33 U.S.C. §1377(e). EPA's interpretation that under *Montana v. United States*, 450 U.S. 544 (1981), tribes may assert jurisdiction over all waters within the reservation covered by the Clean Water Act, even if flowing over private land, was upheld in *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). For a complete list of similar areas in which tribes have authority, see the tribal portal on the EPA website at <http://www.epa.gov/tribalportal/laws/tas.htm>.

⁵ This section relies on Canby (1988) and Wilkinson (1987).

RESERVATIONS AND CHANGING INDIAN FEDERAL POLICIES⁶

By 2009 the U.S. federal government recognized 562 Indian reservations in the United States with 66 million acres in trust.⁷ A central problem that Indians face today is the complex and confusing pattern of laws, especially federal laws, that dominate their lives as a result of more than 200 years of federal government regulation. There has not been a consistent federal Indian policy. Pevar (2004) distinguishes six stages:

1. Agreements between equals—The Northwest Ordinance of 1787, ratified by Congress in 1789, declared that *good faith shall always be observed towards Indians; their land and their property shall never be taken from them without their consent*.

2. Relocation and Reservations—In 1830, Congress passed the Indian Removal Act, which authorized the President to *negotiate* with eastern tribes for their relocation west of the Mississippi River. During the 1830s most of the eastern tribes either had lands reduced in size or were forced to move to the west. The Bureau of Indian Affairs saw the solution to the *Indian Question* as the placement of Indian people on specific tracts of land, with incentives to learn *civilized labor* as the only solution to eventual peaceful coexistence with non-native settlers.⁸

3. Allocation and Assimilation, 1887 to 1934—Tribal government was seriously affected by the sudden encroachment of non-Indians onto reservations and by drastic decreases in the tribe's land base. The General Allotment Act of 1887, also known as the Dawes Act, was successful in fragmenting the land base (albeit to different degrees, depending on the reservation) but failed to assimilate Indians into the dominant mainstream, that is, changing them into individual productive farmers with Christian values. Of the 140 million acres of land they collectively owned in 1887, only 50 million acres remained in 1934 when the allotment system was abolished.

4. Indian Reorganization, 1934 to 1953—The onset of the Great Depression all but eliminated the desire of non-Indians to obtain additional Indian lands. In 1934, Congress passed the Indian Reorganization Act (IRA), *to rehabilitate the Indian economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism*. Between

1935 and 1953, Indian holdings increased by more than two million acres, and federal funds were spent for on-reservation health facilities, irrigation works, roads, homes, and community schools.

5. Termination, 1953 to 1968—In 1953, Congress adopted House Concurrent Resolution No. 108, which declared that federal benefits and services to various Indian tribes should be ended *at the earliest possible time*. In the following decade, Congress terminated its assistance to more than one hundred tribes. Each of these tribes was ordered to distribute its land and property to its members and to dissolve its government.

6. Tribal Self-Determination, 1968 to the present—In 1968, Congress prohibited states from acquiring any authority over Indian reservations without the consent of the affected tribe. The Indian Self-Determination and Education Assistance Act of 1975—possibly the single most important piece of Indian legislation since the IRA—allows Indian tribes to administer the federal government’s Indian programs on their reservation. Many tribes have used this opportunity to rid themselves of unnecessary federal domination. The Indian Tribal Government Tax Status Act of 1982 extends to the Indian tribes many tax advantages enjoyed by states, such as the ability to issue tax exempt bonds to finance government programs. The Indian Gaming Regulatory Act of 1988 authorizes Indian Tribes to engage in gaming to raise revenue and promote economic development.

In 1994 more policies aimed to enhance the Indian business environment. Employment and training programs were implemented to facilitate the ability of Indian and minority businesses to procure federal contracts.

Later, in 1999, the federal government included reservation areas and small businesses owned by Indians in the Small Business Administration Historically Underutilized Business Zone (HUBZone) program. However, inability to use trust land as collateral to access credit has limited individual initiatives to rehabilitate land and/or the initiation of private businesses in and out of Indian Country. While the business climate has improved in the last four decades, it is not possible to predict its continuity given the historical swings in the federal policy.

Four themes have prevailed and form the doctrinal basis of the present Federal Indian Law.

First, the tribes are independent entities with inherent powers of self-government.

Second, the independence of the tribes is subject to great powers of Congress to regulate and modify status of the tribes.

Third, the power to deal with and regulate the tribes is wholly federal.

Fourth, the federal government has responsibility as trustee for the protection of the tribes and their properties, including protection from encroachments by the states and their citizens.

These principles are dynamic. Federal Indian Law is greatly concerned with actual or potential conflicts of government power. When such conflicts arise in a legal setting, they appear as issues of jurisdiction. It is not surprising, therefore, that controversies in Federal Indian Law frequently have at their core a jurisdictional dispute.

Federal vs. tribal law. While the subject of Federal Indian Law might legitimately be thought to include the internal law that each tribe applies to its own affairs and members, this is not the common definition. Instead, that body of law is separately referred to as tribal law, and it may range from oral traditions to entire codes borrowed intact from non-Indian sources. It is particularly interesting to determine when tribal law (rather than state or federal law) governs a particular situation.

The Indian tribe is the fundamental unit of Indian Law. Without it there is no reason for the law to operate. Yet, there is no all-purpose definition of an Indian tribe. A group of Indians may qualify as a tribe for the purpose of one statute or federal program, but may fail to qualify for others. Caution is recommended in the use of definitions. At the most general level, a tribe is a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes. The key problem with this definition is the word “recognized.” Recognized by whom? Recognition may come from many directions, and the sufficiency of any given recognition is likely to depend upon the purpose for which tribal status is asserted.

Legally, the most important recognition is that of the federal government. This recognition may serve to establish tribal status for all purposes. The Department of Interior requires federal recognition to be eligible for many federal Indian services it administers. Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. The existence of a special relationship between the federal

⁶ This section relies on Otis (1973) and Pevar (2004).

⁷ Assistant Secretary-Indian Affairs, Bureau of Indian Affairs, Bureau of Indian Education. <http://www.bia.gov/>.

⁸ Excerpt from the annual report of the Commissioner on Indian Affairs, 1876, available at: <http://library.louisville.edu/government/federal/agencies/interior/indianaffairsreport.html>. Italics are by this paper’s author.

government and the concerned tribe may confer immunity of the Indian lands from state taxation.

Who is an Indian? The question of who is an Indian varies according to the purpose for which a definition is sought. In general, a person must meet two requirements to be an Indian: she or he must (1) have some Indian blood, and (2) be regarded as an Indian by her or his own community.

To have Indian blood is to have had ancestors living in America before the Europeans arrived, but it is difficult to demonstrate a person's percentage of bloodline, referred to as quantum.

Individual tribes have authority to decide who is eligible to register as a member. For some tribes, it is enough that a parent, grandparent, or great grandparent was clearly identified as Indian. For others, eligibility may be established as low as a one-sixteenth-blood quantum; and for others, the requirements may be set at one-fourth tribal blood. It is not always necessary for an individual to be formally enrolled in a recognized tribe to be regarded as a tribal member for jurisdictional purposes. Nevertheless, enrollment is commonly required for acceptance as a member of the tribal community, and it provides by far the best evidence of Indian status.

Tribal councils. The majority of federally recognized tribes vest their legislative authority in a **tribal council**. Council members are usually elected for a fixed number of years, either by district or at large. The council has powers over internal affairs of the tribe. However, all ordinances or resolutions of the tribal council that have an effect are subject to review by the Secretary of the Interior. This represents a very substantial limitation on self-government because the secretary, through the Bureau of Indian Affairs, is to approve nearly all ordinances.

Most tribal constitutions provide for a **chairman**, sometimes called **governor**. In some cases the chairman is elected by vote of the council, or he or she is directly elected by the voting tribal members. It is the chairman's duty to preside over the tribal council and then confer varying degrees of executive authority. But the role of the chairman varies from tribe to tribe.

Tribal courts have existed since prior to the Indian Reorganization Act. Their predecessors were the Courts of Indian Offenses, established in the 1880s by the Secretary of Interior to try to "civilize" the Indians. Tribal court systems vary from these structured, multiple court system of the Navajo Nation, served by tribal prosecutors and defense advocates, to less formal single-judge courts operated on a part-time basis without supplementary services. In many tribes, the judges are popularly elected, but in others, they are appointed by the tribal council. The tribal judges are rarely lawyers, but most of them undergo some form of training while in office.

Tribal corporations, under charters of the Indian Reorganization Act, were designed to allow the tribes to

engage in economic activity in a corporate form and create perpetual membership corporations encompassing all tribal members. Corporate powers were conferred, but actions such as the pledging of tribal income or the entering of leases are subject to approval of the Secretary of the Interior. The corporate power to sue and to be sued brought about legal controversy as to whether tribes have surrendered their sovereign immunity. The legal status of tribes in relation to the federal government is rooted in American history; a synopsis of Indian federal policies begins on page 2.

Impacts of Self-Determination Era in Idaho: Casinos, Hotels, Golf Courses, Jobs, Sales

After the 1998 Gaming Act, Indian tribes in Idaho developed casinos, hotels, and golf courses as a source of employment and revenue. The act allowed tribes to play a role as stakeholders in the economic development of the counties where the reservations are located. In addition to the gaming activities in casinos, a number of non-gaming businesses have grown such as convenience stores, gas stations, logging, wood products, farming and ranching, mining, gift shops, museums, manufacturing facilities, shopping centers, and restaurants.

According to Peterson and DiNoto (2002), in 2001 the Indian tribes were contributing to Idaho's economy with 7,400 jobs (4,500 gaming-related), \$159 million in wages and earnings (\$84 million gaming-related), \$478 million in sales (\$250 million gaming-related), \$17 million in property and sales taxes (\$11 million gaming-related), and \$6 million in state income tax payments. Their combined activities significantly impact local and state economies.

Total Indian gaming and non-gaming businesses create more jobs and economic activity than about half of the 44 counties in Idaho. These businesses are among the largest employers in their regions in terms of economic impacts.

The Coeur d'Alene Tribe is the second largest employer in Kootenai County and the second largest employer in Benewah County. The Kootenai Tribe is the largest employer in Boundary County, and the Nez Perce Tribe is the second largest employer in Nez Perce County (Peterson and DiNoto, 2002).⁹ Idaho's education has also benefited economically from Indian gaming activities. Proposition One, The Indian Gaming and Self-Reliance Act, approved in 2002, stipulated that five percent of net Indian gaming revenues are earmarked for local education programs and school districts on or near reservations.¹⁰

Intergovernmental relations: mixed results. In terms of intergovernmental relationships, the fruits of self-determination are mixed.

While the federal government self-determination policies have created more room for Indian cultures, they have also

given room for increased pressure from the state and local governments. For example, the North Central Idaho Jurisdictional Alliance (of city and county governments surrounding the Nez Perce Reservation) was formed to oppose Indian nation jurisdiction as the Nez Perce flexed their powers to self-rule in the 1990s¹¹ and in this decade.¹²

The Coeur d'Alene Reservation south of the city of Coeur d'Alene has had some of the better intergovernmental relations in Idaho.¹³ A memorandum of understanding used by the tribe to deal with law enforcement issues in Kootenai and Benewah Counties is an example of reasonable and respectful relationships. However, there are disagreements in Benewah County about the tribal sovereignty over the southern one-third of Lake Coeur d'Alene (Allred, 2004).

Tribal Councils are looking ahead, beyond gaming and amenity businesses, to further expand tribal and non-tribal businesses within and outside Indian Country.

Opportunities and Challenges

Idaho's Indian populations are becoming more economically sophisticated. Key partners in the regional and state economy, they are proactive players in the design of a future compatible with their sovereignty, indigenous identity, and sustainable economies of the modern world.

Opportunities are tremendous to further develop native enterprises inside and outside reservations. The factors that hinder or promote tribally and privately-owned enterprises have been articulated by development practitioners and scholars.¹⁴ Tribal development will continue to evolve, making valuable contributions in the assessment of local Indian economies and exports, identification of economic sectors with high payoffs, impact analysis of alternative businesses, and community development.

Challenges. Indian tribes face at least two challenges: (1) Preservation of tribal identity with highly fragmented resource base (land on trust and its allotments), and (2) Recovery of property rights on natural resources (land and water, fish and wildlife) that are intrinsic to Indian identity.

⁹ Employment figures refer to direct, indirect, and induced jobs estimated with IMPLAN. Detailed rankings by county are provided in Peterson and DiNoto. No similar information is available for the Shoshone Tribes.

¹⁰ See Peterson and DiNoto (2002).

¹¹ See The Harvard Project on American Indian Economic Development (2008, p. 282).

¹² See Allred (2004).

¹³ See Allred (2004) for the situation with the other Indian tribes in Idaho.

¹⁴ See Cornell et al. (2007), Malkin et al. (2004), Miller (2008) and Spilde-Contreras (2007).

¹⁵ See Peterson and DiNoto (2002).

IDAHO INDIAN NATIONS AT A GLANCE

Land. Five Indian reservations in the State of Idaho are home to federally recognized tribes with almost 2 million acres in trust.

Tribal Lands' impact on Idaho's economy¹⁵

- Jobs: 7,400 (4,500 gaming-related)
- Wages/earnings: \$159 million (\$84 million gaming-related)
- Sales: \$478 million (\$250 million gaming-related)
- Property/Sales tax: \$17 million—\$11 million gaming-related and \$6 million in state income tax payments.

Impact on local/county economies

- Total Indian gaming and non-gaming businesses create more jobs and economic activity than about half of the 44 counties in Idaho.
- These businesses are among the largest employers in their regions in terms of economic impacts.
- Coeur d'Alene Tribe is the 2nd largest employer in Kootenai and Benewah Counties.
- Kootenai Tribe is the largest employer in Boundary County.
- Nez Perce Tribe is 2nd largest employer in Nez Perce County.

Idaho education benefits/population

Proposition One, The Indian Gaming and Self-Reliance Act, approved in 2002, stipulated that 5% of net Indian gaming revenues are earmarked for local education programs and school districts on or near reservations. According to the Bureau of Indian Affairs, Idaho's tribal enrollment in 2005 was 10,808.

Table 1. Census figures come from the Indicators Northwest website at <http://www.indicatorsnorthwest.org/DrawRegion.aspx?RegionID=16>. **Acres figures** come from these five sites: <http://www.indiancountryextension.org/tribes/fort-hall> <http://www.shopaitribes.org/spt15/> <http://www.indiancountryextension.org/tribes/nez-perce> <http://www.indiancountryextension.org/tribes/coeur-d-alene> <http://www.kootenai.org/history.html>

Tribe	Land/acres	Counties included	Indian population		
			2000	1990	1980
Shoshone-Bannock at Ft. Hall	521,519	Bannock Bingham Caribou Power	3,648	3,035	2,542
Shoshone-Paiute at Duck Valley (Idaho-Nevada)	289,819	Owyhee, ID Humboldt, NV	998	1,022	932
Nez Perce	770,453	Clearwater Idaho Latah Lewis Nez Perce	2,101	1,863	1,463
Coeur d'Alene	345,000	Benewah Kootenai	1,251	749	541
Kootenai	13	Boundary	71	61	40
TOTALS 5 Indian Nations	1,926,804 acres	12 Idaho 1 Nevada	8,069	6,730	5,518

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