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**EXECUTIVE SUMMARY**

**Self-Government, Taxation, and Tribal Development:  
The Critical Role of American Indian Nation Business Enterprises**

by

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Under federal policies of self-determination through self-government, the 574 federally recognized American Indian nations in the United States are now expected to perform essentially all of the functions performed by state and local governments everywhere. Unlike state and local governments, however, Native nations have severely limited powers and opportunities to generate the tax revenues they need to support the services they provide. Thus, tribal governments rely heavily on the businesses they own to provide their core budgets.

State and local governments, too, operate myriad commercial enterprises—ranging from their ubiquitous lotteries to liquor stores, port and airport authorities, electricity and water companies, toll roads, transit companies, zoos, and many others. Such state-owned businesses, however, typically account for minuscule portions of their overall budgets. Moreover, as a general matter, when the purpose of a state’s businesses is to fund its governmental services, those businesses are not subject to taxation by the federal government or other governments.

The United States Treasury’s newly Proposed Rule on the federal tax status of tribal government entities would clarify that enterprises wholly owned by tribal governments cannot be subject to income tax. By putting tribal governments on equal footing with other governments when it comes to wholly-owned government enterprises, the Proposed Rule would eliminate uncertainty regarding tribes’ federal tax status and solidify a key element of the demonstrably successful federal policy of tribal self-determination through self-government. This promises to have a major—and positive—impact on tribes and their neighbors.

Adoption of the Proposed Rule will immediately foster improved access to credit and directly enhance resources needed for economic development, service provision, and infrastructure investment across America’s Native nations. The tribal and non-tribal citizens of the United States will benefit.

## **Self-Government, Taxation, and Tribal Development: The Critical Role of American Indian Nation Business Enterprises**

by

Joseph P. Kalt<sup>1</sup>

### **I. Tribal Self-Determination through Self-Government: A Policy That Works**

After decades—indeed centuries—of failed policies, in the early-1970s the United States began putting into law an encompassing policy framework that sought to improve the lives of its Native citizens. It did this by fulfilling its trust obligations to the nation’s American Indians and Alaska Natives through strategies of tribal *self-determination*.<sup>2</sup> By the late 1980s, what started as a program of enabling tribes to take over and administer formerly federal functions was transformed into more true *self-government* with the passage of Self-Government Amendments to the Self-Determination and Education Assistance Act of 1975 (Public Law 93-638). Now, after nearly 50 years of sustained bi-partisan support for tribal self-determination through self-government, the results are nothing short of phenomenal.

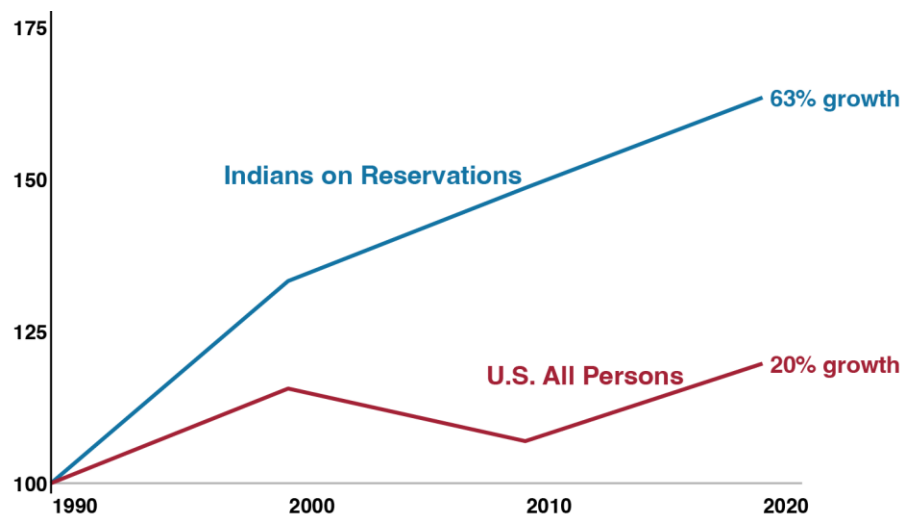
U.S. Census Bureau data reveal that from 1990 onward, and after decades of stagnation and deprivation, economic and community development have taken hold in Indian Country. Since the 1990 Census was taken (in 1989), the real (i.e., inflation-adjusted) income per person of the average Native citizen living on an American Indian reservation has grown by 63%. By comparison, the real income per person of the average American overall has risen by only 20% (see Figure 1).

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<sup>2</sup> The Self-Determination and Education Assistance Act of 1975 (Public Law 93-638), available at [https://www.congress.gov/bill/93rd-congress/senate-bill/1017#:~:text=Public%20Law%20No%3A%2093%2D638,\(01%2F04%2F1975\)&text=Indian%20Self%2DDetermination%20and%20Education%20Assistance%20Act%20%2D%20Declares%20that%20the,of%20educational%20and%20service%20programs.](https://www.congress.gov/bill/93rd-congress/senate-bill/1017#:~:text=Public%20Law%20No%3A%2093%2D638,(01%2F04%2F1975)&text=Indian%20Self%2DDetermination%20and%20Education%20Assistance%20Act%20%2D%20Declares%20that%20the,of%20educational%20and%20service%20programs.)

**Figure 1: Growth in Real (inflation-adjusted) Per Capita Income:  
Indian Country v. the U.S. as a Whole (1989=100)**



To be sure, the economic growth that has finally taken hold in Indian Country has not been uniform across Native nations, and some remain stalled and deeply impoverished. Nevertheless, the sustained economic development is affecting such broad swaths of Indian Country—encompassing large and small, urban and rural tribes—that both aggregate and average data show marked improvements in the quality of tribal citizens’ lives and Native communities’ social conditions. Thus, for example, the U.S. Census data show that more than 47% of Indian reservation families with children were living below the federal poverty line in 1989 (see Figure 2). By 2018, this figure was down to 27%. This progress against severe poverty has been made by letting tribes take the reins of their own governments.

**Figure 2: Families with Children Living in Poverty  
Indian Country v. the U.S. as a Whole**

	1969	1979	1989	1999	2008	2018
<b>Total U.S.</b>	10.8	12.6	15.5	13.8	15.7	13.6
<b>Caucasian Alone</b>	7.9	9.2	11.8	10.9	13.0	11.5
<b>African American Alone</b>	32.3	33.5	35.4	28.9	29.6	25.0
<b>American Indian / Alaska Native Alone</b>	33.3	23.7	27.0	23.4	31.5	24.2
<b>AIAN Alone on Reservations</b>	57.0	43.0	47.3	35.7	32.2	27.0

Decennial Censuses 1970, 1980, 1990, and 2000. ACS 5-year averages for 2010 and 2020 are noted in their middle years (2008, 2018).

The reductions in reservation poverty are showing up directly in social conditions. For example, the proportion of Native citizens on reservations living in crowded housing has gone from more than 16% in 1989 (when the corresponding figure for the U.S. as a whole was under 5%) to less than 8% today (compared to 3.3% for the U.S. as a whole).<sup>3</sup> Native unemployment on reservations has declined from approximately 26% to 14% over this period; and the number of Native citizens on reservations who have college degrees has risen from only 4% to over 9%.<sup>4</sup>

These data and indicators are hugely encouraging. But there is still a long way to go: The starting “gaps” between tribal citizens’ standards of living and social conditions, as compared to those of the average U.S. citizen, were shockingly large, and even at the striking growth rates we see in Figure 1, closing those gaps will take a long time. Today, the average incomes of Native reservation residents are still only slightly more than half of the U.S.-wide average. Poverty is still too high, and living conditions are still too substandard.

What is clear is that the primary cause of the economic development and concomitant improvement in social conditions on reservations has been the federal policy framework of self-determination through self-government. The fact that sustained economic development took hold in the late 1980s is not coincidence.<sup>5</sup> To be sure, the birth and growth of the tribal gaming industry has been a positive contributor. But the spread of tribal casinos (which are owned by tribal *governments*) is itself a direct manifestation of tribal sovereignty and self-government. Tribes’ rights to go into the gaming business (or any business) are not “special” rights enjoyed by Indians. Instead, just as the citizens of one of the fifty states can vote or otherwise press their state legislators to allow casino, lottery, or other gambling businesses to operate within their states’ jurisdictions, so too can tribal citizens and their legislatures (i.e., tribal councils) make such decisions.

Moreover, the visibility in the media of large, high-dollar tribal casinos obscures the fact that such portrayals apply to a very small number of the 250 or so tribes that own gaming operations, usually the Native nations that happen to be located in or near major U.S. population

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<sup>3</sup> See Kalt, Joseph P., *American Indian Self-Determination Through Self-Governance: The Only Policy That Has Ever Worked* (hereinafter, *The Only Policy*) Statement to the Commission on Native Children, December 15, 2022, Figure 5, available at [https://commissiononnativechildren.org/wp-content/uploads/2022/12/STMT\\_AI-Self-Determination-Thru-Self-Gov\\_12-15-22-Kalt.pdf](https://commissiononnativechildren.org/wp-content/uploads/2022/12/STMT_AI-Self-Determination-Thru-Self-Gov_12-15-22-Kalt.pdf).

<sup>4</sup> U.S. Census data, var. years, as reported in Medford, A.B., J.B. Taylor, and E. Moreno, *Social & Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey 1990 – 2020* (forthcoming, Harvard Kennedy School Project on Indigenous Governance and Development).

<sup>5</sup> For extended discussion of the causal role of the policy of self-determination through self-government, see Kalt, *The Only Policy*, *op. cit.* and citations therein.

centers (i.e., near major urban markets).<sup>6</sup> The vast majority of tribal governments' gaming operations are quite small and leave their owner-governments searching for non-gaming sources of revenue. The result of such searching in the era of self-determination through self-government is a veritable “boom” and diversification of tribal economies into non-gaming activities. Tribes today operate hundreds of tribal government-owned businesses (“TGOBs”), large and small, across wide ranges of activity, from manufacturing, agriculture, and natural resources development to health care, retail sales, construction, consulting, and tourism.

Two types of businesses are particularly prominent among non-gaming TGOBs. Federal contractors are one. These “are tribal companies selling goods and services to the federal government under the terms of the Section 8(a) Business Development program of the Small Business Act (15 U.S.C. §631 et seq.). Federal procurement data shows tribal 8(a) contracting revenues to be about \$560 million in 2005. By 2011, these had grown to about \$2.88 billion.”<sup>7</sup> Tribes' Section 8(a) enterprises operate primarily in defense contracting for service industry functions. The second prominent type of non-gaming TGOB operates in the energy and natural resource sector. These industries generate business activity and associated revenues comparable in size to those we find in Section 8(a) activities.<sup>8</sup>

As I (and co-authors) have noted previously regarding the diversification of tribal economies:

Examples [of the current scope of TGOBs]... simply did not exist before tribes took the self-determination reins. Instead, before self-determination, development efforts tended to follow a so-called “standard model” in which tribes chased—sometimes desperately—whatever the federal government was funding in a particular budget cycle. Moreover, project management was typically vested in the tribal councils by federal authorities, who usually seemed unable to imagine tribes being able to create their own business laws and businesses. In the same vein, federally funded development projects were often undertaken upon

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<sup>6</sup> Kalt, Joseph P., A.B. Medford, and J.B. Taylor, *Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine* (hereinafter, *Wabanaki*), Harvard Project on American Indian Economic Development, December 2022, at Figure 5 and associated discussion, available at [https://ash.harvard.edu/news/harvard-project-american-indian-economic-development-releases-research-impacts-restrictions?admin\\_panel=1](https://ash.harvard.edu/news/harvard-project-american-indian-economic-development-releases-research-impacts-restrictions?admin_panel=1).

<sup>7</sup> Kalt, *The Only Policy*, *op. cit.* at Figure 8 and 15 (citing Taylor, J.B., *Native American Contracting Under Section 8(a) of the Small Business Act: Economic, Social, and Cultural Impacts*. Cambridge, MA, 2007; and Taylor, J.B., *A Report on the Economic, Social, and Cultural Impacts of the Native 8(a) Program*, Native American Contractors Association. Sarasota, FL, 2012).

<sup>8</sup> Kalt, *The Only Policy*, *op. cit.* at 16-18.

meeting bureaucratic criteria rather than through consideration of underlying economic feasibility or management and staffing capacities.<sup>9</sup>

## II. Tribal Governments and Their Funding in the Era of Self-Determination

The federal policy framework in which the United States seeks—with considerable success, as discussed above—to fulfill its trust responsibility of providing for the welfare of the country’s Native citizens by empowering the tribal nations to substantially govern themselves has not only resulted in a resurgence of Native nation economies. It has also resulted in a massive increase in the burdens borne by tribal governments as they now strive to be the local government service providers for their own citizens. These are burdens that are gladly—and proudly—taken on by tribes and their leaders, *provided that their hands are not tied when they step forth to exercise and fund their sovereign powers.*

We are now in an era—the Self-Determination Era—in which the governments of the federally recognized American Indian nations have responsibility for performing the full range of functions and providing the full range of services that are expected of their non-tribal state and local counterparts. Tribes today routinely operate schools, police and fire departments, court systems, housing departments, public health facilities and programs, water and solid waste sanitation systems, income support programs, environment and natural resource management departments, road departments, job training and small business development programs, recreational and cultural services, ...and on and on. In fact, with the build-up of governing capacity and experience, more and more cases are arising in which a Native nation government demonstrably outperforms its state and local neighbors in the provision of local governmental services.<sup>10</sup>

Where a tribe does not offer these services, or offers them only at a low level, it is often because the tribal government lacks the necessary financial wherewithal. Federal policies have evolved over the decades and centuries to effectively give discriminatory supremacy to taxation by tribes’ neighboring state and local governments. This frequently applies to areas such as transaction (e.g., sales) and property taxation. In the case of on-reservations sales transactions engaged in by non-Natives, for example, legal conflict over sales taxes often leaves tribes unable

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<sup>9</sup> Kalt, *The Only Policy, op. cit.*, at 17. For further discussion, see Strommer, Geoffrey D. and S.D. Osborne, “The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act.” 39 *American Indian Law Review* 1 (2015).

<sup>10</sup> See *Honoring Nations*, Harvard Kennedy School Project on Indigenous Governance and Development, at <https://indigenousgov.hks.harvard.edu/honoring-nations>.

to tax at all or, at best, having to hammer out legal settlements in which tax revenues have to be shared with neighboring jurisdictions.<sup>11</sup>

The discriminatory treatment of tribes in this regard is obvious. The state of, say, Arizona has primacy in levying sales taxes within its state boundaries, and citizens of, say, Michigan, who buy automobile parts at a Walmart in Phoenix are not exempted from Arizona sales tax. Tribes are routinely denied such primacy of territorial sovereignty. A similar principle of non-discrimination properly applies at the federal level. As a general matter, the federal government does not tax state-government-owned enterprises that directly help states fund their operations. To treat enterprises of tribal governments to the contrary would not only be discriminatory, it would also be starkly inconsistent with the federal government's policy of enabling and expecting tribes to perform the same functions as the country's state and local governments.

Tribes' abilities to generate tax revenues within their boundaries are especially limited in the cases of property and in cases of transactions involving non-Natives and on-reservation property that is not held "in trust" for a tribe by the federal government. The result is that tribes largely lack the breadth of the traditional tax bases enjoyed by their neighboring governments.<sup>12</sup> Both in absolute terms and relative to their state and local counterparts, this disadvantages tribes. Tribes are left to rely on demonstrably inadequate federal funding of local services<sup>13</sup> and, if they have business operations, to drain those tribal businesses of investment funds those businesses could be using to expand and grow. The result on many reservations is dilapidated infrastructure and substandard services that perpetuate social and economic distress.

Available data drive home the point that tribes must depend heavily on their TGOB earnings to fulfill their responsibilities to their citizens. In a 2022 study for tribes in Washington, 23 of the tribes in the state provided data on the composition of their government budgets. The 23 tribes' governments covered 51% of their expenditures from their tribal government-owned enterprises. Only 29% came from a combination of tribal taxes, leases, forestry stumpage, and

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<sup>11</sup> See, for example, Federal Reserve Bank of Minneapolis, *Tribal-State Tax Compacts Rise as a Tool for Tax Clarity in Indian Country*, September 2022, accessed at <https://www.minneapolisfed.org/article/2022/tribal-state-tax-compacts-rise-as-a-tool-for-tax-clarity-in-indian-country#:~:text=Historically%2C%20legal%20challenges%20to%20tribal,for%20tax%20collection%20and%20enforcement>.

<sup>12</sup> See, e.g., U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, 2018, p. 206, Finding F, accessed January 1, 2024 at [12-20-Broken-Promises.pdf \(usccr.gov\)](https://www.usccr.gov/publications/12-20-Broken-Promises.pdf); U.S. Department of Agriculture, *Lack of Tax Base is a Challenge for Tribal Nations*, February 11, 2021, accessed January 1, 2024 at <https://www.usda.gov/media/radio/daily-newsline/2021-02-11/lack-tax-base-challenge-tribal-nations>.

<sup>13</sup> U.S. Commission on Civil Rights, *Broken Promises (op. cit.)*; U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, 2003, accessed January 1, 2024 at <https://www.usccr.gov/pubs/na0703/na0204.pdf>.

other tribally controlled or owned sources. Eighteen percent came from federal grants and contracts, and 4% came from state of Washington-funded grants or contracts.<sup>14</sup> By comparison, state governments, on average, funded approximately 53% of their expenditures through state-levied taxes in 2022.<sup>15</sup> Businesses owned by states typically account for less than 3% of state government spending budgets.<sup>16</sup>

A similar pattern is seen in the budgets of a set of hundreds of individual tribal government programs and departments which have stepped up to the challenge of self-government with outstanding performance for their citizens. Figure 3 reports the funding composition of the 925 tribal programs reviewed over 1999-2018 by the *Honoring Nations* program of Harvard Kennedy School's Project on Indigenous Governance and Development. The program's board of independent experts selects best-practices "honorees" in tribal governance based upon "significance to sovereignty, effectiveness, cultural relevance, transferability, and sustainability."<sup>17</sup>

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<sup>14</sup> Taylor, Jonathan B., *The Economic & Community Benefits of Tribes in Washington* (Taylor Policy Group, May 2022), available at <https://www.washingtontribes.org/wp-content/uploads/2020/10/WIGA-EconImpact2019.pdf>.

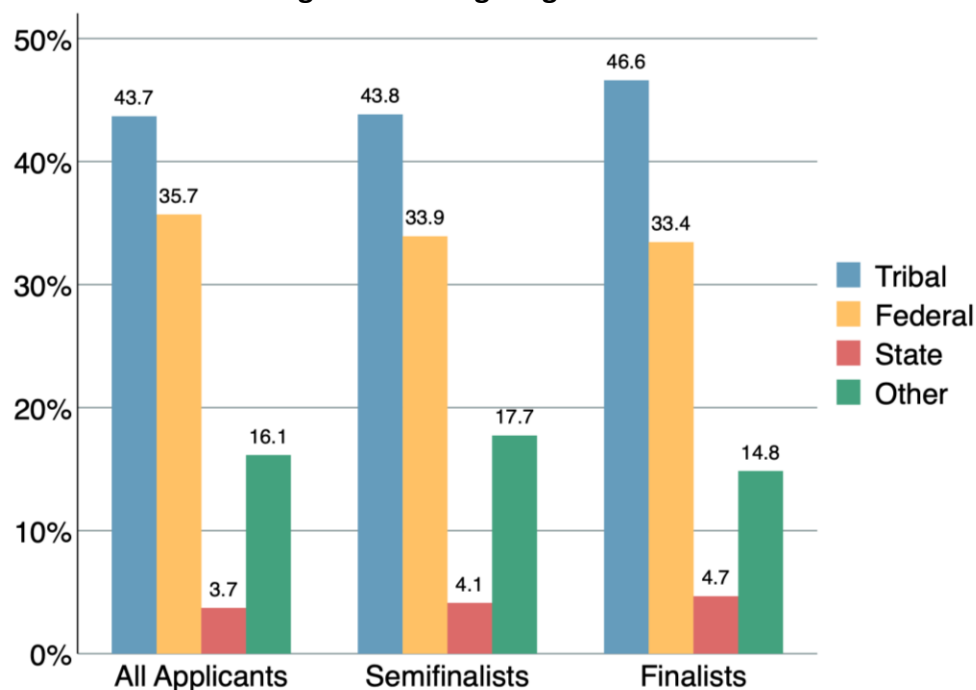
<sup>15</sup> U.S. Census Bureau, *2022 Annual Survey of State Government Finances Tables*, available at [State Government Finances Tables \(census.gov\)](https://www.census.gov/programs-surveys/state/data/tables.2022.List_1585358625.html#list-tab-List_1585358625).

<sup>16</sup> It appears that the most recent comprehensive data on the net incomes of state government-owned business enterprises are for 2016 (*USA Facts* at <https://usafacts.org/data/topics/government-finances/government-run-business/#state-and-local>, accessed 12 December 2023). In that year, the positive net income of such businesses as a share of total state expenditures (including covering the net income losses of state government-owned businesses) was 2.3%. State government expenditures are from U.S. Census Bureau, *2016 Annual Survey of State Government Finances Tables*, available at [https://www.census.gov/programs-surveys/state/data/tables.2016.List\\_1585358625.html#list-tab-List\\_1585358625](https://www.census.gov/programs-surveys/state/data/tables.2016.List_1585358625.html#list-tab-List_1585358625).

<sup>17</sup> See *Honoring Nations*, *op. cit.* For the board, see <https://indigenousgov.hks.harvard.edu/honoring-nations-board-governors>.



**Figure 3: Funding Sources for a Sample of 925 High-Performing Programs of 215 Tribes**



As I and co-authors have previously reported, the data of Figure 3 indicate that:

[H]igh-performing tribal government programs in the era of Self-Determination derive the largest portions of their budgets from their tribal governments—i.e., tribes are self-funding at levels averaging approximately 45%. The noted tribal operations do make substantial use of federal funding, generally in the range of approximately 35% or somewhat less. This reflects the enduring trust responsibility of the federal government to tribes [citation omitted]. Based on data from the Tax Foundation, fully 35 of the fifty U.S. states had more than 35% of their general revenues coming from the federal government as of 2019.<sup>18</sup>

Meanwhile, as noted above, state governments derive the majority of their revenues from state-level taxes, and only on the order of 3% of their budgets is provided by the earnings of state government-owned businesses.<sup>19</sup>

<sup>18</sup> Kalt, *et al.*, *Wabanaki*, *op. cit.* at 14 (citing Bureau of Indian Affairs, *What is the federal Indian trust responsibility?*, November 2017, available at <https://www.bia.gov/faqs/what-federal-indian-trust-responsibility#>; and Fritts, Janelle. 2020. “How Does Your State Compare?” Tax Foundation, 2022), available at <https://taxfoundation.org/facts-and-figures-2020/>.

<sup>19</sup> *USA Facts*, at <https://usafacts.org/data/topics/government-finances/government-run-business/#state-and-local>, accessed 12-12-23.

### III. The New Proposed Rules Would Significantly Strengthen the Federal Policy of Tribal Self-Determination through Self-Government

Taking a broad perspective, the policy of tribal self-determination through self-government has meant shifting the locus of accountability in decisions affecting a tribe away from federal officials and toward that tribes' own citizens and their leaders. While such a shift has been no iron-clad guarantee of improved performance, and results differ from tribe to tribe, the overall effect has been to (1) improve the efficiency of government at the reservation level, (2) increase the likelihood that decisions affecting reservation affairs and conditions are consonant with the needs and cultural values of a tribe's citizens.

These effects are well-documented in existing research. To cite but a few examples:<sup>20</sup>

- Tribal governments that take over and manage their own forests show higher returns and better harvesting practices than those tribes which have not yet been able to similarly exert their governing powers;<sup>21</sup>
- Federal operation of the hospital at Winnebago of Nebraska led to its decertification; tribal takeover has allowed the hospital to regain certification with no certification exceptions;<sup>22</sup>
- Tribal assumption of policing functions on reservations has resulted in substantially reduced crime and greater citizen satisfaction “due to enhanced tribal sovereignty and tribal creation of justice systems that reflect community values and conceptions of justice;”<sup>23</sup>
- “Analysis of Clean Water Act enforcement across 474 tribal wastewater facilities finds that, on average, enforcement increases significantly under tribal [regulatory] primacy.”<sup>24</sup>

Notwithstanding the evidence and research which concludes that local self-government by tribes results in better and more culturally grounded services to citizens of American Indian nations, the pressure from those citizens to always do better means that tribes are constantly bumping up against and challenging limits to their governing authorities. We have seen this

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<sup>20</sup> For further discussion, see Kalt, *The Only Policy*, op. cit.

<sup>21</sup> Krepps, Matthew B., and R.E. Caves, “Bureaucrats and Indians: Principal-agent Relations and Efficient Management of Tribal Forest Resources,” *Journal of Economic Behavior and Organization* 24 (2) (1994): 133–51.

<sup>22</sup> Taylor, J.B., *The Strength of Multi-Institutional Development: The Winnebago Tribe of Nebraska, 1990–2022*, Taylor Policy Group, Inc., Hyannis, MA, 12 December 2023, <https://doi.org/10.61235/TVVZ1237>.

<sup>23</sup> Goldberg, C., H. Valdez Singleton, D. Champagne, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, National Institute of Justice, November 2007; quotation from National Institute of Justice Abstract, at <https://nij.ojp.gov/library/publications/final-report-law-enforcement-and-criminal-justice-under-public-law-280>.

<sup>24</sup> Haider, M. and M. Teodoro, “Sovereignty, primacy & environmental protection,” *Policy Studies Journal*, May 2020; quotation from authors' abstract, at <https://mannyteodoro.com/?p=3441>.

above, for example, in the discussion of tribal taxing powers and limits thereto. In the face of the evidence, it is sound federal policy to expand the boundaries of tribal control.

Toward this end, on September 13, 2024, the U.S. Department of the Treasury and the Internal Revenue Service (“IRS”) issued proposed guidance under the Tribal General Welfare Exclusion (“GWE”) Act of 2014 that would enhance the ability of tribes to govern their communities. Specifically, the GWE Proposed Rule would move tribes’ provision of general welfare benefits toward parity with other governments’ tax treatment of general welfare benefits. In doing so, as Treasury and the IRS note, the Rule would “demonstrate an unprecedented recognition of Tribal self-determination and self-governance in tax regulations by providing deference to Tribes in how they establish their programs, the scope of benefits they provide, and determinations involving Tribal culture or ceremonial activities.”<sup>25</sup>

Treasury and the IRS are also proposing rules that would clarify the tax treatment of entities that are wholly owned by tribal governments. As we have seen above, Native nations that are pursuing strategies of self-government are routinely and very heavily dependent on the earnings of business entities which they own. In effect, these entities provide tribes with home-grown, *de facto* tax bases. Whether tribal governments acquire revenues from these entities through owners’ dividends (as some tribes do) or through explicit imposition of *tribal* income or property taxes on their own enterprises (as some tribes do), the resulting sums are the bedrock upon which tribes actually and effectively exercise their sovereignty. TGOBs are the lifeblood of tribal economies, and another government’s taxation of them is a direct drain on both investment funds for tribal businesses and the funding of tribal governmental services to citizens.

As the Federalist Papers noted almost 250 years ago: “A nation cannot long exist without revenue. Destitute of this essential support, it must resign its independence...” Indeed, this principle undergirds the sovereignty of state governments in our federalist republic. For the federally recognized American Indian nations, to subject tribal enterprise earnings to another government’s taxing powers is to surrender sovereignty to that other government. Applied to the tribes, this implies not only “resignation of their independence,” but removes the very foundation of the unprecedented success of tribal self-governance in the modern era.

The “losers” under policies which would allow non-tribal governments to tax tribal government businesses are not only the tribes and their citizens, but the United States as a whole. As tribal economies have taken off under self-determination through self-government,

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<sup>25</sup> U.S. Department of the Treasury and Internal Revenue Service, press release of 13 September 2024, *U.S. Department of the Treasury Issues Proposed Rules Supporting Expanded Tribal General Welfare for Tribal Communities*, at <https://home.treasury.gov/news/press-releases/jy2579#:~:text=These%20proposed%20rules%20would%20provide,citizen%20of%20a%20Tribal%20Nation.>

they have generated productivity, provided services, and created jobs that spillover through “multiplier effects” to their immediate neighbors and beyond. In many cases, particularly in otherwise poorer rural regions of the country, tribal economies have emerged as the economic and service provision engines of entire towns and counties.

I and co-authors estimate that, immediately prior to the onset of the COVID-19 pandemic, the overall annual economic contribution of the federally recognized American Indian nations to the U.S. GDP was well in excess of \$125 billion, accounting for more than 1.1 million jobs and \$50 billion in annual worker income—of which at least 80% was going to the more than 900,000 non-Natives employed by tribes. Moreover, as those workers earned their income and spent it—overwhelmingly off-reservation, in most cases—federal and state/local tax revenues were being pushed up through income, off-reservation sales, property, and other taxes, to the tune of more than \$25 billion annually.<sup>26</sup> With the pandemic in retreat, these figures are only growing.

In short, it is not in the national interest of the United States to handicap and debilitate the ability of its tribal nations to continue to expand their governmental capacities. Absolutely critical to such expansion are the earnings of the business enterprises owned by tribal governments. Preventing other governments from taxing those earnings puts tribes on a level playing field vis-à-vis state governments, who own many hundreds of revenue-generating enterprises. To do otherwise by discriminating against tribes is inconsistent with both basic fairness and with the federal policy framework of tribal self-determination through self-government.

#### IV. Conclusion: Sustaining the Progress

Within our federalist system, 50 states, more than 3100 counties,<sup>27</sup> and approximately 19,500 incorporated cities and towns<sup>28</sup> exercise sovereign taxing authority within their respective jurisdictions. They do so in order to fulfill the responsibilities they have as sovereigns to serve their citizens. In the case of the American Indian nations, their sovereignty is enshrined in hundreds of treaties and the Constitution and is recognized in innumerable acts of Congress and Executive Orders. When adhered to by the United States, the sovereignty of the tribal nations is embodied in government-to-government relations between the United States, the individual

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<sup>26</sup> Akee, Randall K.Q. E.C. Henson, M.R. Jorgensen, and J.P. Kalt, *The Need for a Significant Allocation of COVID-19 Response Funds to American Indian Nations*, Policy Brief #1, Harvard Project on American Indian Economic Development, 18 May 2020.

<sup>27</sup> U.S. Geological Survey at <https://www.usgs.gov/media/audio/how-many-counties-are-there-united-states#:~:text=Well%2C%20today%20we%20have%20some%20trivia%20for%20you.,1%20in%20Nevada%2C%20and%20the%20remainder%20in%20Virginia%29.>

<sup>28</sup> *World Population Review*, “How Many Cities are in the United States? 2024”, available at <https://worldpopulationreview.com/us-city-rankings/how-many-cities-are-in-the-us.>

states, and the federally recognized American Indian nations and, most especially today, in overarching policies of tribal self-determination through self-government.

Unfortunately, over the centuries, the foundations, principles and practice of tribal sovereignty have been violated repeatedly by discriminatory, results-driven legislation, agency interpretations, and court decisions. Too frequently, these have been made without meaningful representation of the interests of one category of the nation’s recognized sovereigns—the Indian tribes. This has certainly been the case in the arena of taxation. Ambiguity as to the taxing authority of federally recognized American Indian nations and, in many contexts, outright discriminatory subjugation of those nations’ taxing powers within their territorial jurisdictions limit tribal nations’ abilities to raise the capital, build the institutions, generate the commerce, and support the infrastructure that they need to serve their citizens.

The United States has been making progress in recent decades, however halting and contentious, in putting the nation back on track to respecting the Founders’ original recognition of “Indians not taxed”<sup>29</sup> in the Constitution and of the continent’s Indigenous polities as allies and fellow sovereigns. Arguably, the most promising and demonstrably successful attempt in the modern era to get the country back on track vis-à-vis the status of its Native communities has been self-determination through self-government. Treasury’s recently Proposed Rules for coherent and sound implementation of the Tribal General Welfare Exclusion Act of 2014 and for clarifying the federal tax status of tribal government enterprises are critical steps toward sustaining this progress.

The results of the Proposed Rules, if enacted, will be immediate and positive for tribes and their neighboring communities. Implementation of the Proposed Rules will enhance the ability of tribal governments to craft the programs and policies their citizens need and demand. Moreover, by making it clear that other, non-tribal governments do not have taxing powers over the wholly-owned enterprises of tribes, the Rules will create the financial certainty that is needed by tribes and the capital markets which tribes must access as they continue to grow their economies, replenish reservation infrastructures, and deliver governmental services. The results will be transformative for Indian Country and its many neighbors.

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<sup>29</sup> *Constitution of the United States*, Article I, Section 2, Clause 3 (available at <https://worldpopulationreview.com/us-city-rankings/how-many-cities-are-in-the-us>) and Fourteenth Amendment, Section 2 (available at <https://constitution.congress.gov/constitution/amendment-14/>).



## **POLICY BRIEFS**

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