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A New Way Forward: Native Nations, Nonprofitization, Community Land Trusts, and the Indigenous Shadow State

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Abstract

Indigenous sovereignty has been both expanded and restricted in the current self-determination era of federal Indian policy in the United States. This has allowed both the expansion and strengthening of indigenous governments, as well as the continued successful efforts to restrict and regulate these sovereign indigenous nations. The existing models of governance, development, and planning fail to adequately account for these challenges to the fundamental legitimacy of indigenous governments. I propose the model of the 'indigenous shadow state' based around community land trusts and other indigenously-controlled nonprofit organizations, as a complementary model, to compensate for these challenges as a means of ensuring the long term viability of indigenous social and political institutions. I discuss how a community land trust can be utilized to perform the role of a government and serve the long term needs of its citizens in the areas of housing, economic development, and land reclamation. I also briefly discuss how this model can be applied in the urban context.

KEYWORDS: nonprofit government, community land trust, American Indian government, shadow state

Introduction

In this article, I seek to develop a conceptual model for the governance and development of indigenous governments through the use of nonprofit organizations as a complementary alternative to traditional public sector activities. This model is proposed to counter and side-step the limitations placed on the activities of indigenous governments by ‘mainstream’ colonial governments (including federal and state governments). I briefly describe the need for this type of a model due to the diminished sovereignty that indigenous governments possess, and the limitations placed on the governance and development potential of indigenous governments by federal law and the legal decisions of the U.S. Supreme Court. I do not intend that summary to be an exhaustive examination of Federal Indian Law and Policy over the last four decades, rather the intention is to provide a representation of how the exercise of indigenous governance and development continues to be limited and curtailed even in the current era of self determination policies. I also describe the existing governance and development models emphasizing how they capitalize on the strengths of self determination policies, while at the same time failing to account for the seemingly endless legal challenges to indigenous sovereignty and the attempts to further limit the governance, development, and service-provision actions of indigenous governments.

Out of that criticism, I propose the ‘Indigenous Shadow State’ model of governance and development, involving the partnership of indigenous governments with indigenously-controlled nonprofit organizations, to counter these limitations on the actions of indigenous governments. I describe in more detail how a community land trust can be used by an indigenous government to serve as an extension of that government, as well as how it could be used to facilitate various forms of development. This paper thus seeks to connect the academic literature in the broad fields of nonprofit governance and policy, and community-based planning and development, with the broad field of American Indian law, governance, and development in the context of the United States for the purpose of providing a new approach to American Indian governance and development as well as serving as an expansion of the application of government-nonprofit partnerships.

Expansion of Both Liberties and Regulations under Self Determination

The status of Native Nations in the political and legal framework of the United States was initially articulated in a series of U.S. Supreme Court cases known as the Marshall Trilogy, named after Chief Justice John Marshall. Specifically, the case of *Cherokee Nation v. Georgia* (1831) established that Native Nations were

not foreign nations but were instead “domestic dependent nations” and were therefore subject to the authority of the United States. Also, *Worcester v. Georgia* (1832) held that because tribal governments were established political communities, States could not act unilaterally to alter or disrupt the political and legal relationship between the federal government and tribal (indigenous) governments (Norgren, 2004; Duthu, 2008). Collectively, as derived from the Commerce Clause of the U.S. Constitution, these decisions established that the United States Congress had plenary authority over Native Nations. Since the 1970s, indigenous nations in the United States have been subject to federal “self determination” policies (Zaferatos, 1998). The self determination and self governance periods have been typified by the development of indigenous public sector institutions when governmental programs that had previously been administered paternalistically by the federal government were devolved to indigenous governments who took over the management and administration of those programs. Other advances in federal policy since the 1970s have also contributed to the involvement by indigenous governments in issues of public health, housing, environmental protection, etc. (Zaferatos, 1996). The Indian Self Determination and Education Assistance Act of 1975 is typical of our current period’s type of progressive legislation that has allowed indigenous governments to reassert themselves as governments and take control over their land, resources, and assets.

This transition in federal policy has also allowed for the initial realization of truly government-to-government relationships between indigenous and mainstream governments at all levels. In some locations, this transition in federal policy has also impacted state-level policies towards American Indians. An example of this is the State of Washington’s Centennial Accord of 1989. This accord establishes intergovernmental cooperation between state and indigenous governments as the official policy of the state (Zaferatos, 1996). Likewise, the passage of the Davis-Strong Act of 1984, in Alabama, marked the first positive relationship between the State and American Indians since the Removal Era of the 1830s. This Act led to the creation of the Alabama Indian Affairs Commission and the granting of state recognition to a number of indigenous groups in Alabama (Hathorn, 1997).

However, despite the growth in the degree of power and authority that indigenous governments have been able to assert over their own lands and communities, there have also been a number of Supreme Court Cases, federal laws, and state government actions that have succeeded in restricting the sovereignty of indigenous governments over their own lands, over their ability to regulate the actions of outsiders, and the ability of outside governments to regulate the activities of indigenous governments. For instance, the Supreme Court case *Montana v. United States* (1981) is notorious for limiting the civil

authority of indigenous governments over nonmembers on the reservation. The court opinion was “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe” (Duthu, 2008). The court stated that

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe (quoted in Duthu, 2008).

Thus an indigenous government only possessed the power to regulate nonmembers on reservation land if they enter into a “consensual relationship” with either the tribe or an individual, or if the actions of that nonmember are potentially injurious to that indigenous nation. A similarly devastating court case along these same lines is that of *Atkinson Trading Company v. Shirley* (2001), where the court ruled against a tax imposed by the Navajo Nation on the operation of a hotel on the reservation that was operated by nonmembers (Duthu, 2008).

These should be understood fundamentally as a further limitation on the exercise of the inherent sovereignty of indigenous nations. By the term ‘inherent sovereignty’ I mean that Native Nations, as nations and as political communities, were not created by the United States. Federal recognition thus constitutes the formal recognition of sovereignty not the creation of sovereignty; because of their status as “domestic dependent nations” Native Nations no longer possess absolute sovereignty. Thus while some could interpret these and other cases as a clarification of the relationship between the three sovereigns in the United States (federal, state, and tribal governments), I see them as further colonial limitations on the inherent right of a distinct people to act on their own behalf.

An example of restrictive legislation enacted in the self determination period includes, most notably, the Indian Gaming Regulatory Act of 1988. This act imposed a federal regulatory framework on the potential gaming activities that could occur on reservation territories. Primarily, it limited the potential gaming activities to only those which are allowed under federal and state law. It also requires compacts between an indigenous government and a state for the more lucrative ‘Class Three’ gaming operations (Duthu, 2008). Further, the Act limits the manner in which revenues from gaming operations can be used by an indigenous nation. This Act thus exists to protect the interests of the State, rather than the interests of indigenous nations. While a product of the ‘Termination era’, another example of this infringement on sovereignty was Public Law 280, which

was passed in 1953. In certain states, the law extended the civil and criminal jurisdiction of those States onto reservations (Duthu, 2008).

Additionally, a number of states have repeatedly taken it upon themselves to attempt to regulate the actions of indigenous governments in their states, and to interfere with the government-to-government relationship between indigenous governments and the federal government. For example, New York has repeatedly taken an antagonistic approach towards the multiple indigenous governments in the state. Much litigation has occurred between the State and the various indigenous governments of New York in regards to taxation, land claims, and matters of jurisdiction (Hauptman, 1988; Duthu, 2008). One of the recent and major examples of these cases was *City of Sherrill, New York v. Oneida Indian Nation of New York* (2005) (Duthu, 2008). Another example of an action by a state is the State of Connecticut's successful lobby to thwart the federal recognition process by the Bureau of Indian Affairs for the Schaghticoke Tribal Nation. The Schaghticoques were initially granted federal recognition by the Bureau of Indian Affairs in 2004, however the State's Attorney General, Richard Blumenthal, appealed that decision and was successful in his legal campaign to have it overturned and their federal recognition rescinded (Sohn, 2006). As can be seen in each of these examples, there are many actors and special interest groups in the spheres of law and politics that actively seek to restrict the actions of indigenous governments and infringe upon the practice of sovereignty despite the official federal policies of self determination and self governance. It is important to understand that while self determination and self governance are somewhat substantive realities so far in the twenty-first century, it is also true that many in mainstream governments as well as many American citizens are unwilling to allow indigenous nations to have outright authority over their own lands, resources, and resident populations; especially where that involves non-Indians.

Current Models of Governance, Development, and Planning

In the past decades of the self determination period, a number of authors have touted the benefits of governmental action by indigenous governments in terms of acting on their own behalf to promote their own sovereignty and regain power and control over their land, economy, and other resources. This is articulated quite clearly, for instance, in the work of Zaferatos where he advocates the idea of aligning "a tribe's community development objectives with its historical experiences and its political self-determination aims" (Zaferatos, April 2004). Collectively these authors' recommendations can be distilled down into a select number of core policy goals. These include the development of intergovernmental relationships (Zaferatos, 1996; Zaferatos, Winter 2004; Hicks,

2007; Harvard Project on American Indian Economic Development, 2008), the reform and development of stronger, more stable, more professionalized, and more effective indigenous governments (Cornell, 2007; Adams et al, 2007), governmental ownership and protection of cultural and natural resources (HPAIED, 2008), and the development of a diversified, integrated, and yet reasonably self-sufficient indigenous economy. These economic development models are primarily driven by the indigenous government itself via tribally owned enterprises (HPAIED, 2008; Grant and Taylor, 2007), but can also include the involvement of indigenous ‘citizen entrepreneurs’ (Cornell et al, 2007). The importance of economic self-sufficiency is difficult to overstate as the encroachment of American political economy and the creation of a relationship of dependence by indigenous nations is seen by scholars as the source of diminished indigenous sovereignty (Anderson, 1995; Zaferatos, 1996; Zaferatos, Autumn 1998). Thus to state it more simply, relative economic independence is necessary for political independence.

The strength of these development goals is that they are both broad in their applicability across the myriad indigenous governments in the United States, but that they also emphasize the idea of locally and culturally relevant approaches over one-size-fits-all solutions. They also promote the strengthening of indigenous institutions. It should also be noted that these current models were developed as the result of decades of empirical research on the ‘best practices’ by Native Nations across the country and have proven to be quite effective and sound. The field of planning has also become more prominent amongst indigenous nations. Comprehensive and strategic planning offer a vehicle for the indigenous nation to assert its legitimacy, overcome and remedy past policies that weakened the nation, develop a stronger nation, and have its sovereignty recognized by working inter-governmentally on regional issues. In that way planning can allow indigenous nations to transform themselves and take control over their own futures (Hibbard, May 2006; Lane and Hibbard, 2005; Zaferatos, Autumn 1998).

Problem with the Current Models

The current governance and development models, advocated by the aforementioned authors, base the legitimacy of indigenous governmental institutions primarily on the concept of inherent sovereignty and the recognition of that sovereignty by the federal government. While this is correct in terms of legal theory and precedent (Duthu, 2008), it seems to ignore the political reality that became manifest during the Termination Era and still exists to some degree in the restrictive Supreme Court cases, regulatory federal legislation, and interfering state governments. Though inherent sovereignty is the legal foundation for

indigenous sovereignty, the practical reality in terms of power politics is that indigenous governments exist by the abashed acquiescence of the federal government. To put it differently, if federal recognition is what it takes for an indigenous people to exist then subsequently a federal decree is also all that it takes for that to end. This can be seen quite well in the not too distant Termination era of the 1950s and 1960s (Duthu, 2008) as well as in how easily ‘inherent sovereignty’ was further limited in cases like *Montana v. United States* (1981) and *Atkinson Trading Company v. Shirley* (2001), etc.

There exists a mindset that is antagonistic towards indigenous sovereignty and sees American Indians, Alaska Natives, and Native Hawaiians simply as a special interest group. It sees that their interests are addressed and their rights are recognized because they are currently convenient for the political mainstream. Therefore, the status of these rights will become problematic and might not be recognized if they are inconvenient for the political mainstream or if they conflict with the interests of a more powerful special interest group. Given that mindset, it should seem reasonable that periodically there will be substantive political calls for a termination of indigenous sovereignty; or at least a restriction of the power of indigenous governments to regulate the activities of nonmembers. It would also be logical that those efforts by lobbies and moneyed interests would occur in locations where American political economy is strongest. It is through that lens that one should understand the current effort in the New York State legislature to terminate the Unkechaug Nation on Long Island as well as the beliefs and actions of anti-Indian sovereignty groups across the United States (ex: “Upstate Citizens for Equality” in New York). While some people that hold this mindset may be ignorant of the history of the government-to-government relationship between indigenous governments and the federal government, it is also important to recognize that this mindset may also be representative of a ‘conquest ideology’ that is itself inherently antagonistic towards indigenous sovereignty.

While the current development models have proven to be effective over the last few decades, they appear to be based philosophically on the idea of a benevolent or benign mainstream political environment; one that genuinely embraces and supports indigenous sovereignty as exercised through indigenous governments. The aforementioned authors have stated that mutual understanding and a respect for indigenous sovereignty is important for the development and the institution-building of indigenous nations. These models thus require the cooperation of the state and federal governments in order to be effective. The authors offer outreach to politicians and education on federal Indian policy as a way to improve relations, as well as legal challenges based upon the established precedents to enforce those policies (Zaferatos, April 2004; Zaferatos, 1996; HPAIED, 2008). Cornell and Kalt acknowledge this philosophical basis when they discuss the origins of self determination policies as having, originally, an

ideological appeal to both political parties; what they call "bi-partisan" and "bi-ideology" support. They state that "from a liberal perspective, self-determination clearly contains an element of support for human rights and decolonization for Indigenous people", but that also "from a conservative perspective, self-determination is manifested in self-sufficiency, reduced dependency on the U.S. federal government, and devolution of formerly federal authorities to local governmental units" (Cornell and Kalt, 2010).

However, I believe these models are limited by their philosophical basis in cooperation with colonial governments and in the rulings of a colonial legal system. Court cases in recent decades have limited indigenous sovereignty in seemingly arbitrary manners where, increasingly, federal judges have ruled against and limited even the established precedents of Indian Law. A recent example of this was in the case of *Carcieri v. Salazar* (2009), where the Supreme Court restricted the federal government's ability to take land-into-trust to only those indigenous governments recognized at the time of the Indian Reorganization Act of 1934 (Washburn, 2010). Thus the Supreme Court greatly restricted the ability of the federal government to act on behalf of indigenous governments in the establishment of permanent indigenous jurisdiction over land. While a legislative fix could resolve this situation, one has not yet made it through Congress. Cornell and Kalt acknowledge these legal limitations when they state that "the general trend of outcomes in the U.S courts has been a reining in, rather than an expansion, of tribal sovereignty over the last fifteen to twenty years" (Cornell and Kalt, 2010). Absent a benevolent or benign political environment, it seems doubtful that these models will be as effective. For instance, how effective will development that is led primarily by the indigenous government be in the event that Congress returns to the termination philosophy? How effective will it be in a perpetually antagonistic local political environment? While governments affirm indigenous sovereignty in name, the political and legal reality is that the inherent powers of indigenous nations are being limited to where nations have only the ability to regulate citizen members, only in regards to certain activities, and only on reservation lands. The point is that Federal Indian Law and Policy may not be as firm of a foundation as they are assumed to be. Cornell and Kalt state that the existence of self determination policies are threatened by the "evolution of the Republican Party away from its libertarian strains and toward more aggressive support for social policymaking aimed at promoting particular conservative social norms and structures" (Cornell and Kalt, 2010). This observation is consistent with my own that the framework of benevolence on the part of the federal government seems to be dissipating. This uncertainty as to the future of Federal Indian Policy requires indigenous political leaders as well as scholars to ask serious questions about the long-term viability of the current indigenous models of development and governance. This uncertainty also

highlights the need to develop new models or at least to amend the existing models in order to address the changes in the American political environment.

Theory and Solution

The solution that I propose here to remedy these constraints on sovereignty is to 'nonprofitize' (Swanstrom, 1999; Bockmeyer, 2003) components of those indigenous governments. By nonprofitization of indigenous governments, I mean that indigenous governments should look to the creation of and subsequent partnerships with nonprofit organizations that would work in the interests of the nation, but with the protections and privileges afforded to organizations under nonprofit law. The purpose of this strategy is to develop new mechanisms for the strengthening and expansion of indigenous institutional and organizational capacity. These new mechanisms are important because they allow an indigenous people to strengthen their control over their own institutions and resources, while at the same time avoiding legal challenges under the principles of Indian Law. These institutions would therefore provide buffers for the indigenous nation because they could be integrated into the organizational system and be made to function as though they were simply governmental agencies. The process of governance could therefore be conducted in an unimpeded manner. The legal basis for these new forms of indigenous institutions would be nonprofit law rather than fickle Indian law. These new indigenous nonprofits could act outside of the established restrictions on indigenous sovereignty in the areas of land acquisition, formal agreements with other groups, economic development, historic preservation, education, language and cultural preservation, as well as many other issues.

The theory that I propose has similarities to that of the "shadow state". In 1990, Jennifer Wolch described a shadow state as "a para-state apparatus comprised of multiple voluntary sector organizations, administered outside of traditional democratic politics and charged with major collective service responsibilities previously shouldered by the public sector, yet remaining within the purview of state control" (Wolch, 1990). She developed this concept as a critique of the changing role of nonprofit organizations in the United States and the United Kingdom. Her critique was based on the idea that through this devolution of power to the nonprofit sector, the entrenched State interests would be able to subvert the transformative social actions of the nonprofit sector by creating what amounts to a form of dependency by the nonprofit sector on the State for funding. To this Wolch said that "the increasing importance of state funding for many voluntary organizations has been accompanied by deepening penetration by the state into voluntary group organization, management, and goals" and that "the transformation of the voluntary sector into a shadow state

apparatus could ultimately shackle its potential to create progressive social change" (Wolch, 1990). This trend has continued to where it has created what is known as the 'nonprofit industrial complex'. This dependency on the state as well as philanthropic and other nonprofit funding intermediaries has made nonprofits much more accommodationist and less radical in their goals and programs as a result of this desire to maintain funding. Trudeau states that "the contracting relationship [between nonprofits and governments] can thus steer organizations to a position that is favorable to state agendas" (Trudeau, 2008). Ruth Gilmore counters this negative effect of the shadow state by saying that "grassroots organizations that labor in the shadow of the shadow state should consider this: that the purpose of the work is to gain liberation, not to guarantee the organization's longevity" (Gilmore, 2007). The 'shadow state' as a conceptual framework thus existed originally as a means of maintaining the entrenched power structure and preventing radical social transformation.

The idea of the 'shadow state', however, does not need to be exploitative of and detrimental to the nonprofit. Instead in Trudeau's "relational" understanding of the shadow state, he argues to "see the shadow state as the arrangement of state-civil society relationships that manifest in the institutional interactions between government agencies and nonprofit organizations" (Trudeau, 2008). In this sense the shadow state refers more to the hybridized and blurred relationship between the two sectors. Instead of being inherently detrimental, it is understood that "the arrangements of power between institutions of state and civil society are a product of the social milieu in which they take place" (Trudeau, 2008). In this relational understanding of the shadow state concept, the public-nonprofit partnership can be understood to have a transformative effect if the governmental entity desires a transformative effect. Therefore, instead of being viewed as detrimental to or contrary to the service-mission of the nonprofit, the 'shadow state' concept here should be understood only to mean that the agenda of the nonprofit is largely determined by the government and that the nonprofit would thus be made to serve as an extension of the government for the purpose of service provision and for the purpose of regulating the nonprofit sector.

This notion would also be similar to that of the 'hollow state', which is defined as the "metaphor for the increasing use of third parties, often nonprofits, to deliver services and generally act in the name of the state" (Milward and Proven, 2000). The hollow state concept can refer either simply to the hybridized public-nonprofit provision of public services or in the more extreme case to where "as a matter of public policy [the government] has chosen to contract out all its production capability to third parties, perhaps retaining only a systems integration function that is responsible for negotiating, monitoring, and evaluating contracts" (Milward and Proven, 2000). The difference between these two concepts is that the 'shadow state' refers specifically to the power dynamic between the State and

the nonprofit, while the ‘hollow state’ refers to the organizational concept of the devolution of service provision to the nonprofit and private sectors. While these two concepts developed independently of the indigenous context and are therefore limited in reference to that context, they remain important parallel frameworks for understanding my conceptual approach to utilizing nonprofits in the indigenous context.

I propose that, in what I refer to broadly as the ‘Indigenous Shadow State Model’ (but what could also reasonably be called the ‘Indigenous Hollow State Model’), the transformative agenda of indigenous governments may be implemented through the vehicle of indigenously owned and controlled nonprofit organizations, which would provide services to their citizens, subsidize development, and facilitate governance and land reclamation. Indigenous governments could thus ‘nonprofitize’ collective service delivery operations for their citizenry while maintaining public sector governmental control at the top of that organizational hierarchy. This model would incorporate the concept of the ‘hollow state’ as the provision of some services would be devolved to the nonprofit sector; but also because those nonprofits would be owned and operated by American Indians for the purpose of acting on behalf of their respective indigenous government, they would therefore also promote the power dynamic of the ‘shadow state’.

Some of the main issues that need to be addressed in understanding this model are why nonprofit organizations should be established to function in this capacity, and how a nonprofit organization can be utilized in such a manner as to serve the interests of an indigenous government in the areas of housing, economic development, and land reclamation. First, the primary benefit for a nonprofit organization is that they are exempt from sales taxes, income taxes, as well as property taxes in most localities¹ (Hansmann, 1987). That is an important quality when dwelling in a toxic political environment where one of the main venues of attack on indigenous governments is through the vehicle of taxation. That is also important because all nonprofits, no matter what section of tax law they are organized under, are subject to this exemption. The importance of tax exempt status is that, as a private organization, it greatly minimizes the overhead costs when compared to for-profit organizations, and thus makes this organizational model a viable complementary alternative to the public sector. An additional benefit that would come with any organization that is organized as a 501(c)(3) ‘charitable’ organization is that contributions made to the organization are tax deductible for all persons making that contribution. While nonprofit tax exemptions may not completely compensate for many of the protections afforded

¹ These tax exemptions would apply in particular to federal and state taxes if the activities of that organization are deemed to be of a public benefit. However, activities by that organization that are not of a public benefit would be considered for-profit and thus would be eligible for taxation.

under Indian law (i.e. tribal sovereign immunity), they are still important for creating a viable organizational model that works in coordination with indigenous governments and does so independently of outside governments.

A further quality of nonprofits that would make them suitable for use by indigenous governments is that as private organizations they can choose to focus on a specific component of the population. For example, a nonprofit organization can be established to meet the specialized needs of the citizenry of a particular indigenous government, as well as any sub-group of it (i.e. youth, elderly, low income, disabled, etc). Additionally, nonprofit organizations are not necessarily bound geographically to established indigenous lands. This means that the organization could operate on a reservation, on lands adjacent to a reservation, in urban areas, or any combination thereof at the same time. In that way, nonprofit organizations can extend the reach of an indigenous government and expand the footprint of indigenously-owned lands without much interference or oversight from an outside government. A final benefit to the utilization of nonprofits is that any attack made against either the nonprofit or its affiliated indigenous government might be forced to come as an attack on the nonprofit sector itself. And thus to interrupt indigenous control and service provision in this manner, one may have to weaken and undermine nonprofit tax laws.

Even if federal recognition is removed, this model could still be operational because nonprofit organizations, as private entities, can choose to define their constituency in any manner that they wish. One possible way to attempt to restrict membership would be to make descent or lineage-based criteria for membership. The membership criteria would therefore not be racially-based, but would instead be based on either citizenship in that Native Nation or based on descent from a certain ancestor. This should still be applicable in the provision of housing and other services by that nonprofit because the Fair Housing Act, for example, maintains a provision for the exemption of “private clubs”. To this the Act states “nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members” (Fair Housing Act 1968 § Section 807a).

Community Land Trusts

To begin to address the idea of how a nonprofit can be utilized in such a manner as to function as a de facto governmental entity, one must first inquire as to the presence of any established organizational models within the nonprofit sector that can be made to address the particular aforementioned sectors of society. The Community Land Trust model, in a modified form, can be made to operate as an

extension of an indigenous government into the private sector, while still retaining the integrity of the organization.

Jacobus and Brown state that “a community land trust is a nonprofit organization formed to hold title to land to preserve its long-term affordability for affordable housing and other community uses” (Jacobus and Brown, 2010). The distinctive component of the community land trust model is its land ownership system. Davis states that “land is treated as a common heritage, not as an individual possession”, that “land is removed permanently from the market, never resold by the nonprofit owner”, and that the “land is put to use...by leasing out individual parcels”. He also states that “all structural improvements are owned separately from the land” and that the land is “held by a single nonprofit owner that manages these lands on behalf of a particular community, present and future” (Davis, 2010). The first organization that is traditionally identified as a community land trust was established in 1968 in rural Georgia. It was called New Communities, Inc. and was established by Robert Swann and Slater King. It was established to bring about “land reform and economic self-sufficiency” for African American farmers (Davis, 2010). In that way, it provided “land tenure to landless sharecroppers and tenant farmers” (Curtin and Bocarsly, 2010). The community land trust concept grew into the 1970s and 1980s as similar organizations were developed in other locales. Also in this time period, the community land trust concept expanded into urban areas and quickly became used as a means to provide affordable housing to lower income urban residents. The 1990s and 2000s saw the community land trust model transform into a movement as the number of community land trusts grew exponentially. Currently, eighty percent of community land trusts in the United States were formed after 1990, and fifty two percent were formed after the year 2000 (Curtin and Bocarsly, 2010). Curtin and Bocarsly state that nowadays “typically a CLT is a nonprofit, tax-exempt 501(c)(3) corporation dedicated to the preservation of land for the benefit of the community and for its use as low income housing” (Curtin and Bocarsly, 2010). The main value of the community land trust model in the affordable housing sector is typically seen as its taking the cost of land out of the affordability equation (Curtin and Bocarsly, 2010).

Curtin and Bocarsly describe the “classic CLT structure” as a “democratically governed, nonprofit membership corporation”, with its membership consisting of three groups of persons. These are lessee members (people who lease land from the community land trust), non-lessee members (people who reside within the target community), and members who live outside of the target community; however not all community land trusts are member-based. The governing board is typically elected by the first two categories of people, though it is not uncommon for some board members to be appointed by the local municipality (Curtin and Bocarsly, 2010). Typically, the community

land trust leases the land to a lower income buyer who then owns and resides in the building on that leased land. It is also common for the community land trust to oversee the homeowner's mortgage loan to ensure that the homeowner is protected from predatory lending practices. This typically involves homebuyer education programs and the requirement of community land trust approval of the mortgage (Curtin and Bocarsly, 2010). It is also commonplace to put restrictions on the deed and the lease to maintain the affordability of the property, to preserve the quality of the property, and to ensure that the community land trust must approve the future owners of those structures (Abromowitz and White, 2010).

Relevance of CLT Model to American Indians

It may be important here to clarify the relevance of the community land trust model for American Indians. In this sense, why should American Indians adopt another foreign organizational model? American Indians should not be too wary of this model because it was partially inspired by traditional American Indian land tenure systems, as well as similar traditionally collective community-oriented systems around the world (Swann et al, 1972). Writing rather prophetically in the seminal 1972 book, The Community Land Trust: A Guide to a New Model for Land Tenure in America, Robert Swann states that “there are a number of (largely unrealized) opportunities for land trusteeship within established communities or ethnic groups. Of particular note are the efforts of certain groups of Indians, Alaskan Eskimos, and Mexican Americans to retrieve large tracts stolen from them by white settlers” (Swann et al, 1972). Even more on point, Swann continues by stating that the “return of these lands might be more politically feasible through the mechanism of a community land trust sponsored and controlled by the original and rightful holders of the land” (Swann et al, 1972). In that very statement, Swann and the other authors proposed the same basic theory and method of land reclamation that I am currently proposing. For Swann and the other authors writing in 1972, the use of the community land trust model by American Indians was one of the ‘unrealized opportunities’, and even now almost four full decades later the application of the community land trust model in the American Indian context is still an unrealized opportunity. Of the 244 organizations (in 45 U.S. States and the District of Columbia) that are affiliated with the umbrella group, the National Community Land Trust Network, I was unable to find a single organization that was focused on or affiliated with American Indians in some manner (“National Community Land Trust Network”, 2011). The opportunity thus is real, and as I shall demonstrate, community land trusts are only growing in power.

Partnerships between CLTs and Local Governments

In thinking and theorizing about possible public-nonprofit partnerships in regards to community land trusts and indigenous governments, it is important to understand what relationships have already been established between governments and community land trusts. As Davis and Jacobus note “over the past decade, the relationship between municipalities and community land trusts has shifted from adversarial to collaborative as the two have joined in partnerships to achieve their common goals” (Davis and Jacobus, 2008). This is in fact one of the major growth areas of the community land trust model in recent decades. The paradigm behind this relationship has altered even more importantly as of late. The role of the municipality in this initial paradigm was as a supporter of the community land trust; however this has shifted to where in some localities the municipality was actually the instigator of the community land trust. For instance the community land trusts in Irvine, California and Chicago, Illinois were actually established by the local government to then function as a nonprofit sector partner (Davis and Jacobus, 2008). This seems to be the new trend in local government as other municipalities as different as Austin, Texas; Burlington, Vermont; and Tucson, Arizona have likewise taken up this model and created their own community land trusts (Jacobus and Brown, 2010). In a number of these municipally-founded community land trusts, the city government maintains a substantive level of control and influence in ensuring high standards for the organization through contractual agreements. A good example of that relationship is in Irvine, California (Curtin and Bocarsly, 2010). Thus it can be seen that in those instances where a municipality creates its own community land trust, the CLT is made to operate within the realm of governmental supervision, if even outside of direct control. As this precedent for strong local public-nonprofit partnerships has become more established, it would seem reasonable for this ‘shadow state’ model to also work for indigenous governments.

There also exists a precedent for substantive governmental functions being devolved to community land trusts beyond even the aforementioned formal municipal-CLT partnerships. In 1988, Dudley Neighbors Inc., the community land trust located in the Dudley Street Neighborhood of Boston, Massachusetts was granted eminent domain powers by the Boston Redevelopment Authority. A partnership was also established between Dudley Neighbors Inc. and the City of Boston that provided for the transfer of ownership of city-owned properties to the community land trust at a minimal cost (Curtin and Bocarsly, 2010). That kind of substantive devolution of power and responsibility to a nonprofit community land trust is representative of the true potential of community land trusts. That potential lies in the provision of core and fundamental governmental services via a nonprofit institution that operates in a manner that is socially responsible, in the

interests of the community as a whole, and in recognition of its place within the organizational framework. That hidden potential if harnessed properly by indigenous governments could help provide for the long term needs of their citizens without the issues of internal politics and outside legal challenge.

Recommended Alterations of CLTs for Use by Indigenous Governments

While the community land trust model can be made to work in the interests of indigenous governments, there are a few modifications that I would recommend to facilitate that organizational partnership and ensure that the interests of that indigenous nation are being met by the actions of the community land trust. The first of these recommendations would be limiting the membership in the organization to citizens of that particular indigenous nation. In this way the nonprofit's constituency group would be defined as the citizens of that indigenous nation or the descendents of citizens. Because of this exclusive membership, they could try to utilize the 'private club' and other such exemptions in civil rights laws. The second of these would be to have the governing board of the land trust appointed by the indigenous government; however some seats could also be left open for direct election by tribal members as a means of maintaining the intended democratic nature of the organization. That recommendation would emphasize the role of the community land trust as a de facto part of the administrative framework of the nation. Precedents for the governmental appointment of the governing board for a community land trust can also be found in mainstream society. At least initially, the governing boards for the community land trusts in Irvine, California and Chicago, Illinois were both appointed by the local municipal government that had created them (Jacobus and Brown, 2010). Likewise, because the community land trust exists as part of the organizational framework, it should be expected that similar programs operated at the governmental level should be redirected through the nonprofits upon formalization of the partnership with those nonprofits for tribal citizens living off the reservation. Thus these programs will have become 'nonprofitized' (Swanstrom, 1999; Bockmeyer, 2003). Such actions, along with the government's encouragement of citizens to take part in the nonprofit organization have been found to increase the effectiveness and growth of the community land trust (Jacobus and Brown, 2010).

Hypothetical Scenarios

To better understand how the indigenous community land trust would function in these different service arenas, I will demonstrate in this next section a few different scenarios that will highlight the true advantages to this system. Two

different but similar proposed conceptions for the implementation of the indigenous community land trust model as it relates to housing will be described. The difference between these will be whether the desired end is for homeownership or for rental housing. The merits and shortcomings of each will also be described. That will then be followed by two scenarios on how the modified community land trust model can be made to facilitate local community-based economic development, as well as for the provision of community-oriented services. The fifth will highlight how this model can also be used by unaffiliated urban indigenous populations.

Homeownership Scenario

In the homeownership-oriented scenario, the community land trust should be established as a 501(c)(3) 'charitable' organization, with the governing board appointed by the appropriate indigenous governmental official (e.g. Tribal Council, Tribal Housing Director, etc), or directly elected by the citizens. The community land trust would then lease land that they have either acquired through purchase, or has been appropriated for them to individual Indians. Those individual Indians would then own the buildings and dwell in them as their permanent residence. The individual Indian would be subject to property taxes on the house; however this is reduced from the normal property tax because the property owner is only paying tax on the building and not on the land. The community land trust as a function of the lease would be able to acquire annual lease payments (rent) from the homeowner as a way to generate some revenue. Lease restrictions could also be created to guarantee maintenance and upkeep of the property so that it does not lose its value. A failure to keep the terms of the lease in regards to maintenance could result in the revocation of the lease. Also deed restrictions could likewise be placed on the house, prior to the sale, in order to give the community land trust some control over to whom the building may be sold, as well as limiting the appreciation value on the house. A formal partnership established between the Tribally Designated Housing Entity (TDHE) and the community land trust could facilitate participation in the U.S. Department of Housing and Urban Development's Indian Community Development Block Grant and Indian Housing Block Grant programs. These funds would then be used in this system to acquire new land and housing structures for the community land trust. The community land trust would also be able to use any donations made to it in the acquisition of new land or in the construction or maintenance of properties because of its status as a 'charitable' organization. A benefit of this scenario is that these homes, because they involve homeownership by individuals are eligible for the U.S. Department of Housing and Urban Development's 'Section 184 Indian Home Loan Guarantee Program'. That program would be of

particular use to lower income American Indians. One of the obvious drawbacks to this scenario is that each house, if located off of reservation territory, would still be subject to property taxes. While in mainstream society, that is acceptable as a tradeoff between the benefits on the individual homeowner and the subsidization of that property tax; however, as will be shown in the next scenario a method can be developed that requires the payment of no property taxes to an outside government.

Rental Housing Scenario

In the rental scenario, the governing board of directors for the community land trust is also appointed by the appropriate entity in the indigenous government. The community land trust would retain ownership of both the land and the house. The community land trust then leases the land and the house to an individual Indian. Because the community land trust retains ownership of the house in accordance with its nonprofit charitable mission, neither the community land trust nor the individual Indian pays property tax on those parcels. As in the last scenario the community land trust would generate revenue from the annual lease payments made to the organization by the individual. Similarly, lease restrictions can be maintained on the maintenance and upkeep of the property. Failure to comply would result in the termination of the lease and the eviction of that tenant. Also, like the first scenario, the community land trust would be eligible to receive charitable donations and would be able to partner with the Tribally Designated Housing Entity (TDHE) for the acquisition of new land. This scenario represents the community land trust having a different role than in the first scenario. In the former, the community land trust simply subsidized and thus facilitated homeownership, while in this scenario the community land trust serves, perhaps oxymoronically, the role of a 'private public-housing authority'. The negative in this scenario is that individual Indians would not benefit from the wealth generation that is often associated with homeownership. However, the positive to this scenario is that it results in no tax payments to an outside government. Therefore, all money is retained within the framework of that indigenous nation, and the nation has permanently expanded its land base.

Economic Development and Community Service Scenarios

The third and fourth scenarios involve the role that a community land trust, or similar indigenously-controlled nonprofit organization, can have in the enhancement of community-based economic development. The divide between these two scenarios will be along the same lines as that described above for housing. The third scenario involves the subsidization of commercial activities

for Indian-owned entrepreneurial businesses. In that sense, the community land trust could be made to operate in a manner comparable to how economic and industrial development agencies are used by mainstream governments. It would do that by focusing the efforts of these indigenous entrepreneurs on specific commercial districts. In the third scenario, the community land trust acquires commercial property, leases the land, and sells the building to an individual Indian. That individual Indian then opens and operates their business. The community land trust receives annual lease payments and because of its tax exempt status does not pay property taxes. The individual Indian, however, is now subject to both property tax on the structure, and depending on their business they may also be subject to sales tax. However, property taxes might still be avoided if the individual leases both the land and the buildings for their business, with the community land trust retaining ownership of both.

The fourth scenario involves the community land trust organization serving as an umbrella organization for the employment of citizens in the provision of a number of commercial services. In that way commercial activities could operate similar to those of tribally owned enterprises, but possibly with the added benefit of being tax exempt. This umbrella organization approach could also be used to provide a number of community related services via the nonprofit organization (i.e. medical services, educational programs, cultural programs, etc). In order to possibly receive tax exempt status the indigenously-owned nonprofit would have to be able to make the case that what they would be selling, or the services they would be providing, were of educational value about the culture of that indigenous population, or were of some other type of public benefit. The tax exempt status for economic activities would thus be comparable to that of a gift shop in a museum, except that it would operate in a commercial district. This could possibly come to include food as well as any number of services so long as they are presented in the manner of being traditional or of educational value about that indigenous population. The economy could then possibly function as a series of fees-for-service, without the overhead costs of taxation. Even if the organization was not able to receive tax exempt status for its actions, they would still be able to operate a tribally owned enterprise on the tax exempt land of the community land trust without having to go through the land-into-trust process.

Application of CLT Model in Urban Areas

Thus far I have spoken only of the community land trust model as it could be used by indigenous governments themselves. However, another potential use of this model could be by urban Indian community centers. Nonprofit urban Indian community centers have existed in a number of American cities, some of which date back to the 1950s (HPAIED, 2008). By acting on their own (or through a

partnership with an indigenous government) urban Indian community centers could develop themselves to where they operate as an ethnically-based nonprofit ‘government’. The nonprofit itself could exist as a member-based organization that collected member dues and used them in a similar manner to how actual governments use taxes. The urban Indian ‘governments’, through the operation of a community land trust would be able to concentrate the urban Indian population of a metropolis and strive to develop fully functional American Indian neighborhoods. Urban Indian community centers themselves already commonly provide services for employment and job training, education, health services, and American Indian cultural and heritage programs (HPAIED, 2008). The addition of housing programs, economic development, and land ownership via the community land trust model would establish many of these urban Indian community centers as de facto ‘governments’, especially if they are able to concentrate the American Indian population geographically into select urban neighborhoods².

Discussion

It may be important here to clarify the role that these nonprofits would have in the organizational framework of the indigenous government and in what context they should be used. The purpose of this model is not to extinguish indigenous sovereignty or to in any way advocate the termination of indigenous governments. The purpose is to develop an organizational mechanism for nonprofit organizations to be able to work in tandem with indigenous governments, and act on their behalf to provide for their citizens in situations where it is legally or politically challenging or possibly even counter-productive for that indigenous government to act directly. It should not be understood necessarily as replacing an indigenous government, but rather along the lines of adding another ‘tool’ to the ‘toolbox’ of indigenous development and governance in the United States. While much of the self determination era of policies should be understood as positive, certain of their limitations are representative of the reality that the ability of indigenous governments and indigenous peoples to act in their own interests will continue to be curtailed. Likewise, though officially the policies of the Termination era are in the past, there is nothing to prevent their return. Based on this understanding of Indian Law as a battlefield on which American Indians

² Due to the Fair Housing Act and other civil rights legislation, it may be difficult to restrict activities purely to American Indians absent a direct affiliation with an indigenous government. However, the community land trust could still be structured in a manner consistent with its intended American Indian constituency. This could possibly be done via the mission statement of the organization as well as certain qualifications regarding the composition of the governing board.

have, arguably, been slowly losing for the past two centuries, one of the advantages of the indigenous shadow state model is that it changes the battlefield, at least somewhat, away from Indian law and into nonprofit law.

One could argue that it is incorrect to think that subjecting themselves to the regulatory authority of outside governments could be beneficial to indigenous peoples. However, that view would ignore the fact that all indigenous nations within the United States are already subject to the complete authority of an outside government (be it Congress' Plenary Authority or through Public Law 280 also state governments). Such a view would also necessarily ignore the profundity of diminished sovereignty and the level of regulation that already exists. In that sense, it is perhaps more productive to view federal and state authority as two heads of the same colonial 'beast', rather than viewing one as necessarily better than the other. Also, it makes more sense to believe that local or regional political economy as well as political culture are more to blame for antagonistic Indian policies than whether an entity is federal or state in origin. Both state governments and the federal government have in various localities and at different points in time worked cooperatively with indigenous governments, and they have also both worked against the interests of indigenous peoples. It would thus be overly simplistic to understand these relationships as simply one being bad while the other is good; both are colonial authorities. Their status as either progressive and cooperative, or antagonistic and imperial is based on how they choose to behave organizationally. Thus what I am proposing should be understood as altering the organizational interactions that indigenous peoples have with those colonial authorities and increasing their organizational capacities.

A close example that currently exists in practice to what I have described thus far is the Menominee Community Center of Chicago³, which is officially endorsed by the Menominee Indian Tribe of Wisconsin as the representative of the government for Menominee citizens residing in Chicago (HPAIED, 2008; Heraghty, 2005). Through this endorsement and official partnership the Menominee government is able to extend its reach outside of the reservation and 'govern' its citizens in a major metropolitan area by utilizing a nonprofit organization. Adding housing and economic development to their service delivery package would perhaps be a logical extension of the current mission of the organization in terms of fostering the Menominee community in Chicago in a

³ The Menominee Community Center of Chicago was formed in 1994. In 1996, it became officially recognized by the Menominee Nation Tribal Council. The community center is a nonprofit tribal program and is eligible for federal funding. It consists of a five member board of directors and its actions are overseen by the Menominee government. The community center conducts cultural activities as well as information and referrals for social services. The community center has sponsored "powwows, traditional fish feasts, and breakfasts for homeless Menominee. It has hosted language classes...and has worked with the Tribal Historic Preservation Office regarding Menominee artifacts" in Chicago (Heraghty, 2005).

more holistic manner. The Menominee model could be understood within the framework of the 'indigenous shadow state' as an initial prototype that could be emulated by other indigenous nations seeking to exert influence over their citizens living off the reservation.

Since indigenous governments are subject to differing frequencies and types of legal attacks in different States, it is perhaps important to explain, more explicitly, the context wherein this model could be used effectively and to the greatest benefit of an indigenous community. It is important to understand that the Indigenous Shadow State model, like any organizational model, should only be applied and implemented where it is appropriate. For instance, this model would not necessarily be appropriate in States where progressive Indian policies are in place, or with larger and more developed indigenous nations that already have significant public sector institutional capacity. However, this model is more applicable with smaller indigenous governments that currently lack much institutional or organizational capacity. It would also be appropriate in States that have taken the position of antagonism toward Native Nations, and for indigenous governments that exist in proximity to larger metropolitan areas because of the concentration of moneyed interests in those regions. In these situations the existence of a nonprofit organizational infrastructure would serve as a backup or reserve system in the event that indigenous public institutions become subject to political and legal attack. Generally speaking however, in this model the indigenous government would be able to directly control existing reservation territories, while through the mechanism of nonprofit organizations they would be able to indirectly control land, people, and other resources located off of the reservations. These nonprofits could thus be organized in a manner that would operationally mirror their public sector counterparts. Also along those lines, a nonprofit could be used to collect and maintain land before the ownership is transferred directly to the indigenous government for the "land-into-trust" process. Similarly, if an indigenous nation sought to expand its economy and land holdings into an established urban area, a community land trust could focus and subsidize the activities of indigenous citizen entrepreneurs into specific commercial districts. It would likewise be able to physically concentrate the housing of those citizens into specific neighborhoods so as to facilitate community interconnectedness and promote relationships between citizens of that indigenous nation in the urban setting. Also, this model could be used for the expansion of organizational capacity by and facilitate the development of state-recognized tribes that lack the protections of Federal Indian Law and the access to Federal funding. This model would allow these state recognized tribes to consolidate land for the possible creation of reservations, as well as create the social and political infrastructure for service delivery and program management.

Conclusion

As I have tried to demonstrate, indigenous sovereignty has been both expanded and restricted in our current era of self-determination policies. This has allowed the expansion and strengthening of indigenous governments, as well as the continued successful efforts by some segments of mainstream society to restrict and regulate these sovereign indigenous nations. This has highlighted the political reality of the fragility of indigenous sovereignty within the political and legal framework of the United States. The existing models of governance, development, and planning, while bold and progressive, are overly reliant on a cooperative and hospitable mainstream political environment and therefore fail to take into account the assaults on the fundamental legitimacy of indigenous governments, as well as other outside influences that hamper the ability of indigenous nations to develop and govern effectively. I proposed the model of the 'indigenous shadow state' based around community land trusts and other indigenously-controlled nonprofit organizations to compensate for these political attacks as a means of ensuring the long term viability of indigenous institutions, and as a means of expanding the reach of indigenous governments outside of reservation lands. This model should be understood as operating in a complementary manner with the existing indigenous governance, development, and planning models. I also discussed how a community land trust can be utilized to perform the role of a governmental agency and serve the long term needs of its citizens. Further, I discussed the possible use of the community land trust model for the development and further organization of the urban indigenous population in the United States. To this urban application, I noted the example of the Menominee Community Center of Chicago as a possible prototype; though the Menominee example is still relevant, as an example of an existing organizational structure, for the potential non-urban indigenous shadow states. Though it is perhaps limited in its scope of applicability, the core importance of the 'indigenous shadow state' model in all of its possible applications is the ability of an indigenous population to maintain control over its own resources and maintain stability in its own institutions over the long term, while at the same time avoiding the dangers of taxation and regulation by an outside government, the fluctuations in the real estate market, and the fluctuations in Federal and State Indian laws and policies. Thus if utilized properly by indigenous governments, the 'indigenous shadow state' based around the community land trust and other such nonprofit organizations could not only be a viable way forward for Indian Country, but also the most advantageous route given a perpetually hostile political environment that engulfs and disrupts the ideal government-to-government relationship between indigenous governments and the federal government.

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