12

Excessive Federal Bureaucracy

President Ronald Reagan opined on the federal government's self-determination policy in 1983, stating:

> [S]ince 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.[1]

The same year, President Reagan created a Presidential Commission on Indian Reservation Economies to examine impediments to tribal economic development, and unsurprisingly, the Commission concluded Indian country was encumbered by "[a] Byzantine system of overregulation [that] actually deters investment by raising costs, creating uncertainty, and undermining local initiative."[2] Four decades have passed since the Commission made these remarks; nevertheless, tribes remain mired in federally imposed rules and regulations that exist exclusively in Indian country.

Companies aiming to serve Indian country populations routinely surrender to the forces of federal bureaucracy rather than wait years for federal permission to open a business.[3] The dense layers of red tape help

[1] Statement on Indian Policy, 1 Pub. Papers 96, 96 (Jan. 24, 1983).

[2] Presidential Comm'n on Indian Reservation Econ., Rep. & Recommendations to the President of the U.S. 31 (Nov. 30, 1984), https://files.eric.ed.gov/fulltext/E-D252342.pdf [https://perma.cc/W4UP-FCAV].

[3] Kevin Washburn & Jody Cummings, Explaining the Modernized Leasing and Right-of-Way Regulations for Indian Lands 3 (2017), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1554&context=law_facultyscholarship [https://perma.cc/5GRG-7Y9T].

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explain the dearth of privately owned businesses in Indian country. After all, businesses have an alternative to the federal bureaucracy burdening Indian country – open just across the reservation border. In fact, the Navajo Nation border town of Gallup, New Mexico doubles in size on weekends as Navajo citizens leave the reservation to purchase basic goods there.[4] Countless other examples abound of businesses opening outside of Indian country to avoid federal bureaucracy.

12.1 TRUST LAND

Many commercial activities require land, and land use in Indian country is complicated. Indian country has three primary land tenure types: fee simple, restricted fee, and trust land – which can be tribal or individual. Trust lands are owned by the United States for the benefit of the tribes or individual Indians. Accordingly, the United States holds title to trust land while tribes or an individual Indian retain the right to use the land, a legacy of the Doctrine of Discovery and *Johnson* v. *M'Intosh*. Trust land is Indian country's predominant land tenure form and can be located outside the boundaries of a reservation. For most purposes, restricted fee lands operate the same as trust land. However, title to restricted fee land is owned by the tribe or an individual Indian. Despite ownership, restricted fee lands cannot be freely alienated – hence, the name restricted fee.[5] Indian country also contains fee simple lands. Lands held in fee simple can be freely alienated and operate similarly within the borders of Indian country as fee lands do outside of Indian country, though jurisdictional issues frequently arise. Fee simple is the United States' predominant land tenure form.

Indian country's bureaucratic maze is often tied to trust land. Because the United States owns trust land, it can – and does – impose conditions on its use. Moreover, the United States' ownership of trust land means it cannot be freely alienated. Inalienability restricts access to capital; indeed,

[4] Press Release, Grand Canyon Trust, New Native American Business App Pushes Back on Border-Town Spending (Jan. 7, 2020), www.grandcanyontrust.org/new-native-american-business-app-pushes-back-border-town-spending [https://perma.cc/8KHT-KDU8].

[5] Cong. Research Serv., R46647, Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress 2 (2021); *Restricted Fee Tribal Lands, Testimony of Donald "Del" Laverdure, Principal Deputy Assistant Secretary for Indian Affs., Before the Subcomm. on Indian and Alaska Native Affs., H. Comm. on Nat. Res.*, U.S. Dep't of the Interior (2012), www.doi.gov/ocl/hearings/112/HR3532_020712 [https://perma.cc/T7JD-WEH6].

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simply encumbering trust land can require the Secretary of the Interior's approval.[6] Trust land's title being vested in the United States means those who wish to use it must lease it, and leasing trust land is often a complex matter. Different federal regulations exist for different types of leases, including agricultural, residential, and wind and solar projects.[7] The federal regulations can also vary from reservation to reservation.[8]

While storefronts are becoming less significant, many businesses require office or warehouse space. Oftentimes, an individual or company wishes to purchase the land and building where the business is located because the land and building are assets; however, trust land cannot be purchased. This means a lease must be executed on trust land. Although leases are common, ownership is often preferable from a capital perspective. Trust land's inalienability means the lender cannot acquire ownership if the borrower defaults. Thus, the lender's risk is higher in leasehold mortgages. Lenders compensate for this risk by charging higher interest rates for leasehold mortgages. Higher interest rates mean the borrower is paying more to operate on trust land than to operate on fee simple land.[9] Capital is vital to business operations, so trust land's inalienability places businesses at a financial disadvantage.

Leasing property in most jurisdictions is fairly easy. The lessee locates the lessor. The parties agree to terms, and the terms can be simple – a description of the property, lease duration, and price. Of course, lease agreements can be complex, but the complexity is a consequence of the parties' choice rather than a bureaucratic decree. Though the lease may not explicitly say so, the parties must comply with the relevant local laws. Parties may also choose to record the lease in the local registry. Federal agencies and local bureaucrats are not usually involved. The transaction is confined to the two parties. Not so on trust land.

Indian country business site leases are governed by the Code of Federal Regulations. While there is no official lease template,[10] the BIA mandates lease agreements comply with a slew of requirements, including submitting environmental and archaeological reports and surveys;[11] completing

[6] Cong. Research Serv., R46647, *supra* note 5, at 10.
[7] Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. Mich. J. L. Ref. 563, 576 (2021).
[8] *Id.*
[9] Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 Nat. Res. J. 317, 363 (2006).
[10] 25 C.F.R. § 162.402 (2024).
[11] 25 C.F.R. § 162.438(g) (2024).

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the environmental reports alone will likely cost well over $100,000 and take at least six months.[12] The lease agreement must authorize the BIA to inspect the lease premises. Likewise, lessees are required to cooperate with BIA requests for information relating to the lease site.[13] Lessees are also required to waive their right to sue the United States or the beneficiary of trust land in order to obtain a business site lease of trust land.[14] If the business site lease is of individual Indian trust land, the BIA must approve the price of the lease[15] and whether the individual Indian can receive non-monetary compensation.[16] Moreover, special circumstances must be met in order for the lessee to make payments directly to the individual Indian trust land owner rather than the BIA.[17] The BIA also mandates lessees to obtain insurance to protect Indian landowner's interests.[18] While many private landlords insist their tenants purchase insurance, no state, and likely no city, has rental insurance requirements.[19]

These federal controls on trust land undermine tribes' ability to govern their land. Due to federal regulations, tribes cannot exercise the same autonomy over *their* land as state and municipal governments do. In addition to thwarting tribal self-government, the federal government's slow-moving land bureaucracy makes accessing capital more difficult thereby undermining tribal economic development efforts. Federal control over trust land suggests tribes are lesser governments, incapable of managing their own land.

12.2 LAND FRACTIONATION

Using individual Indian trust land can be further complicated by fractionation. Due to allotment, individual Indians acquired ownership of reservation lands. The Indian Reorganization Act locked these lands in trust

[12] Adam Crepelle, *It Shouldn't Be This Hard: The Law and Economics of Business in Indian Country*, 2023 Utah L. Rev. 1117, 1130 (2023).
[13] 25 C.F.R. § 162.413 (2024).
[14] *Id.* § 162.413(d)(1).
[15] 25 C.F.R. § 162.421 (2024).
[16] 25 C.F.R. § 162.426 (2024).
[17] 25 C.F.R. § 162.424 (2024).
[18] 25 C.F.R. § 162.437 (2024).
[19] *Does the Law Require Renters Insurance?*, Effective Coverage, www.effectivecoverage.com/10410/does-the-law-require-renters-insurance/#:~:text=No%20State%20Mandates%20Renters%20Insurance%20By%20Law&text=There%20is%20no%20state%20statute,that%20you%20carry%20renters%20insurance.&text=It's%20not%20a%20legal%20mandate,need%20to%20have%20renters%20insurance [https://perma.cc/CKR2-KZXM].

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status. This preserved Indian landholdings; however, title ownership passed down to heirs in undivided property interests. That is, rather than two heirs each receiving half of the 160-acre allotment – 80 acres each – the heirs each instead received 50 percent interest in the entire 160-acre allotment. As trust land is inalienable, fractionation worsens over time.[20] Today, a thousand individuals can possess an undivided interest in a single tract of land.[21] Over a quarter million individuals possess an interest in fractionated trust land on more than 150 reservations.[22]

The federal government is responsible for managing fractionated trust lands on behalf of individual Indian owners. The federal government's management of fractionated trust land is infamously poor; indeed, those who possess an interest in fractionated land are commonly unable to obtain rudimentary information about their land interest or activities occurring on it.[23] Inadequate recordkeeping has enabled the United States to "lose" billions of dollars owed to individual Indian allotment holders, à la the *Cobell* litigation.[24] The low-quality records of fractionated land are largely a function of cost – the federal government spends more money on recordkeeping than the land is actually worth. The Supreme Court spelled this out in a 1987 opinion:

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.[25]

Congress has attempted to solve the fractionation puzzle multiple times but has not succeeded yet. Thus, fractionation continues.

[20] Hodel v. Irving, 481 U.S. 704, 707 (1987).
[21] *Managing Indian Land in a Highly Fractionated Future*, Message Runner (Indian Land Tenure Found., Little Canada, MN), Fall 2018, at 1, 1, https://iltf.org/wp-content/uploads/2016/11/ILTF_Message-Runner-9.pdf [https://perma.cc/CFB9-2VAN].
[22] *Fractionated Title Creates Countless Issues for Landowners*, Message Runner (Indian Land Tenure Found., Little Canada, MN), Fall 2018, at 1, 2, https://iltf.org/wp-content/uploads/2016/11/ILTF_Message-Runner-9.pdf [https://perma.cc/CFB9-2VAN].
[23] *Id.*
[24] Cobell v. Norton, 240 F.3d 1081, 1089 (D.C. Cir. 2001) (Cobell VI).
[25] Hodel v. Irving, 481 U.S. 704, 713 (1987).

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Fractionated land issues go beyond recordkeeping. Using fractionated land requires the consent of greater than 50 percent of the interest if a tract of land has more than twenty interest holders.[26] Some allotted parcels have more than 1,000 interest holders, meaning an individual who desires to use the land may have to track down more than 500 people then convince them to consent to the desired use. Doing this is time-consuming and may very well be impossible due to faulty federal records. However, using allotted land requires the consent of 80% of the interest to use it if six to ten owners are involved, and 90% of the interest if five or fewer owners are involved. This enables a single interest holder to hold out for a higher price and impede development.[27]

Fractionation was not created by tribal law; rather, fractionation is a direct result of two federal policies – the General Allotment Act and the IRA. The inefficiencies of fractionated land often render it functionally worthless and an impediment to tribal economic development.

12.3 THE HEARTH ACT

In 2012, Congress passed the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH) to "provide federally recognized Tribes with a way to exercise greater control over their lands and to use judgment, through their own regulations and governmental processes, to benefit their people."[28] Tribes have proven themselves to be much more efficient at processing leases than the BIA. For example, prior to implementing the HEARTH Act, obtaining a lease on Ho-Chunk Nation land took up to a year and half due to slow-moving federal bureaucracy. Since Ho-Chunk Nation implemented the HEARTH Act, the tribe's land can typically be leased in four to six weeks.[29] Experiences like this

[26] 25 C.F.R. § 162.012 (2024).

[27] Crepelle, *It Shouldn't Be This Hard*, *supra* note 12 at 1131; *Fractionated Title*, *supra* note 22, at 2.

[28] Press Release, U.S. Dep't of the Interior, Indian Affs., Statement on the Ninth Anniversary of the Signing of the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act (July 30, 2021), www.indianaffairs.gov/news/statement-ninth-anniversary-signing-helping-expedite-and-advance-responsible-tribal [https://perma.cc/A8DP-79L2].

[29] A case study of Ho-Chunk Nation's implementation of the HEARTH Act was published by the Federal Reserve Bank of Minneapolis. For the findings and impact, see Ctr. for Indian Country Dev. of the Fed. Res. Bank of Minneapolis & Enterprise Cmty. Partners, Tribal Leaders Handbook on Homeownership 88–91 (Patrice H. Kunesh ed., 2018), www.minneapolisfed.org/indiancountry/resources/

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have made the HEARTH Act popular with tribes as a means to enhance control over their land.[30]

More than seventy tribes have taken advantage of the HEARTH Act so far;[31] nonetheless, the HEARTH Act is not true tribal sovereignty as the federal government retains control of tribal land leases. The Act merely lets tribes take over the federal leasing process; it does not empower tribes to create their own leasing guidelines.[32] Tribes implementing the HEARTH Act are also required to continue reporting leases, including collection of lease payments, to the BIA.[33] Furthermore, the Secretary of the Interior has the authority to determine whether tribal leasing rules were violated.[34]

12.4 RIGHTS-OF-WAY

Even developers who are not building directly on trust land may need to cross it.[35] For example, a fiber optics company may be required to traverse trust lands to access fee lands.[36] A right-of-way crossing trust land requires federal approval, including the Secretary of the Interior's blessing for the amount of compensation received by the tribe or Indian owner.[37] Moreover, the precise procedure to obtain a right-of-way varies between BIA offices, and the process often proceeds at a torpid pace.[38] Indeed, the BIA took more than eight years to review rights-of-way for oil and gas

tribal-leaders-handbook-on-homeownership/case-study-hearth-act-implementation [https://perma.cc/G2MG-9C8P].

[30] *HEARTH Act Remains Popular as Tribes Assert More Control on Homelands*, INDIANZ (Apr. 24, 2018), www.indianz.com/News/2018/04/24/hearth-act-remains-popular-as-tribes-ass.asp [https://perma.cc/DK8J-LTFW].

[31] Press Release, U.S. Dep't of the Interior, Indian Affs., Indian Affairs Approves Three Tribal Nations' HEARTH Act Regs (Feb. 25, 2022), www.bia.gov/news/indian-affairs-approves-three-tribal-nations-hearth-act-regs [https://perma.cc/Y3T3-R5RD].

[32] 25 U.S.C. § 415(h) (2024); Josephine Foo, *The HEARTH Act of 2012 and the Navajo Leasing Act of 2000: Financial and Self-Determination Issues*, AM. BAR. ASS'N (Jan. 3, 2019), www.americanbar.org/groups/environment_energy_resources/publications/nar/20190103-the-hearth-act-of-2012/ [https://perma.cc/HSJ2-8P9C].

[33] 25 U.S.C. § 415(h)(6) (2024).

[34] *Id.* § 415(h)(8).

[35] *Tribal Land Right-of-Way Overview*, OPEN EI (updated Jan. 2, 2020), https://openei.org/wiki/RAPID/Roadmap/3-FD-b_(2) [https://perma.cc/9JYW-8CBY].

[36] Thomas H. Ships, *Rights-of-Way Across Indian Lands*, *ch. 5*, *in* RIGHTS-OF-WAY: HOW RIGHT IS YOUR RIGHT-OF-WAY? at *Introduction* (Found. for Nat. Res. & Energy L. (née Rocky Mountain Mineral L. Found.) 1998).

[37] 25 U.S.C. § 325 (2024).

[38] Colby L. Branch & Alan C. Bryan, *Indian Lands Rights-of-Way*, FOUND. FOR NAT. RES. & ENERGY L. *9–10 (née Rocky Mountain Mineral L. Found., No. 5 RMMLF-Inst. Paper No. 9, 2014).

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infrastructure on the Southern Ute Indian Tribe's reservation. The price of gas reached record heights while the BIA's decision was pending. Due to the BIA's delayed right-of-way approval, the Southern Ute Indian Tribe was unable to capitalize on the price increase and lost approximately $95 million in revenue. Despite the BIA being directly responsible for the loss, Southern Ute had no recourse for the lost funds.[39] The BIA revised its right-of-way regulations years later; however, a federal court commented, "[T]he Final Rule will likely create far more confusion, chaos, and litigation than what the Department of the Interior ever contemplated."[40] Consequently, a land matter as simple as obtaining a right-of-way can become a complex, time-consuming matter in Indian country.

12.5 INDIAN TRADER REGULATIONS

Another bureaucratic impediment peculiar to Indian country is the Indian trader rules. These laws were promulgated by the first United States Congress in the Trade and Intercourse Act of 1790. The Indian trader laws forbade non-Indians from engaging in business with Indians in Indian country without first obtaining federal permission.[41] According to the Supreme Court, Congress enacted Indian trader laws for the following reason:

> The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these "Wards of the Nation."[42]

Though Congress would not describe Indians as "inexperienced, dependent and improvident" today, Indian trader laws remain part of the United States Code.

Indian trader laws require non-Indians wishing to partake in business with reservation Indians to obtain a federal license to do so. In order to acquire the license, traders must jump through a heap of hoops, including proving the licensees and their employees are of good moral character.[43]

[39] U.S. Gov't Accountability Off., GAO-15-502, Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands 22 (2015).

[40] Washburn & Cummings, *supra* note 3, at 32.

[41] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 1, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. §§ 177, 261–264 (2024)).

[42] Ewert v. Bluejacket, 259 U.S. 129, 136 (1922) (citation omitted).

[43] 25 C.F.R. § 140.9 (2024).

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If the would-be licensee is also seeking a business site lease, the Indian trader license will not be issued until the business site lease is approved,[44] which can take over a year. The license also only covers one establishment.[45] This means a business must obtain a separate license to expand on the same reservation. Furthermore, the Indian trader license cannot be transferred without federal permission. Licensed Indian traders cannot even lease space in their office without federal approval.[46]

Even after successfully procuring an Indian trader license, businesses remain under the federal microscope. The federal government prohibits Indian traders from selling or purchasing any item the United States provides to Indians. In fact, licensed traders are not even allowed to have such items in their possession.[47] Businesses operated by a licensed Indian trader "must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate."[48] Licensed Indian traders can only pay Indians in cash and face federal restraints on their ability to offer credit to Indians.[49] Most remarkably, the federal government has the authority to set the price of goods offered by Indian traders as the Code of Federal Regulation mandates:

> It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.[50]

No business wants to deal with this level of federal micromanagement.

To be sure, Indian trader laws seem to be seldom enforced – one reservation superintendent could not figure out how to acquire the licenses from the BIA, so he considered "employing local high school art students to make [Indian Trader] licenses."[51] The licenses are possible to procure though, and failure to comply carries serious penalties. Individuals

[44] 25 C.F.R. § 140.11 (2024).
[45] 25 C.F.R. § 140.14 (2024).
[46] 25 C.F.R. § 140.15 (2024).
[47] 25 C.F.R. § 140.16 (2024).
[48] 25 C.F.R. § 140.14 (2024).
[49] 25 C.F.R. §§ 140.23, 140.24 (2024).
[50] 25 C.F.R. § 140.22 (2024).
[51] United States ex rel. Keith v. Sioux Nation Shopping Ctr., 488 F. Supp. 496, 500 (D.S.D. 1980).

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caught selling goods to Indians on a reservation sans license will have their inventory forfeited and face the very precise fine of $1,617.[52] Indian trader laws also empower the president of the United States to deny individuals the license and shut down trade on reservations altogether.[53]

Indian trader laws' continued existence is irrational because they have no logical purpose in the twenty-first-century United States. The laws were designed to protect Indians from unscrupulous whites, and there was a logical reason for this in 1790 – many Indians did not speak English and were unfamiliar with Anglo-American mores. Neither reason exists today. On top of this, federal courts have noted Indian trader laws harm tribal economic development efforts by casting a cloud of uncertainty over reservation business transactions. Furthermore, a federal appellate court stated Indian trader laws provide licensees with a monopoly over reservation Indians and this power can be used to exploit Indians.[54] Indian trader laws also only apply in Indian country, which makes little sense given their purpose is to protect Indians from deceitful non-Indian businesses, and Indians are much more likely to encounter non-Indian businesses outside of Indian country.

Another issue with Indian trader laws is that they employ flagrantly racial classifications. Indian trader laws overtly distinguish between "an Indian of the full blood" and everyone else. "Indian," as used in the United States Code, usually refers to Indians in the political sense; that is, Indians are distinguished by their citizenship in a tribal government rather than their race. "Indian of the full blood" is racial. Consequently, the distinction is likely unconstitutional because Indian trader laws single out Indians based upon their Indian blood rather than their tribal citizenship.

Additionally, Indian trader laws expressly declare:

> That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.[55]

"White person" is a racial classification. Indeed, the Supreme Court held persons of African ancestry could not be prosecuted for violating the

[52] 25 C.F.R. § 140.3 (2024).
[53] 25 C.F.R. § 140.2 (2024).
[54] Rockbridge v. Lincoln, 449 F.2d 567, 569 (9th Cir. 1971).
[55] An Act to Amend Section Twenty-One Hundred and Thirty-Three of the Revised Statutes in Relation to Indian Traders, ch. 360, 22 Stat. 179–180 (1882) (codified at 25 U.S.C. § 264 (2024)).

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Indian trader statutes in 1879 because "[t]he term 'white person,' in the Revised Statutes, must be given the same meaning it had in the original act of 1834."[56] And when Congress said "white person" in 1834, it meant *white* person. The Court admitted "[t]here may be no good reason for restricting any longer this liability to acts of whites,"[57] but said Congress was responsible for changing the law. Over a century has passed, and Congress has yet to act.

Indian trader laws do not just apply to non-Indian businesses; rather, Indian trader laws directly limit tribal economic freedom. Tribes can, and routinely do, purchase land on the private real estate market. Tribes purchase land for a variety of reasons, but a nearly two-centuries-old Indian trader law expressly forbidding tribes from selling their land without federal approval remains part of the United States Code.[58] Persons who attempt to purchase lands directly from an Indian tribe without federal approval are subject to monetary penalties. The text of the statute does not distinguish between fee and trust lands. Accordingly, there is uncertainty over whether tribes can freely sell their fee simple land on the private real estate market. No federal court has declared a tribal sale of privately purchased land invalid under the Trade and Intercourse Act in the last century,[59] but, in 2000, a member of Congress said the law prevents tribes from selling their privately acquired land.[60] Existing federal regulations also support the position that tribes cannot sell their privately purchased land without federal approval.[61] Uncertainty over whether tribes need federal approval to sell their privately owned land makes purchasing tribal land risky, thereby decreasing the land's market value.

To remedy this uncertainty and facilitate market transactions, some tribes have successfully lobbied Congress to enact legislation enabling them to freely alienate their privately owned lands.[62] That is, it takes an act of Congress for tribes to profit from the private real estate market. No state government requires an act of Congress to sell land. Hence, Indian

[56] United States v. Perryman, 100 U.S. 235, 236 (1879).
[57] *Id.* at 236–37.
[58] 25 U.S.C. § 177 (2024).
[59] Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands without Federal Approval?* 0 Am. Indian L. J. 10, 11 (2012).
[60] *Id.* at 24–25.
[61] 25 C.F.R. § 152.22(b) (2024).
[62] Jarboe & Watts, *supra* note 59, at 24.

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trader laws continue to operate on the premise that tribes are lesser governments incapable of governing their land.

12.6 NATURAL RESOURCE DEVELOPMENT

Not only are tribes unable to freely alienate their land but tribes face significant, federally imposed barriers to utilizing the natural resources on their land. Simply cutting down a tree on trust land can result in bureaucratic hurdles as the Supreme Court explained in 1980: "[T]he Secretary [of the Interior] has promulgated a detailed set of regulations to govern the harvesting and sale of timber."[63] The Secretary of the Interior remains intimately involved in timber management on tribal lands.[64] Federal regulations now permit tribal law to govern tribal timber management; nevertheless, tribal law does not automatically govern tribal land.[65] Rather, tribal law only governs tribal timber to the extent the Secretary of the Interior thinks the tribe is competent to manage its own timber. For example, the federal regulations explicitly authorize tribal enterprises to engage in the timber management business, yet the Secretary of the Interior must approve most every action of the tribal enterprise.[66] Tribes are barred from selling *their* timber on the open market sans the Secretary of the Interior's consent.[67] The Secretary of the Interior also gets to decide how the tribe's timber payment is structured.[68]

Timber is but one of the tribal resources the federal government controls; indeed, the federal government has been involved in oil production on tribal lands since 1891.[69] Over the years, Congress has enacted various laws to encourage energy production on tribal lands. Nonetheless, federal bureaucracy remains a major impediment to tribal energy production. If an oil company wants to engage in energy production in most state jurisdictions, the company must complete four regulatory steps and can commence production in about three months.[70] On tribal trust land, oil companies must navigate forty-nine regulatory steps and doing so can

[63] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 146–47 (1980).
[64] 25 U.S.C. § 407 (2024).
[65] 25 C.F.R. § 163.4 (2024).
[66] 25 C.F.R. § 163.13 (2024).
[67] 25 C.F.R. § 163.14(a) (2024); 25 C.F.R. § 163.19 (2024); 25 C.F.R. § 163.20 (2024).
[68] 25 C.F.R. § 163.23 (2024).
[69] Adam Crepelle, *Finding Ways to Empower Tribal Oil Production*, 22 Wyo. L. Rev. 25, 34 (2022).
[70] *Id.* at 40.

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take more than three years – including more than a year simply to obtain a land lease.[71] The drilling permits are more expensive in Indian country too, approximately $100 in some states versus more than $10,000 in Indian country.[72]

On top of this, oil leases of trust land often involve the BIA soliciting bids. The winning bidder is required to place one-quarter of the bid in a noninterest-bearing account until the Secretary of the Interior approves the lease. The money can remain in the account for over a year; accordingly, Indian country oil producers have significant funds tied up for a year while receiving no benefit.[73] And due to inflation, winning bidders stand to lose significant sums of money while waiting for Secretarial approval. The federal regulatory process is so burdensome that the United States' Office of Inspector General reported in 2012 "the oil and gas industry generally considers Indian leases to be their lowest priority, preferring to lease private, state, and federally owned lands first."[74]

Congress sought to improve tribes' ability to develop their oil reserves by passing the Indian Tribal Energy Development and Self-Determination Act.[75] The Act allows tribes to enter a Tribal Energy Resource Agreement (TERA).[76] TERA enable a tribe to engage in oil production with minimal federal oversight; however, tribes must first satisfy several requirements. The Government Accountability Office noted the TERA process is regularly described as "complex, confusing, and time-consuming."[77] Even the BIA described TERA's regulations as "hefty."[78] The regulatory gauntlet is so dense that experts believed it is impossible for a tribe to achieve TERA approval; in fact, no tribe has even applied for a TERA.[79]

[71] *Id.*
[72] *Id.*
[73] Id. at 41.
[74] Off. of Inspector Gen., U.S. Dep't of Interior, Oil and Gas Leasing in Indian Country: An Opportunity for Economic Development, Report No.: CR-EV-BIA-0001-2011, at 4 (2012), www.doioig.gov/sites/doioig.gov/files/CR-EV-BIA-0001-2011Public.pdf [https://perma.cc/S9GL-27HZ].
[75] 25 U.S.C. §§ 3501–3506 (2024).
[76] 25 U.S.C. § 3504(e) (2024).
[77] GAO-15-502, Indian Energy Development, *supra* note 39, at 33.
[78] *Tribal Energy Resource Agreements (TERAs)*, Indian Affs., U.S. Dep't of the Interior, www.bia.gov/as-ia/raca/regulations-development-andor-under-review/TERA [https://perma.cc/9VGZ-87KC].
[79] Tana Fitzpatrick, Cong. Research Serv., R46446, Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress 19 (2020).

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12.7 GAMING

Although non-Indians often assume tribes can simply open a casino, federal bureaucrats are extensively involved in Indian gaming. Immediately after the Supreme Court affirmed tribes' inherent sovereign right to permit gaming on their land,[80] states lobbied Congress to curtail tribal sovereignty in the gaming sphere, and Congress obliged with the Indian Gaming Regulatory Act (IGRA).[81] IGRA created the National Indian Gaming Commission (NIGC), which is housed within the Department of Interior.[82] The NIGC has the power to prevent tribal gaming and to shut down existing casino operations.[83] Tribes cannot enter into casino management contracts without approval of the NIGC chair.[84] The NIGC chair's approval of a casino management contract may constitute a "major federal action[] significantly affecting the quality of the human environment."[85] As a result, the chair usually waits until a National Environmental Policy Act (NEPA)[86] environmental assessment is complete prior to authorizing a contract. A NEPA review adds substantial costs in time and expense to the approval process. IGRA also mandates that tribes conduct background checks of key casino employees and report the result of these investigations to the NIGC.[87] While tribes generally have an amicable relationship with NIGC, the purpose is purely paternalistic. States pushed for IGRA and greater regulation of tribal gaming to prevent organized crime from infiltrating tribal operations. However, states admitted there was no evidence of organized crime being involved in tribal gaming.[88]

IGRA greatly curtails tribal sovereignty over gaming. It grants states authority over all Indian gaming that is disconnected from traditional Indigenous activities, known as Class I gaming.[89] In fact, states can outright prohibit tribes from gaming by outlawing gaming within the state;

[80] See discussion of California v. Cabazon Band of Mission Indians, 480 U. S. 202 (1987) in Chapter 14.
[81] Indian Gaming Regulatory Act of 1988, Pub. L. No. 100–497, 102 Stat. 2467 (current version at 25 U.S.C. §§ 2701–2721 (2024)).
[82] 25 U.S.C. § 2704 (2024).
[83] 25 U.S.C. § 2706 (2024).
[84] 25 U.S.C. § 2711(a) (2024).
[85] 42 U.S.C. § 4332(C) (2024).
[86] National Environmental Policy Act of 1969, Pub. L. No. 91–190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4347 (2024)).
[87] 25 U.S.C. § 2710(b)(2)(F) (2024).
[88] California v. Cabazon Band of Mission Indians, 480 US 202, 221 (1987).
[89] 25 U.S.C. § 2703 (2024).

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thus, there are no tribal gaming enterprises in Utah because the state bans gaming. If states permit *some* form of gaming, tribes are permitted to partake in Class II gaming, defined as bingo, pull-tabs, and unbanked card games, most notably poker. However, the unbanked card games must be played in compliance with the laws of the surrounding state, including the hours of operation and pot limits.[90] Class III gaming is defined as "all forms of gaming that are not Class I gaming or Class II gaming,"[91] such as blackjack, roulette, and slot machines that use a random number generator.[92] Tribes can only engage in Class III gaming by entering a compact with the surrounding state. States hold all the power during compact negotiations because they can unilaterally bar tribes from gaming. To counter this reality, IGRA imposes a good faith requirement on states during compact negotiations.[93] The Supreme Court invalidated this requirement in 1996;[94] thus, tribes are largely at the mercy of states during compact negotiations.

IGRA provides tribes some protection during negotiations because the Secretary of the Interior must approve the tribal–state compact before it becomes valid.[95] Kevin Washburn, former Assistant Secretary for Indian Affairs, has written, "The Department's role in reviewing tribal-state gaming compacts under IGRA is surprisingly broad."[96] The Secretary of the Interior has denied approximately two dozen gaming compacts. The specter of disapproval creates economic troubles as it triggers renegotiation between the tribe and the state. This takes time and money that may lead casino investors to abandon the project.[97] In response to Class III compacting issues, tribes have adapted to Class II video gaming devices to mimic many of the features of Class III slot machines, so-called Class 2.9 games.[98] For example, Class III slot machines historically used coins. Tribes developed slot machine analogues that were

[90] 25 U.S.C. § 2703(7)(A)(ii)(II) (2024).
[91] 25 U.S.C. § 2703(8) (2024).
[92] Rob Capriccioso, *Legal Distinction Between Class II and III Gaming Causes Innovation, Anguish*, Indian Country Today (updated Sept. 13, 2018), https://indiancountrytoday.com/archive/legal-distinction-between-class-ii-and-iii-gaming-causes-innovation-anguish [https://perma.cc/P7VZ-EKFW]; www.bestuscasinos.org/blog/class-ii-vs-class-iii-slot-machines-what-are-the-main-differences/.
[93] 25 U.S.C. § 2710 (2024).
[94] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
[95] 25 U.S.C. § 2710 (2024).
[96] Kevin Washburn, *Recurring Issues in Indian Gaming Compact Approval*, 20 Gaming L. Rev. & Econ. 388, 389 (2016).
[97] *Id.*
[98] *Id.* 393–94.

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entirely cashless to evade the Class III regulatory hurdles.[99] Tribal gaming operations have faced more regulatory obstacles than any other form of gaming in the United States;[100] nevertheless, tribal innovations have enabled tribal gaming to become a $40 billion a year industry.

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Federal bureaucracy hinders tribes' ability to operate as governments. Tribal lands are governed by an intricate federal regulatory regime, so tribes are not free to implement their own rules. Moreover, most of the federal rules governing tribes provide few practical benefits. If the federal regulations did, other governments would be seeking them. Until tribes are liberated from the extensive federal regulatory web, tribes will remain lesser governments, and the federally imposed restraints on tribal jurisdiction epitomize tribes' status as lesser governments.

[99] Capriccioso, *supra* note 92.
[100] *Id.*

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