



## Reducing Poverty to Improve Native American Health Outcomes

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For many decades, Native Americans have experienced higher rates of health problems than the general American population and other racial minority groups.<sup>1</sup> Today, the average Native American dies five and a half years sooner than the average American.<sup>2</sup> During the first year of the COVID-19 pandemic, Native Americans faced the highest rates of infection, hospitalization, and death due to COVID-19 when compared with any other race or ethnicity in the United States.<sup>3</sup>

At least two important causes are behind the poorer health outcomes that Native Americans experience. First, the Indian Health Service (IHS), a healthcare system funded and managed by the federal government, has struggled chronically with underfunding and bureaucratic shortcomings. Second, the pervasive poverty that many Native Americans experience has contributed to poor health outcomes. Institutions that raise transaction costs of economic development and innovation perpetuate poverty, contributing to worse health outcomes.

Improving Native American health will require both immediate, small-scale policy changes and long-term, large-scale institutional reforms. In terms of small-scale policy changes, Congress could increase funding for the IHS, which is an immediate and practical solution for delivering more healthcare to more individuals. However, increasing IHS funding will not solve the underlying management problems in the IHS or the institutional problems contributing to widespread poverty. This brief focuses on long-term, large-scale changes to the governance institutions on reservations that contribute to poverty. Other briefs in this series tackle the smaller, more immediate changes to IHS policies and performance.

Perhaps the most important policy reforms are those that remove barriers to entrepreneurship and economic growth. Through alleviation of poverty and increased economic growth, health outcomes for Native Americans are likely to improve, even without other institutional changes to the IHS.

## **ECONOMIC GROWTH AS A REMEDY FOR HEALTH PROBLEMS**

Scholars have identified a relationship between poverty and poor health outcomes.<sup>4</sup> Economic growth appears to improve health outcomes because people with more wealth are likely to have better nutrition and more access to healthcare providers. Additionally, economic growth increases the number of resources for governments to put toward public health services and complementary goods and services for healthcare, such as improved transportation infrastructure.<sup>5</sup> Conversely, improved health outcomes seem to improve economic growth because healthier people are more productive and accumulate more human capital.<sup>6</sup>

## **INSTITUTIONAL BARRIERS TO ECONOMIC GROWTH ON RESERVATIONS**

Many Native American reservations are islands of poverty within the United States. Despite decades of federal and tribal initiatives, economic development and health outcomes on reservations have consistently lagged behind other places in the United States.<sup>7</sup> Removing barriers to economic growth and alleviating poverty will likely result in a healthier Native American population.

Economic development is heavily dependent on formal and informal institutions, which are the rules of the game according to which human action takes place. Formal institutions, such as legislation and regulations, directly affect the way that economic development takes place. Informal institutions, such as social norms and civic groups, also influence how economic action unfolds. When institutions, both formal and informal, facilitate entrepreneurship and innovation, a society can experience economic growth and higher standards of living over time. However, if a society's institutions hamper exchange and entrepreneurship, that society will experience relatively slow economic growth and, in the worst cases, economic decline.

Scholars and policymakers have pointed to several formal and informal institutions that have contributed to poverty on many reservations.<sup>8</sup> This institutionally caused poverty inhibits reservation residents from successfully coping with both chronic medical problems and new problems such as pandemics.

Because tribes have some autonomy and self-governance under the federal government's self-determination policies, formal institutions can and do vary from reservation to reservation. However, the federal government's legal relationship with tribes means that many institutions are similar across most, if not all, tribes. At least three institutional channels impede entrepreneurship

and economic development on many reservations. These three channels make it more difficult for people to engage in mutually beneficial exchange, become entrepreneurs, and discover new innovations:<sup>9</sup>

- Property rights and the federal land trust
- Dual federal–tribal bureaucracy
- Legal and political uncertainty

In the following subsections, we give a brief overview of these three channels, but this discussion is not exhaustive. Many complex issues contribute to poverty on Native American lands, and the three channels discussed here are only some of those issues.

### Property Rights and the Federal Land Trust

Economists largely agree that well-defined and well-enforced private property rights are a prerequisite for sustained economic growth. However, the federal trust system makes on-reservation property rights more ill defined and convoluted than those elsewhere. The trust system, started in the late 19th century, allows the federal government to hold in trust the title for parcels of land owned by a tribal government or by individual Native Americans.

The complexity of property rights under the modern federal land trust means that Native Americans face higher transaction costs for buying, selling, renting, or using property. Therefore, they also face higher costs of engaging in entrepreneurship and private enterprise, which limits economic growth.

Trust land is subject to various constraints over alienation, leasing, and encumbrance. Individual Native Americans and tribal governments who own land held in trust cannot sell their land without the express permission of the Bureau of Indian Affairs (BIA). In addition to permitting the sale of trust land, BIA officials must grant permission to change land uses, make capital improvements, or lease trust lands, which can be a time-consuming process.

Another barrier posed by the trust system is the difficulty of using land as loan collateral. Many banks choose not to lend to individuals or tribal governments with trust land because it is unlikely that banks can repossess the land in the event of a default, which subsequently restricts access to capital markets that are necessary for private enterprise.<sup>10</sup>

Furthermore, the bureaucratic oversight of trust lands imposes significant costs on reservation residents through red tape that does not apply to nonreservation private property. For example, trust lands owned by individuals are subject to federal environmental regulations because trust land has a similar legal status to other federal land, such as national parks and national forests. The BIA must apply the provisions of the National Environmental Policy Act (NEPA), the Archaeo-

logical Resources Protection Act, and other federal laws and regulations.<sup>11</sup> Compliance with these laws and regulations increases the time and monetary costs of engaging in economic enterprises, even if those enterprises are small. The environmental assessments and environmental impact statements required under NEPA can be a time-consuming and financially expensive process for those who are least equipped to cope with such costs.

In addition to bureaucratic issues and compliance costs, fractionation is another major issue affecting trust lands. Fractionation occurs when many individuals co-own a parcel of land. Under the land trust, these individuals own a percentage share of the land instead of a distinct area. Today, hundreds or thousands of people may co-own the same parcel of land, which creates difficulty in using the land because the co-owners must agree on whether to use the land or to sell or lease it. Across the United States, approximately 100,000 fractionated tracts of land are owned by more than 243,000 landowners.<sup>12</sup> Fractionation is a significant barrier to entrepreneurial activity because it raises the transaction costs of using trust land, especially leasing the land for any kind of economic development.

The federal trust system is a proverbial double-edged sword. One of the current goals of the federal government is to bring more land into the trust, and the trust system is generally popular with Native Americans. Over the course of American history, tribes have lost the vast majority of their homeland and their sovereignty, but the federal land trust essentially allows tribes and individual Native Americans to “keep Indian lands in Indian hands.”<sup>13</sup> Bringing more land into the trust is an understandable goal, especially because Native Americans lost tens of millions of acres that were originally set aside for them in the mid- to late-1800s. Over the past several decades, millions of acres have been returned to the trust system, allowing tribes to regain some of the land that was lost. Despite the desire to “keep Indian lands in Indian hands,” the federal trust system has significant tradeoffs that must be considered. Thus, a trust system that promotes socially beneficial entrepreneurship, as opposed to inhibiting that goal, will require major policy reforms that make it much less costly for individuals and tribes to use, sell, or lease trust land and the associated natural resources. If the BIA and tribal agencies do not remove costly red tape, entrepreneurship and innovation are likely to remain low, leading to slow rates of economic growth.

#### Dual Federal–Tribal Bureaucracy

The complex relationship between tribal bureaucracies and federal bureaucracies is often ill defined and convoluted. Nominally, the federal government and tribes have a government-to-government relationship, but the federal agencies have the power to create public policies, even if the policies go against tribal leaders’ wishes. Therefore, both federal and tribal bureaucracies have broad discretion to oversee and regulate economic enterprises directly as well as through more indirect means. Sometimes, these two sets of bureaucracies do not agree on public policies, and there can be tension and even contradictions between the policies. Thus, the federal–tribal

relationship has led to a unique form of public administration that sometimes leads to socially unproductive features, such as negative forms of political entrepreneurship, erosion of the rule of law, and impediments to private enterprise.<sup>14</sup>

On reservations, both federal officials in many agencies and tribal officials have the power to oversee how land is used, what type of labor is allowed, which types of businesses are allowed, who receives government allocations of money, how business is regulated, and so on. Because two independently functioning bureaucracies can make public policies on the same topic, reservation residents face relatively large amounts of bureaucratic red tape that increase the costs of engaging in market enterprises, entrepreneurship, and innovation.

One additional complicating factor is that tribal governments function as both firms and governments. Many tribes run business ventures, including tourism, gaming, energy, agriculture, forestry, manufacturing, and telecommunications, while they also have the coercive powers of government to tax, legislate, and regulate.<sup>15</sup> These tribally owned businesses are often some of the largest employers on reservations. Additionally, tribally owned businesses are often the largest source of revenues for tribal governments because reservations have a limited tax base and grants from the federal government are scarce.

Although tribally owned businesses provide many benefits to the members of these tribes, the mixture of government and business often leads to unintended consequences. In many cases, the policymakers who run the business are the same people as or have direct connections to the people who regulate economic activity on reservations. Maintaining the separation between day-to-day business decisions and tribal politics is often difficult for tribal officials because enterprises are overseen or influenced by elected officials and bureaucrats. Thus, on some reservations, the institutional arrangements do not provide for a distinct separation between day-to-day business decisions and tribal politics, leading to an environment with a high potential for rent-seeking and corruption. In the case of many tribal enterprises, a culture of rent-seeking has emerged where political leaders, who are simultaneously business leaders, discover and exploit opportunities that enrich themselves at the expense of their constituents.<sup>16</sup> Despite some problems, many tribes have succeeded in creating governance institutions that effectively separate business management from political decisions.<sup>17</sup> To improve economic development, tribal governments can focus on reforming the governance institutions to insulate tribal businesses from direct and indirect political influences.

### Legal and Political Uncertainty

Owing to the unique structure of formal institutions on reservations, legal and political uncertainty has been one of the greatest barriers to economic development. This uncertainty is also related to the complexity of understanding how property rights work on reservations and navigating the labyrinth of tribal and federal policies created by the dual bureaucracies. Uncertainty and com-

plexity regarding taxation schemes, judicial jurisdiction, incorporation codes, and access to capital markets create barriers to potential Native American entrepreneurs as well as to off-reservation entrepreneurs who wish to enter reservation markets.<sup>18</sup> Thus, the complexity of Native American governance systems creates confusion and uncertainty for people who may want to do business on a reservation and, in turn, creates significant barriers to economic development. Potential entrepreneurs may be uncertain about how government actions will affect their decisions, and this uncertainty hampers the ability of entrepreneurs to engage in socially beneficial actions that create wealth on reservations.

A tribal government's ownership of a business can also lead to uncertainty in some cases. Owing to the common-law sovereign-immunity doctrine, tribes are immune from suit unless Congress gives authorization. Sovereign immunity is not limited to just a tribal government proper; courts have extended such immunity to entities that are directly related to tribes, such as tribally owned businesses, even if the businesses' operations take place off the reservation. Off-reservation entrepreneurs or potential entrepreneurs may be hesitant to engage in economic enterprises directly with tribes or tribally owned businesses because they may not be able to bring a suit if a contract is breached. It is often uncertain who can be sued if a tribal entity violates a contract and which court has jurisdiction. Such uncertainty is a large disincentive to engaging in economically beneficial action.<sup>19</sup>

However, tribal leaders can choose to waive immunity on a case-by-case basis, or they can choose to negotiate limited waivers. In recent years, many tribal officials have chosen to waive immunity from suit for business purposes of enforcement of commercial contracts or leases. Waiving immunity can be controversial. Some tribal government leaders are hesitant to waive immunity because they see it as an abandonment of the progress made in securing sovereign status. By contrast, other officials see the ability to waive immunity, either limited or in full, as the full expression of tribal sovereignty and self-determination. By partially or fully waiving immunity, tribal leaders can signal that they are trustworthy and reliable to engage in economic activity. Off-reservation entrepreneurs and investors have historically been hesitant to use tribal courts because they did not perceive the courts as impartial. However, many tribes have successfully reached commercial agreements by innovatively using neutral arbitration provisions. For example, when entering into these provisions, each party selects a party arbitrator, and the party arbitrators select a third neutral arbitrator to adjudicate.<sup>20</sup> If tribal officials want to increase mutually beneficial exchanges with off-reservation businesses, they should consider the use of immunity waivers and arbitration agreements.

## **INSTITUTIONAL REFORMS TO AID ECONOMIC GROWTH**

Institutional problems demand institutional solutions. Although reservations face institutional barriers to entrepreneurship and economic growth, many tribal and federal leaders are aware

of the problems. Tribal and federal officials across the United States have enacted institutional reforms and new policies to facilitate economic growth, with many successes. Tribal leaders can learn from one another and experiment with their own policies based on the experiences of other tribes. Federal officials can facilitate this mutual learning and experimentation by giving tribes the freedom and resources necessary to devise reforms that are tailored to their unique contexts.

Many tribal governments have shown that they are willing and capable of reforming their institutions to facilitate economic development. For example, several tribal governments have successfully streamlined legal processes, provided resources for tribal members to more easily navigate complex legal institutions, and provided tribal members easier access to capital markets.<sup>21</sup> Tribal officials can learn from these successes, and they can consider other reforms that will reduce barriers to entrepreneurship and economic growth. Some of the more important reforms might include updating the policies for the use of tribal trust land, insulating tribal businesses from direct and indirect political influences, and expanding the use of immunity waivers and arbitration agreements. If more tribal policymakers work to reform problematic institutions to promote socially productive entrepreneurship, reservations would likely experience higher rates of economic growth and lower rates of poverty. Resolving the problem of chronic poverty may help make Native American populations more robust against current and future health crises.

Like their tribal counterparts, federal policymakers have been making some institutional reforms, such as fixing the worst parts of the fractionation problem.<sup>22</sup> Before the 1990s, leasing fractionated trust land required the co-owners' unanimous consent.<sup>23</sup> Over the past 30 years, however, Congress has partially addressed the problem of fractionation by passing the American Indian Agricultural Resource Management Act of 1993 (AIARMA), the Indian Land Consolidation Act Amendments of 2000 (ILCA Amendments), and the American Indian Probate Reform Act of 2004 (AIPRA). The AIARMA and the ILCA Amendments changed the requirements of unanimous consent so that owners of fractionated land could more easily lease their land. In many cases, owners of fractionated land can make decisions with just a simple majority, but some cases still require 90 percent of owners to agree. The AIPRA has helped limit new fractionation through federally assisted estate planning so that further splintering does not occur when a landowner passes away without a will. Despite marginal improvements through these three acts, owners of fractionated trust land still face relatively high transaction costs.<sup>24</sup>

Further federal-level reforms are necessary to reduce economic barriers, facilitate economic growth, and reduce poverty. For example, simplifying the processes and regulations for using, selling, or leasing trust land would reduce the transaction costs facing individual tribal members and tribal governments. Removing or reducing other forms of red tape would more easily allow both individual entrepreneurs and tribal businesses to have more opportunities for economic success. Without continuing the reforms that lower transaction costs, Native Americans are likely to remain impoverished and suffer from higher rates of health problems.



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## NOTES

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