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Checkerboard of Interests: Native American Tribes and the Politics of Land Tenure Reform

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A Checkerboard of Interests: Native American Tribes and the Politics of Land Tenure Reform

Anika Manuel
POSC 410 - Seminar in American Politics



Project Overview

- ❖ Modern financial and land tenure systems for indigenous communities in the United States
 - Explores the driving interests influencing the major political actors in the discourse around land tenure reform
 - Aims to shine a light on the nuances embedded in the contemporary debate of economic self-determination within the Native American reservation system

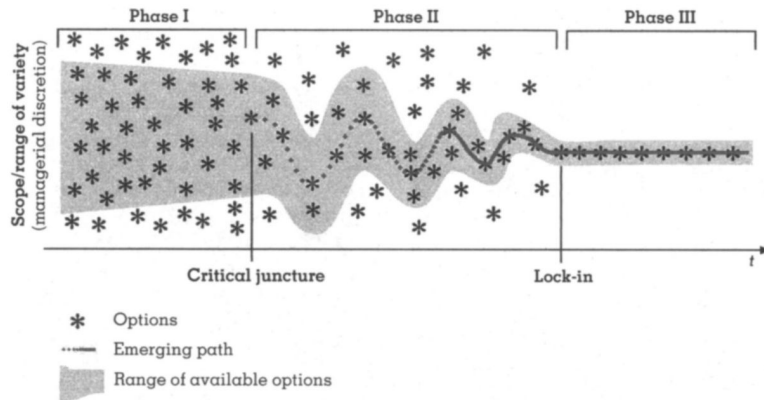
- ❖ **Key Questions:**
 - How has public policy shaped the economic and property rights of indigenous nations in the U.S.?
 - And what are the different interests driving the various policy stances of relevant political actors in this issue, including the federal government and indigenous tribes?

Path Dependence Theory

*Once a country starts down a certain path, the cost of reversal from that path is really high.

- “With increasing returns, actors have strong incentives to focus on a single alternative and to continue down to a specific path once initial steps are taken in that direction” (Pierson 2000)
- HISTORY (a.k.a. sequences) MATTERS (Koch et al. 2009; Pierson 2000)
- Understandings, outlooks, and ideologies within politics are generally tenacious once established

FIGURE 1
The Constitution of an Organizational Path



- Path dependence as a tapering social process
- 3 Developmental Phases (Koch et al. 2009)
 - (1) Singular historical Events
 - Broad scope of action
 - (2) Transformation of singular events into self-reinforcing dynamics
 - Dominant action pattern emerges
 - (3) Organizational lock-in
 - Dominant decision patterns is fixed

Historical Context of Native American Policies

Marshall Trilogy (1820s/30s)

*Known as the cornerstone of modern "Indian law"

*Established 3 basic principles:

- Federal primacy in Indian Affairs
- Exclusion of state law from Indian Country
- Recognition of tribal governance authority

*Conceptualized the Guardian-Ward relationship

Indian Removal Act (1830)

*This forced relocation of tribes became known as the "Trail of Tears"

- Thousands of indigenous communities were removed from their ancestral lands

*Deprived tribes of "untold billions of dollars worth of capital producing assets" and moved them to areas economically undesirable to the federal government and settlers

Dawes General Allotment Act (1887)

*Partitioned native land into private land parcels and opened them up to white settlers

- Authorized forced land cessations

*Immediately resulted in the loss of two-thirds of native land

*Aimed to assimilate Native Americans into mainstream US society

*Only the Native Americans who accepted the plots got citizenship

Indian Reorganization Act (1934)

*Passed in an attempt to halt the destructive patterns of the Dawes Act and restore Native self-government

*Halted allotment of communal tribal lands to individuals and provided for the surplus lands to return to tribes

*Extended the trust period for existing allotments and allowed the SOI accept additional land into trust

*Tribal constitutions

The Land Tenure System

The laws, policies, and customs governing the relationships between individuals and the land.

- **Within the federal trusteeship system, the U.S. government assumes the responsibility for managing, protecting, and developing land for native tribes**
 - Affects all aspects of economic life within indigenous communities
- **Land and property rights are not clearly defined**
 - DOI must approve all transactions that relate to tribal trust land (leasing, rights-of-way, etc.)
- **Tribes have sovereignty in theory but not in practice**
 - Doctrine of self-determination inherently comes into conflict with the BIA's [Bureau of Indian Affairs] trust responsibility



Three Types of Land

01

Trust Lands

Owned by the government and held in trust for the benefit of a tribe

02

Restricted Fee Lands

Owned by tribes or individual tribal members but are subject to a restriction against any sales, transfers, or encumbrance

03

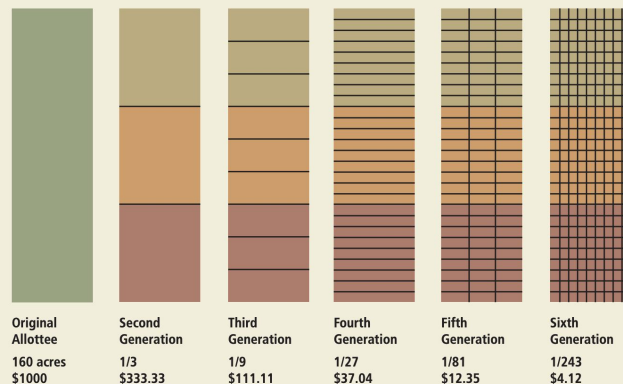
Simple Fee Lands

Completely owned by an individual and are not subject to federal restriction

❖ FRACTIONATION OF ALLOTTED LAND

- A trust parcel owned by more than one owner as undivided interests (extreme co-ownership)
- Leads to a phenomenon known as “checkerboarding”
 - Land with different statuses are interspersed with each other (trust, tribal, individual native members, non-native individuals, etc.)
 - Causes a lot of jurisdictional issues

A Simplified Six-Generation Example of Undivided Heirship
Fractionated Values and Lease Payment Values of Undivided Interest*

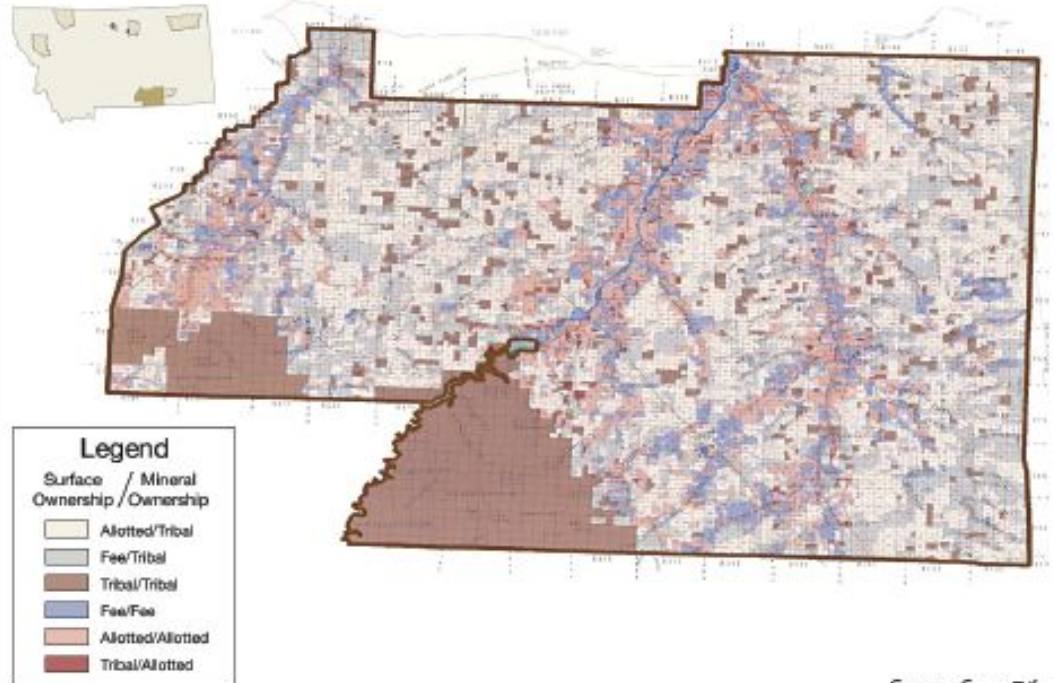


*Presumes only three heirs per person per generation.

What does “checkerboarding” look like?



The Crow Reservation, Montana



Source: Crow Tribe

Methodology

- ❖ Identified the main actors in the politics of land tenure reform
 - **Indigenous Community (interest groups)**
 - National Congress for American Indians — NCAI
 - Native American Rights Fund — NARF
 - Tribal Supreme Court Project
 - Indian Land Tenure Foundation — ILTF
 - **U.S. Federal Government**
 - Congress (Senate Committee on Indian Affairs, HOR Subcommittee for Indigenous Peoples in the United States)
 - Presidential Administrations (Obama, Trump, and Biden)
 - Bureaucracy (DOI — BIA, BLM, & Bureau of Trust Funds Administration)
 - Supreme Court
 - **Non-State Actors**
 - Think Tanks, media groups, etc.
- ❖ Data was collected from policy updates, annual reports, press releases, amicus briefs, executive orders, policies & legislation, testimonies, court opinions, news articles, presidential proclamations, and policy reports

Expectations

1. The current land tenure and federal trusteeship systems within the U.S. federal government are path dependent and are generally resistant to change.
2. The land tenure and federal trusteeship systems have reached the lock-in phase and are potentially inefficient in their ability to adopt better alternatives.
3. Native tribes are too internally divided to agree on one common path of action, and thus cannot pool enough political power to push for change within the federal government.

Data – Indigenous Tribes

These interest groups work together on many projects, issues, etc.

NCAI

- Still support the federal trusteeship program, but are focused on “modernizing the trust relationship”
 - ◆ Reform within the current system (more self-determination)
 - ◆ Strongly stand by the original meaning for the federal trust relationship

2019 Policy Update

“More broadly, NCAI urges Congress to support legislative reforms that provide greater efficiencies in trust resource management, enable better economic returns on trust resources, and foster an increased role for tribal nations in how trust resources are managed.”

NARF

- Acting to reform the trust system, however they are more explicitly against certain governmental actions
 - ◆ Actively fights to increase tribal trust land in court (*Akiachak Native Community, et al. v. Department of Interior, et al. 2006; Oneida v. Village of Hobart 2020; etc.*)

Amicus Brief: *Plains Commerce Bank V. Long Family Land and Cattle Co.* (2011)

“If the doctrine of federalism is such a key constitutional underpinning to mainstream themes of governance and commerce, it seems rather contradictory to prohibit tribes access from this venerated tradition.”

ILTF

- Main goal is to re-acquire all tribal land
 - ◆ Will obtain land in trust, but ultimately pushing for tribes to own their own land
 - ◆ Would still prefer land be in trust if not individual owned
 - ◆ Still working within the system, but lean more towards changing the land tenure system

Message Runner Vo. 9 (2018) - “Managing Indian land in a highly fractionated future”

“Efficient, consolidated management of allotted land will enable landowners and tribal communities to take greater control of their future while reducing the administrative burden on the U.S. government.

Data – Federal Government

Congress

*Recognizes the economic issues Indigenous communities face, but mostly responds by increasing funding to the tribes

→ FY22 appropriations bill

Chairman Schatz (Senate)

“However, Congress’s recent allocation of billions of dollars in targeted resources to help Native communities recover from COVID-19 – including the biggest one-time investment in Native-serving programs in history through the American Rescue Plan – has changed the game. [These] new federal authorities and resources are making a difference on the ground.”

Administrations

**Obama* established the WHCNAA in 2013, and held the annual Tribal Leaders Summit

**Trump* brought back the WHCNAA in the last year of his term, but did not hold any Tribal Leaders Summit

**Biden* restored the WHCNAA and held the first Tribal Leaders summit again this past November

**Biden* also nominated Deb Haaland to be the Secretary of the Interior during his term

- First indigenous person to hold this position
- Both the Obama and Trump Administrations before did not nominate indigenous individuals to be Secretary of the Interior

Bureaucracy (DOI)

What is Deb Haaland doing as Secretary of the Interior?

- Supporting the Bipartisan Infrastructure Law
- Made a new interagency initiative to improve protection of indigenous sacred sites
- Established a formal process to replace derogatory names of the geographic features
- Issued Secretary Order 3400

SO 3400

“The purpose of this Order is to delegate authority to Bureau of Indian Affairs (BIA) Regional Directors to issue decisions on all requests for non-gaming off-reservation fee-to-trust acquisitions.”

Supreme Court

*Has a reputation for making it extremely difficult for cases regarding land and the breaches of trust to reach the Supreme Court

**Carcieri v Salazar* (2009)

- Restricted which tribal lands can be taken into trust to only those tribes recognized in 1934

**McGirt v Oklahoma* (2020)

- Rejected Oklahoma’s proposed disestablishment of a native reservation based on grounds of demographics and historical practices.

Data – Non-State Actors

- ❖ Think tanks, independent journalists, etc.
- ❖ Very, very small part in the discourse around the land tenure and trusteeship system (do not actually have a lot of political power)
- ❖ Mostly argue to replace the federal trusteeship program completely with individual property rights
 - Not a popular opinion both among indigenous tribes and the federal government
 - No evidence of these actors working together with any of the other political actors
 - Chris Edwards, director of tax policy studies at the Cato Institute
 - BLOG POST: “The fundamental issue is the lack of individual property rights on reservations, which undermines incentives for investment and entrepreneurship.” (2021)



Analysis



01

There has been no major changes to the land tenure system since the inception of the modern land tenure system through the Indian Reorganization Act of 1934.

02

The data indicates that the land tenure system for indigenous communities is in the lock-in phase of path dependence.

03

Overall, indigenous communities are not as internally divided on this topic as I had originally expected.

Conclusion

- ❖ What does this mean for modern day society?
 - Change is going to be significantly more difficult to achieve.
- ❖ Limitations:
 - Not a comprehensive look at all the articles, reports, memorandums, press releases, etc. published by the political actors in this discourse
- ❖ Potential areas of future research:
 - Which factors influence the likelihood of individual or group to hold a particular stance in this discourse?
 - How do views among native tribes differ amongst each other? What factors influence this?
 - What needs to happen in order for this path dependence to be broken? What alternatives are being proposed?

Thank you!

Any questions, comments, or
concerns?

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