

Statement of
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Opportunities and Challenges for Economic Development in Indian Country

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¹ These remarks reflect my views and not necessarily those of the Federal Reserve Bank of Minneapolis or the Federal Reserve System.

Chairman Johnson, Ranking Member Shelby, and members of the Committee, thank you for this opportunity to discuss economic development in Indian Country. This is a very broad topic, and I will mainly discuss one aspect of it—promoting the growth of a vibrant private business sector in Indian Country. In particular, I will emphasize that, despite many challenges, tribes have promising opportunities to strengthen the legal and civic institutions that support private enterprise in Indian Country. My primary point is that tribes can overcome the challenges and seize these opportunities, and that they can do so with appropriate outside assistance. The remainder of my remarks will address how tribes can develop a legal and civic framework to promote business development.

Let me briefly explain why the Community Development department of the Federal Reserve Bank of Minneapolis is involved in helping to strengthen the institutional foundations of the Indian Country business sector. The mission of the Federal Reserve's Community Development, or Community Affairs, program is to support the Federal Reserve System's economic growth objectives by promoting fair, impartial access to credit and financial services. In pursuing that mission, Community Development staff members serve as conduits for information to facilitate relationships between bankers and community organizations and to help them develop new insights and approaches to meeting local credit needs. Toward this end, Federal Reserve Banks may specialize on issues that are relevant within their respective geographic districts. The Federal Reserve Bank of Minneapolis covers the Federal Reserve's Ninth District, which stretches from the Upper Peninsula of Michigan to Montana and includes more than 40 Indian reservations. Accordingly, for the past 20 years or more, the Community Development department of the Federal Reserve Bank of Minneapolis has sought to assist tribes and their members in overcoming the significant barriers they often face in accessing credit and financial services for consumer and business purposes.

From early on, we learned that actual or perceived differences in legal institutions between reservation and off-reservation areas are one of the barriers to financial services access in Indian Country, and much of the outreach and technical assistance we have targeted to tribes has been related to developing their commercial and business laws. We also realized that the lack or inadequacy of these laws especially impacts independent small businesses in Indian Country, which typically do not have the resources, powers, and privileges that tribal governments have to arrange financing for larger deals. With that in mind, the Federal Reserve Bank of Minneapolis has supported numerous initiatives aimed at enhancing the private sector business environment in Indian Country. (Additional information on our initiatives and those of our partners is available on our Indian Country Currents web page at www.minneapolisfed.org/indiancountry.)

As an attorney, I have been encouraged to play a lead role in these efforts over the last decade. Based on that experience, I see significant opportunities to boost small business development in Indian Country by fully and effectively implementing the Uniform Law Commission's Model Tribal Secured Transactions Act for collateralized lending. Other important efforts include working with the Uniform Law Commission to develop a Model Tribal Probate Code that will free up land value and facilitate its use as collateral by helping to ameliorate the significant problem of fractionated interests in Indian-owned allotted lands, and to provide Indian entrepreneurs a civic voice through voluntary, cross-sector coalitions like the Montana, South Dakota, Minnesota, and North Dakota Indian Business Alliances.

Because these initiatives are still recent or pending, and because good data on tribal business environments and outcomes are lacking, we cannot provide a thorough assessment of their efficacy at this time. However, the Federal Reserve Bank of Minneapolis will monitor progress

and, over time, provide feedback on which approaches are associated with improved economic performance and small business development in Indian Country.

The Opportunity for Private Sector Development in Indian Country

In our outreach work, we see many signs that the private business sector in Indian Country is underdeveloped. Documenting these impressions with hard data at the local level is not always easy because, as noted by leading scholars,² data on the private sector in Indian Country are generally scarce. However, some revealing data are available in South Dakota, which is unusual in that it has several counties lying entirely within reservations (or nearly so) and bordering similarly remote and rural counties that are entirely outside of Indian Country. This uncommon political geography means that data from the U.S. Census Bureau's County Business Patterns can be used to compare the number of non-agricultural private sector establishments, employees, and payrolls for these adjacent reservation and non-reservation counties.³

For example, Ziebach and Dewey counties in north-central South Dakota lie mostly on the Cheyenne River Reservation, with only a bit of Dewey County included in the Standing Rock Reservation. Bordering them to the south are the non-reservation counties of Haakon and Stanley. According to the 2009 County Business Patterns data, Ziebach and Dewey counties together hosted 8,100 residents and 122 non-agricultural private sector establishments with 764 employees receiving just over \$22 million in annual pay. Despite a significantly smaller combined population (4,900), Haakon and Stanley counties together were home to considerably

² *The State of the Native Nations*, Harvard Project on American Indian Economic Development, Oxford University Press, 2008, page xxi.

³ Most government establishments are excluded from the County Business Patterns data. Exceptions include government-sponsored wholesale liquor establishments, retail liquor stores, book publishers, federally chartered savings institutions, federally chartered credit unions, and hospitals.

more non-agricultural private sector establishments (186), employees (1,580), and pay (over \$41 million).

Similar patterns are common for other pairs of reservation and non-reservation counties in South Dakota. These gaps partly reflect the generally lagging state of economic development on reservations. From another perspective, however, they also reveal the potential opportunities to boost reservation economies by expanding their private business sectors, including retail and professional services as well as manufacturing.

Institutional Challenges

The underdeveloped state of the private business sector in Indian Country is not an accident. It reflects the difficult history of dislocation and dependence that tribal societies experienced well into the twentieth century. These experiences directly stripped tribal societies of their traditional sources of wealth and disrupted the formation of new enterprises. They also sapped traditional tribal governing institutions and inhibited the bottom-up development of new institutions adapted to the modern economy. By the 1970s, when tribes finally gained a robust degree of self-governing autonomy within the United States, reservations had a weak private sector and lacked the types of legal infrastructure and civic institutions that help the off-reservation business sector grow.

Let me illustrate the challenges involved by discussing the impact that inadequate commercial law has on entrepreneurs in Indian Country. In particular, I will focus on the lack of clear laws and institutions to support the use of personal property as collateral to secure loans and other extensions of credit. By personal property, I mean tangible and intangible property, such as

machinery and accounts receivable, that is not land or affixed to land. These types of transactions outside of Indian Country are governed by Article 9 (titled *Secured Transactions*) of the Uniform Commercial Code (UCC), which has been uniformly adopted by all 50 states as well as the U.S. territories. Within Indian Country, however, the state of secured transactions law is largely incomplete, outdated, or nonexistent, and highly non-uniform.

Federal Reserve Bank of Minneapolis President Narayana Kocherlakota captured the essence of the problem in a speech he gave in Helena, Mont., earlier this year:⁴

In the United States, the bulk of our practical, everyday business law is state, not federal, law. But tribes are sovereign, to varying but significant degrees, with respect to state law. That is, state laws and state legal procedures and institutions often do not apply, or do not clearly apply, to business disputes on reservations. Unless appropriate tribal laws and institutions are in place, the result can be a vacuum, a real or perceived lack of business law and related institutions on reservations. Not surprisingly, this has a chilling effect on business and economic development.

The lack of fully developed laws to support collateralized lending that President Kocherlakota referred to is a widespread impediment to economic development, and especially private sector business development, in Indian Country. While tribal governments may be able to negotiate loan terms for large-dollar initiatives, small businesses located within tribal jurisdictions do not have such negotiating power. The lack of laws that establish the rules for these kinds of transactions creates a high-risk environment for lenders and other creditors. The result is either no deals or high-cost deals to compensate for the risk.

Of course, some tribes and lenders are aware of this problem and have implemented a number of remedies. Some tribes have simply adopted by resolution the secured transactions law of an adjacent state. Others have hired attorneys or engaged law school students to draft unique tribal

⁴ *Economic Development in Indian Country*, April 14, 2011. Available at www.minneapolisfed.org/news_events/pres/speech_display.cfm?id=4650.

secured transactions laws or, more often, discrete components of such laws, such as provisions governing the processes for repossessing collateral upon default. Some tribes have accommodated the needs of lenders by entering into contracts with special provisions that incorporate by reference the provisions of Article 9 as enacted by a particular state for discrete financing deals. Most tribes, however, have no laws governing secured lending. In these tribal jurisdictions, the law of various state jurisdictions is typically left to fill the vacuum on a transaction-by-transaction, and very uncertain, basis.

Although these varied approaches have accommodated a degree of lending and economic development on reservations, most have significant defects. Tribes that have simply adopted state secured transactions laws often find them culturally inappropriate (for example, because they do not prohibit using, and thereby placing at risk, sacred or historically significant objects as collateral) or inadequate (for example, because state secured transactions laws incorporate by reference other state laws that the tribe has not adopted). High legal costs have prohibited many tribes from engaging legal counsel to draft customized tribal secured transactions laws, and those that have engaged counsel to do so often fail to keep their statutes up to date as the related laws in surrounding states have evolved. For example, UCC Article 9 was significantly revised in the late 1990s, and by the early 2000s the revisions had been adopted by all of the states. Many tribes that had based their laws on state Article 9 versions prior to the revisions have not similarly updated their laws and, as a result, many provisions in the tribal laws have been rendered essentially unworkable in the current secured lending environment.

Another significant issue with tribal secured transactions laws is the lack or inadequacy of mechanisms for publicly filing liens in collateral. Secured transactions laws necessarily rely on public lien-filing systems to perfect security interests in collateral for purposes of determining

priority of those interests vis-à-vis other creditors or parties of interest such as trustees in bankruptcy. States generally administer their UCC filing systems in a central location, typically within the office of their secretary of state or banking division. Without a sound, credible UCC lien-filing system that readily allows electronic public filings as well as searches of debtors and liens against collateral, a secured transactions law is incomplete and thus ineffective. In my experience in reviewing the laws and processes of dozens of tribes, a sufficient, reliable, and easily accessible tribal-based lien-filing system does not exist. This is not surprising. Filing systems are complex and costly to implement and maintain.⁵ Some tribes' secured transactions laws identify the office of the clerk of the tribal court or tribal secretary as the location to file a security interest. However, in my experience, the actual mechanisms for filing financing statements as well as continuations, amendments, and terminations, often do not exist.

Discussions with staff in the appointed offices generally reveal no filings and no staff awareness of actual processes to file financing statements or conduct lien searches pursuant to public requests. Other tribes defer unofficially to a state filing system for lien filings under tribal law. The result, often, is that lenders and others face confusing and uncertain rules, and thus risky legal environments, that either deter them from doing business in Indian Country or raise the costs of doing business in tribal jurisdictions.

Seizing the Opportunity to Improve the Institutions of Business Law in Indian Country

The development challenges resulting from the lack of satisfactory institutions for collateralized lending in Indian Country are formidable. Nonetheless, with some assistance, tribes are meeting the challenges and seizing the opportunities for developing institutions that support private sector

⁵ In a recent conversation with the business manager of a state UCC-filing office, it was noted that its soon-to-be implemented updated UCC-filing system is costing approximately \$500,000. This cost is for the programming alone, and does not include staffing costs or maintenance.

business development in Indian Country. I will illustrate this by summarizing the drafting, adoption, and implementation of a Model Tribal Secured Transactions Act (MTSTA).⁶

In response to tribal leaders' concerns about the lack of affordable credit for business development and consumers in their communities, a special committee of attorneys attacked the issue with an approach pioneered by state governments. Like tribal governments, state governments face the dilemma of exercising their sovereign independence while ensuring that their laws are sufficiently similar to other states' laws to encourage commercial activity, including cross-border business. To address this need, states often base their laws on model statutes drafted by the Uniform Law Commission (ULC)—a group of lawyers, judges, legislators, legislative staff, and law professors appointed by state governments “to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”⁷ In 2001, the ULC formed a special committee to extend this approach to tribes, by drafting a Model Tribal Secured Transactions Act (MTSTA). The idea was to develop model legislation that tribes could adapt to local cultural and business needs while still providing a solid, stand-alone law sufficiently similar to state law so as to encourage cross-border commerce (e.g., a secured loan from an off-reservation lender to a business located on the reservation). The MTSTA was to be available at no cost to tribes.

Along with more than a dozen ULC commercial law experts, I served as an advisor to the MTSTA drafting committee from its inception. To ensure that tribal concerns were identified and appropriately addressed, we were advised by legal counsel for several California rancherias

⁶ Further information on the development of the MTSTA is available on our Indian Country Currents web page at www.minneapolisfed.org/indiancountry and in the articles cited there.

⁷ “About the ULC,” ULC web site, www.nccusl.org/Narrative.aspx?title=About%20the%20ULC.

and representatives from ten Indian tribes, including Crow Nation, Sac and Fox Nation, Navajo Nation, Chitimacha Tribe of Louisiana, Oneida Indian Nation of New York, Cherokee Nation, Confederated Tribes of the Warm Springs Reservation, Chickasaw Nation, and Little Traverse Bay Bands of Odawa Indians. Their active participation was critical to the project.

With the completion and publication of the MTSTA in August 2005, I and other members of the drafting committee made ourselves available to explain the model act to interested tribal governments. We published a comprehensive accompanying guide on how tribes could adapt and implement the law, and over the last five years have made dozens of presentations to tribal representatives, community development specialists, bankers, and other important stakeholders around the country.

In 2006, Crow Nation, situated in southeastern Montana, became the first tribe to adopt the MTSTA. Their experience illustrates some of the challenges of implementing it effectively. Explaining the 100-page act to tribal legislators required a strong commitment from individual leaders within the tribe. Official tribal business is conducted in the Crow language, so additional effort was required to translate key legal concepts into Crow.

Passage of an adapted version of the MTSTA by the Crow Legislature did not end the implementation challenges. The tribe recognized the need (discussed earlier) for a reliable public lien-filing system to complete their secured transactions system. I worked with the Montana Secretary of State's Office and the tribe to facilitate discussions about utilizing the state UCC lien-filing system as the tribe's official filing system. The result of negotiations was a Joint Sovereign Filing System Compact that officially recognizes Montana's UCC filing system as the

location for filing financing statements pursuant to the Crow Nation's Secured Transactions Act. The arrangement does not infringe on tribal sovereignty or tribal jurisdiction. The State of Montana simply provides a ministerial function on behalf of and at no cost to the tribe. Because these filing systems are complex and costly to implement and administer, the arrangement offers the tribe a reliable and recognized public filing system that lenders and other creditors know and trust. The arrangement is a win-win for the state and the tribe.

The official compact signing ceremony was held in February 2007 in the Mansfield Room of the U.S. Capitol and was attended by a large number of Crow dignitaries; the Montana Secretary of State and other state officials; Montana's three U.S. Congressional delegates—Senators Tester and Baucus, and Representative Rehberg; and representatives of the ULC and the Federal Reserve, as well as several other federal agencies and Native organizations.

The Crow-Montana compact set a precedent. The following year, the Oglala Sioux Tribe on the Pine Ridge Reservation in southwestern South Dakota, having also enacted the MTSTA, entered into a similar UCC-filing arrangement with the South Dakota Secretary of State; and just last month, the Leech Lake Band of Ojibwe signed a joint powers agreement with the Minnesota Secretary of State to do the same. Statewide initiatives are now under way in Montana and South Dakota to encourage the remaining tribes in those states to enact the MTSTA and consider entering into similar filing system compacts with their respective states. The hope is to establish a reasonably uniform and reliable lending environment throughout Indian Country across the region.

The Federal Reserve Bank of Minneapolis recognized that enactment of the law and establishment of a credible filing system arrangement were not all that was needed to create a

sound legal environment for secured lending in tribal jurisdictions. Together with the ULC, the Federal Reserve Bank of Minneapolis has hosted two multiple-day training sessions for tribal judges and attorneys on the MTSTA, and I have provided several shorter training sessions for tribal judges on the model act. In addition, we have hosted workshops for those tribes that have enacted the law to ensure that local lenders have an opportunity to learn about the new legal environment for lending in these tribal jurisdictions. We will continue to provide such support to tribes in our District that adopt the law and establish appropriate filing system arrangements. To date, and to the best of our knowledge, more than 25 tribes have either adopted or are in some stage of reviewing the MTSTA for enactment. Demand for our technical assistance in these matters is significant, which is promising in that more and more tribes seem to be taking an interest in enacting the model law.

Further Challenges and Opportunities

ULC Model Tribal Probate Code Initiative. The need for additional model tribal laws addressing a variety of issues that impact business development is great. One initiative being considered by the ULC is a model tribal probate code that would provide tribes with a comprehensive legal framework to address the significant problem of land fractionation moving forward, and that would be consistent with and further supplement the American Indian Probate Reform Act of 2004 (AIPRA).⁸ Pursuant to federal policy of the times, fractionation of lands allotted to individual Native Americans in the early part of the twentieth century has rendered vast areas of Native American-held land useless for development purposes or as collateral for loans, because land parcels are held in joint ownership, often by dozens or even hundreds of owners. The effect

⁸ 15 U.S.C. §2201 et seq., Public Law 108-374, October 27, 2004; 118 Stat. 1173.

has been to tie up untold land value that could otherwise serve as collateral or contribute to development. Comprehensive and thoughtful probate laws are needed to help address some of the issues that land fractionation has caused. The ULC has hosted several preliminary meetings with key stakeholders from across the country who heartily support the effort. A modest amount of funding, however, is needed to enable the ULC to proceed in a way that ensures Native attorneys and other experts are able to fully participate as advisors to the drafting process.

Indian Business Alliances. Concurrent with our work assisting tribes with commercial law development, the Federal Reserve Bank of Minneapolis has provided technical and organizational assistance to establish coalitions of diverse institutions and organizations with the mission of supporting Native private business development. The Montana Indian Business Alliance (MIBA), South Dakota Indian Business Alliance (SDIBA), and Minnesota Indian Business Alliance (MNIBA), established in 2006, 2007, and 2008, respectively, share a common mission and strategic approach to developing and supporting Native entrepreneurs. These alliances are made up of representatives of tribal, state, and federal governments and their respective agencies; tribal colleges and other educational institutions; community development organizations; foundations; financial institutions; corporations; nonprofits; and Native small businesses.

By working together, IBA members have helped to elevate the dialogue, regionally and nationally, about the importance of incorporating Native entrepreneur development into strategic discussions regarding Indian Country economic development. The IBAs focus their work in four strategic areas: governance, infrastructure, finance, and resources.

Governance includes such things as development of tribal policies that are favorable to private business, comprehensive ethics codes and systems, and constitutional reform to institute independent courts and other dispute resolution mechanisms. *Infrastructure* includes the development of legal and regulatory infrastructure; physical infrastructure such as telecommunications networks, zoned industrial sectors, and road enhancements; and workforce development. *Finance* incorporates all sources of business funding, including commercial lenders, community development financial institutions, equity funds, microloan funds, and other gap financing sources. And *resources* include such things as technical assistance and education for business owners, financial education, credit counseling and repair programs, and business mentoring.

The IBAs tackle their objectives through conferences, workshops, policy forums, webinars, and research initiatives; and each hosts a comprehensive web site featuring, among other things, resources for tribal governments and small business owners. Notable initiatives and accomplishments of the IBAs include: (1) significant work on capital access issues, including a survey of nonbank and commercial bank lenders in Montana and their lending to Native businesses, and related analyses of the capital access environment for Indian entrepreneurs; (2) support for input into the development of the Montana Department of Commerce's Indian Equity Fund which provides small equity grants to Native small businesses; (3) an in-depth research initiative examining the business environments on all of South Dakota's reservations; (4) advocacy for tribes' adoption of the MTSTA and filing system arrangements with their respective states; (5) statewide policy forums; and (6) Indian business directories.

Together, the IBAs have provided a significant voice for Native entrepreneurs in our Northern Plains and Rocky Mountain regions. We are also pleased to announce that, according to North

Dakota Indian Affairs Commissioner Scott Davis, North Dakota has begun the process of forming a North Dakota Indian Business Alliance aligned with the common mission of the MIBA, SDIBA, and MNIBA.

The Challenge of Assessing Results

The efforts and opportunities I have described for strengthening the institutional foundation of the private sector in Indian Country are new, and some have not yet taken shape. Their newness makes it nearly impossible to assess their effectiveness at this time. However, the passage of time alone will not fully solve the assessment challenge, for—as indicated above—data on the business environment and business outcomes on reservations are very limited.

Over time, the Federal Reserve Bank of Minneapolis intends to contribute on this front, too, because we are committed to a fact-based, realistic approach to economic development in Indian Country. In the near future, we expect to gather at least anecdotal information from bankers and other lenders regarding their perceptions of and experiences with new tribal business laws. We are gathering information about business laws and other business environmental factors on a number of reservations in order to statistically assess how these factors relate to the best measures we have of economic outcomes and well-being on reservations. I am hopeful that we will be able to make at least some preliminary findings available next year.

Additional Initiatives

I have focused on the Federal Reserve Bank of Minneapolis' institution-focused program for promoting private sector development in Indian Country. Although this has long been our

primary program related to access to financial services in Indian Country, we recognize that financial services access and economic growth in general depend on a wide array of factors. Accordingly, we and our Community Development colleagues from around the Federal Reserve System engage in many other Indian Country initiatives, including efforts aimed at enhancing personal financial education and credit counseling, access to housing finance, reservation employment and transportation opportunities, and tribal usage of federal financial programs.⁹

This year, Community Development staff from the Board of Governors of the Federal Reserve System and multiple Reserve Banks collaborated to host tribal leaders and officials from nine federal agencies at daylong “Growing Economies in Indian Country” dialogues in Phoenix; San Diego; Portland, Ore.; Billings, Mont.; Bangor, Maine; and Lac du Flambeau, Wis.¹⁰ The workshop series engaged nearly 600 tribal leaders, community organizations, and financial institutions in a dialogue about the short-term and long-term opportunities for growing economies in Indian Country. The results of these conversations are being summarized and compared in order to identify follow-up steps for the Reserve Banks and others. In addition, and as a continuation of this work, the Federal Reserve is planning to organize a national summit as a way to gather key stakeholders. This forum will be designed to provide an opportunity to share thinking on where additional research and data collection may be useful, to identify promising practices observed in the field, and to make policy recommendations that will address economic development strategies and solutions.

⁹ For further information on Indian Country initiatives at all of the Reserve Banks, see the Community Development links at www.federalreserve.gov/communityaffairs/national/reservebanks.htm.

¹⁰ For further information on these conferences, see www.frbsf.org/community/resources/2011/0601-Growing-Economies-in-Indian-Country/index.html.

Conclusion

The challenges to economic growth in Indian Country are numerous, but over the past decade we have seen many tribal governments and individuals meet those challenges and create new opportunities. Mr. Chairman, in your letter inviting this testimony you stated that “Fostering small business growth is a vital step toward increasing employment opportunities and improving local economies in Indian Country.” We wholeheartedly agree. We are well aware of the legacy of barriers and gaps that history has placed in front of Native American entrepreneurs, including barriers to accessing capital and financial services. Speaking personally, I can say that the legacy of weak legal and civic organizations important to small business growth and financial access is a particularly challenging barrier that I have witnessed on reservations across the United States. I am pleased to say, however, that our efforts at the Federal Reserve Bank of Minneapolis, such as the initiatives on model tribal codes, IBAs, and Indian Country economic research that I have described, allow us to work with tribal leaders and other Native and non-Native partners to remove these barriers. I have seen much progress in institution building in Indian Country over the past decade. With the right combination of grassroots leadership and appropriate outside assistance, I see many more opportunities for tribal citizens and their leaders to further develop sound legal and civic institutions to support a vibrant small business sector in Indian Country.