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THE MAGAZINE OF FREE MARKET ENVIRONMENTALISM



SPECIAL ISSUE: AMERICAN INDIANS AND PROPERTY RIGHTS



FROM THE EDITOR

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The experiences of American Indians, past and present, have figured extensively in PERC's thinking, writing, and personal relationships. The White Mountain Apache Tribe received PERC's 1999 Enviro-Capitalist Award for the management of natural resources in its 1.6 million-acre reservation in east-central Arizona. The tribe dramatically improved the quality of its environment through market tools.

Often, however, the connection between PERC and American Indian experience is less sanguine. We have felt the need to challenge myths of communal ownership and environmental ethics that are often invoked as uniquely American Indian. By correcting myths, writers at PERC have also shown the positive side of the historical picture. Most recently in their book *The Not So Wild, Wild West*, Terry Anderson and P.J. Hill pointed out that American Indians initially traded with white settlers in the West—before the U.S. Army came west after the Civil War and stirred up trouble.

This special issue of PERC Reports takes another look at American Indian experiences, current and past, through the lens of property rights and local control. The issue coincides with the publication of *Self-Determination: The Other Path for Native Americans*, edited by Terry L. Anderson, Bruce L. Benson, and Thomas E. Flanagan. Two of the essays are based on chapters in this collection and published with permission of Stanford University Press. One is by D. Bruce Johnsen, and the other by Carlos Rodriguez, Craig S. Galbraith, and Curt H. Stiles.

Our central essay was written by Bill Yellowtail, a former Montana legislator and now a senior project specialist for the Cook Center of Sustainable Agriculture in the American West. Yellowtail describes himself as both an Indian and a cowboy. As a leader of the Crow Indians, he understands tribal traditions and has a commitment to tribal sovereignty, while at the same time recognizing the limitations of tribal sovereignty in the modern world of commerce. Yellowtail's article is adapted from a chapter in a new book, *Lewis & Clark through Indian Eyes*, edited by the late Alvin Josephy and published by Alfred Knopf. This excerpt is published with permission, as is an article by Bruce Benson from a Rowman & Littlefield book stemming from a PERC forum in 1991.

The goal of this special issue is to learn from past and present trends in American Indian life, especially economic life. Readers will gain new insight into how American Indians improved their lives in the past and how individual initiative, property rights, and trade can pave the way to the "other path" in the future.



HILL



BENSON



FLANAGAN



JOHNSEN



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SELF-DETERMINATION

THE OTHER PATH FOR NATIVE AMERICANS



TERRY L. ANDERSON, BRUCE BENSON
& THOMAS E. FLANAGAN

SELF-DETERMINATION

| *By Terry L. Anderson*

THE OTHER PATH FOR NATIVE AMERICANS

In my youth, I spent summers on an Indian reservation where my uncle managed a ranch. One of my heroes was Francis Calf-Looking. Francis was a real cowboy, and I was a “wannabe.”

Every morning Francis would wrangle the horse so my cousin and I could ride and help him move cows from one pasture to another. The exception to his wrangling, however, was on Mondays after payday. Almost without fail, he would go on a drinking binge common on the “rez.” But this never tarnished my heroic image of Francis.

What I did not know at the time was just how different our lives really were. I came from a middle-class family where home ownership was a given, where going to college was expected, and where health care was excellent. Francis Calf-Looking, on the other hand, had a good job compared to other Indians on the reservation, but he would have lived in poverty had he not received room and board at the ranch. He probably didn’t complete high school, and his toothless grin was an indicator of substandard health care.

I don’t know whatever happened to Francis, but as I pursued my economics career I did reflect on just how different our lives were. It is obvious even to the casual observer that

the “First Nations” remain Third World nations surrounded by a sea of wealth.

Like the explanations of Third World poverty, the explanation of poverty on Indian reservations lies in the structure of property rights and the rule of law. And that is where PERC’s interest lies—how do the institutions in the form of laws, customs and rules on the reservations affect the stewardship of natural, human, and physical capital assets? The following insights into reservation institutions help us understand the problems surrounding stewardship and economic development.

LAND TENURE ON RESERVATIONS

My research on reservation economies began more than a decade ago when Dean Lueck and I examined the impact of land tenure on agricultural productivity (Anderson and Lueck 1992). Reservations, especially large western ones, are a mosaic of land ownership. Some land is privately owned (fee simple), some is allotted to tribal members and held in trust by the federal government (individual trust), and some is owned by the tribe and held in trust by the federal government (tribal trust).

Because the latter two tenures are encumbered with extensive bureaucratic restrictions and because small parcels of individual trust lands can have hundreds of owners (this is known as the fractionation problem), Dean Lueck and I hypothesized that agricultural land owned in fee simple would be more productive. Indeed, we found that individual trust lands were 30 to 40 percent less productive and tribal trust lands were 80 to 90 percent less productive than fee simple lands. As with so many other PERC studies, these data show that institutions influence productivity and resource stewardship.

INSTITUTIONAL MYTHS

Just as property ownership is a key to stewardship, the tragedy of the commons results when property rights are lacking. A recent article by Jack Broughton published in the *Ornithological Monographs* examines the “Prehistoric Human Impacts on California Birds.” Broughton notes that explorers in California during the eighteenth and nineteenth centuries were amazed at “the abundance of artiodactyls, marine mammals, waterfowl, seabirds, and other animals . . . and the

incredible wildlife densities reported in their accounts are routinely taken as analogues for the original or pristine zoological condition” (2004, 1). By carefully studying the Emeryville Shellmound, essentially a prehistoric garbage dump located near Emeryville, California, Broughton documents the decline and rise of bird populations between 2600 and 700 years ago. With these data, he tests the hypothesis that bird populations declined and disappeared because of hunting by humans. He concludes that the evidence of depression based on “declining relative abundances provides fairly secure evidence of exploitation depression or direct harvesting based mortality” (44)

Put another way, Broughton’s data show that Native Americans and the wildlife on which they depended were not immune to the tragedy of the commons (Hardin 1968). They too overused and depleted resources that were open to all. He found this phenomenon with birds; we also know that before Europeans brought Great Plains bison to near-extinction, “the buffalo population was already being systematically overhunted” (Benson 2006, 56) by Indians fighting over tribal territories.

Anthropological records also show, however, that North American Indians had a rich institutional history centering on property rights (see Anderson 1996). For example, equestrian hunters who rode into stampeding buffalo herds marked their arrows so that they could tell who launched the lethal shot and therefore who would be rewarded with the choicest cuts of meat. As Bruce Johnsen (see page 15 in this issue) documents, American Indians even owned some salmon spawning streams; as a result, the salmon were better husbanded.

FINDING THE OTHER PATH

American Indians face choices in their future, as they have in the past. The powerful painting on page 3, “Pigeon’s Egg Head (The Light) Going to and Returning from Washington,”¹ by George Catlin, suggests that two alternative paths for Native Americans have dominated their lives since the creation of reservations. The painting tells the story of “The Light,” who went to Washington, D.C., in the fall of 1831. As described in Catlin’s letters, “The Light” left for Washington dressed in traditional clothing but returned the next spring “with a complete suit *en militaire*, a colonel’s uniform of blue, presented to him by the President of the United States, with a beaver hat and feather, with epaulettes of gold—with sash and belt, and

broad sword; with high-heeled boots—with a keg of whiskey under his arm, and a blue umbrella in his hand” (Catlin [1844], Letter 8.) The two paths are a museum-like traditional life and a life determined by the “Great White Father” (i.e., the federal government). The first may be romantic but is unlikely to help lift Indians from poverty. The second has made Indians “wards of the state,” dependent on governmental transfers with all of the accompanying social ills.

Some might contend that another path to wealth comes from Indian nations’ sovereign status. For example, this status allows tribes to capitalize on gaming opportunities. But, as Ronald Johnson points out (2006), gaming profits for Indians are likely to be short-lived. State governments are not likely to let tribes maintain their monopoly on gambling. Moreover, sovereignty is a two-edged sword. As Bill Yellowtail suggests in his essay in this issue (page 10), one edge gives tribes the potential to establish institutions necessary for economic development. Unfortunately, the other edge of the sovereign power is that it can be used to take wealth and discourage investment and trade, and this is what has happened in Indian country.

There is another path. Writing about the Third World, Hernando de Soto, in *Mystery of Capital* (2000), studied local communities from Peru to Africa, showing that top-down institutions typically thwart investment markets and the creation of productive capital. Indeed, de Soto earlier coined the term “the other path,” which consists of local control and local institutions that evolve from the bottom up, establishing a stable rule of law conducive to economic growth. This suggests the third path to economic growth for American Indians.

RULE OF LAW

Work that Dominic Parker and I did on the impact of state courts on Indian reservations hints at what this path might look like (Anderson and Parker 2006). In 1953 the federal government passed Public Law 280, which required some reservations to turn their judicial systems over to the states in which they reside. It mandated state jurisdiction over civil disputes and criminal offenses arising on reservations in some states and made this jurisdictional shift optional in others.

Because state courts have a reputation for providing a stable rule of law, the contrast between economic development on reservations under state jurisdiction and those with their own tribal

courts provides a natural experiment for determining whether and how a stable rule of law might affect reservation economies. For a sample of 237 reservation economies between 1989 and 1999, we found that per-capita incomes are approximately 25 percent higher on reservations with state court jurisdiction. Per-capita incomes on reservations with state court adjudication grew at rates approximately 15 percentage points higher than reservations with tribal court adjudication.

In the broadest sense, these empirical results underscore the critical role of secure property rights in determining whether reservation economies will grow or stagnate. The Anderson and Parker data suggest that the same variables important to economic prosperity in developing countries are important on Indian reservations. Without formal and informal institutions that lower transaction costs and reward productivity, reservation economies are likely to remain enclaves of poverty in a sea of prosperity. ■

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NOTE

1. This is the cover art for *Self-Determination: The Other Path for Native Americans*, edited by Terry L. Anderson, Bruce L. Benson, and Thomas E. Flanagan, forthcoming from Stanford University Press. The oil painting is located at the Smithsonian American Art Museum.


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The reservation system institutionalized false myths about communal ownership and the lack of property rights among Indians. This has had unfortunate consequences for entrepreneurship and economic development.

AMERICAN INDIAN COLLECTIVISM |

PAST MYTH, PRESENT REALITY



In the past, most if not all North American indigenous peoples had a strong belief in individual property rights and ownership. Frederick Hodge (1910) noted that individual private ownership was “the norm” for North American tribes.

Likewise, Julian Steward (1938, 253) asserted that among Native Americans communal property was limited, and Frances Densmore (1939) concluded that the Makah tribe in the Pacific Northwest had property rights similar to Europeans.⁷ These early twentieth-century historians and anthropologists had the advantage of actually interviewing tribal members who had lived in pre-reservation Indian society.

By the late 1940s, however, these original and firsthand sources of information had died, and false myths and historical distortions began to take dominant shape. By the mid-1960s, the tone in many college history books, history-inspired films and novels, and even speeches had completely changed (Mika 1995). A typical historical distortion, for example, is found in Baldwin and Kelley’s best-selling 1965 college textbook, *The Stream of American History*, where they write, “Indians had little comprehension of the value of money, the ownership of land . . . and so land sharks and grog sellers found it easy to mulct them of their property” (208). These myths were further fueled by popular books such as Jacobs’ (1972) *Dispossessing the American Indian*, which suggested that Native Americans felt that land (and other property) was “a gift from the gods” and as such not subject to private ownership. Gradually more and more people started to honestly believe that the indigenous people of North America had been historically communal, non-property oriented, and romantic followers of an economic system more harmonious with nature.

Today, tribal leaders, politicians, and various interest

groups in both the United States and Canada often repeat these myths as fact when discussing business, economics, and entrepreneurship during tribal conferences and congressional hearings (Selden 2001).

Terry Anderson (1995) attributes the beginning of the myth to settlers seeking farm land in the Great Plains, who interacted only with nomadic tribes that did not view land as an important asset. These settlers mistakenly generalized the lack of interest in land to infer a lack of property rights among all tribes. We argue that this fiction was further propagated in the nineteenth century by a virtual army of East Coast newspaper journalists, dime novelists, and Washington politicians who, in spite of writing about Native Americans, often had little contact with tribal groups. Reported, retold, and unchallenged, these incorrect perceptions ended up as the basis for later laws and institutional codification.

Compounding the problem was the land tenure system of the modern reservation. The system institutionalized and codified the legends, with dramatic and unfortunate consequences for indigenous entrepreneurship and economic development.

THE RESERVATION SYSTEM

In the United States, the modern relationship between land tenure and the reservation system was formally established with the General Allotment Act of 1887, known as the Dawes Act, and later with the 1934 Indian Reorganization Act. These governmental actions institutionalized a land tenure and property rights system that was fundamentally collective in nature, and they created obstacles to efficient economic organization.

Over time, congressional actions and judicial decisions created four types of land tenure on reservations: individual fee simple (privately land owned by individuals), individual trust

(held in federal trust for individuals), tribal trust (held in federal trust for the tribe), and fee simple tribal land (owned by the tribe, but not in federal trust). Modern reservation land tenures are, for the most part, a combination of individual and tribal trust land. Modern reservation land tenures are, for the most part, a combination of individual and tribal trust land. Land that was used individually for a homestead or for subsistence farming typically became somewhat like personal property and constituted individual trust land. These assets could be improved, leased, or inherited among tribal family members. Tribal trust land was managed by the elected tribal council.

Although individual trust lands resemble fee-simple private property, they are nevertheless still within the Indian trust and the rules and regulations established by the various laws. Title, for example, cannot be transferred. Hence, while individual trust land can be mortgaged, it cannot be used as collateral. The income derived from the asset, rather than the asset itself, becomes the collateral for the loan. There are also jurisdictional issues associated with loan defaults or other claims on individual trust land. In addition, successive generations of inheritance create fractional ownership of property among distantly related tribal members, which may prevent reaching consensus regarding the use of the asset as collateral.

Another limitation is civil and tribal litigation. As an increasing number of cases are filed related to individual property rights, inheritance, and divorce, these assets become virtually useless as forms of collateral. Finally, many properties are now suboptimal in size for modern agricultural development.

These increased transaction costs inevitably raise the cost of capital. Thus they create inherent inefficiencies and render real estate, usually the most important source of capital for entrepreneurial initiatives, virtually inaccessible for those purposes (see de Soto 2000). The potential for accumulating equity capital is severely limited and much of reservation land sits underutilized as a capital resource. The increased cost of capital inhibits individual initiative and shifts the focus to tribal trust land. As a result, over the last century second, third, and fourth generation tribal members have adopted a more collective perspective in property ownership.

Another largely ignored factor has been the continuous migration of the more entrepreneurially inclined tribal members off the reservation. In a study of entrepreneurial spin-offs from casino gaming on U.S. reservations, Galbraith and Stiles (2003) found that, according to many senior tribal members, the more entrepreneurial indigenous individuals and families had moved off the reservations to start businesses in the cities.

THE MOVE TO COLLECTIVISM

Whatever the reasons, there has been a dramatic evolution in the past several decades to a more collective orientation among indigenous people in the United States. We believe that this trend has been driven by collective land tenure systems that are counter to both the historical context and culture of the indigenous communities.

De Soto (2000) has made the forceful argument that economic development requires the establishment of institutions that protect property rights and the creation of a legal system sophisticated enough to allow the efficient transfer and development of these rights, as well as the ability to extract full benefit from them. In his discussion of the economic problems confronting the poor of South America, for example, de Soto (2000) argues that the entrepreneurial initiatives of these groups are severely restricted by their inability to access the most basic and important source of capital, i.e., their land.

Rather than the “institutional voids” found in other parts of the world (de Soto 2000), the North American native populations face an entrepreneurial problem that is grounded in the “frozen capital” of the reservation system. The arrangement forces collective ownership on cultures that were historically non-collective, possessing well-defined property rights and personal ownership of productive assets, and highly entrepreneurial. It also creates legal barriers, which increase both organizational and transaction costs.

Not surprisingly, individual entrepreneurial activity among tribal members has been an abysmal failure. Galbraith and Stiles (2003) investigated gaming and non-gaming Native American

Gradually more and more people started to believe that the indigenous people of North America had been historically communal, non-property oriented, and romantic followers of an economic system more harmonious with nature.

tribes in the southwestern United States and found mean average business startups for non-gaming tribes of typically less than 0.15 per 100 adult tribal members. This is a business birth rate significantly lower than most developed economies (about 0.37/100 adults in the United Kingdom and estimated at over 1.00 in the United States) (Levie and Steele 2000; Fraser of Allander Institute 2001).

The picture is even bleaker for employment from business startups. The vast majority of the tribal startups were microenterprises or hobby businesses, generating employment several levels below typical employment generated from business births in developed economies.

What are the reasons behind this low level of entrepreneurial activity? A large part is simply due to the barriers to individual property rights created by the reservation system. Non-gaming-related entrepreneurial firms cannot access their individual or family-specific capital, and thus need to compete at the low micro-level of entrepreneurial activity. On the other hand, gaming-related individual enterprises, which tend to be somewhat larger, are mostly protected monopolies providing inputs to a tribal-owned casino, and thus shielded from the higher organization and transaction costs associated with the reservation system.

Early indigenous people in North America were both highly entrepreneurial and acutely aware of the economic forces around them, but labored under a regime of high transaction costs associated with a fragmented, nonuniform and nonstandardized system of laws, contracts, and language. These economic disadvantages were further institutionalized by a nineteenth-century collective land tenure system that was alien to the cultural, economic and entrepreneurial context of most indigenous tribes of North America. This misdirected public policy prevents indigenous populations from exploring the full potential of entrepreneurial initiatives.

Even so, within the last two decades several forces are at play that now create an opportunity, at least for some tribal communities, to engage in entrepreneurial activities that could contribute to economic development. These opportunities have come in the form of: (a) government-sanctioned monopolies, such as casino gaming, which have created substantial income

for some reservation economies, (b) environmental economies, particularly in the area of game hunting and fishing on reservations, and (c) the sale of natural resources, such as minerals, timber, and oil that are best accessed and managed by large estate holdings.

For tribes with access to these types of opportunities, the gains can be substantial. But successful entrepreneurial behavior must balance three competing forces: (a) the scale efficiencies of environmental activities and natural resource management, (b) individual entrepreneurs' need to have less restrictive access to their "frozen capital," and (c) the social pressures and policies created by the historical distortions regarding indigenous attitudes toward property rights and the productive use of environmental resources. Entrepreneurial success depends on taking advantage of the first and overcoming the obstacles posed by the latter two. ■


The mean average number of business startups for non-gaming tribes in the southwestern United States is typically less than 0.15 per 100 adult tribal members, significantly lower than most developed economies.

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INDIAN SOVEREIGNTY |

DIGNITY THROUGH SELF-SUFFICIENCY



When Meriwether Lewis and William Clark wintered in 1804–05 among the Mandans and the Hidatsas in what is today North Dakota, they also traded. Fabricating iron implements at their portable forge, they bartered them for the corn and squash that sustained the Corps of Discovery through the bitterly cold winter. A few months and a thousand miles later, Lewis was astonished to arrive in the Nez Perce community and find that one of these trade axes had preceded him.

By contrast, an earlier, nearly fatal encounter with the Teton Sioux was a result of Lewis's brash announcement that the United States would now be taking charge of commerce. Incensed, the Tetons threatened to eradicate this intrusion upon the finely tuned regional trade network. By that harsh lesson, Lewis learned to approach the local trade czars with deference and diplomacy. Ultimately, Lewis and Clark reported to President Thomas Jefferson that native inhabitants throughout the Louisiana Territory were a thoroughly independent, business-like lot—sharp entrepreneurs and shrewd dealers.

The point to be extracted is that American Indians never have been strangers to the American entrepreneurial spirit. The point to be projected from here forward is that contemporary American Indian sovereignty depends upon a successful rekindling of that entrepreneurial spirit. It's the Indian way.

BEYOND POLITICAL SOVEREIGNTY

In 1971 the late Alvin Josephy, along with a host of leading thinkers, declared a new paradigm for American Indians: *self-determination*. Josephy defined the concept as “the right

of Indians to decide programs and policies for themselves, to manage their own affairs, to govern themselves, and to control their land and its resources” (1971). The announcement gave structure and shape to the policy evolution that has occupied the Indian debate for the ensuing thirty-five years. Progress toward that vision has been substantial.

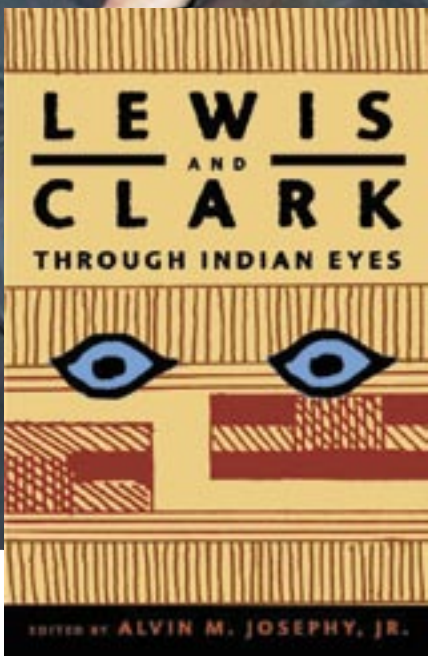
As a concept, tribal self-determination has been elevated to the status of something called “tribal sovereignty.”¹ This is self-government by Indian tribes as delineated by court cases that set jurisdictional boundaries.

Huge credit is due to the warriors for tribal sovereignty. But the paradigm has an obvious shortcoming: It lacks consideration for the role of the Indian citizen, the individual, the person.

Even with tribal sovereignty, we continue to experience devastating personal and family-level despair. Poverty and unemployment are twice the national average; we have consistently lower educational success than the national norm; alcohol-related mortality rates are triple the national average (Harvard Project on American Indian Economic Development 2004). We should think of these human imperatives as matters of *Indian sovereignty* as distinct from tribal sovereignty.

Indian sovereignty—the autonomy of the Indian person—means re-equipping Indian people with the dignity of self-sufficiency, the right not to depend upon the white man, the government, or even the tribe. This is not a new notion. It is only a circling back to the ancient and most crucial of Indian values—an understanding that the power of the tribal community is founded upon the collective energy of strong, self-sufficient, self-initiating, entrepreneurial, independent, healthful, and therefore powerful, individual persons. Human beings. Indians.

Even a cursory review of our revered traditions, stories, and legends reveals a recurring celebration of the man or woman who is distinguished for empathy with and generosity toward someone less fortunate. But to be generous, this person



Tribal self-government, illustrated by this 2004 swearing-in of members of the Crow legislative branch in Montana, is important. But so is the autonomy of the individual Indian.

had to have been resourceful and capable enough to generate wealth in the first place. Call it enterprise or entrepreneurship or productive capability, it is the underlying assumption of the legend. That is the Indian way. It always has been.

SOMETHING IS AWRY

This is not to diminish the reality of forces of oppression and injustice: displacement, incarceration, forced dependency, impoverishment, and human trauma of the worst kinds. The bicentennial observance of the Corps of Discovery evokes bitter memories of injustice and tragedy. But as Amy Mosset, Hidatsa-Mandan historian, states, we must move on. “Our

tribes have survived catastrophic events in the past 200 years. But if we grieve forever, we will never move forward” (quoted in *Time Magazine*, July 2, 2002).

Between the time of Lewis and Clark and today, something has gone awry with our proud and powerful Indian myth (I use that term to mean our sense of who we are and how we fit in the universe; that is, our self-actualizing identity). A destructive dissonance has arisen between our most revered cultural standards and our day-to-day, operational culture.

Our operational culture is slashed by personal and community dependency. Dependency has become the reality of our daily existence. Worst of all, generation by generation it becomes what sociologists term learned helplessness—an internalized sense of no personal possibility, transmitted he-

reditarily and reinforced by recurring circumstances of hopelessness. The manifestations are epidemic: substance abuse, violence, depression, crime, trash.

The danger for Indians lies in capitulation to victimhood as an acceptable community myth. Excuse-making and blame provide shelter for irresponsibility, incompetence and failure of personal initiative.

Michael Running Wolf, a Northern Cheyenne, admonishes us Indians and the community at large to beware the victimhood myth: “[W]e walk the border between protecting our values, and acting the part of victim. Not victims in the sense of being injured individuals, but subscribing to the belief that we deserve sympathy. It’s belief that bases our identity upon the wrongs we have endured, rather than our accomplishments and integrity. It’s a phenomenon that demands the nurturing of victimhood” (Letter, *Bozeman Daily Chronicle*, Nov. 2, 2004).

Running Wolf is right. There is no future in victimhood and its self-destructive corollaries—excuses and dependency. Far better to apply our finite personal energy to a constructive belief system and a corresponding action plan.

Every Indian community will have to make a determined effort to confront our realities, analyze our conditions and our prospects with all of the tools of modern social science, and then chart a strategic course back to individual and community strength. For example, it is time to move beyond training only teachers, lawyers, and petroleum engineers and begin preparing some smart, energetic, and dedicated Indian sociologists, psychologists, geographers, economists, and MBAs. These professionals, in tandem with our elders, can help us understand the human dynamics of where we are and help us identify the insertion points for us to intervene in our cycle of despair and dependency.

“It is not Indian to fail!” Birdena Realbird, a Crow public-school educator and irrefutable traditionalist in her own right, asserts that excuse-making serves no constructive end. To say that Indians cannot be expected to excel in the contemporary universe because of our Indian-ness is the worst kind of insult to the honor of our proud culture and blood heritage. Rather, argues Realbird, we ought to view ourselves as fortified by our heritage and therefore better

equipped than most other folks to prevail over whatever challenge arises.²

Personal accomplishment follows robust expectations, and vital community psychology follows both. Now, *that* is a myth to evolve to—or return to. That is the Indian way as it was before Lewis and Clark.

RETHINKING TRIBAL GOVERNMENT

Tribal sovereignty—that is, the prerogative of governing territory and the interactions among the people in the territory—is a necessary government purpose. That is why we have such a lively economy in the Indian law world, even when the rest of the regular Indians flounder in poverty: A disproportionate share of tribal financial resources is absorbed by legal costs of endless (but admittedly necessary) litigation over issues of tribal sovereignty. Those resources, or at least some of them, could well be dedicated to meaningful economic development.

The trouble is that we Indians are so focused in tribal-think and on tribal jurisdiction, which by definition entails power, control and influence, that we completely overlook the daily exigencies of Indian living.

Secondarily, tribal governments try hard to rescue the people by “program.” Comparatively little of the tribal government energy and budget typically go

to empowering people toward sustainable self-sufficiency.

The tribe has a critical function in the arenas that government can do well. But even at its most benign, tribal government has failed to grasp what virtually all other institutions in the world know—that government is inherently poorly suited to being in business. The proper *economic* role for tribal government ought to be to ensure necessary infrastructure and then facilitate private enterprise *for Indian entrepreneurs*, with an eye toward building the capacity of individuals and families to be truly independent.

Economists Stephen Cornell and Joseph Kalt (1998) of Harvard University point out the prerequisites for sustainable entrepreneurship in Indian communities: stable institutions and politics; fair and effective dispute resolution; separation of politics

from business management; a competent bureaucracy; and cultural coherence. “The central problem is to create an environment in which investors—whether tribal members or outsiders—feel secure, and therefore are willing to put energy, time, and capital into the tribal economy” (Kalt 1996).

THE “NOT-INDIAN” FALLACY

Surely, some of the enormous intelligence, resourcefulness and creativity ensconced in the tribal official/tribal attorney reservoir could be redirected to making this happen. Yet two standard objections to the creation of entrepreneurial institutions are predictable.

First, “it’s not-Indian” to be in business. But this is simply mistaken. To believe it would guarantee self-defeat, given the global socio-political-economic milieu, driven by profit, in which we exist. Furthermore, we all know a few hardy Indian souls who are making it on their own.

The second objection is that individual enterprise contradicts our Indian sense of and commitment to the welfare of the whole, the tribe. Of course, our ancient ethic of the interdependence of all people and all things is one of the gifts that we Indians can offer Western philosophy whenever our neighbors are at last willing to acknowledge it. We treasure the sense of kinship and community that has always been key to our survival.

But, as noted above, the wherewithal for generosity and sharing must originate in initiative, enterprise, and creativity on somebody’s part. That is neither selfish nor greedy; it is simply being resourceful and capable, perhaps motivated by a desire to be altruistic and generous.

“You’ve got to take care of yourself, and then you can take care of your family and your community,” says Shane Doyle, a young graduate student who is a singer from a traditional Crow family.³ To buy into the opposite thinking is to kill personal motivation and, ultimately, buy back into the deadly dynamics that got us in this fix in the first place.

What endures, and shall always sustain us if we choose to pursue it, is our strength, our uniqueness, our confidence as Indians. Within that framework of profound spiritual commitment, our cultures have always evolved on a multitude of fronts—religious, material, linguistic, economic, artistic, intellectual. But too often today, we find it tempting to time-freeze

our myth, usually in an era already past, and then enforce it with a posse of culture police.

SEIZING OUR DESTINY

Increasingly, however, we feel a dissonance between our traditional culture, which tends to be reserved for periodic celebrations, and our daily operational culture. We cannot afford to allow that gap to expand into a gulf. Indian communities must be visionary enough to give our people permission to evolve our culture so that it is relevant to our personal existence.

A linchpin of this is economic security on a purely personal Indian basis. We don’t need much, but we cannot function in today’s world without economic dignity. If we can achieve that, then we can free our creative energies for the greater works of community vitality and tribal sovereignty. We must give Indians permission to pursue that age-old but newly-remembered paradigm of entrepreneurial self-sufficiency. Surely that is not the entire solution, but it is part of the puzzle.

We trust that if we empower our people to seize their own Indian destinies then they will take care of our tribal destiny. That is the Indian way. ■

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NOTES

1. The phrase “tribal sovereignty” should be purged and replaced because it conjures up unrealistic expectations and grounds for an unnecessary fist-fight all around.
2. Personal conversation, 2004.
3. Personal conversation, 2004.

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© Museum of History and Industry/CORBIS. Chilkat Dancers at Potlatch in Alaska. Chilkat (Tlingit) dancers pose in traditional ceremonial attire during a potlatch at the village of Chilkat (Kwikwan) in Alaska.

This a scene from a traditional potlatch among the Tlingit and Kwakiutl Indians in Alaska. A modern-day analogue, a second-price sealed-bid auction, might resolve British Columbia's conflict over salmon.

A MODERN POTLATCH? |

PRIVATIZING BRITISH COLUMBIA SALMON FISHING



Tensions run high between native and commercial fishermen in British Columbia. One reason is that the Pacific salmon fishery is being depleted. Another is the case law determined by the Canadian Supreme Court, which gives First Nations tribes priority to a fixed claim over commercial fishermen for the seasonal salmon catch.

Unfortunately, the legal discourse on these issues is framed by the Canadian courts' reliance on cultural anthropology. Cultural anthropologists have traditionally regarded the British Columbia First Nations as "hunter-gatherers" who had the good fortune to reside in an environment naturally "super-abundant" with salmon. But this view is contrary to an economic interpretation of the ethnographic record.

In this essay, based on a longer one (Johnsen 2006), I will paint with a broad brush a picture of how tribes managed Pacific coast salmon before the arrival of white settlers and will present a plan that is culturally consistent with past tradition, one that can end the disputes over tribal salmon rights and lead to a sustainable fishery. For more detail, see my longer essay.

When Europeans made first contact on the Pacific coast, many tribes had exclusive property rights to salmon streams (Johnsen 1986, 2001).¹ Because Pacific salmon return to their natal streams to spawn, tribal ownership of streams provided secure ownership of native salmon stocks. Rather than being the fortunate beneficiaries of a naturally rich environment, the coastal tribes actually created an abundance of salmon through centuries of purposeful husbandry and resource management.

Tribes in British Columbia lost exclusive ownership of their salmon stocks with the arrival of commercial canneries, the first appearing at the mouth of the Fraser River in 1871. Commercial fishermen began intercepting salmon in the ocean rather than in

streams, beginning the long downward trend in salmon stocks. Government regulation has been unable to stop this decline. Between 1950 and 1997, nearly fifty percent of the salmon populations in British Columbia were wiped out due to overfishing and other intrusions. Degradation of spawning habitat also occurs through industrial pollution, erosion from logging roads, silt deposits due to clear-cutting, organic wastes, dams, changes in water temperature, and changes in water flows owing to real estate development. In the absence of public outcry, federal and provincial governments apparently lack the incentives to properly protect the stocks.

THE ROLE OF SALMON

The importance of salmon to the pre-contact native economy cannot be overstated. Most coastal tribes' livelihood revolved around the yearly cycle of salmon runs. Except on larger rivers such as the Fraser, each tribe normally claimed a large territory oriented around one or more rivers small enough to be owned throughout their entire length. The tribe consisted of several shifting subdivisions, sometimes called clans, which in turn were divided into local group houses. These tribal groups took much of the salmon harvest in tidal or fresh water with elaborate fish weirs (small dams or fences) and traps, or with dip nets, harpoons, and spears, primarily at upstream summer villages controlled by local clan-house leaders. Almost uniformly up and down the coast, wealthier title holders were known by a name that translated roughly into "river owner."

It would be difficult to find a genus in the animal kingdom better suited to husbandry than Pacific salmon. The time between generations is short enough, and the struggle to reproduce keen enough, that during a person's lifetime the characteristics of a given salmon stock can evolve dramatically in response to

minor environmental changes, whether induced by nature or by human influences.

The tribes' fishing technology was suited to salmon husbandry. Many tribes relied on fish weirs. During a run, salmon entered a holding trap, and the attendants could select which salmon could continue to the spawning beds. To increase the average size of fish, a chief could have required the attendants to harvest the smaller fish, leaving the larger fish to spawn and, in turn, to reproduce larger offspring. It is plausible that the tribes engaged in purposeful genetic selection of stocks this and other ways.

Tribal organization was also suited to knowledge accumulation. Tribal chiefs held title to streams and other resources on behalf of their tribe. A tribal leader's reputation was part of his payoff from superior salmon husbandry, and tribal chiefs were known to possess a corpus of "secret" knowledge about how best to use their resources to create wealth (Drucker and Heizer 1967, 7).

Potlatching evolved as a way to define and enforce exclusive tribal property rights to salmon streams and stocks. This ceremonial gift-giving has been described as "the ostentatious and dramatic distribution of property by the holder of a fixed, ranked, and named social position to other position holders" (Codere 1950, 63). The practice redistributed wealth both within and between tribes and seems to have increased at the time of European contact.

The famous ethnographer Franz Boas (1966) and the students of cultural anthropology who followed him deserve much of the credit for recording tribal culture on the Pacific coast of the northern United States and southern Canada. But Boas and his followers misunderstood potlatches (Suttles 1990, 85). In Boas' view, they were primarily a means of establishing social rank. In contrast, Suttles (1960, 1968) and Piddocke (1968) proposed that potlatching provided a form of social insurance against local hardship such as the occasional failure of salmon runs. Donald and Mitchell (1975) supported this hypothesis with empirical evidence.

The coastal tribes were extremely protective of their streams, with trespassers often summarily executed.

Potlatching was an alternative to violence in enforcing tribal property rights. Tribes that experienced unexpectedly high productivity would make protection payments—gifts—to those whose productivity was unexpectedly low. Given that all tribes faced the possibility of a poor salmon run at one time or another, all faced the possibility that others would encroach on their salmon rivers. Gift-giving kept potential encroachers away and avoided mutually destructive warfare.

A POTLATCH ANALOGUE TODAY

Giving tribes exclusive ownership of salmon stocks, including the option to manage them for commercial purposes, would be possible within Canadian law, but the Canadian Supreme Court will probably be reluctant to restore salmon stock ownership to the tribes in a way consistent with their pre-contact customary rights. The social upheaval from such a judicially orchestrated transfer of wealth would be devastating.

An alternative is available in a return to the concept underlying the potlatch. When tribes experienced disputes over the title or ownership of streams, the rival claimants resolved the dispute with a "rivalry potlatch." As

Drucker outlines it (1955, 128), "When two chiefs claimed the same place, the first one would give a potlatch, stating his claim; then the second would try to outdo him." At some point, one of the chiefs either "gave away or destroyed more property than his opponent could possibly equal." This ended the contest for ownership because he and his tribe had shown that they had fewer resources.

We can go back to the "rivalry" potlatch to solve today's problems. The modern analogue of the rivalry potlatch is a second-price sealed-bid auction, but one in which the winner pays the loser an amount equal to the loser's bid.

In a standard auction, the winner pays the amount of the bid to the seller. In a second-price sealed-bid auction, the winner pays an amount equal to the loser's bid. In this proposal, the proceeds would go to the loser, rather than the seller or a third party. The idea is that each party to the auction calculates the

Tribal ownership of streams provided secure ownership of native salmon stocks. Rather than being the fortunate beneficiaries of a naturally rich environment, the coastal tribes actually created an abundance of salmon through purposeful husbandry and resource management.

value of the asset to him (or her or, in this case, an organization). The party that wins the bid obtains a permanent right of ownership, but must compensate the loser for the value that the loser placed on the asset.

Although the details of conducting such an auction are best left to investment bankers, basically the auction would require the Canadian government (the Crown) to recognize those with vested interests in the mobile ocean fishery (commercial fishermen) as an “incumbent” class of claimants and British Columbia’s tribes as a “rival” class. Each tribe interested in an exclusive claim to a salmon-spawning river system would create a tribal corporation jointly owned by the tribe and a central British Columbia First Nations holding company. Collectively, the tribes would control the holding company, and each tribe would individually control its own tribal corporation. With the Crown’s mandate, the incumbent class (commercial fishermen) could also be organized as shareholders in a corporation.

After arranging financing, these corporations would then submit sealed bids for the exclusive and perpetual right to control and collect the residual income (the excess above the tribes’ total current fixed claims) from the British Columbia salmon fishery, with the winner paying the loser the amount of its losing bid. (Current fixed claims by Indian tribes would not be threatened or invalidated.)

If the incumbent fishermen were to win the auction, they would pay the amount of the tribes’ losing bid to the tribes and thereafter hold the exclusive right as a group to commercially harvest salmon (which would still be regulated by the government). The tribes would relinquish any residual claim to the fishery beyond their total current fixed claims and would continue with their subsistence fishery.

If the tribes were to win the auction—which is more likely—they would pay the commercial fishermen their losing bid. They could then abolish the mobile ocean fishery, by assigning exclusive stream-based tribal rights to salmon stocks in accordance with each tribe’s traditional lands and subsequent inter-tribal negotiations.

There is no guarantee that the tribes would win the auction. But the reason to expect them to win is that the capitalized returns from husbanding selected salmon stocks in a system of stream-based tribal rights would dramatically exceed the returns under the present system, which is based on the rule of capture and a government-regulated open-access fishery.² Thus, the expected increase in the tribes’ wealth would easily allow them to prevail.

The fishermen would be compensated according to their revealed valuation of their residual claim to the British Columbia salmon fishery under its current and expected institutional structure.

Taking the case law at face value, the goal of the Crown is not simply to hand aboriginal peoples an entitlement, but to bring them into the modern era with a reasonable prospect of achieving prosperity through reliance on their distinctive cultural rights. Because tribal ownership of salmon stocks represents the core of these rights, the Crown’s fiduciary duty requires that the tribes be given the opportunity to reclaim them. By compensating incumbent fishermen to voluntarily relinquish their claims, British Columbia’s tribes can once again aspire to prosperity, while contributing proudly to the Commonwealth of Canada. ■

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NOTES

1. Throughout this essay, I borrow freely from my earlier work to keep citations to a minimum.
2. The creation of individual fishing quotas could increase the potential value of the present system.

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THE 19TH CENTURY COMANCHE |

A LEGAL SYSTEM BASED ON INDIVIDUAL RIGHTS

The centralized legal systems of modern Indian reservations contrast sharply with Indian legal systems that prevailed before the arrival of Europeans in North America. Indian law evolved spontaneously in response to the demands for rules and justice by members of small groups. It was customary as opposed to authoritarian.¹ That is, it was accepted not because it was backed by some powerful individual or group but because each individual recognized the benefits of behaving in accordance with other individuals' expectations.

As E. Adamson Hoebel, who is responsible for some of the most important anthropological studies of American Indian law (and whose work is cited several times in this article), explained, community groups were "autonomous and politically independent. There is no tribal state. Leadership resides in family or local group headmen who have little coercive authority and are hence lacking in both the means to exploit and the means to judge" (1954, 294).

The nineteenth-century Comanche illustrate the decentralized nature of traditional Indian culture. By then, tremendous changes had already occurred in the life of the Plains Indians as a result of the movement of Europeans into America (Hoebel 1954, 126–27). Before the arrival of the Spanish, for instance, the Plains Indians were largely river bound and rarely traveled over the plains. But the introduction of horses by the Spanish allowed the Plains Indians to significantly expand their hunting territories and led them to modify their legal institutions. Further pressure for change resulted from British and French settlement that displaced many of the Eastern woodland Indians.

In the sixteenth century the Comanche were part of the Shoshonean group of tribes occupying the headwaters of the

Missouri and Yellowstone rivers. They were not warlike (Hoebel 1954, 129) and they had no tribal organization. They lived in isolated family bands that were economically self-sufficient. By the eighteenth century the Comanche had split from the rest of the Shoshoneans and invaded the Southern Plains.

CHANGES FOR THE COMANCHE

This was only part of a tremendous change in the Comanche way of life that followed their acquisition of horses. Their numbers grew, and they became very militant as they strove to acquire new hunting territory and then defend their claims. They also raided in order to obtain wealth from other Indians and from the advancing Euro-Americans. Military prowess became a source of considerable pride and prestige for the individual Comanche.

Still, the Comanche of the nineteenth century had no political unit that could be called a tribe. The population was distributed among a large number of loosely organized, autonomous bands with no formal organizations for warfare. "War chiefs" were outstanding fighters with long records of accomplishments against enemies. Anyone was free to organize a war party if he could convince others to follow him, but such individuals had leadership roles only when others voluntarily followed, and only for the period of the raid (Hoebel 1954, 132). They had no authority in internal tribal matters such as law.

There were also band headmen or "peace chiefs," but they too had no formal authority. They were typically well-respected wise men of the band who made certain routine decisions regarding the day-to-day operation of the band, such as when and where to move the camp. However, as Hoebel observes, "Anyone who did not like his decision simply ignored it" (Hoebel 1954, 132). A respected peace chief might have influence in important



Nineteenth-century Comanche were militant warriors. They had no political unit that could be called a tribe but they had a legal system based on accepted rules of conduct.

decisions of the band but he had no special authority in such decisions.

Despite the lack of formal legal authorities, there was a clear, widely held set of rules of conduct reflecting individual rights to private property. Indeed, among the Comanche, “the individual is supreme in all things,” wrote Hoebel (1954, 131). It is true that the Comanche, like other Plains Indians, did not recognize private land holdings. But property rights develop only after the benefits of doing so outweigh the costs (Demsetz 1967). The nomadic hunting and gathering lifestyle of the Plains Indians, particularly after the introduction of horses, meant that rights to specific tracts of land were worth little. Furthermore, land was still so abundant that individual property rights were largely unnecessary.

For other resources, however, private property rights did evolve. Private ownership was firmly established for such things as horses, tools for hunting and gathering, food, weapons, materials used in the construction of mobile shelters, clothing, and

various kinds of body ornaments that were used for religious ceremonies and other activities.

Cooperative production (such as group raids to take horses from enemy tribes or group hunts) did not imply communal ownership. The product of such cooperative activities was divided among participants according to their contributed effort. Individuals might share such things as food at times, but they did so out of generosity.

PROCEDURAL RULES

As with other Indians, respect for the rules regarding individual rights was encouraged by the threat of ostracism. In fact, among the Comanche, ostracism was not just directed at offenders. A male who suffered a legal wrong had to take action against the offender or face social disgrace as a coward. For example, adultery and the taking of another’s wife were considered

direct attacks against the husband. The aggrieved could either confront the accused directly and publicly by stating the offense and demanding what he considered appropriate compensation for damages, or he could send a representative to prosecute the claim, perhaps implying the matter was not worth his personal attention. If the accused offender was a powerful warrior the accuser could also form a group to prosecute.

If an individual lacked self-confidence or status to gather a prosecuting group, Comanche legal procedure allowed for two options. The plaintiff could ask a war chief—or “champion-at-law”—to act for him, and if this warrior agreed, he would then be obliged to see the process through to the end. Or second, an old woman could be sent to prosecute, “hoping through presenting his cause pitifully to touch the compassion of the offender and so gain larger damages than he himself would dare demand” (Hoebel 1967, 191).

Once the charges were made, the next step was bargaining. Rules of “judicial” procedure were followed, but evidence and witnesses were seldom presented. The accuser was expected to ascertain guilt before confronting the offender, so no evidence was necessary. Of course, guilt could be denied, but such denial “was so uncommon that there are not cases enough to draw sound conclusions,” wrote Hoebel (1967, 192).

The defendant typically recognized that he would have to pay restitution when he committed an offense (Hoebel 1954, 134), because Comanche rules of obligation were well known. He hoped to use the adjudication process to keep the payment light, whereas the plaintiff hoped for a large payment. Cases could only be settled by mutual agreement reached through bargaining. Previous legal decisions might serve as a guide, and in this respect Comanche law was case law (Hoebel 1954, 135).

If the bargaining process broke down, the parties had the right to use or threaten to use force. This did not result in individual “might makes right,” however, because a plaintiff need not prosecute his claim by himself. If an offended individual was not confident of his strength, he could gather his relatives (particularly his brothers) and perhaps other friends to aid him in seeking compensation, as noted above. Friends and relatives were willing to provide support because they might need the plaintiff’s support in some future dispute or other joint venture. This did not degenerate into violence, with the offender building his own support group, because Comanche law did not extend to the offender the privilege of putting a group together (Hoebel 1967, 196).

This over-balancing in favor of the injured party did not result in unduly high restitution, mainly because plaintiffs had to share their compensation with their support group. Moreover, group participants’ claims to shares of the compensation took precedent over the plaintiff’s claim, providing another incentive for the plaintiff to limit his show of force. In addition, a large show of force meant that the plaintiff lost considerable prestige within the band.

Those injured parties whose status was so low that they could not gather a support group could still rely on the “champion-at-law” (Hoebel 1967, 198). This institution was purely a social device. There were no payments to convince a warrior to act as a champion, and he did not receive a share of the compensation paid by the offender. But any warrior who refused to do so was considered to be afraid of the defendant. The champion-at-law was not an arbitrator or even a mediator. He served to represent a damage claim in the bargaining process and, if need be, in physical combat.

This and other procedures developed by the Comanche were clearly designed to generate a bargained settlement rather than violent confrontation. Given the primitive, warlike nature of nineteenth-century Comanche society with respect to other social groups, whether Indian or white, their laws and legal institutions represent a remarkably efficient, violence-free system of internal order. ■

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NOTE

1. See Benson (1990, 1991) for detailed theoretical explanations of the development of customary law and cooperative institutions for law enforcement and adjudication.

BRUCE BENSON, a PERC Julian Simon fellow in 2004, has written widely on non-governmental systems of law, including *The Enterprise of Law: Justice without the State*. Benson is the DeVoe Moore Distinguished Research Professor at Florida State University. This essay is adapted from “Customary Indian Law: Two Case Studies,” in *Property Rights and Indian Economics*, Terry L. Anderson, ed., Rowman & Littlefield, 1992.



BLACKFEET GATHERING |

Some readers of *PERC Reports* might wonder why we have devoted a special issue to American Indian history and development. The answer is that PERC's mission is to promote environmental quality through property rights and markets. Doing so requires a firm understanding of how these institutions relate to resource stewardship and economic growth.

American Indian institutions provide a crucible for developing this understanding. In the past, property institutions among Indians determined whether natural resources were carefully husbanded or subject to the tragedy of the commons. Today, those same institutions help explain why reservation economies languish and why reservation environments are so often disappointing.

One of my favorite examples of property rights in Indian culture is the teepee, depicted in this wonderful oil painting, titled *Blackfeet Gathering* (12"x14"), by Michele Kapor, one of the premier landscape artists in the Mountain West. (For more information on the artist and her work, go to www.kapor-arts.com). This geometric dwelling was privately owned, usually by a woman, who accumulated the hides, sewed them together, and maintained the structure.

Michele painted this teepee scene for me, and I decided to use it as way of giving the readers of *PERC Reports*, such as yourself, an opportunity to support the magazine made so informative and attractive by Jane Shaw and her crew.

Here's the deal. Michele Kapor's original oil painting shown here will be auctioned off to the highest bidder above \$2,000, with the proceeds from the auction going toward future issues of *PERC Reports*. The highest bidder will get the painting, valued at \$550, and will get a tax deduction for his or her contribution to PERC in excess of that amount.

You can bid on this painting by e-mailing perc@perc.org. If you don't use e-mail, you can call PERC, (406) 587-9591 and ask



You can bid on this painting and make a donation to PERC.

for your bid to be relayed to Laura Huggins, PERC's director of development. Bids will be posted as they are received at www.perc.org so you can keep track of whether you are the highest bidder. Bidding will end at 5 p.m. MDT on June 30, 2006.

I hope you enjoy this issue of *PERC Reports* as much as I did writing for it. At PERC we are committed to furthering the understanding of how societies of free and responsible people are organized and how such organization can improve resource stewardship. The research in this issue shows that American Indians understood the importance of these institutions in the past and that resurrecting property rights and the rule of law on reservations is crucial to raising American Indians out of poverty.

In addition to being PERC's executive director, TERRY L. ANDERSON is a bow hunter. In this "On Target" column he confronts issues surrounding free market environmentalism. Contact him at perc@perc.org.



THE IMPORTANCE OF PROPERTY RIGHTS |

Political and economic institutions—the rules, laws, and customs that guide behavior—help determine living standards around the world. New research by Daron Acemoglu and Simon Johnson (2005) reveals that among these institutions well-defined and enforced property rights are most important in shaping long-run economic growth and thus prosperity.

In any economy there are two key rules of the game: property rights institutions, which include protections against expropriation by the government, and contracting institutions, which facilitate private contracts between citizens. Acemoglu and Johnson find that, when property rights institutions protect people from expropriation (for example, via high taxes, price controls, or outright confiscation), individuals can profit from investment in both physical and human capital. This investment produces higher rates of growth, which eventually yield much higher living standards.

In contrast, the authors find that contracting institutions (such as those determining how difficult it is to resolve contractual disputes through the legal system) have little effect on measures of long-term prosperity. Instead, when contracting institutions are weak or flawed, but property rights are protected, individuals seem to simply alter the terms of their contracts to avoid most of the adverse effects of such flaws. In contrast, the only sure way to avoid predation by the state in the face of weak property rights is to refrain from investing in the first place—which yields poverty in the long run.

The authors' conclusions result from their empirical estimates of the impacts of alternative patterns of European colonization. They show, for example, that the legal systems brought by the colonists interacted with pre-existing conditions of the

lands they colonized to shape the long-term institutions of each colony. Some nations happened to colonize prosperous lands where population densities were high, as Spain did in Mexico and Peru. These colonizers imposed legal institutions that would facilitate the exploitation of indigenous peoples. This yielded short-term riches for these colonial powers, but discouraged long-term investment. Other nations, such as England in colonizing North America, settled lands with few local inhabitants, and thus had to rely on investment and voluntary exchange to survive. This required strong property rights institutions, which promoted investment and yielded long-run prosperity.

These forces were amplified by local disease conditions. In locales such as sub-Saharan Africa, where settler mortality rates

Some nations happened to colonize prosperous lands where population densities were high, as Spain did in Mexico and Peru. These colonizers imposed legal institutions that would facilitate the exploitation of indigenous peoples. This yielded short-term riches for these colonial powers, but discouraged long-term investment.

sometimes exceeded 50 percent per year, colonizers created legal institutions that enabled them to extract resources quickly, without regard for protecting long-term investments. This was an understandable short-term strategy. But its long-term legacy has been legal systems with weak property rights that even today enable governments to extract resources at will from their citizens.

In contrast, settlers in low-mortality colonies, such as North America, opted for property institutions that would protect their investments from predation by others, especially the state. These decisions of 400 years ago have produced dramatic differences in long-term prosperity. Per-capita income levels today can differ by a factor of fifty across nations with different property rights institutions, and the people who live where property rights are strongest are the richest.

Today's contractual institutions also reflect the legal systems of early colonists' countries of origin. English colonists brought with them English common law, which made possible



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a wide range of relatively inexpensive means of settling contract disputes. Colonists from France, Spain, and Scandinavia imported civil law systems, which rely on cumbersome, highly formalized means of settling contract disputes. The difference in legal systems has meant considerably higher costs of creating and enforcing private contracts for citizens of civil law nations. By any of a variety of measures, the red tape that must be endured to enforce a private contract in a civil law nation is roughly double that experienced in a common law country.

The authors find, however, somewhat surprisingly (in their view and mine), that this difference in legal formalism has little impact on current standards of living. They suggest that this may be because wherever there are strong private property protections, people are ingenious in writing contracts that will (mostly) keep them out of cumbersome regulatory and judicial systems.

This explanation is consistent with the work of Ronald Coase (1960), which showed that if property rights are defined, secure, and transferable, individuals will ensure that resources

go to their highest valued uses. But there may be another (albeit complementary) explanation: Standard measures of real income treat legal fees as equivalent to, say, vacation expenditures. The results of this paper thus do not rule out the possibility that citizens of civil law nations spend their time in court, while those of common law nations spend it at the beach.

Apart from its general message on the long-term importance of social and legal institutions, this paper has an encouraging yet chilling message. Equipped with systems of well-defined and enforced property rights, humans can prosper anywhere on the earth. But if these institutions are lacking, any prosperity is likely to be short-lived, at best.

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POACHERS TO RANGERS

In the heart of Cambodia is the most important waterbird zone in mainland Southeast Asia. At Prek Toal, just-hatched chicks peep in deafening high tones, while larger birds take off, land, and perform mid-air acrobatics.

Many rare and endangered birds make their home here, a UNESCO Biosphere Reserve on the edge of Tonle Sap, Southeast Asia's largest freshwater lake. During the monsoons, water levels rise 30 feet in the lake, which harbors populations of black-headed ibis, painted storks, milky storks, and spot-bellied pelicans. But, when the rains stop, Prek Toal goes dry.

A thriving trade in chicks and eggs supported many local families until 2001, when government officials clamped down on bird hunters and egg collectors. Now, five years later, bird populations have soared, and the poachers have found jobs as rangers. Protecting birds, rather than exploiting them, has produced incomes four times what local people earned from illegal trading. And because of their intimate knowledge of the area and of bird habits, these poachers-turned-rangers are undeniably the most able bird conservationists available.

Working from treetop platforms, armed with binoculars, they count birds and watch for poachers. The few poachers who have been caught in the ensuing years have been sentenced to work as rangers without pay.

Poaching at Prek Toal has been nearly eliminated, and the villagers, who are now employed to care for the birds, readily admit they love their charges and would never inflict the harm they once did in order to support their families.

—*Christian Science Monitor*

CITIES ADOPT GREEN TOPS

When the elevator stops on the top floor of some of the world's newest downtown skyscrapers, the occupants may be in for a surprise. Before them may be a field of waving native grasses and a stunning display of wild flowers. Birds chirp, and butterflies go about

their business without even noticing they are in midtown and not some pastoral location far from the traffic and concrete of a major metropolis.

One of the latest trends in building is the green roof. Although the idea has been around for many years, it is rapidly gaining in popularity. And exactly what is a green roof? Basically it is various forms of green and growing plants often set out across the roof top in trays that contain lightweight aggregate soils anywhere from 3 to 6 inches deep. Don't think about the deep, rich, and heavy soil of an Illinois farm, but something a little more modern.

The advantages of such a roof compared to the typical asphalt variety are many. It significantly reduces the roof's temperature during summer months, which leads to a similar reduction in air conditioning and the energy bills that accompany that cool comfort. It also lasts longer than a conventional roof, needing replacement on average every 40 years as compared to every 10 to 20 years.

It loves water. When a deluge passes over the city and storm drains are overwhelmed, sometimes emitting raw sewage as a result, the green roof soaks up all that extra water and even filters it before sending what it doesn't use down the drains. In China, green roofs are popular because the storm water is stored and treated, creating a self-sustaining water system for hundreds of apartments, schools, and businesses that often suffer water shortages. The Chinese also see the benefits of green roofs in easing fuel shortages and reducing greenhouse gases.

While this certainly appears to be a rosy picture, the fact is that green roofs cost more. Some estimates have pegged the cost of green roofs at \$10 to \$15 per square foot compared to \$3 to \$9 for a conventional roof. Despite these initial costs, green roofs produce energy savings, last longer, and add to property values. Last year, green roof space in the United States grew by 70 percent.

While some countries are considering making green roofs mandatory for certain buildings, they are totally voluntary in the United States. Steven Peck, however, sees a bright future ahead.



Cambodian families, who once supported themselves by poaching eggs and chicks near Tonle Sap, Southeast Asia's largest freshwater lake, now make a living as rangers, protecting the birds they once exploited.

As president of Green Roofs for Healthy Cities, a nonprofit industry association, he predicts that green roofs will someday be treated as necessary infrastructure just like sewers and streets.

—Reuters

PROTECTING FORESTS, ENRICHING PEOPLE

While rampant illegal logging takes place around them, two indigenous communities in Nicaragua have banded together to harvest wood in a sustainable manner and to act as a buffer for Nicaragua's largest protected area. Indigenous people own and manage more than 54,000 acres adjoining the 1.8 million-acre Bosawas Reserve. With help from conservation groups, they are learning to harvest marketable wood in a manner that protects the soil and does not disturb the waterways or endanger biodiversity. Their goal is to gain certification from the Forest Stewardship Council, thus adding value to their product.

Forest experts teach them how to encourage the growth of marketable trees such as mahogany as well as the best methods for replanting following a harvest. They must also prune back

competing vegetation. In addition to replanting their own land, they are involved in replanting nearby areas that have been illegally cut.

One of the most exciting aspects to their involvement in the forestry project is the opportunity to introduce several new species of trees as yet unknown to international buyers. So, in addition to improving their forestry skills, they also will be learning how to market their products. By reaping greater economic value from their forests, they will be able to reduce the amount of farmland they cultivate in once-forested areas. Many villagers are also being trained by national and international agencies to fight forest fires in order to protect their own forests as well as those in the reserve.

The prospect of developing new markets and adding value to their current products will allow these native peoples to remain living and working in their forest communities for many years to come. At the same time, it will significantly increase their standard of living

—Environmental News Network

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A DISTORTED PICTURE OF CANADIAN FORESTS

Alison Berry's article about Canadian forest management ("Timber Tenures," March 2005) takes a somewhat truncated view of the situation—giving us all of the good but none of the bad.

There are some very large downsides to the timber lease and tenure structures, and those pitfalls have caused significant destruction of vitally important old-growth temperate rain-forest over the years. One of the largest of these downsides is that many of the tenures contain "use it or lose it" provisions. A second is that the incentives created by a provincial system that derives a significant proportion of funding from timber harvesting are misaligned toward over-exploitation.

A net result of these and other failures of the tenure system is that out of roughly 170 valleys on Vancouver Island, 159 have been largely or completely clearcut. Until the 1980s and 1990s

these were mostly old-growth, temperate forest systems. The harvesting methods and impacts to wildlife and water quality were egregious; these had knock-on effects on the keystone species of this ecosystem, salmon. As salmon runs are wiped out through sedimentation, water quality and temperature impacts, and other effects, the species that rely on salmon also begin to disappear.

Yes, trees will grow again on Vancouver Island, but the biodiversity values of those old-growth systems will not be replaced in twenty generations, if then.

Kent W. Gilges

Senior Program Manager, Forest Conservation

The Nature Conservancy

Rochester, New York

ALISON BERRY RESPONDS:

I agree that there are many downsides to the Canadian timber tenure system. For example, the annual allowable cut—the "use it or lose it" provision that you refer to—is a minimum amount of timber that must be cut by tenure holders each year. As I mentioned in the article, this policy discourages forestry that does not include intensive logging, as does the emphasis on timber over other forest values in Canada.

My article highlighted the positive sides of the tenure

system to help generate solutions for the "analysis paralysis" facing U.S. public land management agencies. It would not be necessary to incorporate the less successful aspects of the tenure system into U.S. forest policy.

Without minimum harvest levels or an emphasis on timber production, timber tenures could transfer management responsibility to the private sector, encourage local control, and open up a range of opportunities on forest lands, including the development of non-timber forest resources.

It is true that Harrop-Procter is the exception and not the rule in Canadian forestry. But Vancouver Island, too, is an unusual case where the combination of a rare ecosystem and an abundant and accessible timber supply has resulted in bitter battles over conflicting resource values.

The United States can learn from Canada's timber tenure system, not just from Harrop-Procter and Vancouver Island, but from forest management across the country, where local control and more secure tenures—in terms of duration, renewability, and rights allocated—encourage responsible forest management.

TAX, YES. SUBSIDY, NO

While ethanol (“A Kernel of Support for Ethanol,” March 2006) is one of my favorites among all the food groups, it is not my choice for displacing gasoline. Aside from the (at times huge) subsidies that are inherently political, and therefore exceptionally difficult to dislodge, there are other very troublesome aspects which were given little or no attention in the *PERC Reports* dialogue.

The very rapid phase-out of methyl t-butyl ether (MTBE) and its replacement with ethanol will prove to be either expensive or unworkable for some months and probably several years unless the costly program of barring ethanol imports ceases. (This prohibition on imports is, of course, just another subsidy for “home-grown” ethanol, enacted to get farm state votes and make Archer Daniels Midland happy.) Ethanol can be produced from sugar cane much more efficiently than from corn; unfortunately the United States lacks the proper climate for growing very large amounts of sugar cane (and let's not even begin to think about all those Northern Plains sugar beet farmers with their 110-day growing season . . .). The idea that ethanol can be produced in oil-refinery quantities from other sources (e.g., switch grass) is still very much a laboratory exercise, decades from reality.

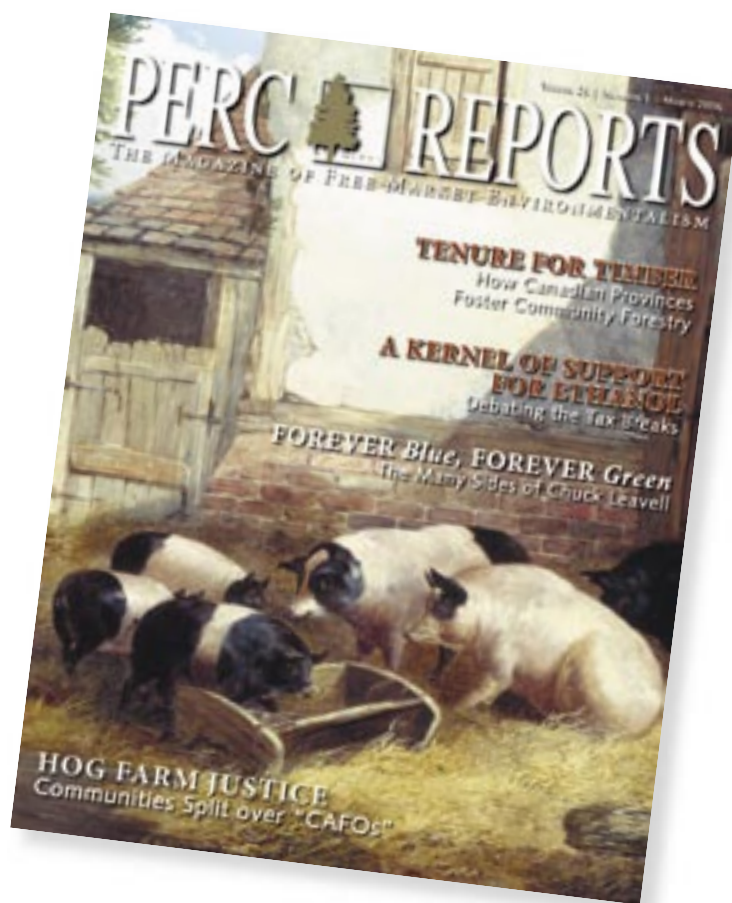
The real problem is the likelihood—indeed, the probability—that ethanol/gasoline mixtures will poison groundwater supplies. If MTBE was a problem, it was a small one compared to the mobilization of toxic components of gasoline (notably

benzene) into drinking water supplies. (Benzene is far more soluble in ethanol/water mixtures than in water alone.) If this happens, and I believe it could, it would shut down the ethanol business instantly in some regions and disrupt transportation over much of the nation.

If we really want to find a replacement for petroleum-based fuels then tax them on an increasing schedule that rises, say, 5 or 10 percent a year for as long as it takes, return the added revenues to taxpayers through payroll tax reductions and get the government out of the energy selection and subsidy business—where it has an unbroken three-decade record of failure.

Ernst Habicht Jr.

Port Jefferson, New York



JANE S. SHAW welcomes vigorous debate about controversial environmental topics. Send your letters to her at: *PERC Reports*, 2048 Analysis Drive, Suite A, Bozeman, MT 59718 or shaw@perc.org.



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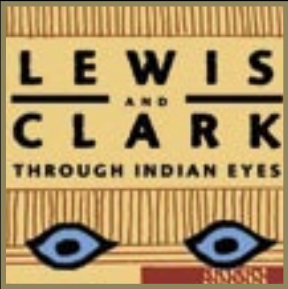
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