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Capital, Inequality, and Self-Determination: Creating a Sovereign Financial System for Native American Nations

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CAPITAL, INEQUALITY, AND SELF-DETERMINATION: CREATING A SOVEREIGN FINANCIAL SYSTEM FOR NATIVE AMERICAN NATIONS

W. Gregory Guedel, Ph.D.* & J.D. Colbert**

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Executive Summary

The existing financial system in the United States is not working for Native Americans. The aggregate data on chronic Native American poverty, unemployment, and lack of reservation business activity indicates a substantial disconnect between tribal communities and traditional sources of development capital such as banks, credit unions, and other commercial lenders. Structural conditions in tribal communities do not embody the legal elements or collateral base required by commercial banks to provide loans and credit for Native American economic development. What tribal communities need is a new financial system, built upon an understanding of the unique economic and legal conditions of Native American nations, to provide access to capital on terms that are structurally and culturally consistent with the realities of Native American life.

This policy paper describes an innovative program to create a new financial institution that can facilitate much-needed access to capital and affordable financial services for Native American nations: the Tribally Chartered Bank (TCB). The TCB would be a new banking system—rather than a new bank under the existing system—that would be chartered under tribal law and regulated by an independent tribally appointed governing body. Organized under the sovereign authority of one or more tribal governments and free from the short-term focus of publicly listed banks, the

TCB would offer a means for tribes to secure the “patient capital” required for long-term economic and infrastructure development.¹ The potential benefits of the TCB for Native American communities are substantial and far-reaching, including:

- direct capital investment into reservation businesses, housing, and infrastructure;
- a long-term approach to access and ROI on capital, designed specifically for the Native American paradigm;²
- lending standards based on tribal needs and conditions, not bank shareholder demands;
- opportunities to become the primary banking institution for emerging businesses such as legal cannabis and online gaming;
- embracing a culture of creativity and innovation in financial products, processes, and technology.

The TCB’s organizational structure and operational activities can be designed for mutually beneficial integration into existing American/global financial networks through:

- a compact for cooperative oversight with U.S. agencies, providing transparency and legitimacy;
- utilizing existing and accepted financial infrastructure such as SWIFT and NACHA; and

1. Patient capital “bridges the gap between the efficiency and scale of market-based approaches and the social impact of pure philanthropy. Patient capital has a high tolerance for risk, has long time horizons, is flexible to meet the needs of entrepreneurs, and is unwilling to sacrifice the needs of end consumers for the sake of shareholders. At the same time, patient capital ultimately demands accountability in the form of a return of capital: proof that the underlying enterprise can grow sustainably in the long run.” See *What Is Patient Capital?*, ACUMEN, <http://acumen.org/ideas/patient-capital/> (last visited Jan. 17, 2017).

2. Return on Investment or “ROI” is commonly defined as the ratio of net income to the average capital employed in an investment or enterprise.

- deploying state-of-the-art FinTech to enhance efficiency and reliability for transactions.

The TCB would be an institutional means for Native American nations to address and improve the chronic conditions of poverty, unemployment, and underdevelopment within their communities. Tribes would create the financial system to recognize specific conditions and serve the unique needs of their members. By providing support for the formation and operations of the TCB, the U.S. government would also provide substantive redress for its historical policies that have directly resulted in the deleterious economic conditions experienced by tribes. In contrast with traditional banks that are constrained by the legal strictures of federal or state charters, the TCB would embody the beneficial flexibility of tribal laws and sovereignty, and provide a powerful instrument for enhancing Native American self-determination.

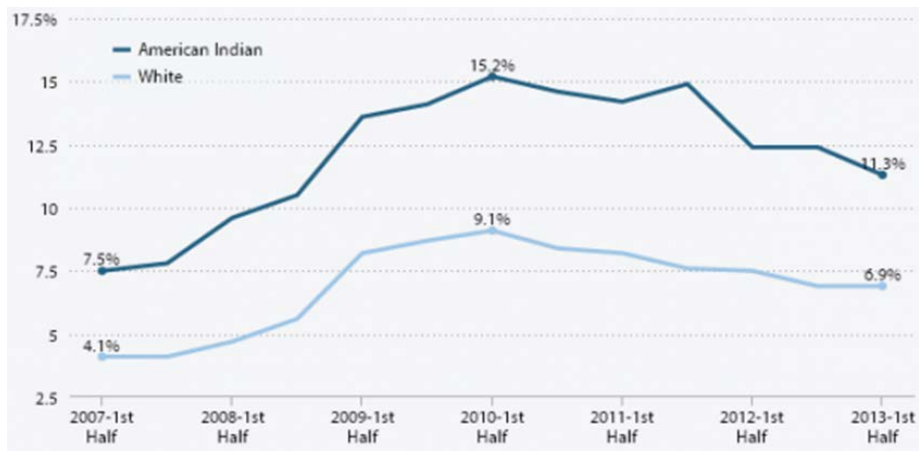
I. Introduction

The economic and related development conditions of Native American nations and their members chronically and severely lag behind accepted standards for the rest of the United States. One-third of reservation-based Native Americans fall below the poverty line, and aggregate Native American unemployment is twice the U.S. average.³ Tribal governments, unable to spur economic development within reservation territories and operating without a typical municipal tax base, struggle to provide even the most basic services and infrastructure.⁴ The significant and chronic disparity in economic advancement between the Native American population and the U.S. average is illustrated by comparative unemployment rates, reflecting their progression prior to, during, and after the recent “Great Recession”:

3. *Poverty and Possibilities in Indian Country*, FCNL INDIAN REP. (Friends Comm. on Nat'l Legislation, Washington, D.C.), Spring 2012, at 1, http://fcnl.org/assets/pubs/indian_report/IR_Spring_2012_d4.pdf; see also Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?* 80 OR. L. REV. 757, 758-59 (2001).

4. *Poverty and Possibilities in Indian Country*, *supra* note 3; Miller, *supra* note 3.

Table 1. United States National Unemployment Rates



Note: “American Indian” refers to individuals identifying as American Indian or Alaska Native alone or in combination with another racial category.

Source: EPI analysis of basic monthly Current Population Survey micro data.⁵

With these economic and human security conditions, it is little wonder some commentators have described Native American nations as the “fourth world.”⁶

A fundamental element for any economic development program is access to capital, which makes purchases, investments, and asset building possible—increasing and sustaining economic activity. Although the United States controls more capital than any other nation, access to this capital is uneven within the country and numerous communities struggle to obtain funding for basic development.⁷ Nowhere is this inequality more starkly evident than in Native American nations, where poverty, unemployment, the prevalence of “food deserts,” and other symptoms of scarce capital

5. Algernon Austin, *High Unemployment Means Native Americans Are Still Waiting for an Economic Recovery*, ECON. POL’Y INST. (Dec. 17, 2013), <http://www.epi.org/publication/high-unemployment-means-native-americans>.

6. CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 271 (2006) (“However favorable the new legal and policy framework might be, every Indian tribe in the postwar years faced challenges befitting a third world nation—some have called aboriginal peoples the fourth world.”); see also Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT’L L. 131 (2012).

7. John Cassidy, *Piketty’s Inequality Story in Six Charts*, NEW YORKER (Mar. 26, 2014), <http://www.newyorker.com/news/john-cassidy/pikettrys-inequality-story-in-six-charts>.

manifest at far higher rates than the national average.⁸ According to a report published by the Board of Governors of the Federal Reserve, “insufficient access to capital” is a primary challenge to economic development in Native American nations.⁹

From Marx to Piketty, economists and scholars have understood the importance—and bemoaned the unequal distribution—of global capital for the better part of 200 years. Marx identified capital as a “social power,” without which people “cannot become masters of the productive forces of society.”¹⁰ In *Capital in the Twenty-First Century*, Piketty recognizes that “[b]efore production can begin, funds are needed for equipment and office space, to finance material and immaterial investments of all kinds, and of course to pay for housing.”¹¹ For Native American communities, the chronic lack of available capital has caused development to stagnate in all of these basic elements of their economies.

One element of the inequality of capital distribution in the United States is particularly unusual and counterintuitive from an economic perspective. In general, having a presence within a particular territory for an extended period of time is an advantage for a community of people in accumulating capital available within that area.¹² Yet in the United States, extreme longevity of presence does not correlate with increased wealth—in fact, the opposite has manifested. Native Americans resided within the territory of the United States for thousands of years prior to European contact, yet today the small amount of land and resources they own and control is effectively “dead capital” that cannot be leveraged to create development opportunities.¹³ In essence, those who have lived in the United States the longest have accumulated the least, and for Native Americans this historical

8. Alysa Landry, *What Is a Food Desert? Do You Live in One? 23.5 Million in this Country Do*, INDIAN COUNTRY TODAY (Apr. 28, 2015), <https://indiancountrymedianetwork.com/culture/health-wellness/what-is-a-food-desert-do-you-live-in-one-235-million-in-this-country-do/>.

9. SUSAN WOODROW ET AL., GROWING ECONOMIES IN INDIAN COUNTRY: TAKING STOCK OF PROGRESS AND PARTNERSHIPS 4-6 (Apr. 2012) (Board of Governors of the Federal Reserve System White Paper), <http://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf>.

10. KARL MARX, THE COMMUNIST MANIFESTO 65, 68 (W.W. Norton & Co. 1988) (1848).

11. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 385 (2014).

12. *Id.* at 368-70.

13. Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014), <http://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#61ad1ed36cc6/>.

anomaly has resulted in a situation where, according to Piketty, “[t]he past devours the future.”¹⁴

For Native American nations, the lack of access to capital inhibits their ability to finance new projects such as housing, business development, and renewable energy that would benefit both the tribal communities and the United States.¹⁵ Yet despite their difficulty in accessing capital, Native American nations possess significant potential for economic growth based on untapped resources, land, and sovereignty.¹⁶ The transformative opportunity embedded in this potential is beginning to inspire creative approaches to new development pathways, with tribal finance expert Gavin Clarkson identifying Native American nations as “America’s domestic emerging market.”¹⁷ Harnessing this potential and implementing development programs that can have a real impact on conditions within tribal communities will require not only inventive thinking, but also the creation of new and innovative economic institutions.

Commenting on the current state of global capital distribution, Bill Gates has noted that “governments can play a constructive role in offsetting the snowballing tendencies” of inequality in access to capital when they embody the will to do so.¹⁸ In the government-to-government relationship between the United States and Native American nations, the federal and tribal governments have a mutual interest in facilitating the enhancement of Native American economic and human security development. Moreover, such work is directly connected to the U.S. government’s legal obligations as a signatory to the United Nations Declaration on the Rights of Indigenous Peoples.¹⁹ The Articles relating to economic development address these obligations:

14. PIKETTY, *supra* note 11, at 571.

15. Jenny Small, Note, *Financing Native Nations: Access to Capital Markets*, 32 REV. BANKING & FIN. L. 463 (2013).

16. Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL’Y 441, 443 (2001-2002) (“Sovereignty is best defined as the vested powers of self-government, self-control, self-determination, and self-actualization.”).

17. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 285 (2009).

18. Bill Gates, *Why Inequality Matters*, GATESNOTES: THE BLOG OF BILL GATES (Oct. 13, 2014), <http://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review>.

19. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. . . .

. . . .

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.²⁰

The Declaration provides direct mandates (and in fact binding obligations under international law) for the U.S. government to take official action to facilitate improved economic development in tribal communities. These general obligations provide a framework for the United States to begin working with tribal governments on new policy initiatives to address the specific deficiencies experienced by Native American nations in accessing capital within existing financial systems, particularly in light of the failings of those systems so glaringly exposed by the recent financial crisis.

The systemic breakdown in U.S. and global finance that occurred during the “Great Recession” period of 2007-10 revealed numerous weaknesses in the structure and performance of existing financial institutions. Subsequent

20. *Id.* arts. 21, 38, 39.

analysis of those weaknesses has produced policy recommendations for improving the performance and equality of access to these institutions:²¹

- establish short, simple, and direct connections between financial institutions and the end-users of capital;
- prioritize transactions that place capital into the hands of people who will use it for on-the-ground development activities, rather than transactions between financial institutions in pursuit of corporate profits; and
- create specialized institutions with a direct focus on serving specific types of capital users and needs, with business models and institutional priorities based on meeting those needs.

These policy concepts are particularly relevant for addressing the endemic problems Native American nations experience in accessing sufficient capital to promote economic and human security development.

II. Challenges For Tribes In Accessing Capital

The problems Native American nations experience in accessing development capital can be seen as arising from three primary causes: (1) the historical and structural conditions of tribal communities; (2) the unwillingness of commercial lenders and other mainstream capital sources to conduct business with tribes and their members; and (3) the failure of the U.S. government to uphold and properly manage its legal and trust obligations to facilitate capital availability.

A. Historical and Structural Problems

Thousands of years before Europeans first took to the sea in search of the “New World,” the indigenous people of North, Central, and South America had established unique and flourishing civilizations that stretched from the Arctic Circle to Tierra Del Fuego. While the nations of Europe languished in the Dark Ages, the indigenous nations of the Americas were creating scientific, cultural, and architectural achievements that are marvelous to ponder even today.²² A key element of the success of these societies was their economic activity, which involved trade with other indigenous nations

21. JOHN KAY, *OTHER PEOPLE’S MONEY* 259-60 (2015).

22. W. GREGORY GUEDEL, *STRATEGIES AND METHODS FOR TRIBAL ECONOMIC DEVELOPMENT* (2013).

in combination with local endeavors that were harmonious with the natural world and sustainable with available resources.²³

The general picture of Native American political economy in the twenty-first century is radically different from pre-Columbian times. The political subjugation of indigenous nations by European colonizers, combined with forced geographic dislocation from their ancestral lands and traditional trading partners, essentially destroyed the original paradigm of economic development in the Americas. Native American nations were forcibly removed from their ancestral territories by the U.S. government, thereby losing both the capital value of the land and the asset base of natural resources associated with it. This dislocation deprived tribes of untold billions of dollars' worth of capital producing assets, and consigned them to areas of the United States that were considered economically undesirable by the U.S. government and American settlers.²⁴

The land that Native American nations retained typically included several conditions that prevent it from being effectively leveraged to obtain development capital:

- reservations are often located in geographically isolated areas, far from established commercial and population centers that could provide a market base for tribal economic activity, and on land that is commonly devoid of natural economic resources;²⁵
- tribal lands generally have a “checkerboard” of varying title status, limiting the ability of tribal governments and businesses to put their lands into productive economic use;²⁶ and
- a lack of infrastructure investment leaves many tribal nations to cope with inadequate roads, utilities, and communication networks for economic development.²⁷

A further problem, and a puzzling irony, is inherent in the sovereign lands owned by a tribal government itself. To ensure the protections of tribal sovereignty and prevent alienation to third parties, lands the tribal

23. *Id.*

24. CHARLES WILKINSON, *BLOOD STRUGGLE* (2005).

25. *See The Poverty Cycle*, RUNNING STRONG FOR AMERICAN INDIAN YOUTH, <http://indianyouth.org/american-indian-life/poverty-cycle> (last visited Jan. 17, 2017).

26. GUEDEL, *supra* note 22.

27. *See Housing & Infrastructure*, NAT'L CONGRESS OF AM. INDIANS, <http://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure> (last visited Jan. 17, 2017).

government holds title to are often converted into “trust land.”²⁸ The U.S. government acknowledges that it holds such land “in trust” for the tribe, and thereby extends its own legal protections over the land against potential creditors or other outside entities.²⁹ Tribal governments, however, cannot levy property taxes upon trust lands.³⁰ This creates a “Catch-22” wherein tribes must place their land into trust in order to fully assert their sovereign jurisdiction over those lands, but by putting the land in trust they forfeit the sovereign capital revenue of property taxes that could be derived from their lands. Consequently, this deprives tribal governments of a stable (and often sizeable) revenue source that is available to almost every other jurisdiction in the United States to provide capital for infrastructure, essential services, and community development.³¹

B. Commercial Capital Source Problems

Economists and development scholars have long recognized that “[f]or any economy to grow, banking institutions must be available to help provide individuals with standard loans, and provide small businesses and industries with the necessary amount of capital to pay for wages, materials, and other developmental costs.”³² Even the Federal Reserve has noted that the shortage of banking institutions located near Native communities is a primary barrier to accessing capital markets.³³ In some communities, Native Americans living on reservations may need to travel as far as thirty miles to

28. *Office of Trust Services*, INDIANAFFAIRS.GOV, <http://www.indianaffairs.gov/WhoWeAre/BIA/OTS/index.htm> (last updated Oct. 7, 2016) (“The Office of Trust Services carries out Indian Affairs trust responsibilities to Indian tribes and individuals and oversees all headquarter activities associated with management and protection of trust and restricted lands, natural resources, and real estate services.”).

29. *Id.*

30. *Taxation*, NAT’L CONGRESS OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance/taxation> (last visited Oct. 6, 2016) (“In general, tribal governments lack parity with states, local governments, and the federal government in exercising taxing authority. For example, tribes are unable to levy property taxes because of the trust status of their land . . .”).

31. *Id.*

32. Ansson & Oravetz, *supra* note 16, at 462.

33. WOODROW ET AL., *supra* note 9, at 4; *see also* Ansson & Oravetz, *supra* note 16, at 462 (“In general, banking institutions have even failed to establish banking facilities within Indian country. For instance, the Navajo reservation, which has a population of more than 200,000 individuals, only has several banking facilities. Meanwhile, a border town, such as Gallup, New Mexico, with a population of 20,000, has almost three times as many as [sic] banks.”).

access an ATM - a barrier known as the “buckskin curtain.”³⁴ This dearth of mainstream financial institutions has created a disproportionate unbanked population and a vacuum into which predatory lenders such as payday loan companies have moved, eroding tribal members’ personal capital with high interest rates and fees.³⁵ As a result, Native Americans often find themselves in a negative cycle where they turn to predatory lenders because they cannot connect with traditional lenders, and then they become ineligible for future traditional lending due to their indebtedness to the predatory lenders.³⁶

Further still, Native-owned businesses that possess adequate collateral and good credit histories struggle to obtain capital for operations and expansion.³⁷ For example, financing of more than \$100,000 tends to be difficult for Native Americans and tribal nations to obtain, reflecting a seemingly unwritten risk-underwriting threshold beyond which most banks are unwilling to lend.³⁸ Even Native Americans with above average income often have difficulty financing the purchase or improvement of a home, as banks remain wary of any reservation based collateral for their loans.³⁹

The unwillingness of the financial regulatory bodies to adopt policies and procedures that account for the conditions of tribal communities presents another significant barrier to capital access. On an institutional level, Regulation D of the Securities Act of 1933 appears (intentionally or otherwise) to preclude Native American nations from obtaining status as

34. Ronald A. Wirtz, *Breaching the “Buckskin Curtain,”* FED. RES. BANK OF MINNEAPOLIS (Sept. 1, 2000), <https://www.minneapolisfed.org/publications/the-region/breaching-the-buckskin-curtain>.

35. FIRST NATIONS DEV. INST., *BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES* (2008).

36. *Predatory Lending in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 20 (2008) (“The effect of having a tribal population unbanked and subject to predatory financial firms is that it strips an already vulnerable population of the opportunity to advance by preventing them from building assets, equity and wealth.”).

37. WOODROW ET AL., *supra* note 9, at 4.

38. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *INSIGHTS REPORT: COMMERCIAL LENDING IN INDIAN COUNTRY: POTENTIAL OPPORTUNITIES IN A GROWING MARKET* (Feb. 2016), <http://www.occ.gov/topics/community-affairs/publications/insights/insights-commercial-lending-indian-country.pdf>.

39. Aaron Drue Johnson, Comment, *Just Say No (to American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 117 (2010-2011).

“accredited investors.”⁴⁰ The regulation thereby prevents tribal governments from accessing and investing in various, potentially high return financial vehicles, which further “inhibit[s] capital formation and investment in Indian Country.”⁴¹ Tribes also do not qualify for exemption from SEC registration for bond issues enjoyed by municipal, county and state governments, thereby greatly inhibiting the raising of capital for street, sewer, water facilities and other capital improvements in tribal communities.⁴²

A concurrent problem is that banks and other traditional capital sources are reluctant to provide funding to tribal communities, as tribal sovereignty precludes the use of standard financial security mechanisms such as property liens, foreclosures, or repossession of goods.⁴³ Tribal lands that have been placed into trust status cannot be leveraged as collectible collateral for bank financing, and the legal jurisdiction of tribal governments generally prevents property seizures and sales by outside commercial and law enforcement agencies.⁴⁴ As a result, most American financial institutions do not do business with tribes or lend money for reservation business, housing, or other development activities, thereby perpetuating the obstacles to economic progress in tribal communities.⁴⁵

Despite federal incentives, non-native private lenders often forego providing needed banking services to tribal members due to perceived structural risks.⁴⁶ The fear of sovereign immunity artificially raises the risk profile of tribal borrowers in the eyes of traditional banks, as does a lack of understanding of tribal law and legal systems.⁴⁷ The inability of banks to

40. Clarkson, *supra* note 17, at 285. See generally *Accredited Investors*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/accred.htm> (last modified Oct. 21, 2014).

41. Native Am. Cap., LP, Policy Briefing: Native American Tribes Require Reg D Change (n.d.), <https://www.sec.gov/rules/other/265-23/nac020306.pdf>.

42. *Id.*

43. Small, *supra* note 15, at 488.

44. See *id.* at 473.

45. *Id.* at 494.

46. Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Tribal Secured Transaction Law*, BUS. L. TODAY, Nov./Dec. 2005, at 38, 39, <http://www.americanbar.org/content/dam/aba/publications/blt/2005/11/lending-indian-country-200511.authcheckdam.pdf>.

47. *Opportunities and Challenges for Economic Development in Indian Country: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 112th Cong. 52 (2011) (statement of Susan M. Woodrow, Community Development Advisor, Federal Reserve Bank of Minneapolis) (“[L]enders and others face confusing and uncertain rules, and thus risky

utilize traditional default remedies such as foreclosure and repossession on tribal lands also contributes to an industry-wide reluctance to finance Native American development needs.⁴⁸

C. Conflict of Law Problems

When banks provide loans to tribal borrowers, legal uncertainties often manifest due to conflicts between the laws governing the activities of federal or state chartered institutions and the sovereign legal status of tribal nations.⁴⁹ Issues of jurisdiction, sovereign immunity, and available rights and remedies outlined in financial agreements between banks and tribal borrowers have resulted in varying court opinions that confuse rather than clarify the legal landscape.⁵⁰ It is well defined, however, that contemporary banking law remains ill-equipped to deal with the sovereign status of Native American nations and their affiliated enterprises.

A threshold challenge in applying existing financial laws to tribal transactions is determining jurisdiction for disputes. The overlap of tribal, federal, and state laws creates uncertainty regarding which courts can exercise personal and subject matter jurisdiction when a tribal borrower has a dispute with a federal or state chartered bank.⁵¹ In *Cheyenne & Arapaho Tribes v. First Bank & Trust Co.*, the Tenth Circuit ruled that the tribal government borrowers waived their sovereign immunity from state court jurisdiction by signing contracts with First Bank & Trust Company. That court noted that while the Tribes' accounts were subject to Oklahoma law the state court lacked jurisdiction to resolve the dispute because it was a matter exclusively for tribal courts.⁵² The situation for banks is further complicated when a borrower quit-claims or otherwise transfers its interest in loan collateral to a tribal entity after the loan is made, leaving the bank to deal with an ambiguous legal scenario outside the scope of the parties' financing negotiations.⁵³

legal environments, that either deter them from doing business in Indian Country or raise the costs of doing business in tribal jurisdictions.”).

48. Jon Swann, *Native American Bank: Banking the Unbanked*, COMMUNITIES & BANKING, Summer 2008, at 20, http://www.bostonfed.org/commdev/c&b/2008/summer/swan_native_american_bank.pdf.

49. Small, *supra* note 15, at 494.

50. *Id.* at 488-89.

51. *Id.* at 488-93.

52. 560 F. App'x 699, 701 (10th Cir. 2014).

53. See *Burley v. OneWest Bank*, Civ. No. 2:14-1349 WBS EFB, 2014 WL 6835526 (E.D. Cal. Dec. 3, 2014).

Current banking laws have difficulty accounting for complex multi-party deals involving a lender, a tribe, and the U.S. government.⁵⁴ Banks are subject to uncertainty regarding whether the terms of a deal they make with a tribe are enforceable if the Bureau of Indian Affairs (BIA) or other federal agency also has an interest in the transaction. For example, a bank's right to apply the deposit of a depositor to offset that depositor's debt has been held to be limited once the bank has notice of a third party interest in the funds on deposit.⁵⁵ When a bank has knowledge that a third party, such as the BIA, has an interest in funds deposited in the account of a tribal borrower, the account must be considered special and the bank is prohibited from exercising any claimed right of set-off.⁵⁶ Banks are also precluded from setting off the indebtedness of a tribal enterprise against tribal cash deposits if the deposits are considered federal appropriations of revenue-sharing funds between the United States and the tribe.⁵⁷

In situations where a federal agency has an interest in a tribal transaction, banks often find themselves limited in their ability to obtain relief from the United States if the parties fail to fulfill contractual obligations. For example, in *Montana Bank of Circle, N.A. v. United States*, the Court of Federal Claims held: (1) the failure of the BIA and an Indian-chartered corporation to enter a formal lease agreement underlying a bank loan was not a breach of contract the bank could enforce; (2) the bank could not recover as a third-party beneficiary; and (3) the statute requiring approval of Secretary of the Interior and Commission of Indian Affairs for a contract cannot be interpreted as mandating compensation by the United States for losses suffered as a result of contracts with third parties that were approved.⁵⁸ Such uncertainties increase the risk profile for banks in considering loans to tribes, thereby reducing the approval rates for tribal loan applications.

Another uncertainty that shadows tribal lending is whether a particular loan agreement is even enforceable in the first place. Banks have suffered unexpected losses in tribal loan transactions when they subsequently discovered that their agreement with the tribe lacked required approval from the federal government. In *Wells Fargo Bank, N.A. v. Lake of the*

54. Small, *supra* note 15, at 494.

55. *Liberty Sav. Ass'n v. Sun Bank of Jacksonville*, 572 F.2d 591 (7th Cir. 1978).

56. *See United States ex rel. Crow Creek Sioux Tribe v. Tri-County Bank of Chamberlain, S.D.*, 415 F. Supp. 858 (D.S.D. 1976); *see also Crow Tribe of Indians v. Little Horn State Bank*, No. 94-35391, 1995 WL 299886 (9th Cir. May 17, 1995).

57. *Navajo Tribe v. Bank of New Mexico*, 556 F. Supp. 1, 4 (D.N.M. 1980).

58. 7 Cl. Ct. 601, 611, 614 (1985).

Torches Economic Development Corp., a trust indenture was held to be an unapproved “management contract,” and was thus void under the Indian Gaming Regulation Act.⁵⁹ Lack of clarity as to which transactions may be subject to tribe specific laws, such as the Indian Gaming Regulatory Act, repeatedly results in wasted legal efforts by banks and the dismissal of cases on jurisdictional grounds.⁶⁰

Moreover, the First Circuit illustrated in *Penobscot Indian Nation v. Key Bank of Maine* that tribes also experience uncertainty regarding federal approvals and protections for their deals and assets.⁶¹ The *Penobscot* court rejected the tribe’s assertion that a business loan for a fee simple land purchase was unenforceable due to a lack of approval of the agreement from the Secretary of the Interior under 25 U.S.C. § 81, holding that

reading § 81 to apply to Indian lands purchased in fee simple for business reasons contradicts the statute’s purpose and its drafters’ intentions. Even those courts that have propounded a broad reading of § 81’s “relative to [Indian] lands” component, moreover, have not found that this phrase refers to Indian fee lands.⁶²

It can also be difficult for banks to obtain viable security interests in tribe-specific collateral such as an individual’s right to receive future per capita payments, the issuance of which has been held to be a matter of exclusive discretion for the tribal government.⁶³

Banks and existing banking laws have chronically failed to recognize the specific socio-economic conditions and needs within tribal communities. Problematic federal laws struggle to allocate trust assets to Native Americans based on troubling racial categorizations such as “mixed-bloods” and “full-bloods.”⁶⁴ Lack of experience on the part of traditional banks in handling trust funds and other restricted assets on behalf of Native American children has long been a problem, resulting in allegations of

59. 677 F. Supp. 2d 1056, 1060-62 (W.D. Wis. 2010). The trust gave unapproved third parties the authority to set up working policy for a casino’s gaming operation in violation of federal statutes. *Id.*

60. *See id.* at 1061; *see also* Wells Fargo Bank v. Cabazon Band of Mission Indians, No. EDCV 12-01278 VAP, 2012 WL 4718879, (C.D. Cal. Oct. 3, 2012).

61. 112 F.3d 538 (1st Cir. 1997).

62. *Id.* at 552 (citing *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1214 (7th Cir. 1995); *United States ex rel. Shakopee v. Pan Am. Mgmt. Co.*, 616 F. Supp. 1200, 1217-18 (D. Minn. 1985)).

63. *DeCora v. DeCora (In re DeCora)*, 387 B.R. 230, 243 (Bankr. W.D. Wis. 2008).

64. *See Hackford v. First Sec. Bank of Utah, N.A.*, 521 F. Supp. 541 (D. Utah 1981).

mishandling of trust obligations and illegal activity that deprives families of much-needed financial assets.⁶⁵ Banks in some cases have been held to only nominal fiduciary standards in their dealings with tribal customers, being obligated only to avoid “material deception” in handling tribal transactions.⁶⁶

Federal courts have also been part of the problem by frequently demonstrating a distinct lack of understanding regarding the evolving nature of tribal economics and business activities. For example, transactions occurring off reservation are of increasing importance to tribal nations and businesses, yet in *Little Horn State Bank v. Crow Tribal Court* the District Court of Montana denied relief sought by tribal borrowers in a repossession case because “[t]his transaction occurred outside the exterior boundaries of the reservation and is not of tribal importance.”⁶⁷

Conflicts are presently emerging between state and Tribal laws regarding short-term lending products, which are often provided to borrowers through online portals accessible nationwide. These conflicts complicate the electronic lending landscape within the United States and produce legal actions that can require the participation of tribes in widespread jurisdictions.⁶⁸ Resolving the inherent legal conflicts between traditional lenders and tribal borrowers calls for a new legal regime that can adequately account for the sovereignty, legal status, and the unique economic conditions of Native American nations.

D. U.S. Government Trust Management Problems

An exacerbating factor that compounds the financial struggles of Native American nations is their inability to gain full access to capital and economic resources *they already own*. Dating back to the nineteenth century, the U.S. government has assumed a fiduciary trust responsibility on behalf of Native American nations and their members to manage cash, land, and natural resources worth tens of billions of dollars.⁶⁹ Among the many trust activities it undertakes, the U.S. government leases surface use and mineral rights on tribal property and is responsible for depositing the monetary proceeds from such activities into capital accounts the United

65. *United States v. Barnett*, 7 F. Supp. 573, 576 (N.D. Okla. 1934).

66. *Hackford*, 521 F. Supp. at 550.

67. 690 F. Supp. 919, 922 (D. Mont. 1988).

68. *See Otoe-Missouri Tribe of Indians v. N.Y. State Dep’t of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014) (detailing the issues involved in short-term lending operations conducted by tribally owned businesses).

69. *Office of Trust Services*, *supra* note 28.

States manages for tribes and individual Native Americans.⁷⁰ In theory, this trust concept was designed to protect tribes and their members from exploitation by outside parties, and to help the tribal asset base grow for the benefit of future generations. Unfortunately, the various federal agencies in charge of trust assets have chronically mismanaged them, and the amount of actual capital made available for beneficial use by tribal communities is only a small fraction of the true value of the assets—effectively turning those assets into “dead capital.”⁷¹

Prior to instituting the tribal “trust lands” policy (with its attendant problems noted above), the U.S. government undertook a radically different approach from the late nineteenth to mid-twentieth century. During this “termination era,” the federal government sought to end tribal ownership of land altogether through a policy that would create, in the words of President Theodore Roosevelt, “a mighty pulverizing engine to break up the tribal mass.”⁷² The U.S. government ordered the “termination” of ownership of lands by tribal governments, with fee simple ownership of those lands being allotted in shares to individual tribal members. Two primary results followed, both of which devastated the potential land-capital base of Native American nations:

- (1) unscrupulous real estate speculators acquired (legally or otherwise) vast tracts of the most desirable properties previously owned by tribal governments and paid negligible value to tribal members for their lands. This deprived tribal communities of both the short and long-term capital value of the land that the “termination” policy was ostensibly designed to provide; and
- (2) due to a failure of the U.S. government to provide an orderly process for trans-generational ownership succession of allotted tribal lands, the land that remained in tribal members’ ownership became increasingly fractionated over time. Today, many parcels of land within reservations have dozens (sometimes hundreds) of owners, each holding a small percentage of the property title. This fractionation of ownership makes beneficial

70. See Small, *supra* note 15, at 474-77.

71. Hernando de Soto, *Dead Capital and the Poor*, SAIS REV., Winter-Spring 2001, at 13, 17.

72. *Teddy Roosevelt*, INDIGENOUS KNOWLEDGE COMMONS. <http://indigenous.knowledge.org/discussion/native-conversations/big-question-1-does-tribalism-have-a-valid-role-in-modern-life/post/teddy-roosevelt/> (last visited Oct. 10, 2016) (excerpt from President Theodore Roosevelt’s State of the Union Address, Dec. 3, 1901).

economic use of the land almost impossible, as securing sale/lease authorizations from so many owners is often unattainable.

Beyond the misguided and destructive policies regarding tribal lands, the United States further deprived tribes of capital generated from their retained territory. During the twentieth century and continuing today, the Department of Interior has taken responsibility for stewarding the oil/mineral leases and other resource-based revenue on over 56 million acres of tribal land.⁷³ The federal trust relationship requires the United States to effectively manage the “acquisition, disposal, rights-of-way, leasing and sales” of tribal land resources, and assist tribes “in the management, development, and protection of trust land and natural resource assets.”⁷⁴ Unfortunately, gross mismanagement of these assets became the norm, depriving Native American communities of vast sums of desperately needed capital.

The most prominent example of trust mismanagement leading to the destruction of Native capital is reflected in the recent “Cobell Settlement.”⁷⁵ While serving as Treasurer of the Blackfeet Nation, Ms. Eloise Cobell discovered irregularities in the federal management records of funds held in trust by the United States for the benefit of hundreds of thousands of Native Americans. In many instances, Ms. Cobell discovered no records at all. Working with the Intertribal Monitoring Association, she attempted in the 1980s and 1990s to convince the responsible federal government agencies of the need for procedural reform and an accounting of the trust funds. When the reform effort failed to achieve progress, Ms. Cobell initiated a class action lawsuit in federal court to force the administrative reform and compel an accounting from the U.S. government of the trust funds belonging to individual Native Americans.⁷⁶

After several trials over thirteen years, the federal agencies responsible for managing trust funds for Native Americans effectively admitted they could not produce a reasonable accounting of their actions.⁷⁷ It was clear

73. *Q & A: Department of the Interior's Final Leasing Reform*, INDIANAFFAIRS.GOV, <http://www.bia.gov/cs/groups/public/documents/text/idc-037327.pdf> (last visited Oct. 7, 2016).

74. *Office of Trust Services*, *supra* note 28.

75. *See* Small, *supra* note 15, at 474-77.

76. Complaint at 4, *Cobell v. Babbitt*, No. 1:96CV01285 (D.D.C. 1996), http://www.indiantrust.com/docs/1996.06.10_Cobell_Complaint.pdf.

77. *See* Findings of Fact and Conclusions of Law, *Cobell v. Kempthorne*, Civial Action No. 96-1285 (JR) (Jan. 30, 2008), http://www.indiantrust.com/docs/oct_trial.pdf

from the evidence that for decades, billions of dollars in revenue collected by the government—money that was gained from the lease of tribal lands that should have gone into trust for native people—had simply disappeared.⁷⁸ The exact amount of money that was unaccounted for has never been determined, due primarily to the government's failure to keep even basic records of the business transactions occurring on tribal lands. Ultimately, the Cobell trust litigation was resolved in a settlement whereby the U.S. government pledged a total of \$4.3 billion in restitution and supporting programs for tribal communities—but the average settlement payment check received by individual Native Americans was only \$1,000.⁷⁹

The inability of Native American nations to unlock and utilize capital that should be available to them has severely limited their development progress. The combination of these structural, commercial, and inter-governmental factors has brought the lack of available capital for tribal communities to a point of socio-economic crisis. In response, in 2015 the United States Senate conducted hearings to investigate the problems and seek pathways toward solutions.

III. United States Senate Oversight Hearing on Access to Capital in Indian Country

On June 17, 2015, the United States Senate conducted a public inquiry entitled the "Oversight Hearing on Accessing Capital in Indian Country." The purpose of the hearing was to explore means for tribes "to improve access to capital and their experiences working with Federal partners" and "help Indian communities to prosper and to enjoy healthier lives."⁸⁰ The Oversight Hearing was chaired by Senator John Barrasso (R-Wyoming), Chairman of the Senate Committee on Indian Affairs, and participants included Senator Michael Crapo (R-Idaho), Senator Al Franken (D-Minnesota), Senator Jon Tester (D-Montana), Alejandra Castillo (National Director, Minority Business Development Agency), Derek Watchman (Chair, National Center for American Indian Enterprise Development), Ross Hill (CEO, Bank2), and Dante Desiderio (Executive Director, Native American Finance Officers Association).⁸¹

78. *Id.*

79. GUEDEL, *supra*, at page 22.

80. *Accessing Capital in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 1 (2015) [hereinafter *Hearing: Accessing Capital*], <http://www.indian.senate.gov/sites/default/files/documents/CHRG-114shrg97306.pdf> (opening statement of Sen. John Barrasso, Chairman, S. Comm. on Indian Affairs).

81. *Id.* at III.

The Oversight Hearing produced a number of key findings regarding the current state of capital access for Native American nations:

- Economic development and the capital necessary for that development are significant needs in Native communities. This development relies on capital to start, support, and maintain businesses of all sizes;
- Native and tribal-owned businesses face unique challenges beyond those that non-native businesses in general face. For example, many tribes are located in remote areas, far away from transportation, distribution, or communication systems suitable for sustainable commerce;
- Individual Native Americans do not own as many small businesses compared to other demographic groups. For the most part, they also do not receive business or financial assistance from tribes. Native-owned businesses, however, tend to employ more people than those operated by small business owners in other demographic categories, thereby offering a greater potential impact on employment levels if adequately funded for growth; and
- Cost-effective capital for Native American nations is lacking in both access and effectiveness in meeting the intended purposes, i.e., the limitations on the use of capital imposed by lenders render tribes unable to deploy it where it is needed most.⁸²

The testimony of the Senators and witnesses participating in the Oversight Hearing provided further insight into the specific conditions and challenges Native American nations and their members confront in seeking capital to advance their development programs. The clear consensus from the Oversight Hearing is that a substantial and urgent need for increased access to capital exists for tribal communities, as the mainstream financial institutions and federal government programs have chronically proven themselves inadequate in providing funding opportunities for economic and community development. The findings of the U.S. Senate mandate a new and more effective institutional and government-to-government partnering approach for increasing the capital available to Native American nations.

82. *Id.* at 1-2.

IV. A Sovereign Solution – The Tribally Chartered Bank

In order to overcome their chronic lack of access to capital, Native American nations cannot hope to rely on improvements within the existing financial systems. Indeed, the structural format and economic priorities of those systems virtually ensure the continuation of the status quo, where tribal communities are overlooked, underserved, and struggle to obtain negligible amounts of capital to advance their development. Native American nations must therefore disrupt this inertia by introducing a new dynamic element into the landscape of financial institutions.

To that end, a new Tribally Chartered Bank system (TCB) could provide an innovative solution to the problem of insufficient capital for tribal development within for tribal communities.⁸³ This Section describes the legal basis, organizational structure, and potential benefits of the TCB for Native American nations, their partners, and the tribal citizens they represent.

A. Concept Plan and Benefits

The TCB is a proposed banking system—rather than a new bank under the existing system—that would be chartered under tribal law and regulated by a tribally appointed governing body. Organized under the sovereign authority of one or more tribal governments and free from the short-term focus of publicly listed banks, the TCB would offer a means for tribes to secure the “patient capital” required for long-term economic and infrastructure development. The potential benefits of the TCB for Native American communities are substantial and far-reaching, including:

- direct capital investment into reservation businesses, housing, and infrastructure;

83. The TCB project concept is developing under the leadership of economic advisor J.D. Colbert, whose past positions include serving as President of Native American Bank, N.A. and as Bank Examiner for the Federal Reserve Bank of Boston. See David Melmer, *A Conversation with Chickasaw/Creek J.D. Colbert of Native American Bank*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 29, 2006), <http://indiancountrytodaymedianetwork.com/2006/03/29/conversation-chickasawcreek-jd-colbert-native-american-bank-106156>. The TCB structure and operational approach described in this article is founded upon Colbert’s presentation “Establishing a Sovereign Financial System” at the University of Washington Jackson School of International Studies Tribal Development Colloquium, held on May 28-29, 2015. See Foster Pepper PLLC Videos, *Native American Colloquium: Establishing a Sovereign Financial System*, YOUTUBE (June 8, 2015), https://www.youtube.com/watch?v=ad5q2Zs_csM&feature=youtu.be (address by J.D. Colbert).

- a long-term, “patient capital” approach to access and ROI on capital investments, designed specifically for the Native American paradigm;
- lending standards based on tribal needs and conditions, not bank shareholder demands;
- facilitation and leveraging of existing federal loan guarantee programs for tribal communities;
- opportunities to become the primary banking institution for emerging businesses such as legal cannabis and online gaming; and
- embracing a culture of creativity and innovation in financial products, processes and technology by the TCB and the tribal bank regulatory body.

The TCB’s organizational structure and operational activities can be designed for mutually beneficial integration into existing American/global financial networks through:

- compacting for cooperative oversight with U.S. agencies, providing transparency and legitimacy;
- utilizing existing and accepted financial infrastructure such as SWIFT and NACHA; and
- deploying state-of-the-art FinTech to enhance efficiency and reliability for transactions.

The TCB would be an institutional means for Native American nations to address and improve the chronic conditions of poverty, unemployment, and underdevelopment within their communities. By providing support for the formation and operations of the TCB, the U.S. government would also provide substantive redress for its historical policies that have directly resulted in the deleterious economic conditions experienced by tribes. In contrast with traditional banks that are constrained by the legal strictures of federal or state charters, the TCB would embody the beneficial flexibility of tribal laws and sovereignty, and provide a powerful instrument to enhance Native American self-determination. Banks chartered as a TCB would also be able to organize as tribal 17 corporations to limit their tax exposure and gain a competitive financial advantage.⁸⁴

84. GUEDEL, *supra* note 22, at 99-104.

Banks chartered under tribal law would be imbued with the sovereign powers and immunities of tribal governments, allowing them to participate in emerging economic opportunities such as online gaming and cannabis retailing that federal law currently either explicitly or effectively prohibits for federal and state chartered banks.⁸⁵ Businesses conducting these activities would generate cash that is presently “unbankable,” as federal regulations either prohibit or otherwise dissuade traditional commercial banks from accepting deposits from these forms of commerce.⁸⁶ A TCB chartered under sovereign tribal law, however, could become the primary depository agency for these funds, in a manner consistent with the United States Department of Justice mandate that tribal commerce related to such activities “contain robust controls and procedures.”⁸⁷

85. See David Kelly, *Limited by U.S. Banking Rules, Pot Businesses Rely on Bags of Cash and Armed Guards*, L.A. TIMES (Dec. 19, 2015), <http://www.latimes.com/nation/la-na-pot-banking-20151219-story.html>.

“Banks face a number of risks if they choose to serve the industry, up to and including closure of their institutions,” said Amanda Averch, Director of Communications for the Colorado Bankers Assn. “Regulators can impose civil money penalties, cease-and-desist orders, fines and can ban bankers from their careers for life.”

Id.

86. *Online Gambling: Don't Roll the Dice*, ARCHIVES.FBI.GOV (June 6, 2007), https://archives.fbi.gov/archives/news/stories/2007/june/gambling_060607.

“You can go to Vegas. You can go to Atlantic City. You can go to a racetrack. You can go to those places and gamble legally. But don't do it online. It's against the law,” says Leslie Bryant, head of our Cyber Crime Fraud unit at FBI Headquarters.

.....

We've also had success against companies supporting the money flows behind virtual gambling. In January, for example, two Canadians were charged with operating an Internet payment services company that transferred billions of dollars in illegal gambling proceeds between U.S. citizens and the owners of online gambling sites outside the country.

In 2003, another Internet financial services company paid \$10 million in a civil agreement to settle allegations that it aided illegal offshore and online gambling agreements. The U.S. government has also settled several cases with online businesses that have accepted money to market virtual gambling operations.

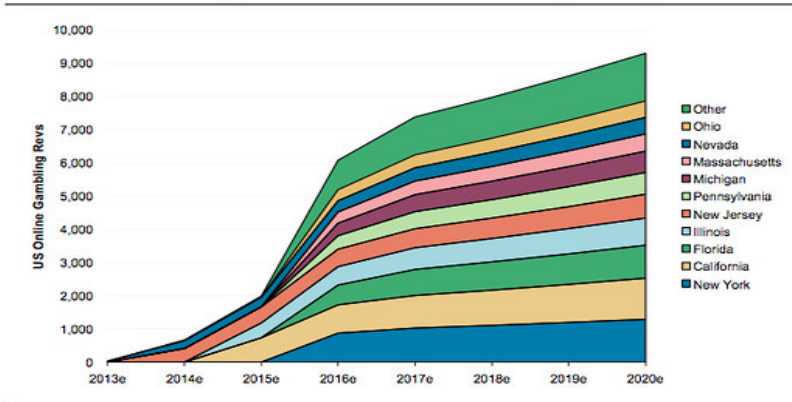
Id.

87. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

Two graphs illustrate the scale of the current and projected revenue from online gaming activity and legal cannabis sales and the corresponding economic opportunity for the TCB to service these revenue streams:

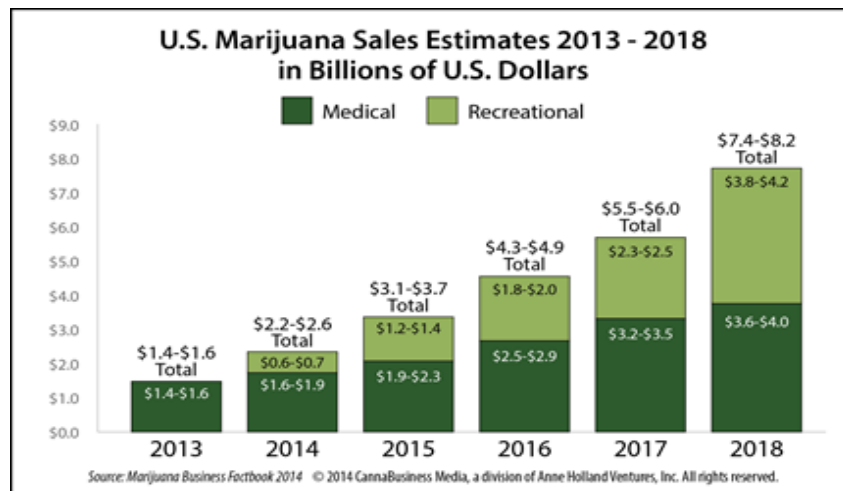
Table 2

Online Gaming Revenue Base Case \$9B by 2020



Source: H2 Gambling Capital, Morgan Stanley Research

Table 3



These two activities are generating billions of dollars of revenue each year - almost none of which is being put to constructive use in the existing U.S. banking system. With federal and state chartered banks unable or unwilling to accept deposits from these economic activities, the billions of

dollars in annual revenue generated from the activities instead circulates untraceably within the “cash economy,” an unregulated realm of finance that presents public safety challenges and is highly inconvenient for legitimate commercial actors.⁸⁸

Substantial portions of gaming and cannabis funds are also being channeled to off-shore accounts or money-laundering schemes, creating a huge problem for U.S. law enforcement.⁸⁹ The United States Department of Justice is now specifically seeking to partner with tribal governments in “[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.”⁹⁰ The tribal governments organizing the TCB could help resolve these problems by entering into a compact for cooperative oversight with U.S. financial agencies for depository receipts and reporting, thereby taking these billions of dollars out of the hands of foreign and/or unlawful entities and placing them into a legitimate and regulated “on-shore” bank.

The direct and potentially gigantic financial benefit for Native American nations would be the TCB’s ability to generate fee revenue from the financial services it provides to these areas of commerce and to leverage the cash deposits to provide the source capital for financing development in tribal communities.

B. Strategic Approach

The purpose of the TCB would not be to compete with existing banks and replicate their standard activities, which have obviously fallen short in funding Native American development. Instead, the TCB should focus on filling the void commercial banks have created through their lack of service to tribal communities, and utilize electronic technology in lieu of costly (and commercially unnecessary) physical infrastructure for facilitating capital transactions.

88. See Editorial, *The Perils of Pot’s Cash Economy*, L.A. TIMES (Oct. 19, 2016, 5:00 A.M.), <http://www.latimes.com/opinion/editorials/la-ed-prop64-banking-20161019-snap-story.html>.

89. James Jarman, *Marijuana Banking, Money Laundering, and the Government*, KRDO.COM (July 15, 2016, 5:48 AM MDT), <http://www.krdo.com/news/local-news/marijuana-banking-money-laundering-and-the-government-/35606891>

90. Memorandum from Monty Wilkinson, Dir., Exec. Office for U.S. Attorneys, U.S. Dep’t of Justice, to all U.S. Attorneys, First Assistant U.S. Attorneys, Criminal Chiefs, Appellate Chiefs, OCDEF Coordinators, Tribal Liaisons, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.

To that end, the TCB from conception should adopt three strategic priorities for improving tribal access to capital:

- (1) create a culture of financial innovation, for both the scope of services to tribal communities and the delivery methods for those services;
- (2) provide banking services to under/unbanked areas of lawful commerce, including traditionally overlooked customers in tribal communities and new emerging ventures (e.g., online gaming & legal cannabis); and
- (3) emphasize “real time” electronic payments and settlements, employing affordable and readily upgradeable internet-based technologies.

Building a network of traditional brick-and-mortar depository banks accessible to all 566 federally recognized tribes would be too expensive and take too long to have a real impact within a relevant time period. Instead, the TCB can utilize electronic payment technology to leap forward into next-generation banking activities, and use internet-based access to connect with the multitude of Native American nations. In lieu of expensive multi-state marketing campaigns, the TCB can partner with national tribal organizations such as the National Congress of American Indians and the Native American Finance Officers Association to help inform tribal communities of the TCB’s programs.

For tribes whose economic prospects have been limited by geographic isolation, the ability to participate in the global economy through electronic financial transactions via a tribally chartered bank presents the opportunity to engage with potentially limitless customers who need never set foot on the reservation. By combining the new legal regime of a tribal banking charter with existing technology and inherent tribal sovereignty, Native American nations can obtain capital on their own terms for investing in self-directed economic development. The initial step in the institutional formation of the TCB is for the sponsoring tribe(s) to adopt a Tribal Banking Code and create a Tribal Banking Commission.

C. The Tribal Banking Code, Tribal Banking Commission, and TCBs

The foundational legal element for the structure and operations of the TCB will be a new Tribal Banking Code—a set of laws that authorize the TCB’s creation and govern its activities. The sponsoring tribe(s) for the TCB would undertake the formation of the Tribal Banking Code as a

sovereign political action, ratified in accordance with the required procedures in the applicable tribal Constitution(s). Although the Tribal Banking Code could be established as an independent body of sovereign tribal law, the existing banking codes for federal/state chartered banks should be studied for best practices and guidance. These banking codes would help to smooth the process for acceptance of the TCB into global financial networks.⁹¹ Key elements and priorities for an effective Tribal Banking Code include:

- threshold standards for capitalization and organization of TCB operations;
- transparency, conflict of interest, and insider-dealing regulations;
- consumer protection and public disclosure requirements;
- compliance standards for protecting customer privacy and account security ;
- rigorous but efficient bank examination protocols; and
- regular evaluations and CAMELS-type ratings of all TCB institutions.⁹²

Although the TBC would follow tribal law, tribal legislatures should consult with U.S. banking regulators and incorporate appropriate provisions for compliance with major U.S. federal banking laws into the Tribal Banking Code. Of particular importance will be compliance with the Anti-Money Laundering Act, the Bank Secrecy Act, the PATRIOT Act, and Know Your Customer rules.⁹³ This approach will acknowledge the practical reality of the dominant status of U.S. regulations in the global financial system, increase opportunities to obtain beneficial technical assistance from federal agencies, and help accelerate the implementation and acceptance of the TCB into global payment and credit systems.

91. Information regarding structural models and baseline requirements for new banking ventures is discussed in detail in OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL: CHARTERS (Sept. 2016), <http://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/charters.pdf>.

92. The FDIC's Uniform Financial Institution Rating System applicable to U.S.-chartered banks utilizes financial assessment categories known by the acronym "CAMELS" – Capital, Asset quality, Management, Earnings, Liquidity, and Sensitivity to Risk. *See* Uniform Financial Institutions Rating System, 62 Fed. Reg. 752 (Jan. 6, 1997), <https://www.fdic.gov/regulations/laws/federal/UFIR.pdf>.

93. FOREST E. MYERS, *BASICS FOR BANK DIRECTORS* 5-19 (4th ed. 2005).

The Tribal Banking Code could create the structural framework for the TCB system through the establishment of a Tribal Banking Commission that will be empowered with supervisory and regulatory authority over the banking entities chartered in accordance with the Tribal Banking Code. The Tribal Banking Commission will be an independent regulatory body of the tribal nation(s) sponsoring the TCB system; it will be imbued with the sovereign powers and immunities of the tribal government(s) and will have responsibility for the creation, regulation, and regular examination of TCBs. The initial Commission could be established with a Governing Board consisting of approximately five to seven members, appointed pursuant to the tribe's internal processes for board appointments and with the experience qualifications specified by the sponsoring tribe(s).⁹⁴ Ideal Board members for the Tribal Banking Commission will have significant prior experience with commercial banking, banking law, and/or service with a federal or state bank regulatory agency.

The Tribal Banking Commission could also appoint a Bank Commissioner—the Tribal Banking Commission's day-to-day operations manager and primary public figure. An early priority for the Tribal Banking Commission and its Commissioner should be the pursuit of a Cooperative Oversight Agreement (Compact?) with U.S. banking regulators in order to coordinate on a co-regulation regime that will strengthen the legitimacy of the TCB system by providing access to federal investigative and enforcement resources for legal compliance issues.⁹⁵ In addition to its institutional duties, the Tribal Banking Commission should envision and foster a culture of innovation and creativity in the financial products, processes, and service delivery of the banks it charters.

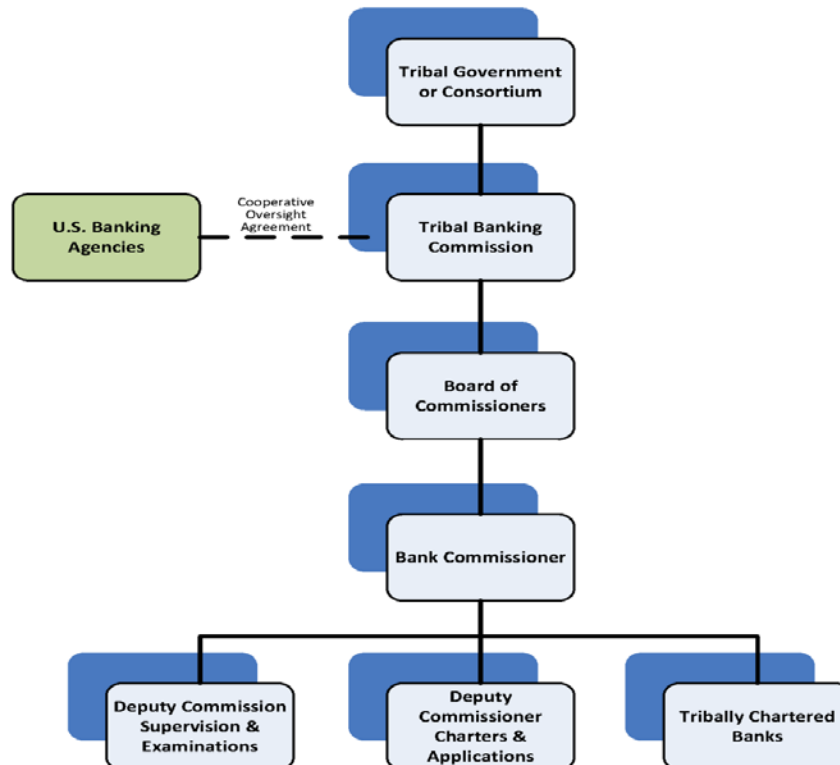
94. The qualifications and integrity of the members of the Governing Board are a crucial element for the successful launch and management of the TCB. The process for vetting potential appointees to the Governing Board should prioritize review of each candidate's experience in banking operations, regulatory compliance, and detailed understanding of both applicable Tribal and federal laws regarding bank chartering.

95. Co-regulation is a standard aspect of U.S. and global financial systems, and is gaining increased prominence due to the proliferation of domestic and international financial vehicles and regulations. *See, e.g.,* Sophie Baker & Anish Puaar, *Market Infrastructure Firms Urged to Take a 'Co-regulation' Approach*, FINANCIAL NEWS (Sept. 18, 2013), <http://www.efinancialnews.com/story/2013-09-18/sibos-2013-market-infrastructure-coregulation> ("Because the financial industry is so busy following one regulation after the other, it has no time, money or resources to go into market requirements. . . . We need to go for co-regulation, where the regulator and the financial industry sit together and define the rules and regulations.") (quoting Michael Steinbach, chief executive and chairman of the board of directors at the Dutch payment processing firm Equens SE).

The Tribal Banking Commission should be organized to be financially self-supporting and self-sustaining, with revenue derived through fees and assessments levied upon the banks it charters. This will be accomplished within the Commission's primary activity: issuing bank charters to Tribally Chartered Banks. The TCBs will be the entities that directly manage the capital within the TCB system, provide the public interface for the system, facilitate payments and deposits, and act as the vehicle for providing access to capital for development in tribal communities.

The initial TCBs will be organized as part of the overall creation of the TCB system, and will connect directly with the sponsoring tribe(s). The Tribal Banking Commission may also charter TCBs that are formed and owned by other federally recognized Indian tribes. Any TCBs formed by other tribes and chartered by the Tribal Banking Commission shall be subject to the supervisory, regulatory, and examination authority of the Commission.

Table 4. TCB Governance and Regulatory Structure



The primary mission of the TCB system is to facilitate increased access to capital for tribal communities. An integral part of the program for achieving this mission is facilitating *existing* capital access programs. As noted during the U.S. Senate Oversight Hearing, there are numerous federal programs that offer loans, loan guarantees, and other financing vehicles for Native American development projects on favorable terms.⁹⁶

In addition to the BIA, funding programs specifically designed for Native American nations are offered by the U.S. Department of Agriculture, the Department of Energy, the Department of Housing and Urban Development, the Economic Development Agency, the Department of Veterans Affairs, and many others.⁹⁷ These programs are, however, chronically underutilized and have never come close to achieving their full potential. Two primary reasons for this failing are: (1) a lack of general knowledge about the programs within the commercial lending community and (2) a lack of experience, and/or will, of commercial lenders in fulfilling the federal requirements and procedures to access the programs.⁹⁸ The TCB will be uniquely placed to fill this gap. It should emphasize communication and partnering with federal agencies that provide financing support for tribal development, and in the process become the one-stop-shop where tribal communities can learn about and participate in the various funding programs the U.S. government offers.

In order to efficiently achieve the goal of facilitating increased access to capital for Native American nations, TCBs must adopt a “cutting edge” and “lean-and-mean” approach to the scope of services they provide. Investing capital to create traditional brick-and-mortar banking infrastructure will reduce the amount of capital TCBs can invest back into tribal communities, thereby undermining the driving purpose for the program. To alleviate that issue, TCBs could initially be conceived as limited purpose banks focusing on advanced electronic commerce, including serving as a preferred platform for electronic payments and fund transfers for commercial and individual customers.

D. Twenty-first Century E-Commerce

The rapidly changing nature of the ways people handle money in every day transactions presents a prime opportunity for the TCB concept. Instead

96. *Hearing: Accessing Capital*, *supra* note 80.

97. *Federal Loan Programs for Economic and Community Development Throughout Indian Country and Alaska*, BIA.GOV (Aug. 2012), <http://www.bia.gov/cs/groups/xieed/documents/document/idc-022680.pdf>.

98. *Hearing: Accessing Capital*, *supra* note 80.

of withdrawing cash from the bank before making subsequent purchases, people now simply place a card, phone, or watch next to an electronic terminal at the shop checkout counter. Increasingly, individuals do not even leave home to make such purchases. Instead, they use web portals such as Amazon to buy everything from gifts to groceries; even high-capital transactions such as mortgage loans are often completed entirely via electronic communication.⁹⁹ By focusing on the high technology/low infrastructure model of commerce, the TCB can participate efficiently in the current and emerging electronic capital transactions that will be dominant throughout the twenty-first century.

The TCB's initial primary commercial activities should focus on real-time electronic fund transfers, payments, and receipts. Utilizing technologies to facilitate instantaneous electronic payments and transfers of funds could enable the TCB to quickly integrate into fee-generating commerce streams including debit card networks; VISA, MasterCard, and American Express systems; the use of e-mail/e-transfer to make instant payments; membership in the NACHA electronic payments association, the Federal Reserve wire system, and the Depository Trust Company; and retail payment networks such as Apple Pay and PayPal.

Focusing on electronic capital transfers will also position TCBs for participation in the emerging e-currency commerce based on block chain platforms such as Bitcoin.¹⁰⁰ Focusing on e-commerce for fee generation, rather than the traditional banking approach that bases revenue on interest charges of loans will be advantageous to the operations and growth of TCBs in numerous ways, including:

- a reduced credit risk profile for bank assets needed to sustain operations;
- lower reserve capital requirements related to operational assets; and
- the ability to maintain smaller Allowance for Loan and Lease Losses ("ALLL") than peer institutions.¹⁰¹

99. The author recently refinanced a home mortgage without ever setting foot in a bank or escrow office, and with all communication, document execution, and payment transfers accomplished via the internet.

100. Lynnley Browning, *Oglala Sioux Hope Bitcoin Alternative, Mazacoin, Will Change Economic Woes*, NEWSWEEK.COM (Aug. 14, 2014, 2:47 PM), <http://www.newsweek.com/2014/08/22/tribe-brought-you-custers-last-stand-sitting-bulls-bitcoin-264440.html>.

101. The ALLL is a calculated reserve that financial institutions establish in relation to

The emphasis on electronic fee-for-service to produce topline revenue also reflects the specific realities of the TCB's mission to serve the needs of Native American nations. The "patient capital" TCBs will provide to finance tribal development projects will need to be structured on long-term payback timeframes and below-market interest rates. Thus, the fee revenue from e-commerce will be the TCBs' primary profit engine, allowing the TCBs to provide tribal development financing on lower-profit terms that traditional banks refuse to offer.

E. Innovation and FinTech Partnering

Serving as the foundation for advanced commerce requires the TCB to incorporate forward-looking technology in all of its operations. The key to successfully implementing the vision of creating a nimble and efficient electronic commerce enterprise is for TCBs to partner with financial technology firms ("FinTech") that are rapidly and constantly innovating financial products. FinTech companies are currently offering systems designed to move money rapidly across a variety of mobile platforms; the companies also focus their business models on connecting their technology with global financial systems and the attendant payment and settlement regimes.¹⁰² These technologies facilitate rapidly growing consumer demand for same-day payments and settlements, mobile banking and mobile payments, seamless integration of technological platform, and timely financial transaction reporting and tracking.

Because only the very largest banking institutions can afford to develop their own proprietary IT platforms and functionality, the majority of financial institutions rely wholly upon third party FinTech providers for their core IT processing and transaction platforms.¹⁰³ With little to no

the estimated credit risk within the institution's assets. This credit risk represents the charge-offs that will most likely be realized against an institution's operating income as of the financial statement end date. See Office of the Comptroller of the Currency, Interagency Policy Statement on the Allowance for Loan and Lease Losses at 2 (OCC Bulletin 2006-47, Dec. 13, 2006), <https://www.occ.gov/news-issuances/bulletins/2006/bulletin-2006-47a.pdf>.

102. Maria Aspan, *Why Fintech Is One of the Most Promising Industries of 2015*, INC. MAG. (Sept. 2015), <http://www.inc.com/magazine/201509/maria-aspan/2015-inc5000-fintech-finally-lifts-off.html>.

103. *Id.* The market for Core IT processing and electronic platform systems for banking is one dominated by four FinTech companies: FIS, Fiserv, D+H and Jack Henry. Penny Crosman, *Can Big Four Core Banking Vendors Oligopoly Be Broken?*, AM. BANKER (Oct. 7, 2013), 12:45 PM EDT, http://www.americanbanker.com/issues/178_194/can-big-four-core-banking-vendors-oligopoly-be-broken-1062654-1.html. Beyond the core systems, "middleware" systems offered by FinTech firms such as Yantech, Moven, Stripe, Square,

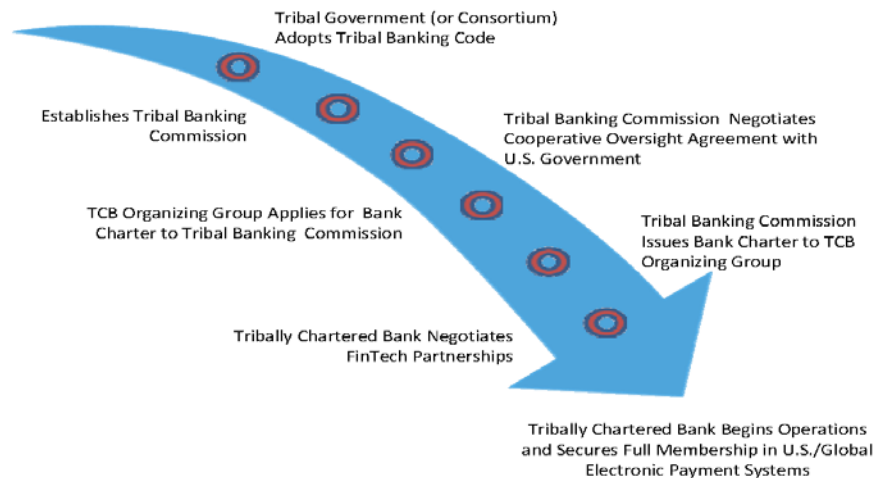
control over the core-processing platform for their financial transactions and standard services, the average bank has a difficult time obtaining a competitive advantage in the market because it lacks the ability to positively differentiate their products and services. The TCB's inherent competitive advantage of tribal sovereignty, however, presents an attractive new opportunity for FinTech companies to become market leaders—particularly by providing electronic systems to facilitate the previously discussed “unbankable” commerce the TCB is intended to capture.

The chance to become the leading provider in these emerging industries is a lucrative proposition for FinTech providers, and the TCB could leverage this unique opportunity to create beneficial long-term partnerships with FinTech firms and obtain cutting-edge technology at an affordable price.

F. TCB Organizational and Chartering Process

The creation of a paradigm-shifting financial system like the TCB requires a methodical approach for initiating and performance-testing each aspect of the organization structure and operational activities as they come into being. The overall process for organizing the TCB system from conception to operational status is illustrated in the following flowchart:

Table 5. TCB Organizational and Chartering Process



Inc., iZettle AB, [BrainTree, Balanced Payments, and Standard Treasury provide financial institutions with APIs (application program interface) to develop end-user applications to facilitate capital transfers, mobile banking and payments, e-commerce, and personal financial money management.

The timeline for initiation and completion of the required milestones would depend upon and be impacted by numerous factors such as the tribe's legislative process and the timeframe for negotiating a compact for cooperative oversight with the U.S. government, but the successful completion of a given stage should increase the overall project momentum, e.g. creating a sound Tribal Banking Code would help attract experts to serve on the Tribal Banking Commission. The crucial first steps of establishing the legal codes and regulatory structure for the TCB system could be undertaken immediately and solely by the sponsoring tribe(s), thereby enabling the process to move forward without reliance upon outside parties or waiting for an alignment of favorable circumstances.

G. SWOT Analysis for the Tribally Chartered Bank

The TCB system is a new and ambitious enterprise, and should be rigorously scrutinized at the conceptual and operational level to determine its viability. A SWOT analysis provides a structured planning method to evaluate the strengths, weaknesses, opportunities and threats involved in a project or in a business venture. For the Tribally Chartered Bank project, the SWOT analysis can be structured using the following categories:

Strengths: characteristics of the TCB that give it an advantage over others;

Weaknesses: characteristics that place the TCB at a disadvantage relative to others;

Opportunities: elements in the environment that the TCB could exploit to its advantage;

Threats: elements in the environment that could cause trouble for the TCB.

SWOT analysis for the TCB reveals numerous dynamic factors in each category:

Strengths

- tribal sovereignty provides legal basis for competitive market advantages;
- self-regulation allows TCBs to set credit standards appropriate for tribal communities;
- tax advantages of tribal status enhance positive revenue margins;
- ability to pursue presently unbanked revenue streams;
- immediate appeal for participation by 566 Native American nations;
- electronic service platform provides agility to predict/serve new commerce trends;
- avoiding brick-and-mortar branch model allows for low Capex costs;
- fee-for-service revenue reduces reliance upon deposit and loan generation;
- shortened time to profitability because of lower overhead costs; and
- ability to provide “patient capital” to tribes through customized financing terms.

Weaknesses

- unprecedented endeavor with no equivalent pathway model;
- must have a financially strong and fully committed Sponsoring Tribe;
- investments from other tribes may not materialize.
- concept perception may be tainted by prior history of “off-shore” banks;
- requires FinTech partnering to implement technology platforms;
- fear of tribal sovereignty/immunity on the part of potential non-tribal partners;
- tribal deposits may require FDIC insurance, adding to administrative burden;
- tribes may be reluctant to work together due to competing economic interests; and
- likely requires co-regulation regime with U.S. government for legitimacy.

Opportunities

- service to increasing numbers of Native-owned businesses;
- ability to bank emerging commerce such as legal cannabis and online gaming;
- become bank of choice for 200+ tribal casinos.
- establish TCB as one-stop-shop for accessing federal loan guarantee programs;
- “corner the market” for development financing to Native American nations;
- partnerships with innovative FinTech companies readily available;
- perfect model for banking emerging block chain currencies such as Bitcoin;
- pro-business regulation from Tribal Banking Commission to entice new customers;
- some existing banks may switch their charter to the Tribal Banking Commission; and
- will be high-profile endeavor that can generate significant free positive publicity.

Threats

- effort may be viewed as an attempt to skirt U.S. banking laws, rules and regulations;
- failure to create a legally viable and operationally sound Tribal Banking Code;
- inability to appoint expert personnel to Tribal Banking Commission;
- inability to hire necessary tech/marketing experts to implement TCB services;
- inability to obtain FDIC insurance and/or co-regulation agreement;
- inability to obtain Federal Reserve Bank Master Account Number;
- U.S. banking community may react negatively and attack the effort;
- U.S. government refuses to co-regulate legal cannabis/online gaming accounts; and
- U.S./global banking laws may conflict with TCB code provisions.

Like any new concept and effort, the idea of the TCB system may encounter resistance and face rejection for its unprecedented nature. All systems and organizations are resistant to change. This is especially true in

banking and with respect to bank regulation and supervision. Given the new and unique nature of the TCB concept, detailed examination of the “Threats” and inherent challenges of the program is warranted in order to ensure a realistic assessment of the potential for success.

G. Challenges of the Tribally Chartered Bank

Personnel/Governance. One major practical challenge to establishing a functional Tribal Banking Commission and TCB is attracting experienced, successful banking professionals with impeccable banking credentials. Such professionals are a *sine qua non* to the bank regulatory community granting de facto accreditation to the Tribal Banking Commission and the TCB. Many successful and established banking professionals of high reputational regard may be reluctant to be associated with the concept for fear that it may be, or will become, viewed as a rogue or outside-the-law operation.

Amending the U.S. “dual banking system” to include Tribally Chartered Banks. From its very foundation, the United States has embraced a “dual banking system,” i.e., heretofore only banks chartered by either a state banking department or a federal bank regulatory body have existed. The concept of a TCB will thus upset and disrupt a static banking system with a history of over 230 years. The inertia of the extant banking system in the United States is deeply engrained and highly resistant to change. The advent of TCBs will necessitate far-reaching and very broad changes and adjustments of state and federal banking laws, rules, and regulations. Such adjustments will likely not come easily or quickly, and will require TCB stakeholders to engage in an effective campaign with officials of the federal government.

Weakening of Anti-Money Laundering Efforts. Another practical challenge facing the TCB is the perception that such banks could weaken existing anti-money laundering efforts across the United States and worldwide banking systems. For several decades there have been increasing intergovernmental efforts to combat illegal activities by taking steps to prevent or inhibit the use of the banking systems to move money for unlawful purposes. The terrorist attacks on September 11, 2001 directly led to the passage of the PATRIOT Act in the United States and to similar legislation worldwide. These laws put additional emphasis upon anti-money laundering efforts to combat terrorism financing.¹⁰⁴ The TCB chartered

104. See *Anti-Money Laundering/Combating the Financing of Terrorism – Topics*, INT’L MONETARY FUND, <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm> (last visited Jan. 18, 2017).

bank may suffer from significant reputational risk as a potential back door to escape such heightened bank regulatory supervision, and will need to clearly demonstrate its transparency and legitimacy as a new partner in curbing unlawful activity.

Reputational Risks. Yet another practical obstacle is the reputational risk of the TCB. The present reality and history of tribally owned banks reflects a very checkered past. On the surface, this history reflects poorly on the tribes involved with such efforts and thus could negatively affect public perceptions of any tribal efforts to establish a TCB. This public perception is primed by the notion of the reservation-based “off-shore bank.”¹⁰⁵ This idea has been widely promoted over the years as a way to offer the traditional Swiss-style secrecy and numbered accounts on a United States domestic basis through Indian tribes. Those involved in such regrettable efforts were members of the Apache Tribe of Oklahoma and the Delaware Nation of Oklahoma. Both tribes launched efforts in the 1990s to create banks imbued with tribal sovereignty, and both efforts ended in ignominy, prison sentences for some, and very bad public relations for the tribes.¹⁰⁶ These and similar efforts have to some extent poisoned the waters for tribes who wish to create a TCB in a responsible and legally compliant manner. At least in the near term, the prior experience of such tribal banking institutions may prove to be an extremely difficult challenge to overcome.¹⁰⁷

The Difficulty of Achieving Comity for the Tribally Chartered Bank. There is a possibility that the current bank regulatory infrastructure in the United States will resist and deny the concept of a TCB. TCB stakeholders will likely need to make a tremendous effort for the community of state and federal bank regulators to recognize the authority of a Tribal Banking Commission. Further, a United States Supreme Court ruling and/or an act of Congress may prove necessary to grant comity to the Tribal Banking

105. *Tribe Offers First Offshore Bank*, INDEP. REC. (Helena, Mont.) (Jan. 17, 2000), http://helenair.com/news/state-and-regional/tribe-offers-first-offshore-bank/article_86afb60c-3d1e-5fdd-8336-7c9642d33de4.html.

106. John Parker, *Indian ‘Bank’ Founders Convicted of Fraud, Deceiving Tribe*, NEWSOK.COM (Apr. 30, 1999, 12:00 AM CDT), <http://newsok.com/article/2651551>; Dana Attocknie, *Delaware Nation Citizens Question Leadership, Election Commission*, NATIVE TIMES (Aug. 13, 2012), <http://www.nativetimes.com/index.php/news/tribal/7582-delaware-nation-citizens-question-leadership-election-commission>.

107. Dan Rutherford, *Tribal Bank Bypasses FDIC, Has Own Rules on Deposit*, TULSA WORLD (Mar. 22, 1997, 12:00 AM), http://www.tulsaworld.com/archives/tribal-bank-bypasses-fdic-has-own-rules-on-deposit/article_28b4a9e9-2378-5f78-ada5-2cbfc14745a0.html.

Commission and to allow a TBC to integrate into the existing global financial systems.

Obtaining FDIC Insurance and Federal Reserve Bank Master Account Number. Even if the concept of a TCB becomes recognized via U.S. Supreme Court ruling or an act of Congress, additional obstacles remain. Although it is legally possible for most any organized group to apply for either a state or federal banking charter, that does not mean that all applicants will actually receive such charter. Each bank regulatory agency will thoroughly review the bank charter application and assess the risks posed by the business plan of such application. Many applications are denied because of the perception of undue business risks, lack of qualified personnel in the proposed bank, insufficient capital, and/or potential illegality in the operations of the enterprise.¹⁰⁸ Accordingly, even if the Tribal Banking Commission approves a tribal banking charter that does not mean the FDIC will approve the charter for deposit insurance or that the Federal Reserve will approve the charter for the issuance of a Federal Reserve Bank master account number.

Both FDIC insurance and a Federal Reserve Bank master account number are indispensable components to any bank and are viewed as its lifeblood.¹⁰⁹ The power to grant these attributes lies totally outside the control of the Tribal Banking Commission and could prove to be the Achilles' heel of the concept.

Inability to Attract Investment Capital. In an environment of legal and/or regulatory uncertainty with respect to the concept, the organizers of a TCB may not be able to attract sufficient capital for launching and sustaining operations. Potential investors may feel that the legal and regulatory environment is too uncertain or tenuous, thus show reluctance to invest the millions of dollars necessary to adequately capitalize a TCB. This concern may also extend to possible perceptions of lax regulation by the Tribal Banking Commission that could give rise to fears that invested capital may be inefficiently applied or siphoned off via unlawful or imprudent management acts.

Fears of Opening "Pandora's Box". Another practical threat to the TCB concept is fear among bankers and bank regulatory agencies that

108. Nathaniel Popper, *Banking for Pot Industry Hits a Roadblock*, N.Y. TIMES (July 30, 2015), <http://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html>.

109. See FIRST NAT'L BANK, THE IMPORTANCE OF FDIC INSURANCE, https://www.the-first.com/uploadedFiles/THE_FIRST/Images/FDIC%20article.pdf (last visited Jan. 18, 2017).

recognizing and granting comity to one Tribal Banking Commission and one TCB will open the doors to a flood of similar efforts by many of the hundreds of federally recognized tribes.¹¹⁰ While there are only fifty-three extant bank regulatory agencies in the United States today (fifty state bank agencies and three federal bank agencies), there could potentially be hundreds of tribal bank regulatory agencies and perhaps thousands of TCBs. Establishing the procedures and logistical structure to ensure uniformity of quality, laws, rules, regulations, policies and procedures will be paramount. Fears of opening a “Pandora’s Box” of widespread TCB activity may combine with a lack of federal will or resources and stall the concept.

These hardships persist in Native American nations despite repeated attempts to modify the existing finance system to ameliorate such conditions, and despite various federal government interventions into the capital markets and financial system designed to improve conditions in tribal communities. Although well-intended, federal efforts, such as the BIA Loan Guaranty program, consistently fall short in addressing tribal needs.¹¹¹ For example, Senator Al Franken described the paucity of funding from the program as “embarrassing.”¹¹² Moreover, the United States Special Trustee for American Indians Vincent G. Logan has stated: “When we talk about economic development, I always tell all the people that I work with: credit is how the world was built. We are not going to get very far” unless they have access to credit.¹¹³

The lack of financial systems within Native American nations persists despite SWOT analysis indicating that the Tribally Chartered Bank risks are outweighed by the opportunity to fulfill an urgent and substantial need for credit and capital among Native American nations. The inherent challenges of creating a new financial system dictate that successful implementation of the TCB will require: focused efforts and investment by one or more tribal

110. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-01-29/pdf/2016-01769.pdf>.

111. See Appendix (statement of Sen. Al Franken).

112. *Id.*

113. See Foster Pepper PLLC Videos, *Native American Colloquium: Native American Development and U.S./Tribal Relations*, YOUTUBE (June 5, 2015) [hereinafter Logan Address], <https://youtu.be/H9Ru4hVsyJM> (address by Vincent G. Logan, U.S. special trustee for American Indians, at University of Washington Tribal Development Colloquium, Seattle, May 28, 2015).

governments, beneficial partnership with advanced FinTech firms, and a collaborative inter-governmental relationship with the United States.

V. Policy Recommendations and Next Steps

The TCB presents an opportunity to create an innovative financial institution that can directly address and improve the access-to-capital conditions for Native American nations and their members. The TCB would also facilitate the delivery of the “patient capital” needed for long-term economic, infrastructure, and community development in tribal communities. “Patient” capital is not unprofitable capital—a TCB must be profitable to sustain its operations. However, a TCB need not continually and exclusively chase the highest possible profit margin, nor should it abandon the financing of lower-margin but socially beneficial activities. A TCB can maintain a long-term view of capital productivity consistent with the “seven generations” concept, rather than a short-term focus on meeting the quarterly expectations of outside financial analysts.¹¹⁴ Notably, a TCB can prioritize projects that meet the urgent needs of the most overlooked communities.

The next steps for bringing the TCB to fruition involve policy actions by the tribal government(s) such as:

- drafting TCB governance codes that embody consistency, transparency, cogent dispute resolution mechanisms, and robust oversight;
- investing in partnerships with FinTech companies to create electronic payment infrastructure; and
- Presenting a workable cooperative regulatory oversight plan to U.S. finance authorities.

The U.S. government, via a corollary set of policy actions, will facilitate the implementation of the TCB program by:

- providing technical assistance for integrating the TCB into existing domestic and global electronic payment networks;

114. “The Peacemaker taught us about the Seven Generations. He said, when you sit in council for the welfare of the people, you must not think of yourself or of your family, not even of your generation. He said, make your decisions on behalf of the seven generations coming, so that they may enjoy what you have today.” Oren Lyons (Seneca), Faith keeper, Onondaga Nation, *quoted in Seven Generations – The Role of Chief*, PBS.ORG, <http://www.pbs.org/warrior/content/timeline/opendoor/roleOfChief.html> (last visited Oct. 11, 2016).

- designing a clear path of required actions for the TCB to obtain FDIC insurance for future depository accounts;
- working proactively to implement a cooperative regulatory oversight regime; and
- providing guidance and resources to establish electronic security and fraud-prevention best practices for the TCB.

Two key elements for launching the TCB initiative are obtaining an initial “critical mass” of support among tribal nations and attaining agreement among credible leaders to manage the program’s creation. To obtain federal cooperation, tribes must first demonstrate the commitment, knowledge, and willingness to invest in the program and create the legal and operational infrastructure. In order to build this support, the academic community can take an active role in facilitating meetings and discussion among tribal leaders, utilizing in person networking and real-time electronic participation models similar to the University of Washington’s 2015 Tribal Development Colloquium.¹¹⁵ Partnering with trans-tribal entities such as the National Congress of American Indians and the First Nations Development Institute can assist in bringing key leaders into the discussion, and help identify appropriate divisions of labor among participating tribes based on relative institutional strengths, resources, and administrative capabilities.

The TCB represents a game-changing paradigm shift in that it: (1) disrupts the 240-year model in the United States of the “dual banking system” (i.e., only state or federal charters) by creating a tribally chartered bank system; (2) is a public policy innovation arising locally and organically from tribal communities to intervene in the capital markets to address their well-documented and chronic lack of access to financial

115. In May 2015 the University of Washington’s Jackson School of International Studies hosted a two-day colloquium focused on Native American sovereignty, development, and human security. The Colloquium provided an exploration of the mutual sovereignty dynamic between the United States and Native American nations, with a particular focus on innovative policies for institutional development, economic growth, and social cohesiveness in Native American nations. The program featured national tribal leaders and subject matter experts from a broad spectrum of development backgrounds including governance, economics, law, education, health, and culture. Video recordings and presentation materials for the full colloquium are accessible at no charge via *Sovereignty, Development and Human Security: A Colloquium on United States and Native American Relations*, FOSTER PEPPER (May 28, 2015), <http://webcache.googleusercontent.com/search?q=cache:whvt2kYm1-wJ:www.foster.com/resources/events/sovereignty,-development-and-human-security-a-coll+&cd=1&hl=en&ct=clnk&gl=us>.

services and capital; (3) represents a commitment to robust bank regulation and supervision married to a “pro-business” environment that welcomes and embraces innovations in financial processes and technology; and (4) assimilates and distributes “patient” capital for long-term economic, community, and social development in Indian Country. The United States Special Trustee for American Indians Vincent G. Logan has succinctly stated the mutual foundation that underlies contemporary Native American development: “We know that economic development and the relationship between the [United States] and tribal nations—it all depends upon getting the right pieces into place.”¹¹⁶ The TCB provides a unique platform for the United States and tribal governments to collaborate and construct a “missing piece” within the network of existing financial institutions, and launch a purpose-driven vehicle for enhancing access to the capital that is essential for Native American socio-economic development.

116. Logan Address, *supra* note 113.

APPENDIX

*United States Senate Oversight Hearing*¹¹⁷
Selected Witness Testimony: Accessing Capital in Indian Country

The following excerpts are quotes from the June 17, 2015 testimony of the indicated witnesses appearing at the United States Senate Oversight Hearing on Accessing Capital in Indian Country. They highlight the issues and challenges that impact the accessibility of development capital for Native American nations.

Senator Michael Crapo (R-Idaho):

Regardless of location, access to capital is one of the most important fundamentals of business and economic development.

. . . .

We know the challenges that Indian Country faces in accessing essential business resources are significant. In fact, some of our witnesses today have noted in their testimonies that Native people are most underserved demographic in terms of access to capital.¹¹⁸

Alejandra Castillo, National Director, Minority Business Development Agency:

Access to capital continues to be the number one impediment for Native businesses and other minority businesses.

By any socioeconomic indicator, Native Americans are the most underserved population in the Country. This means that financial literacy, credit history and access to lending institutions on or near Native lands may be lower than in other areas of the Country.¹¹⁹

117. See *Hearing: Accessing Capital*, *supra* note 80; see also Andrew Bahl, *Senate Committee Focuses on Access to Capital in Indian Country*, INDIANZ.COM (June 18, 2015), <http://www.indianz.com/News/2015/017889.asp>.

118. *Hearing: Accessing Capital*, *supra* note 80, at 2.

119. *Id.* at 3.

Derek Watchman, Chair, National Center for American Indian Enterprise Development:

Lower margin projects and start-ups are always challenging to finance.

Infrastructure projects, which are badly needed in Indian Country, are very hard to finance, especially if there is limited Federal funding or because tribes have little tax base[.] [I]t is hard to do bonds based on limited tax bases. Tribes themselves, however, are increasing access to capital through self-financing of their business and economic development projects. . . .

That is why the National Congress of American Indians and NAFOA have repeatedly urged Congress to improve and increase the allocations to the BIA loan guarantee program. Right now it is set at \$7 million.¹²⁰

Senator Al Franken (D-Minnesota):

I was hearing that the BIA Loan Guarantee Program is underfunded. Mr. Hill just talked about it being badly administered. It is hard to get more funding for a program that is badly administered.

What I am hearing is that \$7 million is next to nothing and sort of embarrassing, I think. . . .

. . . There are bands of tribes in my State that have a great need for capital. Because of that, they would be considered a high credit risk but that is exactly why they need capital. . . .

. . . .

. . . The need in Indian Country is so great. I wonder sometimes, the tribes that need it the most, need economic development the most, are probably the worst credit risks in a sense

I just want to make sure that the bands that need it the most get the opportunity to do economic development on their land

120. *Id.* at 8-9.

because they have such high unemployment rates. They need something and they need it the most.¹²¹

Ross Hill, CEO, Bank2:

The BIA Commercial Loan Guarantee Program is truly the only guaranteed loan program that can be widely used for nearly any need on tribal lands. The program could become a vital source of growth and development of Native America

[But] [t]ypically, it is funded about 20 to 30 percent of the maximum authorization. This year is a prime example of the problem. The BIA is already out of commitment authority. . . .

. . . .

. . . [B]ut perhaps as many as 200,000 homes are still needed on reservations alone. The economic impact of satisfying this need could reach as much as \$40 billion on the U.S. and Indian Country economies.

Think of this to picture that. The City of New Orleans has 200,000 homes. The demand is high, the need is great and the opportunity for real economic impact is unquestionable.

. . . .

. . . The [BIA Loan Guarantee] program is not adequately funded, nor is it administrated properly.

. . . .

. . . The BIA is not very accountable to their customer or to the banks. Their process for approval is subject to individual offices and subject to different edicts handed down from Washington from time to time. The process is not one that can be counted on, nor is it one that can be counted on in a timely basis.

. . . .

. . . [W]e cannot close a transaction and get a guarantee on the loan. Without the BIA addressing this problem and making it a serious matter . . . most loans will not be completed and funded that could be.

121. *Id.* at 38, 39, 44.

....

. . . I believe there is just a lack of commitment at the BIA office to remedy the problem.¹²²

Dante Desiderio, Executive Director, Native American Finance Officers Association:

While the need for capital to flow freely into Indian Country is great, existing Federal capital programs have failed to drive economic growth and development that is profoundly needed in Indian Country. We think it is time to take a different look at these programs and ask ourselves why they are not working to reach their full potential.

. . . The first program is the Indian Loan Guarantee Program. . . . [T]he program is not reaching its potential because the total amount of Federal funds budgeted is around \$7 million or \$8 million for all of Indian Country.

. . . Treasury set aside the Native program from the larger CDFI [Community Development Financial Institution] program. . . . The program works but again, its entire budget is around \$15 million for all of Indian Country.

. . . We have 70 Native CDFIs that if you average it out, it is about \$200,000 each, which is not enough for technical assistance and loans.

....

Tribal governments are much different and need much longer term capital, much more patient capital. We do not have the ability to go to the market and raise equity, so we rely on long term, patient capital to grow enterprises. It is a much different role.

The tribal governments are looking at those enterprises to fund programs and services. . . .

....

. . . [And] the long term patient capital is needed to build the infrastructure and the tribal businesses to provide those program

122. *Id.* at 18, 37, 39, 42.

services, even the telecommunications infrastructure that is needed for business development.¹²³

Senator Jon Tester (D-Montana):

I think access to capital in Indian Country is an incredible inhibitor to increase the economy and reduce poverty, and reduce the necessity for the safety net programs at the Federal level.¹²⁴

[O]pportunities will go for naught if tribal economies are struggling – forcing children to take their skills and find jobs elsewhere. . . . We can't let that happen. Our First Americans should not have to choose between making a good living away from their family and homelands or living in poverty.¹²⁵

123. *Id.* at 28, 29, 37, 38.

124. *Id.* at 42.

125. Press Release, U.S. Senate Comm. on Indian Affairs, Tester Remains Committed to Finding a Path to Improving Economic Conditions Across Indian Country (June 25, 2014), <http://www.indian.senate.gov/news/press-release/access-capital-remote-locations-stymie-economic-growth-indian-country>.