

# SECURED TRANSACTIONS BEHIND THE BUCKSKIN CURTAIN

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## INTRODUCTION

In the last twenty years, economic activity on Indian Tribes has fostered a greater interest in creating and facilitating resources that trickle down to tribal members. The unique place that tribes sit as separate sovereigns has opened up unique opportunities in gaming,<sup>1</sup> natural resources,<sup>2</sup> smoke shops,<sup>3</sup> and similar opportunities to exploit gaps in the market that make their services either financially more attractive,<sup>4</sup> or otherwise available in regions where similar services are not possible.<sup>5</sup> Yet, despite the favorable market conditions that Indian tribes experience due to their status as separate sovereigns and regional isolation, the payoff of economic growth has been uneven. Indeed, some tribes that operate in these sectors have experienced just marginal growth of economic opportunity,<sup>6</sup> while others have used the sudden increase in economic resources for social improvement.<sup>7</sup> As Ezra Rosser eloquently describes, these economic conditions are not merely abstract, but rather have life and death implications for tribal members: “Indians living on reservations are poorer than any other group in the United States, and this poverty is felt in everything from the prevalence of substandard housing and lack of basic infrastructure to shortened lifespans and high suicide rates.”<sup>8</sup>

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<sup>1</sup> Richard J. Jr. Ansson & 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 441–484 (2001); Alan P. Meister, Kathryn R. L. Rand & Steven Andrew Light, *Indian Gaming and beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375–397 (2009).

<sup>2</sup> Steven J. Shupe, *Indian Tribes in the Water Marketing Arena*, 15 AM. INDIAN L. REV. 185–206 (1990).

<sup>3</sup> Ansson and Oravetz, *supra* note 2.

<sup>4</sup> Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671–760 (1989); Matthew L. M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue Keynote Address*, 80 N.D. L. REV. 759–808 (2004); Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398–418 (2009).

<sup>5</sup> II Grant Kenneth W., Katherine A. Spilde & Jonathan B. Taylor, *Social and Economic Consequences of Indian Gaming in Oklahoma*, 28 AMERICAN INDIAN CULTURE & RESEARCH JOURNAL 97–129 (2004).

<sup>6</sup> Ansson and Oravetz, *supra* note 2.

<sup>7</sup> Grant, Spilde, and Taylor, *supra* note 6.

<sup>8</sup> Ezra Rosser, *Creating Space for Reservation Growth Symposium from War and Removal to Resurgence: The Legal and Political History of Florida Tribal Governments*, 9 FIU L. REV. 351–360

Significant structural barriers are often the root problem of slow economic growth on Indian tribes, despite the presence of favorable conditions. For example, Robert Miller has pointed to how structural barriers such as federal policies relating to Indian tribal governance, or the lack of focus on economic development by tribes<sup>9</sup> have stymied economic areas otherwise poised for significant economic expansion.<sup>10</sup> In recent years, two major attempts to address certain structural resources in Indian country have been facilitated through different bodies. The Model Tribal Secured Transactions Act (MTSTA) and its successor the Revised Model Tribal Secured Transactions Act (R-MTSTA), have attempted to facilitate access to capital on Indian Tribes by facilitating familiar laws for lenders in relation to chattel and personal property security. Similarly, the growth of Native American Financial Institutions (NAFI)'s attempt to address "credit deserts" that exist largely in areas where Indian tribes are found.<sup>11</sup>

These two structural problems are not unrelated. The lack of familiar, costs-saving, creditor laws is one (but not the only) reason for the lack of traditional lending enterprises in tribal regions. The geographic distance between the center of a tribal community and its access to reliable forms of credit is directly tied to the conditions that would otherwise lead to capital growth on Indian Tribes.<sup>12</sup> This paper begins to unpack that issue by noting the connection between the adoption of secured transactions laws in tribes and the presence of Native American Financial Institutions in proximity to the tribe that has adopted the laws. Nevertheless, while the adoption of uniform tribal laws sets the conditions for potential growth on Indian Tribes, it does not alleviate other structural barriers that may exist which continue to thwart economic activity. Indeed, the experience of the MTSTA and R-MTSTA suggests that other structural barriers exist that have had a more significant impact on tribal economic growth.<sup>13</sup>

Indeed, since the Uniform Law Commission released the MTSTA,

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(2013).

<sup>9</sup> ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (2012).

<sup>10</sup> Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed*, 80 OR. L. REV. 757–860 (2001).

<sup>11</sup> Tristan Ahtone News Oct. 16 & 2018 Like Tweet Email Print Subscribe Donate Now, *Native-owned financial institutions battle credit deserts* (2018), <https://www.hcn.org/articles/tribal-affairs-native-owned-financial-institutions-battle-credit-deserts> (last visited Oct 31, 2019); Ronald A. Wirtz, *Breaching the "Buckskin Curtain"*, 14 REGION (10453369) 6 (2000).

<sup>12</sup> Oct. 16 and Now, *supra* note 12. ("When we ask if we are meeting the credit and capital needs of Indian Country, we will measure the distance between the community and the nearest bank.")

<sup>13</sup> William H. Henning, Susan M. Woodrow & Marek Dubovec, *A Proposal for a National Tribally Owned Lien Filing System to Support Access to Capital in Indian Country* General Law Division, 18 WYO. L. REV. 475–502 (2018).

thirty-one tribes have adopted it as the basis for establishing security over personal property.<sup>14</sup> While the law has been adopted by these tribes in different regions, their implementation has been uneven. Some tribes have partnered with their local state secretary of state offices to contract for filing systems, while others have not set up local filing options. Even still, some tribal officers in tribes where the MTSTA or R-MTSTA were passed are unaware of the new laws, their purposes, or what they effect.

Likewise, the presence of NAFTs have largely been limited to either regions where there already exists a robust financial services sector or where the tribe has aggressively implemented financial expansion measures that have facilitated access for the emergence of NAFTs in these markets. Even in that case though, NAFTs have been largely disproportionate in the kind and variety of investment for tribal communities.

This paper applies an Economic Geography approach to understand how the adoption of commercially friendly laws and the presence of financial institutions interact with tribal well-being.<sup>15</sup> Economic geography is the study of the location, distribution and spatial organization of economic activities across the world or in specific regions.<sup>16</sup> Relational Economic Geography focuses on the role of individual or institutional relationships within a proximity for understanding economic relationships. Relational economic geography has been criticized for its lack of precision and tendency to oversimplify causes and relationships relating to economic phenomenon;<sup>17</sup> and for the view that the relations described are adequately explained by other pre-existing theories.<sup>18</sup> The critiques have been built on the imprecision that relationships are defined within the literature. For example, Peter Sunley points out that relational concepts have been applied in multiple ways in the economic geography literature lending towards its imprecision:

Relational has a dual meaning, ranging from specific forms of relationships to any exchange, agreement or interaction between two or more people and this dual meaning has caused considerable confusion.... The first has developed from economic sociology and

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<sup>15</sup> Andy Pike & Jane Pollard, *Economic Geographies of Financialization*, 86 ECONOMIC GEOGRAPHY 29–51 (2010).

<sup>16</sup> Gordon L. Clark; Maryann P. Feldman; Meric S. Gertler, eds. (2000). *The Oxford Handbook of Economic Geography*. Oxford University Press.

<sup>17</sup> Peter Sunley, *Relational Economic Geography: A Partial Understanding or a New Paradigm?*, 84 ECONOMIC GEOGRAPHY 1–26 (2008).

<sup>18</sup> Henry Wai-chung Yeung, *Rethinking Relational Economic Geography*, 30 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 37–51 (2005).

typically understands *relational* as signifying interpersonal and interorganizational networks and connections of a certain type. The second is linked to post-structuralist thought and uses relational more broadly to point to the significance of all forms of networks and relations between entities.<sup>19</sup>

In short, relational theories at their worst over-emphasize regional phenomenon to the exclusion of other contextual factors to explain why certain regions do poorly and others succeed.<sup>20</sup>

However, that does not mean that economic geography that recognizes relational components are unhelpful in understanding specific economic trends. In this context, “relational” can be precisely defined to mean “specific modes of economic coordination or governance based on strong ties and long-term reciprocal relationships.”<sup>21</sup> The literature then presents two distinctive types of relationships and their impacts on economic success – one being an embedded, organic, natural relationship which is stylized as “informal, self-reinforcing, and sustained by the value of future relationships,” premised on the potential for future investment that cannot be predicted. The second, is a highly formalized impersonal relationship that is premised on the basis of social ties and arm’s length bargaining. In the later of these relational types, the economic activity is atomistic, formalized and impersonal, and primarily driven by profit seeking and opportunism.<sup>22</sup>

In this context, economic relationships overlap across formalized and informal associations in the context of efforts to promote economic growth on Indian tribes. Indian tribal governments represent highly formalized and artificial governing structures over the interests of Indian peoples.<sup>23</sup> They are organized and formalized through structures imposed by the Bureau of Indian Affairs and contain both formalized and geographic criteria. The formalized structures emerge through a process of formalization and recognition by the U.S. Government of the tribal government’s authority.<sup>24</sup> The recognition can happen by legislation, a federal court decision, or by complying with the federal acknowledgement process.

There is also a more organic recognition embedded in U.S. Law of

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<sup>19</sup> Sunley, *supra* note 18.

<sup>20</sup> Yeung, *supra* note 19.

<sup>21</sup> Sunley, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> Richard Loudbear, *Indian Country Politics: Theories of Operation and a Strategy for the Nonviolent Seizure of Political Power*, 31 AMERICAN INDIAN QUARTERLY 66–86 (2007).

<sup>24</sup> Curtis Berkey, *Implementation of the Indian Reorganization Act*, 2 AM. INDIAN J. 2–7 (1976).

tribal self-government. Federal courts have consistently recognized facially tribal self-government as a recognition of their inherent original sovereignty, even if often undoing the tangible realities of that sovereignty.<sup>25</sup> The principle reflects that Indian self-government does not stem from federal recognition but rather by reason of their original tribal sovereignty.<sup>26</sup> The implications of self-government are expressed through treaty making power and through sovereign immunity protection.<sup>27</sup>

In this context, governmental tribes can formally adopt laws and treaties designed to facilitate economic growth. For example, the emergence of model codes designed to import common commercial language and practices into tribal communities stem from a formalized power of the tribal government to enact laws for the tribe's wellbeing. One reason for the emergence of these laws is the concern that the embedded (organic) recognition of tribal self-government is a barrier to doing business in Indian country.<sup>28</sup>

These formalized and organic relationships emerge in specific geographies that help shape and contextualize how economic relationships are developed. Tribes themselves exist in specific territories. For instance, tribes while separate sovereigns are organized across boundaries that are either wholly within one state or across a few states.<sup>29</sup> Some of those territorial relationships are formalized, like in the definition of Indian Country in Federal Statute<sup>30</sup> or in stances where tribes and states enter into treaties or compacts for mutual coordination or cooperation.<sup>31</sup> The relationships that emerge

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<sup>25</sup> See e.g., *Williams v. Lee*, 358 U.S. 217 (1958); *Talton v. Mayes*, 163 U.S. 376 (1896); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10<sup>th</sup> Cir. 1959).

<sup>26</sup> Tribal Self-Government and the Indian Reorganization Act of 1934 Comments, , 70 MICH. L. REV. 955–986 (1971) (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 84 (Univ. of New Mexico ed.).

<sup>27</sup> Kunes, *supra* note 5.

<sup>28</sup> Timothy Berg, *Growing Indian Economies: The Model Tribal Secured Transactions Act*, 42 ARIZONA LAWYER (2006) ("When it comes to loans on personal property, everything from tractors to store fixtures and inventory, [lenders] are looking for enforceability of their security interest. And when a dispute arises, they seek assurance that they have sufficient recourse to enforce that security interest.").

<sup>29</sup> The four corners tribes in Utah, Colorado, New Mexico, and Arizona are a key example.

<sup>30</sup> 18 U.S.C. § 1151 and 40 C.F.R. § 171.3 defining Indian Country as

- a. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- b. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- c. all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

<sup>31</sup>For example, the Crow Nation and the State of Montana entered into a compact in

between tribes, between tribes and states, and tribes and inter-state organizations are more formalized across geographic resources.<sup>32</sup>

The geographic resources available to tribes on the other hand are more organic. While organic natural relationships amongst people associated to tribes emerge and are formalized over time,<sup>33</sup> the geographic relationship of people, tribes, and resources dictate access individuals and communities have to economic resources. The access (or lack of access) to resources shape formal responses by tribes and states. For example lack of access to capital on Indian Tribes has prompted measures by trade groups, federal offices, tribes and states to facilitate conditions that would prompt greater access to capital. Additionally, Native Americans living on reservations suffer much higher rates of poverty (28.4%) than the national average (12.7%), and higher rates than found amongst Native Americans as a whole (22%). The poverty experienced by Native Americans on reservations has roots in both formalized structural and informal organic sources relating to the geography of exclusion.<sup>34</sup> Like other minority groups in the U.S., the extent of inequality often has roots in historically accumulated disadvantage. That disadvantage started through formal structures that provided for removal of native Americans from their ancestral homes. The disadvantage became compounded thanks to the poor quality of the land that they were given to inhabit, limiting their access to resources (organic relationship to the land).<sup>35</sup>

Evaluating the effectiveness of specific measures behind the buckskin curtain is one that appears to be more of an art than a science. One reason for that is the overlap between formalized structures and organic limitations that each have independent impacts on tribal economic growth. For example,

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2008 for the joint use of the state's filing system to facilitate secured transactions laws in tribal territory.

<sup>32</sup> Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AMERICAN ETHNOLOGIST 239–259 (2005); JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (Nachdr. ed. 2008); Eric Cheyfitz, *The (Post)Colonial Construction of Indian Country:: U.S. American Indian Literatures and Federal Indian Law*, in THE COLUMBIA GUIDE TO AMERICAN INDIAN LITERATURES OF THE UNITED STATES SINCE 1945 1–124 (Eric Cheyfitz ed., 2006), <https://www.jstor.org/stable/10.7312/chey11764.4> (last visited Nov 4, 2019); Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development Symposium: Indigenous Economic Development: Sustainability, Culture, and Business*, 12 LEWIS & CLARK L. REV. 1103–1134 (2008).

<sup>33</sup> E. Cheyfitz, *Savage Law: The Plot Against American Indians in Johnson and Graham's Lessee v. M'Intosh and The Pioneers*, CULTURES OF UNITED STATES IMPERIALISM 109–28; Cheyfitz, *supra* note 33; Adam Creppelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 129–186 (2019).

<sup>34</sup> DAVID SIBLEY., GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST (1995).

<sup>35</sup> James J. Davis, Vincent J. Roscigno & George Wilson, *American Indian Poverty in the Contemporary United States*, 31 SOCIOLOGICAL FORUM 5–28 (2016).

tribes in the great planes are typically less prosperous than tribes in other areas of the U.S. Tribes that have more sophisticated forms of government, such as tribal court systems, are more economically prosperous than those with more basic forms of government.

Additionally, the adoption of an Article 9 like system requires different levels of state bureaucracy, a formalized relationship between tribes, its members and other state entities. Filing systems require manpower, organizational capacity, and resources to make the system searchable. Developing those systems on an individual basis by tribes would require not only manpower, expertise, and financial resources. Bill Henning, Susan Woodrow, and Marek Dubovec have proposed a privatized nationwide filing system that tribes could subscribe to that would close the resource gap necessary to implement an Article 9 like system, while making access to financing information more ubiquitous for creditors and debtors (and researchers) alike.<sup>36</sup>

- **State Filing Fee Revenues where compacts exist as a Source for measuring Filing System Utilization**
- **Geographically based Economic performance measures based on the Adoption of Secured Transactions Laws.**
- **Geographically based Economic performance measures based on the Presence of NAFI's**
- **Comparison of tribes with Secured Transactions Laws and/or NAFI's to Regional Economic Performance Measures, and other non-adopting tribal economic performance measures.**

## I. THE MTSTA AND R-MTSTA

In 2002, the Uniform Law Commission (ULC) convened with the participation of tribal representatives to create a uniform code that would facilitate economic development.<sup>37</sup> The project's purpose was to "cultivate environments conducive to entrepreneurship, lending, and investment," in tribal

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<sup>36</sup> Henning, Woodrow, and Dubovec, *supra* note 14. The original plan for this paper was to use filing systems to evaluate utilization of secured filing systems in Tribal Communities. However, the fact that tribes have either not set up tribal filing systems on their own merit, or have in the alternative contracted with local state partners for joint filing systems made that research plan impracticable. The fact that states do not have a way to segregate filing

<sup>37</sup> William Henning & Fred Miller, *State of the U.C.C. A look back at 2007*, 64 No. 3 UCC Bulletin 1 (2008) (noting that the emergence of the MTSTA arose because of identified needs to facilitate economic activity on tribes by facilitating access to credit); Tim Berg, *Growing Indian Economies*, ARIZONA ATTORNEY 32 (March 2006) ("Access to financing and capital is key to economic growth, and such access is hampered in Indian Country by the lack of standard laws governing business and lending transactions.");

territories.<sup>38</sup> In 2001, the Federal Reserve Board in Minneapolis conducted a study that found “as [t]ribal economies expand and capital needs increase, tribal governments need to cultivate an environment conducive to entrepreneurship, lending and investment. A key component of that type of environment is a legal infrastructure that supports contract enforcement and facilitates commercial activity.”<sup>39</sup>

## II. NAFIS AND THE BUCKSKIN CURTAIN

Back in 2000, an Article in *Region Magazine* highlighted the problems of banking access in Indian Country, noting the prevalence of 30 mile drives and non-existent ATM machines. Drawing on an advocacy group's term, the article labeled the problem the “Buckskin Curtain.”<sup>40</sup> According to a recent report from the Center for Indian Country Development, there has not been much change in access to banking.<sup>41</sup> While other forms of financial lending have appeared, traditional brick and mortar banks continue to be scarce resources on tribal reservations.<sup>42</sup> One reason is that traditional federal banks require significant capital reserves that may tie up too many resources for tribes to invest in banking.<sup>43</sup> A second reason is

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<sup>38</sup> The 2005 Implementation guide identifies the purposes of the Model act as: “(1) to assist tribal legislatures in their review, adaptation and enactment of the Act; (2) to facilitate the use and understanding of the Act by tribal judges, legal counsel and individuals promoting business development in Indian Country; and (3) to assist nontribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code (“UCC”).” MTSTA, Implementation Guide and Commentary, Introduction.

<sup>39</sup> HAWKLAND § RMTSTA 9-101:2.50 Uniform Commercial Code Series Model Tribal Secured Transactions Act. The commission worked with appointed members of numerous tribes with the support of the Federal Reserve Bank of Minneapolis to create a model secured transactions law adapted from the article 9 of the UCC.<sup>39</sup> The committee grappled with issues of adapting article 9 of the UCC to be a suitable use for tribes. Concerns of the committee included: “simplifying the act; appropriately reflecting tribal law, customs, and traditions; integrating the act into whatever body of commercial law might exist within a particular tribe; protecting the sovereign immunity of a tribe; and preserving the core concepts of Article 9 so that tribal and state law can be harmonized to the extent practicable.”

<sup>40</sup> Wirtz, *supra* note 12.

<sup>41</sup> Mapping Native American Financial Institutions | Center for Indian Country Development, , <https://www.minneapolisfed.org/indiancountry/resources/mapping-native-banks> (last visited Nov 5, 2019).

<sup>42</sup> {Citation}

<sup>43</sup> BANKS MAY NOT BE ANSWER TO TRIBES' WOES: EBSCOhost, , <http://web.b.ebscohost.com/sulaw.idm.oclc.org/ehost/detail/detail?vid=2&sid=4b902a6a-a91e-4080-b3aa-34f47748f7dc%40sessionmgr101&bdata=JnNpdGU9ZWJhcnQtbGl2ZQ%3d%3d#AN=10107854&db=a9h> (last visited Nov 5, 2019).

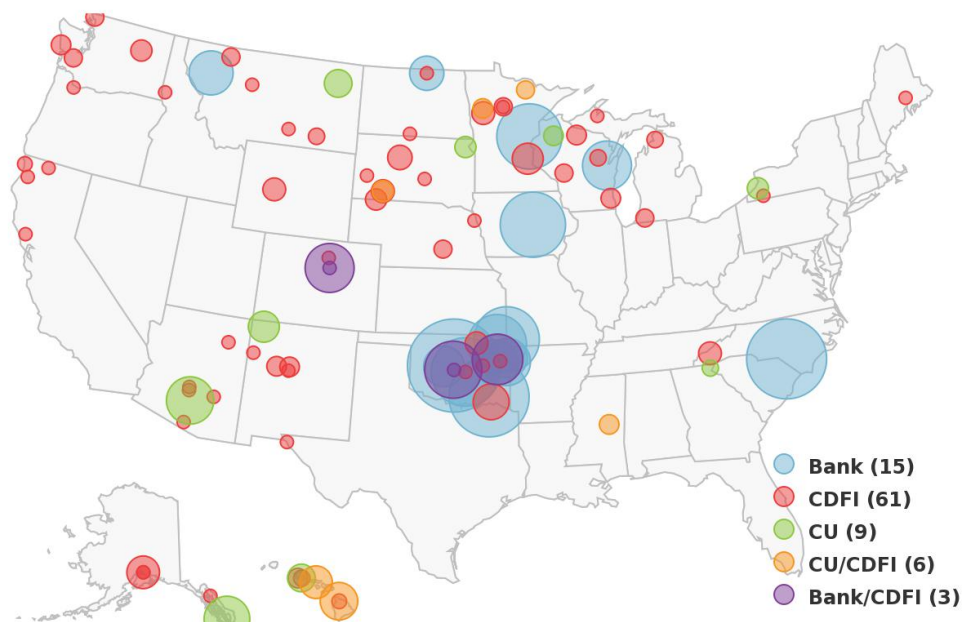


the required organizational capacity that banking requires due to the degree of regulatory oversight.<sup>44</sup>

While traditional banks have not taken root in Indian Country, secondary financial institutions known as Community Development Financial Institutions (CDFI's) have somewhat filled the gap to provide lending access on Indian tribes. CDFIs or combined institutions of banks/ Credit unions and CDFIs comprise 70 of the financial institutions in Indian Country of the ninety-three total native servicing financial institutions.

Institution Type	Number
Bank	15
CDFI	61
Credit Union	9
Credit Union/ CDFI	6
Bank/ CDFI	3

Moreover, these institutions are not evenly dispersed. The map produced by the Center for Indian Country Development shows wide gaps between where Native American Financial Institutions operate.



State	No. Federally Recognized Tribes	Number of NAFI's
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<sup>44</sup> *Id.*

Alabama	1	0
Arizona	21	6
California	108	4
Colorado	2	3
Connecticut	2	0
Florida	2	0
Hawaii		5
Idaho	5	2
Indiana	1	1
Iowa	1	2
Kansas	4	0
Louisiana	4	0
Maine	4	1
Massachusetts	2	0
Michigan	12	3
Minnesota	8	6
Mississippi	1	0
Montana	8	6
Nebraska	6	3
Nevada	19	0
New Mexico	24	5
New York	8	2
North Carolina	1	2
North Dakota	4	3
Oklahoma	38	17
Oregon	10	1
Rhode Island	1	0
South Carolina	1	2
South Dakota	10	7
Texas	3	1
Utah	7	0
Virginia	7	0
Washington	29	6
Wisconsin	12	7
Wyoming	2	1

The effects of this disparity are not evenly felt amongst tribes. For instance, tribes located east of the Mississippi and those in higher population regions typically are able to access conventional banking that is not tribe specific. IN contrast, tribes in the great planes not only lack access to specific resources

dedicated to their tribe's economic growth, but also lack access to banks that otherwise serve other populations.