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Reservation Geography and the Restoration of Native Self-Government

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Recognition of the geographical aspects of Indian settlement on reserves is vital to understanding the potential for Native self-government. This article compares the size and location of Canadian and American reserves/reservations. It concludes that Canada's First Nations situated in the provinces are land poor and that future viable economic development and cultural renaissance will be difficult with only limited and mostly small landholdings. A possible solution is "capital reserves" allocated to First Nations apart from possible land claims. Capital Reserves would provide economic and social benefits to groups of related First Nations without dislocating those who continued to reside on traditional reserves.

Introduction

Recognition of the spatial aspects of Indian settlement on reserves is vital to understanding the potential for Native self-government. In particular, the number and size of reserves, as well as the remoteness, accessibility and dispersal of Native land holdings must be considered. They can impact on the viability and cost of Native courts and institutions, the solidarity of bands, and the economic livelihood of reserve residents. As Native self-government is fleshed out in constitutional reform talks and experiments in limited self-government, it is not widely known that all of the reserves in every province of Canada combined would not cover one-half of the reservation held by Arizona's Navajo Nation.¹

Despite the great difference in Native landholdings between Canada and the United States, there have been few direct cross-border comparisons. The U.S. Department of the Interior maps the Indian lands within its own domain, and the Canadian Department of Indian Affairs and Northern Development periodically issues maps of Native and Inuit lands in this country.² Few people in either country, however, realize how little

1. The Navajo reservation covers almost 16 million acres in northeastern Arizona, southern Utah and northwestern New Mexico. In Canada, 2,242 tracts of reserve land cover just 6.5 million acres in total. See United States, *Annual Report of Indian Lands*, U.S. Department of Interior, Bureau of Indian Affairs (Washington, 1990) at 89 and Canada, *Schedule of Indian Bands, Reserves and Settlements Including Membership and Population, Location and Area in Hectares*, Department of Indian Affairs and Northern Development (Ottawa, 1987), (hereinafter, "The Department").

2. The American Bureau of Indian Affairs has produced numerous maps which have been reproduced in hundreds of books. While not as comprehensive as the American map collection, Canada's Department of Indian Affairs and Northern Development also has extensive mapping including the *Atlas of Indian Reserves and Settlements in Canada, 1971* (Ottawa, 1971).

land is controlled by First Nations in Canada in comparison to related tribes just across the border.

This article will make geographical comparisons of Canadian and American reserves/reservations, as well as assess the geographical reality which impedes the ultimate realization of Native self-government in Canada. Some comparisons will also be made to Australian reserves. Finally, a new entity, the "Capital Reserve" will be put forward as one answer to the existing paucity of reserve land in Canada.

I. *Geocollocation: Different Geography Side by Side*

1. *Comparative Area*

Apart from the number and location of Canadian reserves, the inescapable fact is that Canada's First Nations are relatively "land poor". In Canada's provinces, approximately 2,250 tracts of land totalling 6.5 million acres have been set aside for First Nations.³ Australia has set aside more than 193 million acres of land as Aboriginal reserves. Canada's Aboriginal population is four times that of Australia's,⁴ but while Australia's Aborigines comprise just 1.2% of that nation's population, they hold title to 10.3% of the country's land area.⁵ In the state of South Australia the average reserve size is almost twice the size of all of the reserves in every province of Canada combined. Australia's Aboriginal reserves are extraordinarily large, with many covering tens of millions of acres of arid steppe or vast northern rainforests.⁶

By further comparison, American Indians represent just 0.8% of the United States population, and they control 2.8% of the land in the lower 48 states (or 4% of the United States area if Alaskan Native lands are included).⁷ In Canada, where Aboriginal people make up 3.5% of the national population, less than 0.5% of the area of Canada's provinces is

3. *Supra* note 1.

4. Based on estimates of slightly more than a quarter of a million Australian Aborigines and just over one million Canadian Natives, Metis and Inuit.

5. An estimated 260,000 Aborigines hold title to 193.5 million acres or about 10.3% of Australia. See Australia, *1994 Year Book - Australia* (Canberra: Australian Bureau of Statistics, 1993) at 411 and *Australians: A Historical Atlas*, Division of National Mapping, National Library Series (Canberra: Fairfax, Syme & Weldon Associates, 1987) at 43.

6. In the state of South Australia, where Aborigines hold title to 49.4 million acres, the average reserve size is over 12 million acres. In the Northern Territory Aborigines hold title to 100.4 million acres, with an average reserve size of over four million acres.

7. Based on the 1990 census count of 1,959,234 and 56 million acres of Indian Trust lands in the lower 48 states. Please see Jack Utter, *American Indians: Answers to Today's Questions* (Lake Ann, Michigan: National Woodlands Publishing Co., 1993) at 17 and 121.

reserved for them.⁸ A new order is evolving in the Arctic,⁹ yet only 5% of Canada's Aboriginal population lives in the north. This paper will focus on the relatively land-poor 95% living in the area of the provinces.

2. *Comparative Populations*

Canada's population is barely one-tenth as large as that of the United States, yet Canada's Native population is approximately half as large (or five times larger per capita).¹⁰ At present, estimates of Canada's Native population (including the Metis and Inuit) range from as low as 750,000 to as much as twice that number.¹¹ Estimates of one million Aboriginal persons in Canada are probably not unrealistic.¹² Ontario's Native population is larger than that of any of the American states except Oklahoma, Arizona and (depending on estimates of urban Indians in Los Angeles) California.¹³ Native populations in both countries are now growing at a much faster rate than the national averages¹⁴, and the pressure mounts for far-reaching solutions to endemic and, as yet, unresolved problems and questions.

8. Based on the 1991 Post-Census Survey figure of 1,002,675. See Canada, *Age and Sex - Aboriginal Data*, Statistics Canada Catalogue No. 94-327, Table One (Ottawa, March 1993) and *Schedule*, *supra* note 1.

9. In April 1992 a settlement was reached giving the Gwich'in Indians of the Mackenzie Delta title to almost 9,200 square miles, and co-management over a larger area. This article will briefly discuss below the U.S. Alaska Native Claims Settlement as well as the Council of Yukon Indians Settlement, the Dene-Metis Settlement discussions and the Nunuvet Settlement in the eastern Arctic.

10. In Canada and in the United States, estimates of Aboriginal populations vary widely according to source of data and parameters used to define populations. An American Native person may be considered to be an Indian under the U.S. Census and certain Bureau of Indian Affairs programs, and may not be considered to be Indian under other B.I.A. program definitions. In both Canada and the United States the estimates of urban Indians living off-reserve are often speculative at best. The census bureaus of both countries have recently turned to "Self-Reporting" (ie. "Do you consider yourself Indian?") for estimates of Aboriginal populations.

11. In 1990, Indian and Northern Affairs estimated the "Registered" (or "Status") Indian population to be at 316,000 persons living on reserve and 205,000 persons living off-reserve (some estimates of the off-reserve population are four times that number). Non-Status Indians, Metis and Inuit populations are not included in these figures. See Canada, *Basic Departmental Data - 1990 / Indian and Northern Affairs*, Ministry of Supply and Services Catalogue #R-12-7/1990 E (Ottawa, 1990) at 5.

12. *Post-Census Survey*, *supra* note 8.

13. See *supra* note 8, Table Four (Ontario pop. of 243,000) and Utter, *supra* note 7 at 18.

14. 20th Century estimates have been reported as high as 4.6% increase compared to 1% increase for non-Native Canadians. See James Frideres, *Native Peoples in Canada: Contemporary Conflicts*, 3rd. edition (Scarborough: Prentice Hall Canada Inc, 1988), and Romaniuk, A. and V. Piche, "Natality Estimates for the Canadian Indians by Stable Population Models, 1900-1969", (1972) 9/1 *The Canadian Review of Sociology and Anthropology* 1.

3. *Comparative Settlement Patterns*

While many similarities exist between related Native tribes north and south of the border, different reservation policies undertaken by the North American federal states have led to one dramatic difference. In the 19th Century, the United States rounded up Indian tribes and consolidated large numbers of people on vast reservations where the U.S. Army could keep a close watch over them. Whole tribes, and in some cases several tribes, were relocated onto single reservations. In Canada the opposite approach was taken. Officials recognized only small individual subdivisions of larger tribes, and left these small bands dispersed across thousands of tiny and isolated reserves. As a corollary effect, Canada's First Nations were left with much less land than American Indians, both in total area and in per capita terms. And while dozens or even hundreds of bands may speak similar languages and share common cultural traditions, Ottawa still chooses to ignore the reality of the larger tribes to deal instead only with the small bands which it created under its law.¹⁵

It is important to note that, although Canadian reserves are more widely dispersed than American reservations, the pattern is not the result of a "diaspora" in the Judeo-Roman sense of a people driven from their homeland and scattered. Most Canadian bands retained small tracts of land around their traditional settlements when larger areas were ceded to, or taken by, the Crown. The isolation of small and scattered reserves with limited road access may also have offered some advantages to Canada's First Nations by helping to preserve traditional culture and languages. However, with satellite and cable television, new roads and air service, isolation is becoming a less-effective cultural insulator.

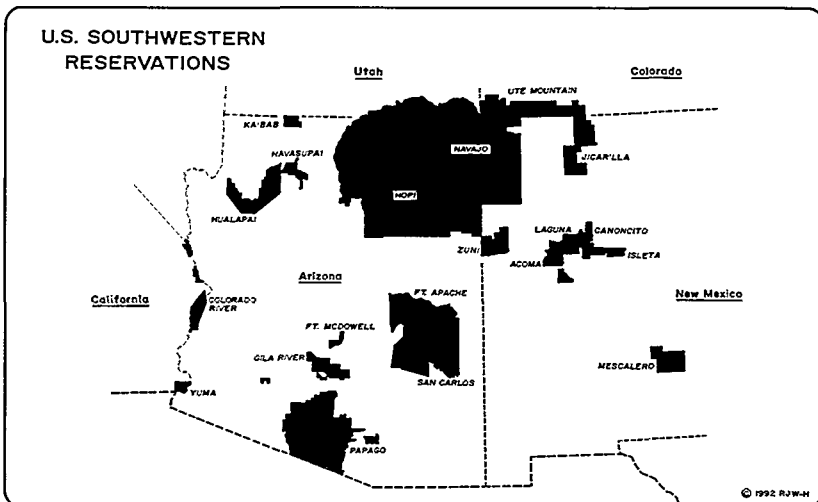
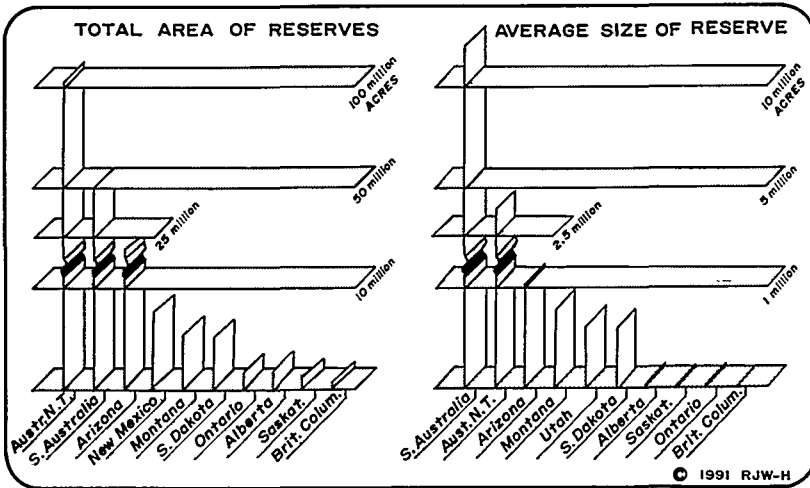
It is also significant that different government policies were not the only influence on Canadian and American settlement patterns. The economic impact of the fur trade and settlement around remote trading posts also played important roles in the dispersal of Canada's First Nations.

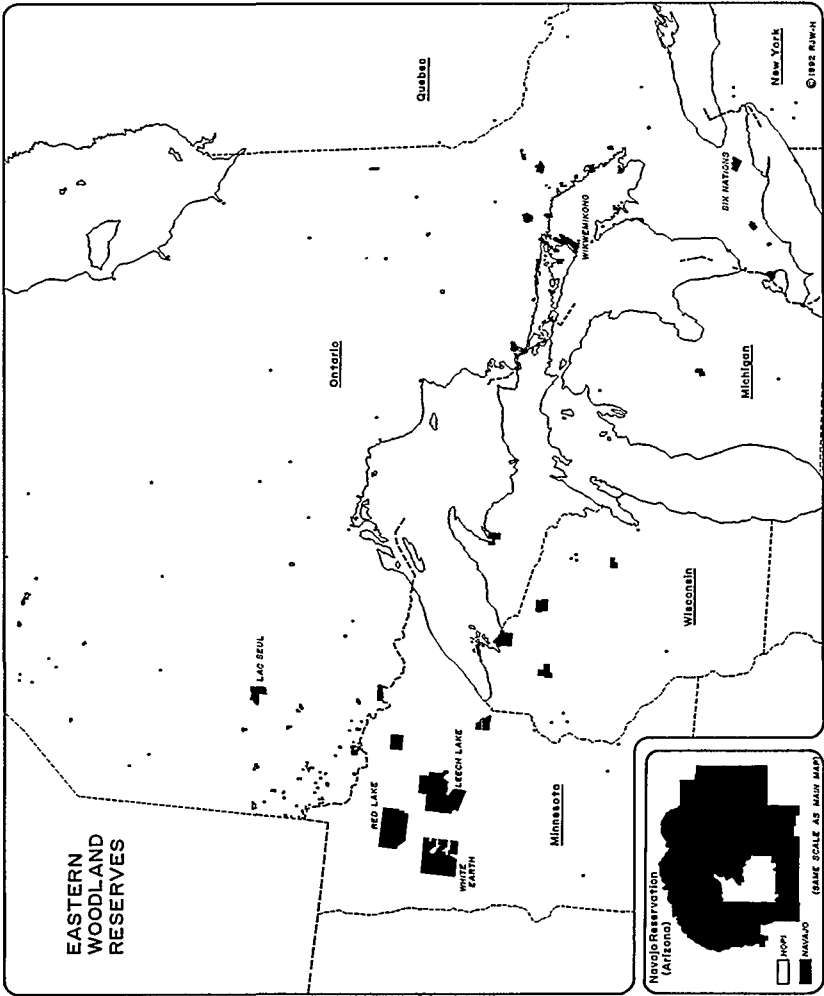
4. *Reservation Geography: The World on Paper*

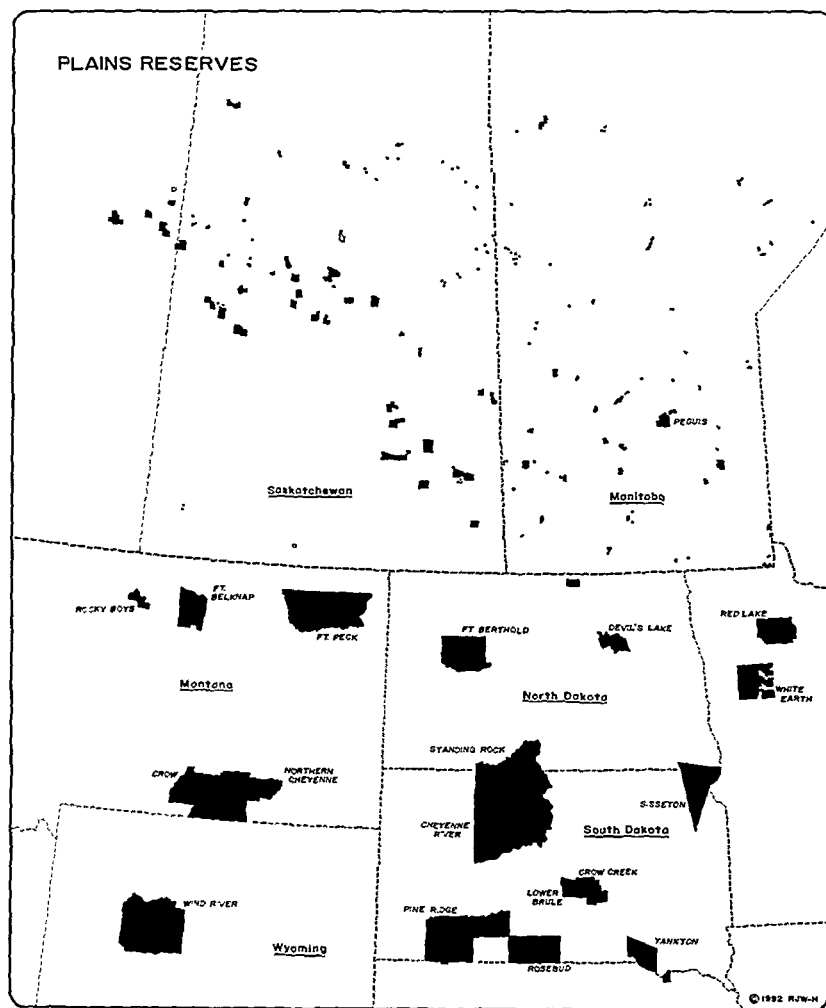
The accompanying maps and charts graphically illustrate the foregoing discussion. For ease of comparison, all maps are presented at the same scale. It must be borne in mind that ongoing claims will eventually alter the map in all three countries, particularly in Canada. However, given the

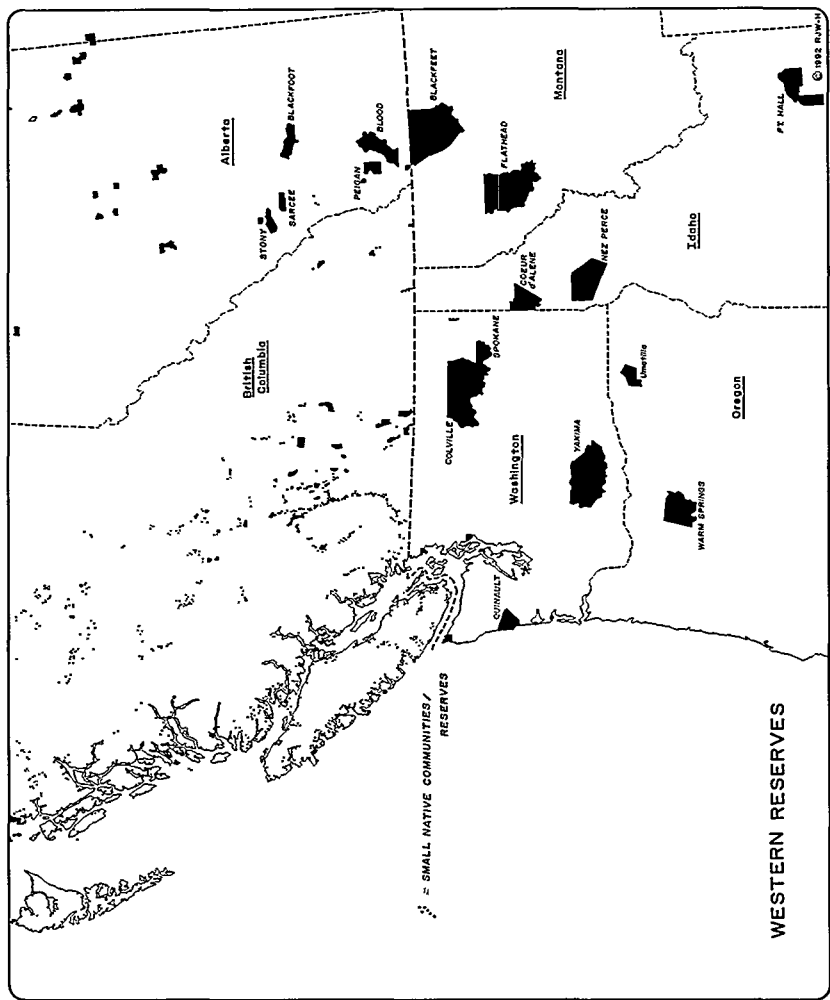
15. In the words of Paul Tennant, the larger tribal groups "... were officially and resolutely ignored." *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: U.B.C. Press, 1990) at 9.

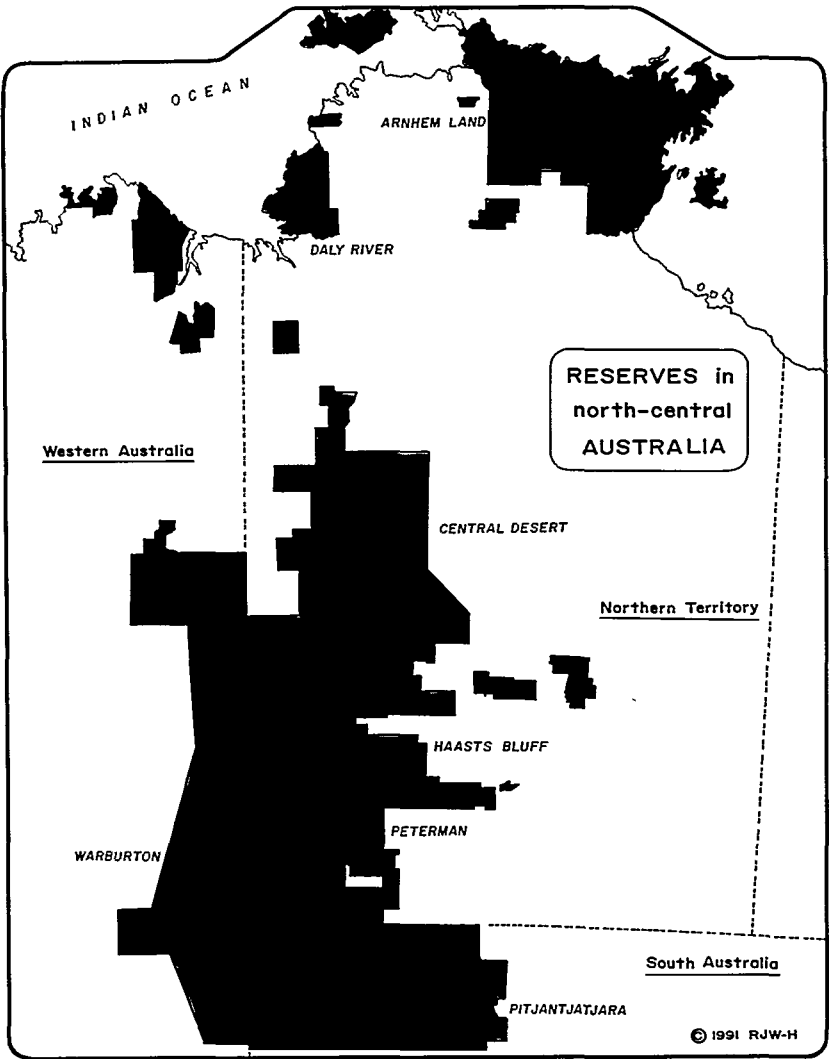
enormous present disparity, it is unlikely that the relative balance, outside of Canada's sparsely populated far north, will change dramatically in the near future.











II. *Canada and the United States: Parallels and Distinctions*

In both the United States and Canada the Indian people share common ethnic roots and have met similar threats to their existence from white society. With the notable exception of the descendants of the Tanoans and Aztecs in the American southwest¹⁶, North America's Native people all belong to one of the great ethnic and linguistic families common to both countries, including the Algonkian, Iroquoian, Siouan, Penutian, Athapaskan and Inuit groups of tribes. The first residents of both countries faced English and French colonizers, contagious diseases, destruction of buffalo herds, successive waves of European and Asian immigration, and banishment to reserves. The reserves, or reservations as they are known in the United States, were generally granted on marginal lands after enormous tracts of Indian territory were appropriated by governments for the "greater good" of the invader society. On both sides of the border the Native population declined precipitously as epidemic diseases and starvation haunted the move to fixed reservations.

The American and Canadian governments also, at one time or another, both callously predicted and accepted that Native populations would eventually disappear through death and assimilation or both.¹⁷ Thus permanent solutions to chronic problems on the reservations, as well as answers to the general question of what was to become of Indian societies, seemed unnecessary. Although some Native languages and even whole tribes are now extinct¹⁸, most aboriginal peoples did survive.

1. *Reservations in the United States*

As European settlement spread across America, most Native groups were moved to reservation lands following a pattern of dislocation, hostilities, and eventual reduction of lands. A few Indian tribes, such as the Pueblo dwellers of New Mexico, managed to retain many of their traditional village sites, while others were moved to distant lands. Most tribes in the eastern part of the United States that survived the colonial era were

16. The Aztec Yaquis and New Mexican Pueblo tribes, Arizona's Hopi, Pima and Papago tribes, as well as the more distant Comanche, Paiute and Shoshoni tribes are among the few Indian nations without cross-border affiliations. The Polynesians of Hawaii also have no counterpart in Canada.

17. Consider the controversial view of Lieutenant-Governor Sir Francis Bond Head of Upper Canada who advocated "euthanasia" of Aborigines by abandonment of contact with whites to let them die out in isolation on their remote reserves, reported by J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989) at 103.

18. A Canadian example is that of the Beothuk tribe of Newfoundland.

forcibly moved west in order to create *lebenstraum* for the expanding new republic.

a. *The move to reservations*

Following the American Revolution, federal statutes such as the *North-west Ordinance* of 1787¹⁹ and the *Indian Non-intercourse Act*²⁰ of 1790 did little to stem the flood of white settlers across the Appalachian Mountains into traditional Indian lands. By 1830, under the authority of the *Indian Removal Act*²¹, President Andrew Jackson ordered that all Indian people living east of the Mississippi River were to be moved, by military force if necessary, to new reserve lands established in the west.²² Many other reservations were created by treaty after the U.S. Army "enticed or coerced" western tribes to cede their traditional areas and then reserve a smaller portion for their own use. By the 1870s the U.S. Army was spending more on Indian wars to open the west to white settlement than was in the entire budget of the new Dominion of Canada.²³ Other reservations were created by Congress, by executive actions of the President, or by action of the Secretary of the Interior.²⁴

Although very large in size by Canadian standards, the American reservations have been whittled down considerably from the much larger tracts set aside a century and a half ago. New territories and several states were eventually carved out of Indian lands in the west. Subsequent intervention by Congress also diminished tribal land holdings. The worst example of Congressional meddling came in the *General Allotment Act* of 1887.²⁵ The intent of this legislation was to allot a portion of existing reservation lands to individual Indian families, and then to sell off the remainder to white settlers. The disastrous effect of this Act was that on 118 reservations Indians lost 86,000,000 acres to homesteaders (62% of all Indian land at that time).²⁶

Much of the land allotted to individual Indians is still held privately by Native families, but generations of landless tribes resulted from allotment. In parts of Oklahoma, where the allotment process was more fully

19. Ch. VIII, sess. I (1787).

20. Ch. XIX, sess. II (1792).

21. Ch. 148, 4 Stat. 411 (1830).

22. Alvin M. Josephy Jr., *The Indian Heritage of America* (New York: Alfred Knopf, 1968) at 323.

23. *Supra* note 17 at 162.

24. William C. Canby, *American Indian Law in a Nutshell* (St. Paul: West Publishing Co., 1981).

25. *General Allotment Act*, also known as the *Dawes Act*, ch. 119, 24 Stat. 388 (1887).

26. *Supra* note 7 at 121 and 250.

implemented, whole reservations disappeared from the map. The Great Sioux Nation, which once covered most of the present states of North Dakota and South Dakota, was divided into six discontinuous smaller reservations.²⁷ On other reservations, such as the Navajo lands, the allotment process never took hold and little land was transferred from tribes to individuals.²⁸ The allotment of Indian lands continued until the *Indian Reorganization Act* of 1934²⁹ ended the practice. Today, fewer than one-half of American Indian reservations are 100% tribally owned.³⁰

b. *American reservations today*

The nearly fifteen million acre homeland of the Navajo Nation is the largest reservation in the United States. There are eleven other reservations which exceed one million acres in size.³¹ The total number of federal reservations is approximately 182³², or as many as 300 if the tiny "rancheria" settlements in California and elsewhere are included.³³ The primary responsibility for Indian Affairs still rests with the federal Department of the Interior, but some American states have established state Indian reservations in addition to the federal lands. There are twelve small state-established reservations in six eastern states.³⁴ Some states have also surrendered large areas of land previously claimed by the state to the federal government in trust for Indian tribes.³⁵ At present, more than 56 million acres are held by the federal government in trust for Indians in the lower 48 states, and another 44 million acres are held by the Native Corporations of Alaska.³⁶ The area of Federal Indian Trust lands in the lower states has increased by more than three million acres since 1985.³⁷

27. *Ibid.* at 251.

28. The giant Navajo reservation of Arizona, New Mexico and Utah is still 95% tribally owned, with just 5% allotted to individual families.

29. Also known as the *Wheeler Howard Act*, ch. 576, 48 Stat. 984 (1934), 25 U.S.C.A. § 461.

30. *Supra* note 7 at 111.

31. *Ibid.* at 112.

32. For comparisons of the major reservations see Confederation of American Indians, *Indian Reservations, A State and Federal Handbook* (Jefferson, N.C.: McFarland and Co., 1986).

33. Of the American states, California has the highest number of reservations with 95, but more than half of these are of the small "rancheria" type which range in size from less than one acre to one square mile. *Supra* note 7 at 112.

34. *Ibid.* at 112.

35. See 25 U.S.C.A. §§ 463 and 463(a)(b)(c) re. the gift of lands by the State of Arizona to the federal government in trust for the Papago Tribe.

36. *Supra* note 7 at 111 and 226.

37. *Ibid.* at 121.

2. *Reserves in Canada*

The first reserves in Canada were established by the Roman Catholic church in New France for Quebec's Indian allies and new converts to Christianity. The Huron reserve at Lorette, as well as the reserves at Sillery, Kahnawake (Caughnawaga), Kanesatake (Oka), Odanak and Akwesasne (St. Regis) were established by religious orders. In addition to French and British Crown grants to religious communities, various Canadian reserves were established by colonial and provincial executive actions setting apart "public lands", by treaty and modern settlement agreements, and by federal purchase of private lands.³⁸ Canada's much smaller population generally saw less direct conflict between Natives and white agriculturalists than in the United States. The colony of Nova Scotia was an exception where the earliest settlers steadily encroached on Mi'kmaq territory. Colonial governments rarely used their meagre resources to "protect" Indian land, although they were far more inclined to call for troops whenever Indians resisted white advances.³⁹

a. *Quebec and the Maritimes*

In Quebec and the Maritime provinces there were no treaties or agreements with Native residents for the surrender of traditional lands. The early and present governments of both regions denied (and still deny) that the Royal Proclamation of 1763, with its requirement that Indian lands can only be surrendered to the Imperial Crown, applies to them. In Quebec and the Maritimes, local commissioners were given the power to dispose of Indian lands.⁴⁰ No compensation was paid to First Nations for lands taken for early white settlement.

By the mid-nineteenth century, colonial legislation in Quebec (Lower Canada) authorized the setting aside of almost a quarter of a million acres for Indian reserves,⁴¹ but the federal government of Canada has been reluctant to purchase large areas of land from the Crown in Right of Quebec for the establishment of reserves.⁴² Other colonial acts purported to control the disposition of Indian lands.⁴³ Almost 45,000 acres were

38. R.H. Bartlett, "Reserve Lands" in B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis, and Inuit Rights in Canada* (Ottawa: Carleton, 1988) at 469.

39. *Supra* note 17 at 88.

40. R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 14 and 15.

41. *An Act to Authorize the Setting Apart of Lands for the Use of Indian Tribes in Lower Canada*, S.C. 1851, c. 106 (14 & 15 Vict.).

42. *Supra* note 38 at 486.

43. *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850 (13 & 14 Vict.).

taken from reserves created in 1851 under land surrenders in 1867 and 1904.⁴⁴ In the Maritimes, reserves were set aside under legislation dealing with the management of crown lands.⁴⁵

b. *Ontario and the Prairies*

In Ontario a commitment, albeit half-hearted, was made to acquire Indian lands through voluntary surrenders rather than by generally denying Native title. In keeping with the Royal Proclamation, Upper Canada's legislation ostensibly maintained the requirement of voluntary surrender of Indian lands to the Crown before they could be sold to white settlers.⁴⁶ Generally, settlers were given land for very little cost, Indians received a small annuity from the government, and the Crown purchased enormous tracts of Indian land for little or no cost to the government.⁴⁷ In the fifteen years after the War of 1812, vast areas of Indian land in Upper Canada were transferred to white agriculturalists in seven land treaties.⁴⁸ By 1850, a pattern in treaty-making had been set with the signing of the Robinson-Huron Treaty and the Robinson-Superior Treaty. Under these, and subsequent, treaties the Indians retained the tracts of land on which they were residing and cultivating, and also retained the right to hunt and fish over the larger ceded areas. A series of numbered treaties were negotiated between 1871 and 1921 by which most of western Canada was opened for settlement. Government policy was to keep reserves small and restricted to a single band. In the prairie provinces, the Crown in Right of Canada continued to hold title to public lands until 1930 when title to the crown lands passed to the three provinces.⁴⁹ Over 785,000 acres were surrendered from prairie reserves in the early years of the twentieth century.⁵⁰

c. *British Columbia*

Some parts of Canada were not covered by any treaty. Except for small areas of Vancouver Island and the northeastern part of the province which

44. *Supra* note 40 at 26.

45. See *An Act for the Administration of the Crown Lands*, R.S.N.S. 1851, c. 28, in which s. 5 authorizes the Governor to reserve lands for the Indians in the province. Other examples can be found in S.N.S. 1842, c. 16 and S.N.B. 1844, c. 47.

46. *An Act Respecting the Management of Indian Lands and Property*, S. Prov. Can. 1860, c. 151.

47. *Supra* note 17 at 92-93.

48. *Ibid.* at 93.

49. *Supra* note 38 at 491.

50. *Supra* note 40 at 26.

fell under Treaty Number 8, most of British Columbia was seized and settled without formal surrender of Indian lands. The official position of British Columbia has been that the Royal Proclamation of 1763 does not apply to British Columbia, and that aboriginal title never existed. Because of the remoteness and the late settlement of the west coast colonies of Vancouver Island and British Columbia, the British government was disinclined to do more than offer cautionary advice when it came to Indian matters.⁵¹

Between 1851 and 1854, Governor James Douglas negotiated fourteen minor treaties covering 3% of Vancouver Island. Although the land was alienated for a pittance, the treaties did explicitly acknowledge Indian title in the non-treaty areas. Yet after 1854 Douglas stopped negotiating land treaties on the island, and he negotiated no treaties at all for the British Columbia mainland colony.⁵² Native communities were granted small plots of land around their villages, and Aboriginal title to all other areas was ignored. The colonial government decided how much land was allotted for each reserve, with the portion generally limited to just ten acres per family.⁵³ The result was that, without formal surrender or compensation, most bands were left with little more than small allocations around their homes in their various seasonal villages. British Columbia Indians were not only left with much less land than their American neighbours, but also had fewer rights and less land than most First Nations in Canada.⁵⁴ Present land claims cover most of the province.

d. *Canada's reserves today*

Canada's Indian lands are scattered across thousands of tiny and remote reserves, many of which are inaccessible by road. Nearly 600 bands have been assigned approximately 2,300 small reserves.⁵⁵ British Columbia alone has over 1,600 reserves with an average size of less than one square mile. Of the American states, only California comes close to resembling the small-dispersed reserve pattern seen across Canada.⁵⁶ The largest Canadian reserves are in Alberta with an average area of 80 acres per capita; the smallest are in Nova Scotia with an average area of just eight acres per capita.⁵⁷

51. *Ibid.* at 18.

52. *Supra* note 15, in chapters 2 and 3.

53. *Ibid.* at 30–33.

54. *Ibid.* at 37.

55. *Supra* note 1.

56. *Supra* note 33.

57. *Supra* note 1(b); and note 38 at 476.

III. *Comparative Federal Jurisdiction: The Geography of Law*

A further geographical consideration which could impact on future land settlements and economic development programs is the difference in the land holdings of the Canadian and American federal governments. Although Canada's provinces were the direct beneficiaries of Native land surrenders to the Crown, the provinces have taken the position that they are under no legal or constitutional obligation to transfer lands to the federal government for reserves.⁵⁸ Canadian federal and provincial governments still maintain the myth of a "unified Crown" with both levels of government loyally serving the same Queen. Most "public lands", however, are controlled by Canada's provinces, and such lands are not relinquished unless purchased from the provinces by the federal government.

Whereas the federal government of Canada is relatively weak and land-poor vis-a-vis its constituent provinces, the stronger U.S. federal government directly controls enormous land tracts in most states with significant Indian populations. Particularly in the American west, vast areas are held by Washington as national parks, national forests, Bureau of Land Management [BLM] lands, and by the Department of Defence in giant military reservations. In addition, almost all Indian reservations are held as Federal Trust Lands. For example, in the state of Arizona:

- 44% of the land is Federally owned (31.6 mil. acres);
- 27% of the land is held in Indian Trust (19.5 mil. ac.);
- 18% of the land is privately owned (12.8 mil. ac.);
- 12% of the land is State owned (8.9 mil. ac.).⁵⁹

In no province of Canada does the federal government own or control more than a small fraction of the lands held by the province. Alberta, with the largest Indian reserves, three major national parks and a large airbase, has yielded the most land to the control of the federal Crown, although nothing like the 71% amount in the case of Arizona. Native Affairs in both countries falls under federal jurisdiction, but while the U.S. government controls hundreds of millions of acres within its states the Canadian federal government has no such land resources apart from the northern territories.

The effect of this provincial control over Crown lands is illustrated by the reticence of British Columbia to relinquish control over part of the Queen Charlotte Islands to create either a national park or an Indian

58. N. Banks, "Resource Leasing Options and the Settlement of Aboriginal Claims", *Canadian Arctic Resources* (Ottawa, 1983), as reported by Frideres, *supra* note 14 at 393.

59. Economic Research Dept., "Arizona Statistical Review" (Phoenix: Valley National Bank).

reserve. British Columbia's extraction of millions of dollars from Ottawa for the South Moresby Park in the Queen Charlotte Islands may be contrasted with Arizona's voluntary surrender of state-claimed lands to the U.S. federal government in trust for the Papago tribe.⁶⁰

Conversely, land settlements may be negotiated with comparative ease in the northern territories where the federal Crown holds the public lands. Where the federal government is not inhibited by constraints on its power to take public lands, settlements are arrived at more quickly and are more generous. Several enormous land claim settlements have been reached, or are near completion, in Canada's north where public lands are held by the federal Crown. Following the model set by the Alaska Native claims settlement of 1971,⁶¹ the government of Canada has negotiated comprehensive agreements with the Indians and Inuit of the Yukon and Northwest Territories.⁶²

Although the provinces are not constitutionally responsible for Indian affairs, their holdings of Crown land give them a much greater role, and more opportunities to obstruct, than comparable American states would have. While large areas of the Arctic will soon be under the control of Inuit and Native organizations, the 95% of Canada's Aboriginal population living in the provinces is facing land-poor self-government.

IV. *Future Prospects for Canadian Reserves?*

No single economic development model is applicable to all cases because the reservations/reserves are as individual as the lands and peoples

60. *Supra* note 35.

61. Under the *Alaska Native Claims Settlement Act, 1971*, Pub. Law No. 92-203, 43 U.S.C.A. § 1601-1628, Native corporations got title to 44 million acres (11% of the state) including mineral rights and received one billion dollars in compensation for the extinguishment of all aboriginal claims.

62. (1) Yukon Agreement in Principle (November 1988) between the federal and territorial governments and the Council of Yukon Indians whereby the Natives will receive \$250 million and title to 10.25 million acres of their traditional lands with mineral rights over part, and exclusive rights to harvest wildlife; (2) Inuvialuit Final Agreement (June 1984) between the federal government and the Committee for Original Peoples' Entitlement whereby the Inuit of the western Arctic will receive \$150 million and title to 22.5 million acres of their traditional lands with mineral rights over part and exclusive wildlife harvesting; (3) Nunuvet Agreement in Principle/Eastern Arctic (December 1989) between the federal government and the Tungavik Federation of Nunavet whereby the Inuit of the eastern Arctic will receive \$600 million and title to 87 million acres of their traditional lands with mineral rights over part and exclusive wildlife harvesting; (4) Dene-Metis of the Northwest Territories Tentative Agreement in Principle (May 1988) between the federal government and the Dene and Metis Associations of the Northwest Territories in which further negotiations are expected to lead to a similar final agreement. See also *supra* note 40 at 39 and 48-51.

themselves. Population size, soils, climate, mineral/timber/water resources, proximity to urban areas, topography, tourism potential, access to capital, and education levels are among the many social and geographical factors which make each reserve economy unique.

Some obstacles, such as limited water supply are more common on western reservations in the United States, while others, such as inadequate transportation and road links tend to plague Canadian reserves. An important similarity between most Canadian reserves and American reservations is that both have chronically high unemployment rates. Once again, there is no single cause, yet common contributing factors would include resource-poor marginal land, distance from employment centres, poor education and high drop-out rates, and the lack of investment capital available to Indian enterprises. What is quite different, however, is the potential to make an impact on the problem.

The population, area and location of a reserve will shape the reserve's development potential. Commercial enterprises and governmental structures which work on 1.5 million acre reservations may not readily transfer to reserves of just 1,500 acres. It is submitted that as long as Native people possess or control large areas of land they, at least, have the potential to lessen the devastating effects of chronic high unemployment. When investment capital can be found and applied to the large land base, American Indian nations have lessened poverty and buttressed the institutions of tribal sovereignty.⁶³ In Canada, even if capital is to be found there is much less of a resource to apply it to.

1. *Land-based Development Applications*

Some of the larger reservations in the United States or Canada are suitable for grain and oil crop production, while others have developed significant cattle and sheep herds. Other tribes have used their proximity to universities, mines and cities to build rental housing on-reserve for the students or workers.⁶⁴ In Canada, labour-intensive selective forestry (as opposed to the more mechanized and highly criticized clearcutting) could offer potential employment and lessen environmental protest if reserves were large enough to make the projects viable. As capital-intensive mecha-

63. Although some tribes found it too intrusive, the *Indian Reorganization Act of 1934*, *supra* note 29, set the pattern for self-management and established a revolving credit program which was used to fund tribal projects, as well as to build up livestock herds, to form credit unions and co-operatives, and to improve educational and health services.

64. Examples of such "Proximity Development" include the Cour d'Alene Reservation in Idaho or the Okanagan Reserve in British Columbia. Many other reserves near cities offer rental housing for non-Native commuters.

nized farming staggers under crushing debt loads, the more labour-intensive organic farming could also be expanded onto Canadian reserves near population centres.⁶⁵ If suitable areas come under Native control, forest-recreation activities such as tourism, skiing, wilderness outfitters and hunting/fishing lodges are particularly well suited for areas such as southern British Columbia, Ontario's Lake Huron region and Nova Scotia's Cape Breton Island. Whether or not a large reserve can exploit any of the above potential uses is uncertain at this point, but it is already clear that having thousands of tiny and scattered reserves with little more land than surrounds run-down villages offers scant economic potential to Canadian First Nations.

2. *Economic and political development on American reservations*

Poverty or prosperity may visit reservations whether large or small due to other factors listed above such as location. The tiny Cabazon Tribe of Indio, California is an example of a well-situated small tribe. The 30 member band has cashed in on its location near Palm Springs with hundreds of millions of dollars worth of development including rental housing and a power plant.⁶⁶

In terms of Native self-government and economic development, no tribe has gone farther than the Navajo Nation of Arizona, New Mexico and Utah.⁶⁷ With 200,000 members and an enormous reservation⁶⁸ the Navajo people have taken over responsibility for the police, courts, jails, schools, hospitals, public housing, and even taxation of resource companies working on the reservation. The fully bilingual Navajo Tribal Courts are "separate but equal" to the 88 member Navajo Tribal Council following the example of the United States division of powers. More than three-fourths of Navajo people speak the Navajo language.

Much of the money to pay for this Indian nation-building came from taxes and royalties on oil and coal production on the giant reservation, and from electric power sales.⁶⁹ While much of the land is arid and barren, tourism is growing in scenic areas such as the Monument Valley of movie

65. Sections of the *Indian Act*, R.S.C. 1985, c. I-5 which require the prior written authorization of the Superintendent before foods produced on reserves can be sold off-reserve should be repealed. For example, s. 32(1).

66. *Supra* note 7, at 139-40.

67. For a detailed review of the economic, social and institutional developments of the Navajo Nation over the past century, see Garrick and Roberta G. Bailey, *A History of the Navajos: The Reservation Years* (Santa Fe: School of American Research Press, 1986).

68. The Navajo Reservation is approximately the size of mainland Nova Scotia or of the combined area of the states of Massachusetts, New Hampshire and Vermont.

69. *Supra* note 67 at 236.

fame and the Canyon de Chelly National Park. Although it has been suggested that the Navajo Nation could even become the 51st state of the United States⁷⁰, little more than a century ago the tribe's very existence was precarious. In 1868 a reservation was established and later expanded, and then expanded again, to over 25,000 square miles. A 20th Century population explosion swelled the tribe to its present population. Like their Athapaskan cousins in Canada's far north, the Navajo still refer to themselves as the "Dineh".

3. *Natural Resources on Reserve Lands*

As of 1988, American Indians collected \$161 million from mineral leases on reservation land. One-third of America's low-sulphur coal, as well as one-half of the nation's uranium and one-sixth of its natural gas reserves lie under Indian trust lands.⁷¹ In Canada, during 1979-80 mineral revenues from reserves exceeded \$200 million, practically all of which came from oil and gas on Alberta reserves. However, the extent to which the First Nations are entitled to the benefit of the minerals located on reserve is subject to the interest retained by the province and the way the *Indian Act*⁷² recognizes those provincial interests.⁷³ Relevant federal statutes such as the *Indian Reserve Mineral Resources Act*⁷⁴ or the *British Columbia Indian Reserves Mineral Resources Act*⁷⁵ are also subject to the various federal-provincial resource agreements.

No province has more vigorously pursued its own interests to the detriment of First Nations than British Columbia.⁷⁶ Federal-provincial agreements made in 1929 and 1943⁷⁷ left the province with the right to take 5% of reserve land for public works, to authorize water rights for off-reserve interests, to take construction materials for public works, and also gave the province jurisdiction over minerals on reserve. According to Bartlett:

The effect of the grant of the administration, control and disposal of minerals, including the setting of royalty rates, has been to enable the province to deny any benefit to the Indian bands.⁷⁸

70. Speculation reported by Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman, OK: University of Oklahoma Press, 1987) at 185.

71. *Supra* note 7 at 122.

72. *Supra* note 65 at s. 57.

73. *Supra* note 38 at 536.

74. R.S.C. 1979, c. 192.

75. S.C. 1943-44, c. 19.

76. *Supra* note 40 at 147.

77. O.C. 1036 B.C., July 29, 1938; S.C. 1943-44, c. 19, s. 2.

78. *Supra* note 40 at 148.

With respect to precious metals:

A band in British Columbia has absolutely no power in law to prevent the development of a precious metals mine on a reserve, the revenue from which would flow almost entirely to the province.⁷⁹

The 1924 Canada-Ontario Reserve Lands Agreement,⁸⁰ which also served as the model for the Natural Resources Transfer Agreements of Manitoba, Saskatchewan and Alberta, provided for federal administration of resources, subject to provincial requirements such as those for claim-staking and prospecting. One-half of the Ontario royalty goes to the province, and one-half goes to the federal government for the benefit of the Indian bands.⁸¹ The federal government also administers minerals on Nova Scotia and New Brunswick reserves, with all proceeds going to the bands under 1958 federal-provincial agreements.⁸² The province of Quebec has no agreements with the federal government over the control of mineral resources on reserve lands, apart from the specific areas falling under the James Bay and Northern Quebec Agreement⁸³ and the North-eastern Quebec Agreement.⁸⁴

V. *Capital Reserves: A Modest Earthquake?*

It is submitted that Canada's First Nations need larger areas under their control not only for economic development reasons, but also to reassert tribal identities beyond the limits of the individual band level. A tribe of 35,000 persons can build and share facilities such as hospitals or community colleges when 35 bands of 1,000 members could not. This does not mean, however, that the present and long-established system of band organization should be overturned and thousands of lives disrupted. The concept of Capital Reserves could be developed as an economic measure to lessen poverty and dependence on welfare on reserves, with little or no change to the existing band order. Corollary benefits could also assist the assumption of Native sovereignty, and help to reforge traditional tribal and cross-tribal bonds. Native institutions and enterprises thus fostered would even provide indirect economic assistance to large areas of rural Canada.

79. *Ibid.* at 149.

80. S.C. 1924, c. 48.

81. Except that the province receives none of the royalty on reserves established before 1930 in the prairie provinces. *Supra* note 38 at 491.

82. *Supra* note 40 at 153.

83. S.C. 1976-77, c. 32; S.Q. 1976-77, c. 46.

84. S.C. 1976-77, c. 32; S.Q. 1978, c. 98.

1. *What is a Capital Reserve?*

A capital reserve would be a large new and original reserve for larger tribal groups (or coalitions of bands) created out of federal and provincial lands. Its purpose would be to provide a large tract of land to be used for the economic and social benefit of a group of related First Nations. In the United States, since 1970 more than 500,000 acres of federal land has been transferred to tribes "for socio-economic purposes unrelated to land claims."⁸⁵ This is not the same as having a group of bands attempting to pool their existing small and scattered land holdings. The promotion of Native and regional economic development would thus become a distinct new basis for the creation of reserves in addition to those treaty or under aboriginal rights based on traditional occupation of land.

Capital Reserves would complement or add to the present system of reserves, and, as such, would not diminish existing land holdings or legal entitlements in areas where claims are still pending. Past, present and future claims would be unaffected because the capital reserves would be a multi-band economic development tool rather than a part of ongoing claims. However, the capital reserves should be established, if at all, for economic development reasons rather than as an inducement to extinguish existing land claims under aboriginal title or treaties. Bands not presently engaged in land-claim litigation should not be denied access to this multi-band economic resource merely because they do not have extant claims to barter. Nor should bands with existing claims forfeit what is rightly due, or be denied access to economic development assistance merely because they are asserting such claims.

Similarly, the establishment of a large new joint-use reserve should not be used by government as a device to move and consolidate Native people in central locations for the administrative convenience of the state. No efforts should be made to forcibly relocate persons (as in the American experience or in past attempts to move Newfoundlanders from isolated outposts or the forced resettlement of Inuit people to bolster Canada's Arctic sovereignty claims). If capital reserves ever become a reality, they should be taken to be a joint economic development tool in the hands of First Nations, rather than as an administrative tool in the hands of the Crown. Residents of isolated reserves would thus be able to remain where they are, if they so wished, and still vicariously benefit from economic development on a distant capital reserve in which their band is a participant.

85. As reported by Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton Univ. Press, 1985) at 668.

2. *The Management and Use of Capital Reserves*

The management of the common reserve should be given to the Native groups involved. The participants should exercise as much flexibility and creativity as they need to develop the resource as they see fit. The power granted to the new entity by the constituent bands would necessarily follow the goals and aspirations of the participants.

Some First Nations might choose to limit the inter-band co-operation to simply holding the large tract jointly as a form of profit-a-prendre, as in the business sense of the word capital. Others might regard the multi-band level management and the capital reserve site as ideal for new or expanded tribal institutions, courts or social services. If the coalition had plans for larger shared facilities such as a hospital or community college, the jointly-owned capital reserve could again be a convenient venue. Still others with designs of tribal nationalism could use the new reserve in the fullest political and cultural sense of the term capital, as the administrative and cultural centre of a larger tribe consisting of many bands. Some bands may choose to establish or strengthen 'greater tribal councils' to manage the capital reserve, while other bands may wish to keep most control at the existing band level. Nova Scotia's Mi'kmaq Nation has always maintained a Grand Council of the greater tribe. This exemplifies the type of organization which could assume control over a new capital reserve jointly-held by closely tied bands. Unity would follow.

How the groups of bands select their greater council to manage the capital reserve should be left up to the participating bands to decide. Existing band councils would remain in charge of their respective reserves and any attached legal claims, as well as deciding the extent of interaction with other bands in connection with the Capital Reserve. At a minimum, the capital reserve would be a means to deploy the greater strength, vision, and resources of the larger group (or tribe) to pursue larger goals and to tackle endemic problems. In addition:

Programs for Indian economic development must have maximum internal autonomy, and the Indian community must be allowed to manage its own funds.⁸⁶

3. *The Scale of Capital Reserves*

The size and character of any proposed capital reserves would necessarily depend on the number and population of bands participating. To maximize the size and development potential of the Capital Reserve, First

86. Sol Tax and Samuel Stanley, *American Indians: Facts and Figures*, sub nom *Toward Economic Development for Native American Communities* (Washington: Joint Economic Committee of Congress, U.S. Gov't Printing Office, 1969) at 75.

Nations would have to seek a greater coalition of participants. For maximum local control, smaller jointly-held reserves could be arranged. By way of comparison to the American example, if the unified Ojibwa/Odawa of Ontario were to have even one half of the territory granted to similar sized tribes in the United States, then a joint reserve of 1.5–2.0 million acres would be in order. A location north of Lake Huron and east of Lake Superior would be a logical site for such a reserve. An even larger capital tract (possibly in northern Manitoba) would be appropriate if large numbers of Cree bands joined to manage it. However, care would have to be taken to ensure that lands acquired for joint economic resource reserves are not subject to claims litigation unless releases were obtained from the claimants. With most of British Columbia subject to on-going comprehensive claims negotiations, some resolution of these claims would be necessary before Capital Reserves could be formed.

The concept of jointly-held capital reserves is just one proposal to provide tracts of land which are sufficiently large to be economically viable for development by First Nations. Present band structures and property holdings would need not be disturbed under such an arrangement as it could be set up similar to any other joint enterprise. The less tangible cultural effects of the drawing together of ethnically related bands are harder to chart in the abstract. The fact remains, however, that the economic, administrative and cultural arrangements must be for the First Nations alone to make.

Conclusion

Obviously, great difficulties remain on American Indian reservations and the Australian Aboriginal reserves. Yet there is at least the potential for these peoples to overcome poverty and social disarray through their own efforts and means. A few tribes are already well on their way to economic self-sufficiency while attaining an unparalleled degree of tribal sovereignty. Not all tribes or bands would choose to follow the same path as the Navajo Nation, yet the importance of the land as an economic resource and as the focus of tribal culture is a fact that is common to all Native peoples.

Observation of some of the more self-sufficient American reservations shows not only the economic importance of land but also its importance in the renaissance of Native culture. Despite the prevalence of poverty and sub-standard dwellings, even the Canadian micro-reserves still provide roots and a homeplace to Indians who have left for the cities, as well as providing some freedom from the heavy hand of municipal regulation encountered while off-reserve.

Euro-Canadians and later immigrants to Canada tended to use somewhat less violent means to take the world's second largest country away from its original inhabitants than did the New Republic to the south. Still, two hard truths have emerged to our dishonour. First, the Queen in Right of Canada (and in Right of all of its Provinces), was miserly in reserving lands for the Aboriginal people of the Dominion when compared to other English-speaking lands settled under similar circumstances. And secondly, in their zeal to procure Indian lands at little or no cost to the Crown and white ratepayers, the early Indian Department officials left so little land resources to the First Nations that only a dependant welfare state could result.

Regardless of the outcome of constitutional discussions and First Ministers' Conferences, Native self-government will be a hollow victory if First Nations have little land and resources to govern. The present micro-sized and dispersed reserves show demonstrably little potential for ever providing a basis for economic renewal from within the Native communities, or for freedom from economic wardship. Past policies of reserving the least land possible for indigenous peoples now appear to have been penny-wise and pound-foolish as First Nations reapproach sovereignty without their traditional lands and with no modern livelihood. Much of the current problem stems from the fact that Indian bands were not expected to survive as such. The irony is that they did survive and the cost of solving a long deferred problem may be high.

There is no sorrow above the loss of a native land.

Euripides, 431 B.C. (from *Medea*)