Risky Business?

THE COMPLEX CASE OF SURETY BONDING IN AMERICAN INDIAN COUNTRY

Abstract

Surety bonds are financial instruments required for many construction projects. Both American Indian contractors and non-Indian contractors doing work in Indian Country face unique legal and financial obstacles to obtaining surety bonds. This paper uses qualitative and quantitative techniques to examine the nature of these challenges. While our quantitative research can only hint at possible barriers to credit, our qualitative research suggests American Indian contractors face significant barriers to obtaining surety bonds. In addition, tribes also face unique complications to surety bonding for construction projects in Indian Country; however, many have developed techniques to avoid such problems. We also propose a number of policy options to address the issues unique to Indian Country and analyze the strengths and weaknesses of each.

Sahar Angadjivand, Elyse Bailey, Jennifer Bendewald,
Nicole Mickelson, Ahna Minge, Robert Pickering, Andrew Twite

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SECTION 1: INTRODUCTION

In many cases, American Indian reservations remain islands of poverty amidst a sea of prosperity. Much scholarship has been devoted to both identifying the causes of this insular poverty and alleviating it through economic development. This paper aims to contribute to this discussion by focusing on a component of economic development in Indian Country that has received virtually no academic attention: surety bonding.

Despite its seemingly obscure nature, surety bonding is playing an increasingly large role in the construction industry: virtually all federal construction contracts and many state and local projects require surety bonds.[1] In addition, over the past two decades, more and more private construction contracts have required bonds.[2] It is also becoming common for subcontracting work to be bonded.[3]

Surety bonding is especially relevant In Indian Country because the construction industry is particularly well suited to help tribes build economic self-sufficiency. In the construction industry, human capital is more often developed through on-the-job training and apprenticeships than through formal education; this gives the construction sector unique potential to provide direct employment to Tribal citizens, who on average have lower educational attainment than whites and African-Americans.[4]

But along with this potential, Indian Country carries unique challenges for surety bonding: sovereign immunity, jurisdictional ambiguity, and governmental instability all increase the perceived risk of bonding projects in Indian Country. For tribally owned building projects, this can mean fewer bids, higher costs and less development as tribes are forced to confront tradeoffs between construction expenditures and other valuable programs. For American Indian contractors, inability to obtain surety bonding would constitute a major barrier to entry and growth in a competitive and capital-intensive

[1] Surety Information Office, "Miller Act," accessed December 1, 2012, http://suretyinfo.org/?page_id=177
[2] David Radcliffe (surety agent) interview with the authors, October 1, 2012.
[3] Native American Contractors Association, "Native American Business Provisions in the American Economy Recovery Act to Aid Native American and Alaska Native Economies," January 14, 2009, http://www.nativecontractors.org/media/pdf/NACAStimulusPlan-1-14-09(1).pdf
[4] National Center for Education Statistics, "Status and Trends in the Education of Racial and Ethnic Minorities," accessed December 10, 2012 from http://nces.ed.gov/pubs2010/2010015/indicator7_27.asp

sector.[5] It is important to note the distinction between the issues faced by contractors and those faced by tribes as owners of construction projects. While there is overlap in the legal and economic roots of the issues, they play out in notably different ways. For this reason, our analysis will address each independently.

This paper will explain how surety bonding works in Indian Country, highlighting the unique complications and suggesting potential policy solutions. In order to provide a framework for our analysis, we begin by presenting background information on surety bonding, including an explanation of how surety bonds function as financial instruments and a brief history of surety bonding in the United States. Next, we provide a brief legal history of surety bonding, outlining the relevant legal concepts for our analysis. The background section concludes with a discussion of existing literature on the role that legal institutions play in access to credit and economic development.

After describing our methodology in Section Three, Section Four examines the impact of surety bonding on American Indian contractors. We begin with a qualitative analysis investigating the ability of American Indian and tribally owned contractors to obtain surety bonds for construction projects both on and off Indian reservations. Our research includes interviews with American Indian contractors, surety companies and agents, and legal experts in the field. In particular, we examine the barriers that American Indian contractors face in obtaining surety bonds and explore the effectiveness of government programs designed to remove these barriers. This qualitative examination is supplemented by a quantitative analysis of American Indian contractors. Because of data limitations, we are unable to directly ascertain whether contractors are able to obtain surety bonding. Instead, we consider how jurisdiction of civil disputes affects American Indian contractors. Specifically, we use data from the Survey of Business Owners to identify differences between jurisdictions in the size of American Indian contracting companies, as well as differences in patterns of start-up capital and access to credit. We also use data from the Federal Procurement Data System to examine jurisdictional effects on the number and value of federal contracts

[5] W. Ron Allen, "Testimony to the United States Senate Committee On Indian Affairs," August 17, 2011, http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=9260

awarded to American Indian contractors. Through this mixed method approach we find that American Indian contractors faces a number of barriers to bonding. The quantitative analysis, however, is not able to assign causality of barriers to credit to legal jurisdiction. Following this analysis, we present several changes that could be made to existing programs to help alleviate these challenges.

Our analysis turns next to the impact that surety bonding has on construction and development within Indian Country. Through our research, we have identified four key barriers to the use of surety bonding for tribally owned construction projects: issues of sovereign immunity, the jurisdiction of dispute resolution, difficulty in collection on judgments, and tribal government instability. We address each issue individually before describing possible policy solutions to address the potential problems that can arise when tribal entities are parties to a contract.

Our paper concludes with a brief summary of our findings. American Indian contractors report inability to obtain bonding for a number of reasons. Meanwhile, tribes have developed a number of ways to overcome obstacles; however there may be unseen costs. In addition we discuss several opportunities for future research that could be valuable to better understanding these dynamics.

SECTION 2: BACKGROUND AND LITERATURE REVIEW

2.1: SURETY BONDING

2.1.1: FUNDAMENTALS OF SURETY BONDING

A surety bond is an insurance product in which a third party, the surety, guarantees fulfillment of a contract between two parties. In order to ensure the contract between the obligee (or project owner) and the principal (or contractor) will be successfully completed, the principal purchases a surety bond.[6] All federal construction contracts worth $150,000 or more require surety bonds, as well as most other state and locally

[6] United States Small Business Administration. "Surety Bonds: Explained." Accessed December 1, 2012, http://www.sba.gov/content/surety-bonds-explained.

financed construction projects. It is also common for privately funded obligees to require surety bonds, often as a requirement of the owner's lending institution.[7]

There are three types of surety bonds: bid bonds, payment bonds, and performance bonds. Bid bonds ensure that the bidder on a contract will enter into the contract if it's awarded. Payment bonds certify that all suppliers and subcontractors will be paid for their work. Performance bonds guarantee that the principal will perform as stated in the contract.[8] Payment bonds are the most frequently requested and, typically, the most expensive.[9] Defaults on bonds of any type, however, are uncommon.

Contractors obtain surety bonds by applying to a licensed surety company or surety agent. The underwriting process entails an in-depth assessment to gauge the likelihood that the contractor will fulfill the contract. While each surety has its own underwriting criteria, all typically include a detailed review of what CCI Surety, Inc. calls "the three C's": credit, capabilities, and capital.[10] Sureties examine not only contractors' corporate credit histories, but also their personal credit histories and previous work projects completed. The assessment of contractors' capital resources is the most important aspect of the underwriting process and is the most common cause of denial.[11] It is also common for sureties to require personal indemnities, wherein the owners of the contracting company and their spouses make their personal assets available in the event of a surety bond default. This is especially risky for general contractors managing a series of subcontractors in a large project.[12]

Upon approval, contractors are required to pay a bond premium to the surety company. The bond premium can vary from .5% to 3.5% of the total cost of the project, with the average premium around 2%.[13] The amount of the premium is determined by three factors: the perceived level of risk of contractor default, the total value of the contract, and the type of construction work being performed. Asphalt construction for

[7] Doug Niesen and Greg Johnson (contractors) interview with the authors, November 20, 2012.
[8] United States Small Business Administration. "Surety Bonds: Explained." Accessed December 1, 2012, http://www.sba.gov/content/surety-bonds-explained.
[9] Joshua Loftis (surety company Vice President) interview with the authors, November 20, 2012.
[10] Jeremy Crawford (surety company Vice President) interview with the authors, November 13, 2012.
[11] Ibid.
[12] Doug Niesen and Greg Johnson (contractors) interview with the authors, November 20, 2012.
[13] See e.g.: David Radcliff (surety agent) interview with the authors, October 1, 2012; Jeremy Crawford (surety company Vice President) interview with the authors, November 13, 2012; Joshua Loftis (surety company Vice President) interview with the authors, November 20, 2012.

road repair, for example, has a much lower risk of default than construction of a large facility: because larger construction projects involve more subcontractors and longer time frames, surety bonding becomes riskier; asphalt construction, on the other hand, tends to require fewer subcontractors and shorter timeframes.[14] The total cost of the project also impacts the premium rate: larger projects, which have lower rates of default than comparable but smaller projects, tend to have lower premiums.[15] The single largest premium determinant is the capital resources of the contractor. Large contracting firms with substantial capital assets pay lower premiums because of the lower risk of default and greater likelihood of collection in the event of default.[16]

Surety bonds are required in many large projects due to the inherent risk of the construction industry. This risk predates the bursting of the housing bubble: of the 853,000 construction firms active in 2002, more than 240,000 (28%) were out of business by 2006.[17] Unlike traditional insurance, in which an insurance company pays out losses to its client in the event of catastrophic loss, surety bonds act more as lines of credit in which the contractor is held liable to the surety for any losses the surety pays out. A surety bond is a guarantee to the owner, not the contractor, that the contract will be completed. As mentioned above, upon approval of a surety bond, surety companies require an indemnity agreement, which dictates that the contractor will be liable to the surety for any losses paid on its behalf.[18] Collateral, such as a bank letter of credit or a cashier's check, is often required for contractors that have been determined to be at higher risk of default.[19]

In the case of a contractor default, the surety company completes an investigation to determine whether or not the contractor was at fault. If fault is found, the surety company will take the necessary steps to resolve the issue, which may entail paying suppliers and subcontractors or hiring a new contractor to finish the project. This

[14] Joshua Loftis (surety company Vice President) interview with the authors, November 20, 2012.
[15] Jeremy Crawford (surety company Vice President) interview with the authors, November 13, 2012.
[16] Joshua Loftis (surety company Vice President) interview with the authors, November 20, 2012.
[17] Surety Information Office, "10 Things You Should Know About Surety Bonds," 2007. http://purchasing.state.nv.us/contracting/10.pdf
[18] Joshua Loftis (surety company Vice President) interview with the authors, November 20, 2012.
[19] Alpha Surety & Insurance Brokerage, "What is a Surety Bond Indemnity Agreement?" accessed December 10, 2012, from http://www.alphasurety.com/Surety-Bond-Basics/What-is-a-Surety-Bond-Indemnity-Agreement.asp

process, which may take several months, can set construction projects back considerably.

Obtaining surety bonds is especially challenging for small and emerging businesses. Sureties examine a wide variety of criteria, including references and reputation, ability to meet current and future obligations, experience, necessary equipment, financial strength, credit history, and liquid assets.[20] Many of these criteria are particularly problematic for small and emerging contracting firms. One contractor in South Dakota noted that even with the assistance of a Small Business Administration bonding program, it took almost ten years for him to receive bonding based on these factors.[21] Small and emerging contracting firms are often forced to initially rely solely on contracts that do not require bonding, which are becoming more rare.

Small and emerging contracting firms have faced even greater challenges in recent years. The combination of reduced government spending and lack of housing market growth have substantially reduced demand for contracting services. Reduced demand impacts small contractors disproportionately, because they face increased competition from larger firms, which can obtain lower surety bond premiums. These challenges are visible in the recent increase in failure rates for contracting firms, especially in small and medium markets.[22]

2.1.2: ECONOMIC THEORY OF THE SURETY BOND MARKET

Although surety bonding is not explicitly addressed in the economic literature known to the authors, it is consistent with existing literature on credit markets. In the market for credit, the interest rate is determined by the forces of supply and demand. The analogous price in the surety market is the bond premium. However, the simplest model of supply and demand can only explain the price of credit within certain bounds: we know that surety premiums rarely rise above 3.5% in practice. A contractor may

[20] Marla McIntyre and Dev Strischek, "Surety Bonding in Today's Construction Market: Changing Times for Contractors, Bankers, and Sureties," The RMA Journal May 2005: 31.
[21] Richard Rangel (contractor) interview with the authors, November 14, 2012.
[22] Engineering News-Record, "2011 Surety Market Report" June 27, 2011: S 4, http://www.zurichna.com/internet/zna/SiteCollectionDocuments/en/Products/surety/June%20Surety%20ENR%202011%20(customized)%206.27.11.pdf

theoretically be willing to pay a premium of 10% on a surety bond, but no surety will issue a bond with that high a price tag. Why?

One potential explanation is the presence of information asymmetries in the credit market, meaning that borrowers have better information about their willingness and ability to repay a loan than do lenders. Even the most rigorous application process for a loan or a bond cannot completely cure this asymmetry. According to economic theory, the asymmetrical information inherent in the credit market causes credit rationing, where creditors will not lend to some individuals even if they are willing to pay a high price for it.[23] This is due to two factors. First, a high interest rate or bond premium may signal that the borrower is high risk: borrowers who know they are low-risk are probably willing to pay less for a loan than those who know that they have a high chance of defaulting. Second, a high interest rate or bond premium encourages the borrower to take on more risk, with higher potential pay-offs: in order to turn a profit from a project with an expensive bond, a construction manager may have to engage the cheapest subcontractors, risking inadequate performance and thus a dispute with the owner of the project. The end result of the economic theory of credit rationing is that, left to the free market, some individuals will not get the credit they are willing to pay for.

However, this theory does not explain why surety bond premiums appear to be more tightly rationed than other forms of credit. A rate of 10% is unheard of in the surety market, and yet credit cards show a rate even higher than that. A better explanation for the observed premiums on surety bonds is that project owners determine which projects to bond in a way that precludes the need for high-premium bonds. Project owners tend to require bonds only on large projects, mirroring the federal requirement that publicly-funded projects over $150,000 be covered by a surety bond. This makes sense because, all other things being equal, the downside risk of a project increases as the dollar value increases. Our qualitative research confirmed that smaller contractors can and often do build their businesses around smaller projects that do not require bonds. Crucially, these smaller contractors are those most at risk of facing credit constraints: presumably, they would pay more both for surety bonds and for other formal credit,

[23] Joseph E. Stiglitz and Andrew Weiss, "Credit Rationing in Markets with Imperfect Information," The American Economic Review 71, no. 3 (1981).

such as bank loans. Thus, these contractors are not kept out of the surety bond market by credit rationing per se, but rather by the fact that small projects tend not to require bonding. It could be that the potential cost of a surety bond is keeping some contractors out of the running for large projects at the margin, but on the whole, small contractors would not have the capacity for the type of project requiring a bond. Additionally, our qualitative research indicates that profit margins are higher for small projects, actually creating a disincentive for contractors to expand their capacity.[24] The patterns of requirements for bonding and project profitability both imply that smaller contractors, which would face the highest bond premiums for large projects, tend to work on projects that do not require bonds.

2.1.3: HISTORY OF SURETY BONDING IN THE U.S.

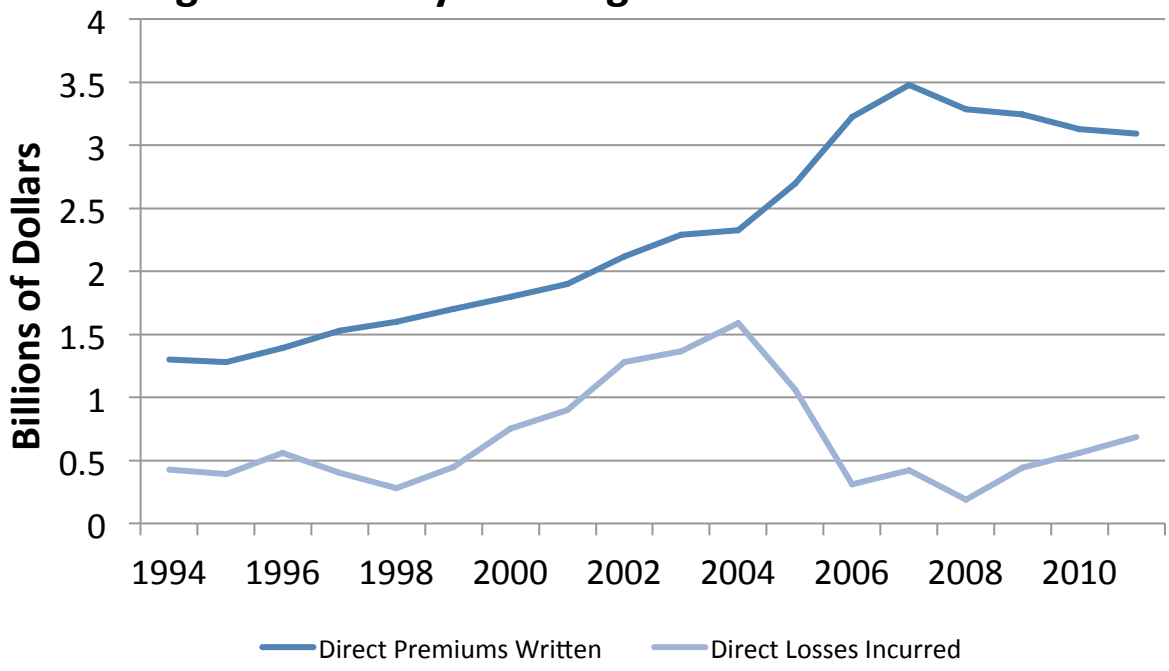
In order to protect taxpayer investments and ensure performance of public construction projects, the federal government requires surety bonding on virtually all federal contracts. Enacted in 1935, the Miller Act requires both performance bonds as well as payment and materials bonds for all federal construction contracts in excess of $150,000. The threshold, initially set at $2,000 (or about $34,000 adjusted for inflation)[25] has been increased three times since its inception: to $25,000 in 1978 (or about $89,000 in 2012 dollars); to $100,000 in 1994 (or about $156,000 in 2012 dollars); and to its current level in 2010.[26]

The recent increases in the threshold raise the question of the appropriateness of the current level. The trend of increasing the threshold in real terms suggests a belief that the threshold applied to too many contracts. The exception is the most recent increase, which was specifically targeted to only adjust for inflation and not affect the percentage of contracts subject to the Miller Act.[27] To the extent that the Miller Act protects taxpayer investments, one could argue that the threshold should be lowered to

[24] Khalid El Effendi (contractor) interview with the authors, December 2, 2012.
[25] All inflation adjustments are calculated from: US Bureau of Labor Statistics, "CPI Inflation Calculator," accessed December 9, 2012, http://www.bls.gov/data/inflation_calculator.htm
[26] Walter Wilson, John Cosgrove McBride and Thomas Touhey, "The Miller Act," *Matthew Bender and Company, Inc. (2012).* Government Contracts: 49
[27] U.S. Government Printing Office, "Federal Register Volume 75, Number 167 (Monday, August 30, 2010), Rules and Regulations, Pages 53129-53135. Accessed December 11, 2012, from http://www.gpo.gov/fdsys/pkg/FR-2010-08-30/html/2010-21025.htm

cover more contracts. However, as mentioned above, surety bond premiums tend to be higher for smaller projects.[28] This increases the cost of construction projects and—as will be discussed in Section 4—also makes it more difficult for small and emerging contractors to compete for these contracts. Ultimately, determining the ideal threshold requires a value judgment of the appropriate balance between these two issues.

Figure 1: Surety Bonding Premiums and Losses



Source: The Surety & Fidelity Association of America "Twelve-Year Experience." Accessed 12/3/12 at http://suretyinfo.org. Summaries (2000-2011) Surety Countrywide (Preliminary)"

Many state and local governments have also passed legislation requiring surety bonding on public construction projects; between these "little Miller Acts" and federal requirements, the vast majority of public construction contracts require surety bonding.[29] This is particularly important in Indian Country, where many large-scale construction projects are financed with federal or state funds.[30]

[28] Jeremy Crawford (surety company Vice President) interview with the authors, November 13, 2012.
[29] Surety Information Office, "Miller Act," accessed December 1, 2012, http://suretyinfo.org/?page_id=177
[30] All federally funded construction contracts over $150,000 require surety bonds, even if the construction will take place on a reservation.

Surety bonding is also playing an increasingly large role in private construction projects. Over the past two decades more and more private construction contracts have required bonds.[31] It is also becoming more common for subcontracting work to require surety bonds.[32] Figure 1 reports total premium revenue and losses incurred in the surety industry, showing that the market doubled in size since the mid-1990s. Since the 2008 recession, the market tightened visibly, as direct losses incurred dropped dramatically while total premiums dropped only slightly.

It is impossible to identify with certainty the cause of this gap. However, we suggest two factors that may be driving this phenomenon. First, sureties adopted more stringent underwriting requirements after experiencing sharp losses in the early 2000s.[33] Despite increased selectivity, total premiums still increased due to the private construction bubble and increasing requirements for bonding. The presence of stimulus funding helped to maintain these high premiums after the onset of the 2008 recession.[34] Furthermore, increased losses often occur three to five years behind periods of economic recession. During this time contractors often complete backlogged work leading to a slow deterioration of financial health preceding default.[35] An alternative explanation may be that private construction projects have decreased dramatically in the wake of the 2008 recession. With a scarcity of demand, one would expect a "survival of the fittest" response in the construction industry, where more efficient construction firms would continue to secure contracts while less cost-effective firms would not, leading to lower default rates overall. Moreover, even absent this effect, the decline in demand for construction would naturally reduce the likelihood of a construction firm "over-extending" itself by taking on more work than it can handle, which would also decrease default rates.

[31] David Radcliffe (surety agent) interview with the authors, October 1, 2012.
[32] Native American Contractors Association, "Native American Business Provisions in the American Economy Recovery Act to Aid Native American and Alaska Native Economies," January 14, 2009, http://www.nativecontractors.org/media/pdf/NACAStimulusPlan-1-14-09(1).pdf
[33] W. J. McConnell. 2012. *2012 State of the Construction and Sureties Industries.* Denver: Vertex Companies, p. 61.
[34] Ibid at p. 49.
[35] Ibid at p. 59.

2.2: LEGAL HISTORY

Throughout its history, the United States' system of federalism has challenged the sovereignty of Indian nations. At all times the federal government has recognized at least a limited right of tribes to govern their own lands within the United States. The limits of these rights, however, have been in continual dispute. Currently, federally recognized tribes have a limited form of sovereign immunity, which is a protection from being sued. In addition, most, though not all, federally recognized tribes have legal jurisdiction over disputes on their own land. Because each of these concepts carries important implications for the surety bond market, this section will highlight the key Supreme Court decisions and federal laws which shape the current state of legal jurisdiction and our current understanding of sovereign immunity.

The right of tribal sovereign immunity was determined early in American history. The Indian Nonintercourse Act of 1790 was the first piece of legislation that signaled tribes' position in the federalist system, stipulating that the federal government had to approve any purchases of Indian lands: in effect, this elevated the tribes above state jurisdiction.[36] The Supreme Court ruling Cherokee Nation v. Georgia (1831) clarified the position of American Indian tribes within U.S. federalism as "a distinct political society" and yet not "a foreign state in the sense of the Constitution."[37] Tribes were to be considered "domestic dependent nations" rather than strictly foreign nations. Because this ruling created a special legal category for tribes that had not existed before—analogous to but not exactly a sovereign state—it set the stage for arguments over the limits of tribal sovereignty that continue today.[38] The original state of a self-governing "distinct political society" has been gradually eroded over the years, replaced with federal and occasionally state governance.

[36] William E. Dwyer, Jr., "Land Claims Under the Indian Nonintercourse Act," 25 U.S.C. § 177, 7 B.C. Environmental Affairs Law Review 259 (1978), http://lawdigitalcommons.bc.edu/ealr/vol7/iss2/3

[37] United States Supreme Court, "Cherokee Nation v. Georgia opinion" 30 U.S. 1, accessed December 2, 2012, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0030_0001_ZO.html

[38] Terry L. Anderson and Dominic P. Parker. "Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations." *Journal of Law and Economics* 51:641-666. (2008). http://www.perc.org/files/AndersonParker.pdf

Federal jurisdiction was first imposed on Indian Country through the Indian Major Crimes Act of 1885. This Act stipulated that major crimes occurring on Indian lands, such as murder or rape, would be held in the federal court system, even in disputes between two tribal members. Shortly thereafter, the General Allotment Act of 1887—commonly known as the Dawes Act—allotted commonly held tribal land to individual tribal members, in an effort to assimilate American Indians through private rather than communal land ownership. Thus, even if tribes had legal jurisdiction over their own lands, the federal government could effectively reduce the amount of land belonging to tribes. Another provision in this Act sold "surplus" tribal lands to non-Indians, greatly reducing the amount of tribally owned land in the country.[39] This practice was halted with the Indian Reorganization Act of 1934, which granted new powers to tribes to govern their lands. However, tribes were still not completely self-governing, as the federal Department of the Interior—through the Bureau of Indian Affairs—still had wide-reaching oversight over the administration of federal programs in Indian Country.[40]

Congress ceased recognizing specific tribes from the mid-1940s to mid-1960s, a general practice known as Indian termination policy.[41] Tribes that were no longer recognized by the federal government stopped receiving federal aid and their jurisdiction over their lands was revoked and replaced by state law. Additionally, in 1953, Public Law 280 (PL 280) ended tribal jurisdiction over criminal disputes in multiple states and also impacted tribal jurisdiction over civil disputes.[42] PL 280 remains an important determinant in whether disputes are brought to state or tribal court as well as the laws that apply. In addition, it has led to uneven tribal jurisdiction across the states. Civil contract law, including that governing surety bonding, remains a murky legal area in states covered by PL 280, with state courts still determining the extent to which the state rather than the tribe has jurisdiction over disputes.

[39] So-called "checkerboarding", the intermingling of Indian- and non-Indian-owned plots of land in a checkerboard pattern, resulted from this policy of allotment.
[40] Tribal Government Leadership Forum, "Summary of the Indian Reorganization Act of 1934," accessed December 2, 2012, http://outreach.asu.edu/tglf/book/statutes/summary-indian-reorganization-act-1934
[41] Michael C. Walch. "Terminating the Indian Termination Policy" *Stanford Law Review*. 35(6):181-1215.
[42] U.S. Department of Justice, "Public Law 280 and Law Enforcement in Indian Country—Research Priorities," accessed December 2, 2012, https://www.ncjrs.gov/pdffiles1/nij/209839.pdf

Beginning in the mid-1960s, however, public sentiment regarding federal-tribal relations began to shift. This change is embodied in President Richard Nixon's 1970 address to the Congress on Indian Affairs, in which he called for transformation to an "era in which the Indian future is determined by Indian acts and Indian decisions."[43] In 1975, the Indian Self Determination and Education Act was signed into law. This and subsequent legislation greatly increased tribes' authority to self-govern. Many presidential administrations have demonstrated support for increased tribal sovereignty. Tribes now exercise significant authority for law enforcement, taxation, regulation and use of natural resources.[44,45]

2.3: LITERATURE ON ECONOMIC DEVELOPMENT IN INDIAN COUNTRY

Significant research exists on the relationship between institutions and economic development at a national level. A number of studies have demonstrated a link between the strength of a country's political, legal and economic institutions and its economic growth.[46] This research has looked at issues through a broad, international lens, yet it remains relevant for the study of surety bonding in Indian Country. A number of scholars have studied economic development on Indian Reservations from an institutional perspective. The earliest of these studies considers how land tenure affects inefficiencies in ranching and other agricultural production.[47] Further studies have led scholars to deduce that because differences in economic prosperity cannot be entirely

[43] Michael P. Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy" *Immigration and Nationality Law Review* 3: 295-344. 1979-1980.
[44] Ibid.
[45] Stephen Cornell, and Joseph S. Kalt. 2000. "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development." *Journal of Socio-Economics* 29: 446.
[46] See e.g.: Acemoglu et al. "The Colonial Origins of Comparative Development: An Empirical Investigation." *The American Economic Review*, Vol. 91, No. 5 (Dec., 2001); R. E. Hall and C. I. Jones. "Why Do Some Countries Produce So Much More Output per Worker than Others?" *Quarterly Journal of Economics* 114,1999; S. Knack and P. Keefer. "Does Social Capital Have an Economic Payoff? A Cross-Country Investigation." *Quarterly Journal of Economics* 112, no. 4, 1997; La Porta et al., "The Quality of Government." *Journal of Law Economics & Organization* 15, no. 1 1999; P. Mauro, "Corruption and Growth." *Quarterly Journal of Economics* 110, no. 3:681-712. 1995.
[47] Ronald L. Trosper, "American Indian Ranching Efficiency." *American Economic Review* 68(4) (1978): 503–516.

explained by natural resources or human capital, institutions may be a contributing factor.[48]

Cornell and Kalt have studied the divergent paths that various tribes have taken in both their institutional and economic development since the shift in federal policy toward tribal self-determination.[49] The authors outline a litany of obstacles that are often cited when discussing economic development, but also identify several key ingredients for success, including external and internal factors and a strategy for development. Most relevant to this study are the external opportunities of political sovereignty and access to financial capital and the internal assets of institutions of governance and culture. Also related are a tribe's economic system and choice of development activity, as they contribute to the presence or absence of American Indian contractors as well as the decision to build in Indian Country. The authors note that some of these factors are easier for an individual tribe to influence than others. Notably, political sovereignty is something that is changeable but is controlled by federal Indian policy.[50]

In a later paper, Cornell and Kalt attempt to find the institutional "glue" behind economic growth. To do so, they analyze a broad range of institutional variables of sixty-seven reservations. They describe variation among tribes based on their ability to "exhibit sustained economic development."[51] The authors consider both formal (governmental) institutions as well as informal (sociocultural) institutions in their analysis. In their comparison, the authors identify the importance of sociocultural appropriateness of institutions: while economic development depends on the establishment of formal legal institutions, these institutions must be compatible with the tribe's culture.

A number of studies have empirically tested the relationship between institutional variables and economic development outcomes. Anderson and Parker look specifically

[48] Terry L. Anderson and Dominic P. Parker. "Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations." *Journal of Law and Economics* 51:641-666. (2008). http://www.perc.org/files/AndersonParker.pdf

[49] Stephen Cornell and Joseph P. Kalt. "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations." With. In What Can Tribes Do? Strategies and Institutions in American Indian Economic Development, edited by Stephen Cornell and Joseph P. Kalt. Los Angeles: American Indian Studies Center, UCLA. 1992.

[50] Ibid at p. 10.

[51] Stephen Cornell, and Joseph S. Kalt. 2000. "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development." *Journal of Socio-Economics* 29: 446.

at per capita income and the change in per capita income from 1989 to 1999.[52] Their analysis considers the influence of landowner incentives, external adjudication through Public Law 280 (PL 280) or similar mechanisms, and government transfers. The authors find a significant relationship between institutions and economic development. Specifically important for this study is their finding of a significant and positive relationship between state jurisdiction and per capita income and income growth. They argue that their study shows a need to improve legal institutions in Indian Country.

Another area in which legal institutions affect development is credit markets. In a 2012 paper, Dominic Parker examines the impact of PL 280 on credit availability in Indian Country. Because PL 280 allows non-Indian creditors to bring actions against Indian debtors in state courts, one would expect that creditors would be more willing to lend to American Indians living in states covered by PL 280.[53] In his analysis, Parker identifies the changes in credit market size that took place after the implementation of PL 280. After controlling for several demographic, geographic, and economic factors and time trends, Parker estimates that implementation of PL 280 led to an increase in per capita credit of at least 166%. Parker goes on to verify his finding by using more recent data to demonstrate that the credit gap between American Indians and whites is significantly smaller in PL 280 states.[54]

Haddock and Miller consider the ways in which tribal sovereignty is both an asset and a liability for tribal governance.[55] Paradoxically, although sovereignty is often considered an advantage for tribes, it "comes in varieties, some that threaten those who might most aid impoverished Indians."[56] The authors discuss ways in which tribal sovereignty has been diminished through state and federal actions and ways in which a

[52] Terry L. Anderson and Dominic P. Parker. 2006. "The Wealth of Indian Nations Economics Performance and Institutions on Reservations." In Self-Determination: The Other Path for Native Americans, eds. Terry L. Anderson, Bruce L. Benson, Thomas E. Flanagan. Stanford, CA: Stanford University Press, Ch. 6.
[53] Dominic P. Parker, "The Effects of Legal Institutions on Access to Credit: Evidence from American Indian Reservations," http://extranet.isnie.org/uploads/isnie2012/parker.pdf
[54] Ibid.
[55] David D. Haddock,and Robert Miller, "Sovereignty can be a Liability: How Tribes can Mitigate the Sovereign's Paradox" In Self- Determination: The Other Path for Native Americans, edited by T. L. Anderson, B.L. Benson, and T. E. Flanagan. Stanford, CA: Stanford University Press (2006),
[56] Ibid at 194.

tribe may act to reclaim it. Their analysis goes on to consider the role of sovereignty in voluntary relationships such as those with investors.

Investors, the authors argue, are more wary of dealing with tribal sovereigns than they are with state governments or the federal government because of tribes' poor legal reputations. They argue that, as a result, investors forgo opportunities in Indian Country for opportunities with lower risk or charge a risk premium, thus increasing the cost to the tribe.[57] Despite an individual tribe's ethical standards or propensity to act opportunistically, they argue that all tribes are impacted by some tribes' opportunistic actions. The authors conclude that tribes must "find a way to bind themselves against opportunistic behavior."[58] One solution that they suggest is that tribes amend their constitutions to reverse the default assumption of sovereign immunity and replace it with a default assumption of waived immunity for contracts unless expressly stated otherwise. They argue that this would calm investors' concerns that a court may read a waiver more narrowly than intended. The authors also suggest the use of predetermined arbitrator in construction contract disputes.

SECTION 3: METHODOLOGY

To assess the impacts of surety bonding in Indian Country, this study utilizes both qualitative and quantitative methods. The qualitative methods provide the entirety of analyses relating to contracting with tribes, while the question of the impact of surety bonding on American Indian contractors is answered primarily using quantitative data.
Unstructured interviews were conducted with a variety of participants in order to better understand the nature of surety bonding in Indian Country and for American Indian contractors. Interviews were crucial due to the lack of readily available quantitative data. Interview participants included surety representatives, officials of state and federal programs, contractors that work in Indian Country, American Indian contractors, tribal representatives, attorneys working in the field, and a representative of a philanthropic nation-building initiative. The short time frame of this study, as well as accessibility of interview participants, is a major limitation of this analysis. In addition to interviews, this

[57] Ibid at 202.
[58] Ibid at 211.

study utilizes case studies as a method of conveying archetypes of qualitative themes. While these cases are in no way generalizable, they provide the reader with useful examples of potential complications surrounding surety bonding in Indian Country.

In addition to qualitative methods, this study contains analyses of two quantitative data sources. These sources were used to better understand the conditions facing American Indian contractors. The first data source is the 2007 Survey of Business Owners. This survey contains a number of questions about the experiences of business owners as they seek credit. These data are valuable because the underwriting process for obtaining credit is very similar to that of the surety industry. In addition, a business owner's ability to access credit is also often a qualifier for obtaining surety bonding. Using this data, this study analyzes the various funding sources for business creation and expansion for American Indians in the construction industry, by state. These are then contrasted with businesses owned by members of other minority groups and businesses operating in other industries. The study also uses a maximum-likelihood equation to determine whether ownership by an American Indian has a significant impact on a business's access to credit and how that varies depending on the venue of legal adjudication.

The second source of quantitative data is the Federal Procurement Data System. This source was selected for a number of reasons: first, virtually all federal contracts have bonding requirements. Second, the Bureau of Indian Affairs is a predominant source of construction funding in Indian Country. Finally, it is a large source of information regarding contracting outcomes across the United States and tracks contract recipient by business size and minority group, including American Indian. Because surety bonding occurs primarily in the construction industry, this data was filtered to include only construction contracts (NAICS code: 23). The data set uses panel data of the contiguous 48 states over the years 2006-2010, producing 288 observations.

These data were used to generate two dependent variables. The first is the percentage of contract value awarded to American Indian contractors. The second is the percentage of contracts that went to American Indian contractors. This modification adjusts for the fact that disadvantaged businesses may be less likely to secure large

contracts. These analyses primarily attempt to identify whether contractors in states where legal jurisdiction in Indian Country is externally imposed face different contracting outcomes than those in states where jurisdiction is tribally determined. To do so, these data are analyzed through OLS regression against a variable indicating Public Law 280 status. The study uses several specifications including bivariate regression and a model using state and year fixed effects. Additional covariates include state per capita GDP and the percentage of state residents identifying as American Indian.

Unfortunately, more thorough analysis was hindered by lack of available data related to development in American Indian Country. Theses limitation will be discussed in greater detail in Section 6. Most notably, data on rates or specific costs of bonding were unavailable. In addition, the authors were unable to find data related to construction prices or quantities in American Indian Country. This information would provide an alternative way to measure how institutional factors impact development.

SECTION 4: IMPACT OF SURETY BONDING ON AMERICAN INDIAN CONTRACTORS

Our research suggests that access to surety bonding is limited both for American Indian contractors and for American Indian tribes as project owners. This section details our findings on the first demographic: American Indian contractors who need surety bonds to complete construction projects. Our interviews and data analysis indicate that American Indian contractors face unique barriers to accessing surety bonds.

4.1: QUALITATIVE ANALYSIS OF AMERICAN INDIAN CONTRACTORS

For the purposes of this study, it is important to distinguish between American Indian contractors and tribally owned contracting firms. A tribally owned contracting firm is an entity run by the tribe itself, a tribal agency, or a subordinate tribal entity.[59] Its business activities—even outside of Indian Country—are under the purview of sovereign immunity, which may increase the risk perceived by surety issuers. In contrast, American Indians who own their own firms do not have sovereign immunity, even if they are enrolled tribe members. Unfortunately, in spite of repeated attempts to reach out to

[59] The definition of "tribally owned" refers only to companies that are owned and operated by a tribe, and does not indicate whether these firms are formed under tribal, state, or federal law.

tribally owned contracting firms, we were only able to interview one representative. Accordingly, our analysis of tribally owned firms is supplemented with secondary sources.

Like all contractors looking to obtain surety bonds, American Indian contractors are scrutinized with respect to capital, completed work history, and credit. One American Indian contractor indicated that it took him five or six years to obtain his first bond when he began his company nineteen years ago because his young business was not able to meet the stringent demands of the surety companies.[60] He also indicated that, at that time, it was less common for project owners to require bonds. Especially since the recession, it has become more and more common for the general contractor or project owner to require bonding on projects. In addition, it is becoming increasingly common for project owners to require contractors to demonstrate that they can attain surety bonds for subcontracting work.[61]

Additionally, new contracting firms may lack an understanding of the surety bonding process. One American Indian contractor told the following story of the first job she bid on: the City of Saint Paul required a bond for a project that her company had successfully bid on, but not knowing much about the bonding process, she chose to obtain a loan for the project amount and give that to the city in lieu of a bond. When the project was successfully completed, the City returned the money. Her path to successful bonding was a bit different, but as the company's assets grew and it completed more projects, bonding became more attainable.[62]

Perhaps the most significant problem facing American Indian contractors is the lack of access to capital. While the risk of default in the industry overall is extremely low, the most common cause of default for an American Indian contractor is a problem with cash flow, often as the result of an inability to secure adequate loan funding.[63] While many developing contractors face limited access to capital, some argue that American

[60] David Bice (American Indian contractor), interview with the authors November 20, 2012
[61] Native American Contractors Association, "Native American Business Provisions in the American Economy Recovery Act to Aid Native American and Alaska Native Economies," January 14, 2009, http://www.nativecontractors.org/media/pdf/NACAStimulusPlan-1-14-09(1).pdf
[62] Kathy Meyer (CEO of contracting company) interview with the authors, November 20, 2012
[63] Kathy Meyer (CEO of contracting company) interview with the authors, November 20, 2012

Indian contractors feel the effects more heavily.[64] The Native American Contractors Association argues:

> "[P]rivate equity is difficult or impossible to obtain for American Indian business owners. Trust-land issues, jurisdictional disputes, and cultural misunderstandings have long been identified as contributors to these problems. Yet without adequate access to capital and banking services, both Indian tribes and individuals have difficulty breaking cycles of poverty, fostering business activity, and achieving personal and community prosperity."[65]

Tribally owned entities face similar barriers. For example, the physical location of financial institutions creates barriers to accessing credit because, in most cases, these institutions are not located on reservations. Cash flow is especially problematic for small tribally owned businesses, because they are unable to easily access lines of credit needed to complete projects.[66]

Availability of capital and surety bonding are distinct but closely related issues. As a result, it is difficult to separate the proportionate effect that each has on American Indian contractors. This complexity is exacerbated for tribally owned contracting firms, which face the additional complications resulting from sovereign immunity. The tribally owned firm representative interviewed for this study indicated that after going through the process of hiring a Certified Public Accountant prepare financial statements required to apply for a bond, the firm's cash flow was depleted and, for that reason, it was denied approval for a bond.[67] In this context, it is impossible to separate the obstacles to obtaining surety bonds from more general issues of capital and cash flow.

Tribally owned contracting firms often have a particularly hard time securing surety bonds. The perceived risk of sovereign immunity has led some tribally owned firms to be denied access to surety bonding even when sovereign immunity is waived.[68]

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[64] Scott German (contractor) interview with the authors, November 20, 2012

[65] Native American Contractors Association, "Native American Economic Development Budget Priorities For Indian Country Economic Development Needs," December 10, 2008, http://www.nativecontractors.org/media/pdf/NACA-NCAIED-NCAI-Budget-Recommendations.pdf

[66] Tony Belcourt (CEO of Chippewa Cree Construction Corp.), interview with the authors, December 11, 2012.

[67] Ibid.

[68] Native American Contractors Association, "Native American Business Provisions in the American Economy Recovery Act to Aid Native American and Alaska Native Economies," January 14, 2009, http://www.nativecontractors.org/media/pdf/NACAStimulusPlan-1-14-09(1).pdf

As W. Ron Allen, Chairman and CEO of the Jamestown S'Klallam Tribe, stated, "Although, construction is an area with a much higher probability of providing direct employment for Tribal citizens, surety bonding is one of the largest barriers for Tribes seeking entry and growth in this highly competitive and capital intensive sector."[69] Indeed, the representative of the tribally owned firm that we interviewed said that he no longer bids on construction projects requiring surety bonds, due to heightened requirements, such as cash flow, credit and the waiver of sovereign immunity. He did note, however, that his willingness to submit to a waiver would increase if jurisdiction could remain with the tribal court rather than be moved to state court. Waivers of sovereign immunity will be discussed in greater depth in Section 5.1.[70]

A final issue of importance on this subject is the work American Indian contractors do within Indian Country. The single most relevant program in this respect is the Tribal Employment Rights Ordinance (TERO), a tribally based employment initiative that seeks to maximize economic opportunities for American Indians by giving employment preference to American Indian laborers, American Indian-owned contractors, and tribally owned contractors. More than 300 tribal governments nationwide have established TERO offices that benefit any enrolled member of a federally recognize tribe.[71] The Ordinance is not a binding law establishing a quota system, but rather a general guideline; perhaps unsurprisingly, compliance with the ordinance can vary widely between tribes. Importantly, the Ordinance only gives preference to qualified workers or subcontractors.[72] In addition to providing a preference to subcontractors from within Indian Country, general contractors also benefit through a ten percent "preference window." American Indian general contractors

[69] W. Ron Allen, "Testimony to the United States Senate Committee On Indian Affairs," August 17, 2011, http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=9260
[70] Tony Belcourt (CEO of Chippewa Cree Construction Corp.), interview with the authors, December 11, 2012.
[71] Minnesota Department of Transportation, "Tribal Employment Rights Ordinance (TERO) Program," accessed December 12, 2012, from http://www.dot.state.mn.us/civilrights/tero.html
[72] Jack Bassett (employee of the Fond du Lac Reservation), interview with the authors, November 14, 2012.

must go through the normal bidding process, but if they are within ten-percent of the lowest bid, they have the option to meet and take the bid.[73]

In our interviews, some sureties have expressed concern about TERO requirements for construction projects being done in Indian Country, believing it increases risk for the general contractor.[74] However, some contractors working in Indian Country have expressed a preference for construction projects with TERO requirements. Since tribal owners are generally assumed to employ American Indian subcontractors and laborers whether or not a tribe has actively enforced TERO provisions, some contractors feel that contracts in which TERO requirements are explicitly expressed make managing the contracting of projects easier.[75]

4.2: QUANTITATIVE ANALYSIS OF AMERICAN INDIAN CONTRACTORS

Ideally, a quantitative analysis of surety bonding in Indian Country would estimate the effect of being American Indian on access to the surety market by combining data on surety bond applications with the race of the applicant. Unfortunately, although these data exist, they are proprietary and closely guarded by surety bond issuers. However, our qualitative research suggests a close link between access to surety bonds and access to other forms of credit, each of which plays an important role in the capital-intensive construction industry. So, although we cannot measure the surety bond market directly, we can shed light on the relationship American Indian contractors have with other forms of formal credit.

An important theoretical limitation of the analysis in this section is the difficulty of isolating the effects of supply and demand in the market for credit. We are interested in potential restrictions of supply rather than the dynamics of demand. One way of isolating supply from demand is to use a policy affecting the market as an indicator. Drawing on past research on the credit market in Indian Country, we use Public Law 280 (PL 280) as a proxy for jurisdiction of dispute resolution and, therefore, willingness

[73] Lissa Peel (Indian Preference Coordinator, Confederated Salish and Kootenai Tribes), interviews with the authors on November 20, 2012 and December 10, 2012.
[74] David Radcliffe (surety agent) interview with the authors, October 1, 2012.
[75] Doug Niesen (contractor) interview with the authors, November 20, 2012

of banks to supply credit to American Indians.[76] Because PL 280 would impact supply of credit rather than demand, we use the law to explore potential restrictions on credit access under tribal jurisdiction.

To begin our analysis of the potential impact of tribal jurisdiction on American Indian contractors, we used the 2007 Public Use Microdata Sample of the US Census Bureau's Survey of Business Owners (SBO) to examine business trends in the contiguous 48 states.[77] A key drawback of these data for our purposes is the lack of geographic distinction beyond the state level; as a result, we are unable to identify whether or not an American Indian-owned business is operating on a reservation. For instance, if we had an indicator of whether the business was located in an urban or rural area, we might focus on rural businesses to better target those in Indian Country. However, our analysis does only include states with relatively populous reservations; the states used in our analysis are listed in Table 1.[78]

Table 1. PL 280 Status By State

PL 280 States	Non-PL 280 States
California	Arizona
Florida	Colorado
Iowa	Idaho
Minnesota	Kansas
Nebraska	Maine
New York	Michigan
Oregon	Mississippi
Washington	Montana
	Nevada
	New Mexico
	North Carolina
	North Dakota
	Oklahoma
	South Carolina
	South Dakota
	Texas
	Utah

Roughly a quarter of American Indian-owned businesses are located in excluded states with small or no Indian reservations; in all likelihood, these businesses are not located on a reservation and do not figure into the analysis presented below. But in "PL 280 States" and "Non-PL 280 States," observed American Indian-owned businesses

[76] We use the definition of state jurisdiction developed by Anderson and Parker (2008), which excludes states with few and or small numbers of American Indian reservations. Alaska, which also has state jurisdiction, is not included in our analysis.
[77] To ensure the confidentiality of businesses, some small-population states were combined in the SBO PUMS, including Alaska and Wyoming. Therefore, our analysis excludes Hawaii, Alaska, and Wyoming.
[78] We follow the distinction developed by Anderson and Parker (2008).

could be either on- or off- reservation. We believe this gives us the best possible configuration of observations given the limitations. In addition, indications from our qualitative research are that jurisdictional issues are sufficiently unclear in states not covered by PL 280 that we may still expect an effect on access to credit.

Table 2. Average Employment by Business Ownership, Among Businesses With Employees

	Contiguous 48 States	PL 280 States	Non-PL 280 States
American-Indian Owned Business	9.8	7.7	11.0
Number of observations	5278	1329	2412
Minority-Owned Business	9.4	8.8	10.9
Number of observations	105111	37832	24943
Non-Minority-Owned Businesses	13.7	13.2	13.8
Number of observations	787990	214520	214902
All Businesses	13.1	12.3	13.4
Number of observations	898377	253681	242257

Data source: Survey of Business Owners, 2007. *Wyoming and Alaska were combined in the SBO PUMS to ensure confidentiality in low population states; thus, "Contiguous 48 States" excludes AK, HI, and WY.

Table 2 shows average employment among businesses with at least one employee. American Indian-owned businesses have fewer employees than the average business, and American Indian-owned businesses in states with state jurisdiction (PL 280 states) have fewer employees than those in states with tribal jurisdiction (non-PL 280 states).

Table 3a. Share of Start-up Capital Source Among American-Indian-Owned Construction Businesses						
	Savings		Assets		Equity	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	45.87	54.23	7.97	7.03	2.22	6.14
No	48.05	38.47	85.95	85.67	91.71	86.57
Not reported	6.08	7.29	6.08	7.29	6.08	7.29
p-value on difference between PL 280 and Non-PL 280	0.036**		0.141		0.074*	
	Credit Card		Loan From Family/ Friends		Government Guarantee	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	10.14	12.72	1.77	2.04	0.64	0.03
No	83.78	79.98	92.15	90.67	93.29	92.67
Not reported	6.08	7.29	6.08	7.29	6.08	7.29
p-value on difference between PL 280 and Non-PL 280	0.101		0.514		0.348	
	Government Loan		Bank Loan		Venture Capital	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0.41	0.08	6.65	3.42	0.01	0
No	93.52	92.62	87.27	89.28	93.91	92.71
Not reported	6.08	7.29	6.08	7.29	6.08	7.29
p-value on difference between PL 280 and Non-PL 280	0.348		0.007***		0.428	
	Grant		Other		None Needed	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0	0.52	1.88	2.61	30.24	23.16
No	93.92	92.18	92.05	90.09	63.69	69.54
Not reported	6.08	7.29	6.08	7.29	6.08	7.29
p-value on difference between PL 280 and Non-PL 280	0.013**		0.419		0.305	
Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.						

Table 3b. Share of Start-up Capital Source Among American-Indian-Owned Businesses, All Other Sectors						
	Savings		Assets		Equity	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	48.43	50.2	7.85	5.63	2.72	4.89
No	44.76	43.34	85.34	87.91	90.47	88.65
Not reported	6.81	6.46	6.81	6.46	6.81	6.46
p-value on difference between PL 280 and Non-PL 280	0.5		0.067*		0.017**	
	Credit Card		Loan From Family/ Friends		Government Guarantee	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	11.47	11.88	1.6	2.16	0.92	0.52
No	81.72	81.66	91.58	91.38	92.27	93.02
Not reported	6.81	6.46	6.81	6.46	6.81	6.46
p-value on difference between PL 280 and Non-PL 280	0.434		0.411		0.035**	
	Government Loan		Bank Loan		Venture Capital	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0.6	0.31	8.1	3.58	0.21	0.27
No	92.59	93.23	85.09	89.96	92.98	93.27
Not reported	6.81	6.46	6.81	6.46	6.81	6.46
p-value on difference between PL 280 and Non-PL 280	0.272		0***		0.959	
	Grant		Other		None Needed	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0.34	0.48	1.73	1.98	26.31	26.51
No	92.85	93.06	91.46	91.56	66.88	67.02
Not reported	6.81	6.46	6.81	6.46	6.81	6.46
p-value on difference between PL 280 and Non-PL 280	0.557		0.975		0.068*	
Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.						

Tables 3a and 3b show sources of start-up capital for American Indian-owned businesses, both in the construction sectors and in all other sectors. For each capital source, a Pearson chi-squared test shows whether differences between PL 280 and

non-PL 280 states are significant. The most common source of start-up capital in the construction sector are savings, with about half of American Indian-owned businesses reporting this source, followed by credit cards and assets (see Table 3a).

Statistically significant differences between PL 280 and non-PL 280 states suggest that credit is actually easier to obtain under tribal jurisdiction, a finding at odds with previous research on the impact of jurisdiction on economic development. American Indian-owned businesses in states with tribal jurisdiction are significantly more likely to use bank loans as start-up capital, suggesting easier access to credit in those states—however, fewer than one percent of American Indian-owned businesses use this form of capital. Moreover, construction businesses in PL 280 states are significantly more likely to use savings to start their business than those in non-PL 280 states. This result is contrary to most research on the effect of PL 280, which tends to find that reservations under state jurisdiction perform better on various economic development outcomes. Indeed, Parker finds that American Indians living under state rather than tribal jurisdiction of contractual disputes are 50% more likely to have a home loan accepted.[79] Although our findings do not match previous research, the significant differences are small (less than 10 percentage points) and, more importantly, these descriptive statistics are not controlling for confounding factors in jurisdiction and access to credit.

Tables 4a and 4b show sources of expansion capital, in and outside of the construction sector, among American Indian-owned businesses. The most common sources of capital for business expansion are savings, credit cards, and profits. Again, American Indian-owned construction businesses in PL 280 states are more likely to use savings than those in non-PL 280 states. They are also significantly more likely to use credit cards to finance their business expansion, which, although technically credit, may in fact signal a lack access to more affordable credit such as a bank loans. As Table 4b displays, these results hold in non-construction sectors. Again we find that bank loans are more widely used in non-PL 280 states, although this difference is not significant in the construction sector.

[79] Dominic P. Parker, "The Effects of Legal Institutions on Access to Credit: Evidence from American Indian Reservations," http://extranet.isnie.org/uploads/isnie2012/parker.pdf

Table 4a. Share of Expansion Capital Source Among American-Indian-Owned Construction Businesses						
	Savings		Assets		Equity	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	22.8	31.33	5.47	5.51	1.92	4.22
No	68.54	60.76	85.86	86.58	89.41	87.87
Not reported	8.67	7.91	8.67	7.91	8.67	7.91
p-value on difference between PL 280 and Non-PL 280	0.082*		0.808		0.383	
	Credit Card		Loan From Family/ Friends		Government Guarantee	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	10.01	16.55	0.74	0.96	0.12	0.05
No	81.32	75.54	90.59	91.13	91.21	92.04
Not reported	8.67	7.91	8.67	7.91	8.67	7.91
p-value on difference between PL 280 and Non-PL 280	0.083*		0.921		0.911	
	Government Loan		Bank Loan		Venture Capital	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0.15	0.45	7.78	5.85	0	0
No	91.18	91.64	83.55	86.24	91.33	92.09
Not reported	8.67	7.91	8.67	7.91	8.67	7.91
p-value on difference between PL 280 and Non-PL 280	0.766		0.831		0.69	
	Profits		Grant		Other	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	8.04	8.52	0.01	0.09	1.47	1
No	83.29	83.57	91.32	92	89.86	91.09
Not reported	8.67	7.91	8.67	7.91	8.67	7.91
p-value on difference between PL 280 and Non-PL 280	0.791		0.834		0.919	
Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.						

Table 4b. Share of Expansion Capital Source Among American-Indian-Owned Businesses, All Other Sectors						
	Savings		Assets		Equity	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	25.34	27.23	4.83	4.59	1.89	4.74
No	66.05	65.06	86.56	87.7	89.5	87.55
Not reported	8.61	7.71	8.61	7.71	8.61	7.71
p-value on difference between PL 280 and Non-PL 280	0.045**		0.506		0***	
	Credit Card		Loan From Family/ Friends		Government Guarantee	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	10.38	14.02	0.8	1.43	0.24	0.23
No	81.01	78.27	90.59	90.86	91.16	92.06
Not reported	8.61	7.71	8.61	7.71	8.61	7.71
p-value on difference between PL 280 and Non-PL 280	0.003***		0.473		0.449	
	Government Loan		Bank Loan		Venture Capital	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	0.43	0.22	5.95	2.96	0.05	0.13
No	90.97	92.07	85.44	89.33	91.34	92.16
Not reported	8.61	7.71	8.61	7.71	8.61	7.71
p-value on difference between PL 280 and Non-PL 280	0.443		0***		0.592	
	Profits		Grant		Other	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	7.64	8.66	0.34	0.1	1.11	1.09
No	83.75	83.63	91.05	92.19	90.28	91.19
Not reported	8.61	7.71	8.61	7.71	8.61	7.71
p-value on difference between PL 280 and Non-PL 280	0.439		0.34		0.584	
Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.						

Tables 5a and 5b provide other contextual information on access to credit and business activities in the construction sector and in all other sectors. Significant differences between PL 280 and non-PL 280 states show up outside of the construction sector, and paint a mixed story on access to credit. As shown in Table 5b, American Indian-owned businesses are more likely to report ceasing operations due to lack of either business or personal credit under state jurisdiction, but were less likely to report a lack of access to credit needed to expand.

Table 5a. Other Capital Issues Among American-Indian-Owned Construction Businesses

	Did Not Expand		No Access to Credit to Expand	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	42.3	41.83	4.04	4.02
No	49.03	50.26	87.29	88.07
Not reported	8.67	7.91	8.67	7.91
p-value on difference between PL 280 and Non-PL 280	0.923		0.779	
	Ceased Operations Due to Lack of Personal Credit		Ceased Operations Due to Lack of Business Credit	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	1.13	1.91	3.38	4.71
No	26.02	22.32	23.77	19.51
Not reported	72.85	75.77	72.85	75.77
p-value on difference between PL 280 and Non-PL 280	0.522		0.127	

Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.

Table 5b. Other Capital Issues Among American-Indian-Owned Businesses, All Other Sectors				
	Did Not Expand		No Access to Credit to Expand	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	43.63	43.44	3.09	2.08
No	47.77	48.85	88.31	90.21
Not reported	8.61	7.71	8.61	7.71
p-value on difference between PL 280 and Non-PL 280	0.787		0.062*	
	Ceased Operations Due to Lack of Business Credit		Ceased Operations Due to Lack of Personal Credit	
	Non-PL 280 States	PL 280 States	Non-PL 280 States	PL 280 States
Yes	1.39	2.04	0.74	1.18
No	21.67	22.49	22.32	23.35
Not reported	76.94	75.47	76.94	75.47
p-value on difference between PL 280 and Non-PL 280	0.002***		0.001***	
Significance levels: * 10%, ** 5%, ***1%. Data source: Survey of Business Owners, 2007.				

As suggested in Tables 6a and 6b below, the impact of state jurisdiction on access to credit remains significantly negative even when controlling for industry of the firm and state fixed effects. We have three probit models, fitted to two dependent variables: use of a bank loan to start the business (Table 8) and use of a bank loan to expand the business (Table 9). We regress PL 280 status, American Indian ownership status, and the interaction of those two variables, and then include broad industry and state fixed effects.[80] Because the SBO is a survey of operating firms, any effect of a barrier to credit access on the extensive margin of firm creation (i.e. denial of a loan which prevents an individual from starting a business) would not be captured in these data. As Tables 8 and 9 show, firms in PL 280 states use fewer bank loans both to start and expand their business. Theoretically, PL 280 status should not have an effect on all firms, only those owned by American Indians (by clarifying the legal jurisdiction over contracts); thus, the negative coefficient on PL 280 is suggestive of an underlying

[80] Industry is coded by sector, using 2-digit NAICS codes. There are 20 sectors as defined by NAICS.

reason for the lower use of formal credit in these states. Because these states were chosen for state jurisdiction imposition on tribal lands, there may be lingering, underlying aspects of the legal institutions dampening access to credit (i.e. there may be a selection effect, since PL 280 was targeted toward states with troubled tribal institutions). American Indian-owned businesses are about 2% less likely to have used a bank loan to start up or expand than other businesses. Finally, American Indian-owned businesses located in PL 280 states are an additional 2% less likely to access this form of formal credit. Again, this result is contrary to previous research on the effect of PL 280 on credit markets, which finds that state jurisdiction expands access to formal credit for American Indians.[81] It is important to note, however, that the pseudo-R^2 on each model is very small, suggesting that none of the models explain much of the dynamic of bank loan use.

Table 6a. Probit Estimates of Effect of State Jurisdiction on Use of Bank Loan to Start a Business

	(1)	(2)	(3)
Located in PL 280 State	-0.040***	-0.039***	-0.031***
Z-score	-48.98	-48.66	-35.62
AI-Owned Business	-0.0206***	-0.0207***	-0.0220***
Z-score	-5.07	-5.11	-5.55
AI-Owned Business in PL 280	-0.0202***	-0.0201***	-0.0174**
Z-score	-2.84	-2.81	-2.37
Industry Fixed Effects	N	Y	Y
State Fixed Effects	N	N	Y
Pseudo R^2	0.0085	0.0086	0.0117
N	827725	827725	827725

Significance level: ***p < 0.01 **p < 0.05. Marginal effect is reported on discrete change in independent variables. Data source: Survey of Business Owners, 2007.

[81] Dominic P. Parker, "The Effects of Legal Institutions on Access to Credit: Evidence from American Indian Reservations," http://extranet.isnie.org/uploads/isnie2012/parker.pdf

Table 6b. Probit Estimates of Effect of State Jurisdiction on Use of Bank Loan to Expand a Business			
	(1)	(2)	(3)
Located in PL 280 State	-0.0229***	-0.0210***	-0.0153***
Z-score	-31.08	-28.65	-19.73
AI-Owned Business	-0.0167***	-0.0173***	-0.0182***
Z-score	-4.36	-4.61	-4.93
AI-Owned Business in PL 280	-0.0185***	-0.0177***	-0.0160**
Z-score	-2.98	-2.87	-2.53
Industry Fixed Effects	N	Y	Y
State Fixed Effects	N	N	Y
Pseudo R^2	0.0037	0.0104	0.0121
N	808680	808680	808680
Significance level: ***p < 0.01 **p < 0.05. Marginal effect is reported on discrete change in independent variables. Data source: Survey of Business Owners, 2007.			

We turn now to an analysis of the effect of state jurisdiction on federally funded construction contracts awarded to American Indian contractors. The Federal Procurement Data System (FPDS) is a central repository for information on all U.S. federal contracts with an estimated value of $3,000 or more. Once a contract is entered into the FPDS, every modification to the contract is noted, regardless of dollar value. The database includes a wide variety of information on each contract. Most notably for our analysis, the FPDS indicates whether or not the vendor is American Indian. This dataset is particularly useful for our purposes because, as described in the literature review, all federal construction projects over $150,000 are subject to the Miller Act, which requires that all projects have payment and performance surety bonds. Many smaller projects also require bonding. Thus, we can be assured that virtually all of the construction projects contained in this dataset involved at least two types of surety bonds.

Table 7. Effect of PL 280 on the percentage of federal contract value awarded to American Indian contractors, 2005-2010

	(1)	(2)	(3)	(4)	(5)	(6)
Covered by PL 280	-0.048***	-0.007	0.029	-0.021	-0.004	-0.060
	(0.016)	(0.017)	(0.083)	(0.014)	(0.013)	(0.039)
State per capita GDP		-0.007	-0.116***		-0.017**	-0.112***
		(0.012)	(0.004)		(0.007)	(0.036)
Percentage of state population that is American Indian		1.828***	5.350		1.835***	5.090
		(0.280)	(3.682)		(0.231)	(3.352)
State and year fixed effects	No	No	Yes	No	No	Yes
N	162	162	162	288	288	288
R^2	0.052	0.256	0.596	0.008	0.215	0.592

The Dependent Variable is the percentage of the total dollar value of all federal contracts within a state that were awarded to American Indian contractors. Standard errors in parentheses. All specifications include an intercept. State per capita GDP is in ten thousands. In Columns 1-3, the Independent Variable "Covered by PL 280" only includes states in which there are substantial American Indian reservations, as defined by Anderson and Parker (2008); in Columns 4-6, it includes all states except Alaska and Hawaii. Two-sided significance levels: ***p < 0.01, **p < 0.05. Data source: Federal Procurement Data System.

We use these FPDS data to examine how differences in the jurisdiction of dispute resolution stemming from PL 280 affect American Indian contractors. We first examine whether state jurisdiction increases the percentage of total federal contract value in each state that is awarded to American Indians. If state jurisdiction increases the availability of credit to American Indian contractors—as Parker (2012) concluded—and if jurisdictional security decreases surety bond premiums paid by American Indian contractors, then one would expect significant positive coefficients on our indicator variable for states covered by PL 280. If, on the other hand, American Indian contractors have less access to credit in states covered by PL 280—as our analysis of the Survey of Business Owners suggests—one would expect a smaller percentage of contract value to be awarded to American Indian contractors in states covered by PL 280. As Table 7 displays, in Column 1, our simplest specification, the indicator variable for states covered by PL 280 is both negative and statistically significant. This suggests

that, in PL 280 states, American Indian contractors receive a lower percentage of federal construction contracts than in non-PL 280 states. These findings are constistent with those displayed in Tables 6a and 6b. However, there are many additional factors that contribute to this percentage such as the size of the American Indian population. After controlling for per capita state GDP and the percentage of American Indians in the state, the coefficient drops dramatically (in absolute value) and loses statistical significance. Furthermore, the selection of mandatory PL 280 states was not random. Rather, it resulted from systematic difference in the perceived capacity for self-governance of American Indian tribes residing in those states. This suggests there is likely omitted variable bias. To control for the effects of unobservable variables at the state level, we utilized a fixed effects model. When state and year fixed effects are introduced in Column 3, the estimated coefficient becomes positive, though not statistically significant. This suggests that state jurisdiction under PL 280 does not have a significant impact on American Indian contractors in either direction.

Columns 4-6 of Table 7 repeat the analysis of Columns 1-3, but with inclusion of additional states. Following Anderson and Parker (2008), Columns 1-3 exclude states with few or small American Indian reservations. Columns 4-6, on the other hand, includes all 48 contiguous states. Notably, the coefficients are of very similar size within specification compared to their counterparts in Columns 1-3, and they follow nearly identical patterns. This also suggests a limited impact of PL 280 on American Indian contractors. Additionally, the R^2 for Column 4 is considerably lower than for Column 1, which suggests that the specification developed by Anderson and Parker (2008) provides a better estimation of the true economic effects of PL 280.

Table 8. Effect of PL 280 on the percentage of federal contracts awarded to American Indian contractors, 2005-2010			
	(1)	(2)	(3)
Covered by PL 280	-0.029**	0.013	0.059
	(0.013)	(0.012)	(0.039)
State per capita GDP		-0.008	-0.098***
		(0.008)	(0.020)
Percentage of state population that is American Indian		1.863***	3.927**
		(0.202)	(1.758)
State and year fixed effects	No	No	Yes
R^2	0.031	0.376	0.851

The Dependent Variable is the percentage of the total federal contracts within a state that were awarded to American Indian contractors. Standard errors in parentheses. All specifications include an intercept. State per capita GDP is in ten thousands. The Independent Variable "Covered by PL 280" only includes states in which there are substantial American Indian reservations, as defined by Anderson and Parker (2008). Two-sided significance levels: ***p < 0.01, **p < 0.05. Data source: Federal Procurement Data System. Sample size: 162.

As discussed above, American Indian businesses tend to have fewer employees. One would expect contractors with fewer employees to have a smaller mean contract value, as they are less able to compete for large projects. If this is the case, examining only the cumulative value of the contracts awarded to American Indian contractors may obscure the true effect of PL 280. Accordingly, Table 8 repeats our analysis of contract value but changes the Dependent Variable from the percentage of federal contract value within each state awarded to American Indian contractors to the percentage of federal contracts within each state that are awarded to American Indian contractors. The better fit of this variable is clearly visible in the R^2 values which are much higher than in Table 7, The coefficients in Table 8 follow much the same pattern as those in Tables 7: the coefficient for the PL 280 indicator variable increases and loses statistical significance after controlling for state per capita GDP and American Indian's percentage of the state population. Interestingly, the coefficient on PL 280 states rises and approaches statistical significance when state and year fixed effects are included, though it remains statistically insignificant at conventional levels. Additional specification or refinement of the model may lead to findings consistent with earlier studies.

The lack of signficant findings in our preferred model suggests that jurisdiction alone may not be influencing the willingness of surety companies to issue bonds to American Indian contractors. As described in our qualitative research, jurisdiction interacts with a host of factors in the decision to bond a contract. Attempts to impose state jurisdiction may not be sufficient to improve bonding outcomes.

4.3: POLICY OPTIONS: AMERICAN INDIAN CONTRACTORS

Through our research, we have identified two main potential policy options to address the issues unique to American Indian and tribally owned contractors in obtaining surety bonds. The following section provides a brief description of each, followed by a consideration of important strengths and weaknesses. While this study may be insufficient to comprehensively address each, we hope that this discussion will inform and provide direction to appropriate additional study.

4.3.1: POLICY OPTION 1: EXPANDING THE SBA'S SURETY BOND GUARANTEE PROGRAM

Since 1971, the U.S. Small Business Administration (SBA) has administered the Surety Bond Guarantee program to increase access to surety bonds for small businesses. Under the program, qualifying[82] contractors work with surety agencies to obtain bonds of up to $2 million in value; the program then guarantees up to 90% of the surety's loss in the event of a default. This dramatically reduces the risk to the surety company, allowing them to charge much lower premiums. Moreover, because the program gives a preference to "socially and economically disadvantaged individuals," all American Indian and tribally owned contractors automatically qualify for the full 90% guarantee.[83]

While the SBA Surety Bond Guarantee program increases access to surety bonds, it does come with an increased cost to the contractor. In addition to the premium charged by the surety, the SBA charges an additional .729% of the contract price. The

[82] To qualify, a company must be classified as a small business and demonstrate the inability to obtain a bond through mainstream sources; the contract must also require a bond, and the contract bid cannot exceed $2 million.

[83] U.S. Small Business Administration, "About Office of Surety Guarantees," accessed 3 December, 2012, from http://www.sba.gov/about-offices-content/1/2891/about-us/2906

SBA also requires 26% of the surety company's fee to be paid to the SBA.[84] Deputy Director Peter Gibbs of the Office of Surety Guarantees estimates that on average, a small business will pay $19,000 for a $500,000 contract.[85]

One policy option to improve access to surety bonding for American Indian and tribally owned contractors is to increase the SBA program's $2 million limit. Advocates argue that this increase is necessary to reflect the increasing costs in the construction industry and allow American Indian and tribally owned contracting companies to compete with larger contractors. While some opponents worry that this change would increase the risk and therefore the cost of the program, historical data indicates that larger guarantees have a lower risk of default.[86] Moreover, to allow small contractors to compete more effectively for funds from the American Recovery and Reinvestment Act, the cap was temporarily increased to $5 million with an option to authorize guarantees of up to $10 million; although the cap was increased, the program still retained a positive net cash flow.[87]

Although increasing the cap will expand access to surety bonding, there is reason to believe the effect may be minimal. The program is currently underutilized, with participation rates well below historical levels: in 1979, the SBA guaranteed 20,095 bonds, compared to only 1,588 in 2010.[88] While it is possible that the $2 million cap is a factor in the low participation rates, the significant drop-off suggests there are more factors at play. Our interviews suggest that the most common reason for underutilization has been the inability or unwillingness of contractors to follow through with providing required documentation.[89] Even if the process were simplified, a large information campaign would be required to alert contractors to the reform, and the stigma against the program within the contracting community could remain long after

[84] U.S. Small Business Administration, "Bond Guarantee Fees." Accessed December 3, 2012, from http://www.sba.gov/content/bond-guarantee-fees
[85] U.S. Small Business Administration, "Interview with Peter Gibbs." Accessed December 3, 2012, http://www.sba.gov/content/surety-bonds-insurance-and-reassurance-construction-industry
[86] Ibid.
[87] Congressional Research Service. "SBA Surety Bond Guarantee Program." October 6, 2011. Accessed December 3, 2012 from https://www.asaonline.com/eweb/upload/SBA%20Surety%20Bond%20Guarantee%20Program%20--%20CRS%20Report.pdf.
[88] Ibid.
[89] Jeremy Crawford (surety company Vice President), Interview with the authors, November 13, 2012.

changes had been implemented. Thus, it is possible that the program will continue to be underutilized after the cap is increased, while at the same time exposing the SBA to greater potential losses.

4.3.2: POLICY OPTION 2: EXPAND THE BIA'S INDIAN LOAN GUARANTEE PROGRAM TO SURETY BONDS

A second, related option is to expand the Bureau of Indian Affairs' (BIA) Indian Loan Guarantee program to cover surety bonds. Similar to the SBA program, the Indian Loan Guarantee program guarantees up to 90% of qualifying loans. But whereas the SBA Surety Bond Guarantee program is underutilized, the Indian Loan Guarantee program is thriving. The Native American Contractors Association describes the program as:

> "[o]ne of the most successful programs undertaken by the Bureau of Indian Affairs. [...] It has been successful because it provides an attractive incentive for banks to expand and underwrite loans in Indian country. The default rate is enviable, administrative costs are shifted to the banks and demand far outweighs the allocated funding."[90]

Expanding the Indian Loan Guarantee program to include surety bonds might be more effective than increasing the cap on the SBA's Surety Bond Guarantee program. It seems possible that the greater familiarity with the BIA program within American Indian Country could lead to greater participation in a new Surety Bond program. In addition, a new program could be designed to avoid contractors' and surety agents' complaints about the SBA program. This would likely be more effective than making identical changes to the SBA program because the new program would not carry with it the stigma of the current program.

The obvious objection to this approach is the increased duplication that would result. There is already a wide array of programs administered by various federal agencies directed toward Indian Country; introducing a new program would be nearly

[90] Native American Contractors Association, "Native American Economic Development Budget Priorities For Indian Country Economic Development Needs," December 10, 2008, http://www.nativecontractors.org/media/pdf/NACA-NCAIED-NCAI-Budget-Recommendations.pdf

identical to an existing program is inefficient. Opponents might argue that the focus should be on enhancing the efficiency of existing government programs.

SECTION 5: THE IMPACT OF SURETY BONDS ON CONSTRUCTION IN INDIAN COUNTRY

American Indian tribes also face unique issues surrounding surety bonds when they attempt to hire contractors for construction. Our interviews with surety agents, lawyers, construction firms, and other interested parties, indicated that there are several key barriers to the use of surety bonds in these cases. Specifically, four issues have the potential to increase the costs of surety bonding: issues of sovereign immunity, the jurisdiction of dispute resolution, difficulty in collection on judgments, and tribal government instability. We begin by addressing each problem individually before turning to a discussion of potential solutions.

5.1: SOVEREIGN IMMUNITY

In most large construction projects in Indian Country, the tribe is the owner of the project, with the work being performed by contracting or subcontracting firms. In these cases, sovereign immunity is an important issue. Sovereign immunity is a central value to American Indians and an important facet of their culture, and so it can be a very sensitive issue for tribal governments and elders. Many contractors and sureties lack an understanding of sovereign immunity, which can deter development in Indian Country.[91]

Fortunately, sureties and contractors are becoming more adept at including limited sovereign immunity waivers in contracts, and many tribal governments have recognized the potential of limited waivers to promote economic development. Most contractors and their respective sureties request some form of a limited waiver of sovereign immunity, wherein the tribal government makes a legally binding promise to allow the contractor to take legal action against the tribe in the event of a dispute. Though the waiver of immunity is limited to the specific project, tribal governments only enter into these agreements after careful consideration.[92]

[91] Jaime Pinkham (Vice President, Native Nations, The Bush Foundation) interview with the authors, November 7, 2012.
[92] Ibid.

The details of sovereign immunity waivers vary greatly between contracts. Commonly stipulated details include a specification of the parameters of the waiver, the maximum dollar amount that could be legally pursued, the jurisdiction and manner in which a case would be heard, and a process for collection on judgments.[93] For example, a contract may stipulate whether a dispute will be resolved in binding arbitration or in a tribal or state court. It may also contain details regarding how the judgment will be enforced and collected. Waivers are often drafted by tribal or outside attorneys to satisfy the concerns of the contractor, surety, and the tribal government. Many tribal constitutions specify who has the authority to waive the tribe's sovereign immunity; some constitutions permit leaders or designated council members to approve a sovereign immunity waiver, while others require a majority vote among all tribal members. To avoid problems in a potential dispute, contractors and their attorneys must verify who has the authority to waive sovereign immunity.[94]

The willingness to waive sovereign immunity varies greatly among tribes. There are some tribes that, for cultural and historical reasons, are not willing to waive sovereign immunity, even in a specific construction contract. This is problematic because interviews with surety bond agents indicate that some surety companies will not approve a surety bond without a waiver, and that many contractors are unwilling to pursue a project without some limited immunity waiver.

However, the general consensus that has emerged from our interviews with attorneys and contractors is that most tribes are willing to provide limited waivers for specific contracts, and the majority of sureties are generally willing to issue surety bonds for work done in Indian Country. In fact, our interviews suggest that as long as a limited immunity waiver is in place and the contract dictates the jurisdiction for dispute resolution, sureties do not charge a "premium" for bonds written for work done on reservations. Many tribal governments have become more familiar and comfortable with the process of issuing limited immunity waivers, and contractors and sureties have become more culturally competent. Indeed, our interviews suggest that most bonding in Indian Country occurs without issue.

[93] Richard Rangel (contractor) interview with the authors, November 14, 2012.
[94] Mark Jarboe (attorney), interview with the authors, October 25, 2012.

But while the vast majority of construction contracts are completed without issue, there have been cases where sovereign immunity has played an important role. Even if rare, such cases have an impact on surety bond and construction bidding as a whole because the perception of increased risk can lead to fewer, higher bids. The following case study illustrates how sovereign immunity can negatively affect development; while this case is an outlier, it is necessary to bear such possibilities in mind in the consideration of surety bonding in Indian Country.

5.1.1: CASE STUDY: GRAND CANYON SKYWALK

The Hualapai Tribe, located in northwestern Arizona, has approximately 2,300 members. Its one million-acre reservation includes 108 miles on the south bank of the Colorado River, across the river from Grand Canyon National Park.

In 2003, investor and developer David Jin entered into a revenue sharing and management agreement with the business arm of the Hualapai Tribe in which Jin would invest $30 million to build a skywalk.[95] The skywalk is horseshoe-shaped bridge with a floor of glass, jutting out 70 feet over the edge of a cliff 4,000 feet above the floor of the canyon. In return for Jin's investment, Jin would receive a portion of the revenue generated by the skywalk.

In 2009, the relationship turned sour. Jin claimed that the tribe refused to open its books to disclose how much revenue had been collected from the skywalk. The tribe asserted that Jin had not completed the visitor center as per their agreement.[96]

The language in the contract between Jin and the Hualapai Tribe stated that disputes would be resolved through binding arbitration using Commercial Arbitration Rules of the American Arbitration Association, with enforcement handled by any federal court having jurisdiction. When Jin questioned the tribe's accounting for skywalk revenues, the tribe reacted by ending Jin's management contract. When Jin attempted to enter arbitration through the designated channels, the tribe refused to participate.[97]

[95] Pinnacle Surety, "Follow – Up to "Navigating a Minefield:" Dealing with Tribal Entities," March 2012, http://www.pinnaclesurety.com/industry-news/
[96] American Arbitration Association Commercial Panel, 2012.
[97] Ibid.

In February 2012, the Hualapai Tribe voted to pass eminent domain over the management contract and provide $11 million in compensation to Jin. Jin, however, believed his investment was worth more than $100 million.[98] Jin went to federal court in an attempt to stop the eminent domain action, but the federal court dismissed his claim for lack of jurisdiction, directing Jin to first go through the Tribal Court system. But when Jin brought his complaint to the Tribal Court, it ruled that it did not have jurisdiction because the parties had agreed to enforce arbitration in federal court. [99]

Jin then brought his case before the American Arbitration Association, which determined that it had the authority to hear the case. The Tribe initially participated in the procedure, but then pulled out, claiming that when it took the Skywalk contract through eminent domain, Jin lost his rights under the contract and could not force arbitration. The arbiter disagreed, finding in favor of Jin and awarding him $28.6 million. The ruling was finalized on September 6th, 2012, but as of this writing it remains to be seen whether the tribe will honor the ruling.[100]

While access to surety bonds was not specifically identified as an issue in this case, the potential for such difficulties increases the perceived risk of surety bonding in Indian Country. As Ted Quasula, the former chairman of the Tribe's corporation board of directors put it, "[t]his business grab by my own tribe hurts all Native American nations because it raises serious questions for American and foreign investors who must have a level of trust when dealing with tribal nations across the United States." [101]

This case also illustrates the potential difficulties arising from jurisdictional uncertainty in Indian Country construction, which is the topic of our next section. The conflicting jurisdictional rulings of the Federal and Tribal courts illustrates the confusion that can result from imprecise or contradictory contractual language.

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[98] Associated Press, "Arizona tribe votes to take over management of Grand Canyon Skywalk," *St. Paul Pioneer Press*, February 8, 2012, http://www.twincities.com/ci_19923862

[99] Pinnacle Surety, "Follow – Up to "Navigating a Minefield:" Dealing with Tribal Entities," March 2012, http://www.pinnaclesurety.com/industry-news/

[100] Suzanne Adams, "Hualapai tribe could lose everything in Skywalk dispute," *Kingman Daily Miner*, November 16, 2012, http://www.kingmandailyminer.com/main.asp?SectionID=1&SubSectionID=798&ArticleID=52697

[101] Quoted in Ibid.

5.2: LEGAL JURISDICTION

A second complicating factor for surety bonding in Indian Country is legal jurisdiction. While a waiver of sovereign immunity allows a contractor to pursue legal action against a tribe in the event of a contract dispute, it does not, in itself, specify where the dispute may be heard. Depending on the language of the contract, disputes can be heard in tribal court, state court, or through binding arbitration.[102] In cases where contractors or sureties question the qualifications of tribal judges or the impartiality of the tribal laws, they will use contract negotiations to specify the jurisdiction of potential disputes to ensure the complaint would be settled in state court or through arbitration. In surety bonding, jurisdiction can be just as important as sovereign immunity: for example, one contractor in South Dakota stated that even with a waiver of sovereign immunity, he has never worked with a surety that was willing to bond a contract granting tribal court jurisdiction.[103]

Tribal advocates argue, however, that while there may be variability, most tribal court systems are unprejudiced and equitable, with clear and objective court procedures and qualified, licensed judges. One example identified in our interviews is the Fond du Lac Reservation near Cloquet, Minnesota; although virtually all of the contracts for work on this reservation require tribal jurisdiction, because there is the perception of an objective, impartial legal system, contractors have had no difficulty obtaining surety bonds for work done on the reservation.[104]

In spite of apparent success stories like Fond du Lac, many contractors and sureties are wary of settling disputes in tribal courts. Similarly, many tribal entities also question whether they would receive an impartial trial in state courts. Accordingly, a common compromise is to settle potential disputes through binding arbitration. Under this arrangement, the parties are able to outline specific arbitration procedures and choose in advance potential arbitrators who have knowledge of the construction industry, as well as both state and tribal law.[105]

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[102] Federal courts rarely hear cases involving contract disputes.
[103] Richard Rangel (contractor) interview with the authors, November 14, 2012.
[104] Jack Bassett (employee of the Fond du Lac Reservation) interview with the authors, November 14, 2012
[105] Steven Olson (attorney) interview with the authors, November 20, 2012.

While our interviews suggest that disputes over construction contracts are rare, as with sovereign immunity, even outliers can have an impact on bidding and bonding decisions for the industry as a whole. If severe and high-profile enough, these disputes can overshadow the fact that the majority of projects are completed without incident.[106] The following case of a legal dispute in Florida provides an example of such an incident.

5.2.1: CASE STUDY: MICCOSUKEE TRIBE V. KRAUS-ANDERSON CONSTRUCTION COMPANY

The case between the Miccosukee Tribe of Indians of Florida and Kraus-Anderson Construction illustrates the importance of understanding the process for dispute resolution. The Miccosukee Tribe of Indians is a federally recognized Indian tribe with approximately 550 members. Kraus-Anderson, a Minnesota-based construction company, is a large, nationally known contractor with extensive experience negotiating and completing projects within Indian Country: from 1993 to 2003, the firm completed more construction projects on Indian Country that any other contractor.[107]

In 1997 and 1998, the Miccosukee Tribe and Kraus-Anderson entered into several contracts to complete projects on tribal land, with a cumulative value of over $50 million.[108] During contract negotiations, the Tribe agreed to a limited waiver of sovereign immunity, with the limitation that any disputes would be settled in Miccosukee Tribal Court.

In May 2001, when Kraus-Anderson could not resolve a conflict with the Miccosukee Tribe, the firm followed the dispute resolution process in the contract and sued the Tribe in Miccosukee Tribal Court, asking for over $7 million in damages for breach of contract. The Tribe countersued, stating that Kraus-Anderson's work was defective. The Tribal Court denied Kraus-Anderson's claim and awarded the Tribe over $1.6 million in damages. Following Tribal law, Kraus-Anderson filed an appeal to the Miccosukee Business Council, stating that the Tribal Court "(1) exceeded its powers, (2) rendered a decision based on mathematical errors, (3) excluded material evidence and

[106] Richard Rangel (contractor) interview with the authors, November 14, 2012.
[107] U.S. Court of Appeals for The Eleventh Circuit, "Miccosukee Tribe of Indians of Florida versus Kraus-Anderson Construction Company" May 28, 2010, http://www.ca11.uscourts.gov/opinions/ops/200713039.pdf
[108] Ibid

prejudiced Kraus-Anderson's ability to present its case; and (4) was generally prejudiced against Kraus-Anderson."[109] Two weeks later, the Tribal Business Council denied Kraus-Anderson's appeal, claiming it to be without merit.

When Kraus-Anderson did not pay the judgment award, the Miccosukee Tribe filed a lawsuit against the firm in United States Federal Court. Kraus-Anderson argued that the Tribal Business Council's refusal to hear their appeal denied the firm's due process of law. The District Court ruled in favor of Kraus-Anderson.[110]

Upon appeal, the U.S. Court of Appeals overturned the District Court's ruling, citing the United States federal government's desire to promote tribal self-governance and protect sovereign immunity. The Court also determined that that the Miccosukee Tribe could not sue Kraus-Anderson in federal court to collect the judgment, but that the Tribe could try to sue in state court or use their Tribal processes to seize any Kraus-Anderson assets on the reservation.

In 2011, the U.S. Supreme Court invited the Acting Solicitor General to file a brief to express the view of the United States. Fourteen years after the initial contract was signed and twelve years after the initial dispute, the case remains unresolved.[111]

This case highlights the complexity involved in jurisdictional issues. In spite of the clear waiver of sovereign immunity, the firm was still unable to secure a judgment. When questioned about this court case, a representative from Kraus-Anderson indicated that while this case was anomalous, the experience will significantly impact their willingness to agree to Tribal court dispute resolution in the future.[112] Further, the astronomical legal fees associated with this case will indubitably affect contracting and bonding companies' calculation of the risks involved in bringing an action in tribal court. In addition, the Court of Appeals' ruling regarding the Tribe's ability to collect on its judgment highlights the additional complexity of collecting on judgments, which is the topic of our next section.

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[109] Ibid
[110] Ibid
[111] Matthew L.M. Fletcher, "Tribal Immunity, Tribal Court Jurisdiction, and Separation of Powers," April 5, 2011, http://turtletalk.wordpress.com/2011/04/05/tribal-immunity-tribal-court-jurisdiction-and-separation-of-powers/
[112] Phil Boelter (Executive Vice President of Kraus-Anderson), interview with the authors, November 19, 2012.

5.3: COLLECTION ON JUDGMENTS

A third complication for surety bonding in Indian Country is collection on judgments. While collection on judgments for construction projects is often difficult regardless of the location of the dispute, the unique features of Indian Country can exacerbate these issues. As a result, contracts for construction in Indian Country often contain language that stipulates jurisdiction for dispute resolution and judgment (as well as many other conditions described in Section 5.1).[113]

One complicating factor for collection on judgment is the complexity of jurisdiction. The recording and pursuit of a judgment is typically conducted in the same court as dispute resolution. However, when parties have agreed to handle dispute resolution through binding arbitration, they must also stipulate where judgments will be handled. The location of the party's assets is an important factor for deciding where a judgment award would be recorded.[114]Judgments pursued in tribal court only have access to assets located in Indian Country. Likewise, judgments pursued in a state court only have jurisdiction over assets located in that state. Many tribes have assets located outside of Indian Country. Thus, the successful collection of a judgment may depend on the jurisdiction in which it is recorded. While there are some states, such as Wisconsin, that honor tribal court judgments, the majority currently do not. This matter is further complicated by the absence of systems for issuing and recording judgments throughout much of Indian Country.[115]

If a contracting company secures a judgment in an external venue, it may have difficulty collecting on the judgment in Indian Country. Seizure of personal property often requires the assistance of law enforcement, and in cases in which a tribal government does not recognize the ruling, cooperation from tribal law enforcement will be unlikely, if not impossible. Even the perception of potential difficulty can be problematic if it decreases sureties' willingness to issue bonds in Indian Country. And, as the Kraus-Anderson case demonstrates, it is also possible for a non-tribal entity to refuse to recognize judgments in tribal courts; in such cases, a tribe may have the ability to seize

[113] Steven Olson (attorney) interview with the authors, November 20, 2012.
[114] Mark Jarboe (attorney), interview with the authors, October 25, 2012.
[115] Ibid.

property that remains on the reservation, but it must work through the state courts to collect fully on a judgment.

A second complication results from the unique features of property ownership in Indian Country. Much of the land in Indian Country is held in trust by the Bureau of Indian Affairs, which means a judgment creditor will only be able to put a lien on the property with the Bureau's approval.[116] Even determining a tribal entity's assets can be difficult without the tribe's cooperation.[117]

Fortunately, contractors have several options available to help prevent collection difficulties. Escrow accounts or letters of credit can be established in advance to provide for potential settlements. Sovereign immunity waivers can also be designed to permit enforcement of judgment through state courts, with specific accounts and amounts that can be designated to limit tribal liability.[118]

5.4: TRIBAL GOVERNMENT INSTABILITY

A final stumbling block for surety bonding in Indian Country is the instability of some tribal governments. Some tribal governments hold very frequent elections, and, whether deliberately or not, information is not always communicated as a new administration takes over.[119] In Montana, several tribes experience government turnover approximately every two years, making long-term economic development planning nearly impossible.[120] On the other hand, the Red Lake Reservation prides itself on the fact that while its government may have turnover in leadership, the tribal government staff remains quite stable.[121] This stability increases the legitimacy and trustworthiness of the tribal government.

Contractors and sureties indicate that frequent changes in tribal government increase the risk of construction projects in Indian Country. Often, large projects take

[116] U.S. Department of Housing and Urban Development, "Section 184 Indian Housing Loan Guarantee Program" February 2003. Accessed December 12, 2012 from http://www.hud.gov/offices/pih/ih/homeownership/184/processing/chap1.htm
[117] Ed Rubacha (attorney), e-mail to the authors, December 10, 2012.
[118] Ibid
[119] Bart Bevins (Minnesota Department of Employment and Economic Development) interview with the authors, October 18, 2012
[120] Shannon Hahn (Office of Civil Rights, Montana Department of Transportation) interview with the authors, November 16, 2012
[121] Scott German (contractor) interview with the authors, November 20, 2012

several years to develop and plan. With changes in leadership come changes in policy direction. Frequent elections can result in significant delays in or even cancelation of construction projects when the project lacks the support of the new government. Moreover, high rates of turnover may give the perception that the government is not capable of working effectively with outside parties. Consequentially, many contractors take the possibility of upcoming tribal elections into consideration when determining their bids, often increasing their premium to account for the increased risk or even deciding not to bid if turnover seems imminent.[122]

5.5: POLICY OPTIONS: CONSTRUCTION IN INDIAN COUNTRY

Although our research has indicated that the majority of work in Indian Country is completed without complications, our interviews suggest that some contractors and sureties are still apprehensive about working in Indian Country. This apprehension is visible in contractual workarounds such as limited waivers of sovereign immunity. While many in the industry feel that these are sufficient, they may have negative results such as increased attorney's fees for contractors or increased prices for those tribes that are unwilling to waive immunity.

Through our research, we have identified a number of potential policy options to address these issues. The following section provides a brief description of each option, followed by consideration of its important strengths and weaknesses. While this study may be insufficient to comprehensively address each, we hope that this discussion will inform and provide direction for additional study.

5.5.1: POLICY OPTION 1: CONTRACTUAL MODIFICATION

Our first policy proposal to develop and disseminate information on contractual techniques to specify jurisdiction for dispute resolution and provide limited waivers of sovereign immunity. Several high-profile court decisions, as well as cases involving inadequate contract language, have focused the awareness of the surety and construction industries on the need for precise and consistent contractual language. Our findings suggest that these changes improve the likelihood of sureties to bond

[122] Doug Niesen (contractor) interview with the authors, November 20, 2012.

projects in Indian Country and that, more and more, sureties are unwilling to bond without them. Perhaps most importantly, our interviews suggest that as long as a contract provides an effective waiver of sovereign immunity, dictates the jurisdiction for dispute resolution, and specifies the process for collecting on judgments, surety companies do not charge a "premium" for bonds written for work done on reservations.

However, it is essential to note that, while large contractors and wealthier tribes have access to the legal resources necessary to craft effective contracts, small and medium-sized contractors may be unable to procure such contracts. As the Grand Canyon skywalk case study illustrates, a poorly written contract will not adequately address jurisdictional and sovereignty issues. Many smaller contracting firms may not be fully aware of the complexities involved in contracts with tribes. Moreover, even when firms and tribes have the requisite resources, the additional investments in negotiations and legal services will still increase the costs of development relative to off-reservation projects.

While higher costs to construction on Indian Country may be inevitable to an extent, there are measures that could be taken to dramatically limit this Indian Country construction premium. For example, contract templates that address jurisdictional and immunity issues could be developed and distributed to small-to-medium size contracting firms. If these contracts were precisely written and developed with tribal input, they could dramatically cut down on negotiation and legal costs. And if widely disseminated and combined with an informational campaign, these templates may encourage more small- and medium-sized contracting firms to bid on projects in Indian Country, which would increase competition and reduce the cost of development.

The impact of these actions may be limited, however, as many contracts already contain such provisions, and it is impossible to predict with certainty how large an impact these templates would have for smaller contractors considering bidding on projects in Indian Country. Importantly, with the wide variation between tribes and bands, it would be impossible to develop a template that would be universally accepted. Thus, negotiation and legal costs would not be completely eliminated. It is also possible that those tribes who are willing to submit to limited waivers of sovereign immunity have already done so, meaning the impact could be limited even if large numbers of smaller

contractors decide to bid on more projects in Indian Country. Furthermore, this option does not address more fundamental underlying issues related to stability and legal independence. Finally, this option would likely face resistance from lawyers and law firms that specialize in construction contracts in Indian Country.

5.5.2: POLICY OPTION 2: IMPROVE JURISDICTIONAL CLARITY

One policy option that was particularly popular among interviewees was the clarification or reassignment of legal jurisdiction. Current assignment of jurisdiction stems from a complex system of treaties, jurisprudence and legislation. Our interviews uncovered significant uncertainty over whether state or tribal courts retain jurisdiction in the event of contractual disputes. As a result, sureties in all states, regardless of their status in relation to Public Law 280, may be apprehensive about doing business with tribes or American Indian contractors. Several contacts suggested that national legislation be enacted to simply clarify these issues through codification of existing standards. Others suggested that jurisdiction for all contract disputes between tribes and non-Indians should be assigned to state jurisdiction. By clarifying legal jurisdiction, they feel Congress may be able to remedy a driving factor behind the problem at hand by simply eliminating uncertainty.

However, we do not believe that either action is appropriate. Reassignment of jurisdiction contradicts the legal trend toward self-determination and the promotion of tribal self-governance. In addition, our quantitative findings do not suggest that external jurisdiction will improve contracting outcomes or access to credit. This option also eliminates a tribe's ability to build culturally appropriate institutions, something that has been found to be important in some aspects of economic development.[123] In addition, the actual economic impact of uncertainty is impossible to determine and is likely limited. It may not merit the level of attention required to Congressional action.

[123] Stephen Cornell, and Joseph S. Kalt. 2000. "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development." *Journal of Socio-Economics* 29: 446.

5.5.3: POLICY OPTION 3: STRENGTHEN TRIBAL INSTITUTIONS

Another option that may increase the confidence of sureties bonding projects in Indian Country is strengthening tribal legal institutions. Lack of stability of tribal institutions is problematic not only in a jurisdictional sense, but also because it may increase the difficulty of collecting on judgments.

Fortunately, efforts to strengthen institutions are already underway. The Bush Foundation's Native Nations initiative works with tribes to form effective governance models and rebuild tribal constitutions. The project's focus is on understanding the unique situations of each tribal government and identifying strengths, weaknesses, opportunities, and areas of concern.[124] Constitutional reform is an important aspect of this process because many constitutions were framed under templates provided by the federal government, whereas new constitutions can be designed to reflect unique tribal while still providing a stable, effective legal and governmental framework. In addition to the Native Nations project, there is a considerable amount of academic research devoted to strengthening legal institutions in Indian Country.[125]

There are several potential benefits to this option. With enhanced legal certainty, sureties will be more willing to issue bonds in Indian Country, likely at lower rates. In addition, it would give tribes control over the outcomes of the process rather than imposing an external model, allowing them to develop institutions in accordance with their culture. In addition, the work of the Bush Foundation's Native Nations project could serve as a model for expanding these efforts.

Unfortunately, this option has several weaknesses. These transformations would require voluntary participation by tribes. As a result, it will yield few effects if not utilized. In addition, it would require significant time and resources to help identify and build a culturally appropriate system. Furthermore, the smaller tribes with the least capacity for this type of work may be the groups that would benefit the most, as those with larger

[124] Bush Foundation, "2011 Annual Report," Accessed December 11, 2012, from http://www.bushfoundation.org/sites/default/files/Web_Content/Publications/PDF_Files/Annual_Reports/2011AnnualReportFINAL.pdf

[125] See e.g.: Stephen Cornell and Joseph P. Kalt, "Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't," published as Chapter 1 in the forthcoming book, Resources for Nation Building: Governance, Development, and the Future of American Indian Nation, edited by Miriam Jorgensen and Stephen Cornell (under review by University of Arizona Press).

economies may already have financial resources to avoid the problem. Finally, it is unclear how the surety and contracting community would react to these changes. Our interviews suggest that the impacts of access to surety bonding may be the greatest for tribes who have failed to pay contractors in the past. It also seems, however, that these negative experiences have led to apprehension among sureties in their interactions with all tribes. Because of this uncertainty, it is hard to determine whether or how quickly sureties would respond to an internally driven institutional reform.

SECTION 6: CONCLUSIONS AND OPPORTUNITIES FOR FUTURE RESEARCH

Our research has identified several complications of surety bonding unique to Indian Country. The size and impact of these complications, however, remain unclear; accordingly, further research is necessary to fully assess the effects surety bonding has on construction in Indian Country.

Our interviews have demonstrated that American Indian contractors face a number of obstacles related to surety bonding. Some are unique to Indian Country, such as challenges in using property as equity and the jurisdictional challenges of collection. In addition, American Indian contractors also face the myriad challenges experienced by other emerging contracting businesses. Our quantitative analysis suggests that the imposition of external jurisdiction is not sufficient to resolve these issues. However, a major limitation of our quantitative analysis is the inability to separate Indian contractors living on a reservation as opposed to other parts of the state. As a result, any direct effect of legal jurisdiction is obscured in our analysis. More specific quantitative data could be generated through a survey of American Indian contractors. A survey would also allow researchers to ask more specific questions regarding bonding to determine actual effects rather than deduce from related data. If reservation-specific data were available, it would also be possible to conduct a deeper analysis of the impact of legal institutions by considering factors such as judicial education requirements and independence from elected officials.

Interviews and case studies have shown that the undesirable actions of some tribes have impacted others' ability to get projects bonded without waiving sovereign immunity. As a result, many tribes and sureties have established contractual

modifications to avoid potential complications. Although many tribes agree to such waivers, our research has indicated that there are others who do not. Although the precise impact on development is unknown, the increased perception of risk will increase the premiums charged by sureties, and the generally ambiguity surrounding sovereign immunity and jurisdictional issues likely leads to fewer bids on projects in Indian Country, decreasing competition and raising the price of construction projects.

Another potential area for research would be a quantitative analysis of Indian Country construction. Although our interviews suggest that many contractors and tribes have developed workarounds to avoid issues of sovereign immunity or legal jurisdiction, a broader quantitative analysis could help to isolate whether construction projects cost more in Indian Country than outside. This analysis would require significant time and expertise to identify projects in Indian Country and comparable projects outside. Data from sureties regarding what factors impact willingness to bond and the rates given would be another valuable resource. It is our understanding that this information is proprietary and closely guarded. However, if it were made available, researchers could better understand the ways in which the surety bonding process impacts Indian tribes and contractors.

While this study provides a preliminary analysis of the issues surrounding surety bonding in Indian Country, there is considerable room for expansion. The short time frame and challenges in accessing interview participants was a major limitation of the study. Given additional time, this issue would be greatly informed by a broader range of interviews and more systematic analysis. In particular, tribal representatives and American Indian contractors proved hard to access. Future researchers would benefit from leveraging relationships to obtain these interviews. This would be helpful in better understanding the tribal perspective on waiving sovereign immunity as well as challenges faced by American Indian contractors. Increasing the sample size and geographic scope of all categories of interview participants would also be helpful in gaining a more complete and national perspective.

Despite challenges in accessing data, this study identifies and probes the ways in which surety bonds impact outcomes that drive economic development in Indian Country. Once again, the stability and perceived legitimacy of tribes and tribal

institutions have demonstrated themselves to be important determinants of buy in from external business entities. Although evidence suggests tribes may be learning ways to navigate these issues, there is room for additional intervention to further mitigate such challenges.

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