

# Buying Native Sovereignty

**Duane Helleloid**

*University of North Dakota, USA*

**Abstract.** For centuries, outside business organizations have sought to enter into business relationships with indigenous populations, often benefitting both parties. However, the power imbalance that foreign settlers had over indigenous peoples often led to exploitative relationships whereby the indigenous people were marginalized and at times treated inhumanely. While the nature of trade and relationships has changed over time, the special status that native tribes enjoy in U.S.A. continues to attract attention from business enterprises. In the past few years, various organizations have found it advantageous to their business interests to engage in transactions with Native American tribes. Three specific examples are described: Allergan transferred patent rights to a tribe to circumvent a U.S. patent review panel; Tesla opened a store and service center on native land in New Mexico to get around the state's dealership laws; and Lume Cannabis Co. opened retail stores on native lands in Michigan near communities that had decided to not license recreational cannabis stores. All three examples raise questions over the ethics of buying access to native sovereignty. Students are asked to apply ethical theories to try and identify what distinguishes ethical and unethical transactions.

**Keywords:** Allergan, Restasis, Tesla, Lume Cannabis, stakeholders, ethics.

## 1. Governmental Relations Between Native American Tribes and the U.S. Government

The legal status of indigenous people varies across countries and has changed over time, but in many regions indigenous people have some level of independence and sovereignty in governance. The United Nations Declaration on the Rights of Indigenous Peoples, among other provisions, asserts that indigenous peoples have rights to have their own institutions and governance, and pursue development consistent with their needs and aspirations (UN 2022). In U.S.A., treaties and legislation generally allow Native American tribes the ability to regulate commerce on tribal lands. Recognized tribes have a “government-to-government” relationship with the United States government, and can act as a nation within a nation (Sault Ste. Marie 2021). For decades, various tribes have engaged in economic activities that were not allowed on nearby state or federal land, including operating casinos, selling fireworks, and offering cigarettes at much lower tax rates (Galbraith and Kinsel 2021). While many of the businesses on tribal lands are established by tribal members for the benefit of themselves and

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the tribe, at times tribes have worked with non-native businesses in ways that specifically benefit outside business interests.

## **2. Colonization, Relations with European Settlers, and Exploitation**

Prior to the arrival of European settlers, estimates of the population of the territory that now comprises the United States of America (U.S.A.) range from about 1 million (Mooney 1910) to 3.8 million (Denevan 1992) and up to 18 million (Dobyn 1983). Immigrants from Europe, and the slaves they brought from Africa, carried diseases (including smallpox and malaria) for which Native Americans had little immunity. These diseases sometimes decimated tribes, in certain cases eliminating up to 95 percent of a community (Dobyn 1983). Poverty, malnutrition, war, and forced relocations also contributed to a decline in Native American population in U.S.A. By 1890, the estimated population of Native Americans in the United States was only 250,000 (Thornton 1990).

Along much of the east coast of what is now U.S.A., the British sought to establish settlements and cultivate agricultural crops that could be exported to Europe. English common law suggested that the Native Americans owned the land that they occupied, and hence English settlers sought to purchase ownership of lands from Native American tribes. In doing so, however, they ran into a difference in understanding of land ownership. Native Americans generally believed that no one could own the land, but that the rights to use the land could be shared or transferred. In many locations it became customary for the European settlers to regularly provide some sort of gifts to local tribes, which the recipients perhaps viewed as a form of compensation or rent to utilize land they had previously had to themselves. Cultural differences over the concept of land ownership, what constituted illegal poaching, and who could access certain land, led to many arguments and battles with each side feeling betrayed by the other (Pauls 1998).

As the new nation developed following the Revolutionary War (1776) and the War of 1812, the nature of the relationship between Native American tribes and the U.S. government evolved, and at times the U.S. government switched course among three different approaches in its interactions with tribes. One approach that was taken at times was a desire by settlers (and “their” government) to simply eliminate Native Americans altogether from certain locations, and massacres at a number of native communities took place. In response, some tribes took the same approach in attempting to eliminate settlers and settlements, and therefore hopefully discouraging future settlers. A second approach taken by the government was to negotiate treaties with tribes, designating specific lands as belonging to a tribe where it was treated as a sovereign government. While in some locations tribes were allowed to remain on land they currently occupied, in other instances they were forced to leave their homeland and move to a distant

location that was very different in climate and geography. (This was typically less productive agricultural land, and deemed to be of little interest to settlers.) A third approach was to try and assimilate tribes into European (or “American”) culture, eventually eliminating Native American culture. One aspect of this approach was to take children from reservations and have them attend boarding schools, or be raised by families of European descent. Children were discouraged (or prohibited) from engaging in traditional cultural practices and often required to convert to Christianity.

The result of these policies, and the intergenerational trauma that resulted, contributed to the marginalization of rural Native Americans. Many Native Americans, and their tribal governments, continue to have an exploitative relationship with more powerful communities and institutions around them, with Native American residents living in poverty. Although less than 15 percent of rural Americans of European ancestry lived below the poverty line in 2002, about 35 percent of Native Americans did. Native Americans also had about one fourth the level of savings of other Americans who lived in rural areas (Probst *et al.* 2002). While some individual tribes earned considerable revenue from Native-owned corporations, extraction of resources such as oil, or leasing out land for enterprises such as casinos, most tribes and their members had limited financial resources.

What follows are three examples of businesses that have recently entered into financial transactions with specific Native American tribes.

### 3. Allergan

For the fiscal year ending in December 2016, Allergan reported a Net Income of over \$14 billion. In 2015, Allergan had gone through a corporate inversion, as the U.S.-based Allergan was acquired by a much smaller Irish-registered firm – Actavis. A key advantage of this transaction was to shift the company’s legal status to an Irish company, which would reduce tax liabilities and restrict shareholders’ ability to sue directors and executives (Allergan 2016). Corporate inversions were receiving significant attention by Congress and the media as questionable practices at this time, and U.S. legislators were considering ways to eliminate inversions. In Allergan’s 2016 10K, it was noted that there was some risk that the transactions involved could be viewed by U.S. tax authorities as insufficient for classifying Allergan as a foreign corporation, which would result in “significant adverse tax consequences” (Allergan 2016: page 41).

The business overview in the company’s 2016 10-K filing specifically referred to two key products that each earned more than \$1 billion – Botox and Restasis (Allergan 2016; page 4). Allergan had been working on the development of eye drops for years, and in 1994 was issued a patent for Restasis – a product that contained 0.05% cyclosporin and 1.25% castor oil. Several subsequent

patents followed, as did testing to determine the product's safety and effectiveness. Approval to sell and market Restasis was received in 2002, with the original patent set to expire in 2014. Restasis was found to be effective in helping individuals who naturally do not produce sufficient tears, or had "dry eyes". Four makers of generic pharmaceuticals filed documents with the Food and Drug Administration indicating that they planned to introduce generic versions of Restasis following the expiration of Allergan's patents in 2014. In 2013, Allergan filed for and received new patents for Restasis, and provided evidence that a slightly different formulation (0.1% cyclosporin) improved effectiveness. Several makers of generic pharmaceuticals filed suit in U.S. Federal Court to have the new patents invalidated on the grounds of obviousness – that the slight change in formulation fell within the range of formulations described in the original patent, and that this change was "obvious" and indistinguishable from the original formulation. Allergan's own data showed that the effectiveness of the new formulation was statistically insignificant over the prior formulation, although specific doctors provided testimony that they saw improved results in patients. The makers of generic drugs that filed suit to have the new patents declared invalid also asked the U.S. Patent Office to have the patents reviewed by an inter partes review (IPR) board. Under this process, the patent office assembles a group of experts in this particular field to review the validity of the patent. (Allergan 2016; Caligiuri 2017; Mullin 2017)

For the 2016 fiscal year, Allergan reported just under \$1.5 billion in revenue from Restasis. In its 10-K filing, the company provided the following commentary on the potential business risks involving the challenges to patents:

*"In 2011, Congress amended the patent laws and created a new way to challenge the validity of patents: the inter partes review. IPR proceedings take place in the US Patent Office and have both advantages and disadvantages when compared to district court proceedings. Although IPR proceedings are limited to certain types of invalidity challenges, the Patent Office applies different standards that make it easier for challengers to invalidate patents. Moreover, IPR proceedings generally take no more than 18 months, which means it is much faster than challenging a patent's validity in a district court proceeding. In addition, an IPR challenge can be mounted even after a patent has been upheld in court. IPR challenges have recently been brought by Mylan against some or all of our patents covering Restasis and Delzicol products." (Allergan 2016, pages 26-27)*

In September 2017, Allergan transferred the patents for Restasis to the St. Regis Mohawk tribe in New York state. In addition to the patents, Allergan also paid the tribe \$13.75 million, and agreed to pay an additional \$15 million per year as long as the patents were valid. Allergan then filed a motion with the U.S. Patent Office to have the case before an IPR board dismissed; because the patents were now held by a sovereign nation, they were no longer eligible for review by an IPR board. These actions attracted attention from news organizations, legislators, and competitors. "Denise Bradley, a spokesperson for Teva Pharmaceuticals, one of