BRIEFING PAPER

on the

Reports and Recommendations of the

Advisory Council on California Indian Policy (ACCIP)

July 1997
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SUBJECT: Reports and Recommendations of the Advisory Council on California Indian Policy (ACCIP)

L. Introduction

A. Creation of the ACCIP

In the Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416 (October 14, 1992), as amended by Pub. L. No. 104-109 (February 12, 1996), Congress established a statewide Indian Council consisting of representatives of federally recognized, terminated and unacknowledged tribes. The Council's mandate includes submission of recommendations to Congress regarding remedial measures to address the special status problems of California's terminated and unacknowledged tribes, and the needs of California Indians relating to economic self-sufficiency, health and education. Section 5 of the Act provides, in part, that the Council shall:

(3) conduct a comprehensive study of -
   (A) the social, economic, and political status of California Indians;
   (B) the effectiveness of those policies and programs of the United States that affect California Indians; and
   (C) the services and facilities being provided to California Indian Tribes, compared to those being provided to Indian tribes nationwide;

and further provides that the Advisory Council shall

(6) submit, by no later than the date that is 36 months after the date of the first meeting of the Council, a report on the study [studies] conducted under paragraph (3) together with proposals and recommendations . . . and such other information obtained pursuant to this section as the Council deems relevant, to the Congress, the Secretary, and the Secretary of Health and Human Services; and
(7) make such report available to California Indian tribes, tribal organizations and the public.

1The Advisory Council has not yet submitted its final reports and recommendations to Congress. This will occur within the next month after a statewide meeting of the California tribes has been convened to review the final text and recommendations of the reports. This paper discusses the reports and the recommendations of the Council as they now stand. While the Council does not anticipate major changes in the reports or their recommendations between now and their submission to Congress, there may be some changes in recommendations in the final reports not reflected in this paper.
The Council, which held its first meeting in April 1994, established special task forces on recognition, health, education, economic development, culture, and community services (encompassing governance and census issues) and held numerous public hearings throughout California. Its reports address each of these subject areas, in addition to termination issues and the relationship between the federal trust responsibility and the protection of Indian lands and natural resources in California.

The Council’s task of gathering information from California’s many recognized, terminated, and unacknowledged tribes, and distilling this information into a coherent and compelling statement, has been a daunting one. Many people have been involved in this historic endeavor, which represents the first time that California Indians have been invited to speak directly to Congress about their problems. These reports and recommendations represent the voices of California Indian people concerning their problems, most of which can be traced to their unique historical circumstances and the inconsistent and misguided federal policies that have shaped their history.

The Council’s reports will include an executive summary and eight separate reports (on recognition, termination, health, education, culture, community services, economic development, and natural resources/trust responsibility). The Council is now in the final stages of its review of the draft reports and recommendations prior to submitting the final reports to Congress and to the Secretaries of Interior and Health and Human Services.

B. Context of the Work of the ACCIP

In every subject area studied by the Advisory Council, it found that inadequate and inconsistent federal policies, extending over the last century and a half, played a dominant role in denying many California Indians their status as tribal peoples. Within the Departments of the Interior and Health and Human Services especially, there has been a pattern of institutional bias, if not outright discrimination, against the California Indians in the funding and implementation of federal Indian programs and services in California relative to other areas of the country. While history cannot be rewritten, its continuing effects can be examined and understood, and efforts initiated to remedy them in the present. This is the goal of the Advisory Council: that its recommendations will not languish with those of a multitude of previous reports, but will provide a blueprint for a unique partnership between the California Indians, Congress, and the Executive Branch, within the context of the Federal-Indian trust relationship and Congress’ long-standing dealings with the California Indians, to address the special status problems of California’s unacknowledged tribes and the institutionalized under-funding of federal Indian programs and

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2In Rincon Band of Mission Indians v. Harris, 618 F.2d 569 (9th Cir. 1980), the Ninth Circuit Court of Appeals held that the IHS had breached its statutory responsibilities to the California Indians under the Snyder Act, 25 U.S.C. § 13, by failing to develop distribution criteria rationally aimed at an equitable division of its funds. Id. at 575. It was not until the Rincon case was won and Congress established the “Equity Fund” in FY 1981 that California Indians began to receive an increased, though still inequitable, share of the Indian health care funding appropriated by Congress.
services in California.

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native peoples elsewhere in the United States, it is different in many aspects. These include the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the eighteen treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including state-sanctioned efforts, countered only by nominal federal resistance, to "exterminate" the indigenous population.

Genocide, failure to ratify the California Indian treaties and the resulting theft of Indian lands under the guise of law, suppression and denigration of Indian languages and cultural traditions, and the breach of solemn trust obligations — all have been part of the history and experience of the California Indians. Looking at the current problems against this sobering backdrop, it is not surprising that, in most instances, the California tribes have fallen far short of their aspirations and potential.

C. Major Themes of the ACCIP Reports

There are three major areas of need identified by the Advisory Council in its reports. These needs gravitate around the themes of relationship, policy, and specific substantive issues. Of course, when one moves from the more general themes of relationship and policy to the specific problems (the substantive themes), one sees that the failure of relationship and policy is pervasive. Thus, the recommended solutions to substantive problems frequently depend on and are tied to changes in federal policy and, ultimately, the way in which the federal government deals with the California Indians.

1. The need to recast the Federal-Indian relationship in California.

California Indians seek a true partnership with the federal government based on principles of justice and equity. This means creating new opportunities for the California Indians by linking federal resources and support with demonstrated and potential tribal self-sufficiency initiatives. The California Indians seek the opportunity to fully develop and build upon their own initiatives for survival and self-determination, but they need the support of Congress and Executive Branch in creating the appropriate legal and financial mechanisms to implement the


4The refusal to ratify the treaties resulted in the displacement and impoverishment of Native peoples on a scale unparalleled in United States history in terms of acreage of aboriginal lands taken and the number of tribes affected. Not only were the California tribes deprived of their aboriginal lands, encompassing more than 70,000,000 acres, but they were denied the benefit of treaties negotiated in good faith that would have set aside approximately 8.5 million acres of land for 139 tribes.
Advisory Council's recommendations, coupled with the technical assistance necessary to develop and enhance tribal capacity.

2. The need to formulate a new federal Indian policy in California through a dialogue between the Federal Government and the California Indians.

For more than a century, the California Indians suffered the unilateral imposition of federal policies of forced assimilation, neglect, and termination. Even when genuine concern was expressed for the needs of the California Indians, the proposed solution, with rare exceptions, was formulated by the Bureau of Indian Affairs (BLA) based on its view of the Indians' needs. Today, this lack of dialogue is manifested most clearly in the Bureau's restriction of eligibility for federal Indian programs and services to members of federally recognized tribes without regard to Congress', and its own, past dealings with other categories of California Indians. Continuation of this kind of one-sided policy formulation is neither acceptable nor appropriate in light of Congress' broad and unprecedented mandate to the Advisory Council in the Advisory Council on California Indian Policy Act of 1992.

Speaking on the floor of the House regarding passage of the Act and the significance of the Advisory Council's report to Congress, Representative George Miller put it this way:

This report will provide a blueprint for the future of California Indians. We will use the recommendations of the council as we approach California Indian policy in the 1990's and on into the next century. The bill puts the tribes at the helm and empowers them to come up with new ideas to achieve funding equity and to resolve the plight of unacknowledged tribes.

3. The need to address specific substantive issues identified in each of the areas addressed by the ACCIP Reports.

Two major substantive themes found throughout the reports are: (1) unresolved questions of tribal and individual Indian status; and (2) the historical, and continuing, inequities in the development and funding of federal Indian programs and services in California. A third theme, which lies at the heart of tribal economic survival and the promise of self-determination, is the lack of adequate tribal homelands in California. Currently, federal policy and/or legislative

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7 Congressional Record, H7975 (August 11, 1992).
constraints limit development of a comprehensive program for addressing the land needs of California tribes.

II. The ACCIP Reports And Recommendations

While this document is titled a "briefing paper," it is impossible to distill in a few pages not only the effects of a century and a half of widely divergent federal Indian policies and actions in California, but also the views of the Indian people concerning the ways in which the Congress and the Executive Branch should work with them to eliminate the current perpetuation of past injustices. These reports and recommendations are, as Congressman George Miller aptly stated, "a blueprint for the future of California Indians," and should, as he suggests, put "the tribes at the helm" so that the solutions implemented are those of their own choosing. Given this daunting but welcome task, and considering that these recommendations traverse the entire breadth of Indian life in California, the Advisory Council will be as brief as possible.

The following is a short summary of each of the eight reports, and their recommendations, covering the following subjects: Recognition, Termination, Community Services, Education, Economic Development, Trust and Natural Resources, Culture, and Health. Some recommendations are repeated in the individual reports because of the relevance of the recommendation to more than one subject area. For purposes of this paper, the Advisory Council has eliminated the repetition by including such recommendations only once and simply cross-referencing to other reports in which the recommendation appears.

A. The Report on Federal Recognition

Summary: At every hearing the Advisory Council conducted, the testimony confirmed that tribal status clarification is a primary issue of concern to California Indians. The term "unacknowledged" refers to those Indian groups whose status as tribes has never been officially "recognized" by the United States or, if recognized in the past, is now denied by the United States. There are more unacknowledged Indian tribes in California than in any other single state.

The current federal acknowledgment process (25 C.F.R. Part 83) is not appropriate for California tribes. Since the procedure was established in 1978, only one California tribe has successfully completed the process. A major problem with the current process is that it requires unacknowledged tribes to prove their status as self-governing entities continuously throughout history, substantially without interruption, as though that history did not include the federal and state policies that contributed to the destruction and repression of these very same native peoples and cultures.

The issue of federal recognition is crucial to all California Indians because its focus is the development of a coherent and consistent federal process for determining which Indian tribes shall be included within the federal-tribal trust relationship. This report discusses the history of federal neglect of California Indians and how that history has led to the current situation of many of the
unacknowledged tribes. It also discusses the problems presented by the current federal acknowledgment process, and explains how the proposed "California Tribal Status Act of 1997," or equivalent administrative policy and regulatory changes, will result in a more just procedure for California tribes seeking federal acknowledgment.

The report does not recommend specific tribes for recognition, because the entire recognition process, as applied to California Indians, is flawed. Indeed, the Advisory Council recommends that the Federal Acknowledgment Procedure be modified to ensure that all California tribes seeking recognition are assured of a fair determination of their status.

Recommendations:

1. The California Tribal Status Act of 1997 (CTSA) should be enacted to address the unique status problems of California's unacknowledged tribes.

Discussion: This California-specific legislation contemplates the creation of a Commission on California Indian Recognition with the authority to review and decide petitions for federal acknowledgment submitted by unacknowledged California Indian tribes under definite administrative procedures and guidelines. These procedures and guidelines have been developed through an extensive consultation conducted under the auspices of the Advisory Council and involving representatives of California's federally recognized, terminated and unacknowledged tribes, as well as California's highest ranking BIA and Indian Health Service (IHS) representatives.

The federal acknowledgment criteria contained in the draft bill are derived from early standards for federal recognition discussed by former Solicitor Felix S. Cohen in his treatise on Federal Indian Law (the Cohen criteria). The existing federal regulations (25 C.F.R. Part 83 - Procedures For Establishing That An American Indian Group Exists As An Indian Tribe), judicial decisions, as well as the provisions of earlier federal acknowledgment bills introduced in the House and Senate, were also used. The proposed criteria also contain special provisions that address the unique problems the existing federal acknowledgment process poses for California tribes.

The Advisory Council recommends that the 12-year Commission, which would be based in California, be supported by an appropriation of at least $250,000 a year for the lifetime of the Commission. This would mean a total cost of $3,000,000 to complete the acknowledgment cases in California. It should be noted that funding of the BIA's Branch of Acknowledgment and Research (BAR) for the last 17 years has not helped to resolve the acknowledgment petitions of the California tribes.

2. As an alternative to legislative action, the Secretary of the Interior should institute fundamental policy changes to the Federal Acknowledgment Process on behalf of California's unacknowledged tribes. These changes should include:
Use of rebuttable presumptions to: (1) mitigate the historical effects on California’s unacknowledged tribes of repressive federal and state Indian laws and policies that sought to destroy or discourage essential aspects of tribal authority and culture; and (2) extend federal acknowledgment to tribes meeting the previous federal acknowledgment standards;

b. An allowance for gaps of up to 40 years in the proof submitted in support of a petitioner’s identification as an Indian group and its exercise of political influence or use 1934, the date of the Indian Reorganization Act, as the date from which proof of these criteria shall be required;

c. Evaluation of evidence of “community” for California Indian groups should focus on networks of social interaction between group members, rather than on geographic proximity of community members; and

d. Revision of the term “predominant portion,” as it applies to that part of the membership of the petitioner comprising a community, to a “substantial portion.”

Discussion: The application of a rebuttable presumption to three of the BAR criteria for federal acknowledgment (identification as an Indian group on a substantially continuous basis, evidence of community, and exercise of political influence or authority) creates a fairer allocation of the burden of proof. See Section 6(c) of the CTSA. In addition, the California approach creates a rebuttable presumption of federal acknowledgment if the following three requirements are met:

- not less than 75 percent of the current members of the petitioner are descendants of the California Indian group with respect to which the petitioner bases its claim of acknowledgment;
- the membership of the petitioner is composed primarily of persons who are not members of any other Indian tribe; and
- the petitioner is the successor in interest to a treaty or treaties (whether or not ratified), or has been the subject of other specifically listed federal actions.

Once these requirements are met, the presumption is that the petitioner has been previously acknowledged and is deemed to have met the first three criteria for present acknowledgment. See Sections 6(d)(1) & (2) of the CTSA.

The Advisory Council recommends that the criteria dealing with identification as an Indian group and the group’s exercise of political influence over its members allow for gaps of up to 40 years.
years and include a rebuttable presumption stating that changes in the community interaction, organization or political influence of a California Indian group, which occurred during the period 1852 to 1934, did not constitute either abandonment or cessation of tribal relations. The reason for the allowance for interruptions and this presumption is that the federal government should not be allowed to benefit from its own policies and laws, and those of the State of California, that prohibited or discouraged essential elements of tribal authority and culture during this time period. In effect, the federal and state governments created conditions in California during this period that made it impossible, or extremely dangerous or difficult, for most California Indian tribes, especially those who were not “protected” by the Missions, to freely or publicly engage in tribal relations or to identify themselves as Indians. It would be unconscionable to force California Indian groups that suffered through this period to provide evidence that, for the most part, does not exist because of the actions or neglect of the federal and state governments. If there has been voluntary abandonment or cessation of tribal relations during this period, it is properly the federal government’s burden to prove it.

A second approach would be to require proof of identification as an Indian group from 1934, the date of the Indian Reorganization Act (IRA), to the present. This approach makes sense for two reasons. First, the advent of a new Indian reorganization policy represented the first time, since the pre-treaty era, that California tribes were encouraged to function openly and publicly. Second, using 1934 as the base date would also eliminate the need to include those provisions mentioned above governing presumptions and allowances for interruptions in continuity of tribal identity and exercise of tribal political influence. For example, a petitioner would have to demonstrate evidence as a distinct Indian group from 1934 to present, and if the character of the group as an Indian entity has from time to time been denied, this would not be considered conclusive evidence that this criterion has not been met. This would be a workable and fair way to apply this criterion to petitioning California tribes.

The Advisory Council recommends that the term “community” be defined more broadly to account for the fact that genocide and California state laws that indentured Indians and discriminated against them during the latter half of the 19th century resulted in wide geographic dispersal of members of California tribes. Therefore, for California Indian groups, the focus of the term should be on networks of social interaction between group members, regardless of territorial proximity, though the geographic proximity of members to one another and to any group settlement or settlements would still be a factor in determining whether a community exists. Moreover, as long as there is an existing community that can demonstrate descendancy from an Indian group that historically inhabited a specific area, that should suffice.

Finally, the requirement that a “predominant portion” of the membership of the petitioner comprise a community as defined is problematic. The Advisory Council recommends that a “substantial portion” be set as the standard. This standard reflects the unique problems created by wide geographic dispersal and dislocation of California Indian groups.

3. Technical assistance to complete the Federal Acknowledgment Process
should be provided to those petitioning California tribes that have requested such assistance.

Discussion: For the past 36 months the Advisory Council has provided state-wide leadership and a forum for tribes to communicate, assist each other and organize resources. It is necessary for this forum to continue. Re-authorization of the Advisory Council is one potential mechanism for ensuring ongoing leadership. A consortium of tribes with adequate funding would be another vehicle.

The lack of available funds to assist the California tribes in completing petitions and developing realistic economic plans is extremely alarming, because the Task Force learned at the White House and National meetings of unacknowledged tribes that other regions with far fewer tribes needing to complete the process have received far more financial support. In the last 36 months, the Recognition Task Force was given a budget of $25,000 to work on recognition issues and to finalize this report. With this modest sum, the Task Force was able to organize educational meetings, and workshops on legislation; attend and represent the California tribes at meetings; as well as gather information from the BAR and tribes to complete this report. This work is vital and is essential for the petitioning tribes of California, and should be supported by adequate funding.

At least $200,000 a year for the next 12 years should be appropriated for this technical assistance. Two aspects of assistance relative to the acknowledgment process should be provided: (1) assistance in completing the petition and review process, and (2) assistance in developing realistic economic development plans upon acknowledgment.

4. There needs to be a clear definition of California Indian for purposes of eligibility for all federal programs and services available to Indians based on their status as Indians. That definition should include:
   a. any member of a federally recognized California Indian tribe;
   b. any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant
      i. is a member of an Indian community served by a tribe, the BIA, the IHS, or any other federal agency, and
      ii. is regarded as an Indian in the community in which such descendant lives;
   c. any California Indian who holds trust interests in public domain, national forest or Indian reservation allotments in California;
   d. any California Indian who is listed on the plans for distribution of assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian; and
   e. any California Indian who is listed on the rolls of California Indians prepared in 1933, 1955, and 1972 for the distribution of the United
States Court of Claims and Indian Claims Commission awards.*

* This recommendation, which appears in many of the ACCIP reports, will not be repeated in other parts of this paper, but should be noted as a priority recommendation of the Advisory Council.

Discussion: Historically, Congress has dealt with California Indians as a discrete group for purposes of federal benefits and services, as evidenced by the Homeless California Indian Appropriations Acts, the California Indian Claims Cases, and the current eligibility of California Indians for health care services provided by the Indian Health Service. In addition, several federal agencies have recognized the unique history of federal relations with California Indians, and have adjusted their eligibility criteria accordingly. The BIA, however, after decades of similarly recognizing the broad eligibility of California Indians for federal Indian programs, has since the mid-1980s insisted that only members of federally recognized tribes are eligible for the services it provides, even where the particular statute creating the benefit is intended to have a broader application. Thus, Congress should clarify the eligibility of all California Indians, as defined above, for all of the services available to Indians based on their status as Indians.

B. The Report on Termination

Summary: The Termination Policy sought to end the special trust relationship between the United States and Indian people that had been the cornerstone of federal-Indian relations since the United States' earliest years. In light of the destitute living conditions of most California tribes, Congress intended termination of the trust relationship to take place only after specific services were provided to prepare them for the discontinuation of federal aid and supervision, and only after the affected tribe consented to termination. In practice, however, the Executive branch achieved tribal consent through misrepresentation and undue influence, and then terminated federal status without providing the preparatory services.

Despite the fact that the termination policy has been expressly repudiated by both Congress and the Executive branch, some California tribes remain “terminated.” Moreover, those that have been restored have not received adequate federal assistance in reestablishing sovereign relations with the federal government, in strengthening their own governments, and in acquiring lands to replace those lost through termination. This report addresses the historical context of the termination policy and the lingering effects of termination on California Indians, and contains recommendations for remedying the continuing effects of this failed federal policy.

Recommendations:

1. Congress should enact comprehensive legislation establishing a process for the expedited restoration of the remaining terminated California tribes, including modification of the criteria used to evaluate requests for tribal restoration.
Discussion: Though termination has not been the official policy of the federal government since 1970, there has not been a single comprehensive piece of federal legislation to restore the remaining terminated California tribes. This is particularly striking in light of the fact that the federal government has lost or settled all of the California rancheria un-termination cases litigated over the past quarter century. Certainly, Congress has shown its awareness of the need for restoration of terminated tribes by passing at least twelve individual restoration bills between 1973 and 1990. It was not until 1993, however, that Congress finally acted to legislatively restore any terminated California tribes. The two tribes restored by Congress — the Paskenta Band of Nomlaki Indians and the United Auburn Indian Community — bring the total number of California tribes restored through litigation or legislation to twenty-nine.

Today, of the thirty-eight California rancherias terminated under the Rancheria Act of 1958, nine remain terminated. Of these, at least three would meet the following criteria used by the Federal government in evaluating a terminated tribe's eligibility for restoration:

1. there exists an ongoing, identifiable community of Indians who are members of the formerly recognized tribe or who are their descendants;
2. the tribe is located in the vicinity of the former reservation [or rancheria or other lands set aside for their use];
3. the tribe has continued to perform self-governing functions either through elected representatives or in meetings of their general membership;
4. there is widespread use of their aboriginal language, customs and culture;
5. there has been a marked deterioration in their socioeconomic conditions since termination; and
6. their conditions are more severe than in adjacent rural areas or in other comparable areas within the State.9

Generally, Criteria 5 and 6 have not been an issue in the restoration of terminated California tribes because the effects of termination were so economically and socially devastating. Moreover, despite the negative effects of termination on tribal organization and culture in California, most of California's terminated tribes do not have trouble meeting Criteria 4. Criteria 1, 2 and 3, however, have proven the most difficult to meet for tribes seeking restoration.

Criteria 2 and 3 should be modified or eliminated. Termination often resulted in the loss of land to creditors and tax sales. Moreover, the former rancherias were often located in economically depressed areas, and tribal members reasonably chose to move to more urbanized areas to seek employment. In addition, termination removed two major factors that contributed


to the political cohesiveness and function of the tribal entity — tribal communal lands and the federal-tribal trust relationship. When the government distributed tribal lands per capita and severed the trust relationship, the focus of the tribal community naturally shifted from a communal self-governing function based on a common interest in tribal land and federal Indian programs, to individual survival. Tribal relationships receded from formal self-governing functions required by the common ownership of land and common interest in the benefits of the federal-tribal trust relationship to more subtle, less formal, social, economic, and religious interactions between tribal members. Thus, requests for restoration of terminated California tribes should be evaluated under criteria that take account of those factors inherent in the termination process which discouraged Indian people from remaining on their former lands and removed the incentive for them to continue to maintain a formal governing structure.

2. Congress should appropriate funds to assist those terminated California tribes seeking restoration.

Discussion: Terminated tribes seeking restoration must employ attorneys, anthropologists and other experts to help them prove that they meet the government’s criteria for restoration. To defray these and other costs of the tribal restoration effort, terminated tribes usually turn to charities and select public agencies, such as the Administration for Native Americans (ANA) and the State of California’s Indian Assistance Program, for seed money to begin the challenging process of initiating and coordinating the effort to restore tribal status through litigation or legislative advocacy. Unlike unacknowledged tribes seeking federal recognition, the terminated tribes have no access to technical assistance or support from the BIA. In essence, the tribe bears the entire administrative and financial burden of reversing the effects of a policy that the Federal government itself now recognizes as misguided.

3. Congress should appropriate supplemental “Restored Tribes” funding for newly restored California tribes.

Discussion: With respect to newly-restored tribes, the initial tasks faced by the tribes are the development and adoption of comprehensive governing documents, obtaining funds for land acquisition and essential tribal operations, and reestablishing a working partnership with the BIA and other federal agencies. These essential tasks, which present problems to even well-established tribes, often threaten to overwhelm a newly-restored tribe because of the lingering effects of termination. Without “Restored Tribes” or some other form of supplemental funding, newly restored tribes often lack the means to establish and minimally staff a tribal office as a base of tribal operations. Though the challenges of operating tribal programs and exploring options for economic development are imposing even when funds are available, the difference is that, with supplemental funding, the tribe possesses the financial means to begin developing the capacity to carry out these self-governing functions.

4. Congress should enact legislation (a) stating that it is the policy of the United States Government, in carrying out its public and other federal land
management functions, to assist newly restored California tribes in identifying and acquiring public and other federal lands, which have been or may be classified as available for disposal under federal law, for the purpose of meeting tribal housing and economic development needs; and (b) directing federal agencies to consult with the tribes in identifying such public and other federal lands within or near the aboriginal territories of the tribes suitable for such purposes.

Discussion: The restored California tribes each have a very limited land base, or no land at all. The lack of an adequate land base is the primary limiting factor in the efforts of restored tribes to reconstitute their tribal governments, provide housing for tribal members, and develop local economies. Without the ability to acquire federal lands in trust, the primary means of funding tribal land acquisition for housing and economic development is the Department of Housing and Urban Development's Indian Community Development Block Grant Program. In the past, this program has given many California tribes the funding they needed to acquire small parcels of private land, primarily for housing. Its effectiveness today for this purpose is more limited. This is due to the increasingly tight restrictions that the Secretary of the Interior has placed on the fee-to-trust land acquisitions, coupled with the State of California's heightened scrutiny of fee-to-trust transfers because of their potential to give the tribes the means of engaging in gaming operations, which have proven to be a successful vehicle for tribal economic development. These factors have stalled tribal efforts to expand their limited land base and develop economically feasible operations capable of generating jobs for tribal members and revenues for provision of essential tribal governmental services, such as education, health care, housing, and reservation infrastructure improvements.

California tribes, especially those which have had their federally recognized status restored, need affirmative action by Congress to simplify the transfer of federal lands for the creation or expansion of tribal homelands. The current federal land acquisition regulations and policies are simply not adequate to address the immediate needs of these tribes or, for that matter, most of California's recognized tribes. The restored tribes need a congressional remedy responsive to their unique situation, as well as that of the other landless or land-poor California tribes.

5. The Wilton Miwok Indian Community, the Federated Indians of the Graton Rancheria, and the Mishewal Wappo Tribe of Alexander Valley should be immediately restored by Congress. In addition, the other tribes that remain terminated should receive special consideration, according to criteria modified as recommended above, when they are ready to seek restoration.

Discussion: The Wilton Miwok Indian Community, the Federated Indians of the Graton Rancheria, and the Mishewal Wappo Tribe of Alexander Valley meet the current criteria for restoration, and should be immediately restored.
6. Congress should enact legislation declaring that it is the policy of the United States to not interfere with decisions regarding enrollment and eligibility criteria for restored tribes, and that no federal agency should try to influence a restored California tribe to limit its membership to persons listed on the distribution roll prepared pursuant to the Rancheria Act and their descendants.

Discussion: In its advisory capacity to newly restored tribes, the BIA often urges the tribes to confine their membership to persons appearing on the distribution list prepared during termination, and their descendants. This advice interferes with the tribes’ exclusive sovereign power to determine tribal membership, sows conflict among different groups of potential members, and ignores the fact that many tribal members were arbitrarily omitted from the distribution list in the first place. However, because the advice also serves to limit the scope of the BIA’s trust responsibility, it is unlikely that the BIA will abandon this practice without legislative direction to do so.

C. The Community Services Report

Summary: Studies conducted by federal, state, and private agencies spanning almost a century have reached the same conclusion: California Indians have not received their fair share of federal Indian program dollars, and have been denied access to some programs provided to tribes in other BIA service areas. As a result, California Indians in general have not attained the same level of overall development as other Indian groups. The reports reaching this unanimous conclusion have come from both Republican and Democratic administrations, as well as from non-profit organizations.

Inequity toward California Indians continues in BIA per capita allocations for many programs, even when its own service population data are employed. The degree of inequity is understated, however, because the BIA systematically undercounts California Indians by employing inappropriate criteria for counting the Indian service population in California. For example, the 1990 census figure for Indians living in rural parts of California counties containing Indian reservations is slightly more than double the 1989 BIA service population figure for California. Similarly, the 1991 Indian Health Service service population figure for California is slightly less than double the 1993 BIA service population figure for the state. Thus, it appears that if more appropriate service population criteria were applied to California Indians, the service population would at least double. Accordingly, this report documents current inequities in federal allocations for California Indians by calculating per capita expenditures using not only the actual BIA service population statistics, but also the more appropriate figures that are approximately twice those employed by the BIA.

The history of federal policy toward California Indians affords insight into the weaknesses of the BIA’s service population criteria. In particular, the failure of the federal government to ratify the eighteen California Indian treaties and to establish a suitable reservation land base for
California's tribes undermines the rationale for applying the general criterion limiting service population to Indians "on or near reservation" in California. For analogous reasons, this geographic criterion is currently not applied to Indians in Oklahoma and Alaska. Even the limitation of service population to members of recognized tribes is suspect in the context of California history. In California, individuals who participated in claims awards based on past deprivations of land and water rights can prove that the federal government views them as Indians, even though the BIA refuses to recognize their tribal groups. In addition, early BIA reports (e.g., Dorrington, 1928) document situations in which the members of small aboriginal bands of California Indians were granted allotments on the public domain, then later ignored as tribal communities because of their individual, as opposed to communal, ownership of trust land. In essence, the allotments when granted served in lieu of a reservation or communal land base; however, the BIA later denied responsibility for or recognition of the tribal group because it lacked any communal trust land. Not only do some of these groups deserve to be recognized, their members are entitled to be counted as part of the BIA service population and therefore eligible for federal Indian programs and services.

While the BIA since the mid-1980s has moved toward a uniform criteria for eligibility for most of its programs — membership in a federally recognized tribe — other agencies of the federal government have begun to modify their eligibility criteria for benefits, and hence their definition of the service population, to include off-reservation California Indians and members of unacknowledged tribes. Illustrations include the Indian Health Service (IHS) (administering broadly inclusive language from the 1988 amendments to the Indian Health Care Improvement Act) and the Department of Education's Indian Controlled Schools Enrichment Program, authorized by recent amendments to the Indian Education Act that exempt California, Oklahoma, and Alaska Indians from geographic criteria.

Budget data from the 1980s and 1990s confirms that these inequities have persisted. Using the most comprehensive funding category, Operation of Indian Programs, and the BIA's official service population figures over the past five years (1990-94), California Indians are receiving only one-third to one-half the funding received by all other Indians. Similarly, funding from the IHS for California Indians is about 30-40 percent less than the national average over the period 1988 through 1995. Housing and Urban Development Indian Housing programs also show a systematic under-funding over the last decade.

The BIA also under-serves the Sacramento Area in administrative capacity compared to other BIA areas. The area office serving California Indians has the smallest square footage of office space and one of the lowest shares of BIA personnel.

The effects of these documented funding inequities are manifest in the diminished social and economic welfare of California Indians relative to Indians elsewhere in the country. When compared to non-California reservation Indians, California Indians have higher rates of poverty, lower household income, slightly less education, less post-secondary education, and higher rates of unemployment. Only in household characteristics do California reservation Indians do better.
than non-California reservation Indians. These combined indices of adverse social and economic conditions puts California reservation Indians among the lowest socioeconomic groups in Indian country. Since Indians are already among the poorest groups in the country, California Indians are among the most economically deprived groups in the nation. The past and present history of administrative neglect and under-funding most likely has contributed to the adverse social and economic conditions endured by California reservation Indians.

Recommendations:

1. In appropriating and allocating budget funds for individual benefit programs, Congress and the BIA should increase amounts directed to the Sacramento Area Office to insure that per capita spending for California at least equals the national per capita spending average for all areas of Indian country. Per capita spending for California should be calculated taking into account an Indian service population based on the definition of Indian contained in Recommendation 4 of the Recognition Report (see page 9). In addition, Congress should pass legislation that ensures that the BIA, the Indian Health Service, the Department of Housing and Urban Development, and all other federal agencies are funding California Indian tribes at levels comparable to national averages for Indians.

2. Congress should appropriate, and the BIA allocate, the funds necessary to determine the number of California Indians eligible for General Assistance welfare benefits under the Snyder Act. All eligible individuals should be provided with these benefits in the next budget cycle.

3. Congress should appropriate, and the BIA allocate, adequate funds for the planning, establishment, and ongoing operation of tribal law enforcement and justice systems in California.

Discussion: Such law enforcement systems may take the form of individual tribal institutions, consortia, special-purpose entities, or contracts with state or local agencies. Particular attention should be given to support tribal initiatives in the area of child welfare, environmental control, housing administration and evictions, and drug law enforcement. There should be no requirement that these systems resemble non-Indian law enforcement or judicial institutions, so long as they comply with applicable federal law. Once such tribal systems are established, they should receive BIA funding support at per capita levels that are comparable to average per capita funding for tribal law enforcement and justice systems outside of California. Per capita spending for California should be calculated taking into account the revised service population, based on the recommended definition of California Indian contained in Recommendation 4 of the Recognition Report (see page 9).

4. Congress should enact legislation authorizing each California tribe to initiate retrocession of Public Law 280 jurisdiction from the state of California to the
federal government, either in whole or in part. The legislation should also establish a federal commitment to fund and provide technical support for development of law enforcement and justice systems in California as recommended above. Furthermore, where Public Law 280 remains in effect, Congress should clarify those areas of tribal civil and criminal jurisdiction that remain concurrent with state jurisdiction.

5. The Congress and Executive Branch should recognize the disproportionate loss of aboriginal lands by California Indians, and make special provision to ensure that California tribes are not “penalized” for their small land bases in the formulation and application of federal funding formulas that include size of the tribal land base as a criterion for distribution of funds for tribal purposes.

6. Congress should enact legislation establishing the necessary policy and legal framework for a comprehensive federal program to assist federally recognized, especially newly acknowledged and restored, California tribes to acquire public and other federal lands for the purpose of creating viable tribal homelands and addressing the housing, economic development, and cultural and natural resource protection needs of such tribes. (See also Recommendation 4 of the Termination Report, at page 13; and Recommendations 4 and 5 of the Economic Development Report, at page 20.)

7. Congress should authorize supplemental appropriations for the BIA, IHS, and HUD to specifically target the needs of California Indians. These funds are justified as a long overdue remedial measure to address the severe socio-economic effects of decades of federal under-funding of Indian programs and services in California. These funds should be used to develop tribal administrative capacity and infrastructure, develop and fund program consortia for small tribes, and should be aimed at alleviating the chronic poverty, lack of housing, unemployment, and health service inequities suffered by California Indians. Target remedial funding levels should be indicated by adding shortfalls from the national average over recent historical time periods.

8. Congress should establish a base funding amount for needy small tribes in California for development of essential tribal governmental and administrative capacity and structures.

D. The Report on Economic Development

Summary: The prospect of economic development for most California Tribes is grim. Although California Indian tribes consistently express their desire to develop economically in ways that are culturally appropriate and environmentally safe, very few opportunities exist to do
One major obstacle is that most tribes in California have land bases that are too small to support business development, are usually isolated from business centers, and lack natural resources that can be put to commercial use.

The other major obstacle is that years of inequitable funding of tribal governments in California has left them without the administrative capability and infrastructure necessary for successful economic planning. The federal government’s neglect has forced many California tribes to focus on basic issues of survival, rather than on the more practical issues associated with economic development. Thus, the majority of California tribal governing bodies are not experienced in management, preparation of business plans, organizational development, legal and physical infrastructure development, critical analysis of market opportunities and project feasibility, accessing capital for enterprise development, or labor force requirements.

This combination of obstacles has left the tribes with limited options. For those tribes located near large urban centers or recreation areas, gaming operations, which require a relatively small capital investment compared to their profit and job-generation potential and which attract large amounts of private investment capital, are an alternative. Also, some reservations with areas of open, unproductive land located near urban areas have become targets for private waste management companies seeking new locations for municipal and industrial waste disposal. While gaming has provided the economic mechanism through which some California tribes have dramatically reduced poverty and unemployment on their reservations, California’s hostility to Class III gaming operations, and the resulting lack of Tribal-State Class III gaming compacts in California, has jeopardized this area of federally-sanctioned tribal economic development. Both of these kinds of economic development are often perceived as “undesirable” either because of the nature of the economic activity or their potential to create adverse social and environmental effects. However, even when those effects have been adequately addressed by the tribe or, in appropriate circumstances, an involved federal agency, opposition to tribal development initiatives often continues.

The report’s review of selected tribal case histories reveals that some federal activities have contributed to the economic well-being of tribes. First, the presence of Indian Health Service-contracted clinics has contributed to development of the administrative capacity of the contracting tribes. Second, the Bureau of Indian Affairs’ Area Credit Office has, in some cases, been able to facilitate access to managerial and technical expertise, as well as access to equity and debt financing for tribal ventures. This assistance was very valuable to the tribes that received it; unfortunately, allocations of federal dollars to the Bureau’s economic development programs have declined dramatically since 1993. Furthermore, tribes have found it extremely difficult or impossible to access loans for enterprise development, even when viable market opportunities have been identified, technical assistance has been available, and enterprise feasibility has been determined. Third, there was a tendency among California tribes — after years of struggling to develop alternative kinds of enterprise development and facing ever-increasing tribal unemployment and poverty rates — to turn to gaming, as sanctioned under the Indian Gaming Regulatory Act of 1988, as the most immediate source of relief. Yet, the viability of gaming as a primary means of achieving long-term tribal economic development is now in question because of
the lack of any Tribal-State compact for Class III gaming in California and the Supreme Court’s recent decision foreclosing any tribal remedy against the State when it refuses to make good faith efforts to negotiate such a compact.\textsuperscript{10} Still, it appears that until the market for casinos becomes inundated, a significant number of California tribe’s will turn to the gaming industry as their only viable alternative to increasing levels of reservation poverty and unemployment and the trend towards further reductions in federal funding for Indian programs.

The report identifies legal obstacles to tribal economic development and suggests ways in which Congress can clarify tribal taxing and regulatory authority to remove these obstacles and thereby enhance the tribes’ ability to initiate and sustain economic development, and to reap the full benefit from the use of reservation lands and resources. In addition, the report discusses various models for economic development, including the creation of tribal enterprise zones and a Tribal Homelands Private Investment Corporation, similar to the Overseas Private Investment Corporation, as a means of stimulating private investment in underdeveloped and developing tribal economies in California.

Recommendations:

\begin{itemize}
  \item General - Policy Guidelines
  \begin{itemize}
    \item Federal policy initiatives for Indian economic development in California must acknowledge and respond to the diverse and unique situations of Indians in California. Policy initiatives should not pit federally recognized tribes against unacknowledged tribes, unaffiliated Indians or the large urban Indian population of California.
    \item Federal policy initiatives for Indian economic development in California must address the potential conflict between sovereignty and trust responsibility by accommodating tribal self-determination on the one hand and assuring that the federal trust responsibility is properly discharged on the other.
  \end{itemize}

  \item Base Level Funding - Development of Tribal Capacity
  \begin{itemize}
    \item There must be an immediate response to the needs of California tribes through a special appropriation of multi-year, base level tribal funding to provide tribes with sufficient and stable funding to address basic governmental and programmatic infrastructure issues. Base level federal funding is necessary to develop tribal governmental capacity to initiate economic development, and multi-year funding is critical to long-range tribal planning and attainment of economic development goals.
  \end{itemize}
\end{itemize}

Land Acquisition and Administration

4. The Secretary of the Interior should coordinate with Interior agencies and other cabinet level officers to develop a comprehensive approach for identification of public and other federal land that could be made available for disposal to California tribes for housing, economic development, and cultural and natural resource protection purposes. (See also Recommendation 4 of the Termination Report, at page 13; and Recommendation 6 of the Community Services Report, at page 17.)

5. The Secretary of the Interior should work together with the California tribes to develop a comprehensive tribal land acquisition program, similar to but more expansive than past efforts occurring under the Indian Reorganization Act and other Acts which authorized acquisition of lands for Indians in California. Emphasis should shift from isolated, non-productive parcels to lands that may provide viable economic development potentials.

Discussion: California tribes that were parties to the 18 treaties negotiated in 1851-52 would have retained 8.5 million acres of their aboriginal homelands had the treaties been honored by the Senate. When the Senate refused to ratify the treaties and Congress extinguished the California tribes' land claims in the California Land Claims Act of August 3, 1851, California tribes lost claims to their entire aboriginal homeland, totaling more than 70,000,000 acres. Today, the tribal land base in California is approximately 400,000 acres (about .6% of the aboriginal land base) with an additional 63,000 acres of land held in individual trust allotments. Given this history, the large number of impoverished, resource-poor tribes in California, even a modest program of land acquisition should have as its target a long-term goal of returning thousands of acres of public lands to tribal ownership.

6. Existing land acquisition programs, such as that administered by the Department of Housing and Urban Development (HUD), should be expanded and strengthened through interagency coordination and streamlining of the bureaucratic processes (e.g., by designating an agency official to coordinate BIA/IHS/HUD involvement).

7. The process for transfer of lands from fee-to-trust status needs to be facilitated in California by:

a. legislative or regulatory reform to allow identification of "land consolidation areas" (perhaps corresponding to aboriginal territories

or service areas) within which acquired lands may be treated as contiguous to reservations.

b. a unitary, coordinated environmental review process.

c. a comprehensive program to address land contamination issues, including environmental review requirements related to land acquisition and the procedures for assessing and resolving contaminant issues. The program should facilitate a process for transferring or donating to tribes private lands within Indian country that have undergone environmental cleanup.

- Off-Reservation Economic Opportunities

8. There is a need to explore tribal economic development opportunities that are not tied to land base or restricted to Indian country. For example, a program should be developed to provide tax or other incentives for private businesses that promote Indian participation or commit to support tribal economic development by pursuing Indian training and employment goals. Given the inadequate and geographically dispersed land bases of California tribes, such programs should not be restricted to reservation lands, although reservation-based businesses might be given greater incentives.

- Expansion of Existing Programs/New Programs

9. Existing Indian economic development programs should be re-authorized and expanded; as examples:

a. The BIA Loan Guaranty Program and the administering Sacramento Area Credit Office should be funded at increased levels.

b. The BIA should provide training and technical assistance in tribal governance and political infrastructure development, particularly to newly recognized and restored tribes.

c. The BIA should strengthen enforcement of its federal trust responsibility in order to ensure the protection of natural resources held in trust (tribal and allotted). A mechanism for such enforcement might be the creation of a joint review board comprised of BIA, other federal, and tribal officials who would review plans for economic development activities that are opposed by tribal members on the basis of threats to cultural, environmental or physical health.

10. Congress should enact legislation creating a California Tribal Homelands
Private Investment Corporation, similar to the existing Overseas Private Investment Corporation (OPIC), as a means of encouraging American, including Native American, private investment in underdeveloped and developing tribal economies in California through a program of direct loans and loan guarantees that provide medium to long-term funding to ventures involving significant equity and/or management participation by American businesses.

11. **Technical Assistance - Building Tribal Capacity**

   Funding should be made available to support training of California tribes and individual tribal members in a broad range of technical areas, including but not limited to administrative capacity building, physical and social infrastructure development, strategic planning for business and economic development, marketing and business feasibility analysis, business plan development, business management, and federal and state laws relating to tribal economic development.

12. **Gaming**

   The Secretary of the Interior, pursuant to the federal trust responsibility, should promulgate regulations establishing a procedure to allow a tribe to engage in Class III gaming if a state fails or refuses to enter into good faith negotiations to conclude a Tribal-State compact under the Indian Gaming Regulatory Act (IGRA).

13. Congress, in addition to or in the absence of Secretarial action to promulgate regulations providing a remedy to tribes under the IGRA when a state fails to negotiate in good faith, should amend the IGRA to establish a fixed time period once a tribe initiates discussion with a state on a Class III gaming compact in which to conclude the compact, but if a compact is not concluded despite the good faith efforts of the tribe within the statutory time period (e.g., 90 or 180 days), the tribe could go directly to the Secretary of the Interior for approval of its Class III gaming operation.

**Discussion:** California has a long and ugly history of opposition to any form of tribal sovereignty. From the initial decision of the State Legislature in 1852 to oppose Senate ratification of the 18 Indian treaties negotiated by federal commissioners, and the State's resulting genocidal policies of enslavement and "extermination" of the Indian population, to its modern-day opposition to the exercise of reserved Indian fishing rights and tribal regulatory and taxing authority, California has demonstrated its hostility to tribal sovereign authority and the continued efforts of the indigenous peoples of California to chart their own political and economic destiny. Thus, the good faith negotiations that Congress envisioned would occur between the Tribes and
the States under IGRA immediately encountered the institutional hostility of California to tribal sovereignty. IGRA anticipated this problem and provided a federal court remedy where a state refuses or fails to engage in good faith negotiations initiated by a tribe. This remedy, however, disappeared with the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), leaving the states free to flaunt the good faith provisions of IGRA without sanction. California has taken full advantage of its immunity by resisting good faith efforts by the gaming tribes of California to conclude tribal-state compacts on Class III gaming operations. In short, the Congressional compromise of tribal jurisdiction reflected in the IGRA has not worked in California.

What are the alternatives? One alternative would be for Congress to specifically amend the IGRA to eliminate the States' participation, through the mechanism of compacting, in the Class III approval process. In other words, to return to the "bright line" aspect of the Cabazon decision modified only by a process of Secretarial review and approval similar to that which exists in the IGRA. Such an amendment would be unlikely to succeed because the compacting process has worked in other states, and because the States would undoubtedly oppose any process that foreclosed their involvement in decisions on Class III gaming. A more realistic and palatable alternative to the States, and one probably acceptable to most tribes, would be to amend the IGRA to establish a fixed time period for a tribe and a state to conclude a compact on Class III gaming once the tribe has initiated the process, but if a compact is not concluded despite the good faith efforts of the tribe within the statutory time period (e.g., 90 or 180 days), the tribe could go directly to the Secretary of the Interior for approval of its Class III gaming operation in accordance with applicable statutory or regulatory criteria. Certainly, such an alternative would re-install the process with the elements of state accountability and fair dealing that Congress originally intended in passing the IGRA, but which Seminole undermined through its broad interpretation of the States' 11th Amendment immunity.

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12 Whether a tribe, in the absence of state consent to suit, can request that the Secretary prescribe procedures (see 25 U.S.C. §§2701(d)(7)(B)(vii)) under which the tribe may engage in Class III gaming activities, is still an unsettled issue. See, e.g., Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016, 1029 (11th Cir. 1994).


14 The Spokane Tribe in Washington State has made the argument that, even in the absence of congressional action, either a tribal remedy must be read into the IGRA or it must be declared unconstitutional. See United States of America v. Spokane Tribe of Indians, CS-94-0104-FVS (E.D. WA), Answer, Counterclaims And Third-Party Complaint For Declaratory Judgment, Injunctive and Declaratory Relief, at p. 7 (filed April 5, 1994), currently on appeal to the Ninth Circuit Court of Appeals. Specifically, the Spokane Tribe argued that: (1) if there is no remedy, IGRA is unconstitutional in its entirety; and (2), in the alternative, the Secretary of the Interior has a trust obligation to provide a remedy by promulgating regulations allowing Class III gaming when a state refuses to negotiate in good faith. Id.
Report on Trust and Natural Resource Services

Summary: The trust relationship pervades all areas of Indian law. It has been seen as both a source of federal power over Indians, and as a substantive limit on that power. It requires the federal government to deal with the Indians in good faith. Moreover, treaties, statutes and other federal actions can create specific fiduciary duties, the breach of which will give rise to an action for damages.

The BIA interprets its trust responsibility narrowly, both in defining what duties are owed, and in defining the class of Indians entitled to the benefits of trust protection. Even though contradicted by its own past actions, the BIA currently takes the position that only federally-recognized tribes and their members are entitled to participate in federal programs and services for Indians. Moreover, the BIA defines "federally recognized" as applying to only those tribes listed pursuant to 25 C.F.R. Part 83, even in cases where contrary evidence demonstrates previous acknowledgment and lack of termination by Congress. These agency interpretations of the scope of the federal trust responsibility have had a disproportionate impact in California because of the large number of unacknowledged tribes.

One of the most important trust duties is the duty of the federal trustee to protect the Indian land base and its resources and, in appropriate situations, to administer the lands and resources for the benefit of the Indians. The BIA has not met this responsibility in California. One reason for this is that the BIA has not maintained current, comprehensive data on the Indian land and natural resource base in California. In addition, the lack of skilled personnel, especially natural resource experts, at both BIA Sacramento Area and California Agency levels precludes needed data collection on natural resources and results in a lack of technical assistance needed to assist California tribes in their efforts to protect and manage trust resources.

Despite these problems, California tribes have demonstrated remarkable initiative in attempting to address environmental and natural resource protection and management issues. The report discusses a few of the more significant tribal initiatives.

In light of the essential role that water has played in the development of Indian lands, especially in the arid Southwest, the report devotes a special section to the discussion of Indian water resources in California. Another section of the report is devoted to the complex process for acquisition of land in trust status. While fraught with problems, pitfalls, and delays, the fee-to-trust process is nevertheless of acute importance to the California tribes, many of whom lack homelands or have homelands of insufficient size to undertake economic development.

Recommendations:

- Trust Responsibility — Equity

1. Congress should appropriate base level funding for all of California’s federally recognized tribes for development and support of tribal planning
and administrative capacity, including plans with natural resource protection and land use components.

**Discussion:** One of the most well-documented conclusions gleaned from the BIA's own records and reports is that the California Indians have consistently been allocated less than their fair share of federal Indian programs and program dollars. As a result, California tribes have received and continue to receive disproportionately lower levels of benefits and services from the BIA relative to other areas of the country. This lack of equitable and adequate funding and services has prevented the BIA from properly discharging its trust obligations, and has crippled tribal efforts to protect and manage natural resources. Base level funding for tribes in California is essential to close this institutional gap in federal funding and services, and to assist the tribes in developing and enhancing their own capacities for natural resource protection and management.

- **Water Resources**

2. The Department of the Interior should compile and consolidate existing data on Indian water resources in California and assist the California tribes in preparing current inventories of their water resources. In appropriate situations, the Department should assist the tribes in quantifying their water rights. Congress should appropriate funds for this purpose.

- **Land Acquisition and Administration [See Recommendations in Termination and Economic Development Reports]**

- **Public Domain Trust Allotments**

3. Congress should appropriate funds to address the needs of the Indian owners of public domain trust allotments. This would include funding for land surveys to resolve boundary disputes, to quiet title to easements established by prescriptive use, and to enjoin trespass to the land and to resources, such as minerals and timber.

4. As part of its trust responsibility, the Department should establish priorities for conducting water resource inventories, including surface and subsurface water sources, of public domain trust allotments in California and, where necessary, quantifying the allotment's reserved water right. Congress should appropriate funds for this purpose.

5. Congress should appropriate funds for creation of a special position or positions within the Sacramento Area Office charged with the following responsibilities: gathering data related to preparation of allotment resource
inventories; exercising allotment rights protection authority (e.g., in quiet title, trespass, and boundary dispute matters); leasing and permitting activities involving allotment resources; and developing a public information program that would inform public domain allottees of their rights and responsibilities with respect to the lands held in trust on their behalf by the United States.

F. The Report on Indian Education

Summary: Indian people and tribes in California have long recognized and continue to recognize the importance and power of education. Education is inextricably linked to the survival of Indian people and tribal communities at every level. For the individual, education is the source of his or her upliftment and future prosperity, through the acknowledgment of cultural identity and through the acquisition of skills of trade or profession. For the tribe or Indian community collectively, education is the source of continuing cultural vitality, resiliency, and group prosperity as members of the community contribute to the growth and change of tribal and community life. But these positive benefits of education cannot be realized by California Indians unless the barriers blocking the effectiveness of Indian education efforts in California are removed.

The problem areas have been identified and documented in this report. They are generally grouped into four broad categories: the lack of California Indian control, the lack of inclusion of California Indian culture and perspective, overly restrictive eligibility criteria, and the lack of equitable funding. The root cause of these problems is the historical and ongoing discrimination by the BIA against California Indians and tribes and the failure of the federal government to adequately tailor programs and services to meet the unique needs of California Indians in those programs not involving the BIA.

In effect, California Indians are still contending with assimilationist practices, even though the federal policy of assimilation as a guiding principle for the relationship between the federal government and the Indian tribes was discredited and abandoned long ago. The fact is that the policy of Indian self-determination in education, as in other areas, has never been implemented in California in a tangible way. Consequently, those programs and services designed to achieve the goals of self-determination and to uphold a government-to-government relationship between the federal government and the tribes of California have little or no effect in practical terms. Meanwhile, the vast majority of California Indian children continue to languish within a public school system that institutionally invalidates them. It is precisely because most Indian children and adults in California never achieve their educational potential, that the promise of Indian self-determination in education must finally become a reality in California.

In the areas of higher, adult, and vocational education, where Congress has provided at least some of programmatic and funding tools for Indians to progress into skilled and professional positions, the policies of the BIA have short-circuited the opportunities for many California Indians. In these programs, the overarching issues of equity funding and individual eligibility for
BIA programs are most clearly evident. Thousands of California Indians have been denied access to these education programs by administrative fiat implemented in violation of federal law.\textsuperscript{15} Even those California Indians who have not been denied services through the BIA's arbitrary attempt to redefine the California Indian service population are nevertheless denied adequate educational funding and support because the BIA continues to allocate to the California Indians less than their fair share of the Indian education budget. More recently, the BIA has used the budget allocation process to foreclose program eligibility for all California Indians who are not members of federally recognized tribes. By moving all Indian education programs into its Tribal Priority Allocation method of dividing up program funding, the BIA effectively allocates all education funding to California's federally recognized tribes without regard to the Snyder Act's broad mandate to provide education assistance to "Indians throughout the United States."\textsuperscript{16}

The most successful educational projects and initiatives in California have been those that have placed control of education programs with parents and tribes on the local level. This includes the Noli School located on the Soboba Reservation, the Four Winds charter school in Chico, and the formulation of the United Tribes Education Coalition (UTEC) to advocate on behalf of Indian children and parents and to address a myriad of problems in several local public school districts serving the children of multiple tribes. As these few examples illustrate, approaches in California are varied, but they are affected by many of the same issues: tribal control and the concomitant need for tribal infrastructure development; eligibility requirements; and funding. The greatest single reason for the lack of success and the unpopularity of bureau programs has been that they have failed to involve Indians in the planning and implementation of programs which affect them.

Each of the Advisory Council's recommendations is aimed at assisting Congress in formulating thoughtful approaches that are tailored to meet the needs of California Indians in the area of education. In order to translate these recommendations into successful programs, the suggested approaches must be backed by funding commitments from both Congress and the Bureau of Indian Affairs — Congress must make the necessary appropriations, and the Bureau must ensure that the funds are made available promptly and in a manner consistent with effective program implementation. Without adequate funding, even the most carefully crafted programs are unlikely to succeed. Historically, California Indians and tribes have suffered from both failings — inadequate program development and inadequate funding. Nevertheless, they have retained the vision that Indian education in the State of California may one day enable individuals and Indian communities and tribes to reach their ultimate potentials. It is well past time, as we approach the twenty-first century, to attain that vision.

\textsuperscript{15}See, e.g., Malone v. Bureau of Indian Affairs, 38 F.3d at 439-430.

\textsuperscript{16}25 U.S.C. § 13
• General Recommendations

1. Create a grant program for the development of curricula for use in tribally-controlled or public schools, which fully integrates California tribal histories, languages, and cultural perspectives. The entities eligible for the grants would be tribes (both recognized and unrecognized), consortia of tribes, Indian organizations, and collaborative projects between tribes and Indian organizations and school districts. School districts would be ineligible to apply on their own.

2. Enact legislation authorizing the establishment of a joint federal/state/tribal team to study, devise, and implement a plan to create a new tribally controlled education system that involves the 27 State of California Indian Education Centers program, and the BIA tribally-controlled school programs. The study would be jointly funded by the federal government and the state of California. The study would address issues concerning the (a) establishment of tribally-controlled schools, possibly utilizing the facilities and resources of those state Indian Centers already established on or near reservations, and (b) the potential utilization of the remaining state centers as regional technical assistance centers for Indian-specific programs.

Recommendations made under the joint study should be implemented so that final decision-making authority is in the hands of Indian educators and administrators so that each site is specifically designed to suit the needs of the local Indian tribes and communities.

• Program Specific Recommendations

Bureau of Indian Affairs Programs and Services:

Sherman Indian High School

3. Enact express Congressional legislation setting forth enrollment eligibility criteria specifically for California Indian students attending Bureau controlled day schools and boarding schools consistent with the definition of California Indian contained in Recommendation 4 of the Recognition Report (see page 9).

4. In the same legislation, enact express provisions which explicitly allow for Bureau controlled day schools and boarding schools to receive funding for eligible California Indian students based on the new enrollment criteria. This will require amending 25 U.S.C. 20007(f) to define "eligible Indian student" to include a California-specific provision consistent with the
definition of California Indian contained in Recommendation 4 of the Recognition Report (see page 9).

*Tribally Controlled Contract Schools*

5. Enact express Congressional legislation exempting California from the prohibition of new school start-ups contained in the 1995 Department of the Interior Appropriations Act. Enact legislation specifically authorizing establishment of day schools and boarding schools in California under contract with California tribes, consortia of tribes, and Indian organizations serving California Indian children.

6. Increase Congressional appropriations and Bureau funding for such schools so that per capita spending for California approximates national per capita expenditures. Per capita spending for California should be calculated using a method for determining service population that includes all California Indians, as defined in Recommendation 4 of the Recognition Report (see page 9).

*Johnson O'Malley (JOM)*

7. Enact express Congressional legislation exempting California tribal and non-tribal contractors from the Bureau funding distribution formula under the Tribal Priority Allocation (TPA) priority allocation system for JOM monies. Such legislation should specify an alternate funding and distribution method for California:

a. Base level of funding for California JOM programs would be determined according to a student count using the definition of California Indian stated above.

b. Specific program monies would be distributed on the basis of actual counts of students to be served by the programs.

c. The legislation would include express language indicating that the FY 1995 cut off does not apply in California.

d. The legislation would also include a provision specifying that any California JOM monies not contracted for in a particular year would be added to funds available for tribally-controlled contract school start-ups in California.

*Tribally-Controlled Community Colleges*
8. Congress and the Bureau of Indian Affairs should allocate planning grants for at least two new tribally-controlled community colleges in California.

9. Increase Bureau funding for existing tribally-controlled community colleges in California even as new colleges are established, so that per capita spending for California approximates national per capita expenditures. Per capita spending for California should be calculated taking into account members of unrecognized tribes who meet the definition of California Indian in Recommendation 4 of the Recognition Report (see page 9).

**Higher Education Scholarships**

10. Enact express Congressional legislation directing the Bureau of Indian Affairs to revise its eligibility criteria for higher education scholarships so that all California Indians who meet the definition of Indian stated above are eligible. These eligibility criteria should also be revised to clarify that California Indians need not reside "on or near" a reservation in order to qualify for such scholarships.

11. Increase Bureau funding for scholarships to California Indians so that per capita spending for California approximates national per capita expenditures. Per capita spending for California should be calculated using service population figures that include all California Indians who meet the definition of California Indian contained in Recommendation 4 of the Recognition Report (see page 9).

**U.S. Department of Education Programs and Services**

**Formula Grant Program (Title IX, Subpart I)**

12. Implement federal regulations that define the "establishment" of an Indian parent committee to mean the "consistent functioning of the committee during the previous year." The regulations should specify that if such a committee fails to function consistently, the tribal application option is triggered.

   a. Evidence of the consistent functioning of the committee would be regular meetings and regular majority Indian parent membership on the committee.

13. Implement federal regulations modeled after the pre-1984 regulations that provide detailed language regarding access to documents, needs assessment, evaluation, hiring, responsibilities of the LEA and the parent committee, and
composition of the parent committee.

Special Programs and Projects to Improve Educational Opportunities for Indian Children (Title IX, Subpart 2) and Special Programs Relating to Adult Education for Indians (Title IX, Subpart 3)

14. Fully appropriate Title IX, Subpart 2 and 3 programs, with any funding formula to include California-specific provisions that ensure per capita spending approximating the national per capita expenditure for all programs.

15. The funding formula should also include the option that tribes may devise consortia or inter-tribal associations to apply for and administer such funds, or that they may apply separately and later combine funds and administer the programs jointly.

Impact Aid

16. Enact express legislation amending 20 U.S.C. §7701 et seq. and providing direction for revised implementing regulations in the following categories as specified:

a. Local Educational Agency Eligibility

Provide for exemption of public school districts in California from eligibility requirements dealing with minimum numbers of federally connected children (i.e. more than 400 or at least 3% of student enrollment.)

b. Application for Payment

Require joint application by tribe(s) and school district(s), requiring joint signature by tribal government representative(s) and district superintendent. Alternatively, require tribal approval and sign-off on the Annual Impact Aid application submitted by the district to the federal government.

c. Payment

Provide for payment of funds to either the tribe(s) or the district with release of funds dependent upon joint signature by both tribal and district representatives.
Provide for notification of funding to both the tribe(s) and the district.

d. Tribal Option to Remove Children and Contract for Services

Provide for a tribal option **prior to proceeding through the complaint process** to remove all or a portion of its children from the public schools and apply directly for Impact Aid monies to provide educational services for those children. Impact Aid funds would be made available to tribes for all children residing on the reservation who choose to attend the tribal school (regardless of affiliation with the tribe) through the BIA tribally-controlled school program. Provide tribe(s) the option to gradually phase in a tribally-controlled school program by allowing tribe(s) to apply for funds on a periodic basis, as the children are removed from the public school or choose to attend the tribal school.

e. Indian Policies and Procedures

Provide for specific requirements in the district’s Indian Policies and Procedures that restore former federal regulation provisions regarding meaningful Indian input.

Define meaning of “equal participation of Indian children” such that it is understood to include qualitative outcomes (achievement of grade level goals, test scores, grade point averages, dropout rates, enrollment in college preparation classes, graduation rates, alternative assessment outcomes, etc.) of Indian children in comparison to non-Indian students.

Define meaning of data and program information that must be provided to parents and tribes such that it encompasses and is coordinated with the collection and disaggregation of data referenced in Title I of the Improving America’s Schools Act.

f. Federal Reporting

Provide for reporting by the school district to the federal government concerning the equal participation of Indian children as well as program financial information.

*Regional Assistance Centers*

17. Develop federal regulations to carry out authorization for regional technical
assistance centers pursuant to 20 U.S.C. §8621(b) that specify establishment of Indian education program specialists for the two Regional Assistance Centers in California:

   a. Indian education program specialists will disseminate to tribes, on an ongoing basis, information about all federal and state grant programs available to serve Indian children and adults, including higher education financial aid services for California Indians.

   b. The centers will provide parents with information and training regarding the function and role of Indian parent committees under various programs as well as technical assistance for the proper functioning of the committees.

Bilingual Education, Language Enhancement, and Language Acquisition Programs

18. Enact express Congressional legislation amending Title VII, of the Improving America's Schools Act, 20 U.S.C. §7404, to include unrecognized or unacknowledged California tribes, and Indian organizations or consortia of tribes and Indian organizations in the list of Native American entities eligible for the program.

G. The Report on California Indian Cultural Preservation

   Summary: Culturally and linguistically, pre-contact Native Californians were one of the most diverse group of Peoples on Earth. A conservative estimate places their number at 150,000-200,000, comprised of hundreds of individual nations, bands and villages. Their languages numbered over one hundred, derived from five or more language families.

   Socially, California Indians were as diverse as their languages. Due to the diversity of California's geography and natural resources, each tribe's lifestyle had evolved out of a long and close interaction with, and an astute observation of their environment. But philosophical and religious diversity were tolerated, if not appreciated, and it was not uncommon for tribes with different ideologies to have lived as neighbors from time immemorial without serious conflict. Perhaps this was possible because all tribal philosophies encouraged cooperation and taught respect for all living things. Life was held sacred by all Native peoples and each of life's important stages—birth, childhood, adulthood, marriage, death—was marked with ceremony.

   Native Californians have a material culture that dates back thousands of years. Everything that they developed—tools, utensils, shelter, clothing—was molded by their individual ecosystems. Each tribe created ornaments and religious artifacts that were unique to themselves. Traditional monetary systems were structured around values placed on the natural world around them. Moreover, the basketry produced by Native Californians is considered to be among the finest in
the world.

Today, the complex and dynamic nature of tribal existence in California is kept alive by California Indians who continue to practice many of the cultural traditions of their ancestors: ceremonies and dances are held; regalia is made; basketry continues as a fine art; and the complex and dynamic nature of tribal existence in California continues. Today, however, the United States has defined many of these persons as non-Indian for purposes of federal law. The starting point for this report must be the assertion that the essential element of Indian and tribal identity is the tribe's spiritual and cultural existence. This, and not "federal recognition" is what truly distinguishes Indians from others.

This report demonstrates the continued spiritual and cultural existence of Indians in California, despite damage sustained from brutal historical events. The purpose of the report is to document some of the struggles of California Indians, to identify the types of problems they face within a complex legal framework, and to make recommendations for positive changes that will help them protect and manage their cultural resources and preserve them for future generations.

Recommendations: The following recommendations of the Advisory Council are based upon: (a) oral and written testimony collected over the past year and a half, (b) input from a diverse group of individuals who contributed to the development of this report (c) the findings and conclusions contained herein. The recommendations are not intended to be all-encompassing remedies to the problems facing California Indians. Rather, they are offered as starting points for a rudimentary good faith effort by Congress to acknowledge its moral and legal responsibility to protect and aid Indian tribes.

At this juncture, it is also pertinent to set forth some essential principles which pervaded the entirety of the testimony and input offered in support of this report. The principles, fundamental to a discussion of Cultural and Religious practices of California Indians, include the following:

- Significant components of Indian religious and cultural practices in California are land-based.

- Particular sites are of religious significance since time immemorial and continue to be used contemporaneously to the fullest extent possible.

- Many cultural practices are tied to the land and natural resources of a geographic area.

- Native value systems are religion-based, so all aspects of native life carry religious overtones, including hunting, fishing, gathering practices, and child welfare.

- California Indians continue to maintain oral traditions and ceremonial practices that reflect native religions. During the course of these hearings, speaker after speaker shared
current practices and discussed the extent to which traditions and cultural practices have survived and are re-emerging despite centuries of assault and hostile government policies.

-- There is tremendous diversity among native groups in California, facilitated by a cross-tribal tradition of tolerance and acceptance.

-- California has a unique history, including the experience with unratified treaties and the California Land Claims cases, which established that "unrecognized" aboriginal Indians in California are identifiably Indian, and are legally and morally entitled to religious and cultural rights and protections.

-- The violent and dishonorable treatment of California Indians -- as reflected in federal law, policy and practice -- has resulted in large numbers of landless, widely dispersed Indians. This calls for the development of newer, innovative, community-based approaches.

The Advisory Council hereby offers recommendations, both for Congress\(^\text{17}\) and for the Federal Agencies charged with implementing federal law:

- **Recommendations for Congress**

  1. **For California Indians not affiliated with a "recognized" tribe listed pursuant to 25 C.F.R. Part 83**, it is recommended that Congress (a) facilitate immediate Part 83 recognition for petitioning historical California Tribal groups and (b) strengthen service delivery for California Indian people by adopting a legislative definition of "California Indian" to clarify that all California Indians are eligible for services, and are subject to federal laws passed for the benefit and protection of Indian people. (*See Recommendation 4 of the Recognition Report, at page 9.*)

     There is a particularly compelling need where laws relating to child protection and cultural and religious practices are concerned. California Indians, even those not affiliated with a Part 83 tribe, should receive the protections of the Indian Child Welfare Act and should be entitled to fully practice their Indian religion, including use of eagle feathers and other restricted use items.

  2. **Given the unique circumstances of California Indians, creative initiatives should be pursued to increase access to private lands, such as tax incentives**

\(^\text{17}\) The recommendations to Congress may be broad and particularly challenging in terms of implementation. However, they reflect issues of major significance to Indians in California and cannot go unstated.
and immunity from liability for private property owners who make land accessible for Indian cultural and ceremonial use.

There is a critical need to increase access to cultural and religious sites, including traditional burial and ceremonial areas, both on public and private lands.

3. The Lyng\textsuperscript{11} decision should be legislatively overruled and a cause of action granted to tribes and Indian practitioners to protect their religious and cultural interests.

4. Congress should amend the National Historic Preservation Act to:
   a. mandate compliance with tribal consultation requirements when an agency's proposed undertaking may have an effect or adverse effect upon properties of historic value to an Indian tribe that are included, or may be eligible for inclusion, on the National Register of Historic Places;
   b. require federal agencies involved in any undertaking that may affect properties included on the National Register to meaningfully consult with interested Indian tribes and Indian organizations before making a final determination on such undertaking; and
   c. include a finding that American Indian cultural, religious and historical properties should be afforded the same respect and dignity as sites of similar importance to American history and culture. Further, such finding should set out a preference for preservation of such sites over destruction, in order to preserve these areas for the enjoyment and use by future generations of California Indians and other Americans.

5. Congress, in the exercise of its trust responsibility, should provide tribes with the tools to protect their resources, by acknowledging and protecting in-stream use of water for maintenance of Indian fisheries and the integrity of reservation watersheds.

6. Indians, both members of federally recognized tribes and California Indians unaffiliated with a Part 83 tribe, should be exempted from laws limiting the

taking, use and possession of items used for religious and ceremonial purposes, such as feathers from eagles and migratory birds, and animal parts from native wildlife species. If exemptions cannot be granted, accommodations must be fashioned to eliminate the criminalization of the making and possession of religious artifacts and ceremonial regalia.

7. Given the relative poverty and dispersed circumstances of many California Indians and tribes, special accommodations should be made to facilitate repatriation of Indian burials and artifacts associated with California. In particular, the Native American Graves Protection and Repatriation Act (NAGPRA) should be amended, to accommodate claims involving tribes with diverse and mixed historical tribal affiliations, and the legitimate claims of unacknowledged groups.

8. Serious attention should be given to changing the priority of documentation: from individual lineal descendants to aboriginal and culturally affiliated tribes. Such tribes must include unacknowledged groups, if NAGPRA is to be effectively implemented in California. Both NAGPRA and the California State Native American Heritage Commission require identification of lineal descendants.

Documentation from individual tribal members regarding the most likely descendant or lineal descendent criteria is difficult, if not impossible, to establish due to inconsistencies between federal requirements and state recording practices, adoptions and relocations, and inadequate record-keeping practices by the Bureau of Indian Affairs.

9. A centralized California Indian Repatriation Center should be established and funded by Congress to disseminate repatriation information, document current excavation, and assist tribes through a grant program to cover costs of repatriating human remains, associated items and objects of cultural patrimony. The Center would not have authority to petition for repatriation of items, but would facilitate implementation of NAGPRA in California.

10. California tribes should be funded to establish law enforcement and justice systems, either individually or as part of a consortium of tribes. They should be allowed to either contract with state and local governments for the delivery of such services, or to retain the status quo. Tribes should also receive adequate federal financial support for the protection and enhancement of their communities and the effective implementation of the Indian Child Welfare Act.

- Recommendations for Federal Agencies
11. The National Park Service should implement a comprehensive gathering policy for American Indians which recognizes the benefits of Native gathering to National Park Service goals and which does not make “direct ancestral association” a prerequisite for gathering in a park unit.

**Discussion:** This recommendation is supported by current land management policies and federal law: (1) land management philosophies at the federal level are shifting towards ‘ecosystem management,’ which considers traditional Native cultural uses of natural resources to be beneficial in the reproductive potential of plant species; (2) the President of the United States has ordered all federal land management agencies to work with tribes and tribal groups in a government-to-government relationship, and to consider the impact of current policies on Native religions and cultural practices; and (3) the American Indian Religious Freedom Act, 42 U.S.C. § 1996, mandates a review of agency policies and guidelines in an effort to identify procedures which may pose obstacles in meeting the intent of the Act.

12. The U.S. Forest Service (USFS) should develop a final, comprehensive policy covering the complete range of Native American issues that arise in the management of national forests, and which clearly reinforces the tribal-federal trust relationship. This policy must not discriminate against members of unacknowledged groups, and should clearly articulate a no permit/no limit policy for non-commercial collecting for personal or Native community cultural use.

13. The USFS should also establish and fully fund tribal relations programs in each region and include permanent positions in each national forest, so that they are accessible to tribes with whom they must consult under the

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19 See, Richard Haeuber, “Setting the Environmental Policy Agenda: The Case of Ecosystem Management,” 36 Nat. Res. L. Jour. 1 (Winter 1996). Ecosystem management is an ecological and systematic approach to managing natural resources at a landscape scale. Such a system considers the importance of protecting ecosystems as well as individual species; factoring natural disturbance regimes into management schemes; and the utility of a core reserve/buffer zone design approach for natural resource protection. In the 1970's the concept was recast in the form of biosphere reserves that included transition zones of human activity compatible with the natural ecosystem.

Ecosystem Management is being fully explored by eighteen federal agencies, and the major land management agencies already have drafted guidance regarding its adoption. Moreover, the former White House Office on Environmental Policy has undertaken a major ecosystem management initiative, including demonstration projects, and both the 103rd and 104th Congress held numerous hearings and briefings in both the House and Senate regarding legislation to amend the Federal Land Policy and Management Act. 26 U.S.C. §§ 1701-1704 (1988). Haeuber at 9-10
government-to-government relationship. The tribal relations programs should be funded to carry out education and training of agency line officers and staff in all divisions and programs whose policies and programs impact tribal resources. Training should emphasize the beneficial effects on plant and animal populations from local and regional traditional Native use and management.

14. The EPA and USFS should develop a partnership with impacted federally recognized and unacknowledged California tribes to implement a comprehensive pesticide and herbicide use consultation policy which recognizes aboriginal gathering practices and tribal interests in maintaining aboriginal rights and culturally relevant practices. Such a partnership should include tribal-federal agreements or mitigation plans with tribes impacted by proposed chemical sprays.

15. The Environmental Protection Agency (EPA) should formally respond to the California Indian Basketweavers Association petition to bring federal protection to California Indian gatherers, and should continue to investigate ways to protect Native gatherers from pesticides.

16. The current BLM Native American Policy should be amended, after consultation with California Indians, to provide adequate guidelines for access and use of culturally significant areas. The California Indian Policy should provide a mechanism for awarding cultural resource use permits which takes into account California Indian knowledge of, and respect for, their ancestral areas, and which eliminates unnecessary interference from BLM officials with California Indian religious practices as they take place. The terms for awarding the permits should be agreed upon prior to actual use, with a mechanism for immediate dispute resolution.

17. The Department of Defense must adopt regulations for appropriate tribal-federal consultation to ensure the protection of historically significant sites, and develop mitigation measures when a culturally sensitive area on or near lands held by the Department is to be developed. Funding should be made available through the Department of Defense to hire consultants chosen by the impacted tribes to conduct studies before any action is taken which may cause an adverse effect on religious or culturally significant properties administered by the Department.

18. The criteria used by the Administration for Native Americans relating to funding provided under the Native American Languages Act must be modified to: 1) extend program funding cycles to five to 10 years; 2) eliminate burdensome or unnecessary accounting requirements; and 3) adopt
H. The Report on Indian Health

Summary: This report is an assessment of the status of Indian health care programs in California. Principal issues identified by tribes, tribal health programs, urban health programs, non-federally recognized tribes, and persons of Indian descent eligible for services from the IHS, are analysed and presented in significant detail in support of the recommendations included in Section II of the report.

In light of the identified funding deficiencies for California Indian health programs, testimony was provided wherein the issue of "Agency level assessments" on the IHS budget was raised and identified as an area to be studied as a source of funding that should be utilized to meet the unmet need in California. Sections III through VI provide historical background and chronology of events in the history of health services in California and document the Tribes' efforts to bring about equity in funding for health care services for the Indian people of California. A summary of testimony presented to the Health Task Force is included in Section VII of the report.

Recommendations:

1. Additional funding required for comprehensive health care services: There are several different standards against which the level of funding necessary to operate a comprehensive health program for California Indians can be measured, including comparisons with other IHS areas, existing IHS Resource Allocation Methodology, local market comparisons and national expenditure comparisons. Only the local market comparison methodology adjusts adequately for regional differences in the cost of providing health services and is free of political considerations. After surveying the California indemnity insurance market and the more directly analogous Health Maintenance Organization market, it was decided that the most appropriate comparative cost would be $2,400 per person per year. This figure represents the current 1996 cost of providing comprehensive health care services in California.

To calculate the level of additional funding from the Indian Health Service, two additional planning assumptions would have to be made. The first is that the maximum penetration of the census population by the IHS funded health care system is approximately 66%. This percentage is higher than the current penetration rate of 52% which is somewhat depressed compared to historic rates and reflects the impact of consistent and significant under-funding. The second planning assumption is that 33% of the individual Indians who seek care at IHS funded Tribal Health Programs will be covered by alternative insurance primarily, Medi-Cal, the California Medicaid program. This rate of coverage is
higher than the rate on the IHS maintained RPMS data base but compares with rates found by Dr. Trudy Bennett in her 1994 study of Indian Health Care in California and information from a cross section of Tribal Health Programs. Given these planning assumptions, the calculation for additional funding from the Indian Health Service would be as follows:

\[ \$122,004 \times 0.66 \times 0.66 \times \$2400 - \$72,425,848 = \$55,122,152 \]

(Service population times the penetration rate times the rate of uninsured users times the market cost of comprehensive care, minus the available IHS funding level, equals the level of under-funding for Tribal Health programs in California)

2. The California Contract Health Service Delivery Area (CHSDA): The CHSDA currently consists of thirty-seven rural counties. These counties were first identified administratively by the Indian Health Service as the official IHS service area and were later codified in statute as part of the Amendments to the Indian Health Care Improvement Act of 1988 (P.L. 100-713). Currently only two of the thirty-seven CHSDA counties lack federally recognized tribes, Mariposa, and Trinity. There are seven additional counties not included in the CHSDA that could join the CHSDA as a result of the granting of federal recognition to tribes located in those counties. Those counties have large Indian populations, significant portions of which are Indians of California.

It is therefore recommended that these counties be brought into the CHSDA as soon as possible and that funding for each of these counties be added to the IHS program within the area.

Using the same funding formula identified above, the new funding necessary to fully establish a comprehensive health program for the identified Indian population is as follows:

<table>
<thead>
<tr>
<th>County</th>
<th>Population</th>
<th>Additional Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marin County</td>
<td>963</td>
<td>$978,531</td>
</tr>
<tr>
<td>Napa County</td>
<td>781</td>
<td>$816,488</td>
</tr>
<tr>
<td>Kern County</td>
<td>7,329</td>
<td>$7,662,029</td>
</tr>
<tr>
<td>Merced County</td>
<td>1,680</td>
<td>$1,756,339</td>
</tr>
<tr>
<td>Stanislaus County</td>
<td>4,363</td>
<td>$4,561,254</td>
</tr>
<tr>
<td>Monterey County</td>
<td>3,136</td>
<td>$3,278,488</td>
</tr>
<tr>
<td>San Luis Obispo Co.</td>
<td>2,364</td>
<td>$2,471,420</td>
</tr>
</tbody>
</table>

TOTAL ADDITIONAL COST $21,524,549

3. Contract Health Services: The Contract Health Service funding shortfall for California is $8 million dollars, and is included in the global request for comprehensive health services.
4. Small Tribes Facilities Program: It is recommended that Congress fund the Small Tribes Facilities Program in order to correct the major deficiencies that exist for tribally operated health programs in California. Approximately $10 million dollars is required to correct identified deficiencies in Tribal Health Programs and alcohol programs resulting from Deep Look Surveys conducted by the IHS CAO. IHS must be directed to survey all Tribal, urban and alcohol programs. Information included in this report indicates that only twenty-four health programs and three alcohol programs are included in the most recent Deep Look Survey which indicates that approximately $5,385,061 is required to correct all existing deficiencies. This figure is calculated without the inclusion of information and deficiencies of four residential alcohol programs and nine tribal health programs and seven urban health programs.

5. Construction of Youth Regional Treatment Centers: It is recommended that $10,000,000 be provided by Congress for construction of two Youth Regional Treatment Centers in California as authorized in P.L. 94-437 as amended.

6. Environmental Health: It is recommended that the IHS work with the BIA/DOI, EPA and the tribes to address the environmental health issues directly related to the dumping of toxic waste on California Indian Reservations. There have been no definitive studies completed to identify the cost of clean up of the most dangerous, Laytonville and Torres Martinez sites, however the cost could be in the hundreds of millions of dollars. This is an urgent situation and must be acted upon without haste.

7. Sanitation facilities funding requirements: It is recommended that $18,761,000, the unfunded amount in sanitation facilities be made available. Sanitation facilities for FY 96 is significantly underfunded. While the total project cost for FY 96 was estimated at $34,926,100 the actual funding plan was $16,165,100, an unfunded amount of $18,761,000. A breakdown is included as a supplement in the full report.

8. Urban Indian Health Program recommendations are as follows:
   a. Health care reform legislation must include provisions for Essential Community Provider status, 100 percent cost-based reimbursements, grant subsidies, residency programs and allocations of capital funds. This status, available to tribally operated programs, should be granted to all current and future Urban Indian Health Programs.
   b. Immediate transitional funding is vitally needed by Urban Indian Health Programs to build the infrastructure necessary to compete in a reformed health care delivery system. Any health care reform legislation must include the infusion of these capital dollars. Immediate technical assistance must be provided in the areas of managed care systems, capitated health care systems, computerization, quality
assurance, cost accounting, management information systems, networking and other related systems needed to move successfully into health care reform.

c. The present funding level of Urban Indian Health Programs must be increased to be commensurate with the average level of need funded for other Indian Health Service programs. Current level of need funded for Tribal and Indian Health Service-operated programs is approximately 67 percent, whereas the level of need funded for Urban Indian Health Programs is approximately 22 percent.

9. **Traditional Indian Medicine:** In the area of Traditional Indian Medicine, it is recommended that the IHS, at the Headquarters level, collaborate with the Health Care Finance Administration to reform reimbursement regulations to include payment for traditional practitioners.

10. **Recommendations regarding the IHS Scholarship Program** are as follows:

Amend 25 U.S.C. § 1603 to read:

"Indians" or "Indian", unless otherwise designated, means any person who is a member of an Indian tribe...except that, for the purpose of sections 1612, 1613, and 1613a of this title, such terms shall mean any individual who (1), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or (2) is an Eskimo or Aleut or other Alaska Native, or (3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary.

OR

Amend § 1613a to incorporate the broad definition of "Indian" applicable to §§ 1612 and 1613.

In either case, the amendment should be written to apply retroactively, and mandate that those who were denied scholarships due to the IHS interpretation of the 1992 amendments should have their alternative loans repaid.

11. **Data collection and reporting recommendations** are as follows:

a. It is recommended that IHS work with tribes and tribal contractors to evaluate IHS data reporting needs. Are items required in the past necessary in the current healthcare system (e.g. blood quantum)?
b. It is recommended that IHS work with tribes and tribal contractors to identify an electronic solution to meet the data reporting needs of IHS at Headquarters and Area Office level; State Governments, Tribal Governments, healthcare providers, insurers (including HMO’s, PPO’s), accrediting and licensing agencies, local program administrative and financial management, and local programs for other system needs.

c. It is recommended that IHS work with tribes and tribal contractors in evaluating an electronic medical record as replacement for Resource and Patient Management System (RPMS). The system should be commercially available, interface with other computer systems (e.g. financial and billing), be able to be modified by users to meet their specific needs (e.g. tribe of enrollment), be user friendly, contain rigid security systems to the data element level, and support creation of user defined reports.

d. It is recommended that in the interim, the RPMS System be revised to define/redefine data dictionary; capture required data to support patient and insurance billing; allow easy modification of data fields to capture data required by states; contain user-friendly report generation capabilities across all modules; accept/import data from other software programs (e.g. reference laboratory results, coding system upgrades); interface with other commercially available software programs; and capture and report quality indicator data (e.g. HEDIS and Quality Report Card measures).

e. It is recommended that Congress allocate funds for ongoing staff training on the RPMS system and for video conferencing through partnerships with local community colleges, libraries or health programs and IHS trainers.