

**THE ACCIP REPORT ON CALIFORNIA INDIAN  
CULTURAL PRESERVATION**

A Report by  
The Advisory Council on California Indian Policy  
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## SUMMARY

The following are essential principles which pervaded the entirety of the testimony and input offered in support of this report. These principles are fundamental to a discussion of Cultural and Religious practices of California Indians:

- 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 innovative, community-based approaches.

## 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, and (c) the findings and conclusions contained herein. The recommendations are not intended to be all-encompassing remedies to the problems facing the preservation of California Indian cultures. 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.

The Advisory Council hereby offers recommendations, both for Congress<sup>1</sup> 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 California tribal groups (see Recommendation 1 of the Recognition Report), and (b) strengthen service delivery for California Indian people by adopting a legislative definition of "California Indian" to clarify that all California Indians, as defined in Recommendation 4 of the ACCIP Recognition Report, are subject to federal laws passed for the purpose of protecting American Indian cultures and cultural resources.

As Congress has recognized by enacting cultural protection legislation, there is a compelling need to preserve Indian families and cultural and religious practices. California Indians, even those not affiliated with a Part 83 tribe, should benefit from the cultural protection legislation already enacted by Congress, including the Indian Child Welfare Act and laws protecting the practice of Indian religions.

2. Given the unique circumstances of California Indians, creative initiatives should be pursued to increase access to private lands, such as tax incentives and immunity from liability for private property owners who make land accessible for Indian cultural and ceremonial use.
3. The American Indian Religious Freedom Act should be amended to provide a cause of action to tribes and Indian practitioners, so that they can enforce the substantive provisions in the law and protect their religious and cultural interests.
4. Congress should amend the National Historic Preservation Act to:
  - a. Provide for the development and implementation, following appropriate consultation with tribes, tribal organizations, and traditional cultural leaders, of uniform government-wide consultation requirements for all federal agencies when

an agency's proposed undertaking, including any developments that are reasonably foreseeable as a result of the undertaking, may have effects or adverse effects on properties of traditional religious and cultural importance to Indians, that are included, or may be eligible for inclusion, on the National Register of Historic Places. The government-wide consultation requirements should take into consideration the differing cultural practices and norms of Indians. Possible models for these consultation requirements include the Bureau of Land Management Native American consultation requirements. Traditional cultural leaders should be involved in all consultations regarding properties of traditional religious and cultural significance to Indians.

Presently, there are a variety of consultation guidelines throughout the federal government. These guidelines are not consistent and frequently are inadequate to deal with the unique issues facing Native Americans. Although the Department of the Interior Office of American Indian Trust will in the near future publish its proposed guidelines for compliance with the Executive Order on Sacred Sites, there is no assurance that agencies other than Interior will adopt the same guidelines. This balkanization of practices and guidelines can only deter, rather than support consultation. Native Americans become frustrated, to say the least, with all of the varying requirements. Uniform consultation requirements would provide all parties with the assurance that the consultation process will take place in the same manner with all agencies. Thus, patterns of conduct and consultation precedents can be developed which can help in further refining the process.

Consultation with traditional cultural leaders already is required under the National Historic Preservation Act Section 1069 Regulations [see 36 C.F.R. 800.1(c)(2)(iii)]. The regulation does not limit the participation only to traditional cultural leaders from recognized federal tribes. Traditional cultural leaders often are the most important source of information and guidance on culturally significant properties. Their exclusion can only lead to ill-formed decisions which could have a drastic adverse effect on such properties. The regulations already have recognized the value of traditional cultural leaders in Section 106 consultations and that value should be codified to assure compliance.

- b. The definition of "federal undertaking" should be amended to include reasonably foreseeable projects arising out of, or as a result of, the proposed activities or activity.

Presently, the term "federal undertaking" in the National Historic Preservation Act (NHPA) is narrowly and arguably defined so as to include only the project or activity itself [see NHPA Section 301(7)]. Frequently, federally funded or permitted projects are not completed in a vacuum. Rather, the federal project is tied to the development of other projects, some other public lands or even private land. These additional projects would not occur without the federal project. The development of the related projects can, and often does, increase the potential effects and adverse effects of the federal undertaking on properties of traditional religious and



cultural value. Accordingly, the definition should be amended to include reasonably foreseeable projects arising out of, or as a result of, the federal undertaking.

- c. Federal agencies should consult with Indian tribes and organizations, including traditional cultural leaders, at the earliest possible stage of a federal undertaking. Such consultations should not only follow the uniform government consultation requirements (see above), but also National Register Bulletin No. 38. The federal agencies should also take into consideration the limited resources of many tribes and organizations and adjust their consultations to accommodate those limited resources.

Presently, federal law requires that a Section 106 review take place “prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license.” [NHPA Section 106.] Federal implementing regulations further require that the “[a]gency [o]fficial should ensure that the Section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration.” [36 C.F.R. 800.3(c)]. Codification of the “earliest point in the planning process” requirement will further enforce the statutory requirement that federal agencies not wait, as they often do, until virtually the last minute to comply with Section 106.

National Register Bulletin No. 38 sets forth the National Park Service’s guidelines on consideration of traditional cultural properties for nomination or eligibility to the National Register of Historic Places. Even though these guidelines are very thorough and useful, they are seldom followed. Unfortunately, the guidelines do not meet the status of regulations; however, some federal courts have cited the guidelines favorably in their decisions with regard to the Section 106 process. Giving the guidelines statutory or regulatory authority would provide for uniform government consultation requirements and more uniform standards for other Section 106 responsibilities, such as the investigation and evaluation of traditional and cultural properties.

- d. Where any federal agency determines, following consultation with Indian tribes and organizations, including traditional cultural leaders, that a federal undertaking, including reasonably foreseeable related projects, will have an adverse effect on properties of traditional religious and cultural importance to Indian tribes, organizations, or traditional cultural leaders, the federal agency in consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer will, in seeking ways to avoid or reduce the effects, prefer preservation of the property(ies) over its partial or complete destruction. The federal agency will only permit partial or complete destruction of a property of traditional religious and cultural importance after the agency has determined that there is no other reasonable and feasible alternative to the partial or complete destruction.

The requirement of no reasonable and feasible alternative already is well known in federal

and state law. For example, the Federal Transportation Act, Section 4(f), contains the same requirement with regard to the construction of highways through national monuments or parks. Its inclusion here will serve to enforce the standard that traditional cultural properties should be considered as important as other culturally significant properties.

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. All California Indians, as defined in Recommendation 4 of the ACCIP Recognition Report, 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 taking and possession of religious artifacts and ceremonial regalia.
7. Congress should amend the Native American Graves Protection and Repatriation Act (NAGPRA) to:
  - a. accommodate claims involving tribes with diverse and mixed historical tribal affiliations, as well as the claims of unacknowledged and terminated groups;
  - b. change the priority for repatriation from individual lineal descendants to culturally affiliated tribes; and
  - c. establish and fund a centralized California Indian Repatriation Center 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.

Both NAGPRA and the California State Native American Heritage Commission give priority to lineal descendants for repatriation requests. Documentation from individual tribal members regarding the most likely descendant or lineal descendent criteria is difficult, if not impossible, to establish. This difficulty is compounded by the inconsistencies between federal requirements and state recording practices, adoptions and relocations, and inadequate record-keeping practices by the Bureau of Indian Affairs (BIA).

8. Congress should mandate that all federal agencies develop protocols regarding consultation with federally recognized, unacknowledged and terminated California tribes on all federal actions that may adversely affect Native American cultural resources within the tribes' aboriginal territories.

9. California tribes should receive adequate federal financial support to establish justice systems, either individually or as part of a consortium of tribes, so that they can effectively implement the Indian Child Welfare Act (ICWA).

● **Recommendations for Federal Agencies**

10. The National Park Service (NPS) should implement a comprehensive gathering policy for American Indians which recognizes the benefits of Native gathering to NPS goals and which does not make "direct ancestral association" a prerequisite for gathering in a park unit.

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.

11. 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 should apply to all California Indians (as defined in Recommendation 4 of the ACCIP Recognition Report) and should clearly articulate a no permit/no limit policy for non-commercial collecting for personal or Native community cultural use.
12. The USFS should also establish and fully fund tribal relations programs in each region and include permanent staff in each national forest, who are accessible to tribes with whom they must consult under the 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.
13. The Environmental Protection Agency (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.

14. The 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 people from harm caused by pesticide application on or near traditional food and plant gathering areas.
15. The current Bureau of Land Management (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.
16. The Department of Defense should 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 on whether a proposed action may have an adverse effect on religious or culturally significant properties administered by the Department.
17. The criteria used by the Administration for Native Americans with regard to funding provided under the Native American Languages Act should be modified to: (1) extend program funding cycles to five to 10 years; (2) eliminate burdensome or unnecessary accounting requirements; and (3) adopt a separate funding equation for California, which takes into account the large number of small tribes and the huge language diversity and dialect differences.

## I. Introduction

Culturally and linguistically, pre-contact Native Californians were one of the most diverse groups of peoples on earth. A conservative estimate places their number at 150,000-200,000, comprised of hundreds of individual nations, bands and villages.<sup>2</sup> Their languages numbered over one hundred, derived from five or more language families, several of which are considered linguistic isolates.<sup>3</sup>

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 its environment. Philosophical and religious diversity was tolerated. And it was not uncommon for tribes with different ideologies to have lived as neighbors since time immemorial without serious conflict. Perhaps this was possible because tribal philosophies encouraged cooperation and taught respect for all living things. Life was held sacred by the Native peoples, and each of life's important stages—birth, childhood, adulthood, marriage, death—was marked with ceremony.

Native Californians also have a material culture that dates back thousands of years. Everything that they developed—tools, utensils, shelter, clothing—was molded by their individual ecosystems. The basketry produced by Native Californians, for example, is among the finest in the world. Each tribe created ornaments and religious items that were unique to itself, and the monetary systems were structured around the values tribes placed on their natural 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—through ceremonies and dances, regalia making, and the fine art of basketry. Although the complex and dynamic nature of tribal existence in California continues, many of the people keeping California Indian cultures alive have been defined 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 will demonstrate the spiritual and cultural survival 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.

### A. Tribal Land Limitations

One serious challenge facing California Indians in their struggle for cultural preservation is the lack of sufficient tribal lands.

In the early nineteenth century, the U.S. Government recognized the tribes of California and understood that they were capable of entering into intergovernmental relations with the United States. Treaty commissioners were sent from Washington, D.C. in 1851 with instructions to negotiate with Indian leaders. The aboriginal people were promised reservation territory and federal services in exchange for ceding their tribal homelands—the basis for their self-sufficiency—to the government.

Between March 19, 1851, and January 7, 1852, three U.S. treaty commissioners entered into 18 treaty agreements with 139 California Indian signatories.<sup>4</sup> The treaties would have established an Indian land base of approximately 8.5 million acres in California. However, in the face of objections from California's legislature and business interests, the U.S. Senate refused to ratify the treaties.<sup>5</sup> Because the Senate also sealed the file on these treaties, the tribes were not notified of their rejection until 1905.<sup>6</sup>

In the meantime, many California Indians moved to the lands promised them as reservations, but when Congress failed to ratify the treaties, non-Indians were soon able to lay claim to both the traditional Indian homelands and to the reserved lands. The California Land Claims Act of March 3, 1851 (the Act), required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government to present their claims within two years.<sup>7</sup> But the treaty signatories, unaware that Congress had failed to ratify the 18 treaties, did not move to protect their aboriginal title. Most tribes were not notified of the existence of this Act and its implications, and both the State of California and the federal government neglected to file claims on their behalf. The notion eventually prevailed that the State's failure to appear before the special claims board on behalf of the tribes nullified their claims and brought their lands into public domain.<sup>8</sup>

Thus, California tribes lost their legal interest in both their aboriginal lands and the lands reserved by treaty, and were left homeless, dispersed and starving. To remedy this situation, beginning in 1906, Congress made appropriations almost yearly to acquire land for California Indians.<sup>9</sup> Ultimately, approximately 82 small reservations or rancherias were established under the land acquisition program.<sup>10</sup>

#### B. Assaults on Tribal Cultures

The effect on Native California from the influx of Europeans varied by region. Southern and coastal California tribes were impacted differently from the tribes of the north because of the earlier influence of the Mission system.

Between 1769 to 1823, a total of 21 congregational Missions were established between San Diego and San Francisco. Coastal tribes were congregated by garrisons of soldiers stationed at Missions and presidios. Although Catholic fanaticism was rampant, the real purpose of the Missions went beyond religious conversion. Missions served as institutions for the forced labor necessary to support the Spanish occupation.<sup>11</sup> As the Mission system expanded, so too, did the

need for Native laborers. In the early 1800s, Native people from as far away as the Sacramento Valley and the Sierra foothills were forcibly recruited for Mission life. Villages were often assaulted at the will of the Mexican Californios and the Natives seized to provide the labor on ranchos. The actions of the Missions systematically destroyed many aspects of the ceremonial life of coastal and southern California tribes. Several tribal groups went into hiding, and those that remained on their aboriginal lands were forced to live in the midst of the non-Indian cities springing up around them.<sup>12</sup>

The few reservations that were later established did not improve life for the California Indians. The Natives were abandoned with few resources and inadequate food supplies, and the federal government constantly broke its promises of support. Those who fled the reservations were either hunted down by the military or became targets for a policy of extermination that was aggressively embraced by the white miners and pioneers.<sup>13</sup> In the latter part of the nineteenth century, disregard for California Indian life reached unprecedented levels as Indians were hunted and killed for a government-supported bounty and, in some cases, for mere sport. Many Indian women and children were captured and sold into slavery, as California continued to maintain legalized slavery well after President Abraham Lincoln's Emancipation Proclamation.<sup>14</sup>

This period of the worst assault on their way of life saw several revivalist movements among the Natives of California. The Ghost Dance, Earth Lodge and Dream Dances became popular throughout the state.<sup>15</sup> It is reported that the Northern California tribes were extensively involved with the Ghost Dance from the 1870s to the 1920s, and elements of it persist to this day.<sup>16</sup> The more ancient ceremonial dances, such as the World Renewal ceremonies of the Northwest, were also seen as a way to keep the world in balance during a disruptive time.

Throughout this time, Indian parents continued to pass on cultural information to their children, even though some traditional ceremonies, which took various forms across California, could only be carried out with great secrecy.<sup>17</sup> Tribes with doctors, for example, kept up the rituals necessary to help the doctors gain and strengthen their healing powers.<sup>18</sup> This tenacity of the surviving Native peoples inspired the newly established social science of anthropology and scholars like Bancroft, Gifford and Kroeber began to seriously document the continuity of California Native cultures and the resurgence of Native beliefs and ceremonial practices.

The struggle for cultural survival continued as Protestant and Catholic missionaries commissioned by the U.S. Government sought to "civilize" the California Indians. Their idea of "civilization" went beyond imposing their culture and language to forcing an acceptance of Christianity. This was later enforced through military-style education in Indian boarding schools, such as the Sherman Indian School in Riverside, California, and the Greenville Indian Boarding School in Northeastern California. The schools forbade Indian children to speak their Native languages, and Indian religions and cultural traditions were publicly denounced as irrelevant and incorrect. Worst of all, school children were forcefully separated from their families, sometimes for years at a time.<sup>19</sup>

Between 1906 and 1950, federal Indian policy changed, giving California Indians the right to bring land claims against the federal government.<sup>20</sup> Congress also began to provide lands for homeless Indians, and encouraged tribes to develop tribal constitutions and incorporate under federal law.<sup>21</sup> Although not specifically aimed at Indian cultural practices or religious freedom, these policies impacted California Indian culture in a negative way because: (1) the settlement of Indian land claims extinguished aboriginal title to many areas considered “sacred” or central to tribal ceremonial life, resulting in problems of access to sites for gathering and religious use; (2) it created “Indian Communities,” often of mixed tribal descent, which today raises problems in matters of repatriation, seeking federal recognition, implementation of the Indian Child Welfare Act, and land use; and 3) it created tribal corporations, which led to the demise of traditional forms of dispute resolution through culturally appropriate methodologies.

### C. Manipulation of Tribal Identity

Perhaps the most devastating legislation for California Tribes was the Rancheria Act of 1953, which slated 41 California tribes for termination.<sup>22</sup> Termination as a policy of acculturation disrupted tribal life just as the Indian people were making adjustments in their role as tribal governments under a corporate charter. In “releasing” the tribes from federal control, the government stripped tribal members of their identity as Indians for purposes of federal Indian programs.

Although federal recognition does not create tribes, it does trigger the operation of a whole body of U.S. law regarding respect for tribal sovereignty, including laws regarding Indian child welfare, graves protection and repatriation, historic preservation, and access to ancestral lands. Also, many federal programs are available only to federally recognized tribes and their members,<sup>23</sup> so unrecognized Indian individuals have been denied permits for gathering,<sup>24</sup> possession of religious items such as eagle feathers,<sup>25</sup> and use of federal lands for religious purposes.<sup>26</sup>

The loss of their tribal land base and the limited protection available to their cultures took its toll on California’s terminated tribes. Ultimately, some tribes were forced to expend valuable time and resources in litigation to restore their status, which impeded the tribes’ ability to maintain their cultures. Of the 40 tribes actually terminated under the Rancheria Act and its amendments, 29 have been restored through litigation or by legislation.<sup>27</sup> Eleven tribes remain terminated.

### D. Cultural Protection Legislation

Despite continued pressures from the dominant society, California Indian cultures continued to survive and in the 1970s, underwent a renaissance. Suddenly, the younger generation was eager to learn Indian songs and dances, and community-based classes were set up to give instruction in Native art forms. Fortunately, basketweavers, potters and other traditional artists were still around to impart their skills and knowledge to another generation. The 1970s also marked the beginning of the Self-Determination Era, when a number of statutes were passed



to protect Indian cultures.

The American Indian Religious Freedom Act (AIRFA) of 1978 was initially hailed as a tremendous step in securing religious freedom for American Indians, but was later found to lack the enforcement mechanisms necessary to ensure protection of traditional Native beliefs and practices. In Lyng v. Northwest Indian Cemetery Protective Association,<sup>28</sup> the Supreme Court ruled in favor of permitting the U.S. Forest Service to construct a road (the “G-O Road”) through a portion of a National Forest traditionally used for religious purposes by members of three Indian tribes in northwestern California. The Forest Service was allowed to ignore its expert witness, who had concluded that the road would destroy the religion of the three tribes.<sup>29</sup>

Today, there exists a major crisis in Indian Country because of the *Lyng* decision. As the dissent noted, there is now no real protection for the practice of traditional religions within the framework of American constitutional or statutory law.<sup>30</sup> The federal agencies charged with managing public lands argue that to give recognition to any form of traditional tribal religion is to “establish” that religion. Hence, the primary source of protection for culturally significant lands today is environmental and preservation legislation, such as the National Historic Preservation Act (NHPA).<sup>31</sup> As discussed below, a recent situation in California involving the designation of Mount Shasta under the NHPA has proven that the Act is not effective in assuring that California Indian religious practices will be adequately considered in the final designation process.

Congress has also recognized the need for protection and repatriation of American Indian human remains and cultural items excavated or discovered on state, federal and tribal lands.<sup>32</sup> The Native American Graves Protection and Repatriation Act (NAGPRA) provides for Native participation in the excavation of human remains and cultural objects, prohibits trafficking in Native human remains and cultural items, and criminalizes their sale or purchase. Most importantly, NAGPRA mandates each federal agency and museum possessing or controlling collections of Native human remains and associated items to compile an inventory and identify them so that they may be returned to known lineal descendants or tribal organizations. Unfortunately, the deadline for the repatriation of remains has long gone, but the process is far from complete. Some agencies and universities have absolutely refused to comply with the requirements set forth in NAGPRA.

#### E. The Impact of the Past on Contemporary California Indian Cultures

A long history of religious intolerance, racial discrimination and shifting federal policies has threatened California Indian cultures and religious practices. The limitations of existing legislation significantly affect access to sacred areas and items, protection of sacred sites and traditional practices, and protection and repatriation of Native human remains and cultural items. But California Indians are not willing to give up their cultures, their religions and their ancient ties to tribal lands. Having survived formidable attempts to eradicate and exploit tribal resources, California Indians have found unique ways to preserve their traditional languages, religions and songs. It is the goal of this report to present this effort to Congress, and to propose a higher level

of cooperation and partnership between California tribes and the federal government in preserving California Indian religions and cultures into the coming millennium.

## II. Culturally Significant Lands

### A. Management Issues on Federal Lands

#### 1. Plant Gathering on Federal Lands

Traditional gathering of plants for food, medicine, basketry, and making dance regalia for religious ceremonies continues to this day throughout California. The gathering of foods and plants is itself a religious practice based on a reciprocal relationship between plants and humans, developed over thousands of years. It is conducted with great care and reverence for the natural world.

When you gather, you always pray for the plant and the land. And when you're praying for the plant and the land, you kind of make a deal with it, saying that it's going to live on, and that one day it will be a beautiful basket. Then, when you take it home you will have that agreement, so that helps you clean it and do it right.<sup>33</sup>

Besides being a spiritual act integral to Native cultures, gathering physically benefits the affected plant populations. Using techniques such as controlled burning, pruning, digging, and annual harvesting, California Indians shaped the natural world around them. The result was vast oak groves with bountiful acorns; wide grassy plains where native seed plants provided a great food source; and gathering areas where roots were easily accessible for basket-making. Fire helped in small game hunts and in controlling plant-damaging insects prior to gathering time. It has taken a very long time, but California Indian land management is now recognized as having been ecologically sound and beneficial to the delicate ecosystems across the State.<sup>34</sup>

#### 2. Federal Land Management Agencies in California

There are four major federal land and resource management agencies in California: the Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), the United States Forest Service (USFS), and the National Park Service (NPS). The Defense Department is also a major land holder in California, but land and resource management is not their primary mission. While the BLM, FWS, USFS and NPS all have policies regarding land use and management, only the NPS has official regulations that affect gathering by California Indians. The USFS policies on gathering are critical to California Indian cultural survival, but they are not finalized in official regulations. The BLM's multiple use policy allows for a wide range of uses by California Indians, but there is no official gathering policy. A discussion of FWS appears in Section III of this report.

a. The National Park Service

The NPS is the most restrictive of the federal agencies when it comes to allowing gathering by California Indians. There is no authority under current NPS regulations to permit the gathering of renewable resources by American Indians for religious or other cultural purposes. In 1992, the Southwest Regional Director of the NPS presented a paper in which he addressed the need to provide authority to site managers to accommodate Native ceremonial activities on NPS administered lands.<sup>35</sup>

In 1995, a modification to 36 C.F.R. 2.1 was proposed, but no action has been taken on the proposal. Currently, 36 C.F.R. 2.1(d) specifically prohibits the collection of plants, wildlife (including seashells) and other renewable resources for religious or ceremonial purposes, unless specifically authorized by federal law or treaty rights. The proposed modification would allow the taking of certain plants, plant parts, unoccupied seashells, and mineral resources for traditional cultural practices. It would still require a determination by the superintendent that the gathering would not adversely affect park wildlife and reproductive potential of a plant species or other park resources. Only those members of tribes with ancestral affiliations to the park site would be allowed to gather there.

The proposed modification was not generally supported by California Indians because it would not have taken into account the knowledge and expertise possessed by Indian basketweavers and gatherers about native plants and regional ecosystems. Today's California Indian gatherers have to be able to access native foods and plants that are not always located on lands to which they have an ancestral affiliation because of the historical dispersal of aboriginal lands across the state, and because of intertribal marriage. Thus, it is not reasonable to limit gathering only to those members of tribes with "ancestral affiliations" to the area. The overall benefits to the plants and ecosystems derived from native gathering practices must be given great weight when new regulations are finally adopted.

b. The United States Forest Service

The USFS in the Department of Agriculture is by far the most significant of the federal agencies to California Indian basketweavers and gatherers. With control over 20 million acres of public lands, it is the largest federal land manager in the state. California's 19 national forests are located in five of the 10 bioregions of the state and encompass a significant proportion of the state's vegetation types and ecosystems. The array of plants and animals in these national forests is important to California Indians. For example, over 100 plants culturally significant to the Sierra MeWuk have been documented in the Stanislaus National Forest in the central Sierra Nevada. Thus, it is not surprising that the gathering and land management policies of the USFS are of great concern to California Indians.

Nationally, the USFS Native American policy addresses only federally recognized tribes.<sup>36</sup> However, the language in most of the policy statements is broad enough that the field

staff—particularly the District Rangers who have much independence of authority—can, if they choose to do so, accommodate the interests of a broader class of California Indians, regardless of their tribe's status.

The Tribal Relations Program Manager in the California regional office of the USFS has produced a proposed policy for cultural forest resources management, and has worked to inform and educate USFS employees about the Native American policy and the agency's underlying responsibilities to California Indians. Several forests now have Native American Program liaisons who facilitate consultation with nearby tribes interested in or potentially affected by National Forest projects and activities.

The Native American policies and programs of the USFS are of relatively recent origin and consequently, some problems in actual implementation remain. While both the proposed cultural resources management policy and a California region internal memo on special forest products allow for gathering by California Indians without a permit, there have been reports of Forest Service staff attempting to enforce permits or making statements contrary to current policy. Such problems could be alleviated with a final policy statement and regulations on Native gathering.

The current policy for commercial gathering of "Special Forest Products," which requires a permit and fee payment, is sometimes confused with the "permissive use" policy for American Indian personal or community cultural use. Special Forest Products are plants and plant materials sold under the same authority as other timber sales described in the National Forest Management Act (NFMA) and implemented by the USFS.<sup>37</sup> Unless it is necessary to control use because of over-harvesting, gathering for personal use of small amounts of forest products is permissible without a permit or fee.<sup>38</sup>

In 1995, a memorandum was issued from the Department of Agriculture to Forest Supervisors, on the current problems facing the management of Special Forest Products, and potential conflicts over their use and sustainability. The memo noted the culturally important uses of botanicals (e.g., sedge, deer grass, bear grass, redbud, willow, manzanita, onion, acorn, moss and lichen, mushroom, and fern) to many Indian people and groups. But commercial gathering of these plants has created serious problems for basketweavers in some areas of California because the methods used often result in the loss of the entire plant. A basketweaver, for example, gathers only the center shoots of bear grass in the late summer. Commercial harvesters, on the other hand, cut the entire plant at the base, causing the root system to die. This results in the loss of gathering areas for California Indians.

### 3. Pesticide Spraying on Federal Lands

Traditional food and plant gathering in California is further threatened by pesticide spraying on federal lands. Lilly Sanchez, a Shoshone basketweaver, reports that she can no longer gather willow in traditional areas because herbicides have deformed the plants. According

to Ms. Sanchez, "chemical sprays cause the willow to be bumpy inside and have a wormy center, so that the shoots don't grow straight and are then unusable."<sup>39</sup> Some basketweavers who have used plants from areas that had been sprayed report experiencing numbness and sores in their mouth and gums from the poison.

Several of the plants affected by herbicide spraying of forests are used by California Indians in foods and teas, for healing and ceremonial purposes, and in making baskets and regalia. Acorns, for example, are an important food source for many tribes, yet oak trees are often treated with herbicides because they "compete" with commercially harvested conifers for sunlight and nutrients. In the past four years, plans for the use of dangerous herbicides, such as Hexazinone, Triclopyr and Glyphosate have been proposed and implemented in the Stanislaus, Lassen, El Dorado, and Sierra National Forests.<sup>40</sup>

The full impact of these sprays may not be fully known for some time, as long-term health consequences are still being studied. The immediate impact is the loss of culturally significant plants and food sources, such as fish and wildlife, which depend upon healthy watersheds. Members of the California Indian Basketweavers Association (CIBA) and other Native gatherers see the large-scale chemical treatment of federal public lands as an issue of serious consequence to all users of national forests.

In 1994, CIBA filed a petition with the U.S. Environmental Protection Agency (EPA) proposing that the definition of "crops" be extended to a wide variety of wild plants used by California Indians. The petition also requested that the EPA clarify the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulatory definitions to include protection of Native crops harvested for food, medicine and cultural and spiritual uses.<sup>41</sup>

The petition supplemented a petition filed July 8, 1994 by the National Association of State Departments of Agriculture (NASDA), which sought changes to certain worker protection standards. CIBA used the NASDA proceeding to seek relief for California Indian basketweavers who risk exposure to harmful chemicals when they harvest and use plants currently labeled "weeds" by the EPA. CIBA has not yet received a formal response to the petition from the EPA.

In the meantime, CIBA is working with the California Department of Pesticide Regulation on a study funded by the USFS. The study will develop forestry herbicide residue measuring methodologies and include field sampling to determine dissipation rates of chemicals in plants gathered by Natives and the off-site movement of pesticides. The study is expected to show residue levels in various plants and in the different parts of each plant. It will also show whether Glyphosate, Triclopyr and Hexazinone residues leach into adjacent gathering areas.

## B. Access to Federal Lands

The current land base of California Indians consists of mere fragments of their vast ancestral territory. Indian Country in California today is a complex pattern of reservations,

rancherias, allotments (restricted, unrestricted and public domain), terminated tribal lands, and restored lands. There are only three large reservations; the rest are small islands of Indian Country and checkerboards of trust allotments in the public domain.

Most tribal lands are in rural areas close to, or entirely surrounded by federal lands. Not surprisingly, many of these federal lands encompass territory previously used by tribes for gathering, religious and ceremonial purposes, and as burial grounds. Access to these sites, therefore, is crucial to California Indians.

The USFS, BLM, NPS, and Department of Defense are the four primary federal agencies that regulate access to federal lands in California. Of these, the USFS is perhaps the least restrictive in providing access to traditional areas for cultural and religious purposes. However, California Indians have had varied experiences in dealing with this agency.

#### 1. The USFS—An Example of Federal-Tribal Cooperation

The relationship between the USFS and California tribes varies across the state. In some areas, such as the Lassen and Stanislaus National Forests, the relationship is tenuous and characterized by a great deal of conflict over land use and management. In the Klamath National Forest, some of the major conflicts over timber harvesting climaxed in 1988 with Lyng v. Northwest Indian Cemetery Protective Association.<sup>42</sup> As discussed in the Introduction, the Supreme Court ruled in favor of permitting the USFS to construct a road through a portion of a National Forest traditionally used for religious purposes by members of three Indian tribes in northwestern California. Fortunately, Congress designated the disputed sacred “high country” as a Wilderness Area, thus precluding further road building.

In recent years, the USFS at Klamath National Forest has reconsidered its relationship with neighboring tribes and begun to work with them to implement tribal land management practices, such as prescribed burning. Most notably, the USFS recently transferred some ceremonial lands back to the local Karuk tribe. The area, known to the Karuk as Katamin, is considered the spiritual center of the universe and for centuries has been the site of an annual ceremony “to renew the world and ensure the salmon and acorns come back.”<sup>43</sup>

It was in the 1950s, when the U.S. government’s policy of “termination” was employed to break up tribal land holdings, that the Karuk lost possession of the sacred site of Katamin. While most of the Karuk land was assigned to the USFS, four acres, including Katamin, were sold to private owners who built the Somes Bar Lodge for hunters and fishermen. Over the years, the Karuk continued to hold their Brush Dance—a ceremony for healing sick children—at Katamin, watched by tourists at the lodge. In 1993, the property was forfeited to federal authorities after the lodge owner was arrested on various criminal charges, and the land was put up for sale.<sup>44</sup> That same December, tribal leaders met with Secretary of the Interior Bruce Babbitt to request help in reacquiring the ceremonial area for the tribe. After more than a year of negotiations with the U.S. Justice Department and other government officials, the four acres were returned to the

tribe. Now the tribe is negotiating with the USFS to reacquire the rest of the Katamin site.

This is a success story for all California Indians. However, in other National Forests, even those adjacent to Katamin, the lines of communication are closed between tribes and the USFS, partly because USFS field staff is generally unaware of local and tribal history and land management practices. Even within the Klamath Region, problems still arise when logging is proposed, especially in areas of cultural and religious significance to the aboriginal tribes. Many of these problems may be overcome if the USFS makes it a point to consult with local tribes prior to making major land management decisions that will impact tribal access to such areas for religious purposes.

## 2. Bureau of Land Management

According to the BLM's "Native American Coordination and Consultation" manual, it is BLM policy to: (1) recognize traditional Native American cultural values as an important, living part of American heritage; (2) coordinate and consult with appropriate Native American groups to assure that their concerns are identified; (3) review the BLM's proposed land use and other major decisions for consistency with tribal use; (4) participate in and foster consistent inter-agency approaches to addressing Native American and tribal government policies and programs; and (5) avoid unnecessary interference with Native American religious practices.<sup>45</sup>

In practice, however, the policy is easily ignored. A recent example of this occurred with an Indian women's spiritual gathering in Mono County held on the women's ancestral lands now managed by the BLM. The Gathering, which has been held at the same place every year, an area known as "Squaw Leap,"<sup>46</sup> is for the reinforcement of the tribal women's religious practices and spiritual knowledge. Unfortunately, the BLM official assigned to work with the organizing committee this year had little respect for the traditional knowledge of these women.

The women were initially refused access because the BLM had scheduled an interpretive tour of the area for school children at the same time. The BLM official suggested that the Gathering be rescheduled because, according to him, the "public lands are for everyone to use, not just the Indians."<sup>47</sup> He also complained that at a previous gathering someone had picked plants and destroyed a tree on public lands. The committee pointed out that there were no plants for gathering in February and that the tree in question had been dying, and should have been removed.<sup>48</sup>

When permission was eventually granted for the Gathering, the official mandated strict compliance with his orders regarding the placement of the sweatlodge fire and the woodpiles—clearly showing his disregard for the women's ancestral ceremonial areas and practices. He also kept the camp under close scrutiny at all hours, driving past numerous times, even at one o'clock in the morning.<sup>49</sup>

The women felt that the male presence throughout the week was a nuisance and a flagrant

violation of their right to practice their religion. Some of them complained to the District Manager about the officer's conduct but were told that the employee was "just doing his job." Such behavior from BLM officials, in violation of the BLM's own Native American Policy of non-interference, has made the women seriously reconsider holding their spiritual retreat in the area again.

The problem with the current BLM policy is that its guidance is left to the discretion of District and Area Managers directly responsible for administering the lands and resources involved, with no mechanism for dispute resolution.<sup>50</sup> Further, the policy does not adequately address the vital issue of individual access, focusing instead on consultation when proposed action might impact tribal uses.

The BLM should immediately implement a California Indian policy with regulations that allow for negotiation with BLM staff regarding cultural use. Included in this policy should be a mandate for BLM compliance with such cultural use, pursuant to the current BLM Native American policy of non-interference. The public lands are for public use, but there are certain categories of users who retain limited exclusive use rights, such as for grazing and mining. California Indians fall into this category because cultural use of the lands predates federal regulation. It is time California Indians were treated with fairness and good faith when negotiating cultural use of BLM lands.

### 3. The National Park Service

Currently, the NPS has no specific Indian policy with regard to access for cultural use of National Park lands. California Indians using National Parks are, consequently, subject to the same restrictions and fees as all other Park users. As discussed above, the current NPS regulations prohibit the gathering of plants, wildlife and other renewable resources, for any purpose unless authorized by federal law or treaty. Due to the unique history of California Indians and in light of the unratified treaties, the NPS should evaluate its use and access policies with a view to drafting a reasonable and appropriate California Indian policy.

The NPS should consult with California Indians and tribes to draft this policy, which must take into account aboriginal uses of National Park lands, the benefits derived from traditional land use practices, and the federal government's responsibility to protect American Indian religious freedom.

### 4. Department of Defense—Coso Hot Springs

Coso Hot Springs is located within the exterior boundaries of the China Lake Naval Weapons Center, a high-security weapons testing site. Located on Western Shoshone aboriginal lands,<sup>51</sup> the hot springs have been a healing and religious site for Shoshone and Paiute Indians for hundreds of years. American Indians from as far as the Great Plains made pilgrimages to the springs to bathe in the spring's healing waters.



In the 1970s, the hot springs area was placed on the National Register of Historic Places, to preserve its architectural, religious and cultural aspects. In 1979, the Naval Weapons Center (NWC) and the State Historic Preservation Office (SHPO) negotiated an agreement outlining ways to maintain the area. Also in 1979, an agreement was entered into by the NWC and an ad hoc committee, which included members of the Owens Valley Paiute-Shoshone tribes, to set out guidelines for access to the area for religious and healing purposes.

In the early 1980s, in the face of considerable local opposition, the NWC leased an area near Coso Hot Springs to California Energy for developing a geothermal plant. Subsequently, several production wells were drilled near the Coso pools. In August 1989, a group of California Indians became suspicious of the effects of the production wells on the hot springs. The group arranged with the Navy to have the pools inspected and found that the water was too hot to be touched, and that the pools were exploding and overflowing.

A meeting was held in Lone Pine on August 9, 1989, between the NWC and the concerned local Indians to discuss the cause of the problems at Coso. The NWC claimed that California Energy was not responsible for the change in temperature and pressure at the springs. However, it was agreed that the NWC would conduct a study and when it was completed, hold a meeting to discuss the outcome and the measures to be taken to correct the problems.

The final report (the Erskine Report) was completed in January, 1990. It concluded that the problems at Coso Hot Springs were a product of natural causes and were not caused by California Energy's production wells. The local tribes were not satisfied with the findings and obtained the assistance of two geologists who conducted a preliminary study. Based on their own findings, the geologists strongly disagreed with the Erskine Report. They agreed to do a further in-depth study, but the local tribes were unable to raise the money to have it done. In March 1990, Sandy Jefferson, then chairperson of the Lone Pine Paiute-Shoshone Indian Tribe, wrote the NWC requesting funds for the study. The NWC responded by asking for additional details, but the group did not have the money to gather the additional information requested.

As of now, the situation remains unresolved. Access to Coso Hot Springs for healing purposes has been completely precluded by the geothermal plant. It is fairly obvious that drilling in the immediate vicinity has had an adverse impact on the springs. This threat to the Coso Hot Springs property should have been mitigated in a sensitive manner, if not prevented, by the Department of Defense.

### C. Protection of Culturally Significant Lands

The importance of California Indian ceremonial areas, village and burial sites, and religious areas calls particular attention to the nature of Native religious beliefs. California Indians practice their religion in sacred places, much like non-Indians who worship in churches, mosques, temples, and synagogues, but with one major difference: California Indian sacred places are not contained within walls, but usually are unique features in the natural environment. Such features include

streams, springs, mountains, and unusual rock formations. The destruction or damage of these special areas amounts to the destruction of traditional California Indian religions.

#### 1. Graves Protection—NAGPRA

The Native American Graves Protection and Repatriation Act (NAGPRA) prohibits trade, transport or sale of Native American human remains, and directs federal agencies and museums to take inventory of any Native American or Native Hawaiian remains they possess and, if identifiable, return them to the lineal descendants.<sup>52</sup> The Act requires the Secretary of the Interior to establish a committee to monitor the return of remains and objects and authorizes the Secretary to make grants for assisting museums with compliance. NAGPRA prohibits the treatment of remains and objects as archaeological resources. It also prohibits disturbing sites without tribal consent and imposes penalties for unauthorized excavation, removal, damage, or destruction of remains and objects. Unfortunately, the promise of cultural preservation under NAGPRA has not been realized because it fails to address the needs of unrecognized tribes and of reservations with mixed tribal ancestry.

##### a. Tuscarora Pipeline in Secret Valley—Unrecognized Tribes

California Indian human remains were discovered in June 1995 during the construction of the Tuscarora pipeline in Secret Valley, California by the federal government. On July 2, 1995, the project's consulting archaeologists removed the remains from the site and stored them at a laboratory in Davis, California, until the owner of the property where the remains were found demanded their return. The remains were reburied at the original site later that month.<sup>53</sup>

Although at first glance this story appears to be an example of successful resolution of a burial site case, in actuality it highlights two major problems facing the protection of California Indian human and burial remains. First, unrecognized California Indian tribes are clearly at a disadvantage in protecting their burial and ceremonial areas. In this instance, the human remains were found on Maidu aboriginal territory.<sup>54</sup> As required by law, the project's archaeologists consulted with a federally recognized tribe, the Susanville Rancheria, which claimed to represent Maidu interests because some Rancheria members are of Maidu descent. But the Maidu Nation, which is not federally recognized, was not adequately consulted.

Second, archaeologists only consult with the nearest federally recognized tribe, even though it may not have the closest lineal connections to the remains. Although the archaeologist's handling of the remains in this case was approved by the Native American Heritage Commission (NAHC), it did not result in adequate consultation with Maidu tribal groups. If unrecognized tribes were included in the consultation requirements for NAGPRA and other excavation regulations, archaeologists would be more likely to try to discover the tribal identity of the human remains and to learn more about the aboriginal political boundaries of contemporary tribes. In 1996, the National Park Service, which is charged with implementing NAGPRA, recommended to the Secretary of the Interior that the Act be amended to allow non-federally recognized Indian

groups to participate in the process.<sup>55</sup> This recommendation should be implemented to prevent similar problems in the future.

b. Chumash Burials—The Problem of Proving Descendency

An important issue for California Indians is the proper tribal identification of human remains. Under NAGPRA, human remains and associated funerary objects excavated on federal lands are given to lineal descendants, or if lineal descendants cannot be ascertained, to the tribe with the closest cultural affiliation to the remains.<sup>56</sup> Similarly, under California law, the state's NAHC is authorized to identify "Most Likely Descendants" for the purpose of establishing the California Indian tribe or group that can claim the discovered remains.<sup>57</sup> But the NAHC's determination of Most Likely Descendants has often created controversy and resulted in an inequitable outcome.

In 1976, California enacted legislation prohibiting any public agency or private person using public lands from interfering with the free exercise of Indian religions, or causing irreparable damage to an Indian religious site located on public property, "except on a clear and convincing showing that the public interest and necessity so require."<sup>58</sup> The NAHC was created and empowered to: (1) assist state agencies in negotiating with federal agencies to protect Indian sacred places located on federal lands; (2) file court actions to prevent severe damage to and assure Indian access to religious sites and cemeteries; and (3) recommend the state's acquisition of private lands on which Indian sacred sites are located.<sup>59</sup>

In 1991, before passage of NAGPRA, members of the Coastal Band of the Chumash Nation (Chumash) apprehended a man digging up remains in two of their prehistoric cemeteries.<sup>60</sup> The cemeteries are within an area that Chumash tribal members have managed and protected for 20 years. The Chumash pressed charges and the person was successfully prosecuted.<sup>61</sup>

The Chumash remains were then handed over to the University of California at Santa Barbara by the Sheriff's Department. The University subsequently identified the remains and they were made ready for reburial. At this point, Hutash Consultants, the cultural resource management branch of the Chumash Nation, made an attempt to gain possession of the remains, but were unsuccessful.

On January 20, 1995, the NAHC determined that the best way to resolve the issue was to obtain documentation from all Chumash descendants, identifying their specific ancestral region.<sup>62</sup> Although the NAHC requires genealogical documentation to prove status as a Most Likely Descendant, it has not adopted specific criteria for establishing such status.<sup>63</sup> At present, attempts are being made to sort out the criteria, while the remains are kept in a box held by the NAHC.

The problem with both the federal and NAHC processes of determining lineal descendants is that there are no clear guidelines for doing so. These guidelines need to be established so that the purpose of both the federal and state legislation can be met—which is, finding the most

appropriate individual or group for repatriating remains.

## 2. Village Sites—Puvunga and the National Historic Preservation Act

The California Indians now known as Gabrieliños (or Tongvans), Luiseños and Juaneños (alternatively called the Acagchemem Nation) occupied most of what are now Los Angeles and Orange Counties, from prehistoric times through the early 19th century, when European immigrants killed many of them and forced survivors off the land.

One of the villages inhabited by the Gabrieliños was known as Puvunga. That village, located in and around what is now Long Beach, California, has had special religious significance for followers of the Chinigchinich religion since prehistoric times. Practitioners of the religion believe that their prophet and leader, Chinigchinich, emerged from Puvunga and instructed his disciples there. Consequently, Puvunga is as sacred to Chinigchinich practitioners as Bethlehem is to Christians, and Mecca is to Muslims.<sup>64</sup> Like these other ancient sites, Puvunga continues to be used by many California Indians as a place of worship.<sup>65</sup> For this reason, the Puvunga site was accepted for inclusion on the National Register of Historic Places in 1974.

In 1992, the California State University at Long Beach (CSULB) began considering a proposal to construct apartment buildings and retail stores—a mini-mall—on the Puvunga site. The development plans were referred to in an initial study and a Negative Declaration was prepared pursuant to the California Environmental Quality Act (CEQA) and released in December 1992. Initially, the University declared that there was “nothing of significance” on the Puvunga site, though a study by one of the University’s own archaeologists said otherwise.<sup>66</sup> When the University was reminded that the Puvunga site had been on the National Register since 1974, it claimed that it had “made a mistake.”<sup>67</sup>

Subsequently, California State University President, Robert C. Maxson, pledged not to build a strip mall anywhere on campus. But this pledge did not exclude archaeological digs on the site.<sup>68</sup> On receiving complaints from concerned California Indians, the NAHC began an investigation into allegations that the digs would irreparably damage the Puvunga site, and bar access to religious observers. It convened two public hearings on the proposed project in March and June of 1993.

The NAHC eventually determined that, as alleged, the CSULB project would irreparably damage a culturally and historically significant religious site and bar California Indian access to it in violation of California Public Resources Code, §§ 5097.9 and 5097.94(g). The NAHC requested that CSULB refrain from commercially developing or performing further invasive archaeological excavations on the Puvunga site.

On August 18, 1993, the NAHC and individual California Indians filed suit against the Board of Trustees of the California State University (CSU), to prevent CSU from excavating, developing or otherwise unnecessarily damaging, destroying or barring appropriate Native

American access to a sacred site.

On August 20, 1993, the Los Angeles County Superior Court issued a temporary restraining order against CSU and an order to show cause on a preliminary injunction. On September 3, 1993, the Superior Court issued a preliminary injunction, enjoining CSU from undertaking any development or archaeological excavation of the site, and from barring appropriate California Indian access. On April 6, 1995, the trial court heard cross-motions for summary judgment and adjudication.<sup>69</sup>

The trial court held in favor of CSU on each of the issues raised and issued summary judgment on all causes of action for CSU, ruling, as a matter of law, that:

Public Resources Code sections 5097.9 and 5097.94(g), would violate the Establishment Clauses of the California and United States Constitutions if applied to provide the permanent injunctive relief sought.

The NAHC then appealed the trial court's ruling. On December 12, 1996, the Appellate Court reversed the trial court and held, in part, that the University was precluded from maintaining a constitutional challenge of another state agency's statutory authority.<sup>70</sup>

The Puvunga case clearly demonstrates the many arduous steps California Indians must go through to protect even known sites of significance. Surely, a more effective and less costly process can be found.<sup>71</sup> In this case, the fact that Puvunga was listed on the National Register of Historic Places afforded no protection against its development. It leaves California Indians wondering just what the purpose of a designation is, if actions that will adversely affect the property are not prevented or mitigated.

### 3. Ceremonial and Sensitive Religious Areas: The Mount Shasta Case

Not a tribe in Northern or Central California ignores Mt. Shasta. For the Maidu, Mt. Shasta stood above the primeval flood and was the home of the creators. For the Karuk, Mt. Shasta is the "Captain Mountain," Elder Brother to all the great sacred mountains. For the Hupa, Mt. Shasta is Nin Lukkai, Holy White Mother. For the Yurok, their own Doctor Rock, for which they fought the federal government for a decade in the famous G-O Road (*Lyng*) case, is aligned along the shadow of the Winter Solstice with its "big" mountain to the east, Mt. Shasta. The Achomawi and Atsugewi built prayer seats on the hills for hundreds of miles around Mt. Shasta, from which the religious supplicant could draw from the power of its vision. . . Even the Ohlone, Miwok, and Esselen people of Central California place their own sacred mountains as the associates of the great Shasta. The Ohlone say that from the peak of their mountain, Mt. Diablo, the medicine people can see Mt. Shasta in the other world hanging upside down in the sky. The importance of Shasta is real and vivid in the California belief systems today, just as

it appears in the sacred stories of old in the archives and libraries of the state's ethnographics.<sup>72</sup>

This report discusses the Mt. Shasta case at some length because it demonstrates so clearly the many problems facing California Indian sacred site protection: failure to comply with federal law, failure to meaningfully consult with California Indians as required by federal law, and apparent government agency refusal to review and consider in good faith the facts of the case.<sup>73</sup> Most importantly, the case study demonstrates that the NHPA, perhaps the only federal law which may provide some protection for California Indian sacred, village and burial sites, is not effective in assuring that California Indian views will be seriously considered with regard to protection of these sites.

In 1990, the U.S. Forest Service Shasta-Trinity National Forest decided to permit the construction of a ski resort over 1,600 acres on Mt. Shasta. What the Forest Service had not done, however, was comply with the NHPA.<sup>74</sup> This failure was brought to the attention of the California State Historic Preservation Officer (SHPO)<sup>75</sup> by California Indian Legal Services (CILS), a nonprofit Indian legal services agency, in a letter dated November 12, 1990. CILS wrote that there was substantial evidence of Mt. Shasta's historic and religious significance to Northern California Indians, and that the USFS may have failed to consider this information or disclose it to SHPO prior to its decision to permit construction of the ski resort.

Upon receipt of the CILS letter, the California SHPO wrote to the USFS that necessary consultations on the presence of historic properties on Mt. Shasta were not complete. The SHPO further advised the USFS to take immediate actions to resolve the issue of how the ski resort project may affect National Register values on Mt. Shasta.<sup>76</sup> It specifically referred the USFS to National Register Bulletin 38 for guidance and requested that it identify properties on Mt. Shasta which may be eligible for the National Register.<sup>77</sup>

In March, 1990, the USFS agreed to conduct a study of Mt. Shasta's National Register eligibility because of its historic and cultural significance to California Indians. The USFS contracted with two anthropologists at California State University, Sacramento, Drs. Dorothea Theodoratus and Nancy Evans, to conduct the study.<sup>78</sup>

In September 1991, Drs. Theodoratus and Evans published their "Statement of Findings—Native American Interview and Data Collection Study of Mt. Shasta, California."<sup>79</sup> The study was conducted over 60 days<sup>80</sup> and included interviews with 39 California Indians representing six Northern California tribes. The study concluded that:

Mt. Shasta, in its entirety, continues to be held by Northern California Indian peoples as a sacred entity within their physical environment. The Mountain figures prominently in myths and legends that recall significant deeds of time past in general, and specifically world creation for some Native American groups.<sup>81</sup>

Individual sacred sites, such as Panther Meadows (located in the middle of the proposed ski resort), were also identified.<sup>82</sup> Most importantly, the study documented the California Indian position that construction of the ski resort would be a desecration of a deeply significant religious site.

Although the Theodoratus/Evans study presented strong evidence that Mt. Shasta, in its entirety, was eligible for listing on the National Register, the USFS declined to follow the advice of the study it had commissioned. Rather, in early 1992, the USFS issued three draft Mt. Shasta National Register Eligibility Determinations. The first, the Panther Meadows Historic Site Eligibility Determination, stated that Panther Meadows, at the base of Mt. Shasta, was eligible for listing on the National Register. The second stated that the area contained by the Mt. Shasta Wilderness (8,000 foot elevation to the summit) was eligible for listing as a Cosmological District on account of its historic significance in the mythology and cosmology of many Northern California Indian beliefs.<sup>83</sup> The third eligibility determination, the Multiple Property District, stated that there may be other individual historically significant sites on Mt. Shasta, whose eligibility would be evaluated in the future.

Widespread public concern among both Indians and non-Indians over the development of a ski resort on Mt. Shasta prompted the USFS to hold a public comment period on the Draft Determinations. This public comment period ended on April 21, 1992. In the following summer, the USFS sought the California SHPO's concurrence in its Draft Determinations. The SHPO announced a second public comment period, which concluded in early September, 1992.

The comments received by both the SHPO and the USFS, pointed out several shortcomings in the NHPA decision-making process up to that point, including:

1. The USFS had failed to establish an Area of Potential Effect (APE) for the proposed ski resort and related developments as required under the NHPA Section 106 regulations at 36 C.F.R. Part 800, and to evaluate reasonably and in good faith National Register eligible properties within the APE.<sup>84</sup>
2. The USFS had failed to consider all of Mt. Shasta as eligible for listing on the National Register, even though there was more than substantial evidence to support such a finding.<sup>85</sup>
3. The USFS's Public Participation Process had been deficient.<sup>86</sup>

Unfortunately, these justified criticisms did not convince either the USFS or the SHPO to substantially change the Draft Determinations.

In 1993, the Advisory Council on Historic Preservation (ACHP)<sup>87</sup> requested the Keeper of the National Register of Historic Places<sup>88</sup> to review the USFS Draft Determinations. From the start, it was clear that the Keeper's review would focus on whether Mt. Shasta in its entirety was

eligible for the National Register. In fact, in a letter dated May 10, 1993, the ACHP requested the Keeper to consider "whether Mt. Shasta, in its entirety, warrants consideration, either as a site or a National Register district." Clearly, Mt. Shasta's eligibility was back on the table.

On March 11, 1994, and following a review of all available documents, including the public comments, the Keeper announced a historic decision. Mt. Shasta, above 4,000 feet, was eligible for listing as a National Register District, because of "its association with the cultural history and cultural identity of American Indian groups." The Keeper's five-page decision acknowledged the strong evidence in support of Mt. Shasta's eligibility.<sup>89</sup>

But this victory did not last long. Congressman Wally Herger of Northern California and others soon protested the Keeper's decision. These opponents wrongly believed that private property owners within the new Mt. Shasta Historic District would not be able to develop or use their properties, and that the District would inhibit economic development in the community. This position simply ignored the fact that private property owners are free to use their property as they wish unless they obtain federal funding or a federal permit or license for their projects.<sup>90</sup> The NHPA regulations clearly state:

Listing of private property on the National Register does not prohibit under federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.<sup>91</sup>

Likewise, concern about the impact of the Mt. Shasta Eligibility Determination on the local economy was misplaced. Recreational use would continue on the mountain, regardless of the Determination, and individual or small group recreational activities, such as hiking and camping, would not be restricted. Opponents offered no evidence of economic loss due to the Determination. Indeed, they could not, because historical districts generally bring significant economic benefits to a local community.<sup>92</sup>

In addition to complaints over restrictions on private property use, opponents asserted that they had not been included in the process leading to the Designation, and that they were not aware that all of Mt. Shasta was being considered for listing on the National Register. These arguments ignored important facts. The USFS and SHPO notices of public comment, as well as the administrative record, testify to the fact that Mt. Shasta's eligibility, in its entirety, was always at issue.<sup>93</sup> Indeed, many of these same opponents had submitted written comments to the USFS and SHPO, addressing both the eligibility of Mt. Shasta and the private-land issues.<sup>94</sup>

In response to a request from Congressman Herger, the Keeper agreed to visit Mt. Shasta on August 29 and 30, 1994. During this visit, the Keeper met with opponents of the March decision, but not with California Indians. At the meeting, he also announced a new 60-day comment period on Mt. Shasta's eligibility, ending on October 30, 1994. The purpose of the new comment period was to allow people to submit additional information bearing on the historical significance or the proposed boundary.<sup>95</sup>



In addition to concerns over limitations on private property use, economic development and contentions about insufficient notice, the issues raised during this period included many that had been addressed in prior comment periods. And as the third comment period was limited to additional information, both opponents and proponents of Mt. Shasta's eligibility for the National Register could not simply repeat what they had said before.

Accordingly, proponents of Mt. Shasta's National Register eligibility obtained additional statements from a number of experts nationwide on the cultural and historical significance to California Indians of Mt. Shasta in its entirety.<sup>96</sup> For example, Dr. Thomas Buckley of the Department of Anthropology at the University of Massachusetts, Boston, who specializes in the study of Northern California Indian tribal traditions and cultures, observed that some of the significant events on Mt. Shasta associated with Northern California Indian history include the "creation of the world."<sup>97</sup> Dr. Buckley also observed that Mt. Shasta "is richly associated with culturally shaped experience and with cultural patterns of thought that have been placed upon it, most particularly by Native doctors and other medicine people, since ancient days, as today."<sup>98</sup>

In response to the expert opinions, opponents of Mt. Shasta's eligibility offered a 65-year old master's thesis by Charles Stewart.<sup>99</sup> In his paper, Stewart attempted to denigrate California Indian religions by asserting that Mt. Shasta was not "a Mountain that was God." He also alleged that California Indian "myths" involving Mt. Shasta were nothing but a "bit of local coloring."

Stewart did not conduct any field research.<sup>100</sup> And if he had, it is doubtful whether he would have discovered the true relationship between Northern California Indians and Mt. Shasta. At the time he wrote his paper, California Indian religion was outlawed.<sup>101</sup> Such persecution often caused Indians to hide their identity and their religious practices.<sup>102</sup> Furthermore, confidentiality and secrecy are essential characteristics of most American Indian spiritual and ceremonial practices. Given this history, it is not surprising that it is only recently, and only in the face of widespread development, that anthropologists and others have become aware of the importance of California Indian sacred sites.<sup>103</sup>

On November 18, 1994, the Keeper published the new Mt. Shasta National Register Eligibility Determination. The March 1994 decision had been revised substantially and now included the three original USFS Mt. Shasta National Register eligibility determinations: the Panther Meadows site; the Cosmological District above the tree line; and the multiple property designation for the balance of the Mountain. The Keeper's rationale for the revision was simple but misplaced—the mountain lacked integrity. In National Register parlance, integrity "is a measure of a property's authenticity and is evidenced by the survival of physical characteristics that existed during the property's period of significance."<sup>104</sup> According to the Keeper, as a result of road building, minor logging and other activities on the mountain, the entire mountain had lost integrity as a National Register property.

In coming to this conclusion, the Keeper failed to consult with any California Indians on the integrity issue. If he had, he would have been told that to California Indians, Mt. Shasta

continues to be the center of Native religious practices and world views. Clearly, the NHPA in this case was not followed by federal agencies charged with its implementation.

### **III. Fish and Wildlife**

#### **A. Aboriginal Hunting Rights in California**

The regulation of aboriginal hunting rights is a complex matter, but in California, it is even more so because of Congress' failure to ratify the California treaties. Many treaty tribes maintain reserved hunting rights on off-reservation lands under specific phrases within the treaty. Aboriginal rights to off-reservation lands, not reserved in the treaty, are lost.<sup>105</sup> Since California has no ratified treaties, aboriginal off-reservation hunting rights were extinguished, allowing the state to apply general hunting regulations to Indians.<sup>106</sup> Hence, the range of tribal hunting rights is limited to allotted and tribal trust lands. Although occupancy of tribal lands carries with it the right to full use of the land, including hunting and fishing rights,<sup>107</sup> most California Indians are faced with the problem of a limited land base.

Tribal ceremonies require the taking and possession of certain wildlife species currently regulated by the Fish and Wildlife Service. White deerskin is used by the Hoopa Valley Indians in their biannual White Deerskin Dance held along the Trinity River; bear parts and hides are used in the Bear Dance, which takes place in various parts of Northern and Central California; and deer meat is an essential traditional food for certain Indian spiritual gatherings and weddings.<sup>108</sup> To address the cultural needs of California Indians, a permit system should be adopted to allow for the taking and possession of culturally significant species found on federal lands, outside of the state hunting season, and in necessary quantities. Such a permit would protect California Indians in possession of out-of-season game used for ceremonial purposes.

#### **B. Taking and Possessing Migratory Birds**

By tradition, California Indians hunt and fish for food, medicine and materials to make dance regalia. The ceremonial regalia worn by California Indians is among the most intricate and beautiful in the world. Reflecting the wonders of nature, regalia incorporates buckskin, seashell, nuts and seeds (used as beads), and an abundance of feathers. Much of the existing regalia used in ceremonies is decades, or perhaps centuries old.

That hunting is a fundamental part of native religion is reflected in the use of bird parts and feathers in regalia for religious ceremonies. However, current federal restrictions, such as the Migratory Bird Treaty Act (MBTA),<sup>109</sup> make it illegal to kill, hunt, capture, sell or offer for sale any migratory bird, any part of a migratory bird (including nests and eggs), or any products made from migratory birds protected under treaties with Great Britain (for Canada), Mexico, Japan, and the former Soviet Union.<sup>110</sup> This legislation intrudes upon the religious and cultural practices of California Indians by making some regalia used in seasonal dances, such as the Jump Dance and the Bighead Dance, illegal to possess.

Under MBTA regulations, hunting migratory game birds<sup>111</sup> requires a permit from a state agency,<sup>112</sup> while hunting all other migratory birds requires a federal permit.<sup>113</sup> Further, possession and transportation of existing ceremonial regalia, some of it produced centuries before the MBTA, is a violation of federal law; and penalties for violations are substantial. For example, possession of migratory birds or feathers constitutes a misdemeanor crime, punishable with a fine of up to \$500 and/or six months in prison.<sup>114</sup> The penalties under the MBTA pose a significant problem for California Indians who continue to hold religious ceremonies. Although there is an exemption for some Native Americans, it is inadequate because it only applies to tribal members hunting game birds on federal Indian reservations or ceded lands.<sup>115</sup> The exemption does not cover hunting of non-game birds and is not available to members of unrecognized tribes. To protect California Indian religious freedom, the exemption must be expanded to include hunting of game and non-game birds on all federal lands, and must apply to all California Indians.

Another piece of legislation which infringes upon California Indian religious practices is the Migratory Bird Hunting Stamp Act.<sup>116</sup> It requires hunters of migratory water birds to carry a government-issued hunting and conservation stamp.<sup>117</sup> The \$15 hunting stamp is a hardship for many low-income Indians, but there are no exemptions for tribes or tribal members. The Migratory Bird Hunting Stamp Act restricts traditional hunting methods and makes illegal the possession of certain bird parts and, like the MBTA, carries severe penalties for violations.

#### C. Eagles and Eagle Feathers for Religious Use

Congress enacted the Eagle Protection Act in 1940 and amended it in 1962 “to permit the taking, possession, and transportation of specimens (of eagles or eagle parts) . . . for the religious purposes of Indian tribes . . .” where “the Secretary of the Interior shall determine that it is compatible with preservation of the Bald or Golden Eagle.”<sup>118</sup>

The Secretary has since enacted regulations to control the issuance of eagle feather permits for Indian religious purposes.<sup>119</sup> Currently, the permit application requires the individual Indian to submit information such as: (1) the number and species of eagles or feathers used; (2) the state and local area where taking or possession will occur; (3) the name of the applicant’s tribe; and (4) the names of the religious ceremonies for which eagles are required.<sup>120</sup> The applicant must also attach two kinds of certification: (1) from the BIA, attesting that he or she is an Indian, and (2) from an “authorized official” of the religious group, allowing the applicant to participate in ceremonies using eagle feathers and parts.<sup>121</sup>

From the religious practitioner’s perspective, the permit requirements are unduly burdensome. California Indian religions and beliefs, like those of other American Indians, are not easily categorized into “organizations” where possession and use of an eagle feather can be regulated. Although tribal ceremonies have strict rules and prohibitions regarding actions and thoughts of participants, personal religious practice is highly individualized. Thus, the idea of “authorized officials” monitoring the daily ritual use of eagle feathers is absurd.

The most common use of eagle feathers by California Indians is in prayer and purification. Tribal religious tenets view the eagle as a powerful spiritual being in direct communication with the Creator. An eagle feather used in prayer or ceremony provides a connection between supplicant and Creator—its symbolic value similar to that of the rosary used by Catholics. Surely, it would be unthinkable to have the use of the rosary federally regulated in a similar fashion.

The purpose of the Eagle Protection Act is to enhance the principles of the Endangered Species Act and protect the Bald and Golden Eagle populations.<sup>122</sup> The real issue for California Indians is not that they be allowed unregulated taking of eagles, but that they be allowed to possess eagle feathers for religious use. The greatest threat to the current eagle population is not from religious use by American Indians, but from habitat loss, contaminants, poisoning, disease, and natural disasters.<sup>123</sup> The taking of an eagle by Indians is a relatively rare occurrence, as feathers and parts for religious use can be obtained from the Fish and Wildlife Service when an eagle is found dead, or killed to control livestock predation,<sup>124</sup> or confiscated from poachers. Moreover, eagle feathers and parts are passed down from generation to generation, so there is relatively little need for taking live eagles. Eagles are taken for religious use only in very isolated circumstances, but such instances are of extreme religious significance.

As discussed above, current Fish and Wildlife Service regulations requiring certification of American Indians as Indians and as bona fide religious practitioners for purposes of obtaining a permit to possess eagle feathers or parts are burdensome and unfair. For example, in 1994, the BIA refused to grant certification to a California Indian man named Laughing Coyote, a member of an unrecognized California tribe, on the assumption that in order to be “an Indian,” one must be a member of a federally recognized tribe.<sup>125</sup> Later, the U.S. District Court in the Eastern District of California held the BIA’s refusal to be arbitrary and capricious, as Laughing Coyote, who was of 11/16 Mono/Choinumni Indian blood, had been recognized as an Indian for other purposes.<sup>126</sup> Despite the success of Laughing Coyote, California Indians remain concerned that other arbitrary criteria will be used to deny them permits. A legislative definition of California Indian, for the purpose of protecting American Indian cultures and cultural resources, would preclude further arbitrary denials of certification of religious practitioners from the BIA.

#### D. Aboriginal Fishing Rights in California

California Indian tribes continue to possess reserved fishing rights on Indian lands and in reservation boundary streams. These rights have been acknowledged by the executive, the Congress and the judiciary in a number of authorities.<sup>127</sup> Most California Indians have always depended on fishing and water resources for the necessities of life, but unlike most industrialized cultures, they do not regard those resources as commodities to be exploited. Although tribal beliefs vary across the state, salmon, trout and other native fish species often represent family or community wealth, and are important elements of traditional feasts. To address the cultural needs of California Indians, a permit system should be adopted to allow for the taking and possession of culturally significant species found on federal lands, outside of the state fishing season, and in necessary quantities. The permit would protect California Indians in possession of out of season

fish used for ceremonial purposes.

## 1. The Hoopa Valley Reservation

The case law on California Indian fishing rights largely revolves around the Hoopa Valley Reservation and the rights of Yurok and Hoopa tribal members to fish using customary methods (gill nets), unregulated by the California Department of Fish and Game. Initial cases involved determining tribal boundaries and identifying the tribe that could fish in designated areas.<sup>128</sup> In the proceedings on remand of the Mattz v. Arnett decision,<sup>129</sup> the trial court held that as the Hoopa Valley Reservation and its Extension fall within the definition of "Indian Country," the state had no authority to regulate subsistence fishing by Indians on the reservation. The state appealed the ruling, but the Court of Appeals affirmed the trial court's decision, rejecting the state's arguments that (1) federal law did not protect the Indians' traditional on-reservation fishing rights from state regulation, and (2) the state's interest in conservation of salmon was sufficient to justify the regulation at issue in that case.<sup>130</sup>

In 1977, two years after the courts had established that the Indians exercising traditional fishing rights in the Klamath River were exempt from state regulation, the U.S. Department of the Interior promulgated extensive regulations governing Klamath River fishing by Indians of the Hoopa Valley Reservation.<sup>131</sup> The purpose, as set forth in the regulations themselves, is to protect the fishery resources and to establish procedures for the exercise of the fishing rights of Indians on the Reservation until a Reservation-wide management mechanism with the ability to regulate the Indian fisheries is established.<sup>132</sup> The regulations were intended to promote reasonably equal access to the fishery resources by all Reservation Indians, and to assure adequate spawning escapement.<sup>133</sup>

The federal regulations set out guidelines for the use of gill nets in the reserved areas, but California attempted to completely prohibit their use in the taking of salmon, steelhead and striped bass. In People v. McCovey,<sup>134</sup> the Supreme Court of California held that the federal regulation of Indian fishing rights on the Hoopa Valley Reservation preempted state criminal prosecutions, both of on-reservation fishing activities by Indians and off-reservation sale by Indians of fish caught on the reservation. The Court also held that the state's interest in salmon conservation is adequately protected by the federal regulations.

The California fishing cases demonstrate the State's hostility to the exercise of traditional and customary fishing rights, and highlight the need for increased federal-tribal cooperation to counter State resistance and to provide increased opportunities on federal lands for the taking of fish for religious and ceremonial purposes.

## 2. Obstacles to Salmon Production and Harvesting

California Indian reserved fishing rights depend upon an adequate and healthy water supply. The Hoopa Valley Tribe has been successful in its assertion that tribal in-stream water

rights in the Trinity River take priority over all diversions.<sup>135</sup> A federal court recently held that for an Indian tribes' federally reserved fishing right to have any practical meaning, it must include regulation of activities outside the reservation which negatively impact that right.<sup>136</sup>

California's aquatic ecosystems have been severely degraded by human activities over the last 150 years, seriously endangering areas harvested for centuries by California Indians. Fisheries throughout Southern and Eastern California have been completely destroyed.<sup>137</sup> Further, poor water quality and increasing water resource problems severely impact current reserved fishing rights. Industrial and municipal waste introduce multiple pollutants into the waterways, degrading fish habitats and reducing fish populations. Many of these pollutants bioaccumulate in fish species, such as salmon, which California Indians consume in large quantities.

Deforestation, agriculture, grazing, and construction also degrade aquatic habitats by increasing sediment loads in streams. Sediment layers cover gravel beds—the only area where anadromous fish can lay their eggs—resulting in huge declines in fish populations. Other pollutants from non-point sources include pesticide run-off, selenium and other mineral loads from farmland irrigation, and oil and gas from city streets.

Finally, physical barriers, such as dams for hydroelectric power and agricultural irrigation, block spawning fish from heading upstream to their final breeding grounds. Many tribes across the state of California can no longer harvest salmon due to dam building on California's extensive river system. Water diversions also lessen flows, increase temperature and reduce a waterway's natural ability to flush out minerals, salts and other pollutants. The cumulative effect of these impacts on California waterways has been tremendous, and fish populations have suffered devastating declines.<sup>138</sup>

Congress, in the exercise of its trust responsibility, must acknowledge and protect in-stream use of water for Indian fisheries and help tribes protect their resources by maintaining the integrity of reservation watersheds. Moreover, water agencies must meaningfully consult with aboriginal Indians and tribes when dams and diversions are proposed.

#### **IV. Federal Programs and Cultural Protection Legislation**

##### **A. Native American Language Act**

##### **1. History and Purpose**

In 1990, Congress amended the Native American Language Act<sup>139</sup> to acknowledge the unique status of Native American cultures and languages and to give the United States the responsibility to act with tribes to promote the rights and freedom of Native Americans to use and develop Indian languages—even using them as mediums of instruction in schools funded by the Secretary of the Interior.<sup>140</sup> Such instruction is especially vital in California where the Native languages are the most endangered in the country.<sup>141</sup>

## 2. Tribal Programs

California has more endangered languages than any other part of North America, partly because it has the largest number of indigenous languages,<sup>142</sup> yet it trails far behind other states in tribal language programs. Only a handful of tribes have a language program currently in place. Tribes that have made an effort towards educating their members in their native languages have had great results, mostly due to the work of dedicated individuals who are concerned about the extinction of their language.

Funding for tribal language programs in California comes primarily from private sources. Although federal funding is made available through the Administration for Native Americans (ANA) under the Native American Languages Act, it is extremely competitive and requires extensive planning and many administrative costs. Consequently, California tribes, especially the smaller ones, have looked directly to local and foundation funding sources.

## 3. Grassroots Organizing

The primary source of funding for many of the language revival efforts has been the Native California Network (NCN). NCN is a non-profit organization whose primary goal is to promote California Indian cultures and languages. Comprised of members of a wide cross-section of federally recognized and unrecognized California Indian tribes, NCN is both a "think-tank" and a fundraising entity for California Indians. Over the past five years, NCN has administered a community grant program, a community-based research program, and established an advisory council called Advocates for Indigenous California Language Survival (Advocates). The Advocates administer a Master-Apprentice Language Learning Program, which pairs a committed young adult with an elder fluent in the language.<sup>143</sup> The teams meet for a minimum of twenty hours per week to communicate strictly in their Native language.

Funding used by NCN to develop its successful language programs has come primarily from private sources. Four years ago, NCN did receive a three-year ANA grant to develop language programs for a consortia of five California tribes: Quartz Valley (Karuk), Wukchumni Council, Coyote Valley Band of Pomo Indians, the Chemeheuvi Tribe, and the Fort Mojave Indian Tribe. As the smaller California tribes were not getting funded, NCN decided to submit a grant proposal based upon a consortium model. By collaborating and splitting the costs and benefits of their programs, the consortium was able to meet the challenge of limited and competitive funding.<sup>144</sup>

Unfortunately, upon completion of the three-year program, NCN was denied funding for their next project, leading administrators to believe that the ANA program is essentially a "one-time only funding source."<sup>145</sup> This is, of course, the result of limited federal funding. The ANA Native Language Act program was allocated a mere \$1.2 million for the entire country.<sup>146</sup> With over 500 tribes nationwide (over 100 in California alone), the funding falls short of covering even the most basic costs of maintaining California Indian language programs.

To enable California Indians to fully participate in the federal language programs, changes to the ANA regulations are necessary in three identified areas:

First, ANA language programs are currently funded for only one to three years. If a program cannot access private funding to continue activities, it generally ends. ANA funding under the NALA must be modified to include five to 10-year funding cycles, or to establish a priority system for existing programs.

Second, ANA accounting requirements are exacting and for some groups, difficult to meet. ANA program funds must be kept separate from other funds, which is almost impossible when multiple sources of funding are needed to cover the full costs of a single program. Typically, by the time the ANA accounting procedures are understood and implemented, the funding comes to an end. This complaint was voiced by administrators of the NCN, which is very thorough in its own record-keeping and has well established accounting procedures.<sup>147</sup>

Third, the funding equations used by ANA to determine eligibility and priority revolve around tribal population figures. Most California tribes have populations of under 3,000, which basically eliminates them from competition because they lose vital "points" in the proposal evaluation process. The consortium model described above appears to be the only way for smaller tribes to access ANA funding. The ANA should adopt a separate funding equation for California Indian language programs, taking into account: (1) the large number of tribes in California; (2) the enormous diversity in language dialects and families represented across the state; (3) the range in the sizes of California tribes; and (4) the rapid rate of language loss due to the various factors mentioned above. Without a change in the funding criteria, California tribes will continue to fall through the cracks in the ANA funding process.

## B. Tribal Museum Programs

### I. History and Purpose

Tribal museums were first created in California in the 1960s and 70s. The need for tribal museums arose partly from the absence of a positive relationship between California Indians and established museums and universities, some of which are world famous for their extensive collections of California Indian cultural items and ethnographic materials.<sup>148</sup>

Tribal museums take a different approach in presenting California Indians to the public. While mainstream museums present Indian cultures as matters of the past, tribal museums present them as living, embodied in contemporary peoples. The first such "Indian-run" museum was the Malki Museum on the Morongo Reservation in Southern California. The Malki Museum was established in 1965 by Jane Penn, a non-Indian, and Katherine Saubel, a Cahuilla woman extremely knowledgeable in the Cahuilla language and traditions. The Malki features a rich array of basketry, artifacts, photographs, and publications, with interpretations and history of the tribes at the Morongo Reservation and their ancestors: the Cahuilla, Serrano, Chemehuevi, and Cupeño.



Today, the Malki is highly regarded for its ongoing cultural events and publications through the Malki Museum Press. The Press has published materials ranging from Cahuilla ethnography and autobiography, to language dictionaries and grammar books.<sup>149</sup>

The need for tribally operated museums on California reservations has resulted in unique strategies for creating them. Often, tribes work closely with local agencies, such as the California Department of Parks and Recreation, or the city where a tribe is located. The Agua Caliente Band of Cahuilla Indians in Palm Springs, for example, negotiated with the City of Palm Springs to create a museum designed to present Cahuilla lifeways in accurate and meaningful interpretations. The Juaneño have worked hard to establish museum displays at the Mission San Juan Capistrano, and "living history days," where Juaneño and other local non-Indians gather to enact replications of mission lifestyles. Other tribal museums established across the state include the Bishop Paiute-Shoshone Cultural Center, the Sierra Mono Tribal Museum, the Hoopa Tribal Museum, the Ya-Ka-Ama Indian Education and Development Center,<sup>150</sup> the Fort Mojave Tribal Museum, and the Colorado River Tribal Museum. Each has become a center for tribal activity, such as community-based traditional arts and language classes, and tribal historical research, all of which continue to this day.

More recently, there has been a partnership between the National Indian Justice Center and the National Park Service to establish the Golden Gate Institute for Indigenous Cultures and the California Indian Museum and Cultural Center at the Presidio in San Francisco. The Center will honor the contributions of California's indigenous people to the world, educate park visitors about Native cultures and promote understanding of the indigenous world view. The museum will house an indigenous arts program, an archives program and a training program for tribal museums and cultural centers.

Staffing is a common concern when creating a tribal museum. Intimate knowledge of how an object was created and with what materials, its purpose, and its place in the history of the culture are some of the skills needed in a curator. Knowledge about preserving and repairing an object are also necessary. Tribal members who are involved in the ongoing practice of tribal culture are certainly well-suited to become curators of tribal museums. This fact was ultimately recognized by the Smithsonian Institution in Washington, D.C., when it created the American Indian Museum Studies Program, which provides training to employees of tribal museums and American Indian cultural centers, tribal historic preservation officers, and others in related fields.<sup>151</sup>

In addition to tribally operated museums, many California tribes have established cultural centers on their reservations. Cultural centers have a purpose similar to tribal museums, but their primary focus tends to be community-based classes, tribal gatherings and cultural events. In the past 10 years, several tribes have been granted funding for community development efforts through the Department of Housing and Urban Development (HUD) Community Development Block Grant program (CDBG). The Table Bluff Rancheria, Pit River Tribe, Tule River Reservation, and Karuk Tribe have all received funding for tribal community centers to begin the

process of revitalizing their communities.

Many other tribes have opted to establish tribal libraries. In 1989, several tribal libraries were opened, such as the five in southern California which were assisted by the San Diego County Library's Indian Library Services Project. The locations of the libraries are: Rincon Reservation, Viejas Indian School, Pauma Indian Reservation, Santa Ysabel on the Campo Reservation, and the Palomar Community College's American Indian Education Center.<sup>152</sup> Currently, at least a dozen other tribes maintain official tribal libraries which offer culturally relevant materials for readers of all ages, as well as workshops in research methods, tribal history and other topics.

Since tribal museums, cultural centers and libraries require land and financial support, most unrecognized tribes are precluded from developing such facilities. In some cases, the alternative is a state or locally supported nature center or regional museum which hosts on-going cultural events and exhibits. Without tribally owned facilities, however, unrecognized tribes are prevented from repatriating objects of significant cultural patrimony to the tribal community. NAGPRA implementation for unrecognized tribes, therefore, is often limited to those instances when an individual can clearly document ancestry to identifiable human remains.

## 2. The Role of National Museums

In response to years of lobbying and pressure from Indian tribes and advocates, Congress finally provided some protection for Indian cultural resources. The American Indian Museum Act<sup>153</sup> provides for the creation of a new National Museum of the American Indian at the Smithsonian Institution. The statute also calls for repatriation to tribes of some of the Smithsonian's collection of remains of an estimated 19,000 Native Americans and Native Hawaiians.

The Smithsonian must inventory and identify the origins of human remains and funerary objects under its control "in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes."<sup>154</sup> If Indian human remains are identified as those of a particular individual or an individual culturally affiliated with a particular tribe, the Secretary of the Smithsonian, "upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe as the case may be."<sup>155</sup> The law also provides for the return of funerary objects not associated with specific human remains, if they can be identified as coming from a particular burial site.<sup>156</sup>

## 3. NAGPRA Implementation—Repatriation

Aside from governing the return of human remains, NAGPRA also governs the repatriation of funerary objects, sacred objects and objects of cultural patrimony. While work has begun on the repatriation of human remains, repatriation of the other items has not been widely implemented in California, and many tribes are still unaware of their rights and responsibilities

under NAGPRA.

Many federally funded museums and universities refuse to comply with NAGPRA in both letter and spirit. The Ohlone, for example, have a long-pending request for repatriation of cultural items with the Phoebe Hearst Museum at the University of California, Berkeley. The current failure of the repatriation process in California is especially frustrating for tribes that have spent years establishing facilities to house the items of their cultural patrimony. Facilities are available, staff are trained and funding established, but significant amounts of California Indian cultural items languish in boxes in the basements of museums across the country.

a. Repatriation in Northern California

On receiving the summaries and inventories from federal agencies and museums, as mandated by NAGPRA, the Hoopa Valley Tribe of Northern California petitioned the Peabody Museum at Harvard University for the return of 40 pieces of religious dance regalia. The petition, the largest in the country to date for the return of sacred objects, was initially turned down by the University, which asked the Tribe to submit more information regarding the use and purpose of the dance regalia. Among the reasons given by the Peabody was that it wished to determine that the items did indeed belong to the Hoopa and not to another Northern California tribe. Apparently, statements by tribal elders were not sufficient evidence for the Museum, and the Tribe was required to hire an anthropologist to assist in providing technical anthropological data on each of the 40 items.<sup>157</sup> Such activities are barely within the financial means of this large tribe. Smaller, landless and unrecognized tribes stand little chance of recovering anything under the Museum's current standards.<sup>158</sup>

The Peabody Museum also made the argument that the items it held had been freely sold to a non-Indian trader, who in turn, sold them to the University. Items freely sold do not fall under NAGPRA's repatriation requests. In response, the Tribe's anthropologist had to document the extreme duress under which the people had given up their regalia to traders in return for food and protection from white miners and pioneers.

Sacred objects are part of tribal religious life, so there is currently a question as to whether such items can be sold or given away by an individual Indian. This question is troublesome to all parties in the repatriation process because of the strong arguments that support tribal ownership of cultural patrimony. The Peabody's refusal to acknowledge this argument demonstrates the manner in which museums and universities are trying to circumvent NAGPRA. Without adequate legislative support, tribes and individual Indians cannot hope to overcome these obstacles, and items of extreme religious, personal and cultural significance will continue to remain in storage facilities.

b. Southern California Repatriation

In Southern California, there has been a great amount of reburial of recently unearthed

human and funerary remains. However, repatriation from museum holdings is difficult. Even the prominent Southern California tribal and Indian-run museums have had no success in recovering items from federally-funded museums.

Typically, the museums and universities are hesitant to release information on current holdings and reluctant to loan items from their collection, even temporarily, to tribally sponsored exhibits.<sup>159</sup> In fact, local and regional museums are more cooperative than federally-funded museums; they are willing to share information with tribes and loan items for tribal exhibits. In Palm Springs, for example, the Agua Caliente Band of Mission Indians has been working closely with the Los Angeles County Museum to develop exhibits with interpretations.<sup>160</sup> Unfortunately, the Band has not been successful in developing such a relationship with federally-funded museums that house larger collections of items from their aboriginal area.

#### 4. Funding

Aside from the dearth of information from universities, museums and other repositories, the most pressing problem for tribes is finding funds to complete repatriation requests. While NAGPRA and its regulations provide that the Secretary shall make funding available to museums to complete their repatriation work, California tribes have not been allocated funding to implement NAGPRA. The only funding currently available to tribes is through a grant program administered by the NPS. Unfortunately, even those tribes involved with repatriation efforts are often unaware of this funding source, or lack the technical expertise to access it.<sup>161</sup>

Funding is vital to all aspects of the repatriation process. Tribes and individuals must usually view any large collection before requesting the return of the proper items. Professional consultants must be retained by tribes for assistance with the technical documentation required by federal agencies and museums. Also, many agencies and museums require tribal members and/or lineal descendants to be present at the packing and transport of items. All of these activities are costly, and create a great financial burden on tribes who have a legal right to repatriate human remains and their sacred, religious and funerary items. Moreover, items belonging to one tribe may be held by several different museums. The costs of accessing these scattered collections are significant. Unfortunately, this type of situation does not fit into the current NPS grant criteria which only funds projects through a single museum for a particular tribe.<sup>162</sup>

The greatest costs for repatriation are those pertaining to the handling of items returned to tribes and lineal descendants. Cultural items kept in museums have usually undergone years of pesticide and preservative treatment. To "maintain" the items, many museums treat them with harmful chemicals, so that direct contact with human skin carries the risk of chemical poisoning.

When California Indians are allowed to view baskets and other items in museum collections, they are often required to wear rubber gloves and masks for protection against toxic materials.<sup>163</sup> Items made of plants and other natural fibers are kept in glass storage cases to protect museum workers from the fumes of pesticides sprayed on them. The cost to remove all

such chemicals from the items is, according to one anthropologist, the most expensive part of the repatriation process.<sup>164</sup> Funding should be made available to tribes so that repatriated dance regalia can be used in the ceremonies for which they were created. Such expenses are not currently covered by grants made to tribes under the National Park Service NAGPRA grant.

### C. Indian Child Welfare

#### 1. History and Purpose

At first glance, Indian child welfare appears to be a social issue that ought to be discussed in a different context.<sup>165</sup> But it is significant to cultural preservation because of the importance of tribal children to the survival of Indian cultures. All the Native cultures and traditions documented in this report are passed through, and focused around, extensive familial relationships. California Indian cultures depend upon the presence of children to learn, maintain and continue their traditions.

The Indian Child Welfare Act (ICWA) of 1978<sup>166</sup> was passed to address the problem of non-Indian adoptions of Indian children. Tribes and individuals concerned about the high frequency of non-Indian placement of Indian children lobbied for a mechanism by which the tribe would be notified first of an Indian adoptee, giving the child a chance to be placed in a home within their extended family or the tribal community. Prior to the ICWA, Indian families were often viewed by outside agencies and courts as incapable of "proper" child rearing.<sup>167</sup> As a result, 92.5% of the 1,507 Indian adoptees in California in 1975 were placed with non-Indian families.<sup>168</sup>

The ICWA was enacted in response to what was characterized as "[t]he wholesale separation of Indian children from their families" through various methods of state court adjudication of parental rights.<sup>169</sup> Statistics also showed that separations of children from parents occurred more often among Indian than non-Indian families. This was attributed to the insensitivity of "many social workers [to] . . . Indian cultural values and social norms," which led to a misevaluation of Indian parenting skills and an unequal application of standards in considering problems, such as parental alcohol abuse.<sup>170</sup> The states "were also faulted for not providing Indian parents with legal representation and access to qualified expert witnesses, and for coercing them into voluntary waivers of parental rights."<sup>171</sup>

The ICWA addressed these general concerns in both procedural and substantive ways. Its most important procedural elements included the establishment of: (a) tribal courts as the required or preferred forum for adjudicating Indian child custody proceedings; (b) mandatory notice to the child's tribe when involuntary child custody proceedings are initiated in state court; and (c) the tribe's absolute right to intervene in state court proceedings.<sup>172</sup>

The ICWA's more significant substantive components obligate all state courts with jurisdiction over a custody proceeding involving an Indian child to: (a) impose certain minimum burdens of proof whenever issues of involuntary placement or parental rights termination are

involved; (b) make such placement or termination only when there is supporting testimony from qualified expert witnesses; and (c) follow statutorily prescribed placement preferences in all child custody proceedings.<sup>173</sup>

While the remedial objectives of the ICWA are clear, the application of its provisions has resulted in substantial litigation because of perceived ambiguities and the varied nature of the state court proceedings subject to it.<sup>174</sup>

## 2. Current Problems in Implementation

According to the 1990 census, there are at least 242,164 Native American people in California—the second largest Indian population of any state in the nation. Much of this population represents Indians affiliated with tribes located outside the state. It also includes aboriginal California Indians unaffiliated with a federally recognized tribe.

When the ICWA first became law, federal funds were made available to programs providing services to urban Indian populations. Acknowledging California's unique history, the BIA also followed a policy of certifying aboriginal California Indians of 1/4 or more Indian blood as Indians subject to the ICWA. Both of these policies have since been reversed, severely frustrating the ability of Indians in California to secure the protections and benefits of the ICWA.

Kevin Sanders, Social Service Officer at the BIA's Sacramento Area Office, has indicated that California ranks first in the nation in terms of the number of ICWA notices served on the BIA.<sup>175</sup> The Sacramento Area Office receives an average of 50 notices per week in connection with proceedings scattered throughout the state. The Bureau can verify the Indian status of approximately 1,500 of the children for whom notices have been received.<sup>176</sup>

A considerable amount of energy has been directed towards implementing the ICWA in California. Effective January 1995, the California Judicial Council adopted a rule of court to implement the Act.<sup>177</sup> Amendments to the rule became effective in January of 1997. Federal funding guidelines now provide for some tribal ICWA funding, and tribes are working to develop their own juvenile justice systems. Tribes also participate in state juvenile proceedings. All this increased activity has revealed that the state and local systems are not operating in compliance with the ICWA. In some cases, there is outright hostility, as those involved with Indian child custody cases struggle to understand and meet the requirements of the Act.

As things now stand, there is an undisputed need to improve ICWA implementation in California courts. Under the Act, whenever a dependency case involving an Indian child is brought into state court, the child's tribe must be notified and informed of their right to intervene as a party in the proceedings. However, according to the only publicly available data on the matter, the California Department of Social Services in 1983 found that in 80% of the cases, tribes were not given any notice.<sup>178</sup> Agencies and courts often fail to ask if a child is Indian, and it is common for this fact to come up very late in the process of removal and placement, giving rise

to belated appeals that adversely affect the child's well being.

California Judicial Council staff involved in current juvenile court evaluation projects report that visits to juvenile courts throughout the state reveal a total absence of systems to identify and track Indian cases to assure compliance with the ICWA.<sup>179</sup> Even among cases identifiable as Indian, glaring deficiencies are apparent in the court files.<sup>180</sup>

In the first decade following the adoption of the ICWA, there were only two reported California appellate decisions involving the Act.<sup>181</sup> Implementation problems have recently increased, mirroring patterns of major change in California dependency law and increasing activity by tribal advocates in state proceedings. This has resulted in greatly increased appellate activity. Since 1990, a dozen opinions involving the Act have been published, some of them creating direct splits in authority within the state.

Today, implementation of the ICWA in California is in a state of serious disarray. Recent federal policies, including the elimination of funding for critically needed urban programs and the reversal of the BIA's policy conferring ICWA protections upon unaffiliated California Indians, have contributed to this situation.

The absence of federal funds to support the development of tribal courts further frustrates implementation of the ICWA, which requires state courts to transfer proceedings to tribal courts in many situations. There are currently only a few tribal courts in California, virtually none with the resources necessary to handle child custody cases.<sup>182</sup> This situation has rendered impossible one of the statute's two main goals—namely, to leave the placement of Indian children in the hands of tribal decision-makers.

### 3. Interpretation by the Courts

Congress and the U.S. Supreme Court have acknowledged that tribal courts are a more appropriate forum for Indian child custody disputes than state courts.<sup>183</sup> In Southern California, recent state court decisions have refused to enforce this substantive requirement of the ICWA, in part due to the courts' failure to understand Indian tribes as political entities with inherent sovereignty.<sup>184</sup> These decisions have resulted in the placement of Indian children in non-Indian homes, despite the availability of Indian homes. In some cases, state courts feel constrained to make such placement orders for political reasons. The existence of a tribal forum would remove from state courts the most difficult and often highly politicized child custody decisions by transferring jurisdiction to tribal courts.

In cases involving child dependency, California is currently a patchwork of counties with widely varying practices and levels of compliance with the ICWA. Some counties maintain a department specializing in ICWA cases, with judges and attorneys well-versed in the Act, while others routinely ignore the Act's most basic requirements. Similarly, some counties cooperate with local tribes in child welfare matters, while others refuse to view tribes as governmental

entities.

The failure of the California Supreme Court to grant review in any case involving the ICWA has left the different appellate districts with no guidance to resolve the varying outcomes of published decisions. The situation presents nothing but uncertainty to Indian children, parents and tribes as to what they might expect in state courts. Furthermore, the dearth of tribal courts in California has led some highly urbanized counties to deny ICWA protections to all Indian children except those whose parents maintain close contact with their reservations.<sup>185</sup> Because the level of services mandated under the ICWA is, in some cases, higher than that required under state law, this trend is likely to continue as counties search for ways to economize on child protection services.

Funding for tribal courts or other dispute resolution fora, and increased support for tribal ICWA programs, including social workers and other personnel, would enable California tribes to better negotiate with county child welfare systems and enforce the ICWA's minimum standards. Tribal dispute resolution fora with jurisdiction over child welfare matters are a way for counties to reduce their own case loads, and are generally welcomed by county and state social services programs as an appropriate alternative to the troubled local systems.

## **V. Conclusion**

California Indians have suffered through genocide, loss of lands, slavery, poverty, and federal neglect. Nevertheless, they have survived, and the spirit and vitality of aboriginal cultures continues in many forms. Though assimilationist policies sought to make California Indians adopt mainstream European-American values and ideologies, the strength of Indian identity and common history has kept California's Natives distinct from the rest of California. This distinctiveness has led to a feeling of strength and unity among California Indians, but also resulted in misunderstanding and prejudice from non-Indian neighbors.

Much of the misunderstanding of California Indians results from the wide variation of tribal cultures across the state. With well over 100 federally recognized tribes, and at least 40 unrecognized tribes—each with cultures unique to themselves—generalizations cannot be made about California. Southern California alone, with its coastal peoples, interior mountain tribes, and desert bands, is a world apart from the Central and Northern California tribes. Moreover, the varying land bases, government structures, and political power of modern California tribes is a source of confusion to people at the local, state and federal levels.

In order for Congress and federal agencies to deal appropriately with this wide variation, it must be accepted and understood that each tribe will have concerns unique to itself, and its own strategies for creating solutions. Federal agencies must adopt final policies that accommodate local concerns, by consulting directly with the tribes who will be impacted by them: federal public land agencies must include equal participation from federally recognized and unrecognized tribes before major land management decisions are made; cultural uses of public lands should be



permitted with the least intrusion possible on Native traditions; and Indian graves, cemeteries and village sites should be protected to the greatest extent possible, to respect the strong ties that California Indians have to their ancestors and their aboriginal lands.

Congress and federal agencies must also educate themselves about some of the common aspects of California Indian cultures, such as the use of eagle feathers for both tribal ceremonies and individual prayer, the desire to preserve Native languages and songs for use by future generations, and the need to keep Indian children within the tribal community, even when the biological parents are deemed unable to care for the child's immediate needs.

It is the goal of this report to present these concepts to Congress to create a better understanding of California Indian cultural preservation efforts. Many individuals and tribes shared their experiences to identify specific barriers that can be overcome through positive legal change. This report presents these issues to Congress for thoughtful consideration, with recommendations for changes in current federal policies and legislation. By working together, and in appreciation of one another, California Indians and the federal government can become full partners in the stewardship of these lands and in the preservation of the rich tribal cultures they have fostered.

## ENDNOTES

1. The recommendations to Congress may be broad and particularly challenging in terms of implementation, but they reflect issues of major significance to Indians in California and cannot go unstated.
2. See, generally, Robert F. Heizer, Languages, Territories, and Names of California Indian Tribes, (University of California Press, 1966).
3. See LeAnne Hinton, Flutes of Fire: Essays on California Indian Languages (HeyDay Books, 1994), at 2-3.
4. See Bruce Flushman and Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 391, 403 (1986).
5. Id. at 404-406.
6. H.R. Rep. No. 801, 103d Cong., 2d Sess. 2 (1994).
7. Act of March 3, 1851, 9 Stat. 631.
8. See Flushman and Barbieri, *supra* note 4, at 406-408.
9. These acts appropriated funds for the purpose of acquiring land for “homeless California Indians” in general, rather than for particular tribes. See the Act of April 30, 1908, Pub. L. No. 60-104, 35 Stat. 70, at 76; the Indian Appropriation Act of March 3, 1909, Pub. L. No. 60-316, 35 Stat. 781; the Indian Appropriation Act of April 4, 1910, Pub. L. No. 61-114, 36 Stat. 269, at 273; the Indian Appropriation Act of March 3, 1911, Pub. L. No. 61-454, 36 Stat., 1058, at 1062; the Indian Appropriation Act of August 24, 1912, Pub. L. No. 62-335, 37 Stat. 518 at 523; the Indian Appropriation Act of June 30, 1913, Pub. L. No. 63-4, 38 Stat. 77 at 86; the Appropriation Act of August 1, 1914, Pub. L. No. 63-159, 38 Stat. 582, 589; the Appropriation Act of May 18, 1916, Pub. L. No. 64-80, 39 Stat. 123, at 132. Subsequent annual appropriations through 1933 totaled approximately \$290,000 for the purchase of land for homeless California Indians.
10. See “Reservation Data, California, 1951,” reproduced in Hearings: A Review of California Indian Affairs, House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, 85th Cong., 1st Sess., May 24, 1963, Serial No. 10, pp. 186, et seq.
11. See Dolan Eargle, Jr., The Earth is Our Mother: A Guide to the Indians of California, Their Locales and Historical Sites (Tate Co. Press, 1986), at 16-17.
12. See Edward Castillo, “The Impact of Euro-American Exploration and Settlement,” in Handbook of the North American Indians, Vol. 8, Alfred L. Kroeber, ed., (University of California Press, 1976), 104.

13. See, e.g., Robert F. Heizer, The Destruction of the California Indians 1850-1880 (Peregrine Scott Press, 1974), 41-99.
14. See Castillo, *supra* note 12, at 122.
15. See Alfred L. Kroeber, "Elements of Culture in Native California," in The California Indians: A Sourcebook, R.F. Heizer and M.A. Whipple, eds. (University of California Press, 1971), 3, 54-59.
16. Id.
17. When the tribes were forced to move from their aboriginal homelands onto reservations, many of the ceremonies were prohibited by the BIA, so Indian religious practitioners were compelled to adopt various subterfuges so that ceremonial life could continue. Some tribes began to conduct their most important ceremonies on national and Christian holidays. Among tribes with isolated ceremonial lands, it was not as difficult for groups to go into the mountains and remote areas to conduct ceremonies without interference from non-Indians. See Vine Deloria, Jr., "Sacred Lands and Religious Freedom," (Association on American Indian Affairs, 1991), at 4.
18. See Kroeber, *supra* note 15, at 39-43.
19. Boarding schools forced the assimilation and socialization of children by denying them cultural influences and parental interaction. In fact, the schools were explicitly created to wean young Indians away from the old ways and into the American mainstream, albeit at the lowest social and economic levels. Indian children were frequently punished in brutal and humiliating ways for displaying attachment to their home, family, culture, and language. This created a backlash among many California Indian children: children often ran away, and those who returned to the reservations brought with them a fear and hatred of the BIA, the schools, external authority, and any programs brought in to help them. See § I of the ACCIP Education Report, and endnote 6.
20. California Indians' Jurisdictional Act, 45 Stat. 602 (1928), *codified* at 25 U.S.C. §§ 651 (1928).
21. Indian Reorganization Act of 1934, 48 Stat. 984 (1934), *codified* at 25 U.S.C. §§ 461 et seq.
22. California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958). See also the ACCIP Report on Termination. Only 38 of those tribes were ultimately terminated pursuant to the Act. Two additional tribes were terminated pursuant to the amended Rancheria Act. See Appendix B to the ACCIP Termination Report.
23. See § I(B) of the ACCIP Trust and Natural Resources Report.
24. The California State Parks' gathering policy includes only members of federally recognized tribes. Such individuals may apply for a permit to gather traditional foods and plant materials.

“Guidelines for Native California Indian Gathering,” Department of Parks and Recreation, State of California—The Resources Agency.

25. See Laughing Coyote v. United States Fish and Wildlife Service, CV F-93-5055 DLB (E.D. Cal. July 7, 1994) (holding that a member of an unacknowledged tribe, who was named on the California Distribution Roll, and was 11/16 Indian, was entitled to be certified as Indian by the BIA for purposes of applying for an eagle feather permit under the Eagle Protection Act.)

26. See § II(A)(2), *infra*.

27. See Appendix B to the ACCIP Termination Report.

28. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

29. *Id.* at 463.

30. *Id.* at 469. See also Deloria, *supra* note 17, at 10. At the federal level, since the Supreme Court’s decision in Lyng, no case involving the destruction of sacred sites on federal lands has ruled in favor of protection of the site. Consequently, California Indians must now look to federal environmental protection, historic preservation and archaeological resource protection laws to protect significant cultural, historical and religious sites.

Legal protections for Indian cultural resources include the Archaeological Resources Protection Act, 16 U.S.C. § 469 (1988), the National Historic Preservation Act 16 U.S.C. § 470 (implementing regulations found at 36 C.F.R. Part 800), the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1991), and the Indian Arts and Crafts Act, 18 U.S.C. §§ 1158-1159, 25 U.S.C. § 305 *et seq.* (1992).

31. 16 U.S.C. §§ 470 *et seq.*

32. Archaeological Resources Protection Act of 1979, 16 U.S.C. § 469, as amended; and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990).

33. Judith Dides, “The Law of the Land,” adaptation from interview of Josie Lewis, News from Native California, Fall 1992, at 5.

34. California Indian land management practices are cited in recent Forest Service manuals and are promoted by Sonia Tamez, Tribal Relations Program, US Forest Service. See also Kat Anderson, Before the Wilderness: Environmental Management by Native Californians (Ballena Press, 1993), 19.

35. National Park Service Memorandum, “Native American Traditional Uses of Renewable Resources in National Parks: A Proposal to Change 36 C.F.R. § 2.1(c) (d).” The document is undated, but appears to have been drafted in the fall of 1995.

36. Forest Service Manual § 1563.
37. The National Forest Management Act of 1976, 16 U.S.C. § 472a (implemented at 36 C.F.R. § 223.1).
38. 36 C.F.R. § 223.
39. Kathy Kauffman, “. . .and in Eastern California,” News from Native California (Fall 1992), at 6.
40. Triclopyr, which can persist in plant tissues for up to two years, has been linked with cancer clusters in Northwestern California. Granular Hexazinone is an herbicide known to leach into groundwater and persist in streams. The pellets dissolve in the Spring rain and leach into the soil, and the herbicide is taken up by the roots of native shrubs and oaks alleged to compete with commercially valuable conifers.
41. “CIBA Files Petition with the EPA,” CIBA Newsletter, Fall 1994.
42. Lyng, 485 U.S. 439.
43. “Sacred Lands Returned to Tribe,” Chicago Tribune, January 26, 1996, quoting Alvis Johnson, Karuk Tribal Chairman.
44. Interview with Julian Lang, Karuk tribal member and dance leader, May 1997.
45. “The BLM Native American Policy Summary,” summarized from Manual § 8160, “Native American Coordination and Consultation,” BLM Manual Release No. 8-58, January 26, 1990.
46. There has been an interest among local Indians to change the name “Squaw Leap” and revert to its name in the Mono language. But the BLM has refused to consider the change, even though “Squaw” originates from an east coast tribe and means “vagina.” Personal communication, Norma Turner, Mono/Dumna, member of Gathering planning committee and respected elder of the Mono area, May 1997.
47. Id.
48. Id.
49. Id.
50. See “BLM Native American Policy Summary,” *supra* note 45.
51. Letter, dated October 8, 1990, from Dorothy Alther, Esq., of California Indian Legal Services, to Malcolm Margolin, Editor of News from Native California.
52. 25 U.S.C. §§ 3001-3013 (1991).

53. Letter dated July 13, 1995, from Jamie Cleland, Ph.D. to the ACCIP Cultural Taskforce; and Letter dated July 17, 1995, from Claire LeCompte, tribal leader and spokesperson for the Maidu Nation, an unrecognized tribe.

54. Letter dated July 8, 1995, from the Northrup family (Maidu) to the Susanville Indian Rancheria.

55. 61 Fed. Reg. 43,070-43,073 (August 20, 1996).

56. 25 U.S.C. § 3002. If the remains are excavated from tribal lands, the tribe on whose land they were found gets ownership if no lineal descendant can be ascertained. Id.

57. Cal. Pub. Res. Code § 5097.94.

58. Cal. Pub. Res. Code § 5097.9.

59. Cal. Pub. Res. Code § 5097.94. The statute was unsuccessfully challenged by a California archaeologist who sought to resist a Commission subpoena to return stolen Indian artifacts. The court rejected claims that the statute violated equal protection clauses in the constitution. People v. Van Horn, 218 Cal.App.3d 1378 (1990).

Under Cal. Pub. Res. Code § 5797.97, the NAHC is also empowered to “hear the complaint of any Native American organization, tribe, group, or individual that a proposed action by a public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar public access thereto by Native Americans. In the event such a complaint is made, the NAHC may recommend mitigation measures for consideration by the public agency proposing to take such action. If the agency fails to accept the mitigation measures and if the NAHC finds that proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the NAHC may ask the Attorney General [or nongovernmental counsel] to take appropriate legal action . . .”

60. Letter dated July 21, 1995, from Larry Garnica of Hutash Consultants (cultural resource management branch of the Coastal Band of Chumash Nation), to the ACCIP Cultural Taskforce.

61. Id.

62. Letter dated February 10, 1995, from Larry Meyers, Executive Secretary, Native American Heritage Commission, to John Ruiz of the Coastal Band of Chumash Nation.

63. The ACCIP Cultural Taskforce investigation of this matter concluded that there is no specific written policy for implementing the Most Likely Descendant requirement, nor are there specific types of documentation required. A Taskforce investigator was told that “anything that might show descendancy from a California Indian is sufficient.”

64. Members of the Gabrieliño, Luiseño and Juaneño tribes, along with other Chinigchinich practitioners, have long believed that Puvunga encompassed what is now the site of California State University at Long Beach (CSULB). Extensive historical, scientific and anecdotal evidence confirms that the CSULB campus was part of the land associated with the village of Puvunga, including written reports by Father Geronimo Boscana, a Spanish missionary who documented the Chinigchinich religion in the 1800s, and by J.P. Harrington, a noted ethnohistorian and linguist who interviewed descendants of the Puvunga villagers in the 1930s. Studies of the 22-acre Puvunga site performed by archaeologists employed by CSULB confirm that the campus was inhabited by California Indians at various times contemporaneous with Puvunga's existence. Recent excavations at other sites on the campus have yielded artifacts such as shell beads, earthenware pottery, deer bone tools, projectile points, and mortars and pestles.

65. "Sacred Indian Site Headed for Mini-Mall Future?" Cultural Survival Quarterly, Winter 1995, at 5.

66. "Archaeology Today: Digging for Dollars?" Los Angeles Times, Sept. 27, 1993. See also letter dated June 1, 1995, from Eugene E. Ruyle, Professor of Anthropology, UCSB, to Polly Girvin, ACCIP Coordinator.

67. Id.

68. See id. CSULB's development proposal caused an uproar within the University and local communities, which were well aware of the significance of Puvunga in California Indian religion and culture. The issue also drew considerable attention from the news media; numerous articles have been printed on the issue locally and statewide.

69. Following the issuance of the preliminary injunction order and the hearing on the motions for summary adjudication and summary judgment, CSU appealed the order granting the preliminary injunction and also petitioned for a writ of mandate ordering the Superior Court to vacate the injunction. CSU challenged the preliminary injunction on several grounds: one was that the injunction violated the Establishment Clauses of the California and United States Constitutions. CSU contended that Public Resources Code §§ 5097.9 and 5097.94(g), "as applied in this case constitutes a violation of the federal and state establishment clauses." Reply Brief in Support of Petition for Writ of Mandate (No. B078402, filed Nov. 19, 1993), at 23.

In an opinion filed on February 24, 1994, the Appellate Court affirmed the preliminary injunction and rejected CSU's arguments. The California Supreme Court denied CSU's petition for review on May 12, 1994.

70. See Native American Heritage Commission, et al. v. Board of Trustees of the California State University, (2d App. Dist. Dec. 12, 1996) Case No. B093693.

71. It is estimated by one source that the University spent upwards of \$250,000 on attorney fees even before the case was appealed. See "Land Use Battle Continues," Daily 49er, California

State University, Long Beach, Nov. 17, 1994, at 1. Other sources put the amount even higher at \$1.6 million. See "Puvunga battle is for human rights, not property ownership," Daily 49er, Nov. 22, 1994, at 5.

72. Statement by Dr. Lee Davis to the Keeper of the National Register of Historic Places, Oct. 31, 1994.

73. Background information on the Mt. Shasta case was obtained from numerous documents, records and interviews. These documents remain in the Advisory Council's possession should confirmation of any statement herein be required.

74. The USFS often contests this by pointing to an August 3, 1988 letter to the SHPO, seeking concurrence that the USFS had complied with NHPA. The USFS letter states that as a result of studies of Mt. Shasta, which were not identified, "no cultural resources were recovered." The letter fails, however, to tell the SHPO of the comments the USFS had received from California Indians prior to August 1988, affirming Mount Shasta's cultural importance to Northern California Indians. Because this vital information was left out, it is not surprising that on September 2, 1988, the SHPO agreed that the proposed Mt. Shasta ski resort would have no effect on National Register eligible properties.

75. Federal law requires each state to have a SHPO who participates in determining eligibility of properties to the National Register. SHPOs can also play an important role in furthering federal agency compliance with NHPA.

76. The NHPA contemplates two situations in which a federal agency must consider the effect of its undertakings on historic properties. First, where the undertaking may have an effect on properties already included on the National Register and second, where a property may be eligible for inclusion on the National Register. Most frequently, it is the latter situation which arises. In such cases, the responsible federal agency is required to search out and locate those properties which may be eligible to the National Register and determine whether the agency's proposed undertaking will have an effect and/or adverse effect upon those properties.

77. The NHPA implementing regulations (found at 36 C.F.R. Part 800) set forth the requirements that a federal agency must follow in locating properties which may be eligible for listing on the National Register. Pursuant to the regulations, the agency must first establish the undertaking's Area of Potential Effect (APE), which is the area within which the agency believes the federal undertaking will have an effect or impact on any culturally significant properties. 36 C.F.R. § 800.4(2)(1). The APE is not limited to the undertaking's boundaries and often must extend beyond them.

78. Also in March 1991, representatives of the tribes surrounding Mount Shasta—Wintu, Shasta, Pit River, Modoc, and Karuk—met with the Shasta-Trinity National Forest Supervisor, Robert Tyrell, to inform him of the sacred nature of Mount Shasta to California Indians, as well as their concerns about the proposed ski resort. Hence, 13 years after the decision to commit a large



portion of Mount Shasta's public lands to commercial ski development, the USFS began consultations with California Indians on Mount Shasta's eligibility for the National Register.

79. In October 1991, Dr. Winfield Henn, an USFS anthropologist, published the results of his literature search on Mount Shasta's historic significance to California Indians (Henn Study). Henn concluded that Mount Shasta was a very important feature of the California Indian mythological landscape and that the current use of the mountain for spiritual purposes is rooted in traditional practices and values.

80. Because the time period for the Theodoratus/Evans study was so limited, they were unable to interview at least 18 other California Indians who were identified as having information on Mt. Shasta's cultural significance. This led to requests for the USFS to conduct additional studies to assure that all California Indian traditional cultural properties on Mount Shasta were identified. These requests were denied, in violation of the NHPA. See Romero-Barcelo v. Brown, 643 F.2d 835, 860 (1st Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982) (where a consultant acknowledges the need for additional research, the agency is under an obligation to complete that research).

81. See Nancy Evans and Dorothea Theodoratus, "Statement of Findings—Native American Interview and Data Collection Study of Mt. Shasta, California," (U.S. Forest Service, 1991), at 1.

82. The location and identity of many of the Native American ceremonial and sacred sites were not disclosed in the public version of the Theodoratus/Evans study in order to protect the sites from improper use and destruction.

83. This finding offered recognition of the area's importance, but virtually no additional protection for the Mountain because that part of Mt. Shasta was already protected under the California Wilderness Act.

84. The USFS was required, pursuant to the NHPA and following its determination that the ski resort project constituted an undertaking, to establish an APE. The APE is defined as a "geographic area or areas within which an undertaking may cause *changes in the character or use* of historic properties." 36 C.F.R. § 800.2(l) (emphasis added). Following determination of the APE, the USFS must then seek information regarding potential historic properties within the APE. The USFS failed to do both.

Nowhere in the Draft Determinations or administrative record was there any discussion of the Forest Service's effort to establish the APE. Many contended in their comments that Mt. Shasta, in its entirety, constituted the APE. It was conceded that if the ski facility was built, a nearby condominium and shopping project would also be built, and that together both would have significant adverse impacts on Mt. Shasta. The Undertaking would dramatically increase the population of the area, as well as year-round use of Mt. Shasta. See USFS Final Supplemental Environmental Impact Statement (FSEIS), at 15-17.

Further, the Advisory Council on Historic Preservation (ACHP) guidance document, "Identification of Historic Properties: Decision-Making Guide for Managers," provides that "[w]here alternative locations for an undertaking are considered, each such location . . . should be included in the area of potential effect." *Id.* at 16. The USFS, therefore, should have considered alternative ski resort sites as being within the APE. Besides the no-action alternative, the USFS considered nine ski resort alternatives in the FSEIS. *See* FSEIS, at 3-5. Six of the nine alternatives are located on Mt. Shasta, the rest on other nearby mountains. None of the alternative sites were discussed in the Draft Determinations or elsewhere in the administrative record.

85. Once historic properties have been located, NHPA regulations require that the "Agency official shall apply the National Register criteria to properties that may be affected by the undertaking." 36 C.F.R. § 800.4(c)(1) (emphasis added). The National Register Criteria for Evaluation are the following:

The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information in pre-history or history.

36 C.F.R. § 60.4.

Not only did the USFS fail to apply the criteria to Mt. Shasta in its entirety, it failed to apply them to individual historically significant sites on Mt. Shasta, other than those identified in the Draft Determinations. This was in spite of all the evidence set forth in the Theodoratus/Evans study pertaining to Mt. Shasta's cultural significance to California Indians.

Mt. Shasta met all the criteria. First, Mt. Shasta has been associated with events that have made a significant contribution to the broad patterns of our history. As pointed out in National Register Bulletin 15: "properties may have a significance under Criteria A if they are associated with events, or series of events, significant to the cultural traditions of a community." *Id.* at 13. The conclusion of the Henn Study was that, "Mt. Shasta was a very important feature of the mythological and cultural landscape and today's use of the mountain for spiritual purposes is rooted in traditional practices and values." *See* Henn, *supra* note 79, at 9.

Likewise, Mt. Shasta is eligible for listing as a site associated with the lives of persons significant in our past. “The word ‘persons’ can be taken to refer . . . to ‘persons’ such as gods and demigods who feature in the tradition of a group.” Bulletin 38, at 11. According to the Theodoratus/Evans study, many important gods and spirits are associated with the Mountain: a powerful Pit River spirit named Mis Misa is said to live inside the mountain, keeping the universe in balance; the Shasta Indians call the mountain Waka-Nunee-Tuki-Wuki, after the Shasta Creator; and, according to Wintu belief, “Shasta has a spirit of its own.” Theodoratus and Evans, *supra* note 81, at 4-5.

Under the Third criterion, a property may be regarded as representative of a significant and distinguishable entity, even though it lacks individual distinction, if it represents or is an integral part of a larger entity of traditional cultural importance. Bulletin 38, at 12. As evidenced by the Theodoratus/Evans study, there are many sites on Mt. Shasta which, although in and of themselves lacking in historical and cultural significance, are representative of the cultural and mythological importance of Mt. Shasta to California Indians.

The fourth criterion provides that a site is eligible for listing if it has a history of yielding, or potential to yield, information important in prehistory or history. Mt. Shasta has yielded abundant information on California Indian culture and can be expected to yield much more, as pointed out in the Theodoratus/Evans study, that “additional research could reveal other locales or more data about any particular site.” Theodoratus and Evans, *supra* note 81, at 10.

86. Once the APE is determined, NHPA regulations require the USFS to review existing data on historic properties within the APE, consult with the SHPO, and, most importantly, “seek information . . . from Indian tribes, public and private organizations, and other parties likely to have knowledge of, or concerns with, historic properties in the area.” 36 C.F.R. § 800.4(a)(1)(iii).

The USFS also failed to comply with this NHPA regulation as it did not consult many of the public and private organizations with knowledge of Mt. Shasta’s historic importance, even though it had been provided with a lengthy list of private organizations and individuals who could speak to Mt. Shasta’s historical significance.

87. The ACHP may participate in the federal agency’s determination of how to mitigate the undertaking’s adverse effects on a significant historic property. Even more importantly, the ACHP must review any federal agency’s finding that the undertaking will have no adverse effect on historic properties.

88. The Keeper has many responsibilities, including maintaining the National Register and reviewing federal agency National Register eligibility determinations.

89. In fact, some of the evidence relied upon by the Keeper came from the USFS itself. For example, the Keeper noted that, “[i]n Section 8, page 2 of the Forest Service’s Panther Meadow National Register nomination form, the statement that ‘Mt. Shasta has historically been an important feature of the Native American landscape in Northern California’ also suggests that the

landform as a whole is significant.” Determination of Eligibility Notification, E.O. 11593, March 11, 1994, at 2.

90. The aims of NHPA include the preservation of non-federally owned prehistoric and historic resources, and encouragement of public and private preservation. 16 U.S.C. § 470-1 (4) and (5) (emphasis added). Section 106 Regulations set forth a procedure to determine whether a property is eligible for listing on the National Register. 36 C.F.R. § 800.4. The listing of private property, however, does not limit the landowner’s rights. 36 C.F.R. § 60.2.

91. 36 C.F.R. § 60.2. The Keeper, in his letter of August 17, 1994, to Congressman Wally Herger, reminded him that “[d]eterminations of eligibility do not give the Federal Government control over private property. Private property owners can do anything they wish with their property unless there is Federal involvement in a project that would affect their property.”

92. Several studies have been conducted over the past few years which demonstrate that preservation programs can yield significant economic benefits to individual property owners and have a favorable fiscal impact on the tax base of local governments. Economic Benefits of Historic Preservation, 11 Preservation L. Rptr. 1044 (March 1992).

93. The administrative record, which was available to the public, contains at least two other letters which further evidence that all of Mt. Shasta was being considered eligible for historical listing. See letter dated October 8, 1993, from Claudia Nissley (SHPO), to Steve Fitch, Supervisor, Shasta-Trinity National Forests; and letter dated May 10, 1993, from Claudia Nissley, to Jerry Rogers, the Keeper of the National Register of Historic Places.

94. According to the Shasta-Trinity National Forests’ Mt. Shasta interested-party mailing list, Siskiyou County Supervisors Young, Thackery, Zwanziger, Griardino, and Duma and the City of Mount Shasta were mailed notices of all Shasta-Trinity and SHPO comment periods. In response, the Board of Supervisors, on April 21, 1992, objected to the Multiple Property Designation because of the large amount of private land involved in the proposal of Historical Designation.

95. 59 Fed.Reg. 45,002.

96. These statements were not obtained for the first two comment periods because proponents believed that the administrative record, as it existed then, was sufficient to support Mt. Shasta’s eligibility for historical listing. This view was borne out in the Keeper’s March 11, 1994 determination.

97. Statement by Dr. Thomas Buckley to the Keeper of the National Register, Oct. 31, 1994.

98. Id.

99. Charles Stewart, “The Discovery and Exploration of Mt. Shasta,” Master’s Thesis.

100. Dr. Buckley, who reviewed Stewart's paper and was familiar with Stewart's research, observed that Stewart's aim was not to study Native American culture, but to popularize Mt. Shasta as a tourist destination. Obviously, such an objective is hardly conducive to serious inquiry into California Indian traditions. Where, as Dr. Buckley noted, at one time anthropologists were simply "not interested in religion," today they are, and as a result, we now know that places like Mt. Shasta are sacred to Native Americans. Id.

101. See, e.g., Barbara S. Falcone, Legal Protections (or the Lack Thereof) of American Indian Sacred Religious Sites, 41 Fed. Bar News & J. 570 (Sept. 1994).

102. Id. at 571. See also Susan F. O'Donnell, "In Search of the Okwanchu; the People from Mt. Shasta," unpublished dissertation, for documentation of the persecution of Native Americans in the Mt. Shasta region.

103. See National Register Bulletin, No. 38.

104. 16 U.S.C. § 703.

105. United States v. Dion, 476 U.S. 734, *on remand* 800 F.2d 771 (8<sup>th</sup> Cir. 1986).

106. In re Wilson, 30 Cal.3d 21 (1981).

107. Id.

108. Indian weddings, for many California tribes, involve a gift of one or more deer and "Indian money," such as strings of dentallia shell or clamshell disks, by the man to the woman's family, in exchange for the right to marry the woman. Traditional wedding ceremonies are recognized by California law and may take place any time of year. Cal. Pub. Res. Code § 295.

109. 16 U.S.C. § 703.

110. Id.

111. Migratory game birds are those for which there is a hunting season and include, ducks, geese, swans, doves, pigeons, cranes, rails, coots, and woodcocks. 50 C.F.R. § 20.11.

112. 50 C.F.R. § 20.20(b).

113. 50 C.F.R. § 21.11.

114. 16 U.S.C. § 707a.

115. 50 C.F.R. § 20.20(c).

116. 16 U.S.C. §§ 718 et seq.

117. 16 U.S.C. § 718a.
118. 16 U.S.C § 668a.
119. 50 C.F.R. § 22.22.
120. Id.
121. Id.
122. “The Bald Eagle: uplifting news about our Nation’s symbol,” U.S. Fish and Wildlife Service informational brochure (June, 1994).
123. Id.
124. 50 C.F.R. §§ 22.23 and 22.31(h).
125. Laughing Coyote v. Fish and Wildlife Service, CV F-93-5055 DLB, (E.D. Cal. July 8, 1994).
126. Plaintiff, Laughing Coyote, was certified as an Indian and enrolled as a California Indian under the Act of September 21, 1968 (82 Stat. 860 & 861), and enrolled on the California Judgment Fund Roll of California Indians, certifying that he was 11/16 Mono/Yokut. The court held that tribal enrollment in a federally recognized tribe was only one indication of whether or not the issuance of an Eagle Feather Permit is appropriate and necessary “to continue ancient customs and ceremonies that are of deep religious and emotional significance.” Id. at 8.
127. Opinion of the Solicitor of the Department of the Interior, Opinion M-36979 (October 4, 1993). See also Pub. L. No. 102-575 § 3406(b)(23); Donnelly v. U.S., 228 U.S. 243 (1913); Elser v. Gill Net Number One, 246 Cal.App.2d 30 (1966); and Mattz v. Arnett, 412 U.S. 481 (1973).
128. Donnelly v. U.S., 228 U.S. 243 (1913); Elser v. Gill Net Number One, 246 Cal.App.2d 30 (1966); and Mattz v. Arnett, 412 U.S. 481 (1973).
129. Mattz v. Arnett, 412 U.S. 481 (1973).
130. Arnett v. Five Gill Nets, 48 Cal.App.3d 454 (1975), *cert. denied*, 425 U.S. 907 (1976).
131. 42 Fed.Reg. 40,904-40,905 (Aug. 12, 1977).
132. Id. at 40,904(a).
133. 25 C.F.R. § 250.1(a) (1988).
134. People v. McCovey, 36 Cal.3d 517 (1984), *cert. denied*, 469 U.S. 1062 (1984).

135. See, e.g., Stephen Suagee, A Tribal Strategy Increases Streamflows to Restore a Facility, 9 Natural Resources & the Environment 23, 27 (Winter 1995).

136. Parravano v. Babbitt and Brown, 837 F.Supp. 1034 (N.D. Cal. 1993); 861 F.Supp. 914 (N.D. Calif. 1994), *aff'd* 70 F.3d 539 (9<sup>th</sup> Cir. 1995), *cert. denied* 116 S.Ct 2546 (June 24, 1996).

137. For example, the Lewiston Dam in Northern California completely prevented salmon and steelhead from migrating back to traditional spawning grounds in the Trinity, Sacramento and Pit Rivers. The Pit River, Shasta, Wintu, and Maidu peoples can no longer access these traditional foods through customary fishing practices. A similar situation exists in Central California on the Tule River Reservation.

138. In the Upper Eel River, Pacific Gas and Electric Company (PG&E) diverts Eel River water through its Potter Valley Project, which consists of an upper storage reservoir and a lower diversion dam, to generate power and to provide a supplemental water source for irrigation, and municipal and recreational uses in the neighboring Russian River Basin. This trans-basin diversion has had devastating effects on the fisheries of the Eel River and the Round Valley Tribes whose reservation lies downstream of the Project and is bounded by the mainstem, north and middle forks of the Eel River. Currently, the tribes are pressing PG&E to accept a proposal to modify the Project's operations to increase flow releases to the Eel River as a first step towards restoration of its severely depleted salmon and steelhead runs. This recent tribal initiative caps a 15-year effort to force the licensing agency, the Federal Energy Regulatory Commission, to take decisive measures to protect the tribes' federally-reserved water and fishing rights in the Eel River. See Covelo Indian Community v. Federal Energy Regulatory Commission, 895 F.2d 581 (9<sup>th</sup> Cir. 1990).

139. 20 U.S.C. §§ 2901-2906.

140. See David Getches et al., Federal Indian Law, Cases and Materials 3d ed. (West Publishing, 1995), at 773.

141. Dr. Michael Krauss, "The Status of Native American Language Endangerment," Stabilizing Indigenous Languages, at 16-21. Dr. Krauss is the former president of the Society for the Study of Indigenous Languages of the Americas.

142. "Keeping the Languages Alive," News from Native California, Vol. 6, No. 4, (Fall, 1992).

143. "Preserving the Future," News from Native California, Vol. 6, No.3, (Winter, 1994).

144. Interview, Mary Bates Abbot, Director, Native California Network, May 1997.

145. Id.

146. Id.

147. Id.

148. Lee Doris, "Locating the Live Museum," News from Native California, Vol. 4, No.1 (Fall, 1989).

149. Katherine Saubel and other elders have assembled a tremendous body of knowledge, particularly about the Cahuilla language, and the Malki Press has made much of it available to the public. "Malki has their own press," says Katherine, "and they tell the truth, correct old lies and misrepresentations and mistakes." Jeannine Gendar, "Food for Thought," News from Native California, Vol. 8, No. 4 (Spring 1995).

150. Ya-Ka-Ama is located in Sonoma County. The mandate given by its founders is to strengthen the Indian communities in its service area by coordinating, promoting and developing programs that lead to political and economic self-sufficiency.

151. The American Indian Museum Studies Program at the Center for Museum Studies, Smithsonian Institution, provides stipends and training at no cost to Indian tribal museum employees. The Program distributes announcements several times annually for a variety of training opportunities. Eligible persons must submit an application, from which the participants are chosen. Generally, the program is limited to 15 people for each workshop.

152. Karen Brown, "The Indian Library Services Project," News from Native California, Vol. 2, No. 6 (Winter 1989).

153. 20 U.S.C. §§ 80q-80q-15 (1990).

154. 20 U.S.C. § 80q-9.

155. 20 U.S.C. § 80q-9(c).

156. 20 U.S.C. § 80q-11.

157. Interview, Hoopa Tribe's Anthropology Consultant, Lee Davis, May 1997.

158. Id.

159. Interview, Lowell Bean, prominent anthropologist whose work focuses primarily on the Cahuilla and their neighboring tribes, June 1997.

160. Id.

161. 43 C.F.R. part 10. Members of the Cultural Task Force interviewed several distinguished anthropologists who regularly consult with tribes, in addition to tribal museum administrators. None were aware of this significant funding source. The request for proposals was not published in the C.F.R., but was circulated by mail to federally recognized tribes. Unless the tribal office was able to forward the request to the relevant museum employee, the existence of the program went



unnoticed.

162. Interview, David Hostler, Director, Hoopa Tribal Museum, April 1997.

163. Id. This practice is fairly common and has been repeatedly discussed on panels presented by the California Indian Basketweavers Association and in ACCIP testimony from basketweavers.

164. Interview, Lee Davis, *supra* note 157.

165. The Indian Child Welfare Act is also discussed in §§ VIII and X of the ACCIP Community Services Report.

166. Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq.

167. One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. "An Indian child may have scores of, perhaps more than a hundred, relatives who are considered close, responsible members of the family. Many social workers, untutored in the ways of Indian family life, or assuming them to be irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." H.R. Rep. No. 1386, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

168. Indian Child Welfare: A Status Report (U.S. Department of the Interior, 1988), Table 1-2.

169. H.R. Rep. No. 1386, 95<sup>th</sup> Cong. 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

170. Id.

171. American Indian Law Deskbook, Conference of Western Attorneys General (University Press of Colorado, 1993), at 362 [citing H.R. Rep. No. 1386, 95<sup>th</sup> Cong. 2d Sess. 11 (1978)].

172. 25 U.S.C. §§ 1911(a)-(c).

173. 25 U.S.C. § 1915.

174. See, e.g., Edward L. Thompson, Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts, 15 Am. Ind. L. Rev. 1, 62 (1990) (discussing interaction of Oklahoma law and the ICWA with respect to involuntary termination of parental rights proceedings.)

175. The Sacramento Area Office is designated in federal regulations to receive notice under the Act relative to Indian child custody cases occurring in California.

176. Notice must be served on the BIA only when there is uncertainty about the identity or location of the child's tribe, parent or Indian custodian. When the child's tribe is known, direct

service on the tribe is required.

177. California Rules of Court, Rule 1439.

178. The Indian Child Welfare Act: Indian Homes for Indian Children, Conference Proceedings, Aug. 22-24, 1990, American Indian Studies Center (UCLA, 1991), at iv.

179. The Judicial Review and Technical Assistance Project, and the Juvenile Court Improvement Project, California Judicial Council.

180. Interview, Toni Hertz, Administrative Office of the Courts, February 1996.

181. In re Junious M., 144 Cal. App. 3d 786 (1983); In re Robert T. 200 Cal. App. 3d 657 (1988).

182. See § VII of the ACCIP Community Services Report.

183. The Court noted that "Congress perceived the States and their courts as partly responsible for the problem it intended to correct." Mississippi Band of Choctaw v. Holyfield, 490 U.S. 30, 45 (1989).

184. See, e.g., In re Bridget R., 41 Cal. App. 4<sup>th</sup> 1483 (1996).

185. See, e.g., In re Alexandria Y., 45 Cal. App. 4<sup>th</sup> 1483, *pet. for review denied*, 1996 Cal. LEXIS 5304, September 18, 1996.

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