THE ACCIP RECOGNITION REPORT

Equal Justice for California

A Report by
The Advisory Council on California Indian Policy
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RECOGNITION TASK FORCE

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RECOMMENDATIONS

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

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

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

The Advisory Council recommends that the 12-year Commission, which would be based in California, would need appropriate funding. It is suggested that at least $250,000 a year be appropriated for the lifetime of the Commission. This would mean a total cost of $3,000,000 to complete the acknowledgment cases in California. It should be remembered that funding the BIA's Branch of Acknowledgment and Research (BAR) for the last 19 years has not helped to resolve the acknowledgment petitions of the California tribes.

2. **As an alternative to legislative action, the Secretary of the Interior should institute fundamental policy changes to the Federal Acknowledgment Process on behalf of California's unacknowledged tribes. These changes should include:**

   a. **Use of rebuttable presumptions to: (1) mitigate the historical effects on California's unacknowledged tribes of repressive federal and state Indian laws and policies that sought to destroy or discourage essential aspects of tribal authority and culture; and (2) extend federal acknowledgment to tribes meeting the previous federal acknowledgment standards;**

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

Summary

The Advisory Council on California Indian Policy was created by Congress in 1992 to conduct a comprehensive review and analysis of the many problems facing California Indians. At every hearing the Council conducted, it was confirmed that tribal status clarification is the primary issue of concern to California Indians.

The term "unacknowledged" refers to those Indian groups whose status as tribes has never been officially "recognized" by the United States or, if recognized in the past, is now denied. There are more unacknowledged Indian tribes in California than there are in any other single state.

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

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

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

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

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

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

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

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

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

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

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

Finally, the requirement that a "predominant portion" of the membership of the petitioner comprise a community as defined is problematic. We recommend that a "substantial portion" be set as the standard. It would reflect the unique problems created by wide geographic dispersal and dislocation of California Indian groups.

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

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

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

vital and is essential for the petitioning tribes of California, and should be supported by adequate funding.

At least $500,000 a year for the next 12 years should be appropriated for this technical assistance. Two aspects of assistance relative to the acknowledgment process should be provided: (1) assistance in completing the petition and review process, and (2) assistance in developing realistic economic development plans upon acknowledgment.

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

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

OPENING STATEMENT

Ten of the 16 tribally-elected Advisory Council representatives served on the Recognition Task Force. The Task Force gathered information from Indian communities throughout California through public hearings and personal contacts. Even those Task Force members who are from unacknowledged tribes were not prepared for the frustration, despair and in some instances, anger expressed by the unacknowledged tribes in every community. Additionally, the Task Force was stunned by the statistic provided by the Bureau of Indian Affairs (BIA) at the first Advisory Council meeting: two-thirds of the California Indians are NOT recognized. Again and again, those testifying at the public hearings expressed the frustration of working with an acknowledgment process that has been in place since 1978, yet has favorably resolved only one California petition. The frustration is with the lack of a clear procedure for working through the process. The Indian people testifying expressed a clear sense of urgency, placing responsibility upon the Advisory Council and the Recognition Task Force to assist the tribes. Many came forward and stated that they had given the same testimony for generations and nothing had changed. Strong men shed tears and pleaded with the Task Force and Advisory Council to do something. In the end, both the Advisory Council and Task Force members came away with the admonition—the voice of the unacknowledged tribes—directing them to attempt to correct what is perceived as a conspiracy to deny whole peoples their identity.

I. Introduction

There is a crisis in California that demands attention. There are over 80,000 California Natives whose tribes are not acknowledged by the federal government.[1] Recently, Congress has begun to focus some attention on this problem, and to consider the possibility of developing remedial legislation, in consultation with *all* California tribes. In the Advisory Council on California Indian Policy Act of 1992,[2] Congress established a statewide Indian Council consisting of representatives of federally recognized, terminated and unacknowledged tribes. The Advisory Council's mandate includes submission of recommendations to Congress regarding remedial measures to address the special status problems of California's terminated and unacknowledged tribes.

Lack of federal recognition is devastating to unacknowledged Native Americans. To belong to a tribe and participate in its community is central to the identity and way of life of most Native Americans. Moreover, most BIA services and other federal Indian programs are offered to Native Americans not as individuals, but as members of a political entity—the tribe—that has a special, government-to-government relationship with the federal government. In most cases, unacknowledged tribes receive no funding from the federal government. Adequate funding is necessary to support and enhance the informal networks within their communities, to raise their employment levels through job training programs and scholarship funds, and to provide health services and initiate economic development. Therefore, federal acknowledgment is crucial for tribes and their members to ensure their own cultural survival.

Because there are so many unacknowledged Indian tribes in California, the issue of federal

acknowledgment is an urgent problem. The question of why some tribes are recognized and others are not is linked to the extremely complex social and historical circumstances that make California and its indigenous people unique. The United States' dealings with the California Indians over the past century-and-a-half have directly influenced and, in a very real sense, created the complex tribal and individual Indian status problems that persist in California today. The tangled and haphazard nature of federal legislation and legal maneuvering have created a history that is complicated and often contradictory relative to rulings and regulations regarding the status of California tribes.

The federal government must take responsibility for its past actions towards California Indian tribes. This responsibility must begin with the enactment of the California Tribal Status Act, and by providing a clear definition of California Indian for purposes of all federal Indian programs and services. Most unacknowledged tribes have some form of government and maintain traditional values and ceremonies within their community. They resemble recognized tribes in most material aspects, except they lack acknowledgment by the United States, and their institutions and communities have not been influenced by the BIA. Recognition will provide them with the potential to acquire land and water rights for their landless communities, to exercise fully their religious freedom, and to instill in their communities, especially their youth, a greater sense of identity and pride. Most importantly, recognition will extend to them the status and authority of a sovereign tribal entity.

A. Tribal Existence v. Federal Recognition

Tribal existence and identity do not depend on federal recognition or acknowledgment of the tribe. Federal recognition does not create tribes, rather it recognizes social/political entities that predate the United States. It acknowledges a trust relationship between the tribe and the federal government, and entitles tribes and their members to certain federal benefits and protection of their culture and sovereignty. In practical terms, federal acknowledgment triggers the operation of the whole body of federal Indian law.

The definition of what constitutes a tribe is crucial to the acknowledgment process. The word "tribe," however, has both legal and ethnological definitions, and has been used to define a wide variety of different entities in California that differ markedly in their history and organization. Thus, a group of different ethnological tribes may be one tribe under the legal definition. For instance, the Round Valley Tribes consist of several distinct ethnological groups, but is recognized as a single tribe by the federal government. This situation reflects the federal government's practice of placing various groupings of historic California Indian tribes on a single reservation, a practice that was not uncommon in the early history of federal-Indian relations and which persisted into the early twentieth century in California when lands were purchased for homeless California Indians. Other California tribes joined alliances voluntarily in response to changing conditions. Because the term "tribe," as defining a legal entity, has been used to describe such a wide variety of different entities in California, the application of a uniform policy of federal acknowledgment is more difficult to maintain in California than in any other region of the United States.

B. Evolution of the Term "Federal Recognition"

During the Indian treaty-making period and prior to the advent of the Allotment Policy of the 1880s, the United States treated all tribes as sovereigns; tribes were "recognized" by entering into treaties with the federal government.[3] However, even after Congress ended treaty-making,[4] it continued to pass legislation regarding "Indians" and "Indian tribes," without defining those terms. Courts interpreted these statutes as applying only to tribes "recognized by the political department of the government,"[5] yet no single definition of "recognition" existed.

Beginning in 1934, Congress began to define the term "tribe" in Indian legislation, and finally codified the distinction between recognized and unrecognized tribes in the Indian Reorganization Act (IRA):

> The term "Indian" as used [in this Act] shall include persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[6]

In the Act, the term "tribe" was defined as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[7] The Department of the Interior and the BIA were given broad discretion in determining which groups fit the definition.[8] Since that time, Congress has created over 40 different statutory definitions of the terms "Indian" and "Indian tribe" in subsequent legislation.[9]

Until 1978, the BIA determined tribal status on a case-by-case basis as tribes requested benefits or services. According to the BIA, a particular group constituted a tribe or band if:

1. the group had treaty relations with the United States;
2. the group had been named a tribe by Act of Congress or executive order;
3. the group had been treated as having collective rights in tribal lands or funds, even if they were not expressly designated a tribe;
4. the group had been treated as a tribe or band by other Indians; or
5. the group had exercised political authority over its members through a tribal council or other governmental forms.[10]

Tribes that were denied benefits often litigated their recognized status.[11] Finally, in 1978, the Department of the Interior promulgated uniform standards for tribes seeking recognition. These regulations are based on case law, administrative practice and new concepts. The Branch of Acknowledgment and Research (BAR) was created to process the petitions. In 1979, the BIA published the first list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs."[12]

Since the BAR was established, over 40 California tribes have submitted petitions for

acknowledgment. Only one California tribe, the Death Valley Timbi-Sha Shoshone Band, has successfully completed the process.[13]

In 1994, the Department of the Interior attempted to make attaining recognition even more difficult by declaring that only "historic tribes" were eligible for acknowledgment. The Department further required "clear and convincing evidence" that a group met all criteria for acknowledgment, including existence as an "historic tribe." Congress quickly responded by invalidating the restrictive Interior policy.[14] However, the attempt to restrict acknowledgment to a narrowly defined group of "historic tribes" remains illustrative of the BAR's inability to fairly evaluate acknowledgment petitions.[15]

II. A History of Injustice

Historical considerations play a central role in any evaluation of the complex situation of the California Indians, especially where questions of federal recognition and eligibility for federal programs and services are at issue. Thus, the drafters of legislative measures to address the problems of California Indian groups cannot be fully informed without an examination of the unique and, in many aspects, tragic history of the federal-Indian interaction in California during the last century-and-a-half. This history provides some initial answers to the questions of why so many California tribes remain unacknowledged by the federal government, and why so many remain homeless in their ancestral homeland.

Several historical events create a need for California-specific solutions to the California tribes' status issues: (1) the federal government's negotiation of 18 treaties with California tribes during the 1850's and the Senate's refusal to ratify those treaties; (2) the 96% reduction in the population of California's tribal people brought about by the unprecedented onslaught of white miners and settlers during the Gold Rush era and the drive for statehood for California; (3) the BIA's creation of lists or "rolls" of California Indians for purposes of distributing land claims judgments; (4) the federal government's provision of services to "the California Indians" as a group, including creation of public domain allotments for many California Indians who were not settled on rancherias or reservations; and (5) the termination of 40 California tribes during the 1950s and 1960s. Moreover, there has always been, and continues to be, a blatant federal neglect of the California tribes.[16] As a result of these events, the federal government's relationship with the tribes is unique, which suggests that California tribes should not be subjected to the existing process for achieving tribal recognition. Rather, a process should be established that takes the unique needs and special circumstances of California Indian groups into account.

A. The California Indian Treaty Period (1851-1852)

Prior to the arrival of the first Spanish expedition in 1766, the Indians of California were divided into about 500 separate and distinct bands, and enjoyed the sole use, occupancy and possession of all lands in the state. The California Mission Period, extending from 1769 to 1848, had a devastating effect on the aboriginal cultures. Yet, under Spanish and later Mexican rule, the Indians' right of occupancy was, to some extent, protected. After Mexico's defeat in the

Mexican-American War, and the imposition of American rule over California in 1848, this situation changed drastically.

The 1848 Treaty of Guadalupe Hidalgo ended the war between the United States and Mexico and resulted in a large cession of land to the United States. This included the lands that now comprise the State of California. By the terms of the Treaty, the United States agreed to protect the inhabitants of California in the free enjoyment of their liberty and property.[17] Even though efforts were subsequently initiated by the United States to investigate and resolve the Indian title question, these efforts were thwarted by the discovery of gold in California in 1848 and the influx of thousands of Anglo-Europeans, who immediately clashed with the Indians. The admission of California to statehood in 1850 only increased the resistance of the new State and its white citizens to any federal efforts to settle the Indians' aboriginal land claims.[18]

By the Act of September 30, 1850, Congress appropriated funds for the President to appoint three commissioners to study the California situation and "negotiate treaties with the various Indian tribes of California."[19] Treaty negotiations took place from March 19, 1851, to January 1852, during which time the three commissioners met with some 402 Indian chiefs and headmen representing approximately one-third to one-half of the California tribes.[20] Eighteen treaties, signed by 139 of these representatives, were eventually negotiated,[21] purporting to transfer vast Indian land-holdings in exchange for more limited reservations and the promise of federal assistance in the form of schools and agricultural implements.

Contemporaneous with these treaty negotiations, Congress passed the Land Claims Act of 1851,[22] which provided that all lands in California would pass into the public domain, except those to which valid claims were presented within two years of the date of the Act. The California Indians were not informed of the need to present their claims and, therefore, failed to meet the 1853 deadline. The inherent injustice of this statutory foreclosure of aboriginal land claims, without notice to the Indians, was ignored in the rush to claim the lands for the new State of California.

Even this injustice, however, pales in comparison to the federal government's subsequent breach of trust: the United States Senate, under pressure from the California congressional delegation, refused to ratify the 18 California Indian treaties.[23] This set in motion a series of historical events, leading eventually to the current federal recognition problems faced by many of California's unacknowledged tribes. Not only did the Senate refuse to ratify the treaties, it also placed them under seal until their subsequent "discovery" some 50 years later. This action effectively prevented the Indian signatories, some of whom had already abandoned their traditional homes and relocated to the treaty lands, from learning of the Senate's dishonorable action.

Had they been ratified, the 18 treaties would have established an Indian land base in California of approximately 8.5 million acres and provided guarantees of teachers, farmers, carpenters and other workmen to assist the Indians in adjusting to a more sedentary, agrarian lifestyle. The treaties also would have constituted formal recognition of most, if not all, of the

Indian tribes whose status the federal government now questions.[24]

The Senate's refusal to ratify the treaties served as the death knell for large numbers of California Indians and rendered the remainder extremely vulnerable to the hostile non-Indian population.[25] Deprived of protected legal title to their lands, the California Indians, with the exception of certain bands of Mission Indians who had been confirmed in their occupancy by early Spanish and Mexican land grants, became homeless. The impact on the California Indians of the loss of their aboriginal lands is immeasurable. Land based cultures that had existed for thousands of years were disrupted and subjugated socially, politically and economically to a foreign cultural archetype that placed individual property interests above communal concepts of property and social organization. Vast, resource-abundant areas essential to indigenous subsistence and trade-based economies were expropriated without compensation. Even when the Indians could access traditional gathering areas, they found that the food sources, such as acorns, which were essential to Indian subsistence and survival, had become fodder for herds of cattle and swine, resulting in widespread starvation of those tribes whose lands were taken by farmers and ranchers.[26]

Today, California Indians own only a small fraction of the amount of land that was promised by the treaties: more than one-fourth of California's recognized tribes possess fewer than 50 acres of land each. In addition, the majority of California Indians are excluded from federal Indian programs, since most programs require membership in a recognized tribe. In sum, this early breach of faith by the United States set the standard for policies and attitudes that persist to this day in the federal government's treatment of the California Indians.

B. The Extermination Period (1853-1890)

To say that the native peoples of California suffered greatly with the influx of Anglo-Europeans during the 1800s is to grossly understate the brutality with which they were treated. The California Indian population in 1851 has been conservatively estimated at 150,000, with some estimates as high as 200,000. Thirty-nine years later, the report of the Commissioner of Indian Affairs for 1890 recorded a population of 15,283. This represents an approximately ninety-six percent (96%) drop from the conservative 1851 population estimate. In the interim, Indian people were forced off their land, relocated away from populated areas and forced into indentured servitude for the non-Indian population. It was not unusual during this wild period for groups of California Indians to be hunted down and slaughtered with impunity. Indian culture was brutally repressed, and the federal government's weak attempts to protect isolated Indians from genocide (notably, the term "extermination" was in popular usage at the time) by certain elements of the non-Indian population were largely unsuccessful.[27] Some Indian groups were forcibly removed to the four California reservations authorized by statute[28] and to other military forts.[29] Yet, even this "solution" afforded the Indians only a small measure of physical protection and subsistence.

C. The Allotment Period (1887-1934)

Shifts in federal Indian policy at the national level exacerbated the problems of Indians in California. The passage of the General Allotment Act in 1887 divided the tribal land bases nationally by issuing thousands of individual allotments of land, and opened the "excess" (i.e., unallotted) lands of the few California Indian reservations to non-Indian settlement. As a result, even more lands passed out of Indian ownership.

In 1890, Congress appointed the Smiley Commission to conduct a survey of the conditions of Southern California Indians. The Commission's work culminated in the passage of the Mission Indian Relief Act of 1891,[30] which set aside small parcels of land in Southern California for the Indians. Despite this well-intentioned, though belated, effort to provide for some of the Indians, the situation of most California Indians at the turn of the century was grim. The incidence of disease and death was exceedingly high, tribal culture in many areas had been devastated, and most of the dwindling Indian population sought refuge in remote areas of the state where they were sometimes tolerated, but rarely accepted.[31]

At the dawn of the twentieth century, barely 15,000 California Indians had survived the previous half-century of genocide and neglect. Most were landless and living in deplorable conditions, poverty-stricken, ill, and isolated from the non-Indian population.

D. The Homeless California Indian Act Period (1906-1933)

In 1905, the injunction of secrecy that the Senate had placed on the 18 unratified treaties in 1852 was removed by order of the Senate, and for the first time the public was informed of their existence. The Indian Appropriation Act for the 1905 fiscal year authorized an investigation of conditions among the Indians of northern California and directed that some plan for their improvement be submitted to the next Congress.[32] C.E. Kelsey, a San Jose attorney and officer of the Northern California Indian Association, was designated special agent to conduct the investigation. He commenced his investigation on August 8, 1905, and during the next several months personally inspected almost every Indian settlement between the California-Oregon border and Mexico.[33] In response to Kelsey's report and at the behest of government officials and citizens sympathetic to the plight of the California Indians, Congress passed a series of appropriation Acts providing funds to purchase isolated parcels of land in the central and northern parts of the state for the landless Indians of those areas.[34] A number of Indian communities and remnant groups of larger aboriginal tribes and bands acquired modest parcels of land and were given some measure of protection by the federal government. These land acquisitions resulted in what has been referred to as the Rancheria System in California.

E. The Indian Reorganization Period and the California Indian Claims Cases (1934-1969)

In 1934, Congress passed the Indian Reorganization Act (IRA).[35] The thrust of the IRA was to strengthen tribal government by eliminating the "absolutist" executive discretion previously

exercised by the Interior Department and the Office of Indian Affairs.[36] Pursuant to the IRA's policy of reconstituting tribal governments, the BIA supervised elections among the California tribes, including most of the rancheria groups, on whether to accept or reject the tribal reorganization provisions of the IRA.[37]

The IRA brought the allotment of tribal lands to a halt, stemmed the dramatic loss of Indian land that had become the hallmark of the Allotment Period[38] by prohibiting the transfer of Indian land except under narrowly defined conditions,[39] and introduced a new era of federal support for tribal self-government. Despite these positive federal initiatives, few California tribes benefitted economically from the IRA because of the continuing inequities in the funding of federal Indian programs in California.[40]

In addition to the stabilization of the Indian land base which occurred through the IRA's prohibition on the alienation of Indian lands, efforts were made to obtain relief for the uncompensated taking of aboriginal lands by the United States. Immediately prior to and during the Indian Reorganization Period, claims were brought against the United States to compensate the California Indians for loss of their aboriginal lands, including those identified in the 18 unratified California treaties. Collectively known as the California Indian Claims Cases, they established a further precedent for dealing with the California Indians, for some purposes, as a discrete, identifiable group. This approach by the government ultimately fueled subsequent controversies over the tribal status of some of the Indians listed on the rolls prepared for distribution of the claims awards.

In 1928, Congress passed the California Indians' Jurisdictional Act, which permitted the Attorney General of the State of California to sue the federal government on behalf of "the Indians of California" for compensation for the loss of the reservations and other benefits promised under the unratified treaties.[41] California Indians were defined as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."[42]

A second case by the California Indians was authorized by the U.S. Indian Claims Commission Act in 1946, and concerned compensation for the land that had been ceded in the unratified treaties. The distribution roll in this case, assembled from 1950-55, contained 36,095 California Indian names. These two California Indian land claims cases took over half of the 20th century to settle—from 1928 until 1963, with some additional legal activity up to 1974. The first case was litigated in the U.S. Court of Claims until its settlement in 1944. Distribution of payment occurred in two stages, one in the 1950s and the other in 1974. The second case was settled in 1963, although some claims remain outstanding to this day.

The California Indian Claims Cases added to the confusion over the tribal status of California Indians. The courts allowed the Indians of California to pursue claims against the United States as a class, but that decision did not imply that individual California tribes had abandoned tribal relations.[43] Indeed, some tribes initially had pursued separate claims.

As the Claims Cases wound their way to conclusion, the winds of federal Indian policy once again shifted, this time to a policy that targeted almost 50% of California's tribes for termination.

F. The Termination Period (1944-1969)

Even the limited efforts of Congress and the BIA to address the needs of California Indians at the turn of the century, and again through implementation of the IRA, were halted by the federal government when it adopted a policy of termination. California was one of the States where this policy was initially and most widely implemented. Thus, the termination policy is yet another example of the federal government's negligent treatment of California Indians.

In 1953, a concurrent resolution was passed in the House of Representatives that declared it "to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas ... should be freed from Federal supervision and control ...," and that the BIA should thereafter be abolished in those states.[44] Shortly thereafter, Congress passed Public Law 280,[45] which transferred civil and criminal jurisdiction over Indian lands to the States included in the Act. As a result of these two Acts, the BIA presumed that all tribes in California would be terminated; meaning, their special status as sovereign governments having a trust relationship with the United States would be ended. In preparation for this eventuality, the BIA sharply curtailed all of the services that were being provided to all California Indians,[46] even though no tribes had actually been terminated. In fact, federal health services to all California Indians were completely discontinued by 1955.[47] In 1958, Congress passed the Rancheria Act, which undertook to terminate the status of forty-one (41) California rancherias.[48]

In addition, the BIA failed to seek appropriations for the improvements and services promised to the tribes slated for termination.[49] Depositions and documents obtained during litigation of the California rancheria un-termination cases in the 1970s revealed that, while a specific appropriation was authorized by Congress to implement the trust obligations of the federal government under the terms of the legislation, a secret agreement was reached between high federal officials and the Congressional subcommittee that reviewed the legislation.[50] Under the terms of the agreement, the Bureau of Indian Affairs agreed not to seek any special appropriation to carry out the specific statutory and trust obligations imposed on the government under the Act. Instead, in implementing the Rancheria Act the Bureau funded its activities entirely out of its regular appropriations for California, resulting in the gross under-funding of the termination program (and the benefits promised to the Indians under the Act). This unconscionable action also diverted the already scarce funding for Bureau programs[51] in California away from needy reservations and rancherias not included in the termination legislation.

Thus, the Rancheria Act ultimately affected all of California's recognized tribes, whether or not they had been slated for termination. In addition, it had far-reaching effects on those California Indian groups whose status as tribes had never been acknowledged by the government

or, if previously acknowledged, had been subsequently ignored by the government and its agencies. In effect, the policy shift from tribal organization and support for tribal self-government to termination of federal status effectively precluded these unacknowledged tribes from obtaining services for the first time from the BIA. The BIA was not about to recognize these tribes as eligible for federal services when it was both eliminating the level of services to existing federally recognized tribes and terminating the trust relationship with some of those previously recognized tribes.

One must keep in mind that the blueprint for termination of the California tribes was cast as early as 1944 in John G. Rockwell's report entitled "The Status of the Indian in California Today."[52] Rockwell's "inescapable" conclusion was that "the restrictive control exercised by the Federal Government over these Indians is a handicap rather than an assistance."[53] Rockwell reviewed the various reports prepared in the past on the California Indians and concluded that there was unanimity of opinion that

> [t]he institution of wardship can accomplish no appreciable good in this State and the Indian Bureau should definitely undertake action looking toward the abolition of wardship with its attendant services and controls.[54]

Rockwell's words and his attitude that termination of the federal trust relationship and rapid assimilation of the Indians was in their best interests are a striking contrast to the policy statements of only a decade earlier, when the government had announced its policy of reorganization and recognition of tribal communities as the only way to effectively stem the devastating social and economic consequences of the failed policy of allotment and assimilation.[55]

The consequences of this radical shift towards termination of the federal-Indian trust relationship and the withdrawal of federal services to California Indians foreclosed, for yet another 34 years, any hope that California's unacknowledged tribes would receive any official recognition from the federal government. As the federal government commenced its withdrawal from California, first in the areas of Indian health and education,[56] and later as reflected in the termination of the rancheria lands and tribal communities, there was no possibility for tribes to be recognized by the government if they had never previously received federal services.

The dark curtain of misguided federal Indian policy had once again rung down on a more promising era of support for tribal reorganization and self-government. Thus, the push to terminate California's tribes effectively cut short implementation of the Indian Reorganization Policy in California after a mere decade, and it would be a long wait—until 1978[57]—before the federal government offered any opening to the recognition of additional Indian tribal groups in California.

G. The Modern Era

The aforementioned policy eras illustrate the complex nature of federal-Indian relations in California and provide a backdrop to the current debate over the fairness of applying the federal

acknowledgment process to the unique situation of California's unacknowledged tribes. Fueling this debate is the fact that current federal Indian policy restricts most federal Indian programs to federally recognized tribes and their members, in effect treating the unacknowledged California Indians as non-Indians.

Attempts to rationalize this current policy are contradicted by the lengthy history of the federal government's past dealings with the California Indians as a discrete group for purposes of eligibility for federal programs and services.[58] For example, most of the reservations and rancherias in the state were acquired pursuant to appropriations made for the purpose of providing land to "homeless California Indians,"[59] not to identified tribes. In addition, approximately 2580 public domain allotments were made to California Indians, many of which are still held in trust for unacknowledged Indians.[60]

As a result of the California Indian Claims Cases, the BIA maintains judgment rolls listing the individuals who can rightfully claim to be indigenous to California.[61] These judgment rolls list all individuals who "were residing in the State of California as of June 1, 1852, and their descendants now living in said state." They reflect the United States Court of Claims' rejection of the argument that "the Indians of California," as so defined, were not an "identifiable" group of Indians within the meaning of the claims legislation.[62] Thus, many California Indians can point to these judgment rolls as federal government certification of their Indian status. Moreover, the BIA still administers trust funds arising out of the Claims Cases for the benefit of the California Indians.[63] Nevertheless, that same government continues to deny the identity of California's unacknowledged tribal members, for federal purposes, as Indian people.[64]

As we shall see in the following discussion, the injustice of the federal government's denial of its trust obligations to the California Indians is further exacerbated by its creation of a federal acknowledgment process that offers little hope for California's unacknowledged tribes.

III. The Federal Acknowledgment Process—A Continuing Injustice

In 1978, the BIA attempted to resolve ambiguities in the Executive Branch's past approaches to questions concerning the "recognition" or "acknowledgment" of Indian tribes by adopting regulations, setting forth criteria and a petition process through which an Indian group could be formally acknowledged by the United States.[65] The BIA created the Federal Acknowledgment Project, subsequently renamed the Branch of Acknowledgment and Research (BAR), and charged it with the responsibility of reviewing petitions for federal acknowledgment. By the time the BAR staff was organized in October, 1978, 40 tribes nationally had submitted petitions for acknowledgment. To date, the BAR has resolved only 28 petitions. In the meantime, 145 additional petitions have been submitted.[66]

In California, over 40 tribes have submitted petitions for federal acknowledgment. To date, only one petition from an aboriginal California tribe has been finally resolved through the BAR process—the Death Valley Timbi-Sha Shoshone Band was acknowledged in 1983.[67]

Historically, BAR has accepted Letters of Intent and offered little or no assistance, while California tribes, with limited or no resources, stumble through the regulations and the petition process. BAR's own "Summary Status of Acknowledgment Cases," attached hereto as Exhibit 1, shows that there are only three California tribes on "Ready," two of which were previously one tribe. Most of California's petitioning tribes have only been able to count on receiving "Obvious Deficiency" (now called "Technical Assistance") letters. (For samples of these letters, see Exhibit 3.) The information provided to the Advisory Council by BAR has been used to compile statistics that clearly demonstrate that California tribes are not making it through the acknowledgment process.[68] The following is a summary of the actions taken by BAR on California submissions:

- One tribe acknowledged - Death Valley Timbi-Sha Shoshone Band, 1983
- Two tribes denied acknowledgment - Kaweah Indian Nation, 1985
  United Lumbee Nation, 1985
- Three tribes put on "Ready" status - Juaneno (#84a), 1996
  Juaneno (#84b), 1996
  Tolowa Nation, 1996

In addition, one tribe, the Ione Band, has been acknowledged outside of the BAR process.[69]

The submissions by California tribes to the BAR are as follows:

- Forty-three letters of intent
- Fifteen tribes (in addition to those whose petitions have been resolved) have submitted documented petitions -
  - American Indian Council of Mariposa County (a.k.a. Yosemite) (documentation submitted on 4/19/84)
  - Shasta Nation (documentation submitted on 7/24/84)
  - Yokayo (documentation submitted on 3/9/87)
  - Hayfork Band of Nor-El-Muk Wintu Indians (documentation submitted on 9/27/88)
  - Indian Canyon Band of Coastanoan/Mutsun Indians (documentation submitted on 7/27/90)
  - North Fork Band of Mono Indians (documentation submitted on 5/15/90)
  - Wintu Tribe (documentation submitted on 8/25/93)
  - Costanoan Ohlone Rumsen-Mutsen Tribe (partial documentation submitted on 1/26/95)
  - Maidu Nation (documentation submitted on 3/8/95)
  - Muwekma Indian Tribe (documentation submitted on 10/11/95)

Amah Band of Ohlone/Coastanoan Indians
(documentation submitted on 8/22/95)
Ohlone/Costanoan-Esselen Nation (documentation submitted on 8/23/95)
Tsnungwe Council (partial documentation submitted on 8/8/95)
Fernandeno/Tataviam Tribe (documentation submitted on1/16/96)
Antelope Valley Paiute Tribe (documentation submitted in 1997)

- Requests for Previous Acknowledgment - Shasta Nation, 1995
  Nor-El-Muk, 1995
  Tsnungwe Council, 1995 (granted, 1995)
  Muwekma Indian Tribe, 1995 (granted, 1996)

To achieve acknowledgment as an Indian tribe within the meaning of federal law, a petitioning Indian group must satisfy the following seven mandatory criteria: (1) establish that it has been identified as an American Indian entity on a substantially continuous basis since 1900; (2) establish that a predominant portion of the group comprises a distinct community and has existed as a community from historical times until the present; (3) establish that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present; (4) furnish a copy of the group's present governing document, including its membership criteria; (5) establish that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous entity; (6) establish that its membership is composed principally of persons who are not members of any acknowledged North American Indian tribe; and (7) establish that neither the group nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.[70]

One potentially positive development has been the amendment of the regulations in 1994 to include criteria which may simplify the process of acknowledgment when a tribe can demonstrate "Previous Federal Acknowledgment."[71] Previous acknowledgment can be shown by evidence that the tribe had treaty relations with the United States, that it has been denominated a tribe by Executive Order or Act of Congress, or that it has been treated by the federal government as having collective rights in tribal lands or funds.[72] A previously acknowledged tribe need only demonstrate identification as an Indian tribe and exercise of political authority from the date of last acknowledgment.[73] Moreover, the tribe need demonstrate only that it comprises a distinct community at present (not historically).[74] Although these changes hold out the promise of easing the burden of some petitioning California Indian groups, they have not yet led to recognition of any additional California tribes, and it remains to be seen how staff at the BAR will construe these changes in the context of specific California petitions.[75]

There is a further need to address the problems created by the application of totally inconsistent federal Indian policies over a relatively short period of time. The remedies formulated must be responsive to the destructive political, social and economic effects on native peoples who, even during periods of benign federal neglect, were barely surviving at the margins

of California society. For instance, juxtaposed against the federal government's current concern with questions of "recognition" and "acknowledgment" of tribes is the fact that little more than a century ago, the word most frequently used in California with reference to its indigenous tribes was "extermination," and less than fifty years ago, it was "termination." How can we reconcile these vast differences in approach and attitudes towards native peoples in ways that can achieve some measure of justice for California's indigenous tribes today? The federal acknowledgment process fails in this most important task because it demands that the unacknowledged tribes prove their status as self-governing entities continuously throughout history, substantially without interruption, as though that history did not include the federal policies that aided and abetted the destruction and repression of these very same native peoples and cultures.

If the task today is to determine which tribes continue to exist, and in what form, then we must take into account the *entire* history of the United States' interaction with native peoples, including the effects of federal policies on the institutions and forms of tribal survival. Why, indeed, is tribal existence even an issue? Primarily because the federal government, at various times, has advocated or supported policies of conquest, relocation, genocide, and assimilation of America's native peoples. Had all treaties and other agreements with the Indian tribes been honored, including the 18 unratified treaties with the California Indian tribes, we would not have the complex questions of tribal existence and identity, certainly not of the same magnitude, that persist today. For those tribes, or their remnants that have survived but have never been formally "recognized" or "acknowledged" by the United States, is it fairly their burden to prove the fact of their survival? The Advisory Council submits that to the extent a bona fide tribe "fails" the existing acknowledgment criteria, the federal government bears some, if not all, of the responsibility. But how does one factor the government's culpability into the process? This is really the crux of the problem and, at present, the discouraging answer is, "not at all." There must be some way to factor the government's past conduct and policies into the acknowledgment equation.

IV. The Draft California Tribal Status Act—An Opportunity to Redress Injustice

California's unacknowledged tribes have been at the forefront of the effort to change the federal acknowledgment process and to make it more responsive to their particular situation. Their efforts achieved a measure of success in 1992 when Congress passed Public Law 102-416, which created the Advisory Council on California Indian Policy (ACCIP).

The Advisory Council completed an initial draft of legislation entitled, "California Tribal Status Act of 1997" (CASA) (attached hereto as Appendix A). This draft legislation would allow currently petitioning tribes the option of either using a modification of the current federal acknowledgment process administered by the BIA, or transferring their petitions to an independent Commission on California Indian Recognition, created by Congress to administer a California-specific process for unacknowledged California Indian groups. The Commission would apply revised criteria to all transferred and new petitions for federal acknowledgment. The revised criteria are the most important elements of the draft legislation because they change key aspects of the existing Part 83 criteria and create presumptions, under certain circumstances, that

core criteria have been met, thereby shifting the burden of proof to the federal government.

For example, under the current acknowledgment regulations, a petitioner must demonstrate that it has been identified as an American Indian entity by federal, state or other entities "on a substantially continuous basis since 1900."[76] This requirement ignores the fact that there have been no pauses in government policies to remove, relocate, assimilate, or terminate California tribes. Therefore, although many unacknowledged tribes today have viable governments, they cannot prove recognition on a continuous basis. Under the draft CASA, the time period is from "historical times to present," but allows for any interruption in continuity "that is 40 years or less," as long as all other acknowledgment criteria are met. Sec. 6(b)(1). Allowing for interruptions in tribal continuity takes account of the situation that existed in California during the Gold Rush and the ensuing half-century, when some tribal communities, especially in the central and northern portions of the state, had to go underground because of the widespread discrimination against, abuse and killing of Indian people, which accompanied the dramatic influx of non-Indians into California.[77]

In the draft CASA, the three most important criteria for federal acknowledgment are: (1) a statement of facts establishing that a petitioner has been identified as a California Indian group from historical times to the present on a substantially continuous basis; (2) evidence that a "substantial portion" of the petitioner's membership forms a present community and that the members are descendants of a California Indian group which historically inhabited a specific area; and (3) a statement of facts establishing that the petitioner has maintained political influence or authority over its members as an autonomous entity "on a substantially continuous" basis from historical times until the present. Secs. 6(b)(1)-(3). A petitioning group's ability to satisfy these criteria is assisted by a powerful presumption providing that:

> For purposes of the criteria in Secs. 6(b)(1) to (b)(3), "it is presumed that changes in the community interaction, organization or political influence of a California Indian group which occurred during the period from 1852 to 1934 were caused by such group's efforts to adapt to Federal laws and policies that prohibited or discouraged essential aspects of tribal authority and culture, or to avoid the repressive effects of the Indian laws and policies of the State of California, and did not constitute either abandonment or cessation of tribal relations." Sec. 6(c)(1).

Thus, the presumption alters the nature of the existing process by requiring that the federal government examine its own policies and actions, and those of the State of California, during the period 1852 to 1934, in evaluating a petitioning tribe's identification and existence as an autonomous California Indian group, and the degree to which it exercised political influence over its members during that period. The federal government may rebut this presumption, but only with "clear and convincing evidence." Id.

An alternative to this provision, which is not incorporated into the draft CASA, is that the petitioner only be required to demonstrate that it has been identified as a California Indian entity on a substantially continuous basis since 1934, the year in which Congress enacted the IRA. This

point of reference is compelling for two reasons: (1) the IRA represented a clear shift from earlier federal policies which advocated the demise of tribal authority, to a new policy which actively supported the reconstitution and formal recognition of tribal governments; and (2) it was the first unambiguous use of the term "recognition" to describe those tribes whose sovereignty was formally acknowledged by the United States, and who were subject to all federal legislation regarding Indians. In many respects, this alternative would be easier to implement than the presumption mentioned above.

Another key provision of the draft CASA is a presumption of previous federal acknowledgment, if certain criteria are met. The existing acknowledgment regulations provide for previous federal acknowledgment and define the term as "action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States."[78] The regulations contain three examples of the type of evidence that might demonstrate such acknowledgment: (1) evidence that the group has been denominated a tribe by Act of Congress or Executive order; (2) evidence that the group has had treaty relations with the federal government; and (3) evidence that the group has been treated by the federal government as having collective rights in tribal lands or funds. In contrast to the existing regulations, the draft CASA does not define the term "previous federal acknowledgment," but sets forth specific criteria to establish such acknowledgment: (1) not less than 75 percent of the current members of the petitioning group must be descendants of members of the California Indian group with respect to which the petitioner bases its claim of acknowledgment; (2) the membership must be comprised primarily of persons who are not enrolled members of another Indian tribe; and (3) the petitioner must be either a successor in interest to a party to a treaty, identified in any statute dealing with termination, or have been acknowledged as eligible to participate in the Indian Reorganization Act of 1934. Sec. 6(d)(1)(A)-(C). Significantly, the draft CASA defines the term "treaty" to specifically include "any treaty *negotiated* by the United States with, or on behalf of, any California Indian group, *whether or not the treaty was subsequently ratified.*" (Emphasis added.) Sec. 4(25). The 18 unratified California Indian treaties would qualify under this definition.

Moreover, while the draft CASA allows the federal government to rebut the presumption of previous federal acknowledgment, it can do so only by presenting evidence that "either contradicts all, or substantially all, of the evidence submitted by the petitioner, or demonstrates that the petitioner permanently abandoned tribal relations or fails to constitute a contemporary community." Sec. 6(d)(2). In addition, such evidence must be interpreted "in the context of the culture and social organization of the California Indian tribes or groups in the geographical and cultural area of the petitioner." Sec. 6(e).

The presumption of previous federal acknowledgment, like the presumption concerning the actions and policies of the federal and state governments, reallocates certain evidentiary burdens between the petitioning Indian group and the federal government. This creates a fairer process by engaging the federal government as a participant in the process, rather than allowing it to simply pass judgment as to whether the petitioner has met its evidentiary burdens. After all, the federal government was a key actor in the development of Indian policy in California and, as a

matter of fundamental fairness, should be held to account in the acknowledgment process for its inconsistent, duplicitous and ultimately unjust actions in dealing with the California Indians. These provisions, therefore, serve the dual purpose of placing the acknowledgment process in an accurate historical and cultural context, and in achieving an allocation of evidentiary burden that is just, in light of the historical record.

Finally, the Secretary of the Interior should revise the current federal acknowledgment process as specified in Recommendation #2, above, either in addition to enactment of the CASA and as a means of implementing it, or as an alternative for immediately addressing the fundamental unfairness of the process.

V. Conclusion

The members of the Recognition Task Force embraced the opportunity to review the current federal acknowledgment process and to develop recommendations to Congress for changes in the process that would address the unique situation of California's unacknowledged tribes. The Task Force viewed its efforts as critical to the greater task of overcoming the federal government's historical neglect and inhumane policies and practices toward the California Indians. The Task Force saw only two viable options for resolving the 43 acknowledgment petitions from California tribes requiring decisions. The first is the legislative option. The CASA would create a fairer process by establishing an independent Commission on California Indian Recognition, charged with the responsibility applying a process and criteria relevant to the special situation of California's unacknowledged tribes.

The second option would involve fundamental policy changes to ensure that decisions made by the BAR reflect consideration of the special situation of California's unacknowledged tribes. However, the effect of existing BIA policy makers and policies on this option must also be seriously considered. If current policy-makers prove to be uncooperative, it would be difficult to achieve change without creating an independent entity to review federal acknowledgment petitions. While the second option is less desirable than express congressional action, the Advisory Council and the Task Force share the view that, in the absence of such action, the current regulations must be revised to incorporate criteria that fairly address the historical and policy factors that have frustrated the efforts of California tribes to achieve federal recognition.

All of the issues and concerns voiced by California's unacknowledged tribes ultimately stem from lack of acknowledgment. By legislative or regulatory means, an equitable and alternative acknowledgment process must be created for California's 80,000 unacknowledged Indians and their tribes.

Congress, with the assistance and recommendations of the Advisory Council, has the historic opportunity to fashion a legislative solution that will enable California's unacknowledged Indians to reclaim their identities as tribal peoples and be accorded the recognition they so clearly deserve. In doing so, Congress should keep in mind that, while most of California's unacknowledged tribes would concede that there should be a formal process to resolve the

question of tribal status, they would question the BIA's ability to fairly administer that process. Further, because the federal government's repeated violations of trust with the California Indians have contributed to the recognition problem, the unacknowledged tribes assert that the federal government has both a legal and a moral obligation to assume a share of the burden of each tribe's struggle for recognition. This is reflected in the draft CASA's presumptions and stands in sharp contrast to the BIA's preference to serve only as arbiter of the acknowledgment issue, thereby distancing itself from the genesis of the problem itself.

There is something to be said for having an acknowledgment process that protects the integrity of the federally recognized status from fraudulent applicants, but there are even more compelling reasons to have a process that is fair. That is to say, a process that injects the elements of historical reality and fundamental justice into the inquiry surrounding the question of tribal status in California—elements that are lacking in the current federal acknowledgment process.

ENDNOTES

1. Testimony of Ronald Jaeger, Area Director, Bureau of Indian Affairs, Sacramento Area Office, at the ACCIP Hearing, April 8-9, 1994.

2. Pub. L. No. 102-416 (1992), as amended by Pub. L. No. 104-109 (1996).

3. William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 339 (1990).

4. In 1871, Congress passed an act forbidding further treaty negotiations with Indian tribes. 16 Stat. 544, 566 (1871).

5. United States v. 43 Gallons of Whiskey, 93 U.S. 188, 195 (1876).

6. 25 U.S.C. § 479.

7. Id.

8. See Quinn, *supra* note 3, at 357.

9. See, e.g., 12 U.S.C. §§ 1715z-13 and 1715z-13a, 12 U.S.C. § 4701, 16 U.S.C. § 470bb, 16 U.S.C. § 839a, 16 U.S.C. § 941b, 18 U.S.C. § 1159, 20 U.S.C. § 7881, 25 U.S.C. § 479a, 25 U.S.C. § 1301, 25 U.S.C. § 1603, 25 U.S.C. § 2101, 25 U.S.C. § 2201, 25 U.S.C. § 2703, 25 U.S.C. § 3322, 25 U.S.C. § 4103 (effective 10/1/97), 29 U.S.C. § 706, 30 U.S.C. § 1291, 30 U.S.C. § 1702, 33 U.S.C. § 1377, 33 U.S.C. § 2701, 42 U.S.C. § 300f, 42 U.S.C. § 682, 42 U.S.C. § 1437a, 42 U.S.C. § 1996, 42 U.S.C. § 3002, 42 U.S.C. § 5302, 42 U.S.C. § 5603.

10. See Rennard Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed., (Charlottesville, Va.: The Michie Co., 1982), p. 13. The criteria have come to be known as the "Cohen Criteria."

11. See Quinn, *supra* note 3, at 357.

12. 44 Fed. Reg. 7235 (1979).

13. In addition, two tribes currently residing in California, though they are not aboriginal to the State, were denied acknowledgment in 1985 - the Kaweah Indian Nation, and the United Lumbee Nation of North Carolina and the United States. See Exhibit 1.

14. Act of May 31, 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 109, 25 U.S.C. § 476(f)&(g).

15. See, e.g., letter of March 14, 1997, from D. Maddox, Director, Office of Tribal Services, to R. Cambra, regarding the acknowledgment petition of the Muwekma Ohlone Tribe. In her letter, Maddox states that BAR has determined that the Muwekma Ohlone were previously recognized, thus reducing the Tribe's burden of proof by requiring that it demonstrate "it meets the

acknowledgment criteria only for the 70 years since 1927, not the 220 years since the 1770s." (Emphasis added.) Id. at 2. BAR thus construes its regulations to require unacknowledged California tribes, in the absence of evidence of previous recognition, to produce documentary proof satisfying the acknowledgment criteria for almost three-quarters of a century prior to initiation of United States relations with the indigenous tribes of California!

16. For example, the policies of relocation (of reservation Indians to urban areas) and termination were implemented first and most widely in California—in essence using the California Indians as "test cases"—before being rejected and eventually abandoned by Congress.

17. See the report of Robert W. Kenney, Attorney General of California, entitled "History and Proposed Settlement: Claims of California Indians," (Sacramento: California State Printing Office, 1944), p. 9.

18. In 1850, the California legislature passed an Act "for the Government and Protection of Indians," which provided for a minimum of federal interference in state land issues (and also effectively allowed for the sale of Indians into slavery). This Act was repealed in 1863 but had a devastating effect on California Indians.

19. 9 Stat. 554, 558 (1850).

20. Bruce S. Flushman & Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 391, 403 (1986).

21. Charles J. Kappler, Indian Laws and Treaties, (United States Government Printing Office, 1928), Vol. IV, pp. 1081-1128.

22. Act of March 3, 1851, 9 Stat. 631, entitled "An Act to Ascertain and Settle the Land Claims in the State of California."

23. For a discussion of the circumstances surrounding the rejection of the California treaties, see Flushman & Barbieri, *supra* n. 20, at 404-408.

24. See the text accompanying note 10, *supra*.

25. Statements of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Superintendent of Indian Affairs for the State of California accompanied transmittal of the treaties to the Senate for ratification. See Kappler, *supra* note 21, at 1085-1089. The statements—without exception—supported ratification, spoke to the justice of doing so, and ultimately were prophetic (especially that of the Superintendent) in their predictions that failure to ratify would result in disaster for the California tribes. Superintendent E. F. Beale states in his letter of May 11, 1852: "It is evident that if allowed to roam at pleasure, their early extinction is inevitable, and I am slow to believe that the Government, recognizing as it does, their possessory right to all the soil inhabited by them, would deny them the occupancy of a small portion of the vast country from which such extraordinary benefits are in progress of receipt." Id. at 1088.

26. Robert F. Heizer (ed.), The Destruction of California Indians (Peregrine Smith, Inc., 1974), pp. 131-32.

27. Id. at 42-83. Heizer remarks that "Federal troops seem, on the whole, to have acted with discipline and restraint, but they were often under extreme pressure by the local settlers to kill as many Indians as possible, and conflicts between federal and state laws were common. It is clear that the white settlers in California wanted the Indians to be wholly eliminated because they were considered a danger to peace and security." Id. at 41.

28. The Act of April 13, 1864, 13 Stat. 39, (the "Four Reservations Act,") authorized the Hoopa Valley and Tule River Reservations, and formally established the Round Valley Reservation. No fourth reservation was ever established pursuant to the Act.

29. See § II of the ACCIP Historical Overview Report.

30. 26 Stat. 712.

31. See, generally, Heizer, *supra* note 26, at 11-39. See also § II of the ACCIP Historical Overview Report.

32. Act of March 3, 1905, 33 Stat 1048, 1058.

33. See the report of C.E. Kelsey to the Commissioner of Indian Affairs, dated August 8, 1905, p. 2. The Report is attached as Exhibit 1 to the ACCIP Termination Report.

34. See, e.g., the Act of April 30, 1908 [The yearly Indian Office Appropriation Act, H.R. 15219, 60th Cong. Sess.] Pub. L. No. 60-104, 35 Stat. 70, at 76. For a listing of the other appropriation acts for acquisition of lands for homeless California Indians, see the ACCIP Trust and Natural Resources Report, note 1.

35. 25 U.S.C. §§ 461 et seq.

36. Robert N. Clinton et al., American Indian Law (3rd ed. 1991), 359.

37. The Interior Board of Indian Appeals has held that the federal government's action in holding an IRA election within a rancheria community is determinative of the issue of whether the rancheria was recognized as a tribe prior to enactment of the Rancheria Act. See United Auburn Indian Community v. Sacramento Area Director, IBIA No. 92-186-A, 24 IBIA 33 (decided May 28, 1993).

38. The disastrous effects of the allotment period were detailed in a memorandum presented by John Collier, Commissioner of Indian Affairs, to the House Committee on Indian Affairs in 1934. See Hearings on H.R. 7902 before the House Comm. on Indian Affairs, 73rd Cong., 2d Sess. 16-18 (1934). Collier pointed out that, during the period from 1887 to 1934, Indian land holdings were reduced from 138,000,000 acres to 48,000,000, a loss of 65 per cent of the Indian land base.

39. See 25 U.S.C. § 464.

40. See § V of the ACCIP Community Services Report.

41. 25 U.S.C. §§ 651 et seq. The jurisdictional act, however, was so limited that it precluded the possibility of adequate treatment of the claims of California Indians. Specifically, relief was limited to claims for benefits promised, but not received under the treaties. In addition, recovery was limited to $1.25 an acre for the lost treaty lands. Moreover, all disbursements made by the United States for the benefit of California Indians were to be allowed as offsets. See Kenney, *supra* note 17, at 38-41.

42. 25 U.S.C. § 651.

43. The class of California Indians entitled to relief was defined in the 1928 Jurisdictional Act. See id. During the second case, the Court of Claims rejected the United States' argument that the "Indians of California" were not an identifiable group for purposes of presenting a claim before the Claims Commission. Clyde F. Thompson et al v. United States, 122 Ct. Cl. 348, 350 (1952).

44. See H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B-132 (1953).

45. The Act of August 15, 1953 is widely knows as "Public Law 280" because it was originally enacted as Pub. L. No. 83-280. It is now codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

46. See State Advisory Commission on Indian Affairs, "Final Report to the Governor and the Legislature," pp. 9-10, 22 (1969).

47. See id. at 22.

48. Act of August 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, Pub. L. No. 88-419, 78 Stat. 390. The first Termination Proclamation published pursuant to the Rancheria Act appeared on April 11, 1961, and applied to Buena Vista, Cache Creek, Mark West, Paskenta, Ruffey's Rancheria, Strawberry Valley, and Table Bluff. See 26 Fed. Reg. 3073. Only 38 of the 41 rancherias listed in the original Rancheria Act were actually terminated. See Appendix B to the ACCIP Termination Report. In addition, two unlisted rancherias were terminated, apparently pursuant to the 1964 Amendments to the Rancheria Act. See 31 Fed. Reg. 9685 (1966) (El Dorado Rancheria), and 35 Fed. Reg. 11272(1970) (Mission Creek Reservation). During the past two decades, 27 of those rancherias have been restored through judicial decision or settlement. See Appendix B to the ACCIP Termination Report. Two additional tribes, the United Auburn Indian Community and the Paskenta Band of Nomlaki Indians were restored by Acts of Congress in 1993. See Auburn Indian Restoration Act, Act of October 31, 1994, 108 Stat. 4533, 25 U.S.C. §§ 1300*l et seq.*; and Paskenta Band Restoration Act, Act of November 2, 1994, 108 Stat. 4793, 25 U.S.C. §§ 1300*m et seq.* The misguided policy of termination has since been repudiated by both Congress and the Executive Branch. See Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2nd Sess. (1970); see also 25 U.S.C. § 2502 (f) ("Congress

has expressly repudiated the policy of terminating recognized Indian tribes and has actively sought to restore recognition to tribes that previously have been terminated.")

49. Pursuant to the Rancheria Act, several services were to be provided to the affected rancherias to prepare them for the termination of federal support. See § III of the ACCIP Termination Report.

50. See Deposition of Leonard M. Hill, taken in Duncan v. U.S.A., No. 10-75 (Ct. of Cl.), and Duncan v. Andrus, No. C-71-1572 WWS (N.D. Cal.), on September 2, 1975, at pp. 34-36; see also, Memorandum of Sacramento Area Director to Area Indian Advisory Board, dated October 8, 1976, (attached hereto as Exhibit 2) regarding a meeting held on August 26, 1976, concerning Area Office funding and accompanying Transcription of August 26th Meeting. The Memorandum states that "[m]oney spent in completing distribution plans of rancherias being terminated came from the area's regular annual budget, even though Congress authorized appropriations for termination costs under the Rancheria Act of 1958 and the amendment in 1964." Id. at 1.

51. See State Advisory Commission on Indian Affairs, "Final Report to the Governor and the Legislature," (1969), p. 9: "The special Johnson-O'Malley funds for Indian education were withdrawn over a five-year period, but other federal services to Indians were terminated by 1955."

52. Rockwell was Superintendent of the Sacramento Indian Agency at the time.

53. J. Rockwell, The Status of the Indian in California Today (Sacramento Indian Agency, 1944), p. iii.

54. Id. at 24.

55. See, e.g., id. at iii and 92. While acknowledging that the "non-ward" off-reservation Indians in California had not been studied, Rockwell nevertheless makes the unsupported assumption that "[t]his population has made its transition into a white-dominated society, and, apparently successfully so." Id. at 92. Rockwell's unusually optimistic and unsupported conclusion that the California Indians who had assimilated had done so with remarkable success are contradicted by findings in subsequent studies that the California Indian population as a whole, not just the Indians residing on reservation or rancheria lands, had lagged far behind the non-Indian population in access to health care, educational achievement and employment. For a list of reports on California Indians, see § I(B) of the ACCIP Executive Summary.

56. See note 51, *supra.*

57. In 1978, the Secretary of the Interior promulgated the federal acknowledgment regulations, 25 C.F.R. Part 83, establishing the first uniform procedure for recognition of unacknowledged Indian groups.

58. See the remarks of Senator Cranston, made during the debates on the Indian Health Care Improvement Act Amendments of 1988:

> The California Indian population is unique in this country and must be understood in historical context.... [A]lthough they were eventually recognized in Federal law as individual "Indians of California," many California Indians are not members of federally recognized tribes.... [F]airness required the development of policies ... providing specifically for California Indian's eligibility for IHA care.

134 Cong. Rec. S13565 (daily ed. Sept. 28, 1988) (quoted in Malone v. Bureau of Indian Affairs, 38 F.3d 433, 438 (9th Cir. 1994)).

59. See, e.g., 34 Stat. 345 (1906).

60. Interview with Scott Keep, Office of the Solicitor, Department of the Interior.

61. See § II(E), *supra.*

62. Clyde F. Thompson et al., 122 Ct. Cl. at 350.

63. As of mid-1993, more than $2,000,000 in undistributed funds remained in Dockets 342-70 and 343-70, California Judgment Funds. Letter of June 29, 1993, from BIA Sacramento Area Director to California Indian Legal Services.

64. Indeed, it is precisely because of this anomaly that Congress has authorized some limited benefits, such as health services, to California Indians who can trace their ancestry to these rolls, regardless of whether these individuals are members of recognized tribes. See 25 U.S.C. § 1679.

65. See 25 C.F.R. Part 83 ("Procedures for Establishing that an American Indian Group Exists as an Indian Tribe"). These regulations were originally promulgated as 25 C.F.R. Part 54 (43 FR 39361, Sept. 5, 1978) and four years later, were redesignated 25 C.F.R. Part 83 (47 FR 13327, Mar. 30, 1982).

66. See the Branch of Acknowledgment and Research, "Summary Status of Acknowledgment Cases (as of February 13, 1997)," attached hereto as Exhibit 1.

67. See Exhibit 1; see also note 13, *supra.*

68. In an attempt to remedy the lack of progress and communication between California tribes and BAR, the Recognition Task Force of the Advisory Council on California Indian Policy and its members have met 12 times with the Chief of the BAR, Ms. Holly Reckord. The Task Force attempted to facilitate communication and the completion of petitions and responses to "OD" (or, newly renamed "Technical Assistance") letters; helped clarify that the group had exercised political authority over its members through a tribal council or other governmental form; and submitted requests for determinations on Previous Recognition for California tribes. The Task

Force also reviewed the narratives of the California petitions which have been submitted to BAR, reviewed testimony from tribal people at 11 hearings throughout California, and conducted regional meetings and workshops regarding recognition issues for the petitioning tribes.

69. The status of the Ione Band was confirmed by the Assistant Secretary of Indian Affairs in 1994.

70. 25 C.F.R. § 83(a)-(g).

71. 25 C.F.R. § 83.8.

72. 25 C.F.R. § 83.8(c).

73. 25 C.F.R. § 83.8(d)(1) and (3).

74. 25 C.F.R. § 83.8(d)(2).

75. L.A. Dorrington, Superintendent of the Sacramento Indian Agency during the late 1920s, prepared a report for the Commissioner of Indian Affairs on the land needs of numerous California Indian bands living at the margins of non-Indian society, often concentrated in the rural and mountainous areas of the state on scattered public domain allotments, with little or no contact with the Indian agency. In his report to the Commissioner, dated June 23, 1927, Dorrington mentions how little was known of the Indian population and their needs, and the extreme difficulty in getting to some of these isolated areas. Dorrington identifies the Indian bands, their estimated population, and includes his assessment of their need for land and homes. While his report contains little discussion of how these assessments were made, or the reasoning behind the decisions to not recommend the purchase of lands for some bands, it does provide an important source of information on the those Indian bands whose status as such was recognized but which had little contact with the BIA. As to these bands, if their members were residing on public domain allotments, or on lands set aside for them by other means, Dorrington uniformly recommended that no further purchase of land be made for the group. Thus, in many cases, the public domain allotments became a substitute for the creation of new reservations or rancherias.

The Dorrington report provides evidence of previous federal acknowledgment for modern-day petitioners who can establish their connection to the historic bands identified therein. Clearly, the BIA "recognized" its trust obligations to these Indian bands when it undertook—pursuant to the authority of the Homeless California Indian Acts and the Allotment Act—to determine their living conditions and their need for land. The fact that some were provided with land and others were not did not diminish that trust.

Among those California Indian groups that have petitioned for federal acknowledgment, there are several who that can trace their origins to one or more of the bands identified in the Dorrington report. The Muwekma Tribe is one whose connection to the Verona Band (id. at 1) has been recently confirmed in a letter from the BAR, but there are at least eight others: Dunlap Band of Mono Indians (see Dorrington, at pp. 6-7, reference to the "Dunlap band"); Kern Valley Indian Community (id. at 7-8, reference to "Indians ... around the town of Kernville"); Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians (id. at 7-8, reference to the "Tejon

rancheria" and "Tejon Indians"); American Indian Council of Mariposa County (a.k.a. Yosemite) (id. at 12 and 24, reference to the "Yosemite band"); Yokayo (id. at 13, reference to the "Indians of the Yokaia band"); Shasta Nation (id. at 18-19, reference to the "Indians of the Mt. Shasta band"); Hayfork Band of Nor-El-Muk Wintu Indians (id. at 22, reference to the "Hayfork band"); and Tsnungwe Council (id. at 22, reference to the "Indians that comprise the Burnt Ranch").

76. 25 C.F.R. § 83.7(a).

77. See § II of the ACCIP Historical Overview Report.

78. 25 C.F.R. § 83.1.