THE ACCIP REPORT ON COMMUNITY SERVICES:

A Second Century of Dishonor— Federal Inequities and California Tribes

A Report by the
Advisory Council on California Indian Policy
September, 1997

ACCIP COMMUNITY SERVICES/ GOVERNANCE/ CENSUS TASK FORCE

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SUMMARY

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

The BIA funds different programs based on a variety of criteria. Many programs, such as Tribal Priority Allocations (TPA), are funded each year based on historical funding levels. Others are funded based on formulae that take into account eligibility requirements and other factors. Still other programs, such as general welfare assistance and contract support, are based strictly on need. Finally, some programs are funded on the basis of competitive grants. When the BIA budget is viewed in terms of per capita expenditures, however, it becomes clear that all of the types of funding determinations have disadvantaged California Indians.

Inequity toward California Indians continues in BIA allocations for many programs, even when its own service population data are employed. The degree of inequity is understated, however, because the BIA systematically undercounts California Indians by employing inappropriate criteria for counting its service population in California. While no reliable count of California Indians has been conducted, all of the available figures indicate that the BIA severely undercounts the service population in California. For example, the 1990 Census figure for Indians living in the rural parts of California counties containing Indian reservations is slightly more than double the 1989 BIA service population figure for California. Similarly, the 1997 Indian Health Service (IHS) service population figure for California is more than double the 1995 BIA figure. The IHS count of California Indians living in rural areas alone is substantially higher than the BIA service population for the entire state. In fact, the number of California Indians that were certified to participate in the distribution of funds from the California Land Claims cases in 1972 is higher than the BIA's 1995 service population figure. Thus, it appears that the service population would at least double if more appropriate criteria were applied to California Indians. Accordingly, this report documents current inequities in federal allocations for California Indians by calculating per capita expenditures using not only the actual BIA service population statistics, but also the more appropriate figures that are approximately twice those employed by the BIA.

The history of federal policy toward California Indians affords insight into the weaknesses of the BIA's service population criteria. In particular, the limitation of service population to members of recognized tribes is suspect in the context of California history. In California, individuals who hold public domain or national forest allotments, and individuals who participated in claims awards based on the unratified California treaties can prove that the federal government views them as Indians, even though the BIA refuses to recognize their tribal groups.

In addition, the failure of the federal government to ratify the 18 California Indian treaties and to establish a suitable reservation land base for California's tribes undermines the rationale for applying the general criterion limiting service population to Indians "on or near reservation" in California. For analogous reasons, this geographic criterion is currently not applied to Indians in Oklahoma and Alaska. Early BIA reports document situations in which the members of small aboriginal bands of California Indians were granted allotments on the public domain in lieu of reservations or rancherias.[1] These same groups were later ignored as tribal communities because of their individual, as opposed to communal, ownership of trust land. In essence, the allotments served in lieu of a reservation or communal land base; however, the BIA later denied responsibility for recognition of the tribal group because it lacked any communal trust land. Not only do some of these groups deserve to be recognized, their members are entitled to be counted as part of the BIA service population and therefore eligible for federal Indian programs and services.

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

Budget data from the 1980s and 1990s confirms that the inequities have persisted. Using figures from the most comprehensive funding category—Operation of Indian Programs—and the BIA's official service population figures over the years 1990-95, it is apparent that California Indians receive only one-third to one-half the funding received by all other Indians. Similarly, funding from the IHS for California Indians is about 30-40% less than the national average over the period 1988 through 1995. Housing and Urban Development Indian Housing programs also show a systematic under-funding over the last decade.

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

The effects of these documented inequities are manifest in the diminished social and economic welfare of California Indians relative to Indians elsewhere in the country. When compared to reservation Indians elsewhere, California Indians have higher rates of poverty, lower incomes, less education, and higher rates of unemployment. Only in household characteristics do California reservation Indians do better than non-California reservation Indians. These combined indices of social and economic conditions puts California reservation Indians among the lowest socioeconomic groups in Indian country. Since Indians are already among the poorest groups in the country, California Indians are among the most economically deprived groups in the nation.

The past and present history of administrative neglect and under-funding has contributed to the social and economic conditions endured by California reservation Indians.

RECOMMENDATIONS

1. 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 plans of distribution under the rolls of California Indians developed in 1933, 1955 and 1972 pursuant to the distribution of the United States Court of Claims and Indian Claims Commission awards.

   Adoption of the above definition will also require the BIA to eliminate the "on or near reservation" requirement in California.

2. In appropriating and allocating budget funds for individual benefit programs, Congress and the BIA should increase amounts directed to the Sacramento Area Office to ensure that per capita spending for California at least equals the national per capita spending average for all areas of Indian country. Per capita spending for California should be calculated taking into account an Indian service population based on the definition of California Indian recommended above. In addition, Congress should pass legislation that ensures that the BIA, the IHS, the Department of Housing and Urban Development (HUD), and all other federal agencies are funding California Indian tribes at levels comparable to national averages for Indians.

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

Although the Secretary of Health and Human Services was directed to determine the number of California Indians eligible for health care services provided by the IHS,[2] the Secretary has not done so. Thus, there is no reliable estimate of the number of California Indians eligible for Snyder Act programs.

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

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

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

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

7. Congress should enact legislation establishing the necessary policy and legal framework to assist California tribes to acquire public and other federal lands for tribal homelands, housing, economic development, and cultural and natural resource protection. The legislation should state (a) that it is the policy of the United States Government, in carrying out its public and other federal land management functions, to assist California tribes, especially newly recognized and newly restored tribes, in identifying and acquiring public and other federal lands, which have been or may be classified as available for disposal under federal law; and (b) direct federal agencies to consult with the tribes in identifying such public and other federal lands—within or near the aboriginal territories of the tribes—suitable for such purposes.

Many recognized California tribes have land bases that are inadequate to meet their immediate needs for housing and economic development. Some lack any land base whatsoever. Most newly recognized and newly restored tribes find themselves in the same situation. A land

acquisition program is needed which specifically targets the land needs of currently recognized California tribes and anticipates the future acknowledgment or restoration of many currently non-recognized California tribes. Public or other federal lands could be identified through a tribal-agency consultation process and set-aside for specific tribal purposes. Lands identified for transfer to the tribes should have economic development potential and reasonable access to water and roads.

8. The Secretary of the Interior should coordinate with Interior agencies and other cabinet level officers to develop a comprehensive approach for identification of public and other federal land that could be made available for disposal to California tribes for housing, economic development and cultural and natural resource protection purposes.

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

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

I. Introduction

Anyone reviewing the last century of federal policy toward California Indians will be struck by the conclusions reached over and over in government and private studies: California Indians are not receiving a fair share from federal Indian programs. Agencies operating under both Republican and Democratic administrations, at both the federal and state level, have joined this particular chorus.

The major reports that document the plight of California Indians and compare federal treatment of California tribes with the treatment of tribal groups elsewhere are listed in § I of the Executive Summary. The following excerpts from some of those reports demonstrate the history of the inequitable treatment of California Indians.

1906: Report of Special Agent C.E. Kelsey to the Commissioner of Indian Affairs[3]

> The responsibility of the National Government for the present condition of the non-reservation Indians of California seems clear. Had the Government given these Indians the same treatment as it did other Indians in the United States, their condition today would be very different . . .
>
> . . . It should be remembered that the Government still owes these people considerable sums of money, morally at least, but the Government owes more than money. No amount of money can repay these Indians for the years of misery, despair, and death which the Governmental policy has inflicted upon them. No reason suggests itself to your special agent why these Indians should not be placed in the same situation as all other Indians in the United States . . .

1926: Transactions of the Commonwealth Club of California[4]

> The executive has always in fact admitted a much more definite obligation toward Indians whose right to land, assistance and protection, was specifically safeguarded by treaty, than to those unfortunate Indians, like those of California, who have never been able to point to a definite promise on the part of the United States measuring the irreducible minimum of protection to which they were entitled.

1926: The Legal Status of the California Indian[5]

> [The Indians of California] are the neediest of their race, and yet they receive, in educational and health services, and in more direct aid, far less per capita than the average throughout the country.

1969: Final Report to the Governor and the Legislature by the State Advisory Commission on Indian Affairs[6]

[We recommend that] California Indians be declared eligible to participate in all federally funded programs for Indians on the same basis as Indians in other states.

1969: Senate Joint Resolution No. 32, California Legislature, August 21, 1969:

Whereas, The Indians of California are virtually excluded from participation in various federal programs and services that are available to other Indians of the United States; . . . therefore, be it

Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of the State of California respectfully memorializes the President and the Congress of the United States to establish a policy that insures that California Indians are included to the fullest extent in various federal programs and services that are available to other Indians of the United States.

1969: Report of United States Senate Special Subcommittee on Indian Education of the Committee on Labor and Public Welfare

While the Federal Government has been devising new programs to assist the Indian and while Congressional expenditures for Indian education have increased significantly since World War II, these benefits have not accrued to California Indians. The withdrawal in the late 1940's and early 1950's of the already minimal Federal assistance which California Indians then received has been well documented . . . Although the Federal program [for Indian health care] in California was never large, even that was phased out by the Public Health Service . . .The Federal government discontinued its minimal welfare assistance to California Indians in 1952 . . .

1972: Statement of Senator John Tunney before the United States Senate: Discrimination against California Indians[7]

. . . California is not now receiving a fair share of BIA and IHS funds and all California Indians are morally and legally entitled to participate on an equal basis in BIA and IHS programs in the fields of education, health, housing, and economic development.

1973: Indian Eligibility for Bureau Services—A Look at Tribal Recognition and Individual Rights to Services[8]

[H]istorically, California Indians have received much less consideration than Indians of other states . . .[9]

. . . California Indians number 36,489 as documented by the 1970 census. They are all presently eligible for BIA services, yet the Bureau has only been funded to serve the 6,151 Indians living on trust lands. It is true that all of the native California Indians have been served to some extent, yet the degree has been greatly limited by the available funds. It is apparent that the BIA must be appropriated the funds which are commensurate with its obligation.[10]

The 1973 BIA budget allocated $5,117,000 to spend for California Indians. To bring the allocated funds in accordance with the true eligible service population, the federal government should appropriate approximately $11,172,000 . . .[11]

1976: Study by the Department of Housing and Community Development, State of California

Examination of the Bureau of Indian Affairs (BIA) Budget data since 1969 reveals that California has not been receiving its fair share of BIA allocations based on its service population or on its needs and that action is required to rectify the present inequitable funding levels.

California Indians who comprise almost 7% of the BIA's service population have received only 1-2% of the Bureau's total budget since 1969 . . . [L]ong term underfunding of the Bureau's Sacramento Area Office (encompassing the State of California) has caused economic hardship for the Indians of California.

1977: A Report to the Commissioner of the BIA Regarding Funding of Bureau Programs in the Sacramento Area[12]

[A chart for FY 1975] shows the percentage of the total [BIA] allotment for each area, i.e. Sacramento received 1.32% of the total funds available with a population of 36,255 or 6.68% of the population. Based on population, Sacramento has a low $309.97 of the total allotments made for Fiscal Year 1975 . . . Minneapolis's net allotment is $859 per person . . . [T]he average for Billings is $970 [per person] . . . [T]he average for Portland is $1,576 per person . . .

1984: Report of the California Indian Task Force[13]

Administratively, the Sacramento Area in Fiscal Year 1984 had an assigned budget . . . representing 1.7% of the overall Bureau budget and approximately 173

positions . . . compared to a Bureau-wide total of $14,690 or 1.2%.[14]

[For California Indians] there are large areas of unmet needs in terms of housing, educational levels and in nearly all areas of Bureau programs that are normally provided elsewhere . . .[15]

. . . The funding base of five or ten years ago appears to have been established at minimum levels to accommodate a program directed toward a land base that has not changed significantly but which requires a higher level of management and toward a population base greatly underestimated. . . . Even a three-fold increase in base funding for California would not address the needs of approximately 50,000 California Indian people who cannot establish tribal membership but who are nevertheless eligible for many programs.[16]

In summary, funding levels determining the base allocation for the Sacramento Area are based upon incorrect numbers. Few programs, availability of some State programs and a service concept based upon trust property management and individual service has kept funding levels low. Moreover, because of the long period involved in termination matters here in the State of California, general programs to meet the needs of the Indians of California, whether they be members of tribal or other groups or not, [have] been inadequate.[17]

1989: Bureau of Indian Affairs, Resource Allocation Effectiveness Study

[After working through formulas for allocating Bureau funds on the basis of population, land base, and other criteria,] Sacramento does well for all weight sets . . .[Using the recommended formula, Sacramento Area is among the Areas that would receive additional funds.]

Despite the extensive documentation of the plight of California Indians, the federal government has done little to correct the situation. As a result, California Indians have higher rates of poverty, lower household income, slightly less education, less post-secondary education, and higher rates of unemployment than reservation Indians nationally.

II. The Standard of Living of California Indians

While BIA and federal funding are not the sole factors affecting the livelihood of California Indians, they have contributed to the lower levels of employment, income and education than those enjoyed by Indians nationally. American Indians are among the poorest of the poor when compared with other ethnic and racial groups in the United States. According to the 1990 Census, median household income for Native Americans was $20,025, down from $20,542 in 1980. Only African-Americans ranked lower that American Indians, with a 1990 median household income of $19,758. Whites ($31,435), Asians ($36,784) and Hispanics

($24,156), all ranked higher. The 1990 Census shows that American Indians were greatly impoverished, with 30.9% living below the poverty line, compared with 9.8% of Whites, 14.1% of Asians, 25.3% of Hispanics, and 29.5% of African-Americans. In terms of children living below the poverty line, American Indians (37.6%) landed slightly below African-Americans (38.8%), but well above Hispanics (31.0%), Asians (16.6%), and Whites (12.3%).

The Census figures indicate that the conditions of American Indian adults and children deteriorated during the 1980s. In 1980, 32.5% of American Indian children were living in poverty, compared to 37.6% in 1990. The overall unemployment rate for reservation and trust land Indians nearly doubled, going from 13% in 1980 to 25.6% in 1990. Indian unemployment rates in recent years have been 4 to 5 times higher than national rates and are at least double Depression-level rates.

While American Indians nationally are among the poorest groups in the United States, California Indians are generally worse off than other Indians and therefore, are poor within one of the poorest groups in the nation. The following figures indicate that indigenous California Indians have generally fared the worst in terms of socio-economic well-being relative to other Indian groups in other states.

A. Employment

BIA labor force statistics provide comparative views of unemployment rates between California Indians and other Indians.

BIA Labor Force Statistics[18]
Percentage of Indian Unemployment

Year	National	California	Year	National	California
1965	52%	53%	1973	37	49
1966	46	37	1977	26	35
1967	40	46	1985	39	55
1968	39	28	1987	38	47
1969	44	23	1989	40	38
1970	40	49	1991	35	36
1971	39	48	1993	37	41
1972	40	50	1995	35	40

Based on the 16 years for which there are data, California Indian unemployment rates are higher than those of other Indians in 12 out of 16 years. Between 1985-95, California Indians have had higher unemployment rates than other Indians in five out of six of the recorded years.

A 1995 survey conducted by the Task Force provides self-reports from 27 California

Indian communities, showing estimated unemployment in the 15% to 90% range, with a median unemployment rate of 30%. The self-report survey also indicates wide variation in unemployment among the communities.

B. Poverty Levels

California Indians have higher rates of poverty than other Indians. Census data from 1990 indicate that the poverty rate for California Indian reservations was 34.1%, compared to 30.9% for Indians nationally.

The 1995 self-report survey of 27 California Indian communities shows poverty rates ranging from 18% to 100%. The median self-reported poverty rate was 70%, indicating that a very high portion of the California Indian community is suffering from financial distress, and that the true poverty rate may be more than twice that shown in the Census data report.

C. Income

The 1990 Census found that the average of the reservation/rancheria median income in California was $15,871.43 among tribes who responded, which is far below the national Indian median household income of $20,025. The average median for California Indian reservations also was significantly lower than the $19,758 median household income of African-Americans, the group with the lowest national median income in the 1990 Census.

D. Education

Census data for 1990 indicate that California Indians between the ages of 18-24 graduate from high school and college at lower rates and attend fewer years of college than American Indians living on reservations nationally. For California Indians age 25 or above, educational achievement is better for high school and grade school, but worse for post-high school education, compared to reservation Indians in that age group nationally.

	Graduated High School	Some College	Graduated College
California Indians age 18-24	34.7%	13.4%	.47%
Indians Nationally age 18-24	35.5%	16.9%	.53%

According to the 1990 Census, 2.5% of California Indians 25 years or older have not completed the fifth grade, compared to 9.5% nationally. Furthermore, 8.5% of California Indians in this age group dropped out between the 5th and 8th grades, compared to 12% nationally. Also

among this age group, 31.5% of California Indians attended some high school but did not gain a diploma, compared to 24.4% nationally. Adding the latter percentages together yields a total of 42.5% of California Indians in this age group who did not graduate from high school, while the national total is 45.9% for the same category. 31.7% of California Indians within this age group graduated from high school, but took no additional schooling, compared to 29.4% nationally.

In post-high school education, California Indians 25 years or older fare worse than all other reservation Indians in the same age group: California Indians with some college totaled 7.7%, compared to 15% nationally. California Indians collected two-year occupational degrees at a 2.9% rate (compared to 4% nationally) and two-year academic degrees at a 2.4% rate (compared to 1.9% nationally). California Indians also completed college at a lower rate (1.9%) than all other Indians (2.8%), and professional and graduate degrees at a rate of .8%, nearly half the rate for all other Indians (1.13%).

E. Household Characteristics

Each decade the Census Bureau collects information on housing characteristics, which indicates the conditions and physical qualities of life among the U.S. population. In recent years, the Census has collected information on complete plumbing, complete kitchens, household occupancy by ethnicity, access to a vehicle, and presence of a telephone in a household, among other things. Some of this information can be used as an indicator of economic well-being.

An interesting statistic collected by the 1990 Census was household occupancy in American Indian and Alaska Native areas. These data indicate the relative density of Native American tribal members compared to non-Indians living on reservations and rancherias. (More non-Indians living in Indian areas would indicate potential loss of community control and sovereignty by Indian communities.) Based on responses to the Census query, Indians occupied 4,107 households out of a total 18,674 households on California reservations and rancherias. That is, only 22% of the households on California Indian territories are occupied by Indian families.[19] The California data, however, are highly skewed by the special conditions at Agua Caliente, where only 52 out of 10,546 are Indian-owned households. If we withdraw Agua Caliente from the analysis, the rate of Indian household occupancy in California Indian Country is 50%, as there are 4,055 Indian-occupied households among the 8,128 households in California Indian areas. The national rate of Indian occupancy of households in Indian areas is 45%, or 112,615 out of 250,065.

Seventy-one California tribes reported on the following household characteristics representing 4,102 Indian-occupied households. The Census reports that 4% (173) of California Indian homes did not have complete plumbing as compared with 20.2% for all Indian-occupied households in Indian areas. In addition, 4% (165) California Indian-occupied households were without complete kitchens, compared to 17.5% of all Indian-occupied households in all Indian reservation areas. Households without access to a vehicle totaled 704 or 17.2%, which is slightly lower that the national rate of 17.5%. There were no telephones in 1,276 or 31% of California

Indian-occupied households, compared to 53.4% of Indian-occupied homes nationally. The Census data indicate that California reservation Indian households are better equipped with modern conveniences than average reservation Indian households.

For all Indians in California, including non-indigenous California tribes, the median year their house was built is 1966, while the median year of household structure construction for all U.S. Indians was 1970. Hence, as a group, all Indians living in California occupy somewhat older household structures than Indians nationally.

The task force's survey of 27 California Indian communities indicates that California Indians are not satisfied with their present housing accommodations. Virtually all responding communities indicated that they were in need of better housing, with needs ranging from 15 to 214 units per community. The ACCIP hearings brought forth additional comments on housing issues. For example, during the hearing on September 16, 1994, the chair of the Morongo Reservation presented testimony that most tribal housing was substandard and that the tribe needed base funds for maintenance and good management.

The 1990 Census data indicate that California Indian households have more complete kitchens and plumbing, slightly more access to vehicles, and more telephones than the national reservation Indian average. Nevertheless, California Indian communities are rife with substandard housing structures and are in need of new housing and support to maintain their present housing.

III. Service Population: Undercounting and Inequity in California

The BIA funds different programs based on a variety of criteria. Many programs, such as Tribal Priority Allocations (TPA), are funded each year based on historical funding levels. Others are funded based on formulas that take into account eligibility requirements and other factors. Still other programs, such as general welfare assistance and contract support, are based strictly on need. Finally, some programs are funded on the basis of competitive grants. When the BIA budget is viewed in terms of per capita expenditures, however, it becomes clear that all of the types of funding determinations have disadvantaged California Indians.

All of the studies listed in the first section of this report conclude that California Indians have been denied their fair share of federal program dollars.[20] This report reaches the same conclusion. This inequity appears for many programs when per capita spending is calculated using the BIA's own service population figures. The true extent of the inequity, however, is understated because the BIA systematically undercounts California Indians. The eligibility criteria used by the BIA for most of its programs are inappropriate as applied to California Indians, and are applied in a way that undercounts the California Indians meeting the criteria.

There is no reliable count of persons who would meet the definition of California Indian as recommended by the ACCIP. The Census figure for Indians in California includes Indians from other states. The IHS service population figures includes out-of-state Indians living within Health

Service Delivery Areas, and excludes urban California Indians. All of the figures that are available, however, indicate that the BIA service population is too low. The 1995 BIA service population was 55,717.[21] By contrast, the 1990 Census showed 242,164 Indians living in California. The IHS has counted 64,417 California Indians living in rural areas, and this count includes only those individuals who have come into IHS clinics for services. The total IHS service population in California (which includes Indians from other states) is 123,630. The number of California Indians approved for payment from the 1972 distribution of awards from the land claims cases is 69,911. And Ronald Jaeger, the Area Director for the Sacramento Area Office of the BIA, has estimated that there are at least 80,000 "unacknowledged" California Indians.[22] These data indicate that the BIA service population should be at least double its present level. Why have so many Indians in California been excluded from the BIA's service population?

The BIA's service population includes only members of federally recognized tribes and their descendants of one-quarter or more degree who live on or near reservations.[23] It does not include "Indians who reside in urban areas or rural areas not adjacent to reservations. . ."[24]

The BIA's counting methods are inappropriate for several reasons. The limitation of benefits to members of federally-recognized tribes should not be applied in California. In addition, due to the historical loss of aboriginal lands and the failure of the United States government to provide adequate land to large numbers of California Indians do not live "on or near" a reservation.

Even accepting the BIA's limitations on service population, it appears that their counting methods are flawed. The count of federally-recognized tribal members comes from the tribes themselves, who lack staff and resources to undertake population surveys. If resources were provided, the numbers would doubtless rise. The Census allows us to determine the number of Indians who live in rural parts of counties in which reservations are located, an approximation of the "on or near" reservation category. For 1990, that figure is 70,860, or approximately two-and-a-half times the 28,815 BIA service population for 1989. Thus, even under the BIA's own definition of service population areas, there is a serious undercount in California.

In establishing what is equitable funding for California tribes, service population figures are a crucial variable. Undercounting eligible Indians leads to an understatement of potential equity problems. The way the BIA determines eligibility in California has been rejected by Congress, by other federal agencies and in some instances, by the federal courts.

The eligibility criteria and population figures used by the BIA for California are difficult to defend, especially with regard to the limitation of benefits to members of recognized tribes. Even individuals who can prove that the federal government views them as Indians have nonetheless been denied benefits and services available to Indians. In addition, the limitation of benefits to those who live on or near reservations should not be applied in California. Both of these limits on the service population are relatively new, and have served to disenfranchise thousands of California Indians who previously received services from the federal government. To understand

how these Indians came to be excluded and why the practice should be changed, it is necessary to review the history of BIA eligibility policy and its application in California.

Eighteen treaties were negotiated with California tribes during 1851-1852. These treaties would have provided an Indian land base of over 8.5 million acres. Mining and business interests in California strongly opposed the treaties and the California Senators were successful in preventing them from being ratified.[25] Because the Senate sealed the file on the treaties, the tribes were not aware of their rejection until 1905.[26] In the meantime, the California Land Claims Act was enacted, requiring 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.[27] The tribes were unaware of the existence and the implications of the Act, and were still under the belief that the treaties they had signed would be honored. Neither the State of California nor the federal government filed any land claims on behalf of the California Indians and the notion eventually prevailed that the State's failure to appear before the special claims board on behalf of the tribes nullified their claims.[28] After the unratified treaties were made public in the early 1900s, Congress passed a series of appropriation acts to acquire land for California Indians.[29] Every member of an indigenous California tribe was treated as a federal responsibility, regardless of place of residence or formal federal recognition.

In 1921, Congress regularized appropriations for Indian benefits nationwide by adopting the Snyder Act, which gave general authorization for such expenditures. The Snyder Act contains no limitations based on tribal status or geographic restrictions on eligibility, and states only that it is for "the benefit, care, and assistance of the Indians throughout the United States."[30] Since most Indian programs funded through the BIA rest on the authority of the Snyder Act, debate has ensued over whether the BIA may limit benefits provided under the Act to members of recognized tribes, or introduce geographic restrictions, such as requirements that beneficiaries live on reservations or "near" reservations.

A. Tribal Recognition as a Limit

The BIA defines its service population as members of recognized tribes and their descendants of one-quarter or more degree who live on or near reservations.[31] But the service population has not always been so narrowly defined.[32]

After the passage of the Indian Reorganization Act (IRA) in 1934, the BIA began to make more formal distinctions between those tribes (and their members) that were "federally recognized" (by treaty, statute or other federal action) and those that had not been "recognized." Commencing in 1978, this distinction was formalized in the adoption of regulations establishing a process for federal acknowledgment of non-recognized tribes, and the first publication of a list of tribes that the federal government considers to be "federally recognized." The trend since that time has been for the BIA to deny services to Indian tribes and their members if the tribe does not appear on the list published annually in 25 C.F.R. Part 83,[33] but this trend has not been followed by Congress or other federal agencies. For example, the Indian Health Care Act Amendments of

1992 contain a broad definition of California Indian,[34] making many California Indians eligible for health care services provided by the IHS. In addition, the Department of Education provides services to a broader class of California Indians than the BIA.[35] Even where the BIA acknowledges that a broader class of Indians is eligible for particular programs, the allocation and distribution of funding for federal Indian programs through the Tribal Priority Allocation (TPA) process has effectively eliminated BIA programs that previously served Indians who are not members of listed tribes.[36] This development disproportionately disadvantages California, which has the largest number of unacknowledged tribes in the nation.

What makes the situation of these unacknowledged California Indians particularly compelling is that many of their tribes were signatories to treaties signed in the early 1850s, which were never ratified. Many of them hold interests in public domain allotments held in trust by the United States, and most of them are on, or are descended from individuals who are on, the judgment rolls for land claims cases involving the unratified treaties. All of these factors strongly suggest a federal responsibility. Thus, although these individuals have one or more forms of federal certification of their status as Indian, they are not eligible for BIA benefits under contemporary agency standards and are not counted for purposes of BIA service population statistics. In view of the federal government's past treatment of California Indians as a group eligible for benefits, this is not a just result.

Congressional and judicial authorities support the view that the BIA should move toward including certain California Indians from unacknowledged tribes. In Malone v. Bureau of Indian Affairs,[37] decided in 1994, the United States Court of Appeals for the Ninth Circuit held that the BIA had not properly promulgated regulations for higher education grants and loans that limited eligibility to members of federally recognized tribes. A member of an unacknowledged California tribe who had been denied a grant asked the court to enjoin the BIA from conditioning eligibility for grants on membership in a federally recognized tribe. Although the court refused to issue such an injunction, stating that it lacked authority to promulgate eligibility criteria, it did invalidate the existing regulation and offer some guidance to the BIA for the purpose of establishing new regulations. In particular, the court admonished the agency to "adopt criteria consistent with the broad language of the Snyder Act, and we encourage the BIA to look to eligibility criteria used in other Snyder Act programs, such as those set forth in the 1988 Amendments to the IHCIA [Indian Health Care Improvement Act] . . ."[38] The definition of California Indian contained in that Act includes members of federally recognized, terminated and unacknowledged tribes; individuals who hold trust interests in reservation or public domain allotments; and individuals listed on the California Indian Claims rolls and their descendants.

In applying this definition, the IHS has counted 64,417 California Indians who have received services in rural areas. As the Ninth Circuit suggested, a similar definition should be adopted by the BIA for eligibility for its Snyder Act programs. In fact, to eliminate confusion and address the historical inequitable treatment of California Indians, there needs to be a uniform definition of California Indian for purposes of eligibility for all federal programs. The definition of California Indian recommended herein is consistent with the definition that Congress has already

adopted for purposes of Indian health programs,[39] and comports with the broad eligibility criteria approved by the Malone court.

B. Geographic Restrictions

Although BIA practices have not always confined benefits authorized by the Snyder Act to reservation Indians,[40] the BIA now limits its services to Indians living "on or near" reservations. Previously, BIA pronouncements articulated an "on reservation" requirement. For example, in 1970, Assistant Secretary of the Interior Harrison Loesch wrote to the Commissioner of the BIA, "It is a long-standing general policy of the Bureau of Indian Affairs and the Congress that the Bureau's special Federal services are to be provided only to the reservation Indians."[41] Where such limitations found their way into BIA manuals, tribal members who were living near reservations and functioning as part of tribal communities brought lawsuits challenging denials of benefits. In one of these cases, Morton v. Ruiz,[42] the Supreme Court invalidated the "on reservation" limitation, finding that it was inconsistent with Congressional intent behind the Snyder Act and subsequent appropriations acts, and had been promulgated in violation of the Administrative Procedure Act.

As a result, the BIA formalized and expanded its eligibility criteria to include Indians living "near" reservations as well as those living within reservation boundaries.[43] It then established procedures for officially designating particular areas as "near" reservations.[44] Consequently, when the BIA does its biannual determinations of service population and labor force, it directs tribes to identify the "Total Resident Indian Population" by adding together the Indians "within the reservation" and those "adjacent to the reservation."[45]

Oklahoma Indians and (more recently) Alaska Natives have received special treatment under these BIA policies regarding geographic eligibility. In each case, the special treatment responds to a distinctive history of legal actions affecting the existence of reservations in those states. For example, the BIA has taken account of the fact that Oklahoma reservations (but not tribes) were abolished near the turn of this century, by defining "reservations" to include "former reservations in Oklahoma."[46] Furthermore, because Congress established a regime of regions and Native villages in Alaska in lieu of reservations, the BIA has defined the term "reservations" to include "Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act."[47] As a consequence of such special treatment, there is a close approximation between the Census statistics for Indian population in those states and the BIA's figures for service population.[48]

Should the "on or near" limitation be applied to California Indians? This criterion was not in force in the early years of federal responsibility for California Indians. Indeed, in 1970, a BIA official filed a sworn affidavit in the course of litigation, in which he stated, "There has been no instance where a California Indian, otherwise eligible, was denied available federal boarding school or scholarship assistance by the Sacramento Area Office for failure to meet the 'on or near' criteria in the regulations."[49] More recently, however, the BIA has invoked the "on or near"

limitation to restrict service population counts and eligibility for California Indians. As a consequence, many federal officials and Indian advocates have argued that special treatment is warranted for California Indians, just as it has been instituted for Oklahoma Indians and Alaska Natives. The adoption of a uniform definition of California Indians for purpose of eligibility for all federal programs would eliminate this unfair limitation.

The case for such special treatment rests on the distinctive and tragic history of loss of California Indian lands, as set forth above. The small reservations and numerous public domain allotments were too small, too remote, too arid, and unsuitable for occupation or habitation to accommodate the entire native population. As Senator Henry Jackson stated in 1971,

> [B]ecause of the events of history, California Indians are dispersed throughout rural areas of the State rather than being concentrated on several clearly defined reservations. Those historical circumstances also limited the number of acres of trust land available to the Indian people. Thus, only a small percentage actually live on trust land, and [thousands of other] Indians whose socioeconomic problems are no less severe, do not relate to a trust land base.[50]

Federal officials have advanced the view that the situation in California thus closely parallels the situation in Oklahoma, where "former reservations" are counted as territory "on or near" reservations. Maps prepared in 1971 by an Assistant to the Commissioner of Indian Affairs, depicting Indian reservations in California, territories promised in the unratified treaties and areas of Indian community concentration demonstrated three things: (1) that "the extent of Indian trust land and public domain allotments is very limited, emphasizing the notorious landless status of California Indians"; (2) the areas of Indian community concentration "are generally near to and in many instances overlap" the territories promised in the unratified treaties, "a situation comparable to that found in Oklahoma [with the 'former reservations']"; and (3) in addition to those Indians in areas of community concentration, "there are significant numbers of California Indians now residing throughout the State, also comparable to the Oklahoma situation."[51] The Assistant concluded, "Just as in Oklahoma . . . communities of descendants of the original Indians continue to live within or near the reservation boundaries originally delimited but, in California, never established by treaty."[52]

If use of the "on or near" limitation is unfair in California, the question remains how best to count California Indians. The ACCIP has concluded that a uniform definition of California Indian should be applied to all federal programs and services provided to Indians based on their status as Indians. The definition of California Indian recommended herein is compatible with a definition already endorsed by Congress.[53]

Even before the 1988 amendments to the IHCIA, there was a wide discrepancy between the service populations of the IHS and the BIA. This is largely because the IHS has been authorized to designate states, counties and towns as "Health Service Delivery Areas (HSDA)" where reservations are nonexistent or so small and scattered and the eligible Indian population so

widely dispersed, that it is inappropriate to use reservations as the basis for defining the HSDA.[54] IHS estimates are made by counting those Indians (as identified during the Census) who reside in the geographic areas in which IHS has responsibilities, including "on or near reservations" and HSDA.[55] Thus, in 1985, the IHS counted 73,893 Indians in its service population for California, while the BIA's figure was only 25,263. Although the IHS also provides services to Indians from other states, its past and present service population figures nonetheless cast doubt upon those used by the BIA.

Congress has also exempted California Indians from geographic limitations in other statutes. For example, the Library Services and Construction Act states, "The provisions of this title requiring that services be provided on or near Indian reservations, or to only those Indians who live on or near Indian reservations, shall not apply in the case of Indian tribes and Indians in California, Oklahoma, and Alaska."[56] Thus California Indians are included regardless of where they reside within the state. Another example appears in the statute authorizing Child Care and Development Block Grants, which are administered by the Department of Health and Human Services.[57] According to the regulations which implement this program, in determining whether a tribe has 50 or more children (the amount needed to qualify for a block grant), the agency "will include children who live on or near a reservation, with the exception of Tribes in Alaska, California, and Oklahoma."[58]

It is apparent from this history that the BIA has been too slow to recognize and rectify the problems of program eligibility and service population undercount in California.

IV. Land Inequities

In the Treaty of Guadalupe Hidalgo, the United States agreed to protect the inhabitants of California in the free enjoyment of their liberty and property.[59] 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,[60] leading to the rejection of the California Indian treaties by the Senate.

The Mission Indian Relief Act of 1891 and the Homeless California Indian Acts restored some land,[61] and other land was acquired through Indian allotments, which are still administered by the federal government.[62] California Indians were only rarely allowed to keep significant parts of their former territories. As a result, California Indians have one of the smallest per capita land bases[63] and BIA funding levels of any BIA service area in the nation. The historical dispossession of California Indian lands has caused considerable disruption and economic loss among California Indians. This severe history of land dispossession is further aggravated by one of the lowest per capita funding levels within the BIA system.

The distribution of funds for some programs is determined, in part, by the amount of tribal land. California Indians are forced to suffer double jeopardy: having lost most of their lands through irregular methods, they are now deprived of federal programs and adequate budget support for having too little land. Having less land tends to penalize the California Indians not only in government policy and administration, but also by reducing the opportunities for economic and community development.

The following table presents American Indian land ownership by area office, tribe and individual, and per capita acres within each area office region. The individual land holdings listed below include reservation and public domain allotments under federal trusteeship.

Area Comparison of Indian Land Holdings

Area	Tribal Land	Individual Land	Total Per Capita Acres
Aberdeen	2,890,757	3,043,910	46.22
Albuquerque	4,599,100	65,339	78.26
Anadarko	43,387	414,280	10.05
Billings	3,580,382	2,850,618	151.57
Muskogee	77,528	567,265	1.99
Navajo	14,753,252	717,077	68.55
Eastern	441,827	0	8.78
Minneapolis	1,348,723	142,455	19.40
Phoenix	12,317,926	272,853	124.84
Portland	3,956,493	874,127	46.08
Sacramento	405,133	62,852	8.39 (4.20)
Juneau	0	884,100	16.68
TOTAL	**44,414,508**	**9,894,876**	**43.10**

The total per capita acres is calculated by adding tribal land and individual land and dividing by the 1995 BIA *Indian Service Population and Labor Force Estimates.*[64]

The Area Comparison of Indian Land Holdings table indicates that California Indians in the Sacramento Area Office have one of the smallest land bases in the BIA system. In terms of per capita acres, California Indians have 8.39 acres. As was argued above in the analysis of service populations, however, California Indians have been systematically undercounted in the BIA service population estimates by at least 100%. If we use this estimate and divide the California Indian per capita acres by two, the real estimate of California per capita acres is 4.2, which is far below the national average of 43 acres. In either case, only Muskogee has fewer per capita acres for Indians than California.

The effect of land base on funding can been seen by comparing per capita funding for Oklahoma with Sacramento Area Offices of Operation of Indian Programs, which covers a wide variety of programs, some of which use land base as a criteria in the funding formula. The recent

per capita funding rates for California Indians were $522.14 (1991), $749.40 (1992), $700.30 (1994), $582.33 (1995), and $451.33 (1996). Since we estimate that only half of California Indians are included in the BIA Service Population counts, "real" California per capita funding rates were $261.07 (1991), $374.70 (1992), $350.15 (1994), $291.17 (1995), and $225.67 (1996). The Anadarko area had a higher per capita funding distribution during 1991-1994: $808.03 (1991), $915.28 (1992) and $698.43 (1994). The rates for Muskogee area were $175.50 (1991), $109.27 (1992) and $89.88 (1994). California Indians have one of the smallest per capita funding rates of all BIA areas. Indians in the Muskogee area also have very little land, only an average of 3.32 acres per person.

While Indians in Oklahoma have less land per capita than California Indians, many programs that are funded on the basis of land base contain an exemption from that formula for Oklahoma. A similar exemption should apply to California.

The exemption for Oklahoma exists because the government has recognized the unique historic circumstances that led to the loss of land in that state. Eastern Oklahoma is where many Indian nations from east of the Mississippi River were forced to migrate under the 1830 Indian Removal Act. Between 1830 and 1877, many Indian communities and tribes were resettled in eastern Oklahoma, and vast amounts of land were reserved for their use by treaty. A very large amount of Indian land in eastern Oklahoma was later allotted under the General Allotment Act of 1887, the Curtis Act of 1898, and various other acts affecting tribal lands in Oklahoma. Most of the land was allotted to individuals and many Indians subsequently lost their allotments to fraud, failure to pay taxes or mortgage foreclosure.[65] As a result, eastern Oklahoma has a large Indian population and relatively little land in trust status.

California Indians lost their land in a different way. Unlike Oklahoma, where land was granted by treaty and later distributed by allotment, the California Indian treaties were not ratified, and only after considerable dispersal and population decline were small amounts of land granted to some California Indians. California Indians also suffered disproportionately from the Termination policy, pursuant to which 40 California Indian tribes were terminated.[66] So far, 29 of those tribes have been restored, but most are without land and others have recovered only small parcels of land.

Many California Indian tribes are not federally recognized and therefore, do not have trust land. The history of California over the past 150 years is full of efforts to deny California Indians land and community identity. As a consequence, California Indians have retained relatively little land, which inhibits community economic development and puts California Indians at a disadvantage in BIA distribution formulas.

California Indians are also at a disadvantage with respect to the relative value of their lands. Most California reservations and rancherias are very small and often located in marginal economic areas with little access to commerce and regular traffic. The 10 largest reservations and rancherias hold 302,325 acres, or 75% of California Indian trust land.[67] Even the few large

Table 1

Sacramento B.I.A. Allocations
vs.
National B.I.A. Allocations

Direct Appropriations[68]

Year	National Alloc.	Sacramento Alloc.	Sac. % of Alloc.	Nat. Serv. Pop.	Sac. Serv. Pop.	All Other Indian Per. Cap.[69]	Sac. Per Cap.	"Real" Sac. Per Cap.
1969	$263,094,000	$ 2,005,000	.8%	456,520	5,598	$ 583.46	$ 358.16	$ 179.08
1970	$302,745,000	$ 2,472,000	.8%	477,458	2,053	$ 641.05	$1,204.09	$ 602.04
1971	$364,508,000	$ 3,938,000	1.1%	488,083	5,354	$ 758.16	$ 735.52	$ 367.76
1972	$439,685,000	$ 5,810,000	1.3%	533,744	3,344	$ 895.68	$1,737.44	$ 868.72
1973	$514,866,000	$ 9,924,000	1.9%	542,897	6,230	$1,016.23	$1,592.94	$ 796.47
1974	$583,838,000	$ 9,413,000	1.6%					
1975	$691,317,000	$10,949,000	1.6%					
1976	$867,601,000	$11,166,000	1.3%					

reservations like Tule River (55,396 acres) and Round Valley (26,095 tribal acres and 5,612 acres of allotments), in general, have very marginal land for agriculture or economic development purposes. In fact, much of the land on the Round Valley and Tule River Reservations is mountainous and isolated from commerce and effective roadways.

V. The Underfunding of California Indians by Federal Agencies

In the following analysis, it is conservatively estimated that the California Indian service population is undercounted by at least 100% or is only half the "real" number. Since California Indians have been systematically undercounted, an additional per capita statistic labeled "Real" Sacramento Per Capita appears in the column to the far right in all the following BIA appropriations tables.

Funding data from the BIA were not available in directly comparable formats over the 1969-95 period, so we present four tables with internally comparable funding sources over the period from 1969 to the present. Table 1, "Sacramento BIA Allocations vs. National BIA Allocations," covers the 1969 to 1976 period, and shows the per capita funding for the Sacramento Area Office compared with that received by all other Indians included in the BIA service population. If BIA figures are used, in some years California Indians have significantly higher per capita shares of BIA funds for some programs. The table shows, however, that the service population figures for California during this period were not only erratic, but also absurdly low. The doubt raised by these figures is compounded by the fact that 69,911 California Indians were certified as eligible to participate in the land claims judgment in 1972. For purposes of consistency, however, the figures listed in the "real" Sacramento Per Capita column are calculated in the same fashion as elsewhere. The "real" Sacramento per capita figures show that California Indians were systematically underfunded each year during the 1969-73 period.

Table 2, "Area Direct Operations & Tribal Priority Allocations," provides data for several years during the 1980s, and for 1995. This category of funding, representing about one-third to one-half of BIA funding for tribal programs, shows that California Indians received about the same or somewhat better per capita funds, if BIA service population figures are used. However, the "real" Sacramento per capita column shows that California Indians are underfunded by about one-third to one-half the funding level of all other BIA-served Indians.

Table 3, "Operation of Indian Programs," contains the most comprehensive budget information and is probably the best indication of relative distribution of BIA funds. This table provides data for 1991-92 and 1994-96, and indicates that California Indians received less—sometimes close to 50% less—per capita funding than all other Indians, except in 1994. The "real" Sacramento per capita funding level is usually around one-quarter the funding level of all other Indians served by the BIA. California Indians are greatly disadvantaged by the present distribution of BIA funds. These data indicate that funding for California Indians would have to be at least double the present level in order to approach parity with all other Indians.

Table 2

Area Direct Operations & Tribal Priority Allocations[70]

Year	National Alloc.	Sacramento Alloc.	Sac. % of Alloc.	Nat. Serv. Pop.	Sac. Serv. Pop.	All Other Indian Per Cap.[71]	Sac. Per Cap.	"Real" Sac. Per Cap.
1982	$355,620,500	$12,980,000	3.6%					
1985	$272,530,900	$10,136,600	3.7%	786,019	25,263	$333.83	$401.24	$200.62
1986	$250,893,900	$ 8,876,500	3.5%	786,019	25,263	$307.90	$351.36	$175.68
1987	$303,549,900	$ 9,739,700	3.2%	861,570	27,823	$341.02	$350.06	$175.03
1988[72]	$297,664,800	$12,117,300	4.1%	861,570	27,823	$331.43	$435.51	$217.76
1989[73]	$287,732,800	$ 9,832,600	3.4%	949,075	28,815	$312.66	$341.23	$170.61
1995	$405,359,600	$15,975,700	3.9%	1,260,206	55,717	$336.54	$286.73	$143.37

Table 3

Operation of Indian Programs

Year	Area Office Direct[74]	Sac. Alloc.	Sac. % of Alloc.	Nat. Serv. Pop.	Sac. Service Pop.	All Other Indians Per Capita	Sac. Per Capita	"Real" Sac. Per Capita
1991	$1,122,356,059	$19,063,943	1.7%	1,001,441	36,511	$1,143.39	$522.14	$261.07
1992	$1,059,469,237	$27,361,163	2.6%	1,001,441	36,511	$1,069.62	$749.40	$374.70
1994	$ 804,933,411	$31,911,221	3.96%	1,183,967	45,568	$679.04	$700.30	$350.15
1995	$1,308,078,546	$32,445,562	2.5%	1,260,206	55,717	$1059.07	$582.33	$291.17
1996	$1,421,172,391	$25,146,828	1.8%	1,260,206	55,717	$1159.02	$451.33	$225.67

Table 4, "BIA, Total Obligations for Funds 31000-39009," contains annual recurring programs, education, other recurring programs, annual non-recurring programs, central office operations, area office operations, special programs, and tribal priority allocations. Data are supplied for 1992-95, and only those funds allocated to the area offices are considered in the table. Funds allocated to central office administration are not considered. This table shows California Indians doing relatively well if the BIA service population figures are used, with per capita funding rates above that of all other Indians in the years 1992, 1994 and 1995. The "real" per capita distribution in this category, however, is about 50% below that of other Indians served by the BIA.

The data show a clear pattern of chronic underfunding of California Indian programs and area office support. The BIA has underfunded California Indians since at least the 1970s and, as the four tables indicate, at rates of 50% or higher.

Table 4

BIA
Division of Accounting Management
Total Obligations for Funds 31000-39009

Year	Area Office Direct[75]	Sac. Alloc.	Sac. % of Alloc.	Nat. Serv. Pop.	Sac. Service Pop.	All Other Indians Per Capita	Sac. Per Capita	"Real" Sac. Per Capita
1992	$ 16,917,818	$ 807,479	4.8%	1,001,441	36,511	$16.09	$22.12	$11.06
1993	$793,457,948	$25,538,384	3.2%	1,183,967	45,568	$648.60	$560.45	$280.23
1994	$798,878,809	$31,648,200	4.0%	1,183,967	45,568	$648.02	$694.53	$347.26
1995	$782,257,869	$31,866,425	4.1%	1,260,206	55,717	$649.45	$571.93	$285.96

A. Selected BIA Programs

A look at the funding levels of several BIA programs and a comparison of the Sacramento Area's share provides more information about funding patterns for California Indians. The following table presents multi-year funding data for adult vocational training and confirms the pattern of underfunding for California Indians. This program is critical to the future of California Indians.

Table 5, "Adult Vocational Allocations," shows funding for adult education programs between 1985-89 and in 1991. Official BIA figures indicate that California Indians have been receiving adult vocational funding at a rate of nearly twice the national BIA adult vocational average. However, the "real" Sacramento per capita adult vocational funding level is smaller than the national average in every year for which data were available, except 1986. In 1991, the national average was $16.71 per person, while the "real" Sacramento average was $12.04 per person. Although in the middle 1980s, California Indian adult vocational allocations were slightly better than the national average allocations, by the 1990s they dropped to about 25% below the national average. California Indians need an increase in funding of about 25% to match the BIA average per capita distribution in adult vocational training program funding.

Sacramento Adult Vocational Training Allocations
vs.
National B.I.A. Adult Vocational Allocations

Year	Nat. A.V. Alloc.	Sac. A.V. Alloc.	Nat. Serv. Pop	Sac. Serv. Pop.	% of Nat. Alloc.	Nat. Per Capita	Sac. Per Capita	"Real" Sac. Per Capita
1981	$15,548,500	$1,285,000			8.3%			
1982	$16,595,800	$1,220,700			7.4%			
1983	$15,551,600	$1,179,100			7.6%			
1984	$20,189,600	$1,183,800			5.9%			
1985	$15,474,800	$1,125,800	786,019	25,263	7.3%	$19.69	$44.56	$22.28
1986	$18,211,000	$1,039,200	786,019	25,263	5.7%	$23.17	$41.14	$20.57
1987	$17,021,900	$1,038,100	861,570	27,823	6.1%	$19.76	$37.31	$18.65
1988	$18,367,600	$ 990,500	861,570	27,823	5.4%	$21.32	$35.60	$17.80
1989	$17,853,600	$1,079,100	949,075	28,815	6.0%	$18.81	$37.45	$18.72
1990	$17,422,000	$ 938,000	949,075	28,815	5.4%	$18.36	$32.55	$16.28
1991	$16,732,200	$ 878,900	1,001,441	36,511	5.3%	$16.71	$24.07	$12.04
1992	$18,060,000	$ 858,000	1,001,441	36,511	5.3%	$18.03	$23.50	$11.75
1993	$16,796,000	$ 854,000	1,183,967	45,568	5.1%	$14.17	$18.74	$ 9.37
1994	$15,547,000	$ 834,000	1,183,967	45,568	5.4%	$13.13	$18.30	$ 9.15
1995	$15,597,000	$ 869,000	1,260,206	55,717	5.6%	$12.95	$15.60	$ 7.80

B. The Indian Health Service (IHS) in California

Compared with the BIA, the IHS has adopted a more inclusive definition of Indian eligibility for its programs. In fact, the IHS service population numbers approximate the "real" Sacramento area service population, since it is about double the official BIA service population figures. However, the IHS also serves Indians from other states now residing in California, and does not serve any Indians outside of the Health Service Delivery Areas (HSDA). This means that the IHS does not serve any urban California Indians, and does not include them and other California Indians outside of HSDAs in its service population, even though all California Indians are eligible for IHS services.[76] Thus, despite the higher service population, the IHS also underserves California Indians. Moreover, the IHS provides less funding per capita to the Indians in California who are receiving services.

The IHS has a history of underserving California Indians. In 1974, the Rincon Band and individual tribal members sued the IHS on behalf of California Indians for neglecting to provide funding levels comparable to other service areas within the IHS. The U.S. Court of Appeals for the Ninth Circuit held that the IHS had not developed "distribution criteria that are rationally aimed at an equitable division of its funds."[77]

Table 6 shows IHS budget obligations to all areas from 1988 to 1996. For purposes of comparing area direct funding, budget obligations for the IHS headquarters, Albuquerque headquarters and regional offices were withdrawn from the Distribution to Areas column. The IHS figures in Table 6 represent a wide range of health services including federal health administration, tribal health administration, clinical services, contract care, preventive health, urban health, reimbursements, and Medicare collections. Clinical services include hospitals and clinics, dental services, mental health, alcoholism programs, and funds for maintenance and repair of clinical service facilities. Preventive health funding provides for programs in sanitation, public health nursing, health education, community health representatives, and immunization. California Indians continue to suffer systematic and chronic underfunding of health services in the range of 30-45% for most years. The best year for California Indians is 1995, but during that year the California IHS budget was swelled by special grants totaling $12,277,280. IHS headquarters awarded the Hoopa Valley Compact $4,689,813, while the Southern Indian Health Council received $1,708,286, and other California tribes were awarded $5,879,181 in health care grants. Health care compacts are not part of the base funding for California tribes and are granted on an annual basis, so the base IHS funding for California is $78,509,019, instead of $90,786,299. Using the base figures, California Indian IHS per capita funding equals $678.96. This figure falls 29% short of the national IHS per capita distribution.

Despite the Rincon court's specific holding that the IHS had breached its statutory duty to California Indians under the Snyder Act, the IHS continues to significantly underfund health services in California. IHS services need to be made available to all California Indians, and funding should be increased to reach levels of other area offices.

Table 6

Indian Health Service Obligations to Areas

	Distribution to Areas[78]	California Obligations	National Serv. Pop	California Serv. Pop	Nat. Per Cap.	California Per Cap.
1988	934,111,838	37,401,527	1,038,121	80,595	899.81	464.06
1989	1,014,622,581	40,953,447	1,073,886	83,128	944.81	492.66
1990	1,160,940,435	51,319,454[79]	1,102,001	85,818	1,053.48	598.00
1991	1,368,743,131	62,984,674	1,131,013	88,657	1,210.19	710.43
1992	1,411,481,820	65,696,862[80]	1,160,896	91,652	1,215.86	716.80
1993	1,180,208,540	66,245,775[81]	1,160,896[82]	91,652[83]	1,016.64	722.80
1994	1,577,603,767	77,975,612	1,339,678	113,465	1,177.60	687.22
1995	1,313,355,569	90,786,299[84]	1,376,415	115,632	954.19	785.13

C. Housing and Urban Development (HUD) Programs

HUD provided funding and housing unit data on Indian housing programs for a 16-year period from 1980 through 1995. During this period, HUD approved a total of 42,133 housing units of which, 1,909 were in California. At this rate, California Indian tribes gained approval to build 119.3 houses per year, an average that is far below their stated need, as most suffer from chronic substandard housing. Starting in 1980 and continuing through 1995, HUD Indian housing programs spent $3,423,346,445 nationwide; California's share was $202,349,285. California Indian HUD programs averaged a total of $12,646,830.31 per year. On average, California Indian housing programs were granted $106,008.64 per approved housing unit.

Table 7 presents HUD Indian program funding levels for 1980 through 1995. HUD uses the BIA service population figures, according to which California Indian housing programs have done better than the national per capita funding rate in 15 out of 16 years. This indicates that HUD Indian housing program officials may have supported a concerted effort to alleviate the poor housing conditions of many California Indians living on or near reservations or rancherias.

However, considering that BIA service population figures contain an undercount bias of at least 100 percent, the "real" California per capita HUD funding shares fall below national rates for 11 out of 16 years. Using the BIA figures, California Indian housing funding levels were significantly larger than the national per capita rate in 1980, 1982, 1983, 1985, and 1991. Thus, the concentration of higher California Indian housing funds came in the early 1980s, while "real" California per capita funding has exceeded the national average only once in the last 10 years. According to "real" California per capita figures, California Indians over the past decade have been systematically underfunded in Indian housing programs.

Over the past decade, the BIA, IHS and HUD have chronically and significantly underfunded California Indian programs, compared to Indian programs elsewhere. Although funding levels vary from year to year, restoring California Indian programs to funding levels comparable to Indians in other states will require significant funding increases. Merely increasing funding to equitable levels, however, will do little to rectify past years of chronic underservice. California Indians should also be compensated for past years of underfunding by above-average funding levels.

Table 7

Housing and Urban Development (HUD) Indian Housing Programs 1980 - 1995

Year	HUD Total Reserved Funds	Cal. Reserved Funds	BIA Serv. Pop.	Cal. Serv. Pop.	HUD Per Capita	Cal. Per Capita	"Real" Cal. Per Capita
1980	372,622,027	13,407,251	648,683[85]	10,121	574.43	1,324.70	662.35
1981	216,004,681	6,536,249	648,683	10,121	332.99	645.81	322.41
1982	213,011,516	13,641,770	648,683	10,121	328.38	1,347.87	673.93
1983	147,396,911	10,193,830	648,683	10,121	227.22	1,007.20	503.60
1984	156,500,639	2,529,201	648,683	10,121	241.26	249.90	124.90
1985	118,611,385	11,980,423	786,019	25,263	150.90	474.23	237.12
1986	129,362,983	8,050,493	786,019	25,263	164.58	318.67	159.33
1987	268,155,362	15,741,327	861,570	27,823	311.24	565.77	282.88
1988	232,935,363	10,609,247	861,570	27,823	270.36	381.31	190.66
1989	126,489,299	6,187,364	949,075	28,815	133.28	214.73	107.36
1990	246,969,802	9,329,780	949,075	28,815	259.93	323.78	161.89
1991	235,668,221	32,858,902	1,001,441	36,511	235.33	899.97	449.99
1992	254,809,020	11,788,554	1,001,441	36,511	254.44	322.88	161.44
1993	253,750,825	8,566,317	1,183,967	45,568	214.32	187.99	93.99
1994	285,440,317	21,306,713	1,183,967	45,568	241.09	467.58	233.79
1995	270,190,371	19,621,864	1,260,206	55,717	214.40	352.17	176.09

VI. The Unequal Administrative Attention Given to California Indians by the BIA

Over the last two decades the BIA has been downsizing. The number of administrative personnel has declined from about 16,000 to between 10,000 and 11,000 in recent years. The BIA has experienced cutbacks in funding in real terms, as outlays of funding have not kept pace with inflation. Furthermore, the BIA, under the policy of self-determination, has been shifting some personnel positions to tribal governments. Even though all areas have experienced reductions, statistics for 1992 show that California Indians are served by one of the lowest per capita BIA employee ratios and the lowest administrative square footage of any area office.

A. BIA Personnel Distribution by Area

BIA personnel are distinguished between education and non-education personnel. 46% of BIA staff are involved in education, although some areas such as Juneau, Billings, Minneapolis, Muskogee, and Eastern report very few education personnel. The distribution of BIA personnel by area office is given below for the year 1992. In order to calculate the 1992 per capita distribution of BIA employees, the 1991 BIA Indian Service population figures were used.

(1992)	BIA Employees	Per Capita BIA Employees
Aberdeen	1,794	.0202
Albuquerque	1,052	.0197
Anadarko	432	.0111
Eastern	152	.0037
Juneau	232	.0027
Billings	1,069	.0285
Phoenix	2,017	.0227
Minneapolis	295	.0051
Muskogee	225	.0010
Navajo	4,226	.0256
Portland	1,207	.0145
Sacramento	255	.0070 (.0035)

The areas with the smallest per capita BIA employees are Eastern, Juneau, Minneapolis, Muskogee, and Sacramento. Sacramento has .007 BIA employees per person, but since we estimate that California Indians are undercounted by at least 100%, California's rate is better estimated as .0035. After accounting for population differences, BIA employee distribution among the area offices is very uneven, with the favored areas getting four to six times more. Sacramento is among the most underserved areas.

B. Administrative Space By Area

An indirect measure of administrative attention and capability is the amount of square footage of office space maintained by the BIA. The BIA maintains living quarters, schools and non-education buildings to carry out its mission. For the year 1992, we have square footage data for BIA education and non-education purposes. After excluding living quarters and non-maintained buildings, the BIA areas collectively maintained 18,490,736 square feet of building space, of which, education buildings comprised 86%. Sacramento and Juneau were the only BIA areas that did not maintain education buildings. Of all the areas, Sacramento had the smallest amount of building space, and the least per capita square footage serving its Indian population.

1992 Area	**Square Footage**	**Per Capita Square Footage**
Aberdeen	4,018,880	45
Anadarko	264,788	7
Billings	611,491	16
Juneau	99,403	1
Minneapolis	561,316	10
Muskogee	375,799	2
Phoenix	2,088,666	23
Sacramento	18,160	0.5 (0.25)
Albuquerque	1,381,436	26
Navajo	7,069,317	43
Portland	1,014,293	12
Eastern	987,187	24
Total	18,490,736	Average 18.5

Sacramento has one-half square foot of building per California Indian, but when taking into account the undercount, the Sacramento area square footage drops to 0.25 per person. BIA administrative space for California Indians is only 1/74th of the national average for all areas. Only Juneau and Muskogee come close to this figure.

With relatively few BIA personnel and little administrative space, California Indians are among the least served, if not *the* least served Indian group in the nation. The low level of administrative attention inhibits BIA officials and tribal leaders from effectively addressing the administrative, social and economic issues that confront all California Indian communities.

VII. Case Study in Funding Inequity—General Assistance Welfare

> "When the Indian is sick or in need, he dies or recovers, (it seems quite immaterial which) while officials of the federal government and of the county government are exchanging mutual felicitations in regard to his care."[86]

A. Introduction

Before Congress enacted the Snyder Act of 1921, the federal government appropriated funds to BIA agency superintendents on an ad hoc basis to supply the basic needs of Indians under their purview. Sometimes these payments for food, clothing and supplies fulfilled treaty obligations; sometimes they simply addressed pressing human needs. California Indians were among the beneficiaries of these allocations, although every year the demand for funds for care of the old, destitute, sick, and helpless Indians in the state exceeded the allowance.[87] Sometimes California counties were willing to take up the burden of care for local Indians; more often, they declined, especially if the Indians resided on trust land. The state and counties felt little or no responsibility for the federal "wards."

The Snyder Act ushered in an era of more regularized federal appropriations, provided for "the benefit, care, and assistance of Indians throughout the United States" and for "relief of distress and conservation of health." In fact, the Snyder Act was designed to provide general authorization for such appropriations. For the next 23 years, however, amounts appropriated for California Indians continued to be unsystematic and inadequate.[88] Later, by BIA fiat, off-reservation Indians were excluded from benefits, leaving the largely landless California tribes bereft of help.

In 1944, the BIA began to grant cash payments, using Snyder Act funds, as part of a general assistance program.[89] The program was known as "general assistance" to distinguish it from "categorical assistance," which is available through joint federal-state programs only to people who fit into specific categories such as elderly, disabled and families with dependent children.

For its first 30 years, this BIA general assistance program was administered without formal regulations. Only an unpublished BIA manual set forth the eligibility requirements. According to these provisions, the program was residual in nature—only when other federal, state or tribal programs failed to provide benefits would BIA general assistance become available.[90] Other important limitations on BIA assistance were the requirement that recipients live on reservations (a large obstacle for California Indians), and the use of state formulas to establish benefit levels.[91] In 1974, the Supreme Court decided Morton v. Ruiz,[92] a case that challenged the restriction of benefits to Indians living on reservations. In ruling against the BIA, the Court held that the "on reservation" limitation was inconsistent with Congressional intent behind the Snyder Act and subsequent appropriations acts, and had been promulgated in violation of the Administrative Procedure Act.

In the late 1970s, not long after the Court's decision in Morton v. Ruiz, the current regulations governing BIA general assistance were instituted.[93] While widening the eligible group to Indians living "on or near" reservations, the regulation retained the concept of residual benefits. Benefits will be denied if the state has "a general assistance program available to meet the needs of eligible citizens, including the needs of Indians."[94] A state general assistance program is "available" if payments are available statewide to eligible individuals and families, including Indians on reservations; the state either regularly appropriates necessary funds or mandates counties to appropriate such funds; and payments are directed to meeting "monthly minimum essential needs on a continuing basis."[95] Benefit levels are determined in accordance with the standard for Aid to Families with Dependent Children in the recipient's state.[96]

B. General Assistance Welfare and California Indians

For 42 of its 50 years of existence, the Snyder Act general assistance program has not benefitted a single California Indian. The 1995 fiscal year was the first to see even a trickle of such money into the state. Given that over $50,000,000 in general assistance was distributed in 1990 alone,[97] and $105,000,000 in FY 1995, the significance of excluding California Indians is tremendous.

At the time that the Snyder Act general assistance program was inaugurated, non-Indians concerned with the plight of California tribes were advocating decreased federal administration of benefits. To take the place of federally administered benefits, they supported increased federal support for state-administered programs. The proponents of this theory argued that high federal overhead expenses seemed to duplicate state bureaucracies, and that California Indians were relatively more prosperous and assimilated (as evidenced by the high percentage of landless, off-reservation California Indians) than Indians in other states.[98] Federal "wardship" was viewed not only as an obstacle to the Indians' progress, but also as a cruel hoax in view of the meager assistance offered by the federal "guardian."[99] An organization founded by non-Indians and Indians in Southern California, called the Mission Indian Federation, actively espoused these same positions.[100]

By 1940, California had begun assuming responsibility for many of the social services previously provided by the BIA, and the number of BIA staff positions had been stripped down to almost nothing.[101] Beginning in 1944, however, forces within the BIA began to propose partial liquidation of the rancheria system.[102] The two agencies of the BIA in Southern California were abolished, and a subcommittee of the Interior Department of the House Appropriations Committee even voted to delete all of the funds necessary for operations of the BIA in California for fiscal year 1950-51, from the appropriations for the Interior Department.[103] The BIA was preparing for a complete withdrawal from California, and in that environment, it ended all welfare payments to indigent California Indians in 1952.[104]

Congressional Committees, the BIA and the California Legislature considered the issue of termination for several years,[105] until Congress officially adopted it as a broad national Indian

policy in 1953 by Concurrent Resolution.[106] The express goal of termination was:

> to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States . . .[107]

The Resolution further 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.

The promise of state jurisdiction was realized in 1958, when Congress passed Public Law 280. Although the new law did not abolish the federal trust status of tribal lands, federal recognition of tribal governments, or the federal trust responsibility toward Indian people, federal and state practice effectively denied these ongoing federal duties, including duties to provide income maintenance and social services. The consequences were felt with particular force in California, even though Public law 280 identified four other states that would also assume civil and criminal authority. Several factors likely contributed to the stronger effect of Public Law 280 in California. First, of all the states named in the Act, California was the only one named in the concurrent resolution on termination. In addition, unlike other states named in Public Law 280, the Area Office with jurisdiction over California does not have jurisdiction over Indians in other states. Thus, it was easier for BIA officials in California to reshape their concepts and practices radically in the wake of Public Law 280. For example, the Sacramento Area Office could be allocated no general assistance money at all, whereas the area office in Portland (serving Oregon, a state named in Public Law 280 and Washington, a state that was not named) would be allocated some general assistance funds regardless of the passage of Public Law 280. Finally, Public Law 280 was originally fashioned as a bill for California alone. Only as the bill made its way through the legislative process did members of Congress determine that it ought to be more comprehensive. Since California was the model and motivator for Public Law 280, BIA officials naturally would seek to achieve the law's objectives most fully in that state.

Thus, although Public Law 280 did not require that general assistance to California Indians be denied, it came to be used as an explanation for the absence of such benefits.[108] Simultaneously, Public Law 280 negated some excuses that the state and its counties had offered for refusing to provide services to tribal members. In the case of general assistance, which is a state-mandated but county-supported program, Public Law 280 countered an argument that some counties had been advancing to justify refusing aid. San Diego County, for example, had argued that local reservation-based Indians did not qualify for general assistance because they were not "residents" of the county, by virtue of their status as federal "wards." San Diego's argument rested in part on the claim that the federal government's authority over reservation Indians ousted state and local jurisdiction over activities within the tribal territory. The passage of Public Law 280 drained all force from this argument, by conferring civil and criminal jurisdiction on the state.

In 1954, a California appellate court decided Acosta v. San Diego County, and ordered the county to include reservation-based tribal members within its general assistance program.[109] The fact that Public Law 280 figured into this decision reinforced the erroneous view that it had nullified federal obligations to provide welfare benefits. In fact, all that the court had done was to make county benefits available. Federal benefits should not have been discontinued unless the availability of county benefits satisfied federal requirements.

For decades following the Acosta decision, federal and state officials assumed that the existence of California's county general assistance program meant that California's Indians had "available" to them general assistance to meet their needs, within the meaning of the federal regulations. Thus, they presumed that California Indians were not eligible for federal general assistance. Two federal court decisions of the 1980s, however, signaled that state and local general assistance programs would be scrutinized carefully to determine whether their eligibility standards were in fact "comparable" to the requirements for BIA general assistance.[110]

Soon thereafter, California tribes began pressing for BIA general assistance funding. The Southern Indian Health Council, as well as several individual tribes, passed resolutions in 1991 requesting the BIA to allocate general assistance money for California. In response, the social services officer for the BIA's Sacramento Area Office decided to canvas the county general assistance programs operating in those California counties with reservations, to determine whether the programs actually were "comparable" to the BIA program. What he learned was surprising: All but one of the counties required that the recipients of county general assistance repay the benefits, unless they were participating in a county work relief program (i.e., working for the county in exchange for their benefits). The BIA official in Sacramento transmitted these findings to the central office in Washington, D.C. In October, 1993, at the request of the BIA's Central Office, the Solicitor for the Department of the Interior issued a memorandum confirming that county general assistance in California was not "comparable" to federal assistance, at least for unemployables, because of the repayment provisions.[111] Thus, for at least some indigent Indians in California, there is no state assistance equivalent to the federal program. Finally, for fiscal year 1995, an initial allocation of $510,000 was made for California. This amount was for direct service only and did not include funds for administration, so the Sacramento Area Office had to reprogram the funds for administration to hire agency social workers.

The current allocation of BIA general assistance to California is tentative and uncertain. No one knows how many eligible Indians there are. Yet, since general assistance benefits are tied to the state's AFDC payment levels, and California pays one of the nation's highest AFDC benefits, it is reasonable to expect that BIA general assistance payment levels in California will be relatively high for each eligible Indian.

VIII. Case Study in Funding Inequity—Law Enforcement and Tribal Courts

> "The Law and Order situation is critical . . . It is obvious to every careful observer . . .that our present procedure is utterly inadequate and that, if anything, it increases rather than decreases crime."[112]

A. History of Federal Involvement in Tribal Law Enforcement and Dispute Resolution in California

Reservations were first established in California by federal statute and Executive Order beginning in the 1860s. Maintenance of law and order and resolution of disputes on these new civilian reservations was, in keeping with standard principles of federal Indian law, a federal and tribal—not a state—responsibility. The tribes, however, were poorly positioned to discharge that responsibility through the early decades of the twentieth century. Years of population loss and dislocation had disrupted tribal social and political organization. To make matters worse, the Indian Service undermined traditional or popularly elected leaders by appointing more compliant individuals to speak for the tribes and to serve as links for the distribution of meager federal benefits. Just as new social and economic conditions engendered new types of conflicts, both among tribal members and with outsiders, tribal institutions were less able to respond. Writing in the 1917 case of Anderson v. Mathews,[113] the California Supreme Court described a group of Indians residing in Central California as having "no tribal laws or regulations, and no organization or means of enforcing any such laws or regulations."

This account doubtless suffers from an ethnocentric conception of government as entailing specific forms of state coercion. In pre-contact times, tribal political institutions often functioned effectively without the use of incarceration or execution of judgments through levies on members' property. Furthermore, traditional tribal legal processes often "went underground" in response to hostilities from non-Indians, functioning outside the knowledge of state officials. Nonetheless, it is true that contact with non-Indians weakened the clan, family and religious institutions that had supported tribal authority systems.

The federal government did nothing to supply the needs for law enforcement and dispute resolution. Given the pro-assimilationist ideology of the time, federal support to revitalize tribal institutions was not a realistic alternative. In fact, the federal government neither supported tribal governments nor provided an effective legal system for tribal members.

Theoretically, BIA Indian police and "special officers" were responsible for policing California reservations. Also, the federal government could supply criminal courts and civil dispute resolution through Courts of Indian Offenses, which were established by Interior Department regulations and enforced a code promulgated by the Department rather than by Congress. The reality was far different, however. Too few Indian and special officers were assigned to the California reservations to provide meaningful law enforcement. And Courts of Indian Offenses, which existed on reservations elsewhere in the country, could not be found in

California through the middle of the twentieth century.[114] Indian Agent Charles Porter wrote from California in 1883 that the Hoopa Reservation in Northern California was filled with internal dissension, making it impossible to organize either Indian police or Courts of Indian Offenses.[115] In a 1941 memorandum to California BIA Superintendent John Rockwell, the BIA's Chief Special Officer related the problems of reservation law enforcement to the absence of Courts of Indian Offenses. In his view, the absence of such courts made it impossible for officers to make legal arrests, other than for the 10 major crimes enacted by Congress in 1886 and for violation of special Indian liquor laws.[116] This limitation existed because officers were authorized by law only to make arrests for the purpose of sending wrongdoers to court. At that time, the law enforcement personnel consisted of two Special Officers and roughly 11 Indian police officers for the entire state. The Chief Special Officer pointed out that unless courts of competent jurisdiction were provided, it was futile to increase enforcement personnel. Meanwhile, the assaults, batteries, attempted rapes, and other offenses falling outside the scope of the Major Crimes Act and liquor laws continued to plague Indians who had no protection and no legal recourse.[117]

In the area of civil dispute resolution, the federal government was of no greater service to California tribes and their members. Problems with outsiders who trampled upon Indian rights were particularly acute. Non-Indians trespassed on Indian lands, cut their timber and diverted their water with relative impunity, almost daring the United States as trustee to take action.[118] Rarely was any federal response forthcoming. In the case of Round Valley, for example, political pressure from non-Indians caused the United States attorney to withdraw federal actions against non-Indian trespassers.[119] Disputes among tribal members also had no recourse before the federal government. Indeed, it was a dispute over land rights on the Hoopa Reservation in California that led to the homicide prosecuted by the federal government in the landmark Indian law case of United States v. Kagama.[120] Kagama and Lyouse were Klamath Indians who had been relocated onto the Hoopa Reservation. Kagama wanted to build a house on the reservation but Lyouse laid claim to the same site. Kagama requested clarification from the reservation Indian agent, who in turn directed the request to Washington. The BIA did not respond, and the dispute between the two Klamaths escalated into homicide.[121] Thus, the lack of federal assistance in this case was fatal.

Toward the end of the second decade of the twentieth century, members of several Southern California tribes concluded that the federal government would never offer adequate services in the areas of law enforcement and dispute resolution. Thus, they formed the Mission Indian Federation, an association of tribal members and non-Indian allies, which lobbied against the BIA and organized its own police force and judiciary to challenge the BIA's authority.[122] Until the 1950s, many Southern California reservations had two organizations: (1) an elected spokesman and councils; and (2) a Mission Indian Federation group, generally made up of direct descendants of traditional leaders followed by traditional families. The Mission Indian Federation has a controversial legacy because its leaders lent strong support to Public Law 280 and state jurisdiction, while forcefully opposing allotment. Tribal members perceived as friendly to the BIA or to allotment received harsh treatment from Federation police, and some Indians found the Federation police to be as abusive as officers from the BIA.[123] Although the organization faded

away in the 1950s, it offered a model of Indian self-determination in the area of dispute resolution and law enforcement that the federal government has never nurtured in California, even as it has aided tribes in other states.

B. Contemporary Inequities in the Federal Government's Law Enforcement and Tribal Courts Support for California

In general, the federal government has jurisdiction over most reservation crimes except for minor crimes involving only Indians;[124] tribes have criminal jurisdiction over crimes committed by Indians, some of which overlaps with federal criminal jurisdiction;[125] and the states have neither civil nor criminal jurisdiction over Indians in Indian Country.[126] With the enactment of Public Law 280 in 1953, California and five other states received criminal jurisdiction and civil judicial jurisdiction on reservations, subject to certain exceptions.[127] Through the same legislation, the federal government relinquished its criminal jurisdiction. Federal funding for law enforcement in California, which had never been robust, disappeared almost entirely.

While California tribes were being abandoned to the state, an altogether different development was occurring in the non-Public Law 280 states. Beginning in 1959, with the case of Williams v. Lee,[128] tribal authority over civil and criminal disputes in Indian Country was increasingly recognized by the Supreme Court. Soon thereafter, a national policy of self-determination for tribes became ascendant, and with it came federal support for tribal governing institutions such as police and judicial systems. In 1995, the BIA was allocated $80,440,000 for tribal law enforcement and another $14,102,000 for Indian judicial services.

California tribes have garnered almost none of that money. Of the approximately $500,000 in law enforcement monies allocated per year in California in the early 1990s, $100,000-$300,000 had to be diverted from the affected tribes' adult and vocational education programs. And this money went to the counties of San Diego and Riverside—which were given contracts to supplement law enforcement on local reservations—not to the tribes themselves. The per capita spending on law enforcement was $9.19 for California in 1995 (or $4.60, using the "real" service population figures), compared with a national per capita expenditure of $63.83 (see Table 8).

Given the absence of support for tribal law enforcement, it should come as little surprise that there are scarcely any tribal courts in California. The roughly 200 reservations outside of California have approximately 150 tribal courts, almost all of which receive federal assistance. In California, only one of the 100 federally recognized tribes located wholly within the State has a tribal court.[129] That tribe (Hoopa) receives federal funding through a special self-governance program, thereby avoiding the standard federal funding policies that disadvantage California tribes. Two efforts are underway to develop consortium courts serving groups of tribes—one in Southern California dealing exclusively with child welfare matters, and one in Mendocino County in Northern California. Limited federal funding has been available for these initiatives. In most years, Sacramento has received no money at all for tribal courts, while nationally the expenditure has been over $11 per capita (see Table 9).

Table 8

Sacramento B.I.A. Law Enforcement Allocations vs. National Law Enforcement Allocations

Year	Nat. L.E. Alloc.	Sac. L.E. Alloc.	Nat. Serv. Pop.	Sac. Serv. Pop.	% of Nat. Alloc.	Nat. Per Cap.	Sac. Per Cap.	"Real" Sac. Per Cap.
1981	$27,849,000	$431,000			1.5%			
1982	$30,172,400	$405,000			1.3%			
1983	$31,075,00	$405,000			1.3%			
1984	$32,220,700	$405,200			1.3%			
1985	$32,745,300	$452,000	786,019	25,263	1.4%	$41.66	$17.89	$8.95
1986	$30,631,100	$429,100	786,019	25,263	1.4%	$38.97	$16.99	$8.49
1987	$45,997,200	$305,400	861,570	27,823	0.7%	$53.38	$10.98	$5.49
1988	$43,295,800	$399,500	861,570	27,823	0.9%	$50.25	$14.36	$7.18
1989	$44,471,300	$415,500	949,075	28,815	0.9%	$46.86	$14.42	$7.21
1990	$49,569,000	$606,000	949,075	28,815	1.2%	$52.23	$21.03	$10.52
1991	$55,693,100	$560,000	1,001,441	36,511	1.0%	$55.61	$15.36	$7.68
1992	$69,742,000	$660,000	1,001,441	36,511	0.9%	$69.64	$18.08	$9.04
1993	$70,586,000	$656,000	1,183,967	45,568	0.9%	$59.62	$14.40	$7.20
1994	$76,985,000	$666,000	1,183,967	45,568	0.9%	$65.02	$14.62	$7.31
1995	$80,440,400	$512,000	1,260,206	55,717	0.6%	$63.83	$9.19	$4.60

Table 9

Sacramento B.I.A. Tribal Courts Allocations vs. National Tribal Courts Allocations

Year	Nat. T.C. Alloc.	Sac. T.C. Alloc.	Nat. Serv. Pop.	Sac. Serv. Pop.	% of Nat. Alloc.	Nat. Per Cap.	Sac. Per Cap.	"Real" Sac. Per Cap.
1981	$ 4,513,900	$0			0%			
1982	$ 5,032,700	$0			0%			
1983	$ 6,185,000	$0			0%			
1984	$ 7,057,300	$0			0%			
1985	$ 7,041,800	$0	786,019	25,263	0%	$ 8.96	$0.00	$0.00
1986	$ 9,005,000	$0	786,019	25,263	0%	$12.75	$0.00	$0.00
1987	$ 9,804,700	$0	861,570	27,823	0%	$11.38	$0.00	$0.00
1988	$ 8,854,100	$50,000	861,570	27,823	0.6%	$10.28	$1.80	$0.90
1989	$ 9,312,900	$50,000	949,075	28,815	0.5%	$ 9.81	$1.74	$0.87
1990	$10,523,000	$0	949,075	28,815	0%	$11.09	$0.00	$0.00
1991	$11,915,000	$0	1,001,441	36,511	0%	$11.89	$0.00	$0.00
1992	$13,160,000	$0	1,001,441	36,511	0%	$13.14	$0.00	$0.00
1993	$12,950,000	$0	1,183,967	45,568	0%	$10.94	$0.00	$0.00
1994	$13,421,000	$0	1,183,967	45,568	0%	$11.34	$0.00	$0.00
1995	$14,102,000	$0	1,260,206	55,717	0%	$11.19	$0.00	$0.00

Why have California tribes been denied access to most federal funds for law enforcement and court systems? Over the years, the BIA has offered several justifications but none withstands careful scrutiny, and some have recently been repudiated by Congress and other federal agencies.

1. Justification One: California tribes are not "historic" tribes with inherent jurisdiction

For almost 60 years, the Department of the Interior distinguished between "historic tribes," in the sense that a group existed as a tribe before federal recognition occurred, and "created" Indian tribes.[130] A Solicitor's opinion written soon after the Indian Reorganization Act (IRA) was adopted in 1934 interpreted section 16 of the IRA to authorize the Secretary of the Interior to categorize Indian tribes into these two groups.[131] The Department made this distinction—without notifying the affected tribes—on the basis of whether a reservation community was made up of individuals or tribes that had been removed from their aboriginal homelands by the federal government.[132] The Department concluded that the groups located on "rancherias" in California were "created" tribes, because the rancherias were established to alleviate a homeless Indian problem in California rather than to reserve land for a particular tribe.

According to the Department's policy, only "historic" tribes possessed inherent civil and criminal jurisdiction that could function concurrently with state jurisdiction in Public Law 280 states.[133] "Created" tribes were deemed to possess only those authorities that were expressly conferred by the Secretary of Interior.[134] Among other things, "created" tribes were determined to lack the authority to establish judicial systems. According to BIA officials in Washington, D.C. and Sacramento, the majority of tribes located in California had been classified as "created" tribes. Indeed, one BIA official in Sacramento has said that the concept of "inherent powers" was taboo in California.[135] Having taken that position, the Department had a convenient excuse for refusing to fund tribal law enforcement and dispute resolution in California. However, neither California tribes nor Congress were aware of this distinction until the Pasqua Yaqui Tribe of Arizona was denied BIA funding on the basis of this classification. That Tribe brought the situation to the attention of Congress in 1993.

Almost identical bills were introduced in both the House and the Senate to amend the IRA and prohibit the Department of Interior or any other federal agency or official from distinguishing among Indian tribes or classifying them on the basis of the IRA or any other federal law. Senator Daniel Inouye, then Chair of the Senate Committee on Indian Affairs, said that this legislation was intended to make it clear that it is and always has been federal law and policy that Indian tribes recognized by the federal government stand on an equal footing with each other and in relation to the federal government.[136] Senator John McCain, then the ranking minority member on the committee, announced that "[a]fter careful review, I can find no basis in law or policy for the manner in which Section 16 [of the IRA] has been interpreted by the Department of the Interior."[137] He further pointed out that the policy of classifying certain tribes as "created" ignored the fundamental fact that neither Congress nor the Secretary of the Interior has the authority to create Indian tribes, but only to recognize them. He also noted that the Department's

interpretation of Section 16 conflicted with the underlying principles of the IRA, which were to stabilize Indian tribal governments and to encourage self-government.

With broad bipartisan support, the bills that repudiated the distinction between "historic" and "created" tribes were passed and signed into law in May, 1994.[138] As a consequence, the distinction no longer serves as a justification for denying federal law enforcement and dispute resolution funds to California tribes.

2. Justification Two: Lack of tribal concurrent jurisdiction

In the past, the BIA has claimed that Public Law 280 had the effect of extinguishing tribal criminal and civil jurisdiction on reservations. But the weight of legal authority affirms continued tribal jurisdiction concurrent with states under Public Law 280. This authority includes two federal appellate decisions,[139] an opinion of the Solicitor of the Department of the Interior,[140] Attorney General opinions in two Public Law 280 states other than California,[141] and a state court opinion from Alaska.[142] The leading treatise on federal Indian law also propounds the view that tribal jurisdiction is concurrent in Public Law 280 states.[143] A basic principle of Indian law supports this widely held position—the principle that federal legislation should not be interpreted to divest tribes of sovereign authority unless it clearly reflects Congress's intent to do so.[144] Nothing in Public Law 280 expresses the will of Congress to eradicate concurrent tribal jurisdiction. Indeed, the legislative history indicates that Congress intended for tribes to persist as governing bodies.[145]

In the more than 40 years since its enactment, several factors have limited the scope of state jurisdiction under Public Law 280. Under the language of the statute, only statewide laws may be enforced under Public Law 280, not county or city ordinances.[146]

Even statewide criminal laws may not be enforced under Public Law 280 if they are essentially "regulatory" rather than "prohibitory" in nature.[147] Separating the "regulatory" from the "prohibitory" laws, however, is a daunting challenge. The most one can say is that courts seem to focus on whether the state allows the activity under some controlled circumstances or whether the activity is completely outlawed. Nonetheless, many state laws have been found inapplicable to Indian reservations as a consequence of efforts to apply the distinction. State bingo laws and speeding laws are only two examples of such exclusions from state jurisdiction.[148] Furthermore, state civil laws that form part of a state regulatory regime, such as licensing laws, are not rendered applicable to tribes by virtue of Public Law 280.

Certain matters fundamental to the definition and internal workings of the tribe, such as tribal enrollment and domestic relations, are also outside the jurisdiction of the state, notwithstanding the enactment of Public Law 280. These matters are within the exclusive jurisdiction of the tribes. Thus, the federal government could not have conferred authority over these matters to the states by virtue of Public Law 280.

Public Law 280 expressly denies states power to legislate with respect to certain matters, particularly matters of property held in trust by the United States and federally guaranteed hunting, trapping and fishing rights. These exceptions to state jurisdiction were included in Public Law 280 because Congress feared that it would be abrogating treaty or statutory rights and would be responsible for compensating the tribes for the loss of these rights. Over the years, courts have interpreted these exceptions to state jurisdiction broadly. Thus, state zoning laws,[149] laws restricting outdoor advertising[150] and unlawful detainer or eviction laws,[151] among others, are unenforceable on California reservations, with the possible exception of some fee patent lands within the reservations. State fish and game laws are also unenforceable against tribal members on California reservations.[152]

Several statutes enacted after Public Law 280 have reduced the amount of jurisdiction available to states under the 1953 law, simultaneously increasing tribal sovereignty or federal power. For example, federal environmental laws such as the Safe Drinking Water Act give tribes rather than states primary enforcement responsibility for control of contaminants in drinking water on reservations.[153]

Of the six Public Law 280 states, California has been the most resistant to concurrent tribal jurisdiction, in one instance arresting tribal officers who were attempting to exercise criminal jurisdiction over Indians on tribal land.[154] California's aberrant position on the question of concurrent jurisdiction should not justify an absence of federal support.

With all of these exclusions from state jurisdiction under Public Law 280, it is unrealistic to expect tribes to rely entirely on state government for their law enforcement and dispute resolution needs. Indeed, without tribal law enforcement and courts, there is a near vacuum of authority over certain problem areas, sometimes leading to violent or disruptive self-help measures.[155]

3. Justification Three: Availability of state law enforcement and courts as a result of Public Law 280

BIA funding for law enforcement and judicial services is paid out under the general terms of the Snyder Act, which authorizes expenditures for "the benefit, care, and assistance of Indians throughout the United States."[156] When California tribes and BIA personnel in the Sacramento Area Office have requested law enforcement and tribal court allocations for California, however, the most common BIA response has been that the funds are not available for tribes located in states that have assumed jurisdiction under Public Law 280.

There are two problems with using Public Law 280 as an excuse for refusing to fund California tribes. First, tribes in Public Law 280 states other than California are receiving BIA funds for law enforcement and tribal courts. Second, the existence of state jurisdiction does not remove the need for tribal law enforcement, courts and alternative forms of dispute resolution, some of which are rooted in tribal traditions and customs.

For example, in Oregon—a Public Law 280 state—the BIA allocates funds for law enforcement and judicial services. How does this come about? According to Lester Marsten, Chief Judge for the Grande Ronde tribe in Oregon, BIA area offices that include a mix of Public Law 280 and non-Public Law 280 states typically have a large program item for law enforcement and judicial services for the tribes in the non-Public Law 280 states. For such area offices, it is relatively easy to have that program item increased to accommodate an additional tribal government. Thus Grande Ronde, located in a Public Law 280 state, requested a BIA contract to carry out judicial services, and the funds came through the area office in Portland. This Portland Area Office serves not only the Oregon tribes, but also tribes in Washington, a state that has not assumed full Public Law 280 jurisdiction. The preexisting line item for judicial services for the Washington tribes made the addition of funding for Grande Ronde relatively noncontroversial. In contrast, adding a major law enforcement or judicial services item for the Sacramento Area Office would represent a more significant policy decision. Nonetheless, it is disingenuous for the BIA to use Public Law 280 as a justification for denying funds to California tribes when it is offering funding to tribes in other Public Law 280 states.

The second problem with the BIA's position regarding funding and Public Law 280 is that, as discussed above, tribes in Public Law 280 states continue to have substantial law enforcement and dispute resolution needs, even with the existence of state jurisdiction.

Even where states possess jurisdiction under Public Law 280, they do not often exercise it diligently or effectively. Hence, a need for concurrent tribal jurisdiction remains. Ever since the enactment of Public Law 280, complaints have issued from states and tribes alike over the lack of state resources to fund law enforcement and judicial services on reservations. From the state perspective, the fact that Public Law 280 continued the tax-exempt status of reservation lands left them with an unfair deal—new law enforcement responsibilities but no taxing authority to support them. While some states responded to this dilemma by returning jurisdiction to the federal government,[157] California's response was to give low priority to reservation law enforcement needs.

Every gathering and hearing on the subject of Public Law 280 brings forth illustrations of this problem. A *Los Angeles Times* article pointed out that the La Jolla Reservation in San Diego County has been overrun with drugs and violence, with six young tribal members murdered within months in the late 1980s. According to a past tribal chair, when members called the Sheriff's Department to report a murder, it was usually an hour before a deputy arrived. For anything short of homicide, the wait was at least three days. Sometimes there was no response at all. Even representatives of the Sheriff's Department acknowledged that the remoteness of the reservations, the cultural differences between the police and tribal members, and the uncertainties of jurisdiction law discouraged police responsiveness.[158] These complaints are echoed in federal reports on Public Law 280. In 1966, for example, a Senate subcommittee found that "Public Law 280 . . . [has] resulted in a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law."[159] The 1976 American Indian Policy Review Commission reached the same conclusion based on its own investigations.[160]

In 1990, the BIA responded to this problem by shifting the Southern California tribal education funds over to law enforcement contracts with the counties of San Diego and Riverside. Under these contracts, the county sheriffs agreed to provide supplemental law enforcement services on the local reservations and to instruct the deputies assigned to reservations in relevant federal Indian law as well as in tribal customs and traditions. While the local police presence on reservations increased,[161] many tribal members took a dim view of the contracts. Indeed, a grass roots organization, Southern California Indians for Tribal Sovereignty (SCITS), was formed around opposition to these agreements. Opponents of the contracts registered several serious concerns: first, the deputies who operated on the reservations were often heavy-handed, insensitive to tribal governing structures and ignorant of tribal customs; second, the counties should not have received payment for performing their federally mandated law enforcement duties, especially when the necessary funds had to be transferred from important tribal education programs; and third, the widely articulated federal policy supporting tribal sovereignty suggests that federal money should not be used to reinforce state jurisdiction on reservations, but rather to finance tribal law enforcement.[162] As tribal leaders who had originally backed the contracts switched their views, the agreements with San Diego and Riverside counties were terminated.

Public Law 280 cannot justify the lack of federal support for tribal law enforcement and dispute resolution. Large gaps in the state jurisdiction created by the law, as well as failure of the state to discharge its law enforcement responsibilities, create a genuine need for tribal institutions. Indeed, the diversion of tribal education funds to county sheriffs demonstrates how desperate the need is for new sources of federal funds from the BIA. Tribes in California have tried to be resourceful, looking to other federal agencies for money to support law enforcement and dispute resolution. The Administration for Native Americans in the Commerce Department, for example, has given planning money to some California tribes wishing to establish tribal codes and court systems. HUD and the IHS may be sources of tribal funds for law enforcement problems relating to housing and child abuse, respectively. For non-California tribes, however, even many in other Public Law 280 states, these non-BIA sources are over and above the standard BIA funding levels for law enforcement and courts. California tribes should be placed in the same position as these other tribes.

C. Public Law 280 and the Breakdown of Law in California Indian Country

California tribes suffer not only from funding inequities, but also from the jurisdictional effects of Public Law 280. Indeed, the two problems are interrelated. This section highlights the problems associated with Public Law 280 and ultimately recommends a fundamental revision of its terms.

Any account of the jurisdictional effects of Public Law 280 must differentiate the symbolic, the direct and the indirect consequences. Symbolically, Public Law 280 was an affront to tribes because it the diminished tribal sovereignty of all affected tribes without their consent, unilaterally abrogating treaty rights held by some of them. It accomplished these results by greatly enlarging the powers of certain states, including California, on Indian reservations.[163] In treaties with some

of the affected tribes, the federal government had promised that reservations would be set aside for their sole and exclusive use and occupancy. Those words have been interpreted to exclude the possibility of most state jurisdiction on the reservations.[164] Even tribes without treaties had been guaranteed freedom from state jurisdiction on their reservations through Supreme Court decisions resting on tribal sovereignty and the Indian Commerce Clause of the United States Constitution.[165]

Public Law 280 overturned the treaty promises and judicial rulings without tribal consent. Indeed, many tribes actively opposed passage of the law, at least to the extent their meager funds could support travel to Congressional hearings.[166] There was little likelihood that the Supreme Court would find Public Law 280 unconstitutional because of this lack of consent, as the Court usually upheld Congressional power over Indian affairs. But the failure to secure tribal consent demonstrated such disrespect for tribal governments that President Eisenhower was moved to comment on that defect at the time he signed the bill into law.[167]

Apart from this symbolism, the direct effects of Public Law 280 were twofold: First, it extended state criminal jurisdiction and civil judicial jurisdiction over reservation Indians in the named states; second, it eliminated special federal criminal jurisdiction over reservation areas in most of those states. Thus, the law substituted state legal authority for federal on all the designated reservations. Historically, states resented the special rights and status of tribes under federal law, and the federal government often intervened to protect the tribes.[168] Public Law 280 did not strip the tribes of most of these rights and did not erase the trust status of their lands. But by giving the states additional authority on reservations, it empowered an often hostile force.

Public Law 280 also expanded the realm of non-Indian control over reservation activities in view of the fact that federal courts were not authorized to hear many civil and criminal disputes arising on reservations in the pre-Public Law 280 era. State courts suddenly could hear reservation-based civil disputes and criminal cases that federal courts would not have entertained in the past and that tribes would have treated as within their sole purview. But this was not the only effect of Public Law 280. Although this law only addressed the question of which governments had power to resolve criminal and civil disputes on reservations, its passage signaled a change in the philosophy shaping federal Indian policy. No longer would the federal government profess (if not discharge) responsibility for the welfare of tribes and tribal members. Instead, states would be asked to assume that responsibility, just as they were assuming responsibility for the education, welfare and health care of needy non-Indians. Public Law 280 was just a small step toward the realization of that vision. But the federal Indian bureaucracy—the BIA—used it as an excuse for redirecting federal support on a wholesale basis away from tribes in the "Public Law 280 states" and toward all other tribes.[169]

Nowhere was this reallocation of funds more evident than in California, where the Congress also singled out 41 small reservations (out of more than 100 in the state) for termination—meaning that these tribes would no longer be recognized by the federal government, and that their lands would no longer enjoy federal trust protection. Together, termination and Public Law 280 formed a toxic brew, eating away at the funds authorized by federal law for Indian welfare,

education and health care in California. Moreover, for California, the advent of Public Law 280 meant that tribes were never "dealt in" to many of the new federal Indian programs that Congress and the BIA instituted in the 1960s and 1970s, largely in response to social movements of that period. The most striking illustration of this phenomenon is funding for tribal law enforcement and tribal courts. Until the middle of this century, federal Courts of Indian Offenses handled dispute resolution on many reservations, ruthlessly imposing non-Indian norms on tribal members. In the 1960s, tribes in the non-Public Law 280 states began to form their own judicial and law enforcement systems, partly to fend off state jurisdiction and partly to express their own sovereignty. Federal funding for tribal courts and police escalated sharply outside of California, fueled by a growing number of United States Supreme Court decisions affirming exclusive tribal jurisdiction over reservation-based disputes.[170] In California, however, the BIA refused to support tribal justice systems, on the ground that Public Law 280 made tribal jurisdiction unnecessary and perhaps even eliminated such tribal authority. As discussed above, courts, attorneys general and federal administrators have affirmed that tribal legal authority survived Public Law 280.[171] But legal authority requires infrastructure and institutions, and Public Law 280 stood in their way.

Public Law 280 has led the federal government to take California tribes less seriously as governments, denying them money to develop codes and courts. For example, in most years California does not receive a single dollar of the $10,000,000 allocated annually by the Department of Interior for Indian judicial services. Less than 1% of the national BIA law enforcement budget is allocated to California, which has at least 12% of the total Indian service population.

These symbolic, direct and indirect consequences combined to produce much distress for tribes, but they also produced a massive irony. The legislative history of Public Law 280 is laden with references to the problem of "lawlessness" on reservations.[172] Traditional tribal justice systems were described as weakened and ineffectual and federal mechanisms were considered too limited in their jurisdiction and too costly to expand. Reservations were described as places of rampant crime and disorder. Public Law 280 was supposed to provide the solution to this problem of "lawlessness" by empowering state civil and criminal courts to do what the tribal and federal systems supposedly could not. Of course, state jurisdiction was not the only possible solution to these problems. Tribal institutions could have been strengthened with federal support, the tribes could have been encouraged to enter into cooperative relationships with states, or the federal government could have assumed greater responsibility.

More tragically, Public Law 280 has itself become the source of lawlessness on reservations. Two different and distinct varieties of lawlessness are discernible. First, jurisdictional vacuums have been created, often precipitating the use of self-help remedies that border on or erupt into violence. Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory have no institutional support or incentive for the exercise of that authority. This kind of lawlessness will be termed the "legal vacuum" type. Second, where state law enforcement does intervene, gross abuses of authority

are not uncommon. This kind of lawlessness will be termed the "abuse of authority" type.

What explains this phenomenon of lawlessness spawned by a statute designed specifically to combat lawlessness? The capacity to contrast Public Law 280 states with all others offers a kind of natural (somewhat controlled) experiment. Three recent incidents in California Indian Country set the stage for an explanation.

1. Incident 1: Sludge Dumping at Torres-Martinez[173]

Located in California's Coachella Valley near the desert town of Indio, the Torres-Martinez Reservation is about half tribally owned and half allotted. In 1989, a tribal member leased her family's 120-acre allotment to a company that proposed to use the site to dump, dry and compost human waste from treatment plants in San Diego, Orange and Los Angeles counties. Complaints soon surfaced from tribal members living nearby. The sludge pile produced a terrible odor, attracted legions of flies and fouled the local water supply with bacteria and heavy metals. As it dried and was hauled away, it formed great clouds of dust, which choked nearby residents and coated surrounding homes. Meanwhile, the allottee who had leased the land moved off the reservation.

The 400-person Torres-Martinez tribe had not been asked to and had not approved the lease. This failure to seek prior permission is not surprising, given the structure and operation of this particular tribal government. Although the tribe has a five-member Tribal Council headed by a tribal chair, it has no constitution. Neither does it have codes or ordinances prescribing the conditions for approval of leases or imposing restrictions on activities that might harm the environment. There is no tribal law enforcement agency and no tribal court or other form of justice system. When disputes arise within the tribe, the only recourse available is through the Tribal Council, which ordinarily refers the matter to the next meeting of the General Council, which is made up of all the members of the tribe. The criteria applied at such meetings are not specified in advance, but a spokesperson for the Tribal Council described the unwritten tribal policy as "you can do what you want on your property as long as it doesn't bother other people or the environment."[174] At another point, a spokesperson stated, "She doesn't need our permission for a little business, but the tribe has to decide whether something this big is OK."[175]

Eventually, in February, 1994, the General Council adopted a resolution that the dumping facility should be closed. But the allottee and the dumping companies disputed the Council's authority over allotted land, given the absence of a tribal code provision or constitution; and there was no court or other form of justice system available to enforce the Council's resolution. The dumping continued.

Internal conflicts within the Torres-Martinez tribe partly account for the lack of legal infrastructure. There are divisions among allottees and non-allottees, as well as among traditional family groups, leading many to have qualms about creating a powerful tribal government. But part of the responsibility lies with the federal government's lack of support for tribal justice

systems in California Indian Country.

State law could not help the complaining tribal members either, even with the powers the state acquired from Public Law 280. As discussed above, provisions in Public Law 280 itself preclude states from exercising any authority, civil or criminal, that would affect the status or use of trust land. This exception to state jurisdiction was included in Public Law 280 because the federal government was not relinquishing its trust responsibility over Indian lands, even in states covered by that law. This exception language in Public Law 280 was enough to prevent state jurisdiction over the sludge dumping at Torres-Martinez, but there were other obstacles to state authority as well. In 1976, the United States Supreme Court interpreted Public Law 280's grant of state civil jurisdiction in a highly restrictive manner.[176] According to the Court, states only acquired the authority to hear civil lawsuits against reservation-based Indian defendants, not to apply state civil regulatory statutes, such as health codes and animal control laws, on reservations. Indeed, even if criminal penalties formed some part of these regulatory codes, code enforcement was outside state authority. If the complaining tribal members had sought to invoke California's solid waste disposal laws, they would have run into the argument that these laws are regulatory and therefore inapplicable to the reservation. Moreover, county zoning laws could not be employed against the dump, because other court decisions have limited the jurisdiction conferred by Public Law 280 to state laws; city and county laws are outside Public Law 280 because they are local rather than state-wide in scope.[177] No other federal environmental law authorizes state jurisdiction over dumping on Indian lands.

Because the sludge situation at Torres-Martinez involved leasing and use of trust land, the federal government ought to have been available as a source of redress. As trustee of the allotment in question, its approval was required before the lease could be valid. Responsibility for determining whether to approve such leases rests with the BIA. The National Environmental Policy Act also requires the BIA to conduct an environmental assessment before approving any leases. Thus, because there was no federal approval, the BIA should have been able to void the lease and stop the lessee's use of the property. As trustee for the remaining tribal land, the federal government was also obliged to take legal action against threats to that land, such as pollution of ground water and general nuisance.

In practice, however, the federal government played a passive role at Torres-Martinez. In 1990, the Superintendent for the local BIA agency issued a cease and desist order against the dumpers, but BIA officials made no effort to enforce the order. Following the General Council's resolution in early 1994, the Tribal Council again requested action from the BIA. Another cease and desist order was issued, but again, the dumpers ignored it and no enforcement action followed. By the summer of 1994 the BIA received a proposed new lease for the dump-site, and referred it to the White House Council on Environmental Quality for guidance about whether the lease could be approved before an environmental assessment was completed. Relying on their perception that the tribal members were divided about the dump-site, BIA officials did nothing to expedite a decision. The shortage of staff and resources at the Sacramento Area Office also rendered the BIA ill-equipped to investigate the problem at Torres-Martinez or to seek legal

action from the United States Attorney in San Diego. And dealing with the remote and overworked BIA staff was not an effective outlet for tribal grievances.

With the tribe, the state and the federal government all hobbled by Public Law 280, the eruption of lawlessness was predictable. Tribal members at Torres-Martinez organized a protest group and began hounding the BIA and the EPA with complaints. After the group organized a one-day blockade of the dump site in August, 1994, the house of a prominent member was sprayed with bullets from an automatic weapon. Despite calls to the local sheriff, there was no state law enforcement response. Two months later, the protesters, now joined by over 100 environmental activists, members from other tribes and local members of the United Farm Workers Union, piled old tires, railroad ties, chain-link fencing, and empty barrels at the entrance, bringing the 1,000 tons-a-day sludge deliveries to a halt. A tent encampment also materialized on the site, the protesters signaling their determination to resist the smelly invasion. As rumors circulated of attack by the allottees and their tribal allies, protesters fortified the encampment and prepared for confrontation. County sheriffs cruised the area but held back from arresting the protesters. At one point, trucks carrying the allottees and some executives from the sludge company tried to break the blockade. After almost two dozen sheriff's deputies moved in, the blockaders allowed the truck to enter, then resumed the blockade.

At last, the federal government roused itself to action. At the request of the BIA, the United States Attorney for the Southern District of California filed suit to enjoin the dumping, claiming it was being conducted without federal lease approval and that it constituted a nuisance. Within two weeks of the start of the protest, a federal judge issued a temporary restraining order, followed by a preliminary injunction six weeks later. In the meantime, allies of the allottee seized the tribal hall during a meeting to nominate candidates for the next Torres-Martinez election and locked out the current chair, an opponent of the dumping. Notwithstanding this disruption, the current chair won reelection.

Lawlessness of the "legal vacuum" type is the central theme of both this story and others like it. Both the illegal sludge dumping and the blockade were a result of the legal vacuum that had been created on the reservation. Had legal authority been more fully realized in the tribal or federal government, the blockade—a self-help action fraught with possibilities of lawless violence—probably could have been avoided. If, for example, the tribe had developed a leasing code, an environmental review process and some dispute resolution system, a decision could have been made to allow or not to allow the dump; and that decision would have benefitted from community acceptance of the process. Alternatively, if the federal government had provided greater support for the BIA officials in California to enforce the laws of trespass and nuisance, the complaining tribal members might not have become so frustrated with federal inaction.

Yet this tale of lawlessness should not be allowed to obscure the subplots. Lawlessness was also evident when members of the group opposing the dump were subjected to threats and intimidation, with no response from local law enforcement authorities. Even a spray of bullets across the home of Marina Ortega, the opposition leader, could not evoke a police presence.

Justifiably then, when rumors of attack darkened the protesters' camp, they prepared fortifications rather than call the sheriff.

Such stories unfortunately are common on reservations in California. John Mazzetti, Vice Chair of the Rincon tribe, testified in 1989 before the Senate Select Committee on Indian Affairs:

> [T]he County Sheriff's Office response to criminal activity is almost non-existent. When the Sheriff's Office receives a call regarding gunfire and someone being shot, it often takes them more than one hour to respond to the incident, if at all. With criminal activities of a lesser degree, often the County Sheriff does not respond at all, leaving the reservation with little or no protection.
>
> The San Diego County Sheriff has stated officially that he does not like to provide services to Indian Tribes . . . Perhaps the reason for this is due to the reservation not having a taxable base to draw funds from in order to defer the cost of providing law enforcement.[178]

Many tribes suggest that uncertainty about the reach of state jurisdiction under Public Law 280 is the source of the sheriffs' reluctance to enter reservations. As discussed above, Public Law 280 creates a large gray area where state jurisdiction is doubtful, largely where a criminal law is part of a broader state regulatory scheme. This ambiguity in the law is a direct consequence of Congress's attempt in Public Law 280 to steer a middle course between the policy extremes of terminating tribes and actively supporting tribal sovereignty. The problem of unresponsive county sheriffs, as understood in this way, is inherent in Public Law 280.

John Mazzetti's statement suggests another diagnosis for the problem of unresponsive county officers, however. By empowering the state only partially—giving it law enforcement responsibility but not regulatory or taxing authority—Public Law 280 bred resentment and neglect among state and local authorities. As Mazzetti points out, the sheriff had costly duties (especially where reservations were remote from county centers), but no means to fund them. Moreover, because the reservations in Public Law 280 states stood apart from state regulatory policy, state and local officials did not view tribal members as part of their political community. This lack of commonality seems to have rendered local officials less inclined to protect citizens on reservations. When this absence of fellow feeling combined with the traditional hostility between local communities and tribal Indians, the product was a void in county law enforcement.

It is true that tribes in non-Public Law 280 states also complain about the non-responsiveness of federal law enforcement. But with the support the federal government has provided them for tribal law enforcement and courts, the tribes are not so dependent on outside authority to maintain public peace. In addition, the tribes in non-Public Law 280 states retain criminal jurisdiction over Indian offenders, so long as the penalty imposed is no greater than one year in prison and $5,000 in fines.[179] In the more serious cases, tribes may still need to rely on the federal government. But although federal agents, prosecutors and courts are often located further

from reservations than their state counterparts, federal authorities have often established cross-deputization agreements with tribal police, enabling the tribe to ensure greater responsiveness. Furthermore, the federal budgeting process and trust responsibility open the way for tribes to put effective pressure on federal officials to provide proper services. It is apparent that substituting state for federal criminal jurisdiction has only weakened criminal law enforcement as a whole.

A final instance of lawlessness is manifest in the dispute over the Torres-Martinez tribal election, which led to one faction locking the other out of a tribal meeting. Close tribal observers note that economic forces have led to destabilization at Torres-Martinez. Allottees and other tribal members are at odds over whether the tribe should be able to control activities on the allotments. These sharp differences may simply be an amplification of traditions of decentralization and kin group autonomy that have long existed among many Southern California tribal groups. Nonetheless, in their current form, these divisions spill over into tribal elections, where members are tempted to use force because they perceive there is no legal authority to restrain corruption, chicanery or failure to follow tribal rules.

Following contemporary tribal self-determination policy, the federal government generally stands aside from tribal election disputes. The state has no say in such matters, unless they explode into violence. Had California tribes benefitted from the kind of government infrastructure support that tribes in non-Public Law 280 states receive, there be election codes and justice systems in place to help resolve such conflicts. Codes could establish a political balance among competing interests in advance of a particular dispute. A justice system could offer a less political method of dispute resolution once a conflict erupts over an election. Torres-Martinez had none of these options.

The majority of tribes in non-Public Law 280 states have seen the advantages of tribal justice systems as institutions that protect tribal sovereignty and promote a more orderly community.[180] If the federal government had supported California tribes the way it supports tribes in non-Public Law 280 states, it is likely that groups such as Torres-Martinez would come to the same conclusion.

2. Incident 2: Evicting undesirables at Coyote Valley[181]

The name Polly Klaas is indelibly linked with parental fears. In late 1993, this young girl was abducted from her bedroom while her terrified girlfriends looked on and her mother slept in a nearby room. After a two-month search that mobilized the local community and evoked national attention, her mutilated body was found. Soon afterward, a career criminal named Richard Davis was arrested for the crime on the Coyote Valley Reservation, near Ukiah, California, home to about 200 Pomo Indians. Davis, a non-Indian, was staying at his sister's house.

Davis's sister and her family had been living on the reservation for several years, renting a home from a tribal member. Concerns had developed within the tribe about drug dealing and other misbehavior and the tribe had tried to evict her. Yet, in a striking parallel to the situation at

Torres-Martinez, legal recourse was unavailable, and Public Law 280 was largely to blame.

The tribe, the state and the federal government were all effectively disabled by Public Law 280 from helping the Coyote Valley people. The tribe lacked a justice system or police arm that could carry out an eviction. A state court eviction proceeding could not be pursued because trust land was involved. State police possessed the power to arrest and prosecute Ms. Davis for the underlying drug violations, but no police response was forthcoming when tribal members complained. The BIA superintendent for Northern California acknowledged that "under Public Law 280 jurisdiction is local, but 280 has eroded over the years. Local law enforcement is reluctant to come onto reservations because of cultural differences."[182] As at Torres-Martinez, the federal government did hold power to grant relief. The Coyote Valley tribe could have brought an eviction action in the nearest federal court. But forcing simple evictions into federal court is too costly, time-consuming and rigorous to justify the ultimate benefit.[183]

The lack of effective legal redress at Coyote Valley gave rise to self-help bordering on violence. At the time of Davis's arrest, the FBI removed Davis's sister and her family from their home for questioning and to conduct a search. Afterwards, the FBI attempted to return the family to the reservation. But during the period that she was in police custody, the tribe had mobilized. One dozen armed deputies of the Coyote Valley Tribal Council, hastily empowered for the occasion, positioned themselves at the entrance to the reservation, limiting access only to tribal members. For more than an hour, these deputies faced approximately 60 armed law enforcement personnel at the roadblock before tensions eased and the family was taken away. Tribal members recall fearing an exchange of fire. Within a week, the tribe reached an agreement with federal and local authorities that Davis's sister and her family would not be resettled on the reservation.

The roadblock at Coyote Valley had another purpose besides excluding the sister of Richard Davis. Tribal members wanted to register their outrage over the manner in which Davis had been arrested. Local law enforcement and FBI officers had swooped down on his sister's house without so much as notice to the tribal leaders. This disregard for the welfare of the tribal community and disrespect for tribal sovereignty seriously distressed the tribal members.

The same motifs of "legal vacuum" lawlessness that sounded at Torres-Martinez echo at Coyote Valley. There is the jurisdictional gap created when no governmental authority has effective control over evictions. There is also the absence of local law enforcement response when the tribal community is threatened, as by the alleged drug dealing by Davis's sister. Finally, there is the inevitable sequence of self-help and tense confrontation when the frustrated community can no longer tolerate its vulnerability. Public Law 280 plays a significant part in creating each of these problems.

Coyote Valley also experienced the "abuse of authority" form of lawlessness when local law enforcement stormed into the reservation without notifying the tribe. Even though Davis was a notorious and violent offender, tribal leaders could have been alerted to this invasion of their

territory. But Public Law 280 made such acts of comity less likely. First, the absence of a tribal police force meant there was no partner on the reservation for the federal and local police. Second, Public Law 280 diminished the stature of the tribe in the eyes of federal and local police, making them less attentive to the interests of the tribe. As a result, tribal members may have been endangered, and antagonism between the tribe and surrounding non-Indian community members increased.

3. Incident 3: Confrontations with police at Round Valley[184]

Round Valley, about 150 miles north of San Francisco, is one of the earliest and largest reservations established in California, dating back to the 1850s. Indians from seven different groups—Yuki, Wailaki, Pomo, Littlelake, Concow, Nomlacki, and Pit River—settled there, some of them as the result of a deadly forced march, others refugees from the war of extermination waged by non-Indians during the 1850s and 1860s. Today, approximately 1,200 Indians reside at Round Valley. In the spring of 1995, three homicides shook that community and exposed the enormous obstacles impeding effective law enforcement on California reservations.

A series of conflicts between tribal members in two family groups preceded the homicides. There were several incidents of violence, with one family group alleging that the Sheriff did not respond to their complaints. Hostilities between the two groups escalated, and eventually, Arylis Peters shot and killed Gene Britton.

Mendocino County sheriff's deputies could not find Arylis immediately. While two deputies searched the reservation, they encountered Leonard Peters and Bear Lincoln on a dark and remote mountain road. Gunfire ensued, leaving Peters and one of the deputies dead.

Immediately thereafter, the police launched a massive manhunt for Bear Lincoln. The Mendocino County police descended on the Round Valley Reservation in force. Round Valley tribal members described themselves as "living in a state of terror given the severe and illegal harassment" suffered at the hands of these officers. According to their press release of April 20, 1995, the incidents of police misconduct included

> (1) pulling the Lincoln family, including a five-year-old, a three-year-old, and two infants, from a pickup truck and placing guns at their heads;
>
> (2) throwing the 65-year-old crippled mother of Bear Lincoln to the ground and verbally and physically abusing her, leaving her severely bruised;
>
> (3) knocking out the windows on the home of Bear Lincoln's mother and discharging firearms in her home, hitting the cradleboard of one of her infant grandchildren;
>
> (4) entering at least fifty homes without warrants or consent with guns cocked, searching each room;

(5) pointing a machine gun at a 99-year-old elder as the police searched her house and her young grandchildren watched in horror;

(6) pulling a 95-year-old man out of his truck at gunpoint and roughing him up for no reason;

(7) stopping countless vehicles at gunpoint;

(8) interrogating minors in their homes while their parents were away at a press conference;

(9) searching homes while only minors were present, with guns pointed at the minor children;

(10) taking minors into custody without the parents' knowledge;

(11) throwing a mentally disabled man to the ground and harassing him.

Over 50 complaints were filed with the Sheriff's Department. To protect their children from this police activity, many tribal parents evacuated them from the reservation.

The current Mendocino County Sheriff claims that the department now responds equally to calls on and off the reservation. But even he concedes that the department has a long history of problems with the Indians at Round Valley, including ones where the deputies were found to have engaged in excessive force and to have been drunk on duty. In May, 1987, for example, resentment against police abuse sparked a riot, as 100 reservation residents smashed windows in the small downtown area of the reservation town of Covelo. A few weeks after the riot, a violent encounter between a tribal member and a deputy left the deputy stabbed and the tribal member severely beaten. The tribal member was acquitted of attempted murder, the jury finding that the deputy had been drunk and had provoked the entire incident. When the jurors insisted on a Grand Jury investigation of the Sheriff's Department, the Sheriff retaliated by withdrawing officers from the area altogether.

Four months after the police began their intense hunt for Bear Lincoln, he turned himself in to the San Francisco Police Department, but insisted that he is innocent. At the time this report was being completed, Bear Lincoln's murder trial was in progress.

The experience at Round Valley illustrates both the "legal vacuum" and the "abuse of authority" forms of lawlessness. The gap in legal authority was evident when local law enforcement failed to respond to conflicts building up on the reservation. The Round Valley residents could not count on protection from the police when they were physically threatened and abused. The upshot, following a familiar pattern, was self-help and violence. In this case, the pattern unfortunately escalated into homicide.

The "abuse of authority" type of lawlessness is evident in the allegations regarding police response to the death of a tribal member. California tribal members have often complained that when police do attend to tribal problems, they lack cultural sensitivity, disrespect tribal sovereignty and employ excessive force.[185] Typically, this form of lawlessness arises because the holders of power do not see themselves as accountable to reservation communities, either because those communities are a small political minority or because they do not contribute to the local property tax base. Another possible explanation for such lawlessness is that state officials do not view themselves as part of the same political community as tribal members, who owe allegiance to their tribal governments and often receive special exemptions from state law under federal statutes, such as those involving environmental regulation, gaming, and child welfare. When that political separateness is coupled with cultural differences, it is predictable that police will treat the Indians as outsiders and hence, more harshly.

Public Law 280 set up just such a situation. It exempts reservation Indians from property taxes, leaves tribal governments intact (if underfunded), and excludes tribes from considerable amounts of state regulatory law. And the separation between tribes and surrounding communities has been exaggerated by federal court decisions and legislation that have come about since the enactment of Public Law 280. No one predicted, at the time Public Law 280 was enacted, that tribal sovereignty would receive the doctrinal support it does now. What was envisioned was a relatively rapid assimilation of tribes in Public Law 280 states into the state culture, economy and polity. Several dozen California tribes were terminated soon after Public Law 280 was enacted, and the expectation was that other tribes would follow within decades.

Those expectations, fortunately, were not realized. Most of the terminated tribes in California have been restored through litigation or legislation.[186] Tribes in Public Law 280 states have been strengthened by national legal decisions, both legislative and judicial, affirming tribal sovereignty. Leaving tribes to the care of local officials does not make sense under present circumstances. It is too likely that police who feel less political, cultural and economic affinity with tribal members will treat them disrespectfully when tensions arise, as police allegedly did at Round Valley.

D. Responses to Questionnaires and Advisory Council Hearings

Responses to a questionnaire that was sent to all the recognized tribes in California reveal concern about both types of lawlessness discussed in this section—the "legal vacuum" type and the "abuse of authority" type. Of the 19 tribes that responded, all but two complained of serious gaps in protection from county law enforcement. An oft-repeated theme is that sheriffs fail to respond when they are called, or respond hours after the incident, when it is far too late to intercept the wrongdoer. Calls for help with vandalism, assaults, drunk driving, and drug dealing often go unanswered. In one incident where fighting broke out at a HUD house, the sheriffs called back thirty minutes after a complaint was filed to ask whether any guns were involved. By the time the deputies arrived, the assailants were gone. Only when non-Indians are involved or the financial interests of the county are at stake (as with enforcement of truancy laws) do county

law enforcement officers seem to show sufficient interest.

The "abuse of authority" type of lawlessness takes two rather distinct forms: disregard for tribal sovereignty and culture, and police harassment. One third of the tribes complained that county officials fail to respect tribal culture and sovereignty. Some protested trespassing by sheriff's deputies, often in patrol cars going at high speeds. Others noted a pattern of state intrusion on tribal sovereignty, as when local officials seek to enforce county ordinances that are "regulatory" in nature and hence outside the scope of state authority under Public Law 280. Repeated litigation was necessary to fend off these incursions. Finally, some tribes mentioned that local law enforcement officials fail to respect the judgment of tribal members or leaders when questions arise about the necessity or means of making arrests for minor crimes. There are times when an understanding of tribal social structures and traditions is required in order to ascertain whether an offense has really occurred. Due to a lack of funding and incentive, state and local law enforcement officials rarely have the training that would enable them to appreciate tribal culture. One tribe reported that the local tribal chairmen's association had held several workshops on Public Law 280 in the past four years, but the county officials who were invited usually failed to attend.

Tribal concerns about police harassment also surface in the questionnaires, albeit in more muted form. One-quarter of the 19 responding tribes complained of unauthorized searches, questioning of children in the absence of adults, excessive force, and general intimidation of Indians both on reservations and in town.

None of the responding tribes operates a tribal court system. According to the responses received, disputes outside the jurisdiction of state or federal courts (or ignored by those systems) are sometimes referred to tribal councils, which usually attempt to mediate while enlisting the advice of elders. This method of conflict resolution is only partially satisfactory for the tribes. Some tribes report that disputants are willing to abide by the decisions, but others find less compliance. Some say the system works well only for certain types of disputes.

More than two-thirds of the respondents articulate a need for tribal justice systems. Some are concerned that they lack the funds, expertise or size to establish such systems at this time. Even those tribes, however, would like to see conditions change and cooperative arrangements devised—with other tribes or with the state—so that tribal justice systems can become feasible. Without some form of tribal justice system, tribes fear that problems of alcoholism, drug use, election disputes, trespassing, domestic violence, public disturbances, child welfare, employee discipline, housing conditions, land assignments, and speeding on reservations will never receive proper attention.[187] Furthermore, tribal traditions, such as a preference for rehabilitation over punishment, cannot be given effect without a distinctly tribal justice system. Several tribes report working on the development of tribal or consortium-based court systems, usually with some project-specific federal financial support. A few are in the process of establishing memoranda of understanding with local officials to allow for cross-deputization of tribal and local law enforcement personnel.

Hearings before the Advisory Council, held between July, 1994 and May, 1995, offer much the same information as the questionnaires and reinforce their validity. With respect to the "legal vacuum," a witness from the Morongo Reservation stated, "A fund for tribal law enforcement needs to be created to allow the tribes to protect themselves when the state fails to do so." Members from the Coyote Valley and other tribes complained that drug trafficking laws, among others, are not enforced on the reservation, either because the sheriff fails to respond at all or waits on the outskirts of the reservation while local community members apply self-help. This story was repeated by a criminal investigator from the BIA, who noted that because the state receives no federal funds for reservation law enforcement, there is no incentive to enforce the drug laws or other criminal provisions. Not only are state law enforcement services inadequate, but the development of tribal justice systems has been hampered by the funding consequences of Public Law 280. One tribal member captured this concern when he said, "Most tribal governments and Indian organizations cannot effectively establish or administer the tribal operation, due to the insufficient allocations of funding to allow the proper administration on a continuing basis."

The hearings also include several statements decrying local officials' disrespect for tribal sovereignty, as well as their harassment of tribal members. As one tribal member stated, "The state tries to control us. And Public Law 280 has a lot to do with it, too." Because some of the hearings occurred soon after the Round Valley incident described above, numerous speakers leveled charges of police abuse. A witness from Coyote Valley, for example, asserted, "It is not acceptable to place an entire community under siege in vengeance." This same witness complained that a disproportionate percentage of tribal members, as opposed to other county residents, was being arrested for drug and alcohol related offenses, leading to a "permanent scarring" of the Indian community.

One constructive suggestion that appeared in the hearings was the creation of a series of regional "drug courts" throughout the state, which would exercise tribal jurisdiction, have governing boards appointed by tribal councils, and receive federal funding through special drug-related programs. To enforce the laws administered by the drug courts, tribal police forces would be established and their members cross-deputized with state officials to facilitate cooperative actions.

Another positive recommendation brought out in the hearings was the creation of consortium courts to hear child welfare matters, such as adoptions, foster care placements and proceedings to terminate parental rights. The intersection of the Indian Child Welfare Act (ICWA) and Public Law 280 has generated considerable confusion, particularly with respect to categories of cases that the ICWA assigns to exclusive tribal court jurisdiction.[188] Does the ICWA override the state jurisdiction conferred by Public Law 280? There is no simple answer to this question, especially since the ICWA provides a federal petitioning process for tribes in Public Law 280 states to "reassume" jurisdiction. Arguably, tribes do not need to "reassume" child welfare jurisdiction at all, because Public Law 280 never withdrew tribal jurisdiction, and because many types of child welfare proceedings (such as termination of parental rights) never came

within the state's jurisdiction under Public Law 280 because they are "regulatory" in nature. Whether or not the California tribes choose to take the path of "reassumption," they cannot assert child welfare jurisdiction unless they have some form of justice system. Thus, consortium courts are one means of effectively asserting sovereignty in a system where state courts have taken control of Indian children.

E. Tribal Courts and the Indian Child Welfare Act

The need for tribal courts in California is dramatically illustrated by the problems in the administration of the ICWA. The ICWA sets out minimum federal standards which must be met whenever an Indian child is removed from his or her family, or when parental rights to an Indian child are terminated. The ICWA requires that state courts transfer proceedings to tribal courts in many situations. The absence of tribal courts in California has rendered one of the statute's two main goals impossible—that of placing the decision of placement of Indian children in the hands of tribal decision-makers.

The U.S. Supreme Court has acknowledged that tribal courts are a more appropriate forum for Indian child custody disputes than state courts.[189] In Southern California, however, recent state court decisions have refused to enforce this requirement of the ICWA, in part due to the courts' failure to understand Indian tribes as political entities with inherent sovereignty.[190] These decisions have resulted in the placement of Indian children in non-Indian homes despite the availability of Indian placements. In some cases, state courts feel constrained for political reasons to make such placement orders. The existence of a tribal forum for resolution of such disputes would remove from state courts these difficult and often highly politicized child custody decisions by transferring jurisdiction to the tribal courts.

The almost total absence of tribal courts in California has had a devastating effect on the tribes' ability to participate in matters affecting the upbringing of tribal children. The most important tribal concern is the question of whether tribal children will be raised in a non-Indian environment without access to their culture and heritage. In cases involving child dependency, California is currently a patchwork of different 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 familiar with the Act, while other counties routinely ignore the ICWA's most basic requirements. Similarly, some counties cooperate with local tribes in child welfare decision-making, while others refuse outright 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. Moreover, it has added to the uncertainty faced by parents, tribes and Indian children as to what treatment they might expect in state courts. Funding for tribal courts or other dispute resolution fora and increased levels of 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.

The continued lack of tribal courts in California has led to a situation in which some highly urbanized counties have begun to deny ICWA protections to all Indian children except those whose parents maintain especially close contact with their reservations.[191] 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 in the provision of child protection services. Tribal dispute resolution fora with jurisdiction over child welfare matters are a way for counties to reduce their own case loads.

The BIA has not successfully defended California's meager allocation of law enforcement and court funding. California tribes clearly possess civil and criminal jurisdiction, even following the enactment of Public Law 280. To use the state's jurisdiction as a justification for not funding California tribes overlooks the treatment of tribes in other Public Law 280 states, the absence of state jurisdiction over important matters of public safety and community welfare, and the inadequacies of state jurisdiction even where it exists. California tribes need funds to establish their own law enforcement and justice systems, either alone or as part of consortia of tribes. Some tribes may prefer to contract with state and local governments for the delivery of such services, or to retain the status quo. But whatever they may choose, California tribes should receive federal financial support that will allow for effective law enforcement and dispute resolution on their reservations.

Tribes in Public Law 280 states are at a disadvantage compared with tribes elsewhere in the United States. They suffer from lower levels of federal support and an absence of compensating state support. They are subject to abuses of power and gaps in legal authority. In California in particular, the tribes have been broken up into such small and heterogeneous groups that forming effective justice systems is usually unfeasible at the tribal level. There is indeed a crisis of lawlessness, even greater and more genuine than the one perceived by Congress in 1953. A federal response is sorely needed.

This time, the solution should be negotiated with tribal leaders, not imposed upon them against their wishes. It should recognize the fact that so long as tribes remain separate polities exempt from much state law, the solution of state jurisdiction will likely fail unless mutual and cooperative arrangements are established between tribes and states. And it should acknowledge a federal obligation to make up for the funding inequities that have hindered development of tribal institutions in Public Law 280 states, including assistance in the formation of consortia or coalitions whenever tribes deem that desirable.

Many outcomes are possible under these conditions. Retrocession of states' Public Law 280 jurisdiction back to the federal government, upon tribal initiative, is one possibility, and several tribes supported that course of action in their answers to the questionnaire. Tribally initiated retrocession is far from the only possibility, however. Some tribes may prefer to receive federal help to develop tribal law enforcement and dispute resolution institutions, which would operate concurrently and cooperatively with state entities. Other tribes may want to contract with state or local law enforcement to conduct activities that would be too expensive for the tribes to

duplicate. Many such cooperative relationships between states and tribes have been developed in areas such as environmental regulation and child welfare, outside the framework of Public Law 280. Some may want to assert authority over some types of matters, such as child welfare and hunting and fishing, and leave other matters to state or federal authorities. Once Public Law 280 is lifted, other creative may find expression, including efforts to develop justice systems that are more consistent with tribal traditions and multi-tribal consortia that take advantage of economies of scale.[192] But the federal government will have to be a supportive partner in this effort.

IX. California Tribal Government Administration

The rapidly changing economic and political situation among California Indian tribes has presented new challenges to tribal government administration. Most contemporary California tribal constitutions or bylaws were created when the tribes exercised little political autonomy and legal jurisdiction and hence, do not provide adequate guidelines for economic development, community development, or protection of political and cultural rights. Current efforts by California Indians to engage in economic development and assert greater administrative and legal control over their reservations and rancherias often requires modifications to internal tribal administration. Tribal governments must now become administratively larger and include full-time staff positions for fire protection, roadways and public utilities, enrollment, grant administration, and social services, over and above dealing with key economic development and cultural resource issues. Unfortunately, years of underfunding and administrative neglect have resulted in a lack of qualified personnel to administer tribal programs.

A. IRA and Non-IRA California Constitutional Tribal Governments

IRA governments were imposed on many California tribes, since tribal approval was not originally required.[193] But the IRA form of self-government comes with inherent difficulties. Today, most federally recognized California Indian constitutions vary greatly from the original IRA tribal governments that were instituted by the BIA in the 1930s.[194] In general, IRA governments and bylaws do not recognize the major social and political patterns of California Indian communities, and therefore create difficulties in political procedure and decision-making. The application of a culturally alien governance system results in an unfamiliar political process for California Indian tribes. Newly revised constitutions and tribal governments must reflect the social, cultural, and political patterns of California Indian communities.

Many California Indian tribes realize the IRA form of governance has not helped to solve their issues and problems, and have revised their constitutions to adapt to contemporary circumstances. Although some tribes need support from individuals outside the tribe, such as lawyers and the BIA, caution should be taken to prevent over-involvement by outside parties in final determination of California Indian constitutions and ordinances. It is essential that stable funding be made available to California Indian tribes that still need to revise IRA constitutions.

B. Enrollment

California tribal governments maintain records of enrollment as an inherent power, although their roll-books must be certified by the BIA. A few California tribes, however, do not maintain enrollment records because they do not have the funds to do so. When the BIA does assist tribes in certifying membership, BIA personnel often overstep their bounds. For instance, the BIA excessively denies tribal membership to out-of-state applicants. California tribes that are willing to enroll out-of-state individuals as members are blocked by the BIA. The sovereign right to determine tribal membership is greatly impaired by the BIA's over-involvement in the enrollment process.[195]

California Indian tribes need funds, staff, and technical assistance to develop and maintain tribal enrollment records without undue interference from the BIA.

C. Tribal Government Financial Administration

Effective administrative support and financial management are necessary in order to receive and efficiently utilize federal, state and private funds. All of our surveyed tribal governments attempt to provide the minimal administrative and financial organization required to carry out federal and state financial and administrative requirements, but some are not able to do so. A few tribes do not presently have an administrative accounting system. Small tribes are disadvantaged in securing administrative services and technical support because funds for these purposes are not disbursed to tribes with small populations.

An accountant or fiscal policy officer for the tribe is considered an essential element to the tribal administration. Some funding sources require tribes to conduct annual audits to remain eligible. Strict security measures also reduce intervention by federal or state government agencies in tribal administration and finances. Funding should be provided to tribes, on the basis of need, for an accounting system and to hire a fiscal officer or accountant.

X. California Indian Program Needs

Poverty rates among California Indians are among the highest of any group in the United States. Most California Indian communities have had little support for building viable tribal governments capable of exercising their full powers of self-governance.

A survey of 27 California Indian communities, conducted in 1995, included queries about funding levels of and degree of satisfaction with state and federal programs on California Indian reservations and rancherias. In addition, at the numerous hearings held by the Advisory Council, many tribal leaders presented comments about existing program needs and delivery. The survey included queries about federal, BIA and state programs, such as road, health, HeadStart, aging, commodities, Administration for American Indians (ANA), and housing. In general, California Indians reported that they were underfunded, did not have enough information about state or

federal programs and had access to few such programs.

Many small rancherias or reservations reported that they were too small to administer some programs, such as those having to do with justice systems, ICWA, and welfare. In many instances, small tribes would like to work within consortia arrangements in order to gain access to more state and federal programs. One example is the California Services American Indian Block Grant (CSAIBG), which is administered on a statewide basis through three consortia. A welfare grant aimed at the homeless and families below the poverty line, the CSAIBG is allocated from Congress to the California Department of Economic Opportunity, which divides the funds according to a formula among the reservations, rancherias and urban Indian centers. This arrangement was agreed upon by the state, the reservations and rancherias, and the urban centers concerned during the mid-1980s. For many programs, however, there are no such arrangements, and small tribes are deprived of badly needed and potentially beneficial services because they are too small to qualify for a funding program or do not have enough staff or administration to apply for or administer the grant. An overall discussion of the needs of small tribes should be conducted by the tribes and federal agencies. Consortia agreements should be created to provide more access and administrative capability to small California tribes. Any such consortia should be composed of and managed by the California Indian people.

A. General Federal Programs

The surveyed communities mentioned a variety of programs as being very important to them and were highly appreciative of federal programs that tangibly improved the living standards of tribal members. BIA programs, Aid to Tribal Government (ATTG), ANA, HUD, IHS health centers, and Commodities are among the programs most highly regarded by tribal communities.

ATTG, small tribes funds, Housing Improvement (HIP), Community Fire Protection, tribal courts, schools, higher education, adult education, tribal rights protection, land acquisition, road building and maintenance, water rights, legal services, realty service, and base funding for tribal governments are programs for which many communities desire additional or initial funding. In addition, some tribes believe that the BIA should provide more technical assistance.

In small tribal governments, tribal employees have little job security, since grants are usually short term and often cannot be relied on for stable planning and secure employment. With no support for administration, small tribal governments have great difficulty conducting normal business and often cannot pay for basics, such as heating oil, telephones and lights, and must frequently rely on volunteers from their tribal communities. Some small tribal governments operate on as little as $3,000 to $5,000 for administrative expenses per year. Administrations have difficulty mobilizing grant writing to secure additional programs and funds for the community. Without base funding, many small tribes will be unable to create viable tribal administrations, will fail to exercise significant community self-governance, and will be severely constrained in any efforts to develop economically. Significant base funding is thus a high priority for small California Indian tribes.

B. Maintenance of Roads

California receives a small share of the BIA funds for building or maintaining roads. Many California reservations and rancherias are located in areas where there are few state or county roads, where access to roads is difficult and the cost of building and maintaining them is high. The limited funding that the BIA provides to California Indians is inadequate and supports construction of only a few miles of roadway. Some reservations and rancherias do not have public access roads and the residents must gain access from private owners. Such lack of access presents difficulties for adequate police protection and inhibits economic development.

When the BIA does build roads, they perform satisfactory work. However, funds are scarce, so there is a long waiting list. In addition, there were some complaints that counties do not maintain their roads on Indian land. In order for tribal governments to effectively maintain roads on their lands, they need more funding, more work crews, more equipment, and above all, a clearer definition of tribal and county roads.

C. USDA Commodity Programs

Most California Indian communities responding to our survey indicated that they did not receive commodity foods directly from the Department of Agriculture programs or agencies, but that a significant portion of their people (ranging from 3% to 70%) needed access to the commodity program.

Commodities could not satisfy any community's complete nutritional needs. The food content of commodities must be reconsidered, and healthier foods such as fresh fruits, fruits packed in natural juices and vegetables should be made available. In addition, our respondents suggest that the commodities program could be improved in terms of better access to storage and more direct tribal control of the program. Federal regulations of the program are too restrictive, they say, and should be reconsidered in order to better serve Indian people. For example, people on food stamps do not qualify for commodities, even if the stamps do not meet their needs. More information about the program should also be disseminated among the Indian communities. Urban Indian residents are not granted access to commodities, even if they are members of a California tribal community. And many California Indian people have difficulty accessing commodity distribution points because of poor transportation availability. Home delivery of food should be considered for the neediest and most isolated tribal members. Food could be distributed on a weekly basis, rather than according to the longer schedules now in place. California Indians have many pragmatic suggestions for the commodities program and adopting these suggestions will materially improve the value of the program to the neediest community members.

D. Administration on Aging

Our surveyed communities estimate that their resident population aged 65 or over ranges from very few to 40%. The median for this group of communities is 5%. In this group, those in need of care varies from very few to 100 percent. The estimated median need for program care among the elderly is 30%. Those elderly in need of but without care ranges from very few or none to 100% in two communities. In some instances, the elders are cared for by family members.

Seven communities had Title VI Administration for Aging programs, while seven communities did not. For those without programs, the elderly were cared for by the county, by subcontracts, by non-Indian community agencies, and through the Toiyabe Indian Health project. Those communities with Title VI programs report that only a slight majority are satisfied with program services. Most complaints focused on the lack of funding and inadequate services, which were not able to meet the needs of the elderly. Several members of the community who lived off the reservation could not be served by the program. Also, transportation for the elderly was not sufficient; buses would not travel to some parts of the county. At least one community suggested that their Title VI program did not make a serious effort to reach out to the Indian elderly.

The Title VI Administration on Aging program could be improved in a variety of ways. The foremost suggestion of the surveyed communities is that more funding and services be provided. Small tribes have difficulty organizing Title VI programs, but creating program consortia to serve small Indian communities would improve chances of service. Better transportation and regular provision of food for the elderly would also improve the value of the program.

E. HeadStart

Most of our surveyed communities did not have HeadStart programs. Several communities thought they were too small to organize a HeadStart program but would be interested in forming a consortium to administer the program. Some send their children to city and county programs but their attendance is restricted by availability. A slight majority of communities with HeadStart expressed satisfaction with the program. Transportation, supplies and equipment are in short supply. The threat of cutbacks is very discouraging to communities that already administer the program or are contemplating future application.

F. Administration for Native Americans (ANA)

ANA grants are used for a variety of purposes. Most of the surveyed communities had ANA programs in place and those that did not either had received a grant in the recent past or were working on an application to fund a program in the near future. Current grants ranged from $58,000 to $176,000. Several communities use their grant for developing tribal legal codes and ordinances or to amend their constitution. Others use grants for economic development projects. Most communities are satisfied with ANA grants and administration. Nevertheless, several

communities expressed the need for more grant opportunities and higher levels of funding. Economic development was the most mentioned need for ANA funding.

G. Housing Programs

Most of our surveyed communities received federal funds for new construction or renovation of housing and most received Housing Improvement (HIP) funds from the BIA. HIP funding levels varied from $2,000 to $53,000 and the number of housing units affected ranged from 1 to 30 units. About half of our surveyed communities received Housing and Urban Development (HUD) funding for building new houses. Others stated that they were too small and needed the help of a consortium for grant-writing and administration. An overwhelming proportion of the surveyed communities did not believe that HUD funding was adequate. The large majority stated that more housing was needed. Housing needs for individual tribes ranged from five to 214 housing units. Many communities complained that the HIP and HUD funding levels currently received were so small that they were of very little practical value. Most stated that they were in desperate need of new housing and home repair programs. Many tribes do not have enough land to build housing for their members and some of these communities have homeless tribal members. More funds are needed for housing and, in some cases, for acquisition of suitable land to build on.[196]

H. Department of Health and Human Service (DHHS) Programs

Most of the surveyed communities received funding from DHHS. Many of the programs are administered through health consortia, by the IHS and through county administered services. The types of programs funded include general health, ICWA, child care, tribal management through the ANA, family services, dental services, and alcohol and substance abuse.

The surveyed communities were evenly divided over satisfaction with the DHHS programs. The reported problems included: (1) programs are not sufficient to take care of community health needs; (2) inadequate staff; and (3) a need for service delivery people who are sensitive to the needs and cultural preferences of Indian community people. DHHS programs could be improved with more funding, more cultural sensitivity training for service delivery personnel, placement of more clinics within reach of tribal communities, better transportation to health facilities for tribal members, greater training of tribal advisory board members in contract monitoring and administrative and fiscal management, and a reevaluation of program monitoring procedures.

Most surveyed communities have great and pressing health and welfare needs which are not being served. More funds are needed for patient care, dental services, elderly services, and contract health care. More funding and more programs are needed for Education and Child Care, Meals on Wheels, Senior Nutrition Programs, and food vouchers. More programs and funds are also needed in the areas of health treatment, youth and substance abuse treatment, parent training, and community activities. Full-time health clinics and health care beyond levels provided by the IHS should be considered.

I. Indian Child Welfare Act Services[197]

About a one-third of the reporting communities indicated that they were involved in an ICWA consortium and most were satisfied with this arrangement. Even those within consortia, however, thought that the ICWA services needed called for funding at rates two to six times present levels, and also expressed a need for more staff and better staff training.

Those tribal communities that did not work within a consortium had similar comments. More funding is needed to run adequate programs and more training of personnel is necessary. More consistent funding and delivery of technical services are also desirable.

California Indian communities greatly value BIA, federal and state assistance programs. High levels of poverty among California Indian communities foster many social, economic and health problems. Federal and state programs are often the only available means to provide aid to needy tribal members. Government programs are very helpful, but most California Indian communities report that they need significantly more funding, technical assistance, access to more BIA funding categories, and more training of tribal members. Tribal governments prefer to gain more control and input into programs that serve their communities. The large numbers of small tribes in California creates special needs for minimum base funding to manage tribal governments and to consider group alliances or consortia for application and administration of many BIA, federal and state programs.

ENDNOTES

1. See, e.g., the Report of L.A. Dorrington to the Commissioner of Indian Affairs, dated June 3, 1927, at pp. 2, 5, 8, 11, 16, 22 (wherein Mr. Dorrington recommends against acquiring land for various bands of California Indians because their members held public domain and Indian allotments).

2. See 25 U.S.C. § 1679.

3. The report of C.E. Kelsey to the Commissioner of Indian Affairs, at 15. This report was commissioned by act of the U.S. Congress. 33 Stat. 1058 (1905). The Report is attached as Exhibit 1 to the ACCIP Termination Report, and has also been reprinted in Robert F. Heizer, ed., Federal Concern about Conditions of California Indians 1853 to 1913: Eight Documents (Ballena Press, 1979), at 123-150.

4. "Indians in California," in Transactions of the Commonwealth Club of California, Vol. XXI, No. 3, June 8, 1926, at 106.

5. Chauncey Goodrich, The Legal Status of the California Indian, 14 Cal. L. Rev. 83, 97 (1926). Chauncey Goodrich was a member of the Indian Section of the Commonwealth Club and conducted his research for this article under the auspices of the club. Goodrich relied on Indian BIA figures in official reports to calculate that annual expenditures for fiscal year 1923-24 were $29.00 per capita for California Indians and $40.00 per capita for all other Indians. If one excluded from the latter statistic the fee-simple allotted Indians who have been "so largely released from federal guardianship," the $40.00 figure increased to $66.00 per capita for Indians outside of California. Id. at n.55.

6. Final Report to the Governor and the Legislature by the California State Advisory Commission on Indian Affairs, p. 12 (1969).

7. Cong. Rec. S8591.(daily ed. May 31, 1972).

8. Department of the Interior, "Indian Eligibility for BIA Services—A look at Tribal Recognition and Individual Rights to Services," (hereinafter referred to as "Interior Report"). The report was prepared by an 8-member committee: Ernest L. Stevens, John Jollie, Alexander McNabb, Jim Edgar, David Eteridge, Lou Conger, Peter Three Stars, and Velma Garcia. The report, undated, appears to have been prepared in 1972. A copy of the report should be available in the Federal Archives. A poor quality copy is on file with California Indian Legal Services in Oakland, Calif.

9. Id. at 27.

10. Id. at 31.

11. Id. at 34.

12. William D. Oliver, "A Report to the Commissioner of the Bureau of Indian Affairs Regarding Funding of Bureau Programs in the Sacramento Area" (1977), at 4. Mr. Oliver was the former Administrative Officer to the Sacramento Area. He prepared the report at the request of the Sacramento Area Indian Advisory Board. In making these calculations, the author compared expenditures for only those programs that existed at both the Sacramento and the other BIA area offices.

13. Report of the California Indian Task Force (October, 1984). This task force was appointed by Secretary of Interior William Clark during the Ronald Reagan administration.

14. Id. at 2.

15. Id. at 12.

16. Id. at 34-35. See also id. at 12: "These [population] numbers . . . have not been utilized in the past to determine or establish funding or program levels . . ."

17. Id. at 13.

18. BIA labor force statistics are collected by means of self-reports from tribal groups, under close supervision by BIA administrators. These data were collected on Indians living on or near Indian reservations or trust lands. The Labor Force statistics for 1997 were not available as of the date of completion of this report.

19. See Table 2 of the 1990 Census report on characteristics of households.

20. Studies of funding equity for California tribes typically compare federal dollars allocated per person for different area offices of the BIA or other federal agencies. Moreover, since California comprises an entire area office of the BIA, it is possible to juxtapose the federal dollars that reach California Indians with the federal dollars that reach Indians in other parts of the country. While some of the previous studies questioned the population figures put forward for each Area Office or other division by the relevant agency, others relied on the BIA's own service population figures in determining whether California Indians were unfairly denied federal program support. (For references to these reports, see Section II of this report.)

21. Bureau of Indian Affairs, Indian Service Population and Labor Force Statistics, 1995. The service population is compiled in odd years only. The figures for 1997 had not been released at the date of completion of this report.

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

23. Bureau of Indian Affairs, Indian Service Population and Labor Force Statistics, 1995.

24. Id.

25. See Bruce Flushman and Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 390, 403-404 (1986).

26. See H.R. Rep. No. 801, 103d Cong., 2d Sess. 2 (1994).

27. The Act of March 3, 1851, 9 Stat. 631.

28. See Flushman and Barbieri, *supra* note 25, at 406-408.

29. 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. See § II of the ACCIP Termination Report for further discussion of the land acquisition program.

30. 25 U.S.C. § 13.

31. Bureau of Indian Affairs, Indian Service Population and Labor Force Estimates, 1995.

32. "Before 1934, most federal statutes referring to Indians did not define the term." See Robert N. Clinton et al., American Indian Law (3d ed. 1993), 86. Where the term is not defined, "the courts have taken the position . . . that the term 'Indian' means an individual who has Indian blood and who is regarded as an Indian by his or her tribe or Indian community." See Rennard Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed., (Charlottesville, Va.: The Michie Co., 1982), 24.

33. See, e.g., Malone v. Bureau of Indian Affairs, 38 F.3d 433, 435-436 (9th Cir. 1994).

34. 25 U.S.C. § 1679.

35. See 20 U.S.C. § 366, implemented in 34 C.F.R. Part 771.1.

36. See § VI of the ACCIP Education Report.

37. Malone, 38 F.3d 433.

38. Id. at 439.

39. 25 U.S.C. § 1679.

40. Department of the Interior, *supra* note 8, at 12-14.

41. Loesch ascribed this policy to treaty provisions and to the inability of states to raise funds for benefit programs by taxing reservation lands. In fact, few Indian treaties prescribe the range of benefits provided under the Snyder Act. Furthermore, many Indians who live on reservations, such as members of California tribes, have no ratified treaties with the federal government.

42. Morton v. Ruiz, 415 U.S. 199 (1974).

43. See, e.g., 25 C.F.R. §§ 20.20(a)(3) (social services programs); 26.5 (employment assistance services); 31.1 (enrollment in BIA boarding schools). The BIA's choice of "on or near" the reservation echoes legislation that Congress passed in 1956 regarding vocational training programs for Indians. The purpose of this statute, 25 U.S.C. § 309, is "to help adult Indians who reside on or near reservations to obtain reasonable and satisfactory employment . . ." See 25 C.F.R. § 27.5 for the implementing eligibility criterion.

44. See 25 C.F.R. § 20.1(r):

> *Near reservation* means those areas or communities adjacent or contiguous to reservations which are designated by the Commissioner upon recommendation of the local Bureau Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: (1) Number of Indian people native to the reservation residing in the area, (2) a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally, and economically affiliated with their tribe and reservation, (3) geographical proximity of the area to the reservation, and (4) administrative feasibility of providing an adequate level of services to the area. The Commissioner shall designate each area and publish the designations in the Federal Register.

45. Form 5-2119, Department of Interior, Bureau of Indian Affairs, December 1993.

46. See, e.g., 25 C.F.R. § 20.1(v).

47. Id.

48. For Oklahoma, the 1989 BIA service population was 231,952, and the 1990 Census population was 252,089.

49. This affidavit was introduced into the Congressional Record by Senator Alan Cranston in 1971. Cong. Rec. S21326 (daily ed. December 11, 1971). See also the Memorandum of August 14, 1970, from William E. Finale, Area Director, Sacramento Area Office, to Commissioner of Indian Affairs Re: Services to California Indians, at 7; a copy of the memorandum is included as Exhibit 2 to the ACCIP Education Report.

50. Cong. Rec. S21327 (daily ed. December 11, 1971).

51. Memorandum from Roderick H. Riley, Assistant to the Commissioner, to the Commissioner of Indian Affairs, May 13, 1971.

52. Id.

53. See 25 U.S.C. § 1679.

54. 42 C.F.R. § 36.15(c).

55. Letter from Michael H. Trujillo, Director, IHS to Carole Goldberg-Ambrose, November 16, 1995. Trujillo goes on to explain that service populations between Census years are estimated by a smoothing or averaging technique in order to show a gradual transition between the two periods.

56. 20 U.S.C. § 366, implemented in 34 C.F.R. part 771.1.

57. 42 U.S.C. § 9858m.

58. 56 Fed. Reg. 26194 (June 6, 1991), codified at 45 C.F.R. § 98.80(e).

59. 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.

60. 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.

61. The Mission Indian Relief Act of 1891, 26 Stat. 712. For a partial list of the Homeless Indian Appropriation Acts, see endnote 1 to the ACCIP Trust and Natural Resources Report.

62. See § II of the ACCIP Termination Report for a discussion of the history of land acquisition by the federal government on behalf of the California Indians.

63. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996."

64. The land figures used were obtained from each Area Office and are current through December 31, 1996. They are subject to modification by the BIA Central Area Office in its final report on 1996. For Juneau, all Public Domain Native Allotments are included if title has passed to the United States in trust, or the allotment application has been adjudicated or approved. Applications are pending for approximately 245,000 additional acres of allotments. In addition, there is one reservation in Alaska, but it is under the jurisdiction of the Portland Area Office, and

thus is included in those figures.

65. See Angie Debo, And Still the Waters Run: The Betrayal of the Five Civilized Tribes (1940).

66. See the ACCIP Termination Report. Four additional rancherias were sold as "unoccupied" following the 1964 Amendments to the Rancheria Act. See id., Appendix B.

67. For purposes of this calculation, the Capitan Grande Reservation was not included, because it is not currently held for any particular tribe. If it were, however, the percentage of California trust land held by the ten largest reservations would be even higher.

68. Prepared by Mr. William D. Oliver, former Administrative Officer to the Sacramento Area, at the request of the Sacramento Area Indian Advisory Board. (Includes Allocations to Central Office.)

69. All other Indian Service population = National service population - Sacramento service population. All other Indian per capita gives the B.I.A. funding level for all non-California Indians living on or near reservations.

70. B.I.A. Budget Documents.

71. All other Indian service population = National service population - Sacramento service population. All other Indian per capita gives the B.I.A. funding level for all non-California Indians living on or near reservations.

72. Tentative figure.

73. Tentative figure.

74. The Area Office Direct Allocation includes Operation of Indians Programs less Central Office and Central Schools Allocations.

75. The Area Office Direct Allocation includes all 31000-39009 funds obligated to area offices.

76. See 25 U.S.C. § 1679.

77. Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 575 (9th Cir. 1980).

78. The figures in this column represent the total IHS obligations to all areas less budget obligations to Headquarters, Albuquerque Headquarters and regional offices.

79. California obligations for 1990 include $2,152,077 in grants and cooperative agreements awarded to CA Indian tribes.

80. This figure includes $1,455,809 in grants and cooperative agreements awarded to CA Indian tribes.

81. This figure includes $3,676,184 in grants and cooperative agreements awarded to CA Indian tribes.

82. National IHS service population figures for 1993 were unavailable and so the figures for 1992 are used in the table.

83. California IHS service population figures for 1993 were unavailable and so the figures for 1992 are used in the table.

84. This figure includes $12,277,280 in grants and cooperative agreements awarded to CA Indian tribes.

85.The BIA service population figures for 1980-84 are not available. The figures used in the column for 1980-84 are the most recently available 1977 figures.

86. Unpublished report of Dr. A. F. Gillihan to State Board of Health on certain Indians of northeastern California 2 (1921), quoted in Goodrich, *supra* note 5 at 175 n.115.

87. Fifty-first Annual Report of Board of Indian Commissioners 59 (c. 1920).

88. John Rockwell, The Status of the Indian in California Today (Sacramento Indian Agency, 1944).

89. Wolf, Needed: A System of Income Maintenance for Indians, 10 Ariz. L. Rev. 597, 607 (1968). The general assistance program is part of the larger BIA social services program, which also includes burial and disaster assistance, as well as payments to reservation-based foster parents. Like general assistance, these programs are residual to other federal or state benefits. Overall, general assistance forms by far the largest portion of the BIA social services program.

90. Id.

91. See Morton v. Ruiz, 415 U.S. 199 (1974).

92. Id.

93. 25 C.F.R. §§ 20.1-20.30.

94. 25 C.F.R. § 20.21(b).

95. Id.

96. 25 C.F.R. § 20.21 (e).

97. R. Walke, Federal Programs of Assistance to Native Americans: A Report Prepared for the Senate Select Committee on Indian Affairs of the United States Senate, 170 (1991).

98. See, e.g., Rockwell, *supra* note 88.

99. See Goodrich, *supra* note 5 at 157.

100. See M. Mazzetti, Historical Overview of PL-280 in California 13 (Office of Criminal Justice Planning: Indian Justice Program, Sacramento, California, 1980).

101. J. Young, D. Moristo, and G. Tenenbaum, An Inventory of the Pala Indian Agency Records, 5 (UCLA American Indian Studies Center, 1976).

102. See, e.g., Rockwell, *supra* note 88.

103. California Joint Assembly Resolution No. 11, Statutes and Amendments to the Code of California, 1950 First Extraordinary Session 575 (1950). The subcommittee took this action after hearing supportive testimony from the Mission Indian Federation, which had falsely represented that it spoke on behalf of the Southern California tribes. After receiving a memorial from the California legislature protesting this action, the full Appropriations Committee refused to approve the recommendation.

104. E. Castillo, "The Impact of Euro-American Exploration and Settlement," in Heizer, ed., 8 Handbook of North American Indians, (Smithsonian Institution, 1978) 122.

105. A more comprehensive history of the hearings, reports and bills that preceded the Rancheria Act is set out as Appendix A to the ACCIP Termination Report.

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

107. Id.

108. Conversation with Kevin Sanders, Area Social Worker, BIA Sacramento Area Office.

109. Acosta v. San Diego County, 126 Cal.App.2d 455, (4th Dist. 1954).

110. Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983); Kalispel v. Swimmer, Civ. No. 88-126 (E.D. Wash., August 4, 1988).

111. Memorandum from Michael J. Anderson, Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, Department of the Interior to Carol Bacon, Director, Office of Tribal Services, Bureau of Indian Affairs, October 20, 1993. This memorandum analyzes the significance of the work relief requirement for employable recipients, pointing out that individuals who engage in work relief are exempted from the repayment obligation. Therefore, the memorandum concludes, only "unemployable" individuals or individuals "unable to work" are precluded from access to "comparable" county general assistance. Accordingly, only individuals with those characteristics should be eligible for federal assistance. BIA officials have questioned whether it is feasible to determine whether individuals are truly "unemployable" or "unable to

work," and have suggested that the BIA requirement of actively seeking employment should be the only one applied. Furthermore, in some counties, such as San Diego, welfare officials have excluded individuals in remote parts of the county from work relief, leading tribal members to argue that they should be eligible for BIA assistance because they are unable to work off their county obligations. Resolution by Southern California Indian Tribes, April 7, 1994.

112. Rockwell, *supra* note 88, at 126.

113. Anderson v. Mathews, 174 Cal. 537 (1917).

114. The absence of these Courts of Indian Offenses in California was a mixed blessing. In other parts of the country, these courts often served to suppress Indian culture and to override traditional Indian dispute resolution systems. William Hagan, Indian Police and Judges: Experiments in Acculturation and Control (Yale University Press, 1966). Sometime after the passage of Public Law 280 in 1953, a Court of Indian Offenses was established on the Hoopa Reservation exclusively for the purpose of prosecuting fish and game violations.

115. Annual Report of the Commissioner of Indian Affairs, 1883, "Reports of Agents in California," 13.

116. In addition to the Major Crimes Act, there are federal statutes penalizing a variety of offenses when committed within "Indian Country," but only when the perpetrator is non-Indian and the victim is Indian or vice versa. See 18 U.S.C. § 1152.

117. Proposed Report of H.R. 2841, included in letter from J.R. Venning, Chief, Law and Order Section, United States Department of the Interior, Office of Indian Affairs to John G. Rockwell, Superintendent, Sacramento Indian Agency, July 3, 1943.

118. 1872 Report of the Commissioner of Indian Affairs, quoted in Helen Hunt Jackson, A Century of Dishonor 456 (1885); Kelsey Report, pp. 10-11.

119. 1872 Report of the Commissioner of Indian Affairs, *supra* note 118, at 456 (1885).

120. United States v. Kagama, 118 U.S. 375 (1886).

121. An account of this case can be found in Sidney Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century, (Cambridge University Press, 1994) 144-45.

122. Edward Castillo, "Twentieth-Century Secular Movements," in Heizer, ed., *supra* note 104, at 715. A similar organization, the California Federated Indians, was formed in Northern California.

123. Florence Shipek in Encyclopedia of North American Indians, Twentieth Century; Letter from Max Mazzetti to Pauline Girvin, June 17, 1995.

124. See Strickland, ed., *supra* note 32, at 286-308.

125. Id. at 335-341.

126. Id. at 348-380.

127. See Carole Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535 (1975).

128. Williams v. Lee, 358 U.S. 217 (1959).

129. The Fort Mojave Tribe, which straddles Arizona and California and receives its federal funding through the BIA Area Office in Phoenix, also has a tribal court.

130. 140 Cong. Rec. S4278 (daily ed. April 14, 1994) (statement of Sen. Inouye); interviews by Tim Seward of Raymond Fry, Natural Resources Officer, BIA, Sacramento Area Office, and Betty Rushing, BIA, 1993.

131. The IRA created a framework for the organization of tribal governments that was available to any Indian "tribe," which was defined to include "the Indians residing on one reservation." 25 U.S.C. § 479.

132. 140 Cong. Rec. S6146 (daily ed. May 19, 1994) (statement by Sen. Inouye).

133. In a related matter, the BIA refused to accept revisions of the constitution of the Jamul tribe which would have permitted members to be 1/4 rather than ½ blood, on the ground that the Jamul are not a "historic" tribe. Letter from Carol Bacon, Director, Office of Tribal Services, BIA, to Raymond Hunter, Chairman, Jamul Indian Village, July 1, 1993.

134. See 140 Cong. Rec. E663 (daily ed. April 14, 1994) (statement by Rep. Richardson, Chair of the Subcommittee on Native American Affairs of the Committee on Natural Resources).

135. Tim Seward interview with Raymond Fry, Natural Resources Officer, BIA, Sacramento Area Office, 1993.

136. 140 Cong. Rec. S6147 (daily ed. May 19, 1994).

137. Id.

138. See 25 U.S.C. § 476(f)-(g).

139. Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 552 (9th Cir. 1991); Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990).

140. Opinion of Nov. 14, 1978, 6 Ind. L. Rep. H-1.

141. 70 Op. Att'y Gen. Wisc. 237, 243 (1981); Opinion No. 48, Opinion Letter from Robert M. Spire, Attorney General of Nebraska to State Senator James E. Goll (March 28, 1985). The Washington Attorney General has indicated that tribes retain concurrent jurisdiction under Public Law 280, but has opined that such jurisdiction is valid only insofar as its exercise does not conflict with state law. Opinion of the Attorney General of the State of Washington, 1980.

142. Fawcett v. Fawcett, No. IDE-78-537 (Alaska Super. Ct., Feb. 24, 1986).

143. Strickland, ed., *supra* note 32, at 345.

144. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976).

145. See Goldberg, *supra* note 127.

146. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 212 fn. 11 (1987) (stating that such jurisdiction was questionable, but not resolving the issue); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975). See also Zachary v. Wilk, 173 Cal.App.3d 754 (1985) (city rent control ordinances not applicable to Indian reservations); People v. Lowry, 34 Cal.Rptr.2d 382 (Cal.Super. 1994) (dog license ordinance inapplicable to Indian reservation).

147. See Bryan v. Itasca County, 426 U.S. 363 (1976).

148. Cabazon, *supra,* (bingo laws); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991) (speeding laws).

149. Santa Rosa, *supra* note 146.

150. People v. Naegele Outdoor Advertising Co., 38 Cal.3d 509, 213 Cal.Rptr. 247 (1985).

151. All Mission Indian Housing Authority v. Silvas, 680 F. Supp. 330 (C.D. Cal. 1987).

152. People v. McCovey, 36 cal. ed 517 (1984); Mattz v. Superior Court, 46 Cal. 3d 355 (1988).

153. 42 U.S.C. § 300j.

154. See Chemehuevi v. Dick Williams, Civ. No. SACV 920386 GLT (RWRX). Although the tribe sued in 1992 to enforce its right to exercise concurrent criminal jurisdiction over Chemehuevi lands, the tribe dropped the lawsuit before the case was heard. Under the administration of the current incumbent, Dan Lundgren, the Attorney General's office seems to be more receptive to the idea of concurrent jurisdiction, but still refuses to concede that such jurisdiction exists. Conversations with Tom Gede, Special Assistant Deputy Attorney General, October, 1994 and December, 1995.

155. See *infra*. In some of these instances where the state lacks jurisdiction, federal courts are open for civil dispute resolution and occasionally for criminal prosecutions. For example, evictions from tribal housing and enforcement of federal trust responsibility are actions that may

be brought into federal court. Federal law also makes it a federal offense to violate tribal hunting and fishing rules on reservations. Such federal intervention is often difficult to achieve in practice, however, for reasons of cost, distance, and formality. Local tribal courts would be much more effective in resolving tribal disputes.

156. 25 U.S.C. § 13.

157. For example, Washington State retroceded jurisdiction over several reservations, and Nevada retroceded jurisdiction over the Ely Indian Colony.

158. Amy Wallace, "No More No-Man's-Land," Los Angeles Times, June 17, 1991.

159. See "Public Law 280: Legislative History, Background Report on Public Law 280," Committee on Interior and Insular Affairs, United States Senate, 94th Congress, 1st Session, 29-30 (1975).

160. Final Report of American Indian Policy Review Commission (1976).

161. Wallace, *supra* note 158; Statement on Public Law 280 and Law Enforcement, delivered by Southern California Indians for Tribal Sovereignty, September 11, 1991.

162. Id. Although many California tribes are so small that it would be inefficient for each one to form a separate police force, such tribes could either form consortia to achieve economies or they could contract with the counties for enforcement of tribal law.

163. The states designated for such treatment in Public Law 280 were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Other states could come under the terms of Public Law 280 if they took certain affirmative steps.

164. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

165. See Cabazon, 480 U.S. 202.

166. See M. Mazzetti, Historical Overview of PL-280 in California,(Office of Criminal Justice Planning, Indian Justice Program, Sacramento 1980).

167. See W. Brophy & S. Aberle, The Indian: America's Unfinished Business, 186 (1966).

168. See United States v. Kagama, 118 U.S. 375, 384 (1886): "Indian tribes are the wards of the nation . . . Because of local ill feeling, the people of the States where they are found are often their deadliest enemies."

169. F. Shipek, "History of Southern California Mission Indians," in Heizer, ed., *supra* note 104, at 614.

170. See Strickland, *supra* note 32, at 237.

171. See notes 139-142, *supra.*

172. See Goldberg, *supra* note 127, at 540-44.

173. This account is drawn from information supplied by tribal members, newspaper stories, and R. Russell, "Moving Mountains," 16 Amicus Journal 39 (1995).

174. T. Gorman, "Neighbors Blockade Sludge Mountain," Los Angeles Times, October 21, 1994, p. 3.

175. Id.

176. Bryan v. Itasca County, 426 U.S. 373 (1976).

177. Santa Rosa Band of Indians, 532 F.2d at 661.

178. "Issues of Concern to Southern California Tribes," Hearing before the Select Committee on Indian Affairs, United States Senate, 101st Cong., 1st Sess. 122 (1989). Statements to similar effect span the entire period since enactment of Public Law 280.

179. This limit is imposed by the Indian Civil Rights Act, 25 U.S.C. § 1302.

180. Over 150 tribes nationwide have tribal courts.

181. This account is based on newspaper articles, interviews with individuals involved in the incident and testimony given before the Advisory Council on California Indian Policy.

182. B. Mandel, "No Proof of a Fate Worse Than Death," San Francisco Examiner A-10, December 5, 1993.

183. Art Bunce of the All Mission Indian Housing Authority in Escondido, California testified before the Senate Select Committee on Indian Affairs in 1989, complaining of the unauthorized influx of illegal drug manufacturers onto San Diego-area reservations. Even though some of these operations were in HUD-financed homes, the Housing Authority could not effectively evict them. As Bunce stated,

> [T]he eviction procedure when actually used in earnest is extremely cumbersome . . . The Federal courts are overworked, understaffed, and the few cases the housing authority has brought for evictions in drug related cases are taking about 9 months so far and we haven't even gotten to the state of pre-trial conference yet. If that continues . . . the community will continue to have to endure the danger posed by drug operations, some operating in brazen openness on the reservation.

Bunce recommended an amendment to Public Law 280, or at least a revision of the

procedural rules for federal courts that would allow summary or expedited eviction proceedings of the sort routinely conducted in California municipal courts. Absent such an amendment, Public Law 280 had left the tribes with no competent means of effecting evictions.

184. This account is drawn from newspaper stories, postings on the computer bulletin board known as "Nativenet," features from an internet newspaper called the Albion Monitor, testimony given to the Advisory Council on California Indian Policy, and information supplied by members of the Round Valley Indian Tribes.

185. See Southern California Indians for Tribal Sovereignty, *supra* note 161, detailing abuses on the Pechanga, Barona and Viejas Reservations.

186. See Appendix B to the ACCIP Termination Report.

187. In response to a question about the major types of conflicts that come before the community or tribal organization, the following received the highest ratings: substandard housing conditions; trespass; constitutional or articles and bylaws interpretations; election and enrollment procedures; land use conflicts relating to assignments or allotments; and vandalism. This list obviously does not include conflicts that are routed to state or federal courts.

188. These are cases where the Indian child is domiciled or resides on the reservation.

189. 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).

190. See, e.g., In re Bridget R., 41 Cal.App.4th 1483 (1996).

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

192. These consortia also offer the feature (sometimes viewed positively, sometimes negatively) of providing decision-makers who come from outside the small community within which the dispute arose.

193. One tribal representative stated, "As far as we know, we don't know how we became an IRA government." Four tribes suggested that they accepted an IRA government during reclassification from "terminated" to "recognized" tribal status. Prior to termination, they were not organized under the IRA advised by the BIA to restore under an IRA tribal government. Seven tribes gave "unknown" as the reason for how and why they had IRA tribal governments.

194. In the survey of 29 California Indian communities, 23 were recognized tribes and 11 had an IRA constitution. Among the surveyed tribes, most have revised, or have considered revising their constitutions to respond to contemporary conditions. For example, many tribes with IRA governments updated their constitutions and bylaws to deal with taxation and land zoning issues

that did not previously exist. Ten tribes disclosed that their original constitutions were modified at least once after the IRA government was established and recognized by the federal government, and one tribe indicated that it had revised its constitution twice.

Seven of the surveyed tribes are federally recognized non-IRA government tribes. Two of the seven tribes have tribal constitutions and two have tribal constitutions in development. A fifth tribe operates with articles of association and ordinances. The two remaining tribes did not indicate what system of governance they were using.

Within the last 34 years, six federally recognized non-IRA governments adopted constitutions and bylaws. Among our surveyed tribes, all non-IRA governments had documents that were drafted since 1961. Two constitutions and sets of bylaws were created within the past four years. One tribe indicated that a constitution and by-laws were not applicable.

Five of the IRA tribes utilized a BIA intermediary to draft their tribal constitution and/or bylaws. Four tribes used a tribal committee in the creation of their constitution or bylaws. Two others used California Indian Legal Services (CILS) in their proposal, and two tribes used a tribal or private attorney to draft their tribal constitutions.

One tribe drafted its own constitution and/or by-laws, and other tribes are currently working on several drafts through their tribal council. These tribes indicated a great satisfaction with the process because the council worked together in the formulation of their own tribal governance system. They also indicated that by doing the drafting themselves, they prevented intrusion from BIA officials into their internal affairs.

195. The BIA tends to overstep its bounds in this area with both newly recognized and newly restored tribes. See, e.g., the submission of the Ione Band of Miwok Indians to the ACCIP. See also § VII(B)(2) of the ACCIP Termination Report.

196. See § V of the ACCIP Report on Trust and Natural Resources for further discussion of land acquisition programs.

197. See also, § VI of the ACCIP Cultural Resources Report.