ACCIP TERMINATION TASK FORCE

There was no formal task force assembled on termination. George Freeman was the member of the Advisory Council who provided coordination on Termination issues.

LIST OF EXHIBITS

Recommendations

1. Congress should enact comprehensive legislation establishing a process for the expedited restoration of the remaining terminated California tribes, including modification of the criteria used to evaluate requests for tribal restoration.

Though termination has not been the official policy of the federal government since 1970,[1] there has not been a single comprehensive piece of federal legislation to restore the remaining terminated California tribes. This is particularly striking in light of the fact that the federal government has lost or settled all of the California rancheria un-termination cases litigated over the past quarter century. Certainly, Congress has shown its awareness of the need for restoration of terminated tribes by passing at least 12 individual restoration bills between 1973 and 1990.[2] It was not until 1993, however, that Congress finally acted to legislatively restore any terminated California tribes. The two tribes restored by Congress—the Paskenta Band of Nomlaki Indians and the United Auburn Indian Community—bring the total number of California tribes restored through litigation or legislation to twenty-nine.

Today, of the 38 California rancherias terminated under the Rancheria Act of 1958, nine remain terminated.[3] Of these, at least three would meet the following criteria used by the Federal government in evaluating a terminated tribe's eligibility for restoration:[4]

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

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

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

3. **Congress should appropriate supplemental "Restored Tribes" funding for newly restored California tribes.**

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

The "Restored Tribes" funding is also a gesture of good faith and a sound investment by Congress in Indian tribes whose tenacity in seeking restoration will likely be replicated in pursuit of their status and interests as self-governing entities.

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

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

I. Introduction

The Termination Policy sought to end the special trust relationship between the United States and Indian people that had been the cornerstone of federal-Indian relations since the United States' earliest years. It represented another destructive Indian policy that reverberated throughout the smallest and most vulnerable of California's tribal communities. Like the Allotment Policy of an earlier era, implementation of the Termination Policy in California set in motion a series of events that disrupted tribal institutions and traditions, ultimately resulted in the divestment of these small tribes and their constituent members of the majority of their lands, and left the tribes in a more desperate and impoverished state than before.

Through termination, Congress sought to wind up the affairs of certain designated tribes by terminating federal supervision over the tribes, their eligibility for federal benefits, and their coverage under federal Indian laws.[11] Some supporters of the policy claimed it would liberate the Indians from excessive federal supervision, and finally bestow the full privileges of United States citizenship on them.[12] The overriding effect of the Termination Policy, however, was the loss of Indian land to private, non-Indian ownership. Any progress toward self-governance engendered among these tribes by the Indian Reorganization Policy of the 1930s and 1940s was reversed, and assimilation of their peoples and cultures into the American mainstream became the ultimate goal. The termination experiment, like the Allotment Policy, failed to improve the socioeconomic and political situation of the Indians affected.

While Congress and the Executive branch both have acknowledged the failure of the termination policy, they nevertheless have left unremedied most of the devastating effects of that policy. Nationally, Congress has addressed the restoration of terminated tribes on a piecemeal, case-by-case basis. It has never taken the initiative to legislate a comprehensive, national approach to the restoration issue, including remedial measures to redress the continuing effects of termination. Instead, the burden remains on the very tribes that were financially and culturally devastated by termination to persuade Congress to reverse the misguided federal actions of an earlier era. In the meantime, these terminated tribes have extremely limited access to government services and benefits, especially those that foster and support tribal self-determination; their lands are not secured by federal trust status for future generations of tribal members; and they enjoy less federal protection of their cultural heritage than recognized tribes.

While most of the terminated tribes in California have been restored to their status as federally recognized tribes through litigation or legislation, the effects of termination have not been reversed. Termination ended the federal trust status of tribal lands and broke up tribal communal land holdings by distributing the lands per capita to selected tribal members—the "distributees"—and their families. As a result, most of the rancheria lands passed into non-Indian hands within a relatively short period of time. This process was accelerated by the extreme poverty and high unemployment among the Indians and the failure of the Bureau of Indian Affairs (BIA) to prepare them for state taxation and regulation of their lands. In addition, the lack of adequate water and sanitation facilities decreased the utility and value of the rancheria lands and

acres. In reliance on the treaties, many Indians moved to the lands that were to be set aside. The treaties, however, were rejected by the United States Senate, leaving the Indian signatories without a protected interest in the lands ceded by the treaties or the purported reservations.[16] Because the Senate also sealed the file on these treaties, the tribes were not notified of the Senate's rejection of the treaties until 1905.[17]

By the turn of the century, the California Indian population had been reduced from an estimated 150,000 to approximately 16,500.[18] Despite Congress' attempt to protect the occupancy rights of California Indians,[19] 11,300 of those survivors had been displaced from their aboriginal homes, and had no land base.[20]

Following the publication of Helen Hunt Jackson's "A Century of Dishonor" in 1881,[21] public attention began to focus upon the destitute state of these so-called "landless" Indians. The Commissioner of Indian Affairs initiated an investigation in response to reports that the California Indians were literally starving to death. Congress thereafter authorized an investigation of the existing conditions of Indians in Northern and Central California, and directed the Commissioner to report to Congress "some plan to improve the same."[22] C. E. Kelsey, a San Jose attorney and officer of the Northern California Indian Association, was appointed Special Agent to the Commissioner to carry out the Congressional mandate.

Six months from the date of his appointment, Kelsey completed his report and submitted it to the Commissioner of Indian Affairs. According to his report, Agent Kelsey "visited and personally inspected almost every Indian settlement between the Oregon line and the Mexican border."[23] Kelsey found that, for the most part, Indians in Northern California consisted of small, scattered bands and remnants of bands averaging about 50 in number. The Indians were forced to live on lands abandoned by settlers as unusable.[24]

Kelsey attributed the continuing decreases in Indian population in the state to the lack of a secure Indian land base. He noted that "[t]he entire Indian population of Northern California has decreased. . . by about 1,100 in the last three years, most of the decrease being in the landless bands."[25]

Kelsey emphasized the need for immediate relief for the homeless Northern California Indians.[26] He recommended that Congress buy small parcels of land for these destitute and displaced Indians, and indicated "that the land should be of good quality with proper water supply, and shall be located in the neighborhoods in which the Indians wish to live."[27] He also made specific recommendations for the improvement of the reservations in Southern California.[28]

On March 29, 1906, the Commissioner of Indian Affairs, after "a comprehensive review," approved Kelsey's report and ". . . strongly urge[d] that Congress be requested to make an appropriation of sufficient amount to enable the Department to carry out the plans proposed."[29]

The Senate acted on this recommendation by amending the Indian Office appropriation bill

> of impoverished Indian groups, and increasing Indian self-government and self-determination. The policy embodied in the proposed legislation is that the Federal government's only Indian concern is with restricted Indian property, and that it is exclusively for the Federal government to decide when and how to end its responsibilities in that regard. All other obligations toward the Indian, whether based on treaty, statute, charter, agreement, or common decency may be disregarded and forgotten. From this standpoint the proposed legislation is not only unwise and unsound, it is immoral and an affront to the dignity and honor of the United States.[39]

This assessment that federal withdrawal from California represented yet another breach of trust with the California Indians merely slowed the juggernaut of termination. Strong resistance from southern California's mission bands resulted in their eventual exclusion from the process; other, larger tribes, such as Round Valley, Hoopa and Tule River also prevailed in their resistance. Ultimately, it was the smaller, more isolated rancheria communities that became targeted for termination.

Congressional Committees, the BIA, and the California Legislature considered the issue of termination for several years,[40] until Congress officially adopted it as a broad national Indian policy in 1953 by Concurrent Resolution.[41] 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 . . .[42]

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. Congress slated at least five additional tribes in other states for termination.[43]

That same year, Congress passed Public Law 280,[44] which transferred civil and criminal jurisdiction over Indian land to the States included in the Act.[45] California was the only State named in both the Concurrent Resolution espousing termination and Public Law 280. Shortly after the passage of these two Acts, the BIA drastically reduced services to all California Indians,[46] even though no California tribes were actually terminated until 1961.[47] In fact, federal health services for California Indians were completely discontinued by 1955.[48] This discontinuation of services continues to be felt in California, since federal agencies tend to base current funding on historic funding levels.

Around this time, there were roughly 500,000 acres of federally owned land held for the use and/or occupancy of California Indians, which the BIA considered to be of generally poor

to help the Indians to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians.[57]

Another distinctive feature of the Act was that termination was not to be imposed on the listed tribes without their consent. "Section 2(b) manifests the clearly *permissive* character of any execution of the plan, mandating that the plan be carried out only if approved by a majority of the Indians voting in a referendum."[58] Sections 1 and 2(a) made the formulation of a plan mandatory, but section 2(b) gave the Indians the choice of either accepting or rejecting it. There was nothing in the Act which required the Indians of a rancheria eventually to accept a plan, or which gave the Secretary of the Interior any authority to override their vote to reject a plan.[59]

By the Act of August 11, 1964,[60] Congress materially amended the 1958 Rancheria Act. The Act's provisions were extended to all rancherias and reservations "lying wholly within the State of California." Except in the case of the original 41 rancherias named in section 1 of the 1958 Act, however, the process of developing a distribution plan could only be started after distribution had been "requested by a majority vote of the adult Indians of a rancheria or reservation . . ." This amendment allowed the Indians to veto termination at the very outset of the process.[61] The significance of this modification is underscored by the fact that it appears that only two tribes elected to proceed with termination under the amended Rancheria Act.[62]

Despite the permissive nature of the Rancheria Act, for the most part it was presented to the California tribes targeted for termination as a *fait accompli* and their best chance of obtaining some measure of federal assistance before the BIA withdrew entirely from California. From the very outset, it was a process skewed heavily toward ending the federal trust responsibility to as many California tribes as possible in the least costly manner. It is not surprising, then, that the mandates of the Rancheria Act were violated regularly and with impunity by overzealous bureaucrats intent on achieving the overarching goal of assimilating tribal communities into the social and economic mainstream of American life by withdrawing all special protections afforded Indian people and lands under the federal Indian laws.

IV. Implementation of the Act

The government's implementation of the Rancheria Act can only be described as a resounding failure. In fact, in every case where a court reviewed the government's actions taken pursuant to the Rancheria Act, the court found the termination to be unlawful, and that the trust responsibility owed to Indian people had been breached.[63] Indeed, in the majority of these cases, the government itself admitted that termination was unlawful, and chose to litigate only those issues related to the question of what was an appropriate remedy.[64] Thus, there is no question that the government failed to properly implement the Act. This, however, does not end the inquiry. An understanding of what the basic obligations of the government were under the Act, and how it failed the Indian beneficiaries in its discharge of these obligations, is essential to a complete understanding of the continuing consequences of termination.

Once the distribution plan had been approved, a prescribed notice was required, after which any Indian could submit to the Area Director any objections to the plan.[68] After reviewing objections, the Secretary was required to hold a referendum election among the distributees. If approved by a majority of the distributees, the plan became final.[69]

In the implementation of the Rancheria Act, the Secretary of the Interior and the BIA secured the tribes' approval of the termination/distribution plans through misrepresentation and undue influence. The tribes agreed to termination in reliance on the government's promises to make desperately needed improvements to the rancherias. It appears, however, that the BIA knew at the outset of this process that the promised improvements would never be made. Under the terms of a secret agreement with some members of the Congressional subcommittee that reviewed the legislation, the BIA agreed not to seek any special appropriation to carry out the specific obligations imposed on the government under the Rancheria Act.[70] As a result of this agreement, the BIA funded its implementation activities entirely out of its regular appropriations for California, hence the gross under-funding of the termination program (and the benefits promised to the Indians under the Act). Moreover, this action diverted the already inadequate funding of BIA programs for those California reservations and rancherias not included in the legislation, to support the termination process. Thus, implementation of the termination policy had far-reaching effects that extended beyond the rancherias, and impacted California tribes that had not even been slated for termination.[71]

In addition, the BIA failed to inform the tribes that the physical improvements and educational programs offered in exchange for termination were already available through 42 U.S.C. §§ 2004a and 2004b, which sought to improve conditions on Indian trust land in regards to roads, sewers, water supply, and educational opportunities. The BIA also used undue influence to secure each tribe's approval of the distribution plan by representing that agreement to termination was the only way to secure needed improvements, and dropping from the tribal rolls members who opposed termination.[72]

Even more importantly, however, the BIA failed to disclose the economic, social and cultural consequences of termination, including its effect on future members of the community in areas such as religion, Indian education programs, and tribal sovereignty. Generally, termination of a tribe's status resulted in the transfer of tribal lands held in trust to private ownership, transfer of jurisdiction over tribal lands from the federal government to the state, and discontinuance of federal services arising from the trust responsibility.[73] Thus, terminated tribes lost all protection of their traditional way of life. Being classified as "Non-Indians" by the government meant the loss of religious rights granted only to Native people, loss of access to special Indian education programs for tribal children, and the loss of the ability to be heard at the federal and state level as Native American people. These issues were not even raised, let alone discussed, with the tribes proposed for termination; on the contrary, the government presented the Rancheria Act as if it would solve the tribes' economic problems and improve Rancheria infrastructure without altering their cultural and political identity.

C. The failure to ensure that termination would not occur until the specific requirements of the Rancheria Act and the individual rancheria distribution plans had been met

Other than the general requirement that the Secretary determine that the provisions of a distribution plan "had been carried out to the satisfaction of the Secretary,"[81] there were no formal written rules or regulations governing the procedure for determining whether the improvements were adequate, prior to publishing a termination proclamation in the Federal Register. In practice, the Area Director would consult informally with the personnel responsible for each improvement (e.g., road engineer, irrigation engineer), and when he was told that the improvements had been completed, "... then somebody sat down and wrote the completion statement."[82]

The completion statements generally contained conclusory language that all provisions of the distribution plan had been completed. The statements contained no details about the alleged improvements. For example, the completion statement for the Graton Rancheria states: "A domestic water system was provided by developing a well and constructing a water distribution system."[83] The Graton completion statement, like its distribution plan, is typical of the completion statements prepared for the other terminated rancherias.

The Commissioner of Indian Affairs approved the publication of the termination proclamations for each rancheria. No regulations were in place to govern his determination, and in practice the Commissioner based his decision solely on his review of the completion statement. After approval of the completion statement by the Commissioner, the Secretary published the termination proclamation in the Federal Register, declaring those persons listed in the proclamation to be ineligible for benefits and services available to Indians based on their status as Indians.[84]

V. The Trust Obligations of the Federal Government in the Termination Process

The trust relationship between the United States and the California Indians pre-existed the passage of the Rancheria Act and was acknowledged and confirmed in the Act itself.[85] "The federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a *trust status toward the Indian—a status accompanied by fiduciary obligations.*"[86]

As the trustee for the Indians affected by the Rancheria Act, the Secretary of the Interior was bound to deal with the beneficiaries of that trust according to the same rigorous standards which govern relations between private trustees and beneficiaries.[87] Judicial interpretations of the Rancheria Act establish that the fiduciary obligations of the United States toward the Indian people under the Act were to continue in full force until the termination process had been completed.[88] Thus, until the moment of actual termination, federal actions taken to implement the Rancheria Act were bound and constrained by the trust duties of the United States to Indian

as sovereign authorities[95]; and those lands that had been distributed in fee to individual Indians were eligible to be returned to trust status.[96] Damages were also awarded,[97] though in some settlements tribes accepted physical improvements to Rancheria lands instead of monetary damages.

Judgments and settlements in the un-termination cases usually stipulated a time limit for actions that had to be taken to secure a privately owned parcel's eligibility to be held in trust.[98] While these time limits seemed reasonable when entered, it soon became clear that many rancheria residents were confused about these requirements. The BIA's refusal to accept fractional interests created additional problems. In cases where the reservation boundaries had not been restored, any delay by the BIA in accepting lands into trust caused problems for the residents, as many counties continued to assess taxes on Indian-owned fee lands. Thus, even after restoration was achieved through litigation, tribes and individuals were forced to litigate against counties to prevent further diminishment of their land base through tax sales.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 rancherias that were terminated under the original Rancheria Act.[99] Two additional tribes, the United Auburn Indian Community and the Paskenta Band of Nomlaki Indians, were restored by Acts of Congress in 1993.[100]

VII. The Lingering Effects of Termination on California Tribes

Since President Nixon first declared it to be a failure in 1970, both Congress and the Executive Branch have repudiated the misguided policy of termination.[101] However, despite its complete rejection of the termination policy, the Federal Government has failed to take the necessary step of providing a comprehensive legislative solution to the continuing problems of restored tribes and the remaining terminated tribes.

It has been almost forty years since passage of the Rancheria Act. Still, the Advisory Council on California Indian Policy is compelled to ask questions that should have been anticipated, and to which answers should have been provided, long before termination was accepted as policy, and long before the first California distribution plan was prepared. What were the human and economic costs involved in the dismantling of rancheria communities? What was the risk of loss of Indian homes and lands, however meager or unproductive, to creditors, tax sales, and fraudulent transactions once the protection of federal trust status was withdrawn? Was termination simply another chapter in an established pattern of federal neglect and malfeasance toward the California Indians? What were the effects of withdrawing all federal Indian programs and benefits from Indian communities mired in poverty and high unemployment? The real tragedy is that many of these questions *were* asked, and a substantial amount of information was compiled on the conditions of the California Indians before the enactment of the Rancheria Act.[102] Despite the knowledge that most of the targeted Indian communities were not prepared for termination, the government nevertheless carried out the policy. Indeed, it was implemented in a way that left the Indians with no real control over the process and ultimately deprived them of the very

terminated tribes and their members.

B. Effects on Restored Tribes

Restored tribes experience problems of a different character because they have reestablished their government-to-government relationship with the United States. Many of their problems are related to their inability to take full advantage of their self-governing status because of the lack of established governing institutions and procedures, inadequate financial support for essential tribal operations, stiff competition with other federally recognized tribes for limited federal program funds, an inadequate or nonexistent land base, and the BIA's inability to provide the technical and financial support necessary to overcome the disabling effects of termination.

1. The lack of a land base sufficient to support tribal housing and economic development

Because significant portions of the rancheria land base had passed into private hands following termination,[107] it was usually impossible in the restoration process to acquire and return these lands to tribal trust status. Thus, the restored tribes have either a significantly reduced land base or no land at all. Of the 29 restored California tribes, seven have fewer than 50 acres in tribal ownership and 16 have no tribal land base at all. The other six restored tribes each have less than 160 acres in tribal ownership.

Even where rancheria lands were restored and the original rancheria boundaries reestablished, private ownership within reservation boundaries has made assertions of tribal jurisdiction difficult. Private landowners often resist and challenge the exercise of tribal authority, and local governments simultaneously attempt to exercise jurisdiction.[108] These jurisdictional challenges deplete limited tribal resources and complicate tribal planning and economic development initiatives.

2. Difficulties encountered in reconstituting tribal communities under a unified leadership

Attempts to develop a tribal governing document often falter in the intra-tribal strife between different interest groups and factions over issues such as tribal membership, election procedures, and the allocation of tribal power between tribal and general councils. Tribal communities that were split and dispersed by termination and the distribution of lands per capita find themselves struggling to renew and reestablish the bonds of community and to place the tribe above individual self-interested goals. The termination policy's focus was just the opposite—on individual land ownership and self-interested economic behavior—and effectively discouraged the continuation of tribal hierarchical and communal structures. Thus, restored tribal governments often find themselves grappling with the political and social residue of the termination policy.

Too often the BIA exacerbates the problem by carrying forward some of the paternalistic

4. The lack of adequate technical assistance and support services to guide and assist the tribes in the difficult process of restoration

When restoration occurs, the BIA assumes new trust obligations to the restored tribe and new demands are made on the BIA's resources. Thus, in California, restoration forces under-staffed and under-funded BIA agencies to take on new responsibilities at a time when Congress is determined to downsize the BIA and transfer most of its programs into the Tribal Priority Allocation (TPA). Restored tribes that need intensive technical assistance and support services in reconstituting their tribal governments, completing their base rolls and conducting their first post-restoration tribal elections, contracting for programs and services under Indian Self Determination and Educational Assistance Act, and initiating and completing fee-to-trust land acquisitions, are under-served, even where the BIA extends its best efforts. For example, at the time of restoration of the four Scotts Valley tribes, the BIA Central California Agency's service area encompassed more than 50 federally recognized tribes with lands distributed across 21 California counties.[113] It is, therefore, not surprising that the BIA is invariably unable to meet deadlines imposed in restoration statutes, whether they involve completing tribal rolls, reviewing constitutions, holding elections, or adopting plans for tribal economic development. This stalls tribal development, fosters dissension in tribal communities, and encourages political challenges that weaken and distract fragile interim governments. These failures are without remedy and can make a tribe vulnerable to extra-tribal interests that can derail or prevent responsible, planned tribal development.

CONCLUSION

The termination policy, as implemented in California, was a policy of expediency designed to terminate federal benefits and services to most of California's smaller tribes, as quickly and as cheaply as possible. It failed in its touted goal of assimilating these tribal peoples into the American social and economic mainstream—putting them on an equal footing with other Americans. Instead, it thrust most of them into greater poverty, and divided their most essential asset—the tribal homeland, by ending its protected federal status. Although all branches of the federal government have now acknowledged its failure, Congress has not acted to reverse the continuing effects of the termination policy on the California tribes. Restoration of tribal status is only a beginning. Congress must act to provide the restored California tribes with the means, including adequate financial and technical support, to reestablish their tribal homelands and communities and to fully exercise their self-governing powers.

11. Robert N. Clinton et al., American Indian Law, (3rd Ed. 1993), 158; see H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B-132 (1953).

12. See Wilkinson & Biggs, The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139, 152 (1977).

13. See, e.g., Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F.Supp. 1042 (N.D. Cal. 1988).

14. Cary McWilliams, California: the Great Exception, (Peregrine Smith, Inc., 1976) at 25-26.

15. 9 Stat. 452 (1850).

16. Cong. Globe 32nd Cong., 1st Sess. 2103. In most cases, the tribes' aboriginal title was extinguished by the Act of March 3, 1851 ch. 41, 9 Stat. 631 (1851), which required every person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present their claims within two years. Most tribes failed to assert their aboriginal title within the two-year period, largely because the Indians were not notified of the Act and were not aware of its applicability to their claims. In the case of the parties to the unratified treaties, those tribes did not know until 1905 that the treaties they signed were not ratified, and thus had no idea that they needed to protect their aboriginal title.

17. H.R. Rep. No. 801, 103d Cong., 2nd Sess, 2 (1994).

18. Id. at 1-2.

19. In 1853 Congress passed the Act of March 3, 1853, to provide for the survey of the Public Lands of California. Section 6 of that Act stated that Indian tribes then in possession of any tract of land would be protected from losing their occupancy rights to non-Indians under the Homestead and Preemption laws of 1841. 10 Stat. 244.

20. See the report of C.E. Kelsey to the Commissioner of Indian Affairs (hereinafter "Kelsey Report"), attached hereto as Exhibit 1, at 2.

21. Helen Hunt Jackson, A Century of Dishonor, (originally published by Harper and Brothers in 1881, now available from the University of Oklahoma Press, 1995).

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

23. See Kelsey Report at 2.

24. Kelsey reported that if the Indians were able to make the land productive, they faced eviction by nearby non-Indian landowners:

> It is not strange that the Northern California Indians have ceased to try to have

35. See Sherburn F. Cook, The Population of the California Indians, 1769-1970 (University of California Press, 1976), 62, 67. See also, C.H. Merriam, The Indian Population of California, American Anthropology, 594-596 (1905).

36. See, e.g., "The Status of the Indian in California Today, a Report by John G. Rockwell, Superintendent of the Sacramento Agency to the Commissioner of Indian Affairs," Sacramento Indian Agency, 1944.

37. See, e.g., S. Tyler, A History of Indian Policy, (Washington: Government Printing Office, 1973), 147, 151-88. See also, Deposition of Leonard M. Hill, taken in Duncan v. U.S.A., No. 10-75 (Ct. of Cl.), and Duncan v. Andrus, No. C-71-1572 WWS (N.D. Cal.), on September 2, 1975, at 23, 29-34, excerpts of which are submitted herewith as Exhibit 2 (hereafter, "Hill Deposition").

38. In a document (National Archive Record Group 75, CCF 1940-57, 59A-643—Records for 1953-54) entitled "General Withdrawal Programming, Sacramento Area," dated July 1, 1952, the BIA outlined in detail its plan for withdrawal from California and concluded: "It is our opinion that all groups in California are ready for complete withdrawal of Bureau responsibility, assuming that these responsibilities and services [currently being provided by the BIA] will be transferred to the Indians themselves, local or state governments or to other auspices and that safeguards provided in the pending California Withdrawal Bill are retained." (Emphasis added.) Id. at 83.

39. Statement, dated June 13, 1952, by Oliver La Farge, President, AAIA, on legislation (S. 3005, H.R. 7490, and H.R. 7491) "To Facilitate the Termination of Federal Supervision Over Indian Affairs in California," at 9.

40. A more comprehensive history of the hearings, reports and bills that preceded the Rancheria Act is set out as Appendix A.

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

42. Id.

43. See United States v. Burland, 441 F.2d 1199, 1202 n. 4 (9th Cir.), cert. denied, 404 U.S. 842 (1971) (listing termination statutes passed subsequent to H.R. Con. Res. 108).

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

45. The States originally included in Public Law 280 were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

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

59. The Act's permissive nature was further clarified by its legislative history and subsequent court decisions. See id.; Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981); Table Bluff Band of Indians v. Andrus, 532 F.Supp. 255 (N.D. Cal. 1981); Smith v. United States, 515 F.Supp. 56 (N.D. Cal. 1978). The Department of the Interior (DOI) initially concurred in this interpretation of the Rancheria Act as being non-mandatory. See DOI Solicitor's memorandum to the Commissioner of Indian Affairs, dated August 1, 1960, stating (at page 4) that, "[t]he bill as enacted is not mandatory." DOI later reversed its earlier interpretation of this aspect of the Rancheria Act, however, when it promulgated new regulations to govern the termination process in 1965. See, e.g., the former 25 C.F.R. § 242.3(d), n. 1 (1977). These regulations were voided in Kelly v. Department of the Interior, 339 F. Supp. 1095 (E.D. Cal. 1972), on the ground that they were promulgated in violation of the Administrative Procedure Act.

60. Pub. L. No. 88-419 (1964).

61. See, e.g., H.R. Rep. No. 1305, 88th Cong., 2nd Sess. at 3 (1964).

62. See Appendix B.

63. See, e.g., Smith, 515 F.Supp. at 60; Duncan v. Andrus, 517 F.Supp. 1, 6 (N.D. Cal. 1977); Duncan, 667 F.2d at 44-45; Table Bluff Band of Indians, 532 F.Supp. at 259.

64. See Smith, 515 U.S. at 57; Duncan v. Andrus, 517 F.Supp. at 4; Duncan v. United States, 667 F.2d at 44; Table Bluff Band of Indians, 532 F.Supp. at 258.

65. These regulations were first published June 9, 1959, and codified at 25 C.F.R. Part 242. Though the regulations contemplated that proposed distribution plans would be prepared by the Indians affected by the plan, in practice BIA personnel prepared all of the distribution plans. In 1965, successor regulations were promulgated to implement the 1964 amendments to the Rancheria Act, but were subsequently voided. See Kelly, *supra* note 59.

66. See Pub. L. No. 85-671, § 2, 72 Stat. 619 (1958).

67. Defendants Watt, Smith, Finale and Burcell Answers to Plaintiffs' Second Set of Interrogatories, filed September 8, 1981, in Tillie Hardwick v. United States, No. C-79-1710 SW (N.D. Cal.)(3/14/89), at 2, Answer No. 1.

68. 25 C.F.R. §§ 242.4-242.5 (1977).

69. 25 C.F.R. § 242.6 (1977).

70. Hill deposition at 34-36; see also, Memorandum of Sacramento Area Director to Area Indian Advisory Board, dated October 8, 1976, (attached hereto as Exhibit 4) regarding a meeting held on August 26, 1976, concerning Area Office funding, and accompanying Transcription of August 26th Meeting. The Memorandum states that "[m]oney spent in completing distribution plans of rancherias being terminated came from the area's regular annual budget, even though Congress

83. "Graton Rancheria: Completion Statement," at 1.

84. 25 C.F.R. § 242.10. The BIA's position as to the legal effect of the publication of a termination proclamation was somewhat contradictory and unclear, and changed over time. In practice, rancheria assets, primarily deeds to rancheria real property, were routinely issued to distributees and recorded in the county recorders' offices before the proclamations were published. Thus, the completion statements all recite the date that the deeds were issued and recorded. After June 25, 1975, the Commissioner of Indian Affairs changed his position regarding when the federal government's trust duty to the rancherias was terminated, concluding that the provisions of sections 2(d), l0(b) and 11 did not apply until the Section 3 improvements had been satisfactorily completed, even in those cases where a termination proclamation had been published. See the June 25, 1975 memorandum expressing the Commissioner's policy. Of course, this change in policy implicitly recognizes that termination proclamations had been published for some rancherias on which all actions and/or improvements set forth in the distribution plans had not been satisfactorily completed.

85. See, e.g., Pub. L. No. 85-671, § 9 (1958).

86. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975) (citations omitted) (emphasis added).

87. See, e.g., United States v. Mason, 412 U.S. 391 (1973); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

88. See Duncan v. Andrus, 517 F. Supp. at 6; Smith, 515 F. Supp. at 59.

89. See cases cited in Endnote 59, *supra*.

90. 5 U.S.C. §§ 551 et seq.

91. See cases cited in Endnote 59, *supra*.

92. See Appendix B.

93. See, e.g., Duncan v. United States, 517 F. Supp. at 4 (noting that 77% of the Robinson Rancheria land had passed out of Indian ownership following termination). No comprehensive study has been completed on the amount of land that passed out of Indian ownership as a result of the termination of California tribes. A study conducted in 1972 indicated that at least half of the lands of most of the terminated rancherias had passed out of Indian ownership. See Vernon T. Johnson, California Rural Indian Health Board, "California Indian Rancheria Task Force Report," (1972). In general, termination resulted in the rapid transfer of Indian lands to non-Indian ownership. See Strickland, ed., *supra* note 73, at 181-182.

94. See, e.g., Table Bluff Band of Indians, 532 F. Supp. at 261.

108. See, e.g., Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042 (N.D. Cal. 1988).

109. For example, in the case of the Paskenta Rancheria, only two distributees and dependent members were listed in the distribution plan, but subsequent information obtained during the tribe's restoration process identified at least 60 tribal members who resided elsewhere. These tribal members had moved away from the Rancheria in order to hold down regular or seasonal employment. Though residing off the Rancheria, many of them returned to hunt, fish, bury their dead, and attend annual tribal gatherings.

110. See § VIII of the ACCIP Community Services Report (discussing the lack of tribal courts in California).

111. In 1993, 10 years after entry of the judgment in Tillie Hardwick v. U.S.A., No. C-79-1710-SW (N.D. Cal.), "un-terminating" 17 California rancherias, the Hardwick tribes collectively organized to petition Congress for supplemental base level funding, which should have been provided at the time of their restoration, to assist them in completing the process of reconstituting their tribal governments and administering essential tribal governmental programs in the areas of education, housing, land acquisition, natural resources protection, and for other programs. The tribes requested $7.5 million to be distributed over three years. Ukiah Daily Journal article entitled "$7.5 million sought by California Indian Tribes," March 29, 1993. In 1994, the tribes finally succeeded in obtaining a supplemental congressional appropriation of $1,700,000 to establish adequate base level funding for their governments using a tiered approach based on the population size of each tribe.

112. The four tribes restored under the judgments entered in Scotts Valley Band, et al. v. U.S.A., No. C-86-3660 VRW (N.D. Cal.), received $600,000 in FY 1991, $538,000 in FY 1992, and in FY 1993, requested $600,000. See February 12, 1992 letter from Assistant Solicitor Scott Keep to Stephen Quesenberry, California Indian Legal Services.

113. A November 1972 Department of the Interior report entitled Functions of the Bureau of Indian Affairs, Sacramento Area discussed creation of the Central California Agency, with broad geographic and tribal trust responsibility, in these terms: "... the central portion of the State, now known as the California Agency, and for which it is proposed to establish an agency, in fact has 50 per cent of the Indians living on trust lands; 43 per cent of the total membership of bands or tribes; 47 per cent of the reservations and rancherias and 50 per cent of the public domain allotments and purchased properties in the State." Id. at 62.

Indian Child Welfare Act. (25 U.S.C. § 1903(6).)

(3) The instant action is a "child custody proceeding" governed by the Indian Child Welfare Act as well as state law. (25 U.S.C. §§ 1901 et seq., 1903(1).)

(4) Tamara Martinez is indigent.

(5) Ms. Martinez is entitled to court-appointed counsel under 25 U.S.C. § 1912(b) and is entitled to intervene in this proceeding under 25 U.S.C. § 1911(c).

[OPTIONAL] (6) Tamara Martinez is likewise an indigent de facto parent of Vanessa P., and due process requires that counsel be appointed to represent Ms. Martinez.

(7) The court hereby GRANTS Tamara Martinez' petition for court-appointed counsel and appoints _____ counsel for Ms. Martinez.

(8) The court clerk shall certify this appointment of counsel under 25 U.S.C. § 1912(b) and relay information of said appointment to the Secretary of the Interior forthwith.

(9) The court hereby GRANTS Tamara Martinez' petition for intervention under 25 U.S.C. § 1911(c).

(10) The court clerk shall provide Ms. Martinez' court-appointed counsel a complete copy of the court's case file, and add her counsel to the service list.

(11) The court likewise GRANTS Ms. Martinez' petition for invalidation of these child dependency proceedings concerning the minor Vanessa P., on grounds that relevant provisions of the Indian Child Welfare Act (at 25 U.S.C. § 1912) have been violated. (25 U.S.C. § 1914.)

//////////////////

//////////////////