

THE ACCIP TRUST AND NATURAL RESOURCES  
REPORT

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

11/11/11

11/11/11

11/11/11

## TABLE OF CONTENTS

Summary .....	1
Recommendations .....	2
I. The Federal Government’s Trust Responsibility With Regard to Natural Resources of California Indians .....	6
A. General Overview of the Trust Doctrine .....	6
1. The Trust Relationship as a Source of Federal Power .....	6
2. The Trust Relationship as a Limit on Federal Power .....	7
B. Identifying the Beneficiaries of the Trust Relationship .....	8
C. Exercise of the Trust Responsibility in California .....	9
II. Overview of The Indian Land And Natural Resource Base in California .....	11
III. Tribal Initiatives to Protect And Enhance Their Natural Resources .....	13
A. General Environmental Protection .....	13
1. Native American Environmental Protection Coalition .....	13
2. Campo Environmental Protection Agency .....	14
B. Water and Fisheries .....	15
1. Owens Valley Indian Water Commission .....	15
2. Round Valley Indian Tribes .....	16
3. Klamath River Inter-Tribal Fish Commission .....	17
C. Forestry .....	18
1. Hoopa Tribe .....	18
2. California Indian Forest and Fire Management Council .....	18
IV. Water Rights in California Indian Country .....	19
A. Background .....	19
B. Federal Reserved Water Rights .....	20
1. Nature and Characteristics of Reserved Rights .....	20
2. Quantification of Reserved Rights .....	21
3. Scope of Reserved Rights .....	22
4. Indian Water Uses .....	23
5. Allotments .....	24
a. Reservation Allotments .....	24
b. Public Domain Allotments .....	24
V. Land Acquisition by California Indian Tribes And Individuals: Decreasing Opportunities Coupled With Many Obstacles .....	25
A. The Legislative Process .....	26
B. The Allotment Acquisition Process .....	27

C.	Land Acquisition Pursuant to 25 C.F.R §§ 151.1-151.15	28
D.	Land Acquisition through HUD: Community Development Block Grants	30
E.	State Opposition to Tribal Land Acquisition	31
Endnotes		33
Appendix A:	A summary of the procedure tribes must follow to acquire trust lands pursuant to 25 C.F.R. §§ 151.1 <u>et seq.</u>	

**LIST OF EXHIBITS**

- Exhibit 1: Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996."
- Exhibit 2: Letter dated November 4, 1992 from Acting Sacramento Area Director Michael Smith.
- Exhibit 3: Bureau of Indian Affairs, "Fee-to-Trust Land Transactions, November 15, 1996."
- Exhibit 4: Two letters dated July 29, 1997 from Sara Drake, Deputy Attorney General, to Harold M. Brafford, Superintendent, Bureau of Indian Affairs.
- Exhibit 5: Memo dated May 26, 1994 from the Secretary of the Interior to All Area Directors.
- Exhibit 6: Bureau of Indian Affairs, Sacramento Area Office, "Land Acquisition Application (Tribal Requests)."
- Exhibit 7: Bureau of Indian Affairs, "Notices to State and Local Government of Proposed 'Nongaming' Trust Land Acquisitions."
- Exhibit 8: Memo dated 7/19/90 from the Secretary of the Interior to the Assistant Secretary, Indian Affairs.

## Summary

The trust relationship between the United States and Indian peoples pervades all areas of Indian law. It is both a source of federal power over Indians, and a substantive limit on that power. It requires the federal government to deal with the Indians in good faith. Moreover, treaties, statutes and other federal actions create specific fiduciary duties, enforceable in the federal courts through actions for declaratory and injunctive relief and, in appropriate cases, money damages.

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

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

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

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

## Recommendations

### TRUST RESPONSIBILITY

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 rolls of California Indians prepared in 1933, 1955 and 1972 for the distribution of the United States Court of Claims and Indian Claims Commission awards.

Historically, Congress has dealt with California Indians as a discrete group for purposes of federal benefits and services, as evidenced by the Homeless California Indian Appropriations Acts,<sup>1</sup> the California Indian Claims Cases,<sup>2</sup> and the current eligibility of California Indians for health care services provided by the Indian Health Service.<sup>3</sup> In addition, several federal agencies have recognized the unique history of federal relations with California Indians, and have adjusted their eligibility criteria accordingly.<sup>4</sup> The BIA, however, after decades of similarly recognizing the broad eligibility of California Indians for federal Indian programs, has since the mid-1980s insisted that only members of federally recognized tribes are eligible for the services it provides, even where the particular statute creating the benefit is intended to have a broader application.<sup>5</sup> Thus, Congress should clarify the eligibility of all California Indians, as defined above, for all of the services available to Indians based on their status as Indians.

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

One of the most well-documented conclusions gleaned from the BIA's own records and reports is that the California Indians have consistently been allocated less than their fair share of federal Indian programs and program dollars. As a result, California tribes have received and continue to receive disproportionately lower levels of benefits and services from the

BIA relative to other areas of the country. This lack of equitable and adequate funding and services has prevented the BIA from properly discharging its trust obligations, and has crippled tribal efforts to protect and manage natural resources. Base level funding for tribes in California is essential to close this institutional gap in federal funding and services, and to assist the tribes in developing and enhancing their own capacities for natural resource protection and management.

3. As part of their trust responsibility, federal land management agencies should be required to develop protocols outlining a procedure for consultation with California Indian tribes before authorizing activities that might adversely impact nearby or adjoining tribal lands.

Currently, the Bureau of Land Management and the United States Forest Service are required to consult with appropriate Indian tribes only when the approval of leases, permits, or other activity will adversely affect the tribe's use of the federal lands.<sup>6</sup> These agencies should also be required to engage in meaningful consultation with tribes prior to allowing activities on federal lands that might adversely impact tribal lands.

4. The federally recognized status of the Koi Nation of the Lower Lake Rancheria should be immediately clarified by the Assistant Secretary of Indian Affairs. In the absence of any action by the Secretary, Congress should enact legislation clarifying that the Koi Nation of the Lower Lake Rancheria continues to be federally recognized.

The Koi Nation of the Lower Lake Rancheria is a federally recognized tribe, as evidenced by previous acquisition of land in trust for the Tribe's benefit, as well as the Tribe's participation in an IRA election. The Tribe has never been terminated, but was never included on the list of federally recognized tribes updated periodically in 25 C.F.R. Part 83. Because of the Tribe's wrongful omission from this list, it is now prevented from effectively exercising its powers of self-government, and members are unable to obtain federal benefits and services available to Indians based on their status as Indians.

## **INDIAN AND TRIBAL WATER RESOURCES**

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

The first step in protecting a tribe's water rights is the preparation of a water resource inventory. This preliminary action has not been taken for most tribes in California. Thus, the tribes' reserved water rights are jeopardized by competing uses. This situation also hinders reservation housing and business developments that require water.

2. Congress should clarify that tribes can temporarily market or lease their water rights to off-reservation users.

Officials of the Department of the Interior have taken the position that water is a trust asset that cannot be sold without the permission of Congress pursuant to the Non-Intercourse Act. Given this position, Congress should clarify that any tribe can market their water resources during periods in which a tribe does not need or cannot use all of the water to which it is entitled.

## LAND ACQUISITION AND EXCHANGES

Land base issues present monumental problems in California. There is a critical need to increase the tribal land base, as well as a need to explore economic development programs that are not tied to land base. Additional recommendations regarding land acquisition are contained in the ACCIP Community Services Report.

1. The Secretary of the Interior should coordinate with Interior agencies and other cabinet level officers to develop a comprehensive approach for identification of public lands and other federal lands that could be made available for disposal to California tribes for housing, economic development and cultural and natural resource protection purposes. The policy should allow land management agencies to enter into three-party land transactions involving agencies, tribes and private landowners as a means of facilitating tribal acquisition of private lands located on or near reservations. If development of such a policy is not within the existing authority of the Secretaries, Congress should enact legislation providing authority for such transactions.
2. The Secretary of the Interior should work with the California tribes to develop a comprehensive tribal land acquisition program, similar to but more expansive than past initiatives under the Indian Reorganization Act and other statutes.<sup>7</sup> Emphasis should shift from isolated, non-productive

California tribes that were parties to the 18 treaties negotiated in 1851-52 would have retained 8.5 million acres of their aboriginal homelands had the treaties been honored by the Senate. When the Senate refused to ratify the treaties and Congress extinguished the California tribes' land claims in the California Land Claims Act of August 3, 1851,<sup>8</sup> California tribes lost claims to their entire aboriginal homeland, totaling more than 70,000,000 acres. Today, the tribal land base in California is just over 400,000 acres (about .6% of the aboriginal land base) with an additional 63,000 acres of land held in individual trust allotments. Given this history and the large number of impoverished, resource-poor tribes in California, even a modest program of land acquisition should have as its target a long-term goal of returning thousands of acres of public lands to tribal ownership. parcels to lands that may provide viable economic development potentials.

3. Existing land acquisition programs, such as that administered by HUD, should be



expanded and strengthened through interagency coordination and streamlining of the bureaucratic processes (e.g., by designating an agency official to coordinate BIA/IHS/HUD involvement). In addition, the existing formulas for determining grants should be revised so that they do not discriminate against small tribes.

4. The process for transfer of lands from fee-to-trust status needs to be facilitated in California by:
  - a. legislative or regulatory reform to allow identification of "land consolidation areas" (perhaps corresponding to aboriginal territories or service areas) within which acquired lands may be treated as contiguous to reservations.
  - b. a unitary, coordinated environmental review process.
  - c. a comprehensive program to address land contamination issues, including environmental review requirements related to land acquisition and the procedures for assessing and resolving contaminant issues. The program should facilitate a process for transferring or donating to tribes private lands within Indian country that have undergone environmental cleanup.

#### **Public Domain Trust Allotments**

1. Congress should appropriate funds to address the needs of the Indian owners of public domain trust allotments. This would include funding for land surveys to resolve boundary disputes, to quiet title to easements established by prescriptive use, and to enjoin trespass to the land and to resources, such as minerals and timber. Congress should clarify that all owners of public domain trust allotments are eligible for these services, whether or not they belong to a federally recognized tribe.
2. As part of its trust responsibility, the Department should establish priorities for conducting water resource inventories—including surface and subsurface water sources—of public domain trust allotments in California and, where necessary, quantify the allotment's reserved water right. Congress should appropriate funds for this purpose.
3. Congress should appropriate funds for creation of a special position or positions within the Sacramento Area Office charged with the following responsibilities: gathering data related to preparation of allotment resource inventories; exercising allotment rights protection authority (e.g., in quiet title, trespass, and boundary dispute matters); leasing and permitting activities involving allotment resources; and developing a public information program that would inform public domain allottees of their rights and responsibilities with respect to the lands held in trust on their behalf by the United States.

## I. THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY WITH REGARD TO NATURAL RESOURCES OF CALIFORNIA INDIANS

### A. General Overview of the Trust Doctrine

The trust relationship has been the cornerstone of federal-Indian relations since the founding of the American republic.<sup>9</sup> Today it pervades all areas of Indian law. For example, "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."<sup>10</sup> Pursuant to these canons of construction, courts will interpret ambiguities found in treaties, statutes and executive orders affecting Indians in favor of the Indians.<sup>11</sup>

The trust relationship has been viewed as both a source of federal power over Indians, as well as a substantive limitation on the exercise of that power. For instance, it was the initial basis for Congress' assertion of "plenary power" over Indians. On the other hand, it limits this power by requiring the government to deal with all Indian tribes in good faith. When disputes arise about the scope of the trust relationship, the source of the claimed trust duty has become the key to defining the powers and responsibilities of the federal government in dealing with the Indian tribes or individuals to whom the federal action applies. In certain situations, specific trust duties established by treaty, statute or executive order are enforceable through actions by the affected Indians or Indian tribes against members of the executive branch. These actions may involve equitable relief or money damages, or both. Thus, as the trust doctrine has evolved, different types of relationships have been found to exist between the United States and various Indian tribes and individuals.

#### 1. The Trust Relationship as a Source of Federal Power

In 1886, the Supreme Court held that Congress had the power to regulate the internal affairs of the Indians, even though no clause in the Constitution gave Congress that power.<sup>12</sup> The Court apparently found this power in the trust relationship:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

(Emphasis in original.)<sup>13</sup>

Following this decision, courts have often referred to Congress' "plenary power" to regulate Indian affairs.<sup>14</sup> While modern courts assert that Congress' extensive power over Indian affairs is rooted in the Indian Commerce Clause,<sup>15</sup> such an interpretation was not possible prior to the expansive interpretation of the Commerce Power that followed the New Deal.<sup>16</sup> Thus,

Congress asserted extensive power over Indian affairs for 50 years under the federal-Indian trust relationship before it was established that the power was conferred by the Constitution itself.

In the context of the interstate commerce clause, plenary power has been described as “complete in itself, . . . and [without] limitations, other than are prescribed in the constitution.”<sup>17</sup> In the context of Indian affairs, however, Congress’ plenary power is also limited by the trust relationship.<sup>18</sup>

## 2. The Trust Relationship as a Limit on Federal Power

In early cases, the Supreme Court acknowledged the status of Indian tribes as self-governing nations, but further found these nations to be “dependent,” stating that “their relationship to the United States resembles that of a ward to his guardian.”<sup>19</sup> These early statements are the source of what is often described as the “general trust relationship between the United States and the Indian people.”<sup>20</sup> Pursuant to this trust, “the federal government owes a fiduciary obligation to all Indian tribes as a class.”<sup>21</sup>

All branches of the federal government are bound by this general trust obligation.<sup>22</sup> Historically, courts “have viewed Congress’ trust responsibility as merely a moral obligation.”<sup>23</sup> In modern times, however, courts have begun to consider Congress’ trust responsibility in evaluating legislation.<sup>24</sup> In theory, therefore, a court should invalidate Indian legislation where the purpose of the statute is not “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”<sup>25</sup>

When applied to members of the executive branch, a breach of this general trust obligation will entitle a tribe or individual to an injunction or declaratory relief,<sup>26</sup> but will not usually support a claim for monetary damages. To establish that the government owes an Indian person or tribe a special obligation, the breach of which gives rise to damages, one must show that a specific treaty, statute or executive order gives rise to the claimed duty.<sup>27</sup> For example, statutes directing the management of a particular Indian tribe’s assets will be found to create fiduciary duties.<sup>28</sup> Moreover, courts have found fiduciary duties to be created by a single statute that is generally applicable to Indian tribes.<sup>29</sup>

Fiduciary duties also arise by implication from treaties, statutes and other federal actions.<sup>30</sup> For example, “[t]he federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian land or resources.”<sup>31</sup> The implication may arise from a single statute, or from a comprehensive regulatory scheme governing a particular area of Indian affairs.<sup>32</sup>

Once a specific trust duty is found to exist, it will be enforced by courts against the agency to which it was assigned.<sup>33</sup> The federal government “is held to strict standards and is required to exercise the greatest care in administering its trust obligations.”<sup>34</sup>

## B. Identifying the Beneficiaries of the Trust Relationship

While the general trust relationship exists between the United States and all Indian people, specific trust obligations are often more limited. Fiduciary obligations created by treaty are owed to the tribes with whom the government treated. Moreover, statutes and executive orders that create fiduciary duties often define the class of Indians to whom they apply.<sup>35</sup> However, “[b]efore 1934, most federal statutes referring to Indians did not define the term.”<sup>36</sup> 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.”<sup>37</sup> The task of interpreting the scope of federal laws affecting Indians, however, lies in the first instance with the executive agencies charged with administering Indian programs. These agencies invariably take a more narrow view of eligibility for benefits.<sup>38</sup>

After the passage of the 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,<sup>39</sup> 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,<sup>40</sup> 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.<sup>41</sup> 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 process has effectively eliminated BIA programs that previously served Indians who are not members of listed tribes.<sup>42</sup>

While many statutes and executive orders are limited by their own terms to federally recognized tribes and their members, some have a broader application.<sup>43</sup> Despite the obligation to construe statutes liberally and resolve ambiguities in favor of the Indians, BIA agency personnel in California invariably take the position that a statute applies only to federally recognized tribes and their members when the statute is either silent or subject to varying interpretations. In some cases, agency personnel use this distinction to allocate limited funds.<sup>44</sup> These funds are often limited, however, because of the BIA’s practice of calculating its appropriation requests based on the number of members of recognized tribes, despite the fact that other Indians are eligible for some of the services provided by the agency. Moreover, the distinction often seems to be made out of a habitual reluctance to assume broader responsibility, even when Congress intends that the agencies do so.<sup>45</sup>

In addition, the BIA consistently takes the view that tribes are not federally recognized if they do not appear on the list published annually by the BIA, even where there is evidence that a

particular tribe was wrongfully omitted from the list. For example, the Lower Lake Koi is a federally recognized tribe, as evidenced by previous acquisition of land in trust for the Tribe's benefit, as well as the Tribe's participation in an IRA election.<sup>46</sup> In fact, the Tribe was slated to be listed as a federally recognized tribe in 1981.<sup>47</sup> For some reason, however, the Tribe was never listed, and is now unable to obtain federal benefits, even though it is federally recognized and has never been terminated.<sup>48</sup> A similar situation has occurred with regard to the Shaahook group of Capitan Grande Indians.<sup>49</sup>

This narrow view of agency responsibility has a disproportionate impact on California Indians, most of whom do not belong to tribes listed pursuant to 25 C.F.R. Part 83. Given the history of the government's recognition of the California Indians in many different contexts and for many different purposes, including the Homeless California Indian legislation of the early twentieth century, the California Indian Claims cases, and the Indian Health Care Improvement Act, the effort by the BIA to restrict the scope of the trust to exclude California Indians who do not belong to tribes listed in 25 C.F.R. Part 83 constitutes a breach of trust between the government and the California Indians.

### C. Exercise of the Trust Responsibility in California

While the cases to date have not addressed the full scope of the federal government's trust responsibility, they have established that the government has specific trust duties with regard to the management and protection of the natural resources of Indian tribes, including land, timber, water, and minerals.<sup>50</sup>

The trust obligation of the federal government to protect tribal resources has not been properly discharged in California. A primary problem is the lack of adequate funding for trust resource protection in California. The lack of funding has in turn led to poor maintenance of records on tribal resources, and inadequate protective measures being taken to ensure the beneficial use of trust lands.

The ability of the federal government to protect and preserve tribal resources depends on adequate staffing and funding of *both* BIA and tribal programs for protection of these resources. Historically, the BIA has failed to allocate a fair share of its annual budgets to ensure even a minimal level of staffing and funding for purposes of trust resource protection in California. This pattern of disproportionately low funding continues to the present day.<sup>51</sup>

Prior to the era of Indian Self-Determination and tribal authority to contract BIA program dollars, California tribes relied solely on the resources that were allocated to the BIA Area and Agency offices in California through the BIA's internal budget process. For most tribes, these were the only funds available for resource protection related to lands, forests, water, fisheries, and minerals.

After the passage of the Indian Self-Determination and Education Assistance Act in

1975,<sup>52</sup> individual tribes began to contract with the BIA to perform many of the resource protection functions. This was not intended to, nor did it relieve the BIA of its trust responsibility with respect to trust resources. Nor did the advent of individual tribal contracts significantly reduce the disparity in funding levels for BIA programs in California as compared to other states.

With respect to both the BIA and tribal resource protection efforts in California, the California tribes have never received their fair share of the Bureau's budget.<sup>53</sup> This pattern continues with respect to staffing.<sup>54</sup> The Sacramento Area Office purportedly serves 100 federally recognized tribes<sup>55</sup> and 270 public domain allotments. However, it has neither a range conservationist, nor a hydrologist, nor an agriculture engineer, although all other Area Offices employ such experts. (The Acting Area Natural Resources Officer is trained only as an archaeologist.) When issues arise in these areas, the Sacramento Area Office must go to other BIA Area offices to obtain expertise. In addition, the Sacramento Area Office lacks adequate staffing in forestry, fisheries and minerals. Without such personnel, or access to such expertise through other federal agencies on an expedited basis, the BIA is incapable of properly discharging its duties as trustee to protect and conserve trust resources. This means that the tribes must either hire their own experts and consultants whenever immediate action is necessary to defend threats to tribal resources, or rely upon the BIA Sacramento Area Office to garner the necessary expertise, if available, from other area offices. Even when the tribes are able to hire experts and take action on their own behalf, they often remain dependent on the cooperation of the BIA, as BIA approval is required for a wide range of tribal activities that affect trust resources.

Further evidence of the BIA's failure to meet its trust obligations with respect to protection and preservation of trust resources is the lack of comprehensive information on the trust land and natural resources of California tribes and individual Indian allottees. While the BIA does have some information on tribal water resources, and some information on other resources of particular tribes, it does not have a comprehensive collection of data covering the total land and resource base over which it must exercise trust duties.

The BIA has done virtually nothing to fulfill its trust duties owed to Indian allotments on the public domain. No monies have been budgeted for protection of these lands and the resources located thereon. Indeed, it was not until 1995 that the BIA conducted a reconnaissance level inventory of the natural resources of public domain allotments in California. This inventory provides at least some baseline data for determining the existence of trust protection problems, such as trespass, encroachment and conversion of trust resources. Generally, the BIA has addressed the needs of allottees solely on an *ad hoc* basis, reacting to specific complaints from the beneficial owners or their legal representatives. Even then, the BIA's response has most often been grudging and inadequate. This may be attributable, in part, to the fact that there is no BIA Sacramento Area budget line item for trust protection of public domain allotments and, therefore, support for any such activities must come out of other trust protection funds.

As a result of this neglect, many of the public domain allotments lack legal access and have been inadequately protected against encroachments. The lack of access to allotments is a

direct result of the government's past failure to reserve or acquire recorded easements in the issuance of fee patents to adjacent allotted lands and later, in the government's refusal to initiate quiet title actions on behalf of the allottee landowners to establish easements. In the last 10 years, California Indian Legal Services (CILS) has brought at least three lawsuits to secure access to Indian allotments.<sup>56</sup> All of these lawsuits could have been avoided if the government had properly exercised its trust responsibility to ensure that legal access was provided to the trust allotment when it disposed of neighboring allotment or other public domain lands used by the allottee(s) for access to their land.

With regard to encroachment on Indian trust allotments where a survey or re-survey of the boundaries is required to resolve the matter, the absence of any budgeted funds for this purpose has prevented the prompt disposition of meritorious Indian claims. Again, CILS has had to litigate these matters on behalf of allottees who received no assistance from the BIA. In fact, in one instance it took over two years to resolve a simple fence-line dispute that could have been disposed of within months, had the funds for a re-survey been available.<sup>57</sup>

Another issue involving public domain allotments presents a further example of the government's failure to properly discharge its obligations as trustee. It concerns allotments made to individual Indians whose descendants are not members of federally recognized tribes. Recently, the BIA has taken the position that no trust duties are owed to allottees who are not members of federally recognized tribes, and has even gone so far as to suggest that land cannot be held in trust for these individuals.<sup>58</sup> This assertion is contradicted by the fact that many such allotments are held in trust, and the fact that the requirements for obtaining an allotment have never included membership in a federally recognized tribe.

At the time of the allotment policy, allotments were issued to individual Indians regardless of their tribe's status. As discussed above, the distinction between recognized and unacknowledged tribes was virtually nonexistent at that time. Moreover, public domain allotments were available only to Indians "not residing upon a reservation, or for whose tribe no reservation has been provided by treaty."<sup>59</sup> Thus, allotments were available to Indians who were not residing on a reservation even though they might be affiliated with a particular tribe, or whose tribes were landless. Many California Indians fell into these general categories, as evidenced by the large number of public domain allotments issued in California. Therefore, any clear demarcation between these Indian allottees at that time based on a concept of tribal recognition is improbable.<sup>60</sup> For the BIA to now assert that only members of federally recognized tribes may hold trust allotments is contrary to historical and current practice, and constitutes a breach of the BIA's fiduciary duties owed to California Indian allottees.

## **II. OVERVIEW OF THE INDIAN LAND AND NATURAL RESOURCE BASE IN CALIFORNIA**

Considering the number of federally recognized tribes in California, the Indian land base in California is extremely small. There are 89 reservations and rancherias under the jurisdiction of

the Sacramento Area Office,<sup>61</sup> consisting of approximately 400,000 acres of land held in trust for the benefit of California Indian tribes. An additional 63,000 acres of public domain and reservation allotment are held in trust for the benefit of individual Indians.<sup>62</sup> By contrast, the eighteen unratified treaties with California tribes would have reserved approximately 8.5 million acres,<sup>63</sup> and the Navajo reservation in Arizona covers 14,753,252 acres, more than three times the amount of land held in trust for all 100 of the federally recognized tribes located entirely within California.

At least eighteen recognized tribes in California have no tribal land base whatsoever.<sup>64</sup> Many of the reservations in California are extremely small: most are less than 500 acres; 22 are 100 acres or less and, of these, 16 are 50 acres or less, seven are 20 acres or less, five are under 10 acres, and four are under five acres.<sup>65</sup> Only 11 California tribes have a land base of over 10,000 acres.

As mentioned above, the BIA Area Office in Sacramento does not have reliable data on the extent and location of natural resources on trust lands. The following summary is nonetheless based on BIA data since it is, in many cases, the only data available.

According to the BIA Division of Forestry, there are approximately 145,000 acres of tribal trust land that are “capable of bearing merchantable forest products at a high enough value to provide a net benefit to the user.”<sup>66</sup> Almost one-half of that acreage is on the Hoopa Valley Reservation in Northern California. Only two other reservations have more than 10,000 acres of commercial forest lands. Most tribes have a negligible amount of commercial forest lands, or none at all. Tribes that have no land or very little land are at an obvious disadvantage regarding other types of economic development as well.<sup>67</sup>

Although the BIA has compiled several databases regarding the surface waters that pass through various California reservations, this information is not particularly useful for tribes seeking to assert or protect their water rights. The Sacramento Area Office does not have a comprehensive approach to the quantification and protection of Indian water rights and addresses challenges on a case-by-case basis. As is more fully discussed below, tribal water rights analyses are extremely complicated, particularly in the context of California’s dual water rights systems. Thus, the BIA’s failure to gather sufficient data to lay a foundation for a water rights claim jeopardizes tribal rights that may be threatened with little warning in disputes among other users of the water resource. This danger is compounded by the fact that no technical expertise is available at the Area Office—there is no hydrologist on staff in California, though every other Area Office in the nation employs at least one hydrologist. Again, this illustrates the inequity in allocation of BIA funding and personnel resources to California relative to other BIA Area Offices.

Several tribes have taken the initiative in protecting and quantifying their water rights. For example, the Owens Valley Tribes have formed their own water commission, obtained funding for a multi-year investigation of their water rights, and are currently in the midst of negotiations with



the Los Angeles Department of Water and Power and the federal government regarding the quantification and settlement of water rights reserved to the tribes. Similarly, the Round Valley Tribes of the Round Valley Indian Reservation have obtained funding to conduct a water study that will enable them to protect their reserved water and fishing rights in connection with Federal Energy Regulatory Commission proceedings to establish minimum instream flows for the Eel River. In addition, a number of tribes have been deemed eligible for various grants under the Clean Water Act by the Environmental Protection Agency, and several others have applications pending.

### III. TRIBAL INITIATIVES TO PROTECT AND ENHANCE THEIR NATURAL RESOURCES

As mentioned earlier, there is a lack of adequate federal funding and BIA personnel skilled in natural resource matters to support tribal management and protection of Indian natural resources in California. These factors, coupled with an Indian land base that is both limited and widely dispersed over a huge geographical area in parcels ranging from less than 50 to more than 80,000 acres,<sup>68</sup> have discouraged the development of self-sustaining tribal economies. For most California tribes, the natural resource base, other than the trust land itself, is non-existent or economically marginal. Even those tribes which do have a natural resource base in timber, fisheries, water, or minerals, in most cases lack effective environmental and natural resource protection programs. As a result, efforts to address environmental or natural resource issues have been almost exclusively *ad hoc*, without the benefit of adequate planning and policy direction. The situation is further complicated on allotted reservations when individual Indian landowners or their lessees engage in activities that pose a threat to the reservation environment.<sup>69</sup> This state of affairs is slowly changing as some of the larger tribes develop programs using tribal, federal and private funds to develop natural resource and environmental protection programs. Significantly, the initiative for most of these programs has come from the tribes, who often wait for many years before the necessary funding is obtained, and anything of note accomplished.

The following sections provide a sample of some of the projects initiated by California tribes in the area of natural resource management. Some individual tribes have charted their own course in this area, but there are also combinations of tribes, both statewide and regional within the state, that have pooled resources to pursue common resource management and protection goals. These multi-tribal organizations, while they often reflect a wide variation in tribal resource management needs and capacities, nevertheless provide an essential forum for tribes with shared interests to work towards achieving common goals.

#### A. General Environmental Protection

##### 1. Native American Environmental Protection Coalition

In southern California, the Native American Environmental Protection Coalition (NAEPC) was formed as a means of addressing the environmental issues and problems common to the

reservations of its four member tribes. The NAEPC by-laws provide that its purpose "shall be the provision of technical assistance to its member Tribes for the preservation, protection and restoration of the environment on and near their Reservations and other lands, and the environmental health and safety of the members and residents of the Reservations of its member Tribes."<sup>70</sup> The members of the coalition are the San Pasqual Band of Diegueño Indians, the Pechanga Reservation of the Temecula Band of Luiseño Indians, the La Jolla Band of Luiseño Indians, and the Pauma Band of Luiseño Indians.

Since its formation in October 1996, the NAEPC has received funding from the United States Environmental Protection Agency (EPA) under its Indian Environmental General Assistance Program. The EPA funds are being used to support the Tribes' efforts to initiate a comprehensive, integrated approach for assessment of on and near-reservation management practices that may affect the reservation environment, and to develop appropriate codes and ordinances necessary for the effective monitoring and regulation of activities within the jurisdiction of the respective Tribes. In its September 1994 funding application to the EPA, the NAEPC focused on what it characterized as "an increasingly alarming dilemma": "How can the Tribes assess the full range of environmental needs, address existing and potential environmental risks to human health, and prioritize and begin to respond to these needs and risks, without the technical expertise and tribal capacity required for such activities?" The NAEPC has taken some initial steps to resolve this dilemma by contracting for professional services to obtain, for each reservation, solid waste assessment reports and closure plans for current land fills, environmental assessment reports, a community solid waste management plan, Clean Water Act grants, and training for NAEPC staff.

## 2. Campo Environmental Protection Agency

The Campo Band of Mission Indians, a small Southern California tribe with lands located in a semi-desert area at the California-Mexican border, formed the Campo Environmental Protection Agency to provide regulatory oversight in the Band's proposed development of a commercial waste facility. Among the major obstacles the Band had to surmount in exercising its authority to regulate on-reservation development were: an enormous amount of adverse, and mostly inaccurate, publicity about the development; the introduction of state legislation purporting to authorize regulation of reservation activities; and litigation filed by an off-reservation organization questioning the authority and capacity of the Band to select an appropriate commercial waste company and to regulate the activities of the company to ensure that the on and near-reservation environments were protected.

The Band prevailed in the first test of its regulatory authority when Governor Deukmejian vetoed the state bill, citing its conflict with federal law. Thereafter, the State Water Resources Control Board and the Integrated Waste Management Board reviewed the Campo Band's regulations and permits and found them to be equal or superior to State regulation. Following these findings, in 1992 the Band became the first tribal agency in California to sign a cooperative agreement with the California Environmental Protection Agency for the purpose of solid waste

regulation.

The Court of Appeals for the District of Columbia Circuit recently added another twist to the saga of the Campo Band's efforts to assert authority over reservation environmental issues, specifically the siting and regulation of solid waste landfills.<sup>71</sup> In 1995, the Environmental Protection Agency (EPA) had reviewed and approved the Band's solid waste permitting plan pursuant to its authority under Subtitle D of the Resource Conservation and Recovery Act (RCRA).<sup>72</sup> In approving the Band's solid waste program, the EPA treated the Band as if it were a "state" within the meaning of RCRA and determined that the Band's solid waste management regulations set forth "stringent standards" that met or exceeded federal standards. An off-reservation organization, Backcountry Against Dumps, appealed the EPA's decision, asserting that the EPA lacked authority to approve the Band's solid waste permitting process because the Band was a "municipality," not a "state," within the meaning of RCRA. The provisions of RCRA governing "approved state" plans have some obvious advantages over the RCRA provisions governing plans developed by municipalities, mainly that "approved states" (in this case the Band) can comply with the federal operating standards for solid waste landfills by using alternative, more flexible design standards than those that apply to municipalities.<sup>73</sup> The Federal Circuit reviewed the provisions of RCRA and held that the Band was a municipality, not a state, for purposes of RCRA. The Federal Circuit made it clear, however, that the EPA's lack of authority to approve the Band's solid waste management plan did not strip the Band of its sovereign authority to govern its own affairs, observing that "[w]ith its comprehensive environmental codes and an agency and court devoted solely to enforcing tribal and federal environmental regulation, the tribe has as much authority to create and enforce its own solid waste management plan as it ever did."<sup>74</sup>

## B. Water and Fisheries

### 1. Owens Valley Indian Water Commission

In eastern California, the Owens Valley Indian Water Commission (OVIWC) is working to regain control over its constituent tribes' federally reserved water rights. The Commission is a tribal corporation established in 1990 by four Owens Valley Indian tribes: the Utu Utu Gwaitu Tribe of the Benton Paiute Reservation, the Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, the Big Pine Band of Owens Valley Paiute Shoshone Indians, and the Paiute Shoshone Indians of the Lone Pine Community. Its focus is a 1937 land exchange agreement between the Los Angeles Department of Water and Power (LADWP) and the United States Department of the Interior, wherein certain lands belonging to the Owens Valley Paiute Tribes were exchanged for LADWP lands, with the Secretary of Interior reserving the Indian ground water rights on the parcels transferred to LADWP. Through the combined efforts of the tribes and California Indian Legal Services (CILS), in 1991 the OVIWC received its first funding from the BIA to conduct technical studies and legal research of the tribes' water rights, create and support the activities of the OVIWC, and initiate preliminary discussions with the LADWP regarding possible settlement of Indian water claims arising out of the 1937 land exchange agreement.

The OVIWC has been funded annually since 1991 under the BIA water resources protection program and functions as the tribes' water agency and negotiating arm in discussions with representatives of the federal government and the LADWP. In performance of these functions, the OVIWC has conducted legal research documenting the Tribes' water rights in the Owens Valley, completed technical studies to support the Tribes' water claims, and is currently engaged in negotiations with the LADWP under the auspices of a federal-tribal negotiating team.

It took the Tribes almost two decades, without technical assistance or other significant support from the BIA, to convince the BIA of the merit of the tribal claims and to obtain funding to begin the difficult process of fully documenting the technical aspects of their claims. Today the tribes of the OVIWC are well on their way towards achieving a settlement of water rights—an uncertain possibility only a few short years ago.

## 2. Round Valley Indian Tribes

In northern California, the Round Valley Indian Tribes (Tribe), formerly known as the Covelo Indian Community, have been engaged in a 15-year struggle to protect their statutory and federally-reserved water and fishing rights in the Eel River. The Tribe's reservation, one of the oldest and largest in California, lies approximately 35-40 miles downstream from the Potter Valley Project (Project), a federally-licensed hydroelectric generation complex consisting of two dams and related power-generation facilities operated by the Pacific Gas and Electric Company (PG&E). The Project diverts water from the Upper Eel River into the Russian River system, significantly reducing the amount of water that otherwise would be present in the Eel River and available for tribal fishery and other uses during the dry spring and summer months.

The Tribe, a confederation of seven tribes comprised of persons of Concow, Wailaki, Littlelake, Nomlaki, Yuki, Pomo, and Pit River Indian descent, attempted in 1982 to stop the re-licensing of the Project until tribal concerns about the water diversion and its impact on the Eel River fishery were addressed. But lack of funding for experts and studies seriously hampered its efforts. Although the license was eventually renewed, the Federal Energy Regulatory Commission (FERC) ordered PG&E to conduct a 10-year monitoring study to determine the effects of the Project flow regime on the Eel River fishery. Then, after years of no funding from the BIA, the Tribe was awarded \$123,000 in FY 1996 to begin the first phase of investigation and documentation of its claim to Eel River water. This funding came at an extremely opportune time because PG&E had recently completed a 10-year fisheries monitoring study and released its draft report on the study for comment by federal and state fisheries agencies and other interested parties.

In April 1997, the Tribe submitted its initial comments on PG&E's draft monitoring report and are in the process of preparing, with the assistance of both water and fisheries experts, its own recommendations to FERC on an appropriate flow regime for the Eel River. Aided by the second phase of BIA funding, the Tribe will have the ability to effectively participate in the technical discussions and negotiations on the Eel River flow issues.

When the Tribe and its attorney, CILS, first asserted the Tribe's water and fishing rights in 1982, they knew that resolution was many years down the road. Without any funding for technical assistance or studies, the Tribe persevered and today has an excellent opportunity, in the context of further FERC proceedings, to achieve increased protection for the Eel River fishery. By protecting the Eel River fishery and its rights therein, the Tribe is protecting the continued use of the fish resource by tribal members for both subsistence and ceremonial purposes, consistent with tribal practices and traditions.

### 3. Klamath River Inter-Tribal Fish Commission

The Klamath River Inter-Tribal Fish Commission is another example, similar to the Owens Valley Indian Water Commission, of an inter-tribal regional effort to achieve protection and effective management of a trust resource—in this case, a multi-tribal fishery.

The Fish Commission was created to provide a vehicle for consultation and collaboration with one another on common areas of interest in the Klamath River fishery, and for development of inter-tribal policy and direction on fisheries habitat restoration and in-stream flow issues in the Klamath and Trinity River systems. A complex of dams in the Upper Klamath River Basin, collectively known as the Klamath River Hydroelectric Project, negatively impacts both anadromous and resident fish species by presenting an absolute barrier to fish migration and spawning, and by reducing the natural flows below the threshold necessary to sustain viable fisheries. Alteration of the natural river system and adjacent agricultural uses have also degraded water quality. The Hoopa, Karuk, Yurok, Klamath, and Fort Independence Tribes share a common concern and interest in these issues, especially the issues of adequate in-stream flows and the Project's barrier to upstream fish migration. These issues are complicated by the fact that the State of Oregon has initiated a general stream adjudication for those reaches of the Klamath River that lie within Oregon.

Tribal efforts to protect and restore the fisheries in the Upper Klamath have been limited by the lack of scientific data on the effect of Project operations on the fish resource. In order to develop this data, the Tribes have been pressing for the development of an operations plan for the Klamath River Project, including provision for minimum in-stream flows for fisheries.

Simultaneously, the Tribes have also been working collaboratively on water quality and in-stream flow issues in the Trinity River system. The Trinity River Division of the Central Valley Project is a federal project run by the Bureau of Reclamation. It consists of Trinity Dam, a 500-foot dam in the Upper Trinity watershed, and Lewiston Dam, the lower dam and flow re-regulating facility. Lewiston Dam presents an absolute barrier to further upstream fish migration.

Currently, each Tribe funds its participation on the Fish Commission with its own resources or with funding obtained from other sources, such as the Bureau of Reclamation.

## C. Forestry

### 1. Hoopa Tribe

The Hoopa Tribe in northwestern California is one of only a handful of California tribes accorded Self-Governance status.<sup>75</sup> In 1990, it was the first of seven tribes nationally who petitioned and were selected to participate in the self-governance project.<sup>76</sup> As part of its effort to assume full management and control of programs such as forestry—once the exclusive domain of the BIA in its exercise of federal trust responsibilities—the Tribe took charge, first under a Self-Determination Act program commencing in 1988 and, since 1991, under Self-Governance.<sup>77</sup>

Over a five-year period, the Tribe developed a new Forest Management Plan, which went into effect in 1994-95.<sup>78</sup> Unlike previous forest management plans prepared by the BIA, there was extensive involvement of tribal leaders and tribal members. In addition, the new Forest Management Plan was produced by tribal staff, with technical assistance from the University of California, Berkeley. Had Hoopa not been a self-governance tribe, this level of tribal involvement and control over the process would have been unlikely.<sup>79</sup>

While self-governance has given the Tribe authority and technical expertise to establish its own sustained-yield harvest levels, regeneration practices and environmental protection procedures,<sup>80</sup> it has also raised new policy issues relating to economic development of the forest resource. With the shift from federal to tribal management and control, the Tribe will continue to confront policy issues pertaining to forest ecosystems that have been altered due to federal management practices and policies which did not preserve or promote ecosystem health.<sup>81</sup>

A 1995 study reconstructed the historical development of the forest management program at the Hoopa Valley Indian Reservation and reviewed its current program in light of that history and in relation to self-governance. Two of the study's main findings were: (1) the self-governance forestry program is no more costly than comparable USDA-Forest Service programs in its vicinity, and is more cost-effective than other tribal, public and some private programs; and (2) tribal decision-making authority on forest management has increased under self-governance, but there is still room for improvement.<sup>82</sup>

### 2. California Indian Forest and Fire Management Council

The California Indian Forest and Fire Management Council (CIFFMC) is a statewide inter-tribal organization which will soon consist of 17 member tribes. The formation of the CIFFMC was initially discussed at a meeting in Sacramento in May 1993 by California tribes with forestry and fire management concerns. It was formally established on June 20-21, 1994.

The purposes of the CIFFMC are multiple and varied, ranging from basic forest management, such as promoting sound forest and wildland fire management on California Indian lands, to business and economic development, such as assisting in the establishment of California

Indian business enterprises that utilize forest resources or are associated with wildland fire management. In addition, the CIFFMC promotes the integration of cultural approaches to forest and fire management, with emphasis on cultural burning, and encourages the development and training of Indian natural resource professionals. The CIFFMC also facilitates and coordinates communications and information exchange among its member tribes, and between the organization itself and federal and state forest resource agencies.

During 1996, a priority for the CIFFMC was to provide a forum for discussing archaeological rules and regulations. In furtherance of this goal, the CIFFMC Executive Board met with the BIA Sacramento Area Office (SAO) in May of 1996 to discuss tribal concerns about the SAO's archaeological services, such as inadequate consultation between the Area Archaeologist and tribal staff and cultural committees, and the bureaucracy associated with Tribal/BIA/State Historic Preservation Office (SHPO) consultations. The CIFFMC suggested the development of a programmatic agreement (PA) on consultations between the BIA, the SHPO and the tribes, including a provision that would allow tribe-specific consultations to occur within the larger procedural framework for handling the state/federal/tribal consultation process. In addition, CIFFMC recommended that the PA incorporate elements of other consultation and cooperative agreements that have proven effective in practice.<sup>83</sup>

The CIFFMC illustrates the utility of statewide inter-tribal cooperation in achieving shared goals and objectives in the management of tribal natural resources. It provides a model for pooling and sharing resources, which can increase tribal leverage in interactions with federal and state agencies.

#### **IV. WATER RIGHTS IN CALIFORNIA INDIAN COUNTRY**

##### **A. Background**

Outside of limited contexts, water rights are generally a product of state law. Particularly in the arid west, federal government policy has deferred to state and local law and custom, which evolved as the western states were being settled. California has developed a dual water rights system, which recognizes rights based on land ownership and rights based on prior appropriation. The California Constitution applies a rule of reasonable and beneficial use to both types of water rights.<sup>84</sup>

Water rights based on land ownership include riparian rights, which allow the owner of the land through which surface waters flow, to use the quantity of water which may reasonably be put to beneficial use on the adjacent lands.<sup>85</sup> Riparian landowners can increase the amount of water used at any time, as long as the use remains reasonable. Similarly, landowners overlying a groundwater source may extract the quantity of water which may reasonably be put to beneficial use on the overlying lands. Riparian and overlying landowners' water rights are not based on priority and, in times of shortage, each landowner's use is governed by a standard of reasonableness. The rights of riparian and overlying landowners are generally not affected by

non-use, but may be lost by waste, unreasonable use or non-beneficial use.<sup>86</sup>

The prior appropriation system is based not on land ownership but on the notion of “first in time, first in right.” Thus, the first person to put water to a beneficial use (the “prior appropriator”) is entitled to satisfy all of his or her needs, up to the amount he or she has appropriated for beneficial use in the past, before a subsequent appropriator may use any of the water. The rights of riparian and overlying landowners, however, always take precedence over appropriative rights, regardless of when the landowners’ use began.<sup>87</sup> Thus, in times of shortage, the water may be used to satisfy the reasonable needs of riparian or overlying landowners before appropriators can use any water.<sup>88</sup>

Many California tribes had appropriated water for beneficial use on their ancestral lands prior to the arrival of settlers.<sup>89</sup> However, with the onslaught of westward migration to California, the tribes were pushed off their lands in the mad rush to exploit California’s mineral wealth. They were removed to reservations under military “protection” from the hostile occupiers of their lands, or were entreated to relinquish some of their lands with the promise (ultimately broken) that other lands secured by treaty would be made available to them. Thus, as California was being settled by newcomers, the tribes were not in a position to continue their use of water, and so did not establish appropriative rights.

## B. Federal Reserved Water Rights

The treaties, executive orders and congressional acts which created Indian reservations generally did not expressly address water rights, and the federal government often did not otherwise take steps to protect Indian water interests. The courts, however, read treaties, statutes and executive orders that created Indian reservations as impliedly reserving sufficient water to fulfill the needs of the reservation. This is the doctrine of federal reserved water rights.

### 1. Nature and Characteristics of Reserved Rights

Federal reserved rights rest on the theory that, whenever the federal government sets aside land from the public domain for a particular purpose, it impliedly reserves sufficient water to serve the purposes of the reservation.<sup>90</sup> With regard to Indian reservations created by executive orders and congressional acts, the creation of an Indian reservation carries an implied governmental promise to make the reservation livable and to enable the Indian people to be self-sustaining.<sup>91</sup> Thus, in arid western states such as California, Indian reservations will always be imputed to have reserved water rights because, in these locations, life without water would be impossible.<sup>92</sup>

Reserved rights acquire a priority date as of the date of the reservation’s creation.<sup>93</sup> Since most reservations in the United States were created prior to the time non-Indians acquired water rights, federal reserved rights are usually termed “prior and paramount.” In California, however, Indian reservations were created later than in much of the rest of the country;<sup>94</sup> therefore, reserved water rights in California Indian Country are often junior to some appropriative rights held by



non-Indians.

Federal reserved rights do not depend on actual use of water by the Indian people.<sup>95</sup> Like the water rights based on land ownership, they exist even if they are not exercised.<sup>96</sup> Thus, while non-Indians with junior rights may use water that the Indians do not yet use, they must reduce their use of water when the Indian people are in a position to exercise their reserved rights. This is one of the features of reserved rights which has drawn sharp criticism and hostility from non-Indian water users, particularly in the arid parts of California where the demand for water has surpassed supply.

## 2. Quantification of Reserved Rights

The United States Supreme Court has declared that, in creating a federal reservation, the government "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>97</sup> Moreover, the United States has the ability to reserve only enough water to serve the "primary purpose" of the reservation.<sup>98</sup>

Early cases held that the quantity of water reserved for Indian tribes was that amount reasonably necessary for irrigation, stock raising, domestic and other useful purposes, both present and future.<sup>99</sup> The courts often approved a certain quantity of water, but made clear that the quantity could be subject to modification in the future when conditions on the reservation changed.<sup>100</sup>

In recent years, courts have sometimes been required to permanently quantify Indian water rights, usually in the context of a general stream adjudication,<sup>101</sup> for purposes of providing certainty in the allocation of limited water resources.<sup>102</sup> As a result of the McCarran Amendment,<sup>103</sup> enacted in 1952, federal law now provides for a limited waiver of sovereign immunity so that the United States, as trustee of tribal resources, can be joined in state general stream adjudications to determine Indian water rights in that context.<sup>104</sup> While this mechanism provides the benefit of certainty by the simultaneous adjudication of all rights in a given stream,<sup>105</sup> it also presents a drawback for Indian tribes in that state courts and agencies have often proven hostile to tribal water rights.

In cases where reserved water rights are permanently quantified, courts have strictly construed the purpose of the particular reservation. In general, courts look at the purposes for which water was actually being used at the time the reservation was created,<sup>106</sup> or the kind of life the federal government intended for the Indian people in creating the reservation.<sup>107</sup> At the time most reservations were created, the federal government policy was to encourage the Indian people to adopt permanent settlements and engage in agriculture and stock raising,<sup>108</sup> accordingly, courts usually hold that the reservations were created primarily for agriculture and related purposes.<sup>109</sup>

Where agriculture is determined to be the reservation's specific purpose, the United States

Supreme Court has adopted the standard of “practicably irrigable acreage” (PIA) to quantify Indian water rights.<sup>110</sup> Under the PIA standard, tribes are entitled to the quantity of water sufficient to satisfy the present and future needs of the Indian people to irrigate all “practicably irrigable” reservation acreage.<sup>111</sup> In the quantification of reserved water rights, therefore, the tribes are not limited to the amount of water that was necessary for their use at the time of the reservation’s creation.<sup>112</sup> Particularly where the Indian people did not previously practice agriculture but were encouraged to take up that practice, it was expected that water use would increase as the tribes developed the knowledge and technology to enable them to convert to agrarian societies.<sup>113</sup>

When purposes other than agriculture are found to explain the creation of the reservation, the quantification will depend on the amount of water needed to fulfill the alternate purpose. For example, where water is needed to support Indian fishing rights, the quantity of water will be an instream flow sufficient to ensure the survival of the fish.<sup>114</sup> The courts have not addressed quantification where the purposes of the reservation were other than agriculture or fishing.

### 3. Scope of Reserved Rights

Two important issues remain unsettled regarding the scope of reserved rights: whether tribes have reserved rights to groundwater, and whether tribes are limited to using reserved rights only for the purposes for which they were reserved.

While there is no dispute that reserved rights attach to surface waters on or near Indian reservations, the law is less clear with regard to whether such rights also extend to groundwater.<sup>115</sup> In Cappaert v. United States, the Supreme Court stated “we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”<sup>116</sup> Nevertheless, one state court has treated this language as dicta and held that reserved rights do not extend to groundwater.<sup>117</sup> The weight of authority, however, as well as the purpose for the reserved rights doctrine, indicate that federal reserved rights should extend to groundwater.<sup>118</sup>

As more Indian tribes acquire the ability to use their full entitlement of water rights, this issue may become critical in California. The availability of groundwater to tribes will effect the extent to which the tribes’ increased use impacts other water users. Current users of groundwater resources may be adversely affected by a determination that tribes have reserved rights in aquifers. On the other hand, requiring tribes to use only surface waters would unduly impact other users and uses of those resources. The best policy appears to be a resolution of disputes in a way that provides an ample water supply to tribes from both surface water and groundwater sources without unduly disrupting the established expectations of non-Indian water users.

Another issue that often arises as Indian tribes develop the ability to exercise their water rights concerns the uses to which reserved water may be put. The Ninth Circuit Court of Appeals has held that once water rights are quantified, reserved water can be used by the Indian people for

any lawful purpose, regardless of the purpose of the reservation.<sup>119</sup> Other courts, however, have limited tribal uses of reserved water.

This issue has arisen, for example, where a tribe is awarded a quantity of instream water to support fishing rights and wants to change the use of that water. Instream water flows are non-consumptive: that is, they serve their intended purpose and then become available for other water users downstream. One panel of the Ninth Circuit has indicated that a tribe cannot change the use of instream water to “agricultural, industrial, or other consumptive uses (absent independent consumptive rights.)”<sup>120</sup>

A converse example arises where a tribe has been awarded a quantity of water for consumptive purposes, such as agriculture, and desires to change the use of such water to an instream flow. This type change would have no adverse effect on competing non-Indian water users—upstream users would still have to ensure the same quantity of water reached the reservation, and this “use” would actually benefit downstream users by making more water available to them. One court outside of California, however, has denied a tribe the right to such a change of use, based on its belief that any change in tribal water use would have to conform to state law, which did not recognize instream flow as a “beneficial” use.<sup>121</sup> The Ninth Circuit has rejected this approach, reasoning that because reserved rights are a product of federal law, they are not subject to state substantive water law;<sup>122</sup> thus, in California, the fact that state law might not recognize certain uses does not, of itself, prevent tribes from using their water for those purposes.

#### 4. Indian Water Uses

Most tribes in California are using very little, if any, of the water to which they are entitled. Primarily because of the lack of technical and administrative support received from the BIA,<sup>123</sup> tribal governments in California have not established themselves as quickly as some others. As they begin to recover from years of inequitable funding, however, it is likely that more and more tribes will engage in activities that increase their demand for water. As tribes prepare to exercise their water rights, they must also prepare to defend challenges to those rights.

To fulfill its trust responsibility to the tribes, the BIA should immediately begin the process of developing and acquiring data to assist tribes in quantifying their water rights. Such data should include the amount of practicably irrigable acreage, and the instream flow requirement where applicable (e.g., where the tribe has reserved fishing rights). Tribes cannot afford to wait until they are involved in a general stream adjudication or other litigation to begin compiling this type of data.

Perhaps the most critical issue regarding tribal use of reserved water is whether such water can be marketed.<sup>124</sup> In arid western states, such as California, water marketing is evolving as a new economy. California has begun to encourage this practice as a way to reallocate and conserve scarce water resources.<sup>125</sup>

To date, no court with binding authority in California has addressed the legality of tribal marketing of reserved water. The Wyoming Supreme Court, however, the only court to expressly address the issue of off-reservation marketing of tribal water, has indicated that reserved water cannot be exported for sale off-reservation.<sup>126</sup>

The issue of tribal rights to transfer water has been the subject of much scholarly debate.<sup>127</sup> This debate has worked its way into Congress as well. While some Indian water rights settlements completely prohibit the transfer of tribal water,<sup>128</sup> others have allowed water transfers in limited contexts,<sup>129</sup> and still others have allowed such transfers without any limitation save the 99-year time limit generally applicable to leases.<sup>130</sup>

Transfers of reserved water likely require the approval of Congress, pursuant to the Trade and Intercourse Act,<sup>131</sup> or of the Secretary of the Interior if the transfer is deemed a lease subject to the federal law provisions requiring approval of the Interior Department for leases of land and appurtenant natural resources.<sup>132</sup>

For many tribes, water rights may be their most valuable assets, and this is especially true if those rights can be marketed. Tribes are often not in a position to use their full water entitlement on their reservations for agricultural, industrial or commercial purposes, because they lack funding and equipment. Marketing tribal water to non-Indian water users on or off the reservation, at least on a temporary basis, may provide tribes with much-needed capital to develop their reservation lands and then put the water to productive use on the reservation. This activity may be crucial to tribal economic development, and may benefit non-Indian water users who lack access to sufficient water for their needs. Congress should enable tribes to market these valuable resources.

## 5. Allotments

### a. Reservation Allotments

On reservations allotted under the General Allotment Act, Indian allottees have a right to a share of the water reserved for agricultural purposes.<sup>133</sup> The General Allotment Act provides that, where necessary for irrigation, the Secretary of the Interior can regulate “to secure a just and equal distribution . . . among the Indians residing upon any such reservations.”<sup>134</sup> The individual Indian’s share has been held to be a “ratable share,” proportionate to the percentage of irrigable land he or she owns.<sup>135</sup> Thus, an allottee’s right to use a share of tribal water should be measured by the same criteria used to measure the tribe’s reservation water right, i.e. practicably irrigable acreage. But where the tribal water right is based on an instream use, such as to maintain a fishery, it may be difficult to apportion the available water between tribal and allotment rights.

### b. Public Domain Allotments

Many California Indians acquired trust allotments from public lands rather than tribal

common lands. The exact nature of the water right for public domain allotments is unclear. While there are no reported water rights cases involving public domain allotments, there is no principled basis for precluding the application of the reserved water rights theory to these Indian trust lands.

Congress intended the allotments to provide homes and a means of subsistence for the Indian landowners just as reservations created out of the public domain provided homelands for entire tribes. Indeed, early reports prepared by the BIA in response to the effort to increase the Indian land base in California indicate that the allotment of members of small bands of California Indians on the public domain served as a kind of substitute for creation of small reservations or rancherias.<sup>136</sup> The need for water was no less imperative because the land was individually rather than tribally owned. And, regardless of whether the land was held in individual or tribal trust status, the potential for frustration of Congressional purpose would be great unless the land carried with it a water right. In the absence of an implied intent by Congress to reserve unappropriated water for the allottee's reasonable use, the use of allotted lands for purposes such as agriculture, hunting and fishing might be totally frustrated, leaving the individual Indian with barren, worthless lands.

The lack of adequate inventory data on the surface and groundwater resources of public domain allotments, combined with unsettled legal questions regarding the nature of the allottee's water right, have created barriers to the protection and full utilization of public domain allotments in California.

## **V. LAND ACQUISITION BY CALIFORNIA INDIAN TRIBES AND INDIVIDUALS: DECREASING OPPORTUNITIES COUPLED WITH MANY OBSTACLES**

This section of the report reviews the current policies and regulations applicable to California tribes and individual Indians who desire to acquire additional trust lands. The land bases of most California tribes are small, and most tribes do not have sufficient land to provide housing to all tribal members. This is true even of the Hoopa Tribe, which has the largest reservation in California. This dearth of land has greatly affected the tribes' ability to provide viable reservation economies for their members. Hence, there is a compelling need to acquire land for tribes and individual Indians not currently living on reservations.

In most of the United States, the Indian land base was defined primarily by treaties, through which tribes typically reserved some of their ancestral lands for themselves and conveyed the remainder to the United States. This pattern was not followed in California. Although California tribes negotiated treaties that would have established a land base of approximately 8.5 million acres, these treaties were never ratified.<sup>137</sup> A few reservations were established by executive orders and legislation. Finally, in 1906, Congress began to appropriate money for the acquisition of land for "Indians of California."<sup>138</sup> Small parcels of land were subsequently acquired, and were generally assigned to Indians in the area, whether or not they were all members of the same tribe. Many of these small reservations and rancherias passed into non-

Indian ownership during the Termination Era.<sup>139</sup>

For tribes and individual Indians, there are four principal avenues for acquiring lands in trust. Following the end of treaty making in 1871, and up until the passage of the Indian Reorganization Act in 1934, the principal means of acquiring land in trust for tribes was through an executive order or legislation. An additional method followed the allotment era, with legislation permitting individual Indians to acquire allotments of land on the public domain.<sup>140</sup> Congress has passed numerous statutes authorizing the Secretary of the Interior to acquire land for tribes and individuals. Acquisitions requested pursuant to any of these statutes are now governed by 25 C.F.R. Part 151. Finally, tribes can acquire lands through Community Development Block Grants administered by the Department of Housing and Urban Development (HUD).

A review of these different land acquisition processes demonstrates that all of them present significant impediments to the acquisition of additional lands by California tribes and individual Indians.<sup>141</sup>

#### A. The Legislative Process

Before the passage of the Indian Reorganization Act,<sup>142</sup> the primary avenue for land acquisition in trust for tribes was legislation.<sup>143</sup> When the land sought is already managed by a federal agency, legislation appears to be the only practical alternative.<sup>144</sup> Such legislation usually involves the transfer of land owned by the United States and managed by a federal agency to be held in trust for a particular tribe or tribes.

Securing land through the legislative process is difficult for most tribes. A tribe must initially find a sponsor for the legislation. Some Congressional representatives have expressed concern about legislation for land acquisitions, due to the (often unwarranted) fear that gaming operations will be established. Once a sponsor is found, Chairpersons of the relevant House and Senate Committees and their staff must be briefed. As a practical matter, local governments in the transfer areas and other tribes within the constituencies of the Congressional sponsors must also be persuaded not to oppose the legislation.

Because Congress has no comprehensive plan for dealing with land acquisition requests, this process requires Congress to deal with the tribes' land needs in a piecemeal fashion, and tends to create *ad hoc* decisions based on special needs. Though Congress has attempted to address these difficulties by authorizing the Secretary of the Interior to acquire land for tribes and individual Indians, the difficulties associated with that process, described below, have led many tribes to again seek acquisitions through legislation.

The acquisition of land by legislation involves a substantial commitment of time and resources. Often, legal counsel is needed to draft legislation for submission to the Congressional sponsor, and tribal representatives must travel to Washington, D.C., to request the support of

Congressional representatives and their constituencies. This commitment of time and resources is made without any guarantee of success.

Recently, the Secretary, the BIA, the Bureau of Land Management (BLM), and 10 California tribes, assisted by CILS, worked cooperatively to develop a model bill for the transfer of approximately 3,800 acres of BLM land in trust for the tribes as additions to their reservations.<sup>145</sup> On May 28, 1997, the Secretary transmitted the draft bill to the Speaker of the House and the President of the Senate recommending that it be "introduced, referred to the appropriate Committees for consideration, and enacted." The tribes are now attempting to obtain sponsors from the California delegation to introduce the bill and expedite its passage.

Only five bills providing for additional lands for California tribes have been passed by Congress since 1975.<sup>146</sup> This fact alone demonstrates that California tribes generally do not have the resources necessary to pursue legislative solutions to their land acquisition needs.

#### B. The Allotment Acquisition Process

In theory, it is still possible for individual Indians to acquire allotments on public domain lands and within national forests.<sup>147</sup> In practice, however, acquisition of these allotments is nearly impossible due to the conditions, requirements and restrictions that apply to such acquisitions.

The most problematic restriction for California Indians is that, because of internal agency policy, the process is available only to a member of a recognized tribe who does not live on the tribe's reservation, or whose tribe has no reservation.<sup>148</sup> This excludes the majority of California Indians, who are not members of federally-recognized tribes. Moreover, acquisition of public lands is possible only if the lands are "not otherwise appropriated."<sup>149</sup> This is extremely difficult to demonstrate in California, because courts have held that the Taylor Grazing Act of 1934,<sup>150</sup> along with executive orders made in 1934-35,<sup>151</sup> withdrew all lands of the public domain in the western United States from allotment and reserved them for grazing purposes.<sup>152</sup> This severely limits the availability of land for allotment, and requires a reclassification prior to settlement.<sup>153</sup> Neither Forest Service nor BIA officials offer assistance to individuals trying to locate and acquire allotment land. This is not surprising, as there are no funds budgeted for maintenance of the existing public domain allotments in California.

In addition, the applicant must demonstrate that the acreage requested for allotment would provide a home and furnish a livelihood for his or her family through farming, grazing livestock, or both.<sup>154</sup> If the land requested is situated in a national forest, the applicant must prove that the lands "are more valuable for agriculture or grazing purposes than for the timber found thereon."<sup>155</sup> Thus, it is not possible to obtain an allotment for housing purposes only.

There is little, if any, public domain land available for allotment purposes, and any land that may be available is not usually productive enough to provide a livelihood. The allotment provisions currently in place are premised on federal policy which encouraged assimilation

through the adoption of agriculture. At present, many California Indians need land most immediately for housing. The unrealistic restrictions on allotment acquisition make further acquisitions all but impossible.

C. Land Acquisition Pursuant to 25 C.F.R §§ 151.1-151.15

Various statutes authorize the Secretary of the Interior to acquire land for American Indians.<sup>156</sup> Federally recognized tribes and certain individual Indians<sup>157</sup> can pursue such acquisitions according to the process contained in 25 C.F.R. §§ 151.1 *et seq.* A step-by-step summary of the procedure tribes must follow to acquire trust lands is attached as Appendix A. In theory, this administrative procedure should be the primary means by which recognized tribes and individual Indians acquire land. Implicit in the delegation of this authority to acquire land was a recognition by Congress that the legislative process did not adequately meet the land needs of tribes. By delegating authority to the Department of the Interior, Congress hoped to create a more comprehensive, considered approach to land acquisition. Interior was the logical agency recipient of the acquisition power, since it already exercised broad delegated powers over Indian Affairs.

An examination of the application process developed by the Department of the Interior, however, raises several major concerns. The fact that the process is available only to federally recognized tribes, their members, and some descendants of members of recognized tribes means that it does not address the needs of California's many unacknowledged tribes, whose members constitute the majority of California Indians. The process also places the entire burden of identifying suitable and available lands, researching title, and establishing compliance with applicable environmental regulations on the tribes. Few tribes, let alone individual tribal members, have the necessary financial resources and expertise to complete this lengthy and complex application process. Relative to tribes in other states, many California tribes have few members, limited financial resources, and minimal administrative structures. Again, tribes have to commit the time and resources without any assurance that the land acquisition will be successful. These limitations, coupled with a historical pattern that has restricted funding and technical support for these tribal governments, make this process a less feasible alternative for California tribes than for tribes elsewhere in the nation.

Another problematic feature of the application process is that separate, more restrictive procedures apply to off-reservation land acquisitions. For most California tribes, there is no land within reservation boundaries available for acquisition. Also, much of the Indian land base in California is located in isolated areas with very little potential for economic development.

According to the BIA's own estimates, processing off-reservation land acquisitions can take anywhere from one to two years.<sup>158</sup> Recent discussions with tribes who have gone through the process confirm that even two years is an optimistic time frame.<sup>159</sup> There are several reasons for this delay, including the complexity of the process itself, the number of reviews required within the BIA, limited staffing and higher priority work assignments by BIA staff, and the



controversial nature of taking land into trust, especially in California.<sup>160</sup>

As BIA staffing is reduced at the Agency and Area offices, the time frame for completing the process will continue to lengthen. Additionally, the continuing battle between the State of California and tribes concerning gaming will only serve to increase the controversial nature of off-reservation land acquisition and cause further delays. This creates uncertainty for tribes in terms of planning for housing and economic development projects.

It must also be mentioned that 25 U.S.C. § 465, one of the principal authorities for this land acquisition process, is under attack. Recently, the Eighth Circuit Court of Appeals held that 25 U.S.C. § 465 is unconstitutional, reasoning that it violates the nondelegation doctrine.<sup>161</sup> Though the decision was subsequently vacated and remanded by the Supreme Court,<sup>162</sup> § 465 will continue to be challenged by state officials who oppose tribal land acquisitions. The State of California, in fact, has endorsed the position that § 465 is unconstitutional, and any successful application for land to be taken into trust under the authority of that statute is likely to be the subject of litigation.<sup>163</sup>

There are currently 187 land acquisition applications by tribes and individuals pending in California, all of which depend on the authority conferred by 25 U.S.C. § 465.<sup>164</sup> The complex and time-consuming nature of the regulatory process, coupled with the likelihood of litigation challenging any successful acquisition, leaves these tribes with little hope of acquiring additional land in the near future.

A review of the step-by-step process involved in acquiring land pursuant to 25 C.F.R. Part 151<sup>165</sup> demonstrates how time-consuming and complex this process is. Tribal governments must have the funds and experienced staff capable of preparing legal documents, resolving disputes with state and local governments, and monitoring the request/application as it winds its way through a seemingly endless bureaucratic maze. For most tribes in California, the funds and staff simply are not available. Individuals wishing to use this process also will not be successful without sufficient funds and expertise. Moreover, the heightened scrutiny of off-reservation land acquisitions has a disproportionate impact on California tribes, because existing tribal lands are often too remotely located to support many economic development activities.

For tribes wishing to acquire land for gaming purposes, the task is even more difficult. Section 20 of the Indian Gaming Regulatory Act (IGRA) requires review and approval of the state before lands may be acquired for Class II and III gaming activities. Until recently, the current Governor of California had steadfastly refused to negotiate compacts with tribes in California wishing to open and operate Class III gaming operations.<sup>166</sup> Despite his recent agreement to negotiate, it remains to be seen whether the Governor will give his approval for additional land acquisitions. Unless IGRA is modified by Congress, the actions of the state will continue to inhibit these types of land acquisitions and place California tribes at a distinct economic disadvantage in comparison to tribes located in states where tribal-state compacts have been signed.

D. Land Acquisition through HUD: Community Development Block Grants

Some California tribes have successfully acquired land through HUD Community Development Block Grants (CDBG).<sup>167</sup> In evaluating applications for land acquisition to support new housing, HUD gives primary consideration to the tribe's need for new land. To meet this threshold requirement, the tribe must demonstrate that there is a reasonable ratio between the number of acres of land to be acquired and the number of households of low and moderate income that will be served by the project. The tribe must also conduct a survey to clearly and specifically document the housing needs of the population to be served. The survey must identify which households will be served by the project, including the size of each household, income levels of tribal members, and the condition of their current housing. The survey should also include figures on the population of the tribe, their income levels and the percentage who are of low and moderate income, and the present housing conditions. HUD will accept a waiting list approved by the Indian Housing Authority in lieu of a survey.

If the threshold requirements of the application are met, HUD will then evaluate the proposed project's planning and implementation. HUD will consider the suitability of the land and whether it can be taken into trust, the commitment to move families into the housing, and the plans for infrastructure to support the housing. HUD applies a point award system to the application, which is broken down as follows: project need and design (40 points), suitability of the land (20 points), housing resources (10 points), supportive services (5 points), commitment of households (5 points), feasibility of the land being placed in trust (5 points), whether the land meets the need and is reasonably priced (5 points), and infrastructure commitment (10 points).

In order to earn 40 points under the project need and design portion, the tribe must establish that it has no available land for new housing construction, or that the land available is not suitable because it cannot support the necessary infrastructure, such as water and sewage facilities. The tribe will receive 30 points if there is suitable land available but it is dedicated to another use, and will receive 25 points if the land is necessary for both housing construction and construction of amenities and infrastructure for both new and existing housing.

In the next stage of the application process HUD awards up to 60 points based on planning and implementation. The initial set of factors here concern the suitability of the land: the tribe must submit a preliminary land investigation conducted by an independent entity which demonstrates that the soil conditions are adequate for septic systems, that the land has adequate drinking water, is accessible to utilities and vehicles, has proper drainage, and complies with environmental requirements.

Next, the tribe must submit evidence that residents are committed to move into at least 25% of the housing units to be built, or evidence that an application has been submitted for 25% of the units. Documentation is also required to show that police and fire protection, medical and social services, schools and shopping will be available to serve the site. The tribe also must show documentation that households have made a commitment to move into the new housing. Next,

the tribe must either have written assurance from the BIA that the land will be taken into trust, or demonstrate that taxes and fees can be paid for the land. An infrastructure commitment addressing water, electricity, roads, and drainage must also be included in the application. Finally, the tribe must document that the proposed site meets tribal housing needs and is reasonably priced, and that the project can be completed within two years.

While the process described above takes a substantial amount of time and tribal resources to complete, the requirements are relatively clear and reasonable. Unfortunately, funding for the CDBG program has been declining in recent years, and is no longer sufficient to meet the needs of eligible California tribes.

#### E. State Opposition to Tribal Land Acquisition

Aside from the burdensome processes described above, California tribes' efforts to acquire land are often impeded by the State of California's objection to tribal land acquisition. As mentioned above, the State takes the position that the Secretary of the Interior has no authority to acquire lands for tribes in trust. The State also seems to operate on the assumption that any tribal acquisition of land is for the purpose of establishing gaming operations, regardless of the tribe's stated purpose for the acquisition. Given this bias, the State has used the Notice, Comment and Response period of the process to object to proposed land acquisitions.<sup>168</sup>

The State has further hindered tribal land acquisitions by taking the position that the Williamson Act<sup>169</sup> applies to fee-to-trust transfers. The Act is designed to preserve agricultural land and open space, and to promote orderly development.<sup>170</sup> It authorizes 10-year contracts between local government and landowners to preserve agricultural land, in exchange for reduced property taxes.<sup>171</sup> The terms of the contract are binding on subsequent purchasers and are automatically renewed annually, unless either party gives notice of nonrenewal.<sup>172</sup> Thus, the landowner may terminate the contract at any time, but may not develop the land for the balance of the contract period.<sup>173</sup> Because of the automatic renewal provision, the balance of the contract period will always be at least nine years.

In addition to the nonrenewal process, contracts can be canceled upon the landowner's petition if the cancellation is consistent with the purposes of the act, or is in the public interest.<sup>174</sup> The cancellation provisions have been narrowly interpreted by the courts,<sup>175</sup> and local governments have been reluctant to grant exceptions to tribes that acquire land restricted by the Act. Even where cancellations are obtained, the landowner must pay a penalty equal to 12.5% of the land's market value. Many California tribes will not be able to pay such a penalty, even if they manage to get a cancellation from the local government.

Due to the tax benefits provided by the Act, a large amount of land in California is covered by Williamson Act contracts. Several tribes have purchased land restricted by such contracts. While the BIA does not officially view these contracts as encumbrances that must be cleared up prior to transferring the land into trust, any litigation brought by the State would delay

the transfer.

For tribes that need land immediately for housing and economic development, the Williamson Act presents an unacceptable delay. When tribes obtain HUD grants, they must use them within two years or lose the grant, so they do not have time to go through the regular nonrenewal process. Nor will they have time to fight any litigation brought by the State, in the event that the State challenges a transfer of Williamson Act land into trust.

There have been approximately 17,000 acres of land placed into trust for California tribes since 1975, at least 1489.22 of which resulted from the restoration of lands to formerly terminated tribes. An additional 9,000 acres have been acquired through legislation.<sup>176</sup> There is still a great need for substantial increases in the land bases of California tribes. The need for additional lands for individual Indians not currently living on reservations is also compelling. While the high cost of land in California and the unavailability of useable land near or adjacent to current California reservations pose serious impediments for most tribes and Indians in their attempts to acquire more land, the policies and procedures created by the federal government are the most serious obstacle to land acquisition.

## ENDNOTES

1. 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.

2. In 1928, Congress permitted the “Indians of California” to sue the federal government for compensation for the loss of reservations and other benefits promised under the unratified treaties. California Indian Jurisdictional Act, 25 U.S.C. §§ 651 et seq. The claims of all tribal plaintiffs were consolidated, and all Indians living in California on July 1, 1852, and their descendants were qualified to participate. 25 U.S.C. § 651. A second claim was brought by the Indians of California in 1946 before the Indian Claims Commission, which had recently been created by Congress. Act of August 13, 1946, 60 Stat. 1049. Over the following decade, several groups of California Indians filed more than twenty separate petitions for compensation. The claims were initially dismissed because the petitioners were held not to represent an identifiable group with capacity to sue. Hearings were conducted to determine whether the “Indians of California” were an “identifiable group, with the right to present a claim.” After twenty years of argument and briefing, the Indian Claims Commission held that the “Indians of California” were an identifiable group, as defined by the California Indian Rolls. Thereafter, most of the claims were combined. See Bruce Flushman and Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 390, 413 (1986).

3. 25 U.S.C. § 1679.

4. See e.g., 20 U.S.C. § 336, implemented in 34 C.F.R. § 771.1.

5. See, e.g., Malone v. Bureau of Indian Affairs, 38 F.3d 433 (9<sup>th</sup> Cir. 1994) (invalidating BIA regulation limiting eligibility for education grants to members of federally recognized tribes).

6. See § II of the ACCIP Report on California Indian Cultural Preservation.

7. For a discussion of the land acquisition efforts undertaken pursuant to special appropriation acts and, later, the Indian Reorganization Act, see § I of the ACCIP Termination Report.

8.9 Stat. 631.

9. This special relationship was first discussed by the United States Supreme Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Only the federal government shares this relationship with the tribes, because exclusive power over Indian affairs was vested in the federal government by the Constitution and the Trade and Intercourse Act of 1790. See U.S. Const. Art. I, sec. 8; 25 U.S.C. §§ 173 et seq.
10. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).
11. See, e.g., United States v. Winans, 198 U.S. 371, 380-81 (1905); Mattz v. Arnett, 412 U.S. 481, 504-505 (1973).
12. United States v. Kagama, 118 U.S. 375 (1886). In this case, the Supreme Court upheld the Major Crimes Act, which extended, for the first time, the jurisdiction of the federal government over certain crimes committed by an Indian against another Indian within Indian country. Id. at 377.
13. Id. at 383-384.
14. See Robert N. Clinton et al., American Indian Law (3d ed. 1993), 192.
15. See, e.g., Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 86 (1977).
16. The Kagama decision pre-dated the expansive reading of the federal Commerce power, which began with the Supreme Court's decision in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Thus, the Court in Kagama acknowledged that the Indian Commerce Clause did not give Congress the power to enact the Major Crimes Act. Kagama, 118 U.S. at 379.
17. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1924).
18. United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980).
19. Cherokee Nation, 30 U.S. 1 at 17.
20. United States v. Mitchell (hereinafter "Mitchell II"), 463 U.S. 206, 225 (1983).
21. Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9<sup>th</sup> Cir. 1995).
22. See, e.g., Nance v. EPA, 645 F.2d 701, 711 (9<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981); Covelo Indian Community v. FERC, 895 F.2d 581, 586 (9<sup>th</sup> Cir. 1990).
23. Littlewolf v. Lujan, 877 F.2d 1058, 1063-1064 (D.C. Cir. 1989).
24. See, e.g., Sioux Nation of Indians, 448 U.S. at 415; Delaware Tribal Business Comm., 430 U.S. at 84-85 (1977); Morton v. Mancari, 417 U.S. 535, 555 (1974).

25. Littlewolf, 877 F.2d at 1064. So far, no court has held that a specific piece of legislation is invalid based on the trust relationship.
26. See, e.g., Eric v. Secretary of the U.S. Dep't of Housing and Urban Development, 464 F. Supp. 44, 48 (D. Ala. 1978); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9<sup>th</sup> Cir. 1988).
27. See United States v. Mitchell (hereinafter "Mitchell I"), 445 U.S. 535 (1980); Cato v. United States, 70 F.3d 1103, 1108 (9<sup>th</sup> Cir. 1995) ("Courts have recognized fiduciary responsibilities running from the United States to Indian Tribes because of specific treaty obligations and a network of statutes that by their own terms impose specific duties on the government").
28. See, e.g., United States v. Dann, 470 U.S. 39 (1985).
29. Assiniboine and Sioux Tribes v. Bd. of Oil and Gas, 792 F.2d 782, 794 (9<sup>th</sup> Cir. 1986) (finding a fiduciary duty was created by the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396).
30. As mentioned above, a familiar canon of construction applicable to federal actions affecting Indian tribes or individuals requires doubtful expressions to be resolved in favor of the Indians. Pursuant to this canon of construction, courts have found statutes to create fiduciary duties "even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." Mitchell II, 463 U.S. at 225.
31. Inter Tribal Council, 51 F.3d at 203.
32. See, e.g., McNabb v. Bowen, 829 F.2d 787, 791-792 (9<sup>th</sup> Cir. 1987) (finding a fiduciary duty created by the Indian Health Care Improvement Act); Pawnee v. United States, 830 F.2d 187, 190 (Fed. Cir. 1987) (holding that fiduciary obligations to manage oil and gas leases were created by several statutes and regulations promulgated pursuant thereto).
33. See e.g., Mitchell II, 463 U.S. at 226-227; Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1101 (8<sup>th</sup> Cir. 1989).
34. Assiniboine and Sioux Tribes, 792 F.2d at 794. Some courts will apply "the same trust principles that govern the conduct of private fiduciaries." Id. Others have found that not all private trust duties apply to the federal-Indian trust relationship. Begay v. United States, 16 Cl. Ct. 107, 127 n.17 (1987). One court has indicated that the standard applied to the United States as trustee depends on whether its obligation arises under the general trust relationship: "Where Congress intended and recognized only a limited trust relationship, fiduciary obligations applicable to private trustees are not imposed upon the Government." Cape Fox Corp. v. United States, 4 Cl. Ct. 223, 232 (1983).
35. See, e.g., the Indian Reorganization Act, 25 U.S.C. § 479; Indian Health Care Improvement Act, 25 U.S.C. §§ 1603, 1679.

36. Clinton *et al.*, *supra* note 14, at 86.
37. See Rennard Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed., (Charlottesville, Va.: The Michie Co., 1982), 24.
38. See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974) (invalidating BIA's limitation on eligibility for general assistance benefits to Indians living on reservations, finding such an interpretation of appropriations made pursuant to the Snyder Act to be improper and inconsistent with Congressional intent); Zarr v. Barlow, 800 F.2d 1484 (9<sup>th</sup> Cir. 1986) (invalidating BIA regulation that denied higher education grants to members of federally recognized tribes based on a blood quantum standard); Malone v. Bureau of Indian Affairs, 38 F.3d 433 (9<sup>th</sup> Cir. 1994) (invalidating BIA regulation limiting eligibility for education grants to members of federally recognized tribes).
39. See, e.g., Malone, 38 F.3d at 435-436.
40. 25 U.S.C. § 1679.
41. See 20 U.S.C. § 366, implemented in 34 C.F.R. Part 771.1.
42. See § VI of the ACCIP Education Report.
43. See, e.g., the Johnson O'Malley Act, 25 U.S.C. §§ 452-457; Title IX of the Indian Education Act, 20 U.S.C. § 7881(4); and the Indian Health Care Improvement Act, 25 U.S.C. §§ 1603, 1679. See also, § IV(A)(2) of the ACCIP Education Report (discussing eligibility of California Indians for programs authorized by the Snyder Act, 25 U.S.C. § 13).
44. See Morton, 415 U.S. at 231; McNabb, 829 F.2d at 790.
45. See, e.g., Malone, 38 F.3d at 437-438.
46. See the June 21, 1995 letter to the Assistant Secretary of Indian Affairs from the Advisory Council on California Indian Policy on behalf of the Koi Tribe of Lower Lake Indians.
47. See the letter from John Geary, Bureau of Indian Affairs, to "Acting Director, Office of Indian Services," dated October 21, 1980. The letter lists the "Lower Lake Band of Pomo Indians" as a "Non-Terminated Rancheria" that should be included "in our listing of those Indian entities that have a government-to-government relationship with the United States." The Koi Nation received a copy of this letter and other documents through the Freedom of Information Act. There was no document explaining why Mr. Geary's recommendation was not followed.
48. The only statute that could possibly be interpreted as terminating the tribal status of the Lower Lake Koi is the Act authorizing the sale of the Lower Lake Rancheria. 70 Stat. 58 (1956). This statute makes no mention of terminating the services to tribal members, terminating the tribe's status, or the extension of state law over tribal members, as was typical of termination statutes. See Clinton *et al.*, *supra* note 14, at 1186. Thus, on the face of the statute, no clear



Congressional intent to terminate appears. See DeCoteau v. District Court, 420 U.S. 425, 444 (1975). Nor does any such intent appear in the legislative history or surrounding circumstances. Id.

49. Testimony of Nancy Rank, Esq., of California Indian Legal Services, before the ACCIP, December 10, 1994.

50. See, e.g., Mitchell II, 463 U.S. at 596 (finding fiduciary duty to manage timber resources); Maricopa-AkChin v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981) (finding fiduciary duty to manage agricultural lease program); Ash Sheep Co. v. United States, 252 U.S. 159 (1920) (finding fiduciary duty to manage grazing activities); Navajo Tribe v. United States, (finding fiduciary duty to manage oil and gas leases); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 256 (D. D.C. 1972) (finding fiduciary duty to protect tribal fishery); Confederated Tribes of the Colville Reservation v. United States, No. 181-C (Ct. Cl. May 1, 1980), 7 Ind. L. Rep. 5037 (finding fiduciary duty to protect minerals on tribal land).

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

52. 25 U.S.C. §§ 450 et seq.

53. See §§ I, V of the ACCIP Community Services Report.

54. See id., § IV.

55. There are actually 104 federally recognized tribes in California, but four are under the jurisdiction of the Phoenix Area Office of the BIA.

56. All of the following cases involved establishment of prescriptive easements across fee land (formerly public domain land) adjacent to a trust allotment: Alvina Johnson v. Craycraft, No. CV-F-86-305 (EDP) (ADC) (E.D. Cal. Apr. 14, 1988); Dick v. Couch, No. CV-F 29-5244-GEB (DLB) (E.D. Cal. Jul. 7, 1995); Hess v. Parks, No. CIV-S-96-2558 DFL/GGH (E.D. Cal. filed Dec. 31, 1996).

57. Alvina Johnson v. United States, No. CV-F-86-305ADC (E.D. Cal. 1986).

58. See Assistant Solicitor Scott Keep's July 26, 1989 letter to CILS.

59. 25 U.S.C. § 334.

60. See 25 U.S.C. §§ 336-337.

61. This count does not include the three reservations that straddle the California/Arizona border, which are under the jurisdiction of the Phoenix Area Office. Seven of the eighty-eight rancherias are held for the benefit of the Pit River Tribe. Bureau of Indian Affairs, Sacramento Area Office, "Trust Acreage - Summary, CY Ending December 31, 1996" (attached hereto as Exhibit 1).

62. Id.
63. See Flushman and Barbieri, *supra* note 2, at 403-404.
64. See Table 1 to the ACCIP Economic Development Report.
65. Id.
66. Bureau of Indian Affairs, Division of Forestry, "1995 Catalogue of Forest Acres."
67. See the Summary and § I of the ACCIP Economic Development Report for further discussion of the importance of land to tribal economic development.
68. See Exhibit 1.
69. In an increasing number of cases involving allotted reservations in Southern California, tribal governments have initiated lawsuits to shut down activities on allotted lands that pose health hazards or threaten the reservation environment. On the Rincon Indian Reservation, the tribe succeeded in excluding from the reservation the non-Indian operators of a slaughterhouse located on allotted lands. Rincon Band of Luiseno Mission Indians v. Chavez, No. CV 94-1550 H(CGA) (S.D. Cal.) (Order Clarifying Default Judgment Order, entered March 30, 1995). The operator's disposition of animal parts through incineration and other means of disposal posed threats to the air quality and health of other reservation residents. In another case, Indian allottees on the Cahuilla Reservation entered into an agreement with off-reservation businesses under which the businesses were allowed to dump sludge containing toxic materials on the allotted reservation lands. The tribe obtained a preliminary injunction enjoining the dumping. Cahuilla Band of Indians v. Candelaria et al., No. CV 91-5938-ER (C.D. Cal.) (Order Re: Summary Judgment, entered March 10, 1992). Similarly, on the Torres-Martinez Reservation, tribal members blockaded reservation roads in protest over the actions of individual allottees who had entered into agreements with off-reservation companies to dump toxic waste on allotted reservation lands. See § VIII(C) of the ACCIP Community Services Report.
70. Article II, By-laws of the Native American Environmental Protection Coalition.
71. Backcountry Against Dumps v. Environmental Protection Agency, 100 F.3d 147 (D.C. Cir. 1996).
72. 42 U.S.C. §§ 6941-6949a.
73. See 40 C.F.R. Part 258.
74. Backcountry Against Dumps, 100 F.3d at 151.
75. Richard R. Harris et al., Tribal Self-Governance and Forest Management at the Hoopa Valley Indian Reservation, Humboldt County, California, 19 Amer. Indian Culture and Research Journal,

7 (1995). The other tribes that have been accorded self-governance status are the Yurok, the Karuk, and the Redding Rancheria. The Cabazon Band of Cahuilla Mission Indians has an application for self-governance status pending.

76. Id.

77. Id. at 12.

78. Id.

79. Id. at 13.

80. Id. at 28.

81. See Ronald L. Trosper, Traditional American Indian Economic Policy, 19 Amer. Indian Culture and Research Journal, 89 (1995). Trosper observes: "As Indian tribes attain control of their reservations, they will be faced with decisions about the management of ecosystems that have already been manipulated according to the engineering and management principles espoused by the federal government." Id.

82. See Harris et al., *supra* note 75, at 31.

83. The CIFFMC specifically referenced the Hoopa Valley Tribes' Memorandum Of Understanding with the United States Forest Service and the BIA, and the Statewide Fire Agreement as examples of successful coordination efforts.

84. Cal. Const. Article X, Section 2.

85. Peabody v. City of Vallejo, 2 Cal. 2d 351, 366 (1935).

86. It is questionable whether riparian rights can be lost by prescription, which is a form of adverse possession. See People v. Shirokow, 25 Cal. 3d 301 (1980).

87. There is an exception when the appropriation was commenced before the riparian land owner received a patent from the state or federal government. See Lux v. Haggin, 69 Cal. 255, 344-49 (1886). In addition, unexercised riparian rights can lose their priority over appropriative rights in a statutory adjudication. See In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 358-359 (1979).

88. Surface water rights in California are governed by a comprehensive regulatory scheme and subject to the jurisdiction of the State Water Resources Control Board, which is authorized to, among other things, issue permits. Since 1914, permits have been required for all appropriations of surface water. California's statutory scheme provides for general stream adjudications, pursuant to which the State Water Resources Control Board, and ultimately the state courts, have authority to determine all water rights in a given stream. Despite the lack of a comprehensive

regulatory system for groundwater, it can be included in statutory adjudications under certain circumstances. See, e.g., In the Matter of the Application of the Southern California Water Company, 57 CPUC 580 (1992). In that case, the Board found that portions of the groundwater supply were so inter-connected with the surface waters that groundwater had to be included in the adjudication to achieve a “fair and effective” determination of water rights.

89. Originally, the establishment of an appropriative right required possession of the water, as evidenced by some type of diversion of, or physical control over the water. See California Trout, Inc. v. State Water Resources Control Board, 90 Cal.App.3d 816, 819 (1979). Many California tribes diverted water for agriculture prior to the arrival of Europeans.

90. Where Indian land was reserved by treaty, the treaty is generally interpreted as reserving natural resources, including water, not expressly given up by the tribes. Thus, where a treaty is involved, it is the tribe, not the federal government, that impliedly reserved the rights to natural resources. See Winters v. United States, 207 U.S. 564 (1908).

91. See Strickland, ed., *supra* note 37, at 596.

92. As the Supreme Court has stated:

It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

Arizona v. California, 373 U.S. 546, 598-599 (1963) (hereinafter “Arizona I”).

93. In a few cases, reserved rights have been given a priority date prior to the creation of the reservation. When Indian tribes have traditionally and uninterruptedly relied on certain resources for their subsistence or as an integral part of their culture, and the rights to those resources have not been expressly given up through a treaty or other agreement, the tribes are said to have “aboriginal title” to those resources, which dates from time immemorial. See Strickland, ed., *supra* note 37, at 590-591.

94. See § I of the ACCIP Termination Report.

95. See Ahtanum Irrigation Dist. v. United States, 236 F.2d 321, 327 (9<sup>th</sup> Cir. 1956).

96. Id. at 335.

97. Cappaert v. United States, 426 U.S. 128, 141 (1976).

98. United States v. New Mexico, 438 U.S. 696, 702 (1978).
99. Winters v. United States, 207 U.S. 564, 576-577 (1908); Conrad Inv. Co. v. United States, 161 F. 829, 831-832 (9<sup>th</sup> Cir. 1908).
100. See, e.g., Conrad Inv. Co., 161 F. at 835.
101. See, e.g., Arizona I; United States v. Anderson, 736 F.2d 1358 (9<sup>th</sup> Cir. 1984); In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys. and All Other Sources, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court without opinion sub nom, Wyoming v. United States*, 492 U.S. 406 (1989) (hereinafter "Big Horn I").
102. See, e.g., Arizona v. California, 460 U.S. 605, 620 (1983) (hereinafter "Arizona II") (noting certainty of right particularly important with respect to water in western states); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9<sup>th</sup> Cir. 1981) ("We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. Until their extent is determined, state-created water rights cannot be relied on by property owners . . . Resolution of the problem is found in quantifying reserved water rights.")
103. 43 U.S.C. § 666.
104. See id.; Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).
105. See id. at 819.
106. See, e.g., Alaska Pac. Fisheries v. United States, 438 U.S. 78, 88 (1918); United States v. Adair, 723 F.2d 1394, 1409 (9<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984); Colville Confederated Tribes, 647 F.2d at 48.
107. See, e.g., Winters, 207 U.S. at 576; Skeem v. United States, 273 F. 93, 95 (9<sup>th</sup> Cir. 1921); Conrad Inv. Co., 161 F. at 831.
108. Judith V. Royster, A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61, 71 (1994).
109. See, e.g., Arizona I, 373 U.S. at 598-600; Winters, 207 U.S. at 576; Conrad Inv. Co., 161 F. at 831-32; Note, Settlement or Adjudication: Resolving Indian Reserved Rights, 36 Ariz. L. Rev. 195, 205 (1994).
110. Arizona I, 373 U.S. at 600-601.
111. Id. at 600. The Court rejected the "reasonably foreseeable needs" standard urged by the State of Arizona, noting that "How many Indians there will be and what their future needs will be can only be guessed."

112. Cf. Ahtanum Irrigation Dist., 236 F.2d at 326-27.

113. Id.

114. See, e.g., United States v. Adair, 723 F.2d 1394, 1408-1411 (9<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

115. In the context of this discussion, the term “groundwater” refers to water flowing in subterranean streams, to percolating underground water, or to basins. Such underground water may or may not be hydrologically connected to surface water.

116. Cappaert, 426 U.S. at 143.

117. See Big Horn I, 753 P.2d at 100. The Wyoming Supreme Court, while noting that “the logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater,” nonetheless declined to extend the scope of the right because, in its view, no other court had done so. Id. at 99-100.

118. The Wyoming court’s holding has not been followed in any other published opinion and has been criticized by several commentators. Moreover, courts in Arizona and Washington, as well as the Court of Claims and the Federal Circuit, have indicated that reserved rights extend to groundwater. See In the Matter of the Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam, 484 F. Supp. 778, 784 (D. Ariz. 1980); In re Gen. Adjudication of All Rights to the Water in the Gila River Sys. and Source, 15 Ind. L. Rep. 5099, 5104 (Ariz. Super. Ct., Sept. 9, 1988); Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978), *aff’d in part*, 647 F.2d 42 (9<sup>th</sup> Cir.) *cert. denied*, 454 U.S. 1092 (1981); Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660, 699-700 (1986), *aff’d* 877 F.2d 961 (Fed. Cir. 1989); Gila River Pima-Maricopa Indian Community v. United States, 695 F.2d 559, 561 (Fed. Cir. 1982).

119. See Colville Confederated Tribes, 647 F.2d at 48-49.

120. See United States v. Adair, 723 F.2d 1394, 1411 (9<sup>th</sup> Cir. 1983). The Ninth Circuit’s opinion in Adair did not address the common state law “no-injury” rule, which allows for changes in the place or nature of water use only when such changes do not injure competing water users. While no court has expressly addressed the issue, commentators dispute whether Indian water users, as holders of federal rights, are or should be subject to the state law no-injury rule. Compare, e.g., Jack D. Palma III, Considerations and Conclusions Concerning the Transferability of Indian Water Rights, 20 Nat. Resources J. 91, 94 (1980) (tribes should not rely on no-injury rule because they historically have not exercised their rights at all, so virtually any consumptive use would subject competing users to injury), with William F. Veeder, Water Rights in the Coal Fields of the Yellowstone River Basin, 40 Law & Contemp. Probs. 77, 89 (1976) (use of reserved rights should be limited only by no-injury rule), and with Susan M. Williams, Indian Winters Water Rights Administration: Averting New War, 11 Pub. Land L. Rev. 53, 74-75 (1990) (arguing no-injury rule should not by law apply to reserved water use.)

121. See In re General Adjudication of All Rights to Use Water in the Big Horn River Sys. and All Other Sources, 835 P.2d 273, 277-279 (Wyo. 1992) (hereinafter Big Horn II).
122. Adair, 723 F.2d at 1410-1411; id. at n.19.
123. See §§ V, VI, and IX of the ACCIP Community Services Report.
124. The concept of marketing encompasses a variety of transactions, including the outright sale of water rights, or a time-specific transfer of the right to use a certain quantity of water. See Steven J. Shupe, Indian Tribes in the Water Marketing Arena, 15 Am. Indian L. Rev. 185, 197 (1990).
125. See, e.g., Cal. Water Code § 475 (“voluntary water transfers between water users can result in a more efficient use of water, benefitting both the buyer and the seller[,] . . . can help alleviate water shortages, save capital outlay development costs, and conserve water and energy”).
126. See Big Horn I, 753 P.2d at 100.
127. See Christine Lichtenfels, Indian Reserved Water Rights: An Argument for the Right to Export and Sell, 20 Land & Water L. Rev. 131 (1989); Karen M. Schapiro, An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir, 23 Idaho L. Rev. 277 (1987); Shupe, *supra* note 124 at 186, 204 (noting importance of water marketing for tribal control and economic development); Palma, *supra* note 120, at 95-96; Note, Transferability of Reserved Rights from the Indian Allottee to the Non-Indian Purchaser: Are the Purposes of the Reservation Really Being Served?, 17 Land & Water L. Rev. 155 (1982).
128. See, e.g., Ute Indian Rights Settlement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4650; Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2793.
129. See, e.g., Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059; Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549.
130. See, e.g., Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, 106 Stat. 2237; Ak-Chin Indian Water Rights Settlement Act, as amended, Pub. L. No. 102-497, 106 Stat. 3258 (1992).
131. 25 U.S.C. § 177.
132. 25 U.S.C. § 415.
133. See United States v. Powers, 305 U.S. 527, 532 (1939); Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1092 (1981); United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9<sup>th</sup> Cir. 1956), *cert. denied*, 352 U.S. 988; United States v. Adair, 478 F. Supp. 336, 346 (D. Or. 1979). The cases so holding rely primarily on Section 7 of

the General Allotment Act, 25 U.S.C. § 381.

134. 25 U.S.C. § 381.

135. Walton, 647 F.2d at 51.

136. See, e.g., the report of L.A. Dorrington to the Commissioner of Indian Affairs dated June 23, 1927, at pp. 2, 5, 8, 11, 16, 22 (wherein Mr. Dorrington recommends against acquiring land for various bands of California Indians due to the fact that members held public domain and Indian allotments).

137. See Flushman and Barbieri, *supra* note 2, at 403-405.

138. See note 1, *supra*.

139. See § VI of the ACCIP Termination Report.

140. 25 U.S.C. § 336.

141. In addition to the methods described in this report, lands can also be acquired under the BIA Loan Guaranty pursuant to 25 C.F.R. § 103. The Insurance and Interest Subsidy program and 7 C.F.R. § 1823 Subpart N address the purchase of lands with Farmer's Home Administration Funds. There is no evidence, however, that these programs are widely known or used.

142. 25 U.S.C. §§ 461 et seq. That Act conferred authority to the Secretary of the Interior to acquire land for Indians. 25 U.S.C. § 465.

143. See Donahue v. Butz, 363 F. Supp. 1316, 1321 (N.D. Cal. 1973). The authors are not aware of any legislative efforts to acquire trust land for individual Indians rather than tribes.

144. The Secretary of the Interior has taken the position that he does not have the authority under existing law (e.g., 25 U.S.C. § 465) to change the designated use of federal lands through inter-agency transfer, without further congressional authorization.

145. An earlier version of the bill (H.R. 3642, 104th Congress, 2nd Session) passed the House during the last session of Congress and was scheduled on the Senate's consent calendar for the final day of the session, but died when the Senate abruptly adjourned for the year. The Secretary and the tribes subsequently revised the bill.

146. Pub. L. No. 96-338, 96 Stat. 1067-1068 (1980) restored 1240 acres to the Tule River Reservation. Pub. L. No. 94-373, 90 Stat. 1043, 1051 (1976) added 82.28 acres to the Agua Caliente Reservation for economic development. The Act of April 21, 1976, 90 Stat. 373, added 240 acres to the Twenty-Nine Palms Reservation. The Southern California Indian Land Transfer Act set aside 5069.37 acres for eleven tribes. Pub. L. No. 100-581 (1988). Finally, 11,324.16 acres were acquired for the Round Valley Indian Reservation using a special appropriation set



aside for that purpose in the FY 1986 Appropriation Act, Pub. L. No. 99-190. Lands for unterminated and newly recognized tribes have not been acquired by legislation.

147. See 25 U.S.C. § 336. These allotments are limited to forty acres of irrigable land, eighty acres of non-irrigable agricultural land, or one hundred sixty acres of non-irrigable grazing land to any one individual. Allotments within the national forest are authorized by 25 U.S.C. § 337. The regulations and procedures for acquiring these allotments are found at 43 C.F.R. § 2530.

148. As mentioned above, neither the Indian Allotment Act nor its implementing regulations restrict eligibility to members of recognized tribes. See 25 U.S.C. § 334 and 43 C.F.R. § 2531.1. The Department of the Interior, however, asserts that only members of federally recognized tribes may apply for allotments from the public domain.

149. 25 U.S.C. § 334.

150. 43 U.S.C. §§ 315-315(g), 315(h)-315(n), and 315(o)(1).

151. Executive Order No. 6910, 11/26/34; and Executive Order No. 6964, 2/5/35.

152. See Saulque v. United States, 663 F.2d 968, 973 (9<sup>th</sup> Cir. 1981).

153. See 43 C.F.R. § 2530.0-3(C).

154. See 43 C.F.R. § 2430.5(f); Saulque, 663 F.2d at 975; and Hopkins v. United States, 414 F.2d 464, 469 (9<sup>th</sup> Cir. 1969).

155. 25 U.S.C. § 337.

156. See 25 C.F.R. Part 151, Authorities.

157. Members of recognized tribes, certain descendants of tribal members, and non-members who possess at least one-half degree Indian blood of a recognized tribe are eligible. 25 C.F.R. § 151.2(c).

158. See the letter of November 4, 1992 from Acting Sacramento Area Director Michael Smith, attached as Exhibit 2.

159. The tribes contacted are still involved in the administrative process, and thus wish to remain anonymous. See also, Bureau of Indian Affairs, "Fee-to-Trust Land Transactions, November 15, 1996" (Exhibit 3), at 9. This BIA document indicates that some applications filed in 1992 are still pending.

160. See Exhibit 2.

161. State of South Dakota v. United States Department of the Interior, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded sub nom.* Department of Interior v. South Dakota, \_\_\_ U.S. \_\_\_, 117

S. Ct. 286, 136 L. Ed. 2d 205 (1996).

162. Department of Interior v. South Dakota, \_\_ U.S. \_\_, 117 S. Ct. 286, 136 L. Ed. 2d 205 (1996). After the Eighth Circuit decision in South Dakota, an additional regulation was issued, providing that judicial review of the acquisition procedure is available before title is transferred to the United States. 61 Fed. Reg. 18082 (1996).

163. See Big Lagoon Park Company, Inc. v. United States Department of the Interior, et al., Docket No. IBIA 97-85-A, in which the Governor of the State of California, as an amicus curiae, is urging the Interior Board of Indian Appeals to reverse a decision by the BIA accepting eleven acres of land adjacent to the Big Lagoon Rancheria in trust status on the grounds, inter alia, that 25 U.S.C. § 465 is an unconstitutional delegation of power by Congress.

164. See Exhibit 3 at 9A.

165. See Appendix A.

166. The Governor has recently agreed to negotiate with the Pala Band of Luiseno Mission Indians. Negotiations are expected to be complete by the end of September, 1997.

167. Land acquisition to support new housing is governed by 24 C.F.R. § 571.303(b).

168. See the two letters dated July 29, 1997 from Sara Drake, Deputy Attorney General, to Harold M. Brafford, Superintendent, Bureau of Indian Affairs, attached hereto as Exhibit 4.

169. Cal. Gov. Code §§ 51200 et seq.

170. Sierra Club et al. v. City of Hayward, 28 Cal. 3d 840, 850 (1981).

171. DeVita v. County of Napa, 9 Cal. 4th 763, 791 (1995).

172. Sierra Club, 28 Cal. 3d at 852.

173. Id.

174. Cal. Gov. Code § 51282.

175. "We harbor no doubt that the Legislature intended cancellation to be approved only in the most extraordinary circumstances." Sierra Club, 28 Cal. 3d at 853.

176. See Exhibit 3.