

# NATIVE AMERICA AT THE NEW MILLENNIUM

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## ***INTRODUCTION***

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It is impossible to weave a concise and meaningful summary of the state of Native America at the new millennium without losing a sense of the cultural richness and diversity that characterizes Indian Country.<sup>1</sup> The experiences, concerns, problems, and successes of tribes and individuals are as varied as the American Indian and Alaska Native people themselves. They are as different as the subsistence fisherman from the Native Village of Quinhagak, Alaska, is from the Wall Street-savvy Mohegan Tribal Council member, as the parliamentary Flathead democracy is from the traditional Cochiti theocracy, and as the Navajo “code talking” veteran of World War II is from the hip-hopping Pima teenager skateboarding on the Gila River reservation. Indeed, looking across the more than 550 tribes that comprise Indian Country, one sees a picture of diversity – of societies and cultures, of governments and leadership, of organizations and activities, of socio-economic status, and of trends and concerns. Nonetheless, there are identifiable common threads that tie America’s 2.4 million<sup>2</sup> Native Americans together. The task of this introduction is to highlight the patterns.

At the turn of the millennium, American Indians face old challenges armed with newfound strengths, and new obstacles braced by deep traditions. A single, yet incisive example of this convergence of past and present concerns youth on the reservation, especially with respect to two major issues: education and crime. The need for adequate education continues to challenge tribes, but a recent economic resurgence in Indian Country has given many tribes the wherewithal to begin to make up for chronic federal shortfalls in curriculum development and school construction funds. Likewise, while the

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<sup>1</sup> The term “Indian Country” is used in this report to refer to Native communities and areas, rather than strictly denoting those areas legally defined as Indian Country by the federal government. “Native America” and “Indian Country” are used interchangeably throughout this report, as are the terms “Indian,” “Native American,” and “American Indian,” which are intended to include Alaska Natives, unless otherwise noted.

The legal definition of Indian Country is found in 18 USC 1151. It defines Indian Country as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

<sup>2</sup> US Bureau of the Census, *Statistical Abstract of the United States: 1999* (119th Edition) (Washington, DC: US Census Bureau, 1999), Table 12.

burgeoning youth population strains standard non-Indian approaches to gang violence, teen drug use, and youth crime, tribes are tapping deep cultural connections to find solutions. Whether it is the union of Ho-Chunk elders and youth in mentoring programs, the restorative systems of justice for Navajo juveniles, or the training of Ojibwe teens to make music videos in their Native tongue, tribes are finding that traditional intergenerational bonds form a strong foundation for addressing today's issues. Those bonds of family, community, shared history and shared challenges stretch back through centuries. They undergird what it is to be "Indian" in America at the new millennium. They are the foundation on which Indian peoples now strive to define their own futures for themselves.

### *The Long Road To Self-Determination*

A moment's reflection must force acknowledgment of the phenomenal resilience of the Native people of North America. From the moment of European contact, their identity and survival have been under siege. Storms of oppression, racism, disease and attempted extermination have blown over American Indians as fiercely as over any people in history. Yet, with a tenacity that breeds its own offspring in the face of odds so stacked against survival for the last 500 years, America's Native peoples enter the 21<sup>st</sup> Century self-defined by their tribal identifications today as Muckleshoot or Hopi or Omaha or Swinomish or Seneca or Lakota or Seminole or Wampanoag or Penobscot or Delaware or Chickasaw or Lumbee...and on and on through an incredible diversity of culturally and politically distinct communities. To be sure, strains on personal, family and community identity and living conditions threaten to rent Native America. But at the dawn of the new millennium, the Indian voice is rising, population is growing rapidly, economic muscles are being flexed, and the winds of extermination and deidentification are being weathered. And it is not a time of hunkering down in Indian Country. As the research of this project documents, now is a time of proactive striving by Native Americans, individually and collectively, to establish their own fabrics of life by their own designs. From the arts and religion to politics and economics, from culture and language to education and the environment, the defining characteristic of Indian America at the new millennium is the drive for *self-determination*.

Many non-Indian Americans have some vague awareness of Indian issues, as when a conflict arises over the location of new casino or an insulting school mascot appears on the television. And there is general recognition in the broad public of the outlines of a stylized history of contact with Europeans, followed by conflict with the governments of the European colonies, decimation by disease and military engagement, the loss of land and the pushing of Indians onto reservations, and contemporary problems of poverty and attendant social problems – maybe now accompanied by questions about whether all Indians are getting rich on gambling or whether it's "really" Indian to run businesses and governments. Not only does such a simplified history fail to do justice to the experience of being Native;<sup>3</sup> it also misses the drive for self-determination that is at the core of Indian America today. Building a casino is not so much about money from gaming as it is about Indian tribes deciding for themselves what kind of economic activity they will pursue. Asserting tribal control over endangered species management on the reservation is not so much about protecting species as about protecting a tribe's own approach to protecting species. Taking over the reservation's schools is all about local control to fit local Navajo or Chippewa or Chickaloon needs. Launching an all-Indian rock band is as much about saying for oneself what it means to be Indian as it is about making music. Fighting to protect and recover the artifacts and remains of tribal ancestors is a fight to tell a people's own story in that people's own way.

The drive for self-determination in the current era has its immediate roots in the civil rights movement and political activism of, particularly, the 1960s. As with other ethnic and racial minorities,

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<sup>3</sup> See, for example, Brown, Dee, *Bury My Heart at Wounded Knee* (New York: Pocket Books, 1981); Bordewich, Fergus, *Killing the White Man's Indian* (New York: Doubleday, 1996).

the push for civil rights grew out of a long history of demeaning marginalization, racism, political disenfranchisement, brutality, and decades of poverty and social disarray. The Indian case, however, took its own distinct turns. Fired with political audacity and armed with legal underpinnings from high courts, treaties struck between the nation of the United States and their own respective *nations*, US constitutional principles, and occasional Congressional support, Indian activists, a growing number of Indian attorneys, tribal elected officials, and rank and file tribal citizens turned the drive for civil and human rights into the drive for protection and rerecognition of Indian rights of political *sovereignty*.<sup>4</sup>

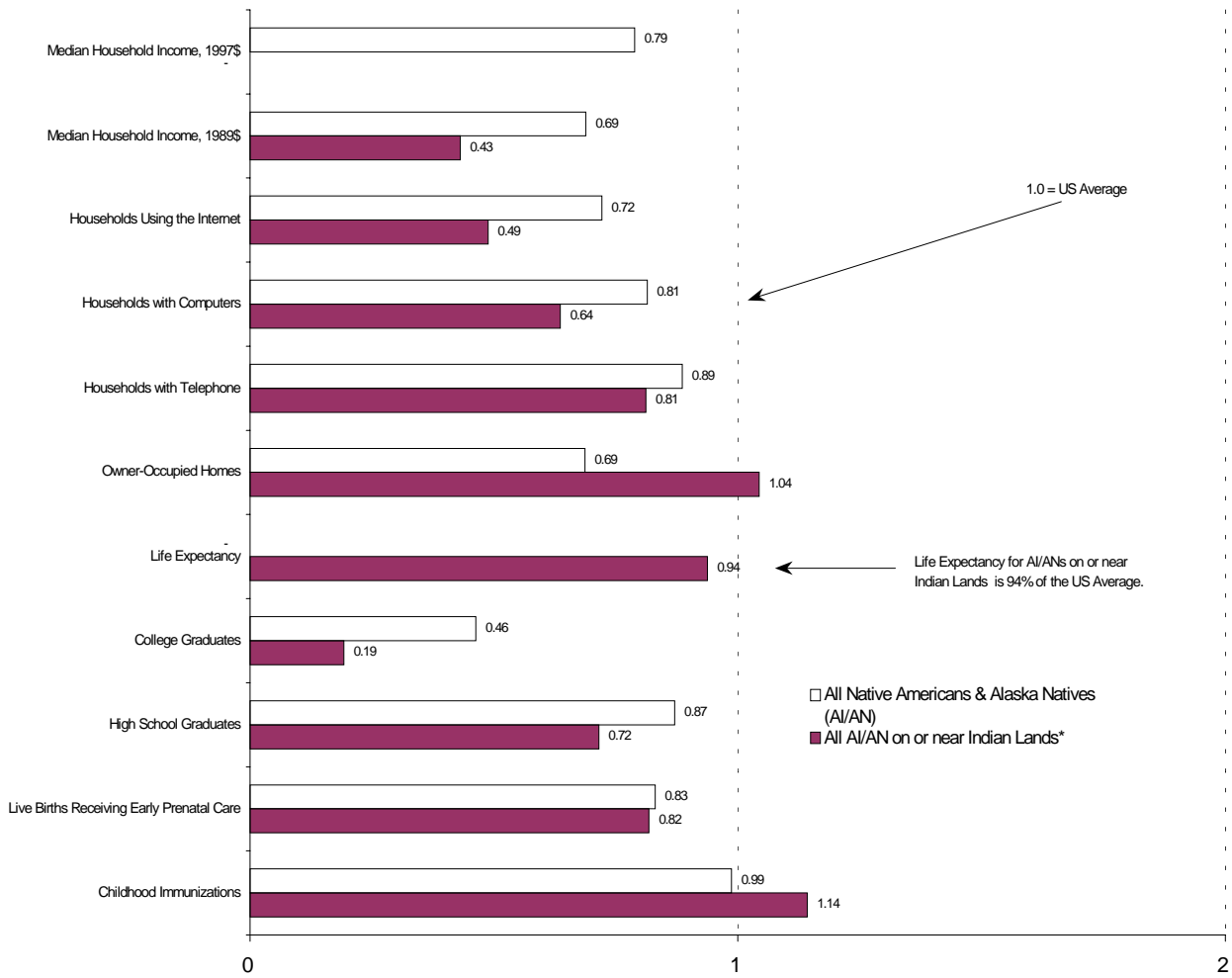
While the resurgence of Indian people and polities in the context of the Civil Rights Movement did not neglect the important work of personal strengthening, challenging the dominant culture's institutions, stereotypes and practices, and asserting distinctly tribal identities and values, the Native version of the Movement sought *and achieved* degrees of political separateness and self-rule. As one noted Native scholar has put it: "Indian Peoples are Nations, Not Minorities."<sup>5</sup> Thus, self-determination for Native Americans is not only an attribute of individuals; it is an attribute of communities. Self-determination is not only personal; it is political. When the young university graduate makes the decision to go home and devote himself to the reservation schools and says "I'm Fond du Lac Ojibwe", he expresses not only the roots of his experience and relations; he expresses the collective identity of a self-governing community that defines itself as the community that is fighting to build its own dental clinic, foster care program, and elder housing. When the young Crow woman leaves her home on the reservation and moves to Billings, Montana because that's the only place there are jobs to be had, she joins the majority of American Indians who live off-reservation. But when she tells her co-workers at Wal-Mart "I'm Crow", she expresses not only the identity of her personal upbringing in Lodge Grass; she also expresses the identity of a nation that is struggling to revise its constitution to tap into the stability of its clan system, trying to stabilize its court system, and hosting the annual festival of nations that is Crow Fair. To be Indian at the turn of the millenium is to live with one's own and one's community's striving for self-determination.

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<sup>4</sup> DeLoria, Vine, Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman, OK, Univ. of Oklahoma Press, 1969); Cornell, Stephen, *Return of the Naitve: American Indian Political Resurgence* (New York: Oxford University Press, 1988).

<sup>5</sup> Wilkens, David E., *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2002), p. 41.

Figure 1  
Measures of Socio-economic Well-being



Sources: see Appendix C for underlying data, sources, notes, and discussion.

### *The Road Is Hard*

Despite the advances tribes are making on their own and with the assistance of nonprofit organizations and the Federal Government, the broader picture of Indian socio-economic status continues to show substantial differentials between Indians and US society at large. As FIGURE 1 and FIGURE 2 indicate, Indians trail their non-Indian counterparts in a multitude of categories of socio-economic health. Figure 1 shows how American Indians and Alaska Natives compare to the US population across eight measures of socio-economic wellbeing, and Figure 2 shows Indians and Alaska Native compare across forty-one measures of socio-economic distress. By and large, when compared with the average American, Indians suffer from lower incomes, lower wealth (as evidenced by homeownership and home quality), lower educational attainment, greater unemployment, higher death rates from certain mental health and chronic diseases, and greater family disintegration. Moreover, Indians that live on or near reservations and other Indian land areas generally tend to have larger socio-economic differentials than Indians generally do.

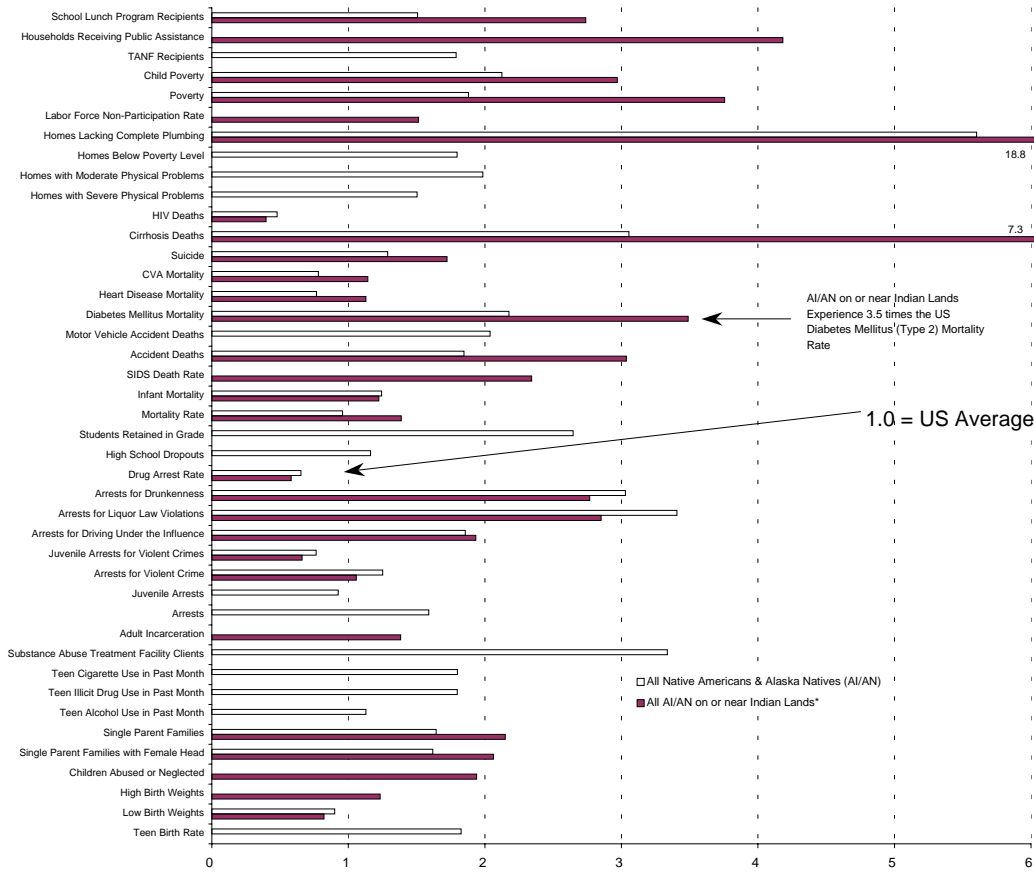
While there are some bright spots where Indians are better off than the average American – for example in HIV deaths and in childhood immunizations – the overall picture is negative and sometimes alarmingly so. Indians in the service areas of the Indian Health Service are 730% more likely to die from cirrhosis than the average American is. Similarly, Indians on reservations and trust lands are one-fifth as likely to graduate from college and four times as likely to live in a household receiving public assistance. The death rate from preventable diabetes is 350% greater for on-reservation Indians. The nationwide Indian per capita rate of substance abuse clinic utilization is 330% of the all-races average. These disparities are indicative of broken societies that are coping with the legacy of centuries of privation, paternalism, and outright subjugation and warfare. While gains have been made, much still needs attention.

Across the spectrum of social, economic, political, and environmental challenges, tribes are engaged in a process of safeguarding recent progress while coping with daunting poverty and ongoing challenges to tribal authority by:

- Strengthening their institutions of governance to more effectively assert their sovereignty;
- Diversifying their economic strengths to better improve their citizens' well-being;
- Innovating their social policies by drawing upon the experience of both the Indian and non-Indian worlds; and
- Tapping and developing their cultural resources – traditional and emergent.

We begin this report by highlighting these four broad themes of tribal activity.

Figure 2  
Measures of Socio-economic Distress



Sources: see Appendix C for underlying data, sources, notes, and discussion.

*Self-Governance* The year 2002 is just over 30 years into what is widely described as the “Self-Determination Era” of Indian policy.<sup>6</sup> Partly in response to vigorous tribal assertions of sovereignty in the courts, in the tribal governments, and in the Congress, and partly in response to the failure of every other federal approach to Indian poverty, the Federal Government has been stepping out of its role as quasi-colonial overseer of Indian affairs and is embracing the twin policy pillars of self-governance and self-determination. The Self-Determination Era has seen tribal governments evolve from being largely

<sup>6</sup> See Appendix B for a listing of the major phases of American Indian law and policy.



extensions of federal program agencies to being as independent and as self-governing as any nation or state.<sup>7</sup>

### **What is Indian Sovereignty?**

“Sovereignty” is a word with multiple meanings, interpretations and implications – and when applied to Indian affairs, there is no consensus on a single definition. At the term’s core, however, is the inherent right or power to govern. At the point of contact between Europeans and Native Americans, Indian nations were, by necessity and nature, sovereign; and the colonists treated tribes as foreign nations, leaving them to regulate their own internal affairs. The colonial powers and later the Federal Government clearly recognized the sovereign status of the tribes: Article 1, Section 8 of the US Constitution reads, “The Congress shall have power to...regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Thus, the governmental status of Indian tribes, and the unique federal relationship between the tribes and the US government, is firmly rooted in the supreme law of the US. And while there has been considerable uncertainty and much debate about the exact nature of this government-to-government relationship and the sovereign status of tribes throughout history, the Supreme Court, the President and the Congress have repeatedly reaffirmed that Indian tribes retain their inherent powers of self-government. (See Legal section)

There are several oversimplified generalizations that describe the present attributes of tribal sovereignty: “(1) Indian tribes possess inherent power over all internal affairs; (2) the states are precluded from interfering with the tribes in their self-government; and (3) Congress has plenary power to limit sovereignty.”\* In other words, tribes possess all powers of self-government except those that Congress has specifically removed. Tribal governments, as independent political entities, have the inherent right to make their own form of government, to determine their own citizenship, to make their own civil and criminal laws and be ruled by them in tribal courts, to license and regulate, and to tax. Tribal governments are responsible for a diverse range of governing functions, which include but are not limited to: educating their citizens, providing law enforcement and administering justice, developing economic, social and cultural programs, building infrastructure, and entering into contracts and agreements with other political entities.

Sources:

\*Canby, William, Jr. American Indian Law in a Nutshell. St. Paul: West Publishing Co., 1988, p. 71.

An Introduction to Indian Nations in the United States, National Congress of American Indians, 1999.

Beginning in the mid-1960s, the self-governance movement was best characterized as a process in which the tribes began asserting sovereignty. The bulk of tribal self-governance efforts was directed toward staking claim to tribal jurisdiction, resources, and decision-making authority while reducing the powers of outside decision-makers. Today, tribes are still making new assertions of sovereignty; however, the general emphasis in tribal government has shifted to strengthening institutions of governance, such as tribal courts, Head Start programs, enterprise boards, constitutions, or district development authorities. Tribes around the country are investing in their ability to get things done for their citizens in ways previously rendered impossible by federal paternalism, off-reservation special interests, and a lack of resources. Importantly, these investments account for a growing number of tribal successes – tribes are overcoming long-standing challenges and creating new opportunities across a wide range of areas. Nonetheless, the challenge of increasing both the breadth and the depth of governing effectiveness is paramount to further tribal development.

*Economic Development* The emergence of true self-governance in Indian Country has fostered increasingly successful economic ventures that make use of regulatory sovereignty, resource control, and

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<sup>7</sup> This is not to say that the struggle for self-governance is complete. In many respects tribes still face the challenges of having non-Indian mores, customs, institutions, and values imposed upon them. All else equal, however, tribes today have much greater control over their affairs than they did a few decades ago.

improved incentives for success. Even prior to the advent of casino gaming in the late 1980s, enterprises were taking root in Indian Country among those tribes that were in the vanguard of self-determination. In the early years of the Self-Determination Era, these enterprises derived their strength from regulatory advantages (e.g., smoke shops), from tribal jurisdiction over natural resource extraction and use (e.g., timber operations and ski resorts), and from tribal material culture and amenity resources (e.g., arts and crafts, and tourism).

Increasingly, tribes are creating an economic environment that will allow them to provide for their citizens' well-being without depending on regulatory advantages (which are under siege in Congress and the state legislatures) or on resource extraction (much of which has plateaued). However, success in these areas remains mixed, and economic diversification, the creation of sustained competitive advantages, the development of managerial human capital, and the attraction and retention of dollars in reservation economies remain challenges for virtually all tribes. While much has been made of Indian gaming in the media, the pace and distribution of Indian economic development remains uneven. Moreover, the low base of income, wealth, and human capital from which Indian economic development started means that even where casino and other enterprises have been successful, much still needs to be done. In the face of unemployment rates that typically exceed Depression-era national averages and legislative uncertainty around gaming and other rights, the work of creating successful economic activity remains one of the most important goals of the tribes.

*Social Reconstruction* Across the vast majority of indicators of social (and economic) health, on-reservation Indians lag the national averages by substantial – and sometimes alarming – amounts. Whether it is the alcoholism rate, the accidental death rate, the preventable diabetes rate, or the college graduation rate, these stark indicators are the most stubborn legacy of decades of poverty, fiscal shortage, failed federal policies of termination and assimilation, off-reservation opportunism, and weak tribal governments. As tribes continue to strengthen their governments and economies, they are directing resources, time, and attention to tackling these problems by augmenting federal programs, creating context-appropriate policies, and integrating approaches across social problem areas and policy disciplines.

While there is considerable creativity and, in some places, considerable enterprise revenue directed at these problems, only limited success has been attained, and large challenges loom in the future. Today, Indian tribes face welfare-to-work mandates with inadequate employment opportunities,<sup>8</sup> continuing federal fiscal reluctance, and a burgeoning youth population. Yet, there are no proven, robust policy approaches readily at their disposal. Along some dimensions (e.g., community policing), the tools of urban policy are being successfully translated to the needs of Indian Country. Along others (e.g., education), self-rule has translated into two decades' worth of experience and experimentation, but with only modest success. In the main, however, tribes confront profound social problems with relatively thin relevant research to guide their prioritization and efforts, a litany of failed policies to avoid, and no clear path for altering the “culture of poverty” while addressing the consequences of poverty. This area of profound need remains a critical challenge for tribal governments.

*Culture and Identity* Throughout the Self-Determination Era,<sup>9</sup> one of the major taproots of self-determination has been – for better and worse – “Indian culture.” To many outsiders, “Indian culture”

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<sup>8</sup> Tribes also operate welfare-to-work programs from a position of significant financial weakness. Federal funding to administer these mandates flowed to states, but not to the tribes, who now find themselves in yet another crisis created by federal policy.

<sup>9</sup> Just who the *self* is in self-determination can be a source of considerable debate. Federal policies, such as forcing multiple tribes to share a common reservation, and conflict over identity – whether it pits English speakers against Lakota speakers, long-time reservation residents against post-gaming émigrés, Apache traditionalists against evangelical Christians – can

means beautiful Acoma Pueblo pottery, grass dancers at the Crow Fair, or a dispute over ancient human remains covered in the local newspaper. While arts, crafts, powwows, and museum pieces matter a great deal to Native Americans, Indian culture is broader and deeper than what is on display to outsiders. It encompasses a group sense of identity, a shared outlook on the world, and a common mode of organizing community affairs. These cultural ties – whether formed from living uninterrupted for generations in an aboriginal homeland, using a common indigenous language, or sharing a common religious practice – have provided powerful problem-solving tools throughout the Self-Determination Era. Early in this period, shared cultural norms were useful primarily in building community cohesion for efforts against outside decision-makers. Increasingly, tribes are relying on shared norms to guide policy and thereby (it is hoped) to make more effective policies governing activities as diverse as education, natural resource management, and health care.

As the political stakes within tribes rise with economic development and true governing discretion, the fractures along cultural lines are becoming further accentuated. Moreover, demographic pressures from within (e.g., high birthrates and intermarriage) and cultural influences from without will continue to exert growing influence over Indian societies, and thus, the notion of what constitutes a given Indian society's culture will not remain static. As Indian Country becomes more complex and multicultural (along with the rest of the world), tribal governments will be increasingly challenged to use this evolving culture as a resource for innovative self-governance and to invest in culture, as they have done to date, without sparking destructive societal conflict.

While there is tremendous heterogeneity among tribes in their aggressiveness in asserting sovereignty, their ability to sustain economies, their experimentation with social programs, and their responses to cultural evolution, there is a common pattern of interrelationship among these domains of tribal activity. The foregoing has hinted at those interrelationships. The following sections elaborate on the frontiers of tribal challenges and how initiatives in one domain depend upon and support initiatives in other realms of activity. Broadly speaking, the following sections demonstrate that Indians are coping with four major challenges:

- *Nation Building* or the continuing task of unwinding the harmful parts of federal intervention in Indian affairs by developing tribal and intertribal organizational capacity;
- *Cultural and Demographic Change* which confronts Indian communities with burgeoning youth populations and repeated tussles between traditional and modern views of what *Indianness* is and ought to be;
- *Broken Societies* wherein lack of opportunity, personal despair, and family breakdown born of centuries of maltreatment and misguided policy continue to beguile individual and community efforts to improve everything from life expectancy to educational attainment to suicide rates; and
- *Creating Civil Societies* in which Indian communities are enriched by increasingly formal organizations outside the spheres of market and government.

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generate deeply divisive debates over who the *self* in self-governance rightly is. Indeed, some historians would argue that the Self-Determination Era was launched by just such a conflict: the “traditionalist” versus “progressive” standoff at Wounded Knee in 1973.

*Methodology*

This report began with a brainstorm of the topics relating to Indian affairs that rise to public salience in the media and in policy arenas. A list of 26 was consolidated into the 20 topics that make up the subsections of each of the three chapters. Then, to inform an initial draft, material was gathered from our prior research and field experience, from relevant government agencies, from Indian tribes and organizations, from library sources, and from the worldwide web. The initial draft was reviewed by the Sounding Board for the project, and that feedback spurred a number of telephone interviews and further quantitative and qualitative research. Where the data affords it, every effort was made to gather data about American Indians and Alaska Natives nationally and about on-reservation conditions as well.

By necessity, this report cannot be encyclopedic; it instead represents an overview of Native America. The cited references, of course, offer more depth, and a growing number of media and research sources covering Indian affairs offer more breadth.

**CHAPTER 1**  
**Peace and Social Justice**

## ***TRIBAL GOVERNANCE AND POLITICS***

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- Tribal governments are armed with legislative and socio-economic policy-making tools unavailable to past generations of Indian leaders. Administrative control over programs that make up the day-to-day business of tribal governance has most notably been achieved by tribes' willingness to embrace contracting and compacting for services heretofore provided by the Federal Government.
- Although many tribes possess governmental forms that remain heavily influenced by the *Indian Reorganization Act* of 1934 (IRA), there remains a broad spectrum of governmental forms, including theocracies, parliamentary systems, and direct and representative democracies. Tradition and tribal history, federal policies, tribal decisions regarding what qualifies an individual as a member of the tribe, and determinations regarding the appropriate role of off-reservation tribal members are all factors that shape the structure of tribes' governing bodies.
- The transition to greater self-governance, fostered by the passage of the *Indian Self-Determination and Education Assistance Act* of 1975, has been a success story for many tribes. This transition, however, is not always easy, and failures have subjected all tribes to legislative attacks and adverse court decisions that erode the right to self-governance.
- The Federal Government has a trust responsibility to protect the rights and property of the tribes.<sup>10</sup> The relinquishment of federal oversight of programs and services throughout Indian Country and the concomitant increase in the political powers of the tribes – both of which have gained momentum in the late twentieth century – do not imply an abandonment of the trust responsibility that the Federal Government bears on behalf of the Indian nations.

Tribal governance has changed dramatically over the preceding three decades. Tribal leaders are more educated and come from a wider range of backgrounds than their predecessors, tribal governments oversee budgets that are many times larger than they were only a few short years ago, and tribal staffs are increasingly professional and capable. In spite of the progress already made, tribal governance is still a difficult endeavor plagued by funding shortfalls, inadequate infrastructure on many reservations, the vagaries of federal policy, and the continuing complexity of tribal legal status.

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<sup>10</sup> Canby, William C., Jr., *American Indian Law in a Nutshell* (Third Edition) (St. Paul, MN: West Group, 1998).

### *Tools for Tribal Governance*

Though a movement towards self-governance had been taking place in Indian Country since the 1960s, the passage of the *Indian Self-Determination and Education Assistance Act* (PL 93-638) in 1975 gave tribes new opportunities to assume control over an ever-broadening set of programs.

Whereas the Federal Government historically carried out the administration of federal programs on the reservations, PL 93-638 allows tribes to take over the provision of such services. The mechanism for this transfer of programmatic control is called a “638 contract” and is much like a contract in the everyday sense of the word – the tribe agrees to provide the program services internally, and the Federal Government agrees to provide funds for administration of the program. Opportunity for contracting encompasses such diverse areas of tribal governance as the provision of educational services, oversight of tribal law enforcement and facilities operations, and resource management initiatives.

PL 93-638 has come to be recognized by many tribal leaders as one of the mechanisms by which Native control over programs and resources can be achieved. Nonetheless, a number of shortcomings limit the program. First, funding restrictions, as well as funding shortfalls, limit the applicability and scale of the program. Second, onerous reporting requirements and federal regulations consume tribal administrators’ time and attention. Third, critics of PL 93-638 are concerned that contracting diminishes the trust responsibility that the Federal Government is obliged to maintain on behalf of the Indian nations.<sup>11</sup> Fourth, contracting under 638 means that tribes have to accept the Federal Government’s relative spending priorities, such that tribes cannot reallocate funds across contracted programs.

In response to these shortcomings, the Federal Government passed the *Tribal Self-Governance Demonstration Project* (PL 100-472)<sup>12</sup> in 1988. This project was an amendment to PL 93-638 and established a five-year pilot program that allowed tribes to compact with the Federal Government under a more flexible arrangement similar to block grants distributed in other areas of federal allocations.<sup>13</sup> In contrast to contracting, which occurs on a program-by-program basis, compacting allows a tribe to receive a lump sum payment from the Federal Government for all compacted services; the monies can then be reallocated across a range of services provided by the tribal government. Tribes are thus better able to appropriate among programs to meet local needs and to address changing conditions.

According to the Office of Self-Governance (OSG), which is the office within the Department of the Interior (DOI) charged with administering tribal self-governance compacting of Bureau of Indian Affairs (BIA) programs, the self-governance initiative was passed to “expedite the transition away from the federal domination of Indian programs.”<sup>14</sup> This transition to Native control of vital governmental functions had been taking place since the passage of PL 93-638, but the pace of transition was unsatisfactory for many tribes and the US Congress. Currently 75 funding compacts exist, with 217 tribes covered by these agreements.<sup>15</sup>

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<sup>11</sup> Contracting does not imply a diminishment of the trust responsibility.

<sup>12</sup> In 1994 the *Tribal Self-Governance Act* (PL 103-413) redefined compacting as an ongoing program rather than a pilot project, and extended the number of tribes eligible for inclusion into the program to 50 (from a limit of 20 under the demonstration program) per year. In August 2000, President Clinton signed PL 106-260, which authorized permanent self-governance authority for Indian Health Service programs and provided for a study of self-governance within the Department of Health and Human Services (HHS).

<sup>13</sup> The initial pilot program was extended for an additional three years with the passage of PL 102-184 in December 1991.

<sup>14</sup> OSG website, accessed at [http://198.183.147.169/program/background\\_information.html](http://198.183.147.169/program/background_information.html).

<sup>15</sup> Consortia of tribes can be funded under a single agreement – in Alaska, for example, the regional corporations provide many of the eligible BIA and IHS services to Alaska Natives under consortia-based arrangements. These numbers are for FY 2000,

Contracting and compacting have become important tools utilized by many Native nations to facilitate the advancement of tribal governance, and they are quite popular as funding mechanisms, but they are not without their problems. The costs associated with supporting contracts burden the budgets of agencies such as the BIA, and at this time compacting is an option only available for programs previously administered by the BIA and the Indian Health Service (IHS). In addition, some see contracts and compacts as little more than block-grant systems that transfer the obligation for service provision from the Federal Government to the tribes, with no concomitant obligation to maintain funding levels and a relinquishment of the safety net previously provided by Washington.<sup>16</sup> For tribes in Alaska, the opportunity to fully utilize the intent of PL 93-638, including the amendments thereafter, are limited. The ability of tribes in Alaska to contract for educational systems, for example, was terminated in 1985 through a legislative rider – despite the existence of federal contracts among five Alaska tribes.<sup>17</sup>

### *Governmental Forms and the Roles of Tribal Citizens*

The governmental structures found in Indian Country are as heterogeneous as the Indian nations themselves are. Athenian-style general assemblies, evolving theocracies with roots in ancient times, and parliamentary systems can all be found operating as governmental structures in the Indian Country of today. The policies of the Federal Government have had a significant homogenizing influence on the structural forms utilized by the tribes. The 1934 passage of the *Indian Reorganization Act*, for example, ushered in a period of constitution writing whose effects are still felt today as tribes struggle to operate under institutions of governance that are, in many cases, markedly different from those previously created by the tribes themselves.

The IRA sought to end some of the worst effects of the allotment period<sup>18</sup> by returning a degree of control to tribal governments, but resulted in mixed success. The mixed success of the IRA was ensured by a design flaw fundamental to the Act – the IRA Constitutions were nothing more than boilerplate documents that ignored the wide variety of legitimate governing formats the tribes had utilized to govern themselves for many years.<sup>19</sup> Crafters of the bill envisioned an environment where tribes could opt out of operation under the terms of the IRA Constitutions, and some tribes took advantage of the ability to opt out. Though the number of tribes adopting IRA Constitutions (181 tribes adopted IRA

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according to the OSG. Though the absolute number of tribes participating is high, many of those operating under a compact are not participating in self-governance in the spirit of the term – some have compacted a single program in a single area, a practice which some argue reduces compacting to merely a funding mechanism that has little bearing on tribal governance *per se*.

<sup>16</sup> Legters, Lyman H., and Fremont J. Lyden (eds.), *American Indian Policy: Self Governance and Economic Development* (Westport, CT: Greenwood Press, 1994), pp. 57-59.

<sup>17</sup> Moreover, funding for law enforcement, facilities operation and natural resource management is non-existent. Recently, the US Department of Justice began to provide limited funds for tribal law enforcement; however, the US Department of Interior does not provide funds in these areas.

<sup>18</sup> Ending allotment certainly helped tribes alleviate the egregious loss of land base they had been suffering under the *Dawes Act* (see Land section and Appendix B of this report).

<sup>19</sup> Fredericks, John, III, “America’s First Nations: The Origins, History and Future of American Indian Sovereignty,” *Journal of Law and Policy*, Vol. VII, No. 2, 1999, pp. 375-376. The model for the BIA’s boilerplate tribal Constitution appears to have been the American Legion’s governing document. It provided for no dispute resolution mechanism, established a strong office of the chief executive, and delineated no explicit separation of powers. Prior to European contact, tribes had evolved a wide variety of institutions of governance, including highly differentiated parliamentary systems with well-articulated checks and balances.



Constitutions and 77 rejected the IRA<sup>20</sup>) might be viewed as broad support for this style of governmental form, the relatively large number of adopters is misleading, as many of these were effectively *forced* to fall under the IRA. The manner in which the referendums on the IRA were held actually made it difficult for a tribe to opt out – abstentions were frequently counted as votes *for* adoption of the IRA Constitutions, and voter turnout was so low that few, if any, real majorities supported this governing system.

Some tribes have fared relatively well under IRA-style governing bodies, while others have floundered under a governmental design at odds with tribal historical and cultural beliefs about what comprises legitimate government. For example, some of the Apache tribes operated, prior to contact with Europeans, under systems of government that were mirrored closely by the IRA-style constitutional design. These nations have done relatively well under the IRA Constitutions because of this historical convergence between the type of governing institutions embodied in the IRA and these tribes' indigenous assumptions about legitimate authority. Other tribes have not been so fortunate. The traditional governments of the Lakota, for instance, did not closely mirror the IRA governments that were subsequently imposed. The people of the Pine Ridge Reservation provide but one example of those even now struggling with difficult questions regarding the type of government under which the Nation should operate.<sup>21</sup>

One of the most fundamental questions to be decided by any constitutional regime is the question of exactly who is governed. The tribes are largely free to determine the answer to this question on a tribe-by-tribe basis, and a number of methods for determining tribal membership are currently employed.<sup>22</sup> Confusion exists over the use of blood quantum (or percentage of Indian blood) for determination of tribal membership. Though some tribes do maintain a minimum blood quantum requirement for membership, an individual can possess a high degree of Indian blood and not be on any tribal membership list. The confusion over tribal membership is heightened by the Federal Government's issuance of a document called a Certificate of Degree of Indian Blood (CDIB). The CDIB allows individuals to demonstrate Indian ancestry, but does not confer tribal membership upon them.<sup>23</sup> The determination of precisely which individuals comprise tribal membership has become more difficult for many tribes as "being Indian" has become increasingly popular and as increasing numbers of people hope to benefit from programs or benefits reserved for members of federally recognized tribes.

An additional question integral to the politics (and the political systems of governance on the reservations) concerns the appropriate role of tribal members who reside off-reservation. Issues such as membership criteria and division of public goods are becoming more contentious as the percentages of the voting tribal populations residing off-reservation continue to grow. A divide is forming within many

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<sup>20</sup> Porter, Robert, *Strengthening Tribal Sovereignty Through Government Reform: What Are The Issues?* accessed at <http://www.socwel.ukans.edu/culturaljustice/strtribe.htm>.

<sup>21</sup> See, for example, coverage of the events of 2000 on the Pine Ridge reservation in "Turmoil at Pine Ridge Could Exact High Price," *Indian Country Today*, March 29, 2000; "Oglala Chief Judge Attacked in His Office," *Indian Country Today*, July, 19, 2000; and "Oglala Council Orders Red Cloud Occupiers Out," *Indian Country Today*, July 26, 2000.

<sup>22</sup> For example, according to the University of Oklahoma, membership requirements for the tribes located within that state vary from direct lineal descent with no minimum blood quantum requirement, at tribes such as the Osage and the Choctaw, to a 1/16 blood quantum requirement for the Ft. Sill Apache, to a 1/4 degree blood quantum requirement at tribes such as the Kiowa and the Comanche. See the University's website at <http://thorpe.ou.edu/OILS/blood.html> for a complete list as of April 1998. Note that tribes are somewhat constrained in their membership criteria because of tribal reliance on federal programs that require 1/4 Indian blood.

<sup>23</sup> Many individuals possess CDIBs that demonstrate ancestry that is traceable back to groups that are not federally recognized American Indian tribes. See Stockes, Brian, "Federal Indian Certification Regulations Raise Concerns," *Indian Country Today*, August 23, 2000, for a discussion of the use of CDIBs to verify eligibility for federal programs that are not reserved only for tribal members, as well as a synopsis of a federal plan to revise the requirements for receiving a CDIB.

Native nations between the desires of those who live on-reservation and those who reside off-reservation. This divide is greatly exacerbated where gaming revenues have grown quickly and the question of how to allocate tribal wealth is intensifying. The resolution of questions such as these occasionally subjects the governing structures of the individual tribes to serious challenges concerning the appropriate form of governance for the tribe in question, and over time is resulting in the reform of the very structure of some tribal systems of administration.<sup>24</sup>

### *The Transition to Self-Governance*

Even with the tools for autonomy afforded tribes by the passage of PL 93-638, PL 103-413, and PL 106-260, tribes have not completely made the promise of self-governance a practical reality. A growing body of evidence suggests that one of the keys to building effective societies is the creation of well-functioning governing institutions.<sup>25</sup> When these institutions are in place, benefits such as increased tribal employment, rising incomes, and revitalized communities can accrue to tribes. In short, needs that went unmet under federal paternalism may be more successfully addressed under self-governance, if the proper governing infrastructure is in place. Examples of tribes that have made great strides towards effective self-governance include the Mississippi Band of Choctaw Indians, the White Mountain Apache Tribe, and the Fond du Lac Lake Superior Band of Chippewa.

#### **The Collection of Data in Indian Country**

The effective expansion of self-governance is needed throughout Indian Country across a multitude of programs, including the collection of accurate and timely Indian- and reservation-specific data. This is but one example of an area in which tribal governments could take a proactive role – the BIA’s inability to collect tribal data is well known. The National Congress of American Indians (NCAI) is attempting to work with the BIA to establish a better mechanism for data collection, but successful implementation of such a proposal will require active assistance from tribal governments.

This complaint about a shortage of information can be heard across a spectrum of issues ranging from economic development to housing, to fetal alcohol syndrome, to crime rates. Policy-makers and analysts in tribal and federal agencies, in congressional committee staffs, in academia, in intertribal organizations, and even in focused Indian lobbying organizations have great difficulty obtaining a robust picture of Indian Country. Two decades ago, when the BIA was much more deeply entwined in tribal government, it was able to compel – on occasion – the production of even sensitive data such as bingo revenues. Now that the BIA has spent 25 years withdrawing from that role, a vacuum remains. Some tribes are becoming quite sophisticated at monitoring their societies. In addition, a number of private sector firms are conducting surveys for tribes and the Federal Government (e.g., Tribal Data Resources and Tiller Research). Nonetheless, difficulties of intertribal coordination, sensitivity about sharing data with other sovereigns, methodological variation, and the like have meant that comprehensive data on Indian Country are lacking in quantity and quality. As tribes continue to engage their nation-building agendas, they will increasingly confront the need to benchmark their government activities against conditions in their communities and against other tribal governments’ activities. Data gathering and analysis will thus be core elements of the nation-building process.

See, for example, Fortune, Jimmie C., *Demographic Survey 1997* (Philadelphia, MS: Mississippi Band of Choctaw Indians, 1997).

Consider, for example, the case of a single example of how the Fond du Lac Band has leveraged its power of self-governance to expand its jurisdictional authority *beyond the exterior boundaries of the reservation*. Concern over the low number of Indian foster children being placed in Indian homes led the

<sup>24</sup> Some tribes, such as the Mississippi Choctaw, are considering *citizenship* status for all on residing on-reservation. The implications of such initiatives for *members* versus *citizens* are not yet known.

<sup>25</sup> For example, a well-functioning court system and a civil service or administrative staff that is insulated from the political process.

tribal government to seek a way to exercise its licensing authority beyond the reservation boundaries, and thus increase the number of eligible Indian foster homes. The Band established the Fond du Lac Foster Care Licensing and Placement Agency, a 501(c)(3) corporation created under the regulations of the state of Minnesota. The Agency has allowed the Band to overcome the jurisdictional problems the Tribe was facing in its efforts to expand its authority into neighboring communities, and serves as a model of innovative governmental practice.<sup>26</sup> By establishing a nonprofit entity that was separate and apart from the Band, the Fond du Lac government's Division of Human Services was then able to contract to this state agency for the provision of programmatic and administrative services, and effectively expand the availability Fond du Lac Foster Care Licensing and Placement Agency, while at the same time dramatically increasing the number of Indian children placed with Indian foster parents.

Unfortunately, not every Indian nation is making as smooth transition into self-governance as Fond du Lac has so far been able to. The Native press is filled with stories of tribes suffering from political infighting, continued economic hardship, and an unraveling of the social fabric that had previously held communities together. Those nations lacking institutions capable of effectively channeling the actions of elected officials are particularly prone to abuse, and tribal politicians backed by strong factions have the ability to exploit their offices unchecked.<sup>27</sup> Nations without an effective set of internal monitoring institutions sometimes find themselves in a spiral of broadening instability, with the Federal Government less willing or unable to serve as a fallback arbitrator. This institutional weakness decreases tribes' stature as sovereigns in the eyes of outsiders and increases the probability that the right of tribes to govern themselves will be weakened through legislative attacks and court decisions.

### *Political Empowerment*

Successful assertions of tribal sovereignty over the last 30 years, coupled with legislative actions by the Federal Government, have increasingly resulted in the political empowerment of the nations of Native America. In turn, many tribes have begun focusing on building the institutional capacity required to function as politically autonomous nations. But many struggles remain. Though tribes' political status is being continuously redefined and disputed in the courts and in the halls of the US Congress, several themes have guided the development of the political powers held by Indian nations.

The degree to which American Indian nations have been viewed as political entities separate and apart from the federal and state governments has varied over time. While the "official" stance of the Federal Government has been that tribes are indeed sovereign, the independence of tribes is subject to great powers of Congress, which possesses plenary power over Indian affairs. Likewise, the level of political control tribes can exert is constantly being questioned. Since the mid-1960s, these questions have begun to be answered through tribal assertions of sovereign rights, court decisions, and explicit legislative action by the Federal Government.

In addition to winning several crucial victories through litigation, tribes have particularly benefited from two significant pieces of federal legislation enacted in the last 25 years. *The Indian Self-Determination and Educational Assistance Act* and the *Tribal Self-Governance Act* once again redefined the Federal Government's position on the ability of tribes to carry out their sovereign political powers.

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<sup>26</sup> For example, the Agency was a recipient of a High Honors award in Harvard University's *Honoring Contributions in the Governance of American Indian Nations* in 1999.

<sup>27</sup> A problem common throughout Indian Country is that tribal governments have long served as "engines" for employment and job-creation mechanisms rather than being accountable as efficient governing structures. The system of jobs-as-political-spoils has skewed elections and hindered the development of capable governing institutions on a number of reservations.

The passage of these acts codified expanding tribal influence and control over an ever-broadening set of programs.

### **Personal Political Empowerment: Indian Women as Political Leaders**

Statistics show a fairly rapid increase and then leveling off in the percentage of Indian women holding the highest office in their nations (the “Chairman,” “President,” “Governor,” or “Chief,” depending on the nation). In 1981 approximately 13% of Native nations’ chief executives were women; in 1992 and again in 2001, some 22% of Native nations’ chief executives were women. While the leveling off may be of concern to activists, Native America does well by comparison to many cultures: statistics for 2000 show only nine female heads of state worldwide (or 3.4%). According to this measure, women in Native America have a much more prominent voice.

Of course, political leadership encompasses many positions within government; in tribal government this includes positions such as Vice-Chairman (or Vice-President, Lieutenant Governor, or Vice-Chief), Tribal Secretary, Tribal Treasurer, council member or legislator, and manager within the tribal administration. While precise statistics are not available, women’s leadership is seen *even more frequently* in such positions. This is true in other cultures and parts of the world as well, but it is worth noting that Native women’s more frequent presence in these positions implies a participation percentage higher than 22% (the percentage of Native nations’ chief executives who were women in 2001) – a rate that in early 2002 was matched by only seven parliaments and legislatures in the world.

The statistics are impressive, yet it is still the case that Native women as political leaders face particular challenges. One leader put it this way: “I don’t have that much power and authority. Before I even open my mouth, the minute I stand up, I have three strikes against me – I’m elderly, I’m a woman, and I’m Indian.” Addressing these challenges and giving increased place to female voices in tribal politics (a place which is strongly influenced by particular Native cultures’ mores) remain important issues for all Indian nations.

Sources:

Anderson, Owanah, “Today, 67 ‘Chiefs’ are Women,” *Ohayo Newsbulletin*, July 1981.

Begay, Manley, “Leading by Choice,” Doctoral dissertation, Graduate School of Education, Harvard University, Cambridge, MA, June 1998.

Prindeville, Diane-Michele, “Women’s Leadership in American Indian Politics,” working draft prepared for the 2002 Western Social Science Association Conference, Albuquerque, NM, April 2002.

“Main Findings and Future Directions,” *The World’s Women 2000: Trends and Statistics* (New York, NY: The United Nations, 2000); accessed at <http://www.un.org/Depts/unsd/ww2000/overview.html>.

“Tribal Leaders and BIA Representatives Directory,” Bureau of Indian Affairs, US Department of the Interior, July 2001; accessed at [www.doi.gov/bureau-indian-affairs.html](http://www.doi.gov/bureau-indian-affairs.html).

“Women in Parliament,” *Economist*, March 16, 2002, p. 112.

Tribes continue to find that increased political powers, however, do not come without attendant costs. Following successful assertions of sovereignty, tribes are often confronted with new challenges, such as underdeveloped institutional capacities for self-government, and leadership that has long been focused on program administration rather than on governing. In addition, the potential for conflict with neighboring non-Indian communities and individuals often increases as newfound political powers are exercised.

The general reduction of federal interference into every aspect of tribes’ political activities has undoubtedly been a positive development for those tribes seeking to make self-governance a practical reality. The federal pullback, however, has left Indian Country, in many cases, without the institutions required to effectively and efficiently discharge important functions associated with their “re-empowered” sovereign status. Tribes are thus put in a situation of governing themselves while simultaneously attempting to build the entire range of requisite governing institutions, including tribal courts, tribal housing authorities, child welfare agencies, tribal wellness centers and district development agencies. Tribal governments that are ill-equipped to establish an appropriate mix of such institutions are likely to suffer. Research from Indian Country shows that carefully crafted institutions are no less important for

economic and social development than natural resources and human talent. Properly structured governing institutions, operating within a set of culturally defined checks and balances, are prerequisites for effective self-governance.<sup>28</sup>

In addition to developing and establishing institutions of governance, the leaders of Indian Country are experiencing a redefinition of the roles that individual political actors are required to play. Rather than being confined to a position of field-administrator of federal policies on the reservations, tribal leaders now find themselves head policy-makers for emerging nations. Many have risen to the task, and several have consistently been held up as examples of proactive leadership for others to follow. Nonetheless, not all tribes have been able to make a seamless transition to self-governance, even in today's environment of relatively contributive federal policy.

### **Political Sophistication in Indian Country**

The political sophistication of the tribes is increasing throughout Indian Country, though there is still a disparate range of savvy when dealing with federal or state officials. The Confederated Tribes of the Grande Ronde, for instance, maintain an office in Salem, just minutes from the state capitol building. In addition to allowing the Tribe easy access to state legislators to discuss issues of importance, the office serves as a valuable tool for educating the public about the rights of the Indian nations. Conversely, stories abound of tribal council members who attend meetings in Washington, DC and who, with a single social or professional *faux pas*, undermine the credibility of all Indians in the eyes of Congressmen and the staffers who oversee the federal policy that impacts Indian Country. Finally, one of the most readily apparent effects of increased tribal control of programs (often through 638 contracting or self-governance compacting) is a blurring of jurisdictional boundaries. As the administrative jurisdictional reach of tribes begins to extend beyond reservation boundaries, legal uncertainties, which have long plagued court cases involving Indian rights (see the Legal and Land sections of this report), are likely to increase. Programs and services that were previously administered by the Federal Government are now increasingly falling under tribal control, and the "service areas" of all such programs do not necessarily conform to the geopolitical boundaries of the reservations. Wildlife management programs are a good example of this jurisdictional problem, as the animals or fish that tribes find themselves managing do not recognize the confines of a particular reservation or national park.

The founders of the United States recognized early in the formation of their nation that the potential existed for the tribes and states to differ over questions of the political rights inherent to the tribes. In the US Constitution, the leaders of the nascent Federal Government explicitly subordinated the powers of both the tribes and the states<sup>29</sup> to the Federal Government, and thus established a still-existing standard that reserves many rights for the tribes, free from regulation by the states with which tribal lands are coincident. This vesting of powers to the tribes rather than the states has been challenged numerous times over the last 225 years, but the legal system of the US has *generally* maintained the establishment of Indian control over reservation lands.<sup>30</sup>

The degree to which the Federal Government recognizes the political autonomy of the Indian nations does shift over time, however, as does the expansiveness of the interpretations applied by the

<sup>28</sup> For a more complete discussion of the role of institutions in Native nation building see Cornell, Stephen, and Joseph P. Kalt, "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development," *The Journal of Socio-Economics* 29, 2000, pp. 443-470.

<sup>29</sup> The subordination of state powers is not complete, as the Tenth Amendment to the US Constitution provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

<sup>30</sup> The *Worcester v. Georgia* decision, issued in 1832, is one of the earliest and most important court decisions to explicitly reject state jurisdiction over a non-Indian within reservation boundaries (see the Legal and Land sections, as well as Appendix B, of this report for additional discussion).

courts to questions of Indian law. These decisions, in turn, affect the degree to which the tribes are able to exercise their political independence. Even in times when federal policy clearly supports the rights of tribes to govern themselves and their lands, the legal system can serve as a check on the political powers exerted by the tribes. Some legal scholars feel that, at the turn of the millennium, Indian Country is subject to conflicting legislative mandate and legal rulings.<sup>31</sup>

Several developments are simultaneously acting to increase the political ascendancy of tribal governments. Primary among these developments is the relinquishment of federal oversight of programs and services throughout Indian Country. The forfeiture of federal control is being achieved by a number of means, including but not limited to a general trend of devolution, litigious victories won by tribes and individual Indians in the court system, and the widespread popularity of contracting and compacting to return control of services directly to tribal governments. Devolution and the advent of contracting and compacting, in particular, are a cause for concern among a number of Indians, who fear that the trust responsibility<sup>32</sup> owed them by the Federal Government will be diminished as tribal governments become more important political actors on the reservations than the Federal Government.

Welfare reform provides an example of the debate raging over the effects of devolution on the trust responsibility. Tribal leaders in Indian Country are concerned that welfare reform is, in fact, a transfer of the federal trust responsibility to the states as well as an abandonment of the government-to-government relationship that exists between the tribes and the Federal Government.<sup>33</sup> The magnitude of the threat posed by an abrogation of the trust responsibility via welfare reform has led to substantial energy being spent by the tribes on advocacy and educational efforts targeted at both the federal and the state levels. These efforts to remind US policy-makers that the trust responsibility remains intact are critical because, though it legally may be the case that the Federal Government maintains its trust responsibility for Indian welfare, welfare reform has placed administrative control of the program in the hands of the states and at a distance from the trustee, i.e., the national government.<sup>34</sup>

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<sup>31</sup> See, for example, Foerster, Arthur F., "Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction," *UCLA Law Review*, April 1999. Mr. Foerster argues that at this time "courts appear to be operating on an assimilation model that is contrary to the self-determination model promulgated by Congress." Mr. Foerster further argues that congressional action is required to draw the appropriate boundaries between tribal empowerment and jurisdictional control that has been eroded within the courts of the various states. In addition, tribal actions can be congruent or at odds with policies and decisions of a number of political actors: the states, Congress, the Executive Branch, the courts, etc.; see Cornell, Stephen, and Jonathan Taylor, "Sovereignty, Devolution, and the Future of Tribal-State Relations," presented at the NCAI Mid-Year Session, Juneau, AK, June 26, 2000.

<sup>32</sup> The trust responsibility is the obligation owed by the federal government to the Indian nations in exchange for ceded lands. The trust responsibility compels the federal government to protect the resources and interests of the tribes, and traces its origins to the treaties signed between the Indian nations and the federal government, as well as defining cases of Indian law such as *Cherokee Nation v. Georgia* (1831), in which the trust responsibility was first formally articulated.

<sup>33</sup> Allen, W. Ron, National Congress of American Indians (NCAI) President, *Prepared Statement on the FY 1999 President's Budget Request for Federal Indian Programs*, to the Senate Committee on Indian Affairs, February 25, 1998, accessed at <http://www.ncai.org/indianissues/FederalAppropriations/99scbt.htm>. See, also, *The Implementation of Welfare Reform in Indian Country: A Comprehensive Review of NCAI's Involvement*, October 1998, accessed at <http://www.ncai.org/indianissues/WelfareReform/wrpimoct98.htm>.

<sup>34</sup> While it is true that tribes can administer Temporary Assistance for Needy Families (TANF) themselves, they face a disincentive to do so because administrative funding does not transfer from the states to the tribes (see the Welfare section of this report).

**Indians Heard at the National Level**

Tribes today are more politically savvy than they were even a few decades ago, and in some local elections the expanding Native population gives Indians an important voice. In Arizona, this large block of voters has helped non-Native “pro-Indian” politicians, such as US Senator John McCain, win office. Colorado, though not one of the ten states with the largest number of Native residents, has been represented in Washington by Benjamin Nighthorse Campbell for more than a decade. A member of the Northern Cheyenne Tribe, Representative Campbell was elected to the House of Representatives in November of 1986 from the Third Congressional District of Colorado. In 1992 he was elected to the US Senate and became the first American Indian to hold a seat in the Senate in more than 60 years. Senator Campbell currently serves as the co-chair of the Committee on Indian Affairs, the first Indian to do so.

In addition to seeing a growing number of elected officials who are cognizant of Native issues, the past 30 years have shown a steady increase in the number of non-elected Native advocates in Washington, DC. Nations such as the Navajo, Saginaw Chippewa, Mashantucket Pequot, and Chickasaw maintain full-time offices in Washington, complete with an ambassadorial corps of diplomats, paid lobbyists, and professional attorneys working to further Native issues.

As this corps of professionals grows, so to does the amount of money being given by Indians in the form of campaign contributions.<sup>35</sup> Increased resources, and the confidence to use these resources to back candidates sympathetic to Indian causes, have recently reached an all-time peak, exemplified by a concerted fundraising effort waged by Indians to help defeat the re-election bid by Slade Gorton, the senior Senator from Washington state, who is well-known for a number of positions he has taken against Indian causes. This concerted effort was perhaps the deciding factor in what proved to be an extraordinarily close race – Maria Cantwell was declared the victor by recount weeks after the ballots were cast on November 7, 2000.

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<sup>35</sup> Enabled by the economic gains made by tribes, these campaign contributions are appropriately viewed by tribes as providing access to the corridors of power long considered unreceptive, if not overtly hostile, to the voices from Indian Country. “In the 1996 election cycle Indian gaming interests gave \$1.6 million in PAC contributions, soft money, and individual contributions combined to federal campaigns. This accounts for 26% of the \$6 million given by the entire gaming industry, which is up from 20% and 8% in the 1994 and 1992 election cycles respectively.” From the Center for Responsive Politics website, accessed at [http://www.opensecrets.org/pubs/cashingin\\_gaming/gaming3.htm](http://www.opensecrets.org/pubs/cashingin_gaming/gaming3.htm).

## ***TRIBAL-FEDERAL RELATIONS***

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- Though the Federal Government recognizes the Indian nations as sovereign governments, much of the treatment of the tribes by the US can be characterized as paternalistic, at best.<sup>36</sup>
- The primary federal agencies that provide services to the tribes are the BIA and the IHS, which have been chronically underfunded by Congress.<sup>37</sup>
- The federal recognition process, by which the US government acknowledges tribal governments, has changed markedly over the last decade and has become an increasingly controversial aspect of the BIA's activities.

The tribal-federal relationship is constantly evolving. The number of federally recognized Indian tribes is increasing, and all tribes find themselves regularly interacting with newly elected US officials who bring their own conceptions and misconceptions of the “Indian problem” to Washington, DC. The interplay between Indian Country and Washington takes place in a complex environment, and, notwithstanding the effects of federal devolution and increasing tribal power, the interactions between the tribes and the Federal Government will continue to remain central to Indian Country for the foreseeable future.

### *Federal Paternalism and Ward Status*

Tribes and the Federal Government have interacted on a government-to-government basis<sup>38</sup> from the earliest days of Indian contact with Europeans. The Federal Government's relationship with tribes

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<sup>36</sup> Some of the earliest interactions between the tribes and the US government are memorialized in treaties signed on a government-to-government basis that remain in effect to this day.

<sup>37</sup> An August 1999 report by the National Academy of Public Administration labeled the BIA an “Organization Under Siege” and noted that the BIA's problems extend well beyond a mere lack of funding: “[The BIA] is widely perceived as having chronically weak management and administration. This perception makes it difficult for BIA to obtain administration and congressional support for its programs, in spite of the widespread opinion in Indian Country that funding is inadequate to meet the acute needs on many reservations.” *A Study of Management and Administration: The Bureau of Indian Affairs*, p. 49, accessed at <http://www.napawash.org/napa/biareport.pdf>.



carries with it a trust obligation owed to the tribes by the United States, which dates back to treaties signed between tribes and the emerging US government. In exchange for land transfers, the Federal Government agreed to oversee assets for the good of tribes (i.e., the beneficiaries).<sup>39</sup>

The trust responsibility, and the precise implications of the responsibility, have shifted over time. Currently, the Federal Government bears a fiduciary duty for the oversight of a broad range of assets such as trust funds and mineral resources. Though the fiduciary duty borne by the Federal Government is stringent in a legal sense, the application of a legal definition to the trust responsibility appears to tie the relationship between the Federal Government and Indian Country too narrowly to a particular set of assets and programs. This relationship, however, is more appropriately viewed in a broader sense than that of simple resource management on behalf of the Indian people. Over time the trust responsibility has grown to encompass many branches of the Federal Government – not simply the BIA and the IHS – and is viewed as a continuing acknowledgment by Washington of the land and assets ceded by the tribes to the US.<sup>40</sup>

Federal practices arising from both the trust obligations owed to tribes and the status of Indians as wards of the Federal Government have been poorly executed. Examples of trust obligations that initially appear beneficial to tribes include the protection of tribal lands from appropriation by unscrupulous individuals; the administration of the development of natural resources for the benefit of tribes; and the prevention of state governments from infringing on tribal rights. Upon closer scrutiny, however, it is apparent that these admirable goals have often been poorly implemented. The negligent administration of the trust responsibility is evident from sources ranging from academic research demonstrating past squandering of reservation resources<sup>41</sup> to lawsuits recently filed and still pending against the Federal Government.<sup>42</sup>

<sup>38</sup> It is important to note that today, there is significant debate whether and how government-to-government relationship applies to ANCSA corporations and regional nonprofit organizations, which under 25 CFR, possess the ability to contract for BIA programs. Many Alaska tribes believe that the government-to-government relationship should exist solely between federally recognized tribes and the US government, not with corporations. (See also Alaska Natives and Alaskan Resources.)

<sup>39</sup> This trust responsibility is sometimes confused with the “ward” status conferred upon Indians by Justice Marshall in his opinion in *Cherokee Nation v. Georgia*. In addition to conferring ward status on the tribes, *Cherokee Nation v. Georgia* also paved the way for the trust responsibilities to form through subsequent legislation and court decisions. Justice Marshall’s use of the term “ward” to describe Indians has proven to be a somewhat unfortunate choice of phrasing. This status has, in some instances, served to protect the rights of the tribes (see, for example, *Seminole Nation v. United States* (1942) in Appendix B), but it has also tended to reinforce much of the paternalism that has since characterized federal actions towards the tribes.

<sup>40</sup> American Indian Lawyer Training Program, *Indian Tribes as Sovereign Governments* (Third Printing) (AIRI Press, 1991), pp. 28-31.

<sup>41</sup> Krepps, Matthew B., “Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry,” in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, S. Cornell and J. Kalt, eds. (Los Angeles: University of California, American Indian Studies Center, 1992), pp. 179-203. Also see Krepps, Matthew B., and Richard E. Caves, “Bureaucrats and Indians: Principal-Agent Relations and Efficient Management of Tribal Forest Resources” *Journal of Economic Behavior and Organization*, Vol. 24, No. 2, pp. 133-151.

<sup>42</sup> For instance, in 1997 concerns over the administration of trust accounts held by the BIA for the benefit of individual Indians came to a head when a federal judge ruled that “Native Americans may file a class-action suit against the Interior Department regarding mismanagement of \$450 million in 300,000 Indian trust accounts.” *Indian Country Today*, December 29, 1999. The case of *Cobell v. Babbitt* is still in dispute, and has led to Interior Secretary Bruce Babbitt and Treasury Secretary Robert Rubin being held in contempt of court for the federal government’s inability to account for trust fund monies.

### **Redressing a Multi Billion Dollar Breach of Trust: An Overview of *Cobell v. Norton***

*Cobell v. Norton* is a class-action lawsuit filed on June 10, 1996, in US District Court in Washington, D.C. to force the federal government to account for billions of dollars belonging to approximately 500,000 American Indians and their heirs, and held in trust since the late 19th century.

Then-Secretary of the Interior Bruce Babbitt, Assistant Secretary of the Interior Kevin Gover and Treasury Secretary Robert Rubin were held in contempt of court in February 1999 by Judge Lamberth for their departments' repeated delays in producing documents, destruction of relevant documents and misrepresentations to the court in sworn testimony. As the case proceeds, new revelations of false testimony, financial misconduct and bureaucratic retaliation have continued to surface.

The facts underlying the litigation involve a broad sweep of United States history. Although US policy in the 1870s was to locate Indians on reservations, hunger for the land by non-Indians led to a break-up of most of the reservations starting in the 1880s. Thousands of individual Indians generally were allotted beneficial ownership of 80- to 160-acre parcels of land in the break-up. As trustee, the government took legal title to the parcels, established an Individual Indian Trust and thereby assumed full responsibility for management of the trust lands. That included the duty to collect and disburse to the Indians any revenues generated by mining, oil and gas extraction, timber operations, grazing or similar activities.

As a result of more than a century of malfeasance, the United States government has no accurate records for hundreds of thousands of Indian beneficiaries nor of billions of dollars owed the class of beneficiaries covered by the lawsuit. The suit encompasses approximately 500,000 Indian beneficiaries.

The purpose of the litigation - which was filed by Eloise Cobell, a member of the Blackfeet tribe in Montana, and her co-plaintiffs - is two-fold: to force the government to account for the money, and to bring about permanent reform of the system.

US District Judge Royce Lamberth bifurcated the case along those lines. After a trial on Phase One - reform of the system - Judge Lamberth ruled on December 21, 1999 that the secretaries of Interior and Treasury had breached their trust obligations to the Indians. The court retained judicial oversight of the system for a minimum of five years, to ensure that it is overhauled, and ordered Interior to provide an historical accounting of all trust funds. An appeal by the government, arguing that the judge had overreached his authority, was unanimously rejected by a three-judge appeals court panel on February, 23, 2001.

To help enforce his orders, Judge Lamberth has appointed both a special master, who oversees the preservation and production of trust documents, and a federal monitor, who provides the judge with assessments of the truthfulness of Interior's representations to the Court regarding execution of trust reform. In his first report to the court - 19 months after Judge Lamberth's December 21, 1999 order - the federal monitor declared that Interior's stated efforts to provide an accounting in compliance with the order are a sham, are "still at the starting gate" and have been marked by "unrealistic responses and evasion."

In December 2001, contempt proceedings against Secretary of Interior Gale Norton and Assistant Secretary Neal McCaleb began. Norton and McCaleb were ordered by the court to show why they were not in contempt of court for failing to comply with the court's order to do an historical accounting and committing fraud on the Court by concealing the true actions of the department regarding the historical accounting and filing false and misleading status reports. A fifth charge of contempt was later added regarding the lack of computer security for individual Indian trust data.

On December 17, 2001, Judge Lamberth issued an order allowing the Interior to issue checks to individual Indian monies beneficiaries. Despite this order, however, defendants still have not issued checks. Instead they have proposed a plan to reorganize management of trust assets within the Department of Interior to a new Bureau of Indian Trust Asset Management-a plan which has been and continues to be overwhelmingly rejected by tribes through Indian Country (see sidebar on BITAM).

The contempt trial and efforts by the Plaintiffs to force the defendants to issue checks will resume in February, 2002 following a court recess.

A trial on Phase Two - accounting for the money - has not yet been scheduled.

Sources:

[www.indiantrust.com](http://www.indiantrust.com).

Native American Rights Fund website ([www.narf.org](http://www.narf.org)).

Likewise, federal initiatives grounded in the idea of Indians as wards have similarly been poorly administered. The government has attempted to prevent complete privation in Indian Country, but the

positive effects that might have stemmed from such paternalistic endeavors have consistently been undermined by woeful implementation and a lack of sufficient funding. Federal programs designed to assist these “wards of the state” through periods of destitution have only served to provide stopgap assistance that has left many tribes reliant on the continued support of the Federal Government, while simultaneously preventing large numbers of Indians from economically advancing themselves and governing their own communities.

The view that tribes are incapable of independent action has been accompanied by a long-standing belief on the part of many federal employees that Indians were unable to conduct the most basic of governmental services without direct federal oversight. For decades, local BIA agents controlled virtually every action taken by tribal governments. To offer but one example, trips by tribal leaders to Washington, DC, were, until recently in some cases, seldom permitted unless the tribal delegation was accompanied by a BIA superintendent. The vestiges of this legacy continue to this day – for example, BIA approval is generally required before tribes can contract with attorneys for legal counsel.<sup>43</sup> This controlling behavior has led most tribal leaders to view the BIA as an obstacle to be overcome, rather than as a helpful organization striving to ensure the self-sufficiency of tribes.

#### *Underfunded Federal Agencies Provide Services to Tribes*

The principal agencies of the Federal Government responsible for providing services to the tribes are the BIA and the IHS. Tasked with administering the bulk of non-health-related federal programs targeted to Indians, the BIA has commanded an annual budget from the US Congress that has ranged from \$1.6 billion to \$2.4 billion since FY 1989.<sup>44</sup> Though these budget numbers might seem large in terms of absolute dollars, with more than 550 federally recognized tribes to service, federal support for Indian programs has been severely lacking:

- A 1995 analysis showed that if “one looks not only at overall Indian spending but also at its major components – BIA, IHS, Office of Indian Education in the Education Department, Indian Housing Development program in HUD, ANA, and INAP – one sees ... that, in constant dollars, **all** major spending items except IHS have declined during the period FY 1975-1996.”<sup>45</sup> (Emphasis in the original.) In addition to evaluating funding on a constant dollar basis, the study showed that until 1985, per capita spending was greater for Indians than for the rest of the US population, but that after 1985 expenditures were less, per capita, for Indians than for the population as a whole.<sup>46</sup>

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<sup>43</sup> 25 USC 1331, 25 USC 476, and 25 CFR 89.

<sup>44</sup> Budget data taken from the DOI website, accessed at [http://www.doi.gov/budget/budget\\_general/budget\\_history\(01\).pdf](http://www.doi.gov/budget/budget_general/budget_history(01).pdf). The largest federal allocation to the BIA, \$2.4 billion, was for FY 1994. Kevin Gover, Assistant Secretary of Indian Affairs, in an Oversight Hearing before the Senate Committee on Indian Affairs on April 28, 1999, asserted that BIA funding has declined 22% over the last 20 years, when inflation is accounted for. He further pointed out that the BIA is working itself out of direct provision of services, and as more funding is provided to the agency, more programs can be contracted and compacted out to tribes for direct administration – BIA projections predicted that “well over two-thirds of its funding will go to contracts, compacts and grants.” Full time equivalent employees at the BIA fell from 16,868 in 1981 to 9,563 in 1999.

<sup>45</sup> Walke, Roger, *Indian-Related Federal Spending Trends, FY 1975-1996*, Congressional Research Service, The Library of Congress, Washington, DC, February 13, 1995, p. 11. This study considered the budgets of six major categories: the BIA; the IHS; the Office of Indian Education within the Department of Education; the Indian Housing Development program for new construction (estimated) within the Department of Housing and Urban Development (HUD); the Administration for Native Americans (ANA); and the Indian and Native American Employment and Training Program (INAP).

<sup>46</sup> *Ibid.*, p. 10. Communication with Mr. Walke indicates that on a per capita basis, real spending on IHS programs has likely leveled off or decreased, leading to an overall decline in service levels.

- Under PL 93-638 tribes can contract to direct programs that were previously overseen by the Federal Government. However, a June 1999 report by the US General Accounting Office (GAO) found that congressional appropriations have been insufficient to cover what are termed “contract support costs.”<sup>47</sup> Contract support costs are intended to cover the reasonable costs of activities that tribal administrators must perform in order to administer 638 contracts in the BIA’s stead. The GAO found that in FY 1998, congressional appropriations for contract support costs were only \$280 million, or 75% of the allowable amount. This shortfall of \$95 million causes significant financial difficulties for contracting tribes, and undermines the “efficiency and productivity of their administrative functions.”<sup>48</sup>
- Tribal studies also demonstrate shortfalls in funding. For example, in evaluating Tribal Priority Allocations,<sup>49</sup> a tribal workgroup found that \$219.1 million of TPA funding was enacted in FY 1998, but that the unmet need of TPA services was \$688.2 million.<sup>50</sup>

The Federal Government’s historical role as tribal overseer is evolving more rapidly today than ever before. Assertions of tribal sovereignty on the part of the tribes, coupled with federal initiatives such as President Clinton’s issuance of Executive Order (EO) No. 13084,<sup>51</sup> which, among other things, required each agency of the Federal Government to “have an effective process” to ensure that tribal representatives are able to provide meaningful input into regulatory policies that “significantly or uniquely affect [Indian] communities,” and EO No. 13175,<sup>52</sup> which revoked and superceded EO 13084, are redefining tribal-federal interactions. EO 13175 strengthens the previous EO by prohibiting federal agencies from proposing legislation that would be harmful to tribes, by requiring agencies to consult with tribes in the rulemaking process, and by requiring agencies to designate an official to handle relations with the tribes.

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<sup>47</sup> United States General Accounting Office, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* (Washington, DC: United States General Accounting Office, Report to Congressional Committees, GAO/RCED-99-150, June 1999).

<sup>48</sup> *Ibid.*, pp. 2-3.

<sup>49</sup> Tribal Workgroup on Tribal Needs Assessments, *Final Workgroup Report*, May 1999. Tribal Priority Allocations (TPA) is a system by which tribal funding priorities guide the structure of the BIA budget in furtherance of the federal policies of self-determination and self-governance. The Tribal Workgroup classified TPA funding in eight categories: tribal government, human services, education, public safety and justice, community development, resources management, trust services, and general administration.

<sup>50</sup> *Ibid.*, chapter 4, p. 5. The BIA’s analysis of TPA funding was issued in July of 1999 and found that current funding only meets one-third of the identified need of the tribes. The BIA’s *Report on Tribal Priority Allocations* can be accessed at <http://www.doi.gov/bia/tpa/TPARept.pdf>.

<sup>51</sup> Executive Order No. 13084, *Consultation and Coordination with Indian Tribal Governments*, which reaffirmed the government-to-government relationship between the tribes and the federal government, was signed by President Clinton on May 14, 1998. The EO can be accessed at <http://www.doi.gov/oait/docs/policies.htm>.

<sup>52</sup> EO No. 13175 was signed by President Clinton on November 6, 2000. EO 13175 can be accessed at <http://www.doi.gov/oait/docs/coordinationEO.htm>. EO 13175 also led to the BIA adoption of an official *Government-to-Government Consultation Policy* on December 13, 2000. The BIA’s consultation policy can be accessed at <http://www.doi.gov/oait/docs/policies.htm>.

### Reforming the Bureau of Indian Affairs?

Facing a contempt charge for failing to remedy the Bureau of Indian Affairs' accounting of Individual Indian Money (IIM) accounts, Secretary of Interior Gale Norton in November 2001 proposed to place all trust fund duties, now spread among several offices but primarily entrusted to the Bureau of Indian Affairs, into a new Bureau of Indian Trust Asset Management (BITAM).

While most agree that the BIA system is dysfunctional, Native Americans generally view Norton's move as a first step in the weakening of the BIA. If trust management is stripped from BIA, what would be left, Indian advocates fear, are functions easily subsumed by other agencies: Indian schools, which could move to the Education Department, and road building, which the Transportation Department could take over. If these and other programs are parceled out, there will be no one office responsible for Indian concerns. In addition to concerns about the potential impacts on the government-to-government relationship, tribal leaders are upset that the Federal Government proposed BITAM without first consulting the tribes. Officials in the Department of Interior, however, say that what Norton is proposing would not eliminate or dilute the BIA, but would consolidate the trust functions in a single entity. Money and personnel would move from the BIA and the special trustee's office to BITAM. A new assistant secretary for Indian trust asset management would oversee the daily management of 1,400 tribal accounts and at least 300,000 individual trust accounts.

Since the controversy erupted, the tribes put together a task force to investigate alternatives to BITAM, and the Department of Interior voiced its willingness to consider their ideas.

Source: Ellen Nakashima, "Receivership Weighed For Indian Trust Funds: Norton's Plan for New Bureau Draws Criticism," *Washington Post*, January 25, 2002; Page A23.

A host of additional formal agreements and contracts are remodeling agencies such as the BIA as a partner that can provide technical assistance and consultative services to tribes on an as-needed basis. Some of these formal agreements are fairly "standard" 638 contracts or compacts under the *Indian Self-Determination and Education Assistance Act* and the *Tribal Self-Governance Act*; others, however, are innovative contractual arrangements agreed to between tribes and federal agencies. Examples include an agreement between the Nez Perce Tribe of Idaho and the US Fish and Wildlife Service (USFWS) for the monitoring of wolves reintroduced into federal forests and an agreement between the Loudon Tribal Council (Alaska) and the United States Air Force to clean up military waste that has degraded the environment surrounding the village.

### *Federal Recognition*

The BIA plays a critical role in defining the tribal-federal relationship by determining precisely which groups the Federal Government recognizes as tribes. This is the most important recognition a tribe can obtain.<sup>53</sup> The difficult task of evaluating applications of groups seeking to qualify as Indian tribes falls to the Branch of Acknowledgement and Research (BAR) within the BIA.<sup>54</sup> Since 1978, the BAR has received more than 200 petitions and letters of intent to petition from groups who would like to be officially recognized as Indian tribes by the US government. Of this number, 71 completed petitions have been submitted and 30 of those petitions have been resolved through the acknowledgement process. Of the 30 petitions resolved by the BAR's procedure, 15 applications have been acknowledged, and 15 have been denied acknowledgement.<sup>55</sup>

<sup>53</sup> Canby, *op. cit.*, p. 4.

<sup>54</sup> As authorized under 25 CFR 83, which became effective in October 1978.

<sup>55</sup> According to the BAR website, accessed at <http://www.doi.gov/bia/bar/Indexr.htm>.

The petition process is lengthy, as seven criteria must be met to the BAR's satisfaction before they will recommend, to the Assistant Secretary of Indian Affairs, that federal recognition be granted to a petitioner. These criteria specify that the petitioning entity:

- 1) have been identified by reliable external sources as an Indian entity since 1900;
- 2) have maintained a continuous community from historical times;
- 3) show that it has maintained political authority or influence on a substantially continuous basis from historical times;
- 4) submit a copy of its governing document, or if it does not have a formal governing document, a statement describing its membership criteria and how they are applied;
- 5) show that the current members of the petitioning group, as a whole, descend from a historic tribe or tribes;
- 6) demonstrate that its members not be mostly members of an already recognized tribe; and
- 7) not be a group which was terminated by legislation.<sup>56</sup>

The federal recognition process is increasingly an activity characterized by controversy. Recognized tribes have been accused of attempting to prevent others from attaining recognition,<sup>57</sup> presumably in an effort to keep the federal funding "pie" from being divided into ever-smaller slices. In addition, the gaming successes of a few tribes have thrown suspicion upon applicants – there are those who believe applications are now predominately motivated by the desire to "cash in" on the ability of recognized tribes to establish gaming operations. Controversies surrounding the process have become persistent enough that the US Congress is considering intervening in the rules guiding recognition. As of May 2000, the US Senate was deliberating a bill that, if adopted, would substantially redefine the procedures for federal recognition and would transfer recognition recommendation power to a new organization that is to be located outside of the BIA. Kevin Gover, Assistant Secretary of Indian Affairs from 1997-2001, has voiced his preference to have the recognition process reformed, noting that the "more contentious and nasty things become, the less we feel we are able to [reform] it."<sup>58</sup>

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<sup>56</sup> For a description of these criteria, see the BAR website at <http://www.doi.gov/bia/bar/arguide.html#Criteria>.

<sup>57</sup> Bordewich, Fergus, *Killing the White Man's Indian* (New York: Doubleday, 1996), p. 91.

<sup>58</sup> "Congress Considers New Process for Tribal Recognition," *Indian Country Today*, May 31, 2000. One of the most recent legislative attacks on the federal recognition process stems from a series of ten articles which appeared in the *Boston Globe* from December 10, 2000, through December 13, 2000, which were focused on Indian gaming and have provided a platform for US Representatives Shays (R-CT) and Wolf (R-VA) to leverage the contention over tribal recognition into a call for a complete overhaul of federal Indian policy.

### **Not All Tribes are Recognized**

A number of tribal groups are not recognized by the Federal Government, and are thus not eligible for programs and benefits that are reserved for those officially acknowledged by Washington. A number of causes have left certain tribal groups without acknowledgement of the US government: some tribes who had the earliest contact with Europeans “vanished” for many years; the federal termination policy legislatively extinguished tribes as political bodies (see Appendix B of this report); and other tribal groups have simply dealt with the various states more frequently than the Federal Government and are state-recognized rather than federally recognized.

The Lumbee Tribe of Cheraw Indians is one of the best-known cases of non-federally recognized tribal entities. The Lumbee have been recognized by the state of North Carolina since the late 1800s, and have attempted to secure federal recognition for a number of years. With the Tribe having more than 40,000 registered members, federal recognition would make the Lumbee the largest tribe east of the Mississippi River, and one of the ten largest tribes in the US. In 1956 Congress passed the *Lumbee Act*, which affirmed the existence of the Lumbee as Indians, but denied the Tribe full federal recognition. The Solicitor General determined in 1989 that while the Act recognized the Tribe as Indian, it simultaneously denied federal services to the Lumbee and thus made them ineligible for the BAR’s recognition process. A 1992 effort to recognize the Lumbee through congressional legislation noted that the 1989 decision by the DOI had left the Tribe “in legal limbo.” The proposed *Lumbee Indians Recognition Act* of 1992 did not pass a vote in the Senate, in spite of an assertion by the Select Committee on Indian Affairs that federal recognition of the Lumbees was being opposed by some primarily due to a perception that recognition would cost taxpayers a significant amount of money, rather than being opposed on grounds of sound policy or a finding of fact that should preclude the Lumbee Indians from full federal recognition.

Many tribes like the Lumbee, who are state-, but not federally, recognized, have encountered difficulties providing basic services for their citizenry. As demonstrated by the recognition efforts of a tribe as large as the Lumbee, a particular set of political challenges can arise, within the recognition process itself, over the provision of federal services, for example, IHS programs. Concerns over a dilution of the level of medical care available through the IHS causes consternation in Indian Country and in Washington – as federal programs become available to newly recognized tribes, if there is no concomitant increase in resources through federal appropriations, various political actors fear that critical services will have to be curtailed or rationed, and an already fiscally burdened branch of the Federal Government will be further undermined.

For additional information on the Lumbee and their efforts to gain federal recognition, see, for example, [http://www.ncsu.edu/stud\\_orgs/native\\_american/nctribes\\_orgs/lumbee.html](http://www.ncsu.edu/stud_orgs/native_american/nctribes_orgs/lumbee.html), <http://www.charweb.org/neighbors/na/lumbee.htm>, and [http://www.lumbee.org/chr\\_history.htm](http://www.lumbee.org/chr_history.htm).

## ***TRIBAL-STATE RELATIONS***

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- As tribal authority and self-governance grow, tribes and states find themselves confronting an increasing number of difficult questions of the proper bounds of jurisdiction and supremacy.
- Not all tribal-state interactions are confrontational. New models of cooperation and dispute resolution, bolstered by some states' explicit recognition of tribes as governments, are helping alleviate some tensions without litigation.
- During an era of federal devolution, tribes and states find themselves with a renewed need for cooperation and open channels of communication.

Relations with the states have been some of the most contentious that tribes have had to face, and in a time of a tribal “convergence of economic strength, legal muscle and political will,”<sup>59</sup> many states are growing increasingly uneasy about their already troubled associations with their Indian neighbors.

### *Tribal versus State Authority*

As tribes exert increasing levels of power and independence, they find themselves interacting with state (as well as county and municipal) governments more frequently. These interactions often revolve around struggles for authority and control over resources and for the power to exercise fundamental governmental control in instances of conflicting or unclear jurisdictional boundaries. In many instances, state and tribal governments are unable to arrive at a non-litigious solution to jurisdictional disputes, and thus continue to find themselves resolving these struggles by turning to the federal court system.<sup>60</sup>

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<sup>59</sup> Egan, Timothy reporter from *The New York Times*, as quoted in “From Wounded Knee to Capitol Hill,” *State Legislatures Magazine*, October/November 1998.

<sup>60</sup> According to Charles F. Wilkinson, states and tribes are relying more frequently on extrajudicial resolution in situations of conflict (i.e., negotiation or arbitration techniques). Wilkinson, Charles F., *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987), p. 9.



The policy of subordination of both the state and tribal governments to the Federal Government traces its origins to the earliest days of the United States as a sovereign power. Article 1, Section 8 of the US Constitution states that “Congress shall have the power ... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>61</sup> Such language set the stage for tribes to view their primary governmental interactions as being appropriately conducted with the Federal Government, rather than with the individual states. State politicians, however, tend to believe that they have responsibilities for, and attendant regulatory jurisdiction over, all people and activities that occur within their territorial boundaries.

It is generally recognized, however, that states lack power over Indians on the reservations, and also lack jurisdiction over tribal lands. There are exceptions – PL 280, for example, gives 15 states some civil and all criminal jurisdiction over Indians within the state’s exterior boundaries.<sup>62</sup> As tribal authority continues to grow and the Federal Government continues to push administration of programs to the tribal, state, county, and municipal levels, tribes and states will find themselves interacting more often than before.

### *New Models of Cooperation*

Though many tribal-state interactions are contentious,<sup>63</sup> not all are overtly hostile. Indeed, many compromises, agreements, and working relationships are being established between the tribes and the states without resorting to antagonistic litigation. The Governors of some states, such as Oregon and New Mexico, have even gone so far as to formalize a government-to-government approach to the tribes.

On May 22, 1996, Governor John Kitzhaber of Oregon signed an Executive Order entitled *State/Tribal Government-to-Government Relations* (EO-96-30). This order recognizes that the policies of the state often affect tribal interests, and further recognizes that the tribes have a unique legal status that requires the state to interact with them on a government-to-government basis.<sup>64</sup>

Similarly, on February 12, 1998, Governor Gary Johnson of New Mexico signed *Executive Order 98-10, State of New Mexico State/Tribal Government Relations Policy*. This order, much like EO-96-30 in Oregon, establishes that the state of New Mexico will interact with the tribes as sovereign governments. It also confirms the state’s intent to work with the tribes in a cooperative manner “which strengthens the concept of a government-to-government relationship.” The issuance of Executive Order

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<sup>61</sup> In addition, Supreme Court rulings in cases such as *Williams v. Lee* (see Appendix B of this report) have protected tribal rights from infringements by the states.

<sup>62</sup> The 15 states are: California, Minnesota, Nebraska, Oregon, Wisconsin, Alaska, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington.

<sup>63</sup> For instance, in disputes over Indian land claims, state and local officials often express outrage with the tribes. Their consternation is triggered by fears of differing land-use policies for contiguous land parcels, diminished tax rolls and unclear jurisdictional questions involving environmental and business laws. See, for example, the letter sent to President Clinton by Governor Pataki of New York in April 2000, quoted in “Battle Over Iroquois Land Claims Escalates,” *The New York Times*, May 16, 2000. In his letter, Governor Pataki accused the Oneida Nation of attempting to “amass large quantities of land upon which it pays no real estate taxes, evades all state and federal environmental and land-use regulations, and wages a war of unfair business competition against the law-abiding, taxpaying business owners in central New York.”

<sup>64</sup> Quigley, Karen, “Oregon’s Three-Point Approach to State/Tribal Relations,” paper presented at the NCAI 2000 Midyear Session in Juneau, AK, June 26-28, 2000. Ms. Quigley, the Executive Director of the state’s Legislative Commission on Indian Services (LCIS), points out that an Executive Order is only a guiding document, and that implementation of the principles outlined in EO-96-30 requires vigilant monitoring. Monitoring in Oregon is performed by state/tribal workgroups called “Clusters.” Clusters, EO-96-30, and the LCIS serve as the three points in Oregon’s three-point approach to state-tribal relations. EO-96-30 can be accessed online at <http://www.governor.state.or.us/governor/legal/execords/eo96-30.pdf>.

98-10 incorporated the July 8, 1996, adoption of an official *Government-to-Government Policy Agreement* between the state of New Mexico and the tribes located within the state. This historic document was signed at a summit meeting in Santa Fe by the Governor and Attorney General of New Mexico, by the Presidents of the Navajo Nation and the two Apache tribes of New Mexico, and by the 19 Governors of the Pueblos located within the state. It affirmed the government-to-government nature of the interactions of the state and the tribes and formalized an understanding that the parties to the agreement will interact “in a spirit of cooperation, coordination, communication and good will.”

On April 11, 2001, delegates from about one quarter of Alaska’s 229 federally recognized tribes signed the “Millennium Agreement” which calls for a temporary committee of four state officials and four tribal leaders to develop recommendations on tribal-state relations and the eventual creation of a permanent forum. The Agreement, crafted by Governor Tony Knowles, follows upon an administrative order signed in December 1999 that establishes that the State of Alaska recognizes those tribes recognized by the Federal Government. At this point, however, it is unclear how many tribes will sign the Millennium Agreement and participate in future tribal-state fora.<sup>65</sup>

State officials who operate under these executive orders verify that the implementation of such policy statements by elected leaders has a profound impact on the workings of the state bureaucracy. Much as the civil servants of the states become used to interacting with tribal representatives as delegates of sovereign powers, state representatives begin to consider the impacts that state actions and regulations will have on the tribes, and begin to proactively seek out input from the tribes that will be affected by proposed state initiatives. In addition to evidence of the positive results stemming from the cooperative spirit embodied in the executive orders discussed above, two major studies undertaken in the past five years have corroborated the benefits accruing to both the states/counties and the tribes from seeking cooperative solutions, rather than resorting to litigation, to overcome challenges that are common to both governing bodies.<sup>66</sup>

#### *New Models of Cooperation are Particularly Important During Devolution*

In a time of federal devolution, new models of cooperative interaction between tribes and states are becoming ever more important. The agreements and working relationships that these governments are entering into do not imply that either the tribes or the states are forfeiting their rights as sovereigns – the parties to these types of arrangements will certainly resort to litigation to resolve disputes that arise and cannot be untangled without the involvement of the courts.

Federal legislation enacted to ensure local control of governmental functions has, to this point, failed to adequately address the implications for tribal (and in some cases state) governments. One of the most common of these failures is not recognizing tribal governments as the appropriate entity to assume program administration. Even in cases where federal legislation *does* provide for tribal administration, inadequate resource allocation and greater oversight than that demanded from the states both work as disincentives for tribes to take on the service provision that otherwise will be administered by state (or county, or municipal) governments. Though the impacts of a given devolutionary policy might differ for tribes and states, both have an interest in assuring that services will be provided to their constituents, and that federal legislation provides them with adequate versatility for program implementation. Thus, tribes

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<sup>65</sup> “Natives, Knowles Ink Millennium Agreement,” Associated Press, April 12, 2001.

<sup>66</sup> See, for example, Reed, James, and Judy Zelio (eds.), *States and Tribes: Building New Traditions* (Denver, CO: National Conference of State Legislators, November 1995 (funded by the Ford Foundation)). See, also, *County Tribal Relations: Six Southwestern Counties and the Navajo Nation* (Tucson, AZ: The University of Arizona, 1997 (funded by WK Kellogg Foundation and the University of Arizona)).

and states today find themselves needing better collaboration and more open channels of communication.<sup>67</sup>

The challenges tribes face in establishing and maintaining mutually beneficial working arrangements with the states are numerous, but strides are being made to overcome them. One particularly entrenched obstacle that tribes are slowly surmounting is the perception (held by many state agencies) that tribes are simply another constituency within the service population, or that the tribes function merely as local interest groups.<sup>68</sup> The experience of Oregon indicates that actions at the highest levels of state government, such as the issuance of EO-96-30 by Oregon Governor Kitzhaber, can set the stage for governmental agencies throughout the states to begin to view tribal-state relations as ongoing interactions between equals, on the appropriate basis: a *government-to-government* basis.<sup>69</sup>

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<sup>67</sup> *Government to Government: Understanding State and Tribal Governments*, National Congress of American Indians and National Conference of State Legislatures, June 2000.

<sup>68</sup> Hicks, Sarah, and John Dossett, "Principled Devolution: Protecting Tribal Self-Determination in an Era of Growing State Power," NCAI Working Paper, September 19, 2000.

<sup>69</sup> Communication with Chip Lazenby, Legal Counsel to Governor John Kitzhaber of Oregon.

## ***INTERNATIONAL RELATIONS***

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- Indian Country is marked by continued efforts to promote indigenous<sup>70</sup> concerns at the international level. These efforts reflect an increase in Native American capacity to advocate on their own behalf, the need for innovative solutions to domestic concerns, and the profound impact of globalization on Native American communities.
- Native American efforts to voice their concerns and defend their interests internationally have been interpreted to be a modern assertion of sovereignty and are showing no signs of diminishing.

Military alliances, tribal conflicts, treaties and wars between clans and tribes are important aspects of the history of Native America. Alliances between sovereign nations are arguably the earliest international relations in Native America. The Ojibway, Odawa and Potawatomi nations, for instance, formed the Council of the Three Fires, a confederacy constructed for military and political purposes. During the 1600s and 1700s, the Council occupied the hub of the Great Lakes and maintained international relations with the Iroquois Confederacy, the Sauk, Fox, Menominee, Huron, Winnebago, Sioux, British and French Nations, among others.<sup>71</sup> Although these relationships were often short lived, they established a method by which differences could be resolved and encouraged trade and a peaceful co-existence. For example, the Council of the Three Fires, in collaboration with Great Britain, negotiated the Treaty of Niagara of 1764 that confirmed the provisions of the Royal Proclamation of 1763 and marked the beginning of peaceful relations with Great Britain. The agreement was captured as both a formal British Treaty and on a Treaty belt in accordance with indigenous law. The Treaty belt, also known as the Covenant Chain, depicts two people holding up opposite ends of a chain, and like any international convention, the signatories would meet annually to reaffirm their alliance and commitment to one another. The alliance eventually eroded as a result of the changing political reality in North

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<sup>70</sup> The term “indigenous” is used in all international documents and will, therefore, be employed in this section. While its application in certain jurisdictions is the subject of controversy, it generally refers to communities whose culture and occupation of a particular territory both pre-dated and survived colonization.

<sup>71</sup> For more information on the Council of Three Fires, see the Anishinabek Nation web-site at [www.anishinabek.ca](http://www.anishinabek.ca).

America in the mid-1800s, but vestiges remained in the form of the other Indian grand councils and political alliances.<sup>72</sup>

Given this history of alliances and the many shared challenges faced by Indigenous peoples throughout history, it is not surprising that Native Americans have extended their reach beyond their own territories and into the international arena. Like Deskaheh, a Mohawk Chief who approached the League of Nations in the early 1920s, tribes and Indigenous coalitions feel compelled to express the views of their people and defend their interests at the international level – often motivated by neglect and the lack of viable solutions provided by their domestic governments. Indeed, Indigenous peoples’ activity in international venues (e.g., the International Labor Organization and the United Nations Human Rights Commission) is on the rise, and importantly, they are playing an increasingly prominent role in shaping the policies of international governing bodies as they affect Indigenous peoples.

This section will briefly examine the history of Indigenous peoples’ participation in the international arena and discuss some of the major issues that are forcing Native Americans to seek out international solutions.

#### *History of International Activism (1924 to present)*

Failing to resolve issues related to land, self-government, and hunting and fishing rights with the Canadian Department of Indian Affairs, in 1922 a Mohawk Chief named Deskaheh traveled from his home in Akwesasne, Mohawk Territory to Geneva, Switzerland to bring the matter before the League of Nations.<sup>73</sup> Since the Haudenosaunee, also known as the Iroquois Confederacy,<sup>74</sup> was not a member of the League and was unrecognized as a state, Deskaheh’s attempts to directly address the League were rebuffed. However, Deskaheh mounted a comprehensive advocacy campaign and subsequently secured the support of King George V of Great Britain and convinced the Netherlands to sponsor his petition.<sup>75</sup> Although the League eventually decided that the matter was solely within the domestic jurisdiction of the government of Canada, Deskaheh’s efforts in Geneva represent one of the first modern entreaties from Native Americans to the international community.<sup>76</sup>

Since Deskaheh’s visit, the rights of Indigenous peoples have become a prominent part of the human rights work of the United Nations (UN) and other international intergovernmental organizations. Even a brief description of the UN’s human rights work now includes references to Indigenous peoples.<sup>77</sup> To a large extent, this can be attributed to the efforts of many Native Americans who have spent almost

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<sup>72</sup> There are also many modern alliances such as the Indigenous Environmental Network and the recent alliance between the National Congress of American Indians (NCAI) and the Assembly of First Nations (AFN) in Canada who have pledged to work together on areas of mutual interest involving Native North American issues.

<sup>73</sup> Veatch, Richard, *Canada and the League of Nations*, (Toronto: University of Toronto Press, 1975) p. 91.

<sup>74</sup> The Haudenosaunee or Iroquois Confederacy consists of Six Nations: Mohawks, Cayuga, Onondaga, Oneida, Seneca, and Tuscaroras. The territory of the confederacy straddles the border between the United States and Canada. See *Stolen Continents*, pp. 114-142, 222-240, and 313-342.

<sup>75</sup> Deskaheh’s letter to King George V read in part, “It is because of the fierce and persistent violation by Canada...of the rights and freedom of my People – the attempts to break down and destroy their government, the Council of Ohsweken, the attempts to deprive them of their liberty and their nationality ... that I feel now compelled to seek Your Majesty’s aid and protection.” Deskaheh to George V, Oct. 22, 1924. Canada, Indian Affairs, RG10, vol. 2286, file 57, 169.

<sup>76</sup> For more information on the lobbying efforts and the involvement of the Netherlands and Canada’s response, please see Veatch, Richard, *Canada and the League of Nations* (Toronto: University of Toronto Press, 1975).

<sup>77</sup> Sanders, Douglas, “Indigenous Peoples at the United Nations: An Overview” [1996] 2 CNLR 20.

twenty-five years publicizing their struggles, educating governments about their concerns and establishing a permanent presence at the United Nations and other international fora. Moreover, Native Americans have led the drafting and development of several international conventions that recognize and affirm their rights to land, their culture and their ability to function as self-determined political entities.

While Indigenous peoples are now regularly consulted, they were rarely included in the development of the early conventions and international human rights law. For example, the International Labor Organization (ILO) – the first international body to specifically address indigenous concerns and attempt to codify their rights in international law – sought no Indigenous input when it adopted Convention 107 in 1957. Titled “Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries,”<sup>78</sup> the purpose of the Convention was to promote improved social and economic conditions for Indigenous peoples generally, though it was developed entirely without their participation. As its title implies, the Convention possessed an assimilationist orientation and did not seem to envisage a long-term place for Indigenous and tribal peoples. There was an underlying assumption that protection would be needed for only a short period of time and that Indigenous people would eventually disappear as politically significant and distinct cultural groups. The Convention was eventually ratified by 27 countries – but the United States and Canada declined.

As early as 1975, Native North Americans established the first two international indigenous advocacy organizations: the Native Canadian-created World Council of Indigenous Peoples (WCIP), and the American Indian-created International Indian Treaty Council (IITC).<sup>79</sup> Representatives of these organizations supported indigenous advocacy at the United Nations and attended all relevant meetings to make submissions regarding the deplorable state of Native America in areas such as life expectancy, employment, health, income and housing.<sup>80</sup> They criticized ILO Convention 107 as being paternalistic and unenforceable, and pushed for a new convention that more adequately reflected the needs and interests of Indigenous peoples. The ILO developed the text for a new convention in response to these criticisms, and pursuant to a 1986 meeting of the ILO’s Committee of Experts that concluded that “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world.” Titled Convention 169 “Concerning Indigenous and Tribal Peoples in Independent Countries” in 1989<sup>81</sup> the drafting of this new convention included participation by the WCIP and IITC and other indigenous organizations. One of the main differences from the 1957 Convention was a greater emphasis on collective rather than individual rights and a commitment to indigenous land rights. Some indigenous organizations remain critical of the fact that the ILO continues to recognize states as the primary actors and that Convention 169 specifically declines to affirm that Indigenous “peoples” possess the right to self-determination as recognized by international law.<sup>82</sup>

During this same period, Native Americans were also monitoring developments at the United Nations Commission on Human Rights (UNCHR). In 1971, the UNCHR appointed Mr. Jose Martinez-

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<sup>78</sup> Convention (107) Concerning the Protection and Integration of Indigenous and Tribal Populations, June 26, 1957, International Labor Organization (entered into force June 2, 1959).

<sup>79</sup> Sanders, *op. cit.*, p. 21.

<sup>80</sup> *Ibid.*

<sup>81</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labor Organization, (entered into force September 5, 1991).

<sup>82</sup> Article 1.3: “The use of the term **peoples** in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.” Note, however, that “having any implications” is a savings clause, not a substantive determination of the issue.

Cobo to undertake a study regarding discrimination against Indigenous people. He issued a five-volume report that presented several recommendations, including the establishment of the Working Group on Indigenous Populations (WGIP) by the Economic, Cultural and Social Committee (ECOSOC) in 1982.<sup>83</sup> The Working Group is a subsidiary committee of the Sub Commission on Prevention of Discrimination and Protection of Minorities and consists of five experts selected by the governments of the five UN geopolitical regions.

In many ways, the Working Group on Indigenous Populations is a United Nations success story. The annual summer sessions have become the largest regularly scheduled human rights meeting in the United Nations calendar, attended by nearly 1,000 persons representing observers for states, Indigenous peoples', non-governmental organizations, and scholars and academics. The WGIP meets for one week immediately before the annual session of the Sub Commission on Promotion and Protection of Human Rights in Geneva and has met every year (except in 1986) since its establishment in 1982. The Working Group has placed special emphasis on the second of its two formal tasks, which are: 1) To review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous peoples; and 2) To develop international standards concerning the rights of Indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world.

In 1993, the efforts of the attendees of the Working Group meetings resulted in what many consider to be a very strong Draft Declaration on the Rights of Indigenous Peoples.<sup>84</sup> The text of the draft was developed by the Working Group with the input of Indigenous peoples, including several prominent Native American advocacy organizations. It remains the first and only time that Indigenous people have been included in the drafting of a UN instrument. The draft stressed rights to land and resources, provided for political autonomy along with rights of political participation in their respective states, and contained provisions protecting cultural rights. While it has been used by Indigenous peoples as a benchmark, it is not without controversy: the provisions that recognize Indigenous peoples as "peoples" with a right to self-determination have been particularly contentious. The draft was forwarded to the Commission on Human Rights for consideration in 1995.<sup>85</sup>

In the course of developing the Draft, Native Americans and the WGIP also pressed for the declaration of the World Decade of Indigenous peoples that began in 1995 and concludes in 2004, with August 9<sup>th</sup> of each year marking International Indigenous Day. Efforts to establish a more permanent body at the UN recently culminated in the establishment of the Permanent Forum on Indigenous Issues by the ECOSOC.<sup>86</sup> There is hope that the establishment of the Permanent Forum will provide a platform that will better support efforts to improve indigenous rights.<sup>87</sup> However, critics say that the Permanent Forum

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<sup>83</sup> UN Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous People, UN Doc. E/CN.4/Sub.2/1986/7 + Add. 1-4 (1986). WGIP established pursuant to UN Resolution 1982/34 of 7 May 1982 of the Economic and Social Council.

<sup>84</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the UN Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993: adopted by the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities by its UN Resolution 1994/45, August 26, 1994 UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56

<sup>85</sup> See: [www.unhcr.ch/html/menu2/10/c/ind/ind\\_sub.htm](http://www.unhcr.ch/html/menu2/10/c/ind/ind_sub.htm).

<sup>86</sup> 3<sup>rd</sup> Committee of the General Assembly, October 26, 2000, A/C.3/55/L.19.

<sup>87</sup> "[The establishment of a Permanent Forum] marks a watershed for the representation of indigenous peoples in the United Nations system. It means that, henceforth, indigenous representatives, not representatives of Member States, will be able to voice their concerns directly to the Council." Comments by General Assembly President Theo-Ben Gurirab (Namibia) on 7 August 2000 Press Release GA/SM/184 OBV/153.

may be another method to take away the hard-won place of Indigenous peoples at the UN by relegating them to consultants and not full participants in the decision making process. There are 16 members in the Permanent Forum, eight are government nominated and Council elected, and the remaining eight are appointed in “consultation with indigenous organizations and groups.” The first session of the Permanent Forum for Indigenous peoples will take place in 2001.<sup>88</sup>

Other efforts by Native Americans to influence the development of international law and the foreign policy of states are more specific, addressing international instruments and agreements such as the Convention on Biological Diversity (CBD)<sup>89</sup> and the attempt to influence policy making at the World Trade Organization (WTO).

The meetings regarding the continued development and implementation of the Convention on Biological Diversity have been well attended by indigenous organizations from North America. Native Americans have also been involved in the ongoing discussions regarding Article 8(j) which acknowledges the importance of indigenous communities in protecting biodiversity and natural resources.<sup>90</sup>

As the CBD has been ratified by numerous countries and is thus binding international law, it shows great promise for Indigenous peoples. It provides a mechanism for tribes to demand access to the decision-making processes of the global private sector with regard to environmental impact, giving them an increasingly powerful role in negotiating, for example, with the petroleum and mining industries. While much of the activity in this respect happens locally, it has bred a desire by international private sector alliances, such as the Global Mining Initiative, to include Native American voices in their efforts to modify business policy and practice.<sup>91</sup> This activity in the global arena complements the work of Native Americans tribes that are dealing with multinational companies, such as in the case of mining in Western Shoshone lands by a subsidiary of RioTinto.<sup>92</sup>

The CBD will become even more important as Native America is affected by what was once called “bioprospecting” and which is now being called “biopiracy.” Indigenous communities around the world, including Native Americans, are becoming increasingly aware that they are being used for both their knowledge of the natural world around them and for their unique genetic make-up. In turn, Native American tribes are increasing the number and volume of their protests in world arenas, targeting the private sector and its organizations, in particular the World Trade Organization. Specific protests revolve around: patenting by Western scientists and companies of plants and plant genes known and used for centuries by Indigenous peoples, either for medicinal or agricultural purposes; use of the knowledge of indigenous communities to secure these plant resources; and access to blood and tissue samples from the members of Native communities.

Indigenous communities are divided in their responses to these issues. Some have not joined the protests over these activities, believing that knowledge and resources are to be shared. Some focus on the

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<sup>88</sup> United Nations Press Release ECOSOC/5932 31 July 2000, in E/CN.4/1998/11/Add.3.

<sup>89</sup> Convention on biological Diversity, 5 June 1992, United Nations Environmental Program, (entered into force on December 29, 1993). Text available at [www.unep.ch/bio/conv-e.html](http://www.unep.ch/bio/conv-e.html).

<sup>90</sup> This conclusion has also been supported by other non-governmental organizations, such as the World Wildlife Fund and the UN Environmental Program (UNEP).

<sup>91</sup> See the web site of the Global Mining Initiative and its study on Mining, Minerals, and Sustainable Development at [www.iiied.org/mmsd/index.html](http://www.iiied.org/mmsd/index.html).

<sup>92</sup> “Digging Holes in the Spirit: Gold Mining and the Survival of the Western Shoshone Nation,” Western Shoshone Defense Project, 1999.



potentially lucrative economic return of these activities, and drive their message toward finding ways within the international system to provide benefits for their communities. Still others focus on issues of sovereignty, looking to modify the international system in order to protect the ability of the communities involved to decide whether and how these resources will be used by others. In particular, they strive to achieve full prior informed consent with regard to any genetic samples taken. And finally, some believe that this knowledge and the life forms involved are to be held sacred, and outside the bounds of patenting and commercial purposes. Much of the debate is taking place within the rubric of the World Trade Organization, its agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS),<sup>93</sup> as well as the *Convention on Biological Diversity*.<sup>94</sup>

In addition to the political victories regarding specific UN initiatives – such as the drafting of the Declaration on the Rights of Indigenous Peoples – Native Americans have also initiated several fundamental changes to UN procedures. One example is the institution of an opening prayer during the opening session of the Working Group, which started in 1995.<sup>95</sup> Native Americans were also instrumental in increasing access to the UN system for Indigenous peoples around the world. As proof of the increasing activity and presence of Indigenous peoples, including Native Americans, at the United Nations, there has been an explosion of indigenous NGOs that have been accredited and have consultative status. These include the American Indian Law Alliance (NY and NM), the International Indian Treaty Council (NM and AK), the Indian Law Resource Center (MT, DC), the National Indian Youth Council (NM), the Grand Council of the Crees (Quebec), the World Council of Indigenous peoples, Inuit Circumpolar Conference (Greenland, Canada, Alaska, Russia), Innu Council of Nitassinian (Newfoundland). With consultative status, these NGOs are permitted to make submissions and participate in all meetings of ECOSOC.<sup>96</sup> These and other organizations are also active participants in the World Commission on Environment and Development, the World Conservation Strategy, Agenda 21 document of the United Nations Conference on Environment and Development and the Global Environmental Facility (GEF).

### *Other International Efforts*

While the majority of the international advocacy undertaken by Native Americans has been focused on the UN, many indigenous organizations and NGOs are also working in other international fora. For example, efforts are being made to work with international organizations with a more regional

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<sup>93</sup> “The theft and patenting of our biogenetic resources is facilitated by the TRIPs of the WTO. Some plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred rituals are already patented in the United States, Japan, and Europe. A few examples of these are ayahuasca, quinoa, and sangre de drago in forests of South America; kava in the Pacific; turmeric and bitter melon in Asia. Our access and control over our biological diversity and control over our traditional knowledge and intellectual heritage are threatened by the TRIPs Agreement. Article 27.3b of the TRIPs Agreement allows the patenting of life-forms and makes an artificial distinction between plants, animals, and micro-organisms. The distinction between “essentially biological” and “non-biological” and “microbiological” processes is also erroneous. As far as we are concerned all these are life-forms and life-creating processes which are sacred and which should not become the subject of private property ownership.” Excerpted from the Indigenous People Seattle Declaration on the occasion of the Third Ministerial Meeting of the World Trade Organization November 30-December 3, 1999. Declaration by the Indigenous Peoples’ Caucus convened and sponsored by the Indigenous Environmental Network, Seventh Generation Fund in alliance with the Indigenous Peoples’ Network for Policy Research and Education, International Indian Treaty Council, Indigenous Peoples Council on Biocolonialism and the Abya Yala Fund.

<sup>94</sup> For more information on the issues involved, please refer to Cultural Survival Quarterly, December 2000, “Intellectual Property Rights: Culture as Commodity.”

<sup>95</sup> Stevens, John, Indigenous Activism at the UN (1998) Native Americas 46.

<sup>96</sup> Full list can be viewed at: [www.un.org/esa/coordination/ngo](http://www.un.org/esa/coordination/ngo).

focus, such as the Organization of American States (OAS).<sup>97</sup> The OAS is currently working on a draft *American Declaration on the Rights of Indigenous Peoples*.<sup>98</sup> Significant progress is being made in the analysis and approval by OAS member states of the draft that the Inter-American Commission on Human Rights presented to the General Assembly in 1997. During a review of the draft in 1999, there was dialogue between representatives of the member states and indigenous representatives from all parts of the hemisphere regarding the substance of the proposed Declaration for the first time in the Organization's history. The government delegations of the OAS member states listened to the demands of the indigenous organizations and completed the review of the Preamble of the Proposed Declaration. It is important to note that during the course of this process, an ad hoc Indigenous Committee of the Americas was created, composed of representatives of different indigenous communities. The purpose of the Committee is not only to participate more effectively in the drafting and negotiation of the Declaration, but also to act as a voice for indigenous communities.

Until the *Draft Declaration on the Rights of Indigenous Peoples* is adopted by the OAS, Native Americans will continue to use the Articles of the *American Declaration of the Rights and Duties of Man* to petition for relief for violations of human rights of Native Americans by the US Government. In *Dann v. US*, the Inter-American Commission on Human Rights (under the OAS) issued "Precautionary Measures" against the United States on two different occasions, in 1998 and 1999.<sup>99</sup> Both urged the US to stop enforcement actions against Western Shoshone land use in Nevada pending the completion of the Commission's proceedings. The basis of the Western Shoshone claim is the 1863 Treaty of Ruby Valley, in which the Western Shoshone signed a treaty with the US government allowing for the building of railways and for the safe passage for settlers. Since then, the government has assumed that it owns the land and that the treaty represented a land surrender. The government has authorized ranching, mining and settlement that has devastated the Western Shoshone culture. For the past 20 years, Western Shoshone ranchers have been asserting Western Shoshone land rights and sovereignty by grazing cattle without government permits on lands claimed by the Federal Government as public lands. This case, along with several others, has been submitted to the OAS for violations of indigenous peoples' rights.<sup>100</sup>

While Native Americans as such do not have official status in the World Bank, many Native American organizations have participated in the recent review of Operational Directive (OD) 4.20 that governs the way the Bank approaches projects and loan applications.<sup>101</sup> OD 4.20 – to be reissued as Operational Policy (OP) 4.10 – was put forward in 1991 as an "operational directive" that specifically

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<sup>97</sup> See [www.oas.org](http://www.oas.org).

<sup>98</sup> Proposed *American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights on February 26, 1997, in: 1997 Inter-American Com. H.R. Annual Report, OEA/Ser.L/V/III.95.doc.7, revised 1997.

<sup>99</sup> The case has also been taken to the United Nations Committee for the Elimination of Racial Discrimination. More information about the Western Shoshone Defense Project can be found at: [www.alphacdc.com/wsdp.html](http://www.alphacdc.com/wsdp.html).

<sup>100</sup> See [www.indianlaw.org](http://www.indianlaw.org).

<sup>101</sup> Among these organizations is First Peoples Worldwide. Background: In 1982, the World Bank issued a brief operational policy statement that outlined procedures for protecting the rights of so-called "tribal people" in Bank-financed development projects. "Experience has shown, the World Bank directive stated "that, unless special measures are adopted, tribal people are more likely to be harmed than helped by development projects that are intended for beneficiaries other than themselves. Therefore, whenever tribal peoples may be affected, the design of projects should include measures or components necessary to safeguard their interests, and, whenever feasible, to enhance their well-being." The directive further stated that, "As a general policy, the Bank will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people, unless adequate safeguards are provided. In those cases where environmental and/or social changes promoted through development projects may create undesired effects for tribal people, the project should be designed so as to prevent or mitigate such effects."

requires community-level participation in the design and implementation of Bank-sponsored projects.<sup>102</sup> It also created an Indigenous peoples Group within the Bank secretariat to assist in the implementation of this directive, and to serve as a liaison unit within the Bank for indigenous community voices. The major objective of the Indigenous peoples Group (formally named the Indigenous Peoples and Cultural Diversity Thematic Team) is to promote greater understanding within the Bank and its borrower countries of the value of cultural diversity in poverty reduction, sustainable development and effective nation building.

Native Americans are also active participants in several multilateral organizations such as the Arctic Council that was established in 1996 and includes representatives of the Governments of Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States. The Council involves all eight Arctic states and has the objective of promoting environmental protection and sustainable development in the Arctic. Indigenous peoples are included as permanent participants: Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Conference, Saami Council and the Russian Association of Indigenous People of the North (RAIPON). They are supported by the Indigenous peoples secretariat in Copenhagen.<sup>103</sup> Native Americans are also members of several international non-governmental organizations such as the World Wildlife Fund (WWF), the International Union for the Conservation of Nature (IUCN), and the Unrepresented Peoples Organization (UNPO). Similar to their attendance at the UN meetings, membership in these international organizations provides them with additional opportunities to voice their concerns and express the interests of their communities. In addition, even private-sector initiatives and agencies, such as the Global Reporting Initiative, have placed decision-making powers and “prior informed consent” on the top of the list of requirements in establishing positive relationships with Native American communities.<sup>104</sup>

Native Americans have also undertaken initiatives at the local level to improve the capacity of indigenous organizations and to provide them with information about efforts to protect their rights in the international arena. These local organizations play an important role in building support at the grassroots level for indigenous rights within various countries as well as providing support to indigenous groups in other countries by disseminating information and providing advice.

At the domestic level, the US State Department has held several annual meetings with American Indians and Alaska Natives, Native Hawaiians and other indigenous Americans to inform them of US participation in international issues that affect tribes and the government’s efforts to support indigenous rights elsewhere. Most recently, the US concluded the Pacific Salmon Treaty with Canada, while ongoing efforts include protecting subsistence hunting under migratory bird treaties with Canada and Mexico, and reaching an agreement with Russia over the subsistence hunting of polar bears in the Bering Sea.<sup>105</sup> In one case, the US entered into a specific convention with Canada in 1987 to address the Porcupine Caribou Herd that migrates between Alaska and the Yukon. The agreement explicitly incorporates Native concerns and notes that they will participate in management decisions over the herd.<sup>106</sup>

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<sup>102</sup> World Bank Operational Manual, Operational Directive 4.20 regarding Indigenous Peoples.

<sup>103</sup> Further information about indigenous component of the Arctic Council can be found at [www.arcticpeoples.org](http://www.arcticpeoples.org).

<sup>104</sup> Global Reporting Initiative, “Sustainability Reporting Guidelines on Economic, Environmental, and Social Performance.” (Boston: Global Reporting Initiative, June 2000), p. 34.

<sup>105</sup> It is not clear to what extent indigenous groups or tribes are involved in these discussions but the outcome of these discussions clearly can have a significant impact upon a particular tribe.

<sup>106</sup> As a result of straddling two international boundaries, some Native American tribes also find themselves facing serious transboundary environmental problems related to pollutants such as acid rain, persistent organic pollutants (POP), solid wastes and oil spills. The National Tribal Environmental Council (NTEC) recently surveyed tribes and found that persistent

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Due to the commitment of international organizations (including the UN) to state sovereignty, restricted funding for inclusion, and widespread misunderstandings about Indigenous peoples, Native Americans will continue to experience difficulty in gaining access to the UN in a substantive decision making role.<sup>107</sup> However, the UN still appears to be the focus of a majority of the international efforts to influence international policy-making. Indigenous people, including Native Americans, will have to work very hard to deal with the UN's commitment to state sovereignty and to overcome a policy-making bias that remains oriented toward the interests of the states that comprise its membership. While many Native American organizations are not viewing "accreditation" as critical to their efforts in accessing the UN, they are recognizing the limits of their influence without substantive access and meaningful participation.<sup>108</sup>

Just as the UN continues to struggle with the issue of state sovereignty, Native Americans will likely continue to assert rights to self-determination within this international body. Self-determination has been interpreted by Native Americans to include control of their lives and livelihoods. They will likely become more involved in the debate regarding the purpose and mission of the various kinds of institutions within the rapidly changing international system(s). Many Native Americans believe that the international institutions themselves – their structures, policies, and projects – need to change to reflect the voices of indigenous communities. Many of the larger institutions, such as the United Nations, World Bank, and the World Trade Organization, have or are now dealing with demands that indigenous communities be included in the decision-making processes and benefit from the streams of projects that occur in or near tribal lands. For its part, the UN is making efforts toward greater citizen participation in its activities, evidenced by the rapid increase in accreditation for community-level organizations and the consideration of a "Peoples Assembly." While the creation of any new global citizens assembly is still hotly debated, the UN has given provisional approval for the establishment of a Permanent Forum on Indigenous Issues, recognizing the unique position of these communities as having governance structures that are quite often separate and distinct from the member nations of the UN. Native Americans will

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organic pollutants (POPs), which accumulate in the tissues of animals and are a health risk to Alaska Natives, actually come from emissions in the lower 48 states and Mexico. Alaska Natives also face problems from air pollution emanating from Russia. Tribes in California and along the Mexican border face air quality problems from pollution caused by urban areas. Other transboundary issues include the disruption in freedom of movement of people and/or cultural resources. Examples of tribes affected include the Tohono O'odham found in southern Arizona where the US-Mexican border bisects traditional tribal lands. This creates problems for tribal members who wish to see one another. Other groups such as the Kootenai and Blackfeet in northern Montana also face similar issues. Tribes along the Mexican border also face additional problems from the presence of illegal aliens, which often utilize tribal lands (again a major problem for the Tohono O'dham, who have, at times, had the Mexican Army intrude upon tribal lands and enter tribal villages). In addition, tribes that utilize migratory resources are also subject to international treaties that may affect their right to utilize traditional resources and hunt and gather as their ancestors have done for centuries. Examples of such resources include salmon in the Pacific Northwest, migratory birds, and marine mammals such as seals, and whales, as well as polar bears and caribou in the Far North and Arctic.

<sup>107</sup> The area of human rights has proven to be a particularly contentious area both in terms of accreditation (with several high profile groups being denied accreditation or having it withdrawn) to reaching any kind of consensus on declarations or conventions spelling out which rights individuals should enjoy. See, for example, Paul Lewis, "UN Committee, Under Pressure, Limits Rights Groups" *New York Times*, June 22, 1999. To some extent indigenous issues are drawn into the same debate, although there are substantial differences, especially in those areas that pertain to collective rights, self-determination and autonomy.

<sup>108</sup> Standards for formal accreditation with ECOSOC are specified in "Arrangements for consultation with Non-governmental organizations" ESC Res. 1296 (XLIV), May 23, 1968, UN ESCOR, 44<sup>th</sup> Sess., Annex, UN Doc. E/4485 (1968) or visit the UN web site at [www.un.org](http://www.un.org).

likely continue to approach the UN as a kind of “higher court” in self-determination and land rights disputes in order to hold the national government to its commitments to the many international declarations and treaties on human rights. These cases are often taken to the UN’s human rights bodies, including the UN Commission on Human Rights, for decision, however, Native Americans have had few successes with enforcing decisions of these bodies.

Due to an exponential rise in global environmental endeavors and debates – such as climate change – and myriad international conferences and conventions, there have been an increasing number of global cross-institutional efforts to protect the world’s resources. In turn, Native Americans have responded in a variety of ways as they increasingly gain the capacity to connect their own local interests in managing land and natural resources with global movements for change. For example, some tribes have become members of some of the key, most successful attempts at global action, such as the Forest Stewardship Council.<sup>109</sup> They were also key participants in some of the studies sponsored by the World Commission on Dams (for example, Grand Coulee Dam Study, Colorado).<sup>110</sup>

#### **An Emerging International Issue: Indigenous Intellectual and Cultural Property Rights**

The increasing omnipotence of the Internet and the current rate of globalization are going to seriously jeopardize the ability of Native Americans to protect their Intellectual and Cultural Property. In addition to the above-mentioned forces, the relative ease of modern travel has sparked increasing interest in “tribal art” and the cultural property of Indigenous people, including Native Americans. The immediate result has been a trend toward commodification of sacred objects and lands, stories, textiles, songs, and clothing which has created huge divisions in indigenous communities regarding whether these things should be shared or not. One of the main drivers is the need for sustainable economic development opportunities and a way for tribal governments to support their members. Indigenous people are being swayed by the argument that “ecotourism” and “cultural tourism” are relatively benign ways that they can raise the necessary revenue *and* protect their culture. There are a growing number of organizations, private sector and NGO, springing up to meet the demand for marketing. The UN’s International Year of Ecotourism in 2002 will only increase the pressure on fragile communities and ecosystems.<sup>111</sup> Depending on the needs and desires of the tribes, there is no single approach being used by Native Americans at this time within the international system, other than the general consensus that the communities should be those with the authority to make decisions regarding their cultural heritage. One Native American organization, the Rethinking Tourism Project, is trying to promote sustainable tourism projects that also respect the rights of Indigenous people to land and natural resources.

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<sup>109</sup> See the web site of the Forest Stewardship Council at [www.fscoax.org](http://www.fscoax.org).

<sup>110</sup> See the web site of the World Commission on Dams at [www.dams.org](http://www.dams.org).

<sup>111</sup> See the web site for the Campaign on the International Year of Ecotourism at [www.twinside.org.sg/title/iye.htm](http://www.twinside.org.sg/title/iye.htm) or the Rethinking Tourism Project at [www.planeta.com/ecotravel/resources/rtp/rtp.html](http://www.planeta.com/ecotravel/resources/rtp/rtp.html).

## ***INTERTRIBAL RELATIONS AND NONPROFIT ORGANIZATIONS***

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- Direct tribe-to-tribe contact occurs numerous times each day as tribal governments conduct their business. These interchanges cover issues ranging from the mundane to the monumental, and likewise range from amiable to antagonistic.
- In the course of their participation in intertribal organizations, tribes come together to consider issues of common concern and often attempt to arrive at a unified stand in order to influence events and policies that will affect a number of tribes. With the diversity of Indian nations' concerns, however, the growth of such intertribal organizations may be constrained.
- About 2,000 Native-led nonprofits organizations are active in the US, and their activities often impact the tribes, either directly or by way of their work with individual Indians or on issues important to Native America. The relative importance of these groups is increasing as the federal government curtails direct service provision and as pluralism among Native people grows.

Tribal governments interact with one another through a variety of channels, including direct tribe-to-tribe communication and collective participation as members of intertribal organizations.<sup>112</sup> Tribal members and tribal governments also interact through non-governmental organizations (NGOs) or nonprofit organizations.

### *Tribe-to-Tribe Interactions*

The relations between tribal governments are as unique and complex as the tribes themselves. It is difficult to make broad generalizations about the state of tribe-to-tribe relations but the majority are generally cooperative and friendly, seeking to find solutions to common problems. The following examples are illustrative of the range of these interactions:

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<sup>112</sup> Here we use *intertribal organizations* to mean those groups where membership is composed of representatives from the tribal governments.

- In 1998, the Oneida Nation of New York told the BIA that it would not accept approximately \$2.6 million in federal monies. The Oneidas requested that the funds be put to use to assist other tribes to fund a study by a well-known intertribal organization – the United South and Eastern Tribes (USET) – and to develop an urban Indian center. The Oneida Nation’s gesture of goodwill exemplifies the amiable nature often found between the nations of Indian Country.
- Though the Navajo and Hopi Nations agree on a large number of issues, their government-to-government relationship has long been strained by one point of contention: the dispute over title to land historically claimed by both nations. Initiated by an Executive Order in the late 1800s, this dispute set off more than a century of land-use conflict that, in recent times, has resulted in the tribes spending years engaged in contentious lawsuits over surface and subsurface rights.
- There is a growing disparity among tribes with successful gaming operations and those without these resources. The growing economic power, and often growing political power, of successful gaming tribes has created new tensions. In some cases, successful gaming tribes have sought to prevent other tribes from initiating or expanding gaming because of increased competition.

### *Intertribal Organizations*

In addition to direct government-to-government interactions, tribal government representatives encounter each other regularly in the course of their participation in intertribal organizations. These organizations can be based upon geography, historic tribal affiliations and/or directed toward specific issues or topic areas. The National Congress of American Indians (NCAI), created in 1944, is the oldest and largest representative tribal government organization. Examples of organizations based on geography are: Intertribal Council of Arizona, Affiliated Tribes of Northwest Indians, United South and Eastern Tribes, Great Lakes Intertribal Council and Alaska Federation of Natives. The Pueblos, while located in the same geographic region, are bound by traditional tribal ties in such organizations as the Eight Northern Pueblos and the All-Indian Pueblo Council.

Intertribal organizations are also organized around particular issues or topic areas such as: National Indian Gaming Association, Intertribal Timber Council, Intertribal Agriculture Council, National Tribal Childcare Association, National Indian Health Board, Council for Energy Resource Tribes, and Intertribal Bison Cooperative. These same issue or topic areas can also be organized geographically; examples include state or regional tribal gaming associations and regional Indian health boards. A growing number of tribal government employees are also developing professional associations to address common interests, such as the Native American Finance Officers Association or the National Association of American Indian Head Start Directors. Overall, these intertribal organizations provide a forum for consensus building, promote common agendas and problem-solving, explore innovation, share and disseminate information, address capacity building, and build public awareness. In all, they provide valuable services to tribal governments.

Not surprisingly, intertribal organizations, which draw their membership from a number of different tribes, do not always achieve unanimity on contentious issues. Naturally, members bring unique objectives and priorities to group discussion. Examples of issues that sometimes lead to dissent among member tribes include:

- *Allocation of Federal Funds* – Programs that are based upon population numbers can pit large tribes against smaller tribes;

- *Historical US-Tribal Relations* – Tribes that have entered into treaties with the US government regularly approach disputes from a different legal foundation than tribes that never formally signed treaties with the US; and
- *Geography* – The remoteness of Alaska frequently gives rise to different priorities than those held by other tribes and can limit the participation of Alaska Natives in intertribal discussions.<sup>113</sup>

### **The National Congress of American Indians**

Founded in 1944, the National Congress of American Indians is the oldest, largest and most representative national Indian organization. It was established in response to the termination and assimilation policies that the US forced upon tribal governments in contradiction to their rights and status as sovereign political entities. Since its creation, NCAI has stressed the need for unity and cooperation among tribal governments for the protection and advancement of their treaty and sovereign rights. Comprised of 250 member tribes in the continental US and Alaska, NCAI is organized as a representative congress that meets at least twice a year. Headquartered in Washington, DC, NCAI monitors federal policy and coordinates efforts to inform federal decisions that affect tribal government interests. Specifically, NCAI aims to secure for its membership and Indian Country at-large the rights and benefits entitled to Indian nations; to enlighten the public about American Indian issues; to preserve rights under Indian treaties or agreements with the US; and to promote the common welfare of American Indians and Alaska Natives. The current issues and activities of NCAI include: protecting programs and services to benefit Indian families, specifically targeting Indian youth and elders; promoting and supporting Indian education; enhancing Indian health care; supporting environmental protection and natural resources management; promoting the rights of Indian economic opportunity both on and off reservations; and protecting the rights of all Indian people to safe and affordable housing.

Source:

The National Congress of American Indians website, accessed at <http://www.ncai.org>.

### *Non-Governmental Organizations/Nonprofits*

In addition to intertribal organizations whose membership is comprised of tribal government representatives, a large number of non-governmental organizations are active in Indian Country. A growing number of these organizations are Native-led and are representative of various issues and constituencies. The Native-led organizations represent the emergence and growing force of the Native nonprofit sector.

From early colonization through the 1800s and beyond, religious groups of many different faiths sought to Christianize Native peoples by establishing churches, missions and schools on the reservations. The initiative to send Indian children to distant, mostly eastern boarding schools and colleges also introduced tribes to another element of the nonprofit sector – educational institutions. This was most likely the first contact tribes had with the non-governmental sector. Groups such as the Indian Rights Association and the Friends of the Indian were active at least as early as the 1880s. Though these groups

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<sup>113</sup> This is not intended to imply that all tribes outside Alaska have the same priorities. It is also important to note that the unique political context in Alaska, where tribes, ANCSA Native corporations and state chartered Native nonprofit corporations co-exist, places strains on questions of representation and the government-to-government relationship. For example, federal agencies tend to provide information to tribes through nonprofit organizations rather than directly to the tribes. Willie Kasayulie, CIP Sounding Board member, notes, “In the Yukon-Kuskokwim Delta, there are six independent school districts, four regional nonprofit organizations, and three subregional organizations for 56 federally recognized tribes. Each with differing responsibilities. Less than half the tribes independently exercise government-to-government relations with state and federal governments. Approximately 70%-75% of the tribes have dual governments where state-chartered municipalities exist and perform all of the governmental activities without full involvement of the tribes.”



were well-meaning, not all of their policy initiatives assisted Indian people. For example, discussions held at the annual conference of the Friends of the Indian inspired the *General Allotment (or Dawes) Act*, which led to the eventual loss of over 90 million acres of Indian land, an Act that continues to have negative reverberations a century later.

But the social and religious reform movement also led to American Indians gaining citizenship in 1924 and to the 1928 *Meriam Report*, prepared by the Brookings Institution, which precipitated significant changes in Indian Country, including the *Indian Reorganization Act of 1934* (IRA). As an outgrowth of the reform movement and the IRA, the National Congress of American Indians continues today as the leading representative body of Native people and tribal governments. Many of the early nonprofit groups on reservations (mostly religious-based), however, focused on charity rather than social change, advocacy or development. These charity-based groups are becoming the minority in Indian Country's nonprofit sector, and the growing demand for social change and development organizations forces them to either diminish their presence or alter their objectives.

There was little development of Native-led nonprofit organizations until the 1960s. In 1961, the Fund for the Republic funded a private study and paid to convene over 500 Indians at the University of Chicago to organize and produce "A Declaration of Indian Purpose." From this gathering, the National Indian Youth Council emerged as one of the more radical Indian voices. The American Indian Movement followed in 1968, and was formed as a civil rights organization largely in response to police brutality. From these groups came a rallying call for Indian rights that later evolved to tribal rights and sovereignty concerns.<sup>114</sup> The movement and relocation of Native peoples to urban areas created an organizational and service vacuum, thus, urban Indian organizations and centers emerged as some of the earliest Native nonprofits.

The transfer of control from the Federal Government to tribal governments has been occurring at the same time as the emergence of Native nonprofits, particularly those serving rural and reservations constituencies. As tribes seek greater control of their governments, there is a parallel movement for Native people to seize control over all institutions that serve Indians. One example is the Indian-controlled school movement, a combination of action by tribes, communities, Native people and private philanthropy.<sup>115</sup> By 1965, private foundations funded six demonstration schools and the first tribal college on the Navajo Reservation was started in 1969 with many of the other 30 institutions starting in the 1970s and 1980s. This movement has led to the creation of the American Indian Higher Education Consortium and the American Indian College Fund, both Native-controlled non-governmental, nonprofit organizations serving a constituency of tribal institutions and people.

Two recent studies by First Nations Development Institute and Native Americans in Philanthropy analyze the emerging Native nonprofit sector and its role in federal devolution. These studies identify several reasons for sector's emergence:

- Nonprofit structures provide a contemporary mechanism for traditional forms of organization or association. Historically, no single governing structure took care of all of the people's needs; rather, this responsibility was assumed by the people themselves, organized in multiple structures and associations.

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<sup>114</sup> Adamson, Rebecca A., "Money With a Mission: A History of Indian Philanthropy," *Tribal College Journal*, Winter 1994, p. 28.

<sup>115</sup> The Ford Foundation played a key role in supporting the emergence of this movement.

- Nonprofits develop where the government fails to provide services or meet certain needs. As tribes transition to self-governance, many do not have adequate resources or capacity to meet the growing needs of their citizens, thus nonprofit organizations emerge to complement and supplement government.
- Federal devolution and federal cutbacks have necessitated the growth and development of nonprofit solutions to fill voids left by former federal service providers.
- Nonprofits develop where the market fails. In this case, either government or nonprofits step in to meet a need. For example, both tribal governments and nonprofits are beginning to address the need of adequate housing and access to financial services.
- Nonprofit organizations offer an outlet for difference and freedom of expression. As Indian Country grows and becomes more pluralistic, tribal governments cannot hope to meet all the needs of a growing and diverse population. In some cases, nonprofit organizations are challenging tribal government policies such as efforts to place toxic waste dumps on reservations.
- As tribes move toward greater self-governance, they are increasingly recognizing the need for and creating the infrastructure for the development of the nonprofit and private sectors.
- The foundation community is learning about and seizing opportunities to support Native issues and programs through nonprofit organizations.

Tribal governments are beginning to recognize the potential benefits of incorporating nonprofit entities that are closely aligned with tribal governments. Rather than incorporating them under the states regulations (thereby giving states an undesirable degree of legal control over tribal activities) many tribes are developing tribal codes under which nonprofit entities can be incorporated. The tribes then seek tax-exempt, 501(c)(3) status from the Federal Government (the Internal Revenue Service). For example, in 1996, the Cherokee Nation incorporated the Cherokee Nation Education Corporation under tribal law, sought recognition by the IRS as a 501(c)(3) in 1998, and received a final revised determination letter ruling from the IRS in 1999.<sup>116</sup> The 501(c)(3) designation removes any perception barriers as to the charitable nature of the tribe's activities and helps assure potential supporters of the tax-deductibility of their gifts.<sup>117</sup> The Cherokee Nation went one step further and requested an IRS ruling on whether the Cherokee Nation Education Corporation was required to submit the Form 990 (Annual Information Return) to the IRS. They received a revised and final letter ruling from the IRS in 1999 that removed the Form 990 reporting requirement. However, a type of report equivalent to the Form 990 is generally required to be filed with the tribal nation on an annual basis, and in addition, this equivalent form is generally required to be made available to the public upon request. Nonprofits

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<sup>116</sup> Allen, Shelly Butler, "Remarks," at the Oweesta 2000 Workshop Session entitled, "Maximizing Your Sovereignty with Tribal Philanthropy," August 2000. Shelly Butler Allen works for the Cherokee Nation Education Corporation.

<sup>117</sup> In the FNFI non-profit study done with 1995/96 data, one of the questions asked was whether or not the non-profit was incorporated under the tribes or the states. The responses indicated a lack of understanding of what this meant as many wrote that they support the tribe. Given the state of tribal code development at the time, an assumption was made that most non-profits located on the reservation were in fact incorporated under the states.

that incorporate under tribal law but are not closely aligned with tribal government are unable to request an exemption from filing the Form 990 with the IRS.<sup>118</sup>

Intertribal organizations can be structured in various ways, including as a nonprofit tax-exempt organization (under Section 501 of the IRS code) or by member tribes using Internal Revenue Code Section 7871 to create tribal political subdivisions. Political subdivisions of tribes must exercise one of three “sovereign powers” as identified by the IRS: the power to tax, the power to enforce, or the power of eminent domain. For example, the Columbia River Intertribal Fish Commission (CRITFC) is legally structured as a political subdivision of the four tribes it represents because it has the power to enforce. Tribes, as well as some intertribal organizations, such as CRITFC, have begun creating tribal charitable funds or foundations using IRC Section 7871 as a way to raise funds for government activities.

There is a growing movement to learn more about nonprofits and their emerging role in Indian Country as evidenced by the NAP and FNFI studies and subsequent forums on Native nonprofits. Led by the American Indian College Fund, Native American Rights Fund, NAP and other Native nonprofits, three forums were held in conjunction with the annual conference of the Independent Sector. These events brought together national, regional, and local Native nonprofit leaders as well as leaders of non-Native nonprofits and philanthropy to discuss and learn about the nature, extent, contributions and potential of this emerging sector.

### *Challenges*

One of the most critical challenges facing the nascent Native nonprofit sector is resource development. As more Native nonprofit organizations emerge, new and expanding sources of support must be identified and nurtured, particularly given the potential for competition between nonprofits and tribal governments seeking financial support from a limited pool of philanthropic and government resources. Although private philanthropy can, in fact, make grants and contributions to tribal government entities, they are often unaware that their contributions are qualifying distributions under IRS regulations or are reticent about making grants to a government entity.<sup>119</sup>

Contributions to Native nonprofits from tribal enterprises and tribal government were low in the mid-1990s but thought to be increasing.<sup>120</sup> Tribes with gaming compacts that require a certain percentage of gaming revenues to be paid to charity now have Native nonprofit organizations to which to direct a portion of their contributions. New tribal and Native foundations may help to support these new and emerging nonprofits, but private philanthropy will also need to increase substantially. In addition, these nonprofits need to identify ways to generate their own income from services. Finally, the sustainability of these new entities will require them to collaborate with government, business and other nonprofits in order to reduce duplicity of services and to take advantage of comparative advantages.

For Native reservation-based groups looking to start a nonprofit organization, there are pros and cons of incorporating under tribal codes. Many of these groups, while seeking independence from tribal government, may want to support tribal sovereignty by seeking incorporation under the tribe. Also if a

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<sup>118</sup> Information letter from the IRS to First Nations Development Institute dated September 8, 1998, clarifying the status of tribal governments as eligible recipients of grants from private foundations.

<sup>119</sup> “Down But Not Out: The Non-Profit Sector in Native America and the New Federalism,” Native Americans in Philanthropy, September 1999, and “Emerging Sector: Non-Profits in Indian Country,” unpublished report, First Nations Development Institute based on 1995/96 data.

<sup>120</sup> Mindy Berry, “Native American Philanthropy :Expanding Social Participation and Self-Determination,” *Cultures of Caring in Diverse American Communities*, <http://www.cof.org/culturescaring/>

Native nonprofit located on reservation and incorporated under the state were to be subsequently dissolved, state law may require its assets to be potentially diverted outside of the tribal community. However, if the political climate of the reservation is unstable, a Native group that wants to start a nonprofit on the reservation may incorporate under the state because it fears that, if incorporated under tribal code, a change in tribal administrations may result in a loss of that incorporation or spark political interference.

Just as in other areas of Indian Country, the nonprofit sector needs to build capacity of the staff, management and boards of directors. Much as the lack of trained managers harms tribal governments, this same lack of a highly qualified managerial force is evident in the nonprofit sector. Although there is a growing awareness of these organizations and their needs, few concerted efforts address the technical assistance and capacity building resources required by these entities.

## *LEGAL*

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- As much as ever, Indian well-being depends on the legal interpretation of tribal and individual Indian rights. Increasingly, Indian tribes confront courts that are hostile to them, if not to long-standing tenets of Indian law. Jurisdictional questions regarding which legal authority applies to a given court proceeding are at the forefront of much of the legal debate when Indians are involved.
- Decisions rendered in the US court system still have enormous impact throughout Indian Country. Rulings that are counter to Indian interests are difficult to overturn, leading some legal scholars to urge tribes to find resolution to a range of issues without resorting to the US courts.
- The power to tax is at the boundary of one of the most important jurisdictional debates being contested in Indian Country today. The ability of tribes to regulate the activities on tribal land is severely threatened by the courts' reluctance to recognize a broad definition of tribal taxing authority.
- The size and sophistication of tribal courts vary widely, and the inclusion of traditional conceptions of justice in some tribal court systems makes a number of the tribal courts particularly well-suited to meet the needs of the tribal population.

The legal questions faced by tribes today cover an extremely broad range of issues: civil, criminal, and probate disputes all have their place within the broad definition of Indian law. Many of the political powers that Indians argue are inherent to them as sovereign nations are under continual dispute by various parties. The increasing political power of the tribes results in a concomitant increase in the number of legal questions and conflicts facing tribes. These questions, in both criminal and civil proceedings, are hotly debated facets of Indian law.

### *Jurisdiction over Non-Indians*

At the center of legal dispute in much of Indian law lies a set of jurisdictional questions. Courts hearing cases involving Indian law are often confronted with competing governmental authorities, and the decisions rendered in such cases dictate the degree of political control tribes are (or will be) able to exert. Criminal jurisdiction over Indian-perpetrated crimes in Indian Country has historically fallen under the authority of the tribes. The tribes have also maintained jurisdiction for most crimes committed by Indians against non-Indians on the reservations. The exceptions to this vesting of jurisdiction are violations of a

set of offenses classified as “major crimes” by the *Major Crimes Act* of 1885. According to the United States Code, the following crimes fall outside the scope of tribal jurisdiction, and instead are held within the exclusive jurisdiction of the United States:

[M]urder, manslaughter, kidnapping, maiming, ... incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 [embezzlement and theft within special maritime and territorial jurisdiction] of this title.<sup>121</sup>

A major change in jurisdictional boundaries took place with the 1990 US Supreme Court ruling in *Duro v. Reina*, which overturned much of the precedent governing jurisdictional inquiry in criminal cases. In rendering this decision, the court averred that tribes essentially held no jurisdictional authority over non-members on the reservations. This ruling flew in the face of virtually all congressional treatment previously applied to the question of Indian jurisdiction, and overrode the language that federal jurisdictional statutes have typically employed. The language used in federal statutes has clearly marked jurisdictional lines as being drawn around “Indians” rather than “tribal members.” For this reason, the assertion of tribal jurisdiction over non-member Indians has often gone unchallenged. The Court’s ruling in *Duro v. Reina* prompted Congress to enact what has become known as the “Duro Fix.” The Duro Fix reaffirmed the rights of the tribes to exert criminal jurisdiction over all Indians.

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<sup>121</sup> *Major Crimes Act*, accessed at <http://www4.law.cornell.edu/uscode/18/1153.html>.

### Challenges to Indian Sovereignty in the Courts and Tribal Responses

Even as tribal governments have made significant strides in reasserting their rights to govern, over the last twenty years Supreme Court decisions, such as *Montana v. U.S.*, *Brendale v. Yakama Nation*, *Oliphant vs. Suquamish Indian Tribe*, and *Strate v. A-1 Contractors* have significantly limited the civil and criminal jurisdiction of tribal governments over events that occur within their territorial boundaries. In the most recent Supreme Court term, the United States Supreme Court issued five decisions affecting the rights of Indian tribes. The Court decided against the tribes in four out of five instances. In particular, the decisions in *Nevada v. Hicks* and *Atkinson Trading Co. v. Shirley* raise strong concerns that the Supreme Court is on an accelerating trend toward removing tribal jurisdiction over the conduct of non-Indians within tribal territory.

In *Hicks*, the Supreme Court, ruled that state officers who are investigating tribal members on Indian reservations for alleged off-reservation crimes are not subject to suit in tribal court for their conduct in the court of their investigations and are not required to obtain tribal permission to enter the reservation to conduct their investigations. The decision weakened Indian nations' jurisdiction vis a vis their state government counterparts. In *Atkinson*, the Court held that the Navajo Nation could not levy an occupancy tax on a hotel located on fee land within the borders of its reservation, depriving the Nation of an important source of government revenue.

More broadly, the two cases make clear that tribal governments are in an increasingly defensive posture in the federal courts. In the long term, this erosion of jurisdiction threatens to make tribal governments ineffective in protecting the cultural identities of their communities.

On September 11th, 2001, tribal leaders from across the country met in Washington, DC, to discuss these recent court decisions. They reached consensus to mount an organized effort to halt and reverse the Supreme Court's erosion of tribal sovereignty. Under an effort named the Sovereignty Protection Initiative, tribes are undertaking a multi-pronged effort to restore and protect tribal sovereignty. The Initiative consists of:

1. Developing federal legislation to reaffirm tribal jurisdiction;
2. Forming a Supreme Court project to support and coordinate tribal advocacy before the Supreme Court;
3. Promoting strategies for tribal governance that will protect tribal jurisdiction;
4. Increasing tribal participation in the selection of federal judges; and
5. Developing a media and advocacy strategy to inform Congress, the public, and tribal leadership about tribal governance and that will promote the overall Initiative.

Source: NCAI website (<http://www.ncai.org>).

In the case of civil jurisdiction, state courts have typically heard actions brought by Indians against non-Indians, even when the matter at hand is clearly within the political boundaries of the reservations. In Alaska, for example, tribes are required to take into protective custody non-tribal members who are intoxicated within tribal jurisdiction, but cannot prosecute them in tribal courts for the crimes they commit. Proceedings involving opposing Indian parties, or cases where a non-Indian sues an Indian over a claim arising in Indian Country, fall under the jurisdictional purview of the tribal courts. For incidents that take place outside of Indian Country, state courts maintain jurisdiction, regardless of the composition of the parties involved.

### *Taxation in Indian Country*

One of the most important regulatory debates being waged in Indian Country at this time centers on the rights of taxation. One of the few certainties in the debate is that states cannot, at this time, tax tribal members who live and derive their income from the provision of goods and services on tribal lands.<sup>122</sup> The unresolved contentions regarding taxation revolve largely around the ability of tribal governments to collect taxes from non-Indian businesses operating on the reservations, and on the ability of state governments to collect taxes on retail sales that take place within Indian lands.

#### **Issues in Indian Country – Taxation**

*“Do tribal governments pay federal taxes?”* Tribal government revenues are not taxed, just like state and local government revenues are not. The Federal Government has never taxed governmental revenue of state, tribal, or local governments. This is a long-standing federal policy with constitutional support that prevents interference with the ability to raise revenue for government functions. Like state and local governments, tribal governments use their revenues to provide essential services for their citizens. Unlike state governments, tribal governments are not in a position to levy property or income taxes. Income from tribal businesses is the only non-federal revenue source.

*“Do tribal governments pay state taxes?”* States cannot directly tax a tribal government. The Supreme Court has held that state governments can collect excise taxes on sales to non-members that occur on tribal lands, so long as the tax does not fall directly on the tribal government. States and tribes have developed a variety of methods for collecting these taxes, which most often take the form of intergovernmental agreements or pre-taxing at the wholesale level.

*“Do Indian people pay taxes?”* Individual American Indians and Alaska Natives and their businesses pay federal income tax just like every other American. The one exception is when an Indian person receives income directly from a treaty or trust resource such as fish or timber; that income is not federally taxed. States also cannot tax tribal members who live and derive their income on tribal lands.”

Source:

NCAI website, accessed at <http://www.ncai.org/indianissues/Taxation/fedstatetax.htm>.

Indian tribes are currently fighting an arduous battle to assert their ability to tax non-Indian businesses that operate within the boundaries of the reservations. Though the debate over taxation is being heard across Indian Country, the state of Montana, and the activities of the Crow Tribe, have been ground-zero for a number of court rulings that potentially significantly limit the degree to which tribes can collect taxes from a number of businesses. The businesses potentially affected range from railroads and utilities, which utilize rights-of-way over reservation lands, to nonprofits such as the Big Horn County Historical Society. In the case of taxation of the activities taking place on railroad and utility rights-of-way, the courts have ruled that non-Indian property located within the reservation, but not on tribal trust lands, is exempt from tribal taxation.<sup>123</sup> The Crow Tribe has also struggled since 1995 to collect a resort tax on businesses operating within the exterior boundaries of the reservation. A number of court setbacks have left the Tribe unable to collect the tax, and found tribal liens filed against the property in question being struck from the records office in Big Horn County.<sup>124</sup>

<sup>122</sup> *Federal and State Taxation Issues for Tribes*, accessed at <http://www.ncai.org/indianissues/Taxation/fedstatetax.htm>.

<sup>123</sup> *Big Horn Electric Cooperative v Adams*, Opinion of the US 9th Circuit Court of Appeals, June 14, 2000. Accessed at <http://laws.lp.findlaw.com/9th/9935799.html>.

<sup>124</sup> “Crow Liens Against Non-Indian Businesses Ordered Removed,” *Indian Country Today*, December 13, 2000.



In retail transactions involving non-Indians on Indian lands, if the incidence of the tax falls on the tribe, the tax is not allowed, while if the incidence of the tax falls on the retail consumer, the tribes collect taxes on behalf of the state. The test for the incidence of a tax is less than satisfying for tribes, as it leaves them weighing the costs of potentially double-taxing certain transactions, versus forgoing the tax, and its attendant revenue stream, altogether.<sup>125</sup> The imposition of state taxes for sales of cigarettes to non-members is the prime example of the retail transactions tax debate impairing the ability of tribal governments to regulate commercial activities taking place in Indian Country. There is, however, some potential relief in sight for tribes who have thus far been frustrated by uncertainty over retail taxation issues. In Oklahoma, another site of particularly intense jurisdictional disputes over taxation, Governor Frank Keating has publicly announced a preference for mediation over litigation, and in doing so has paved the way for tribal-state tax compacting.<sup>126</sup> Such tax compacts, when carefully crafted, allow both the tribes and the states to protect their sovereign interests, provide for a better-functioning tax collection mechanism and will hopefully continue to prevent some of the contentious litigation that has so far characterized the controversies over taxation in Indian Country.

The provision of governmental services is a primary function of any administrative body, and the governments of the Indian nations are no exception. The difficulties tribes are having in the oversight of taxation, as illustrated by the discussion of the Crow Tribe above, are undermining the ability of the tribes to establish and enforce “the ‘rules of the game’ by which citizens trade, interact and cooperate,” as well as eroding their capacity to act “as the provider[s] of the social infrastructure and services”<sup>127</sup> that underlie a well-functioning society. The inability of tribes to collect adequate tax revenues is currently one of the most inhibiting regulatory developments faced by these nations, and is further frustrating the development of capable Indian governments along a number of dimensions – the political, administrative, and legal systems of Indian nations all suffer when the provision of services on the reservations goes underfunded.

### *Tribal Courts*

Most tribes currently operate some form of tribal court.<sup>128</sup> These courts range significantly in size and sophistication. For example, the Navajo Nation judicial branch is highly formalized, maintains a full-time appellate court, and employs tribal prosecutors and defense attorneys, while many smaller tribes operate with a single part-time tribal judge with little or no supporting staff. The degree of reliance on formally codified Western-style law, traditional tribal custom, and innovative Alternative Dispute Resolution (ADR) mechanisms within the tribal courts varies greatly between the numerous court systems operating in Indian Country.

Tribal courts, like the courts of any society, play a critical role in determining how well the community functions. A well-designed court system serves a nation by: clarifying the economic and political rules of the tribe; protecting the rights of members and non-members; maintaining peace and

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<sup>125</sup> Testimony of Susan M. Williams, On Behalf of the National Congress of American Indians, “On the Collection of State Transactions Taxes by Tribal Retail Enterprises,” before the United States House of Representatives Committee on Resources, October 12, 1999.

<sup>126</sup> “The State of Tribal Taxation,” *Business Alert*, First Nations Development Institute, September/October 2000, p. 1.

<sup>127</sup> Kalt, Joseph P., and David Reishus, “Report Concerning the Crow Tribe Resort Tax,” The Economics Resource Group, Inc., November 27, 1996, p. 6.

<sup>128</sup> Canby, *op. cit.*, pp. 63-65.

order; and developing culturally legitimate systems.<sup>129</sup> The provision of these services establishes the legitimacy of the court system within a society, and allows outsiders to develop confidence in their dealings with nations served by competent court systems.

Though most tribes operate some type of tribal court, a majority of Indian legal branches are far from establishing complete legitimacy in the eyes of non-Indian governments, individuals, and court systems. First, the scope of matters in which tribal courts are involved is often not so broad as that of state and federal courts. For example, the court on many reservations does not have a distinct probate division. Second, the capacity of tribal courts is lacking for certain types of litigation – empanelling a jury that is comprised entirely of tribal members who have no connection to a given proceeding is exceedingly difficult on reservations that are sparsely populated and long distances from population centers. Third, tribal courts are still notorious for a lack of independence from the political processes of the reservations. Each of these shortcomings undermines the validity of tribal court systems and erodes the legitimacy of tribal governments. Furthermore, poor decisions in a given Indian court harm Indian Country broadly, as the effectiveness of tribal sovereignty depends upon the acceptance of tribal court rulings when adjudicated matters are subsequently heard or relied upon for precedent in state or federal courts.

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<sup>129</sup> Goldstein, Michael S., *Building Support for the Development of the Hualapai Tribal Court* (Cambridge, MA: John F. Kennedy School of Government, Harvard University, April 1998), p. 2.

### **Burlington Northern and the Crow Tribal Court**

In 1996, the Crow Tribal Court heard the case of two Crow women killed by a Burlington Northern freight train that was crossing the reservation in 1993. The case was only the second jury trial ever to be held in the tribal court, and was the first wrongful death case considered in this venue.

Bringing the case of *Redwolf v. Burlington Northern* to trial had proven difficult in the Crow courts, as differing cultures, limited jury pools, and legal and procedural uncertainty are just a sample of the issues that arose during the trial that cast doubt upon the capacity of the court to fairly adjudicate such a proceeding. Though plaintiffs' attorneys, all non-Indians, were successfully able to bring their case, the defense counsel found that "dealing with the court's uncertainties was a frustrating, disorienting nightmare."

*Differing Cultures.* Opening remarks to the jury by the presiding judge were given in the Crow language, and were viewed as disturbing and prejudicial by the defense attorneys; plaintiffs were allowed to argue that blood-alcohol tests performed on the victims violated Crow culture and thus should not be admitted; and the application of an amalgam of federal law, common law, Crow statutes, and Crow oral tradition all left defense attorneys at a loss for how to deal with cultural differences in the course of the litigation.

*Limited Jury Pools.* Jury selection for the initial jurors selected for the case became a struggle between attorneys, as plaintiffs and defendants argued over a tribal-members-only pool or a total reservation population pool. This first selection of a jury in 17 years in the tribal court eventually drew only from tribal members, and the jurors were quickly dismissed after being exposed to bickering between the attorneys. The next jury selection process forced the court to resort to the issuance of John Doe warrants, a jury pool being composed of passersby pulled off the street. This jury also did not remain intact through the time of trial, so a third jury was selected. Six jurors and an alternate were selected; three jurors and the alternate claimed to be related to the plaintiffs. Plaintiffs' attorneys argued that the definition of "relative" is broader in Crow Country than in the Western sense of the term, and that the jurors should thus be permitted to serve.

*Legal and Procedural Uncertainty.* The Crow Tribal Code does not cover an expansive range of issues, prompting the presiding judge to agree that, "It would be nice if I had more law." In addition to a lack of codified law, the standard of negligence that would be applied to the case was uncertain, and was essentially decided on during a pre-trial brainstorming session between the attorneys and the presiding judge. Further, procedural issues such as the cutoff period for the discovery process did not closely mirror the process found in federal or state courts.

After 12 days of trial, the six-member jury awarded \$250 million of compensatory damages to the heirs of the two women. The jury voted to not award any punitive damages – what might have been seen as an unusual division of damages was particularly striking given that the two women were "a high-school student and a middle-aged woman with little employment history." The unorthodox damage number was made more extraordinary by the fact that the plaintiffs in the case had requested a much smaller award, and plaintiffs' attorneys attempted to have the award reduced to \$25 million, so that the outsize value of the damages would not bias an appeal against them.

On appeal the US District Court declared the judgement in the Crow court void and unenforceable.

Source:

Barker, Emily, "Point of Impact," *The American Lawyer*, January 1997; Order, Cause No. CV 96-17-BLG-JDS, in the US District Court for the District of Montana, in the matter of *Burlington Northern Railroad Company v. Estates of Red Wolf and Bull Tail, et al.*, April 1998.

The Judicial Branch of the Navajo Nation is particularly well known for its success in bringing together Western-style formal statutes, traditional legal doctrine, and an innovative ADR mechanism called "peacemaking." Established in 1982, the Navajo Peacemaking Division is a forum for community-led, consensus-based dispute resolution. The goal of the Peacemaking Division has never been to replace the rest of the Navajo court system, but rather to provide an alternative for certain types of disputes. Resolution techniques are drawn from the Navajo philosophy of *K'e*, which values responsibility, respect, and harmony in relationships. Instead of a single judge adjudicating guilt or innocence and imposing a sentence, Navajo peacemaking is a participatory process in which the affected parties work with a

community leader to resolve disputes amicably. One of the greatest achievements of the Navajo Judicial Branch is that it has successfully incorporated Navajo common law into the entire spectrum of cases it hears – not simply those matters that are decided in its Peacemaking Division.<sup>130</sup>

The continued success of well-functioning Indian courts, and the steady improvement of tribal courts that are not as developed as that of the Navajo Nation, will have a significant impact on the ability of tribes to capitalize on their hard-fought rights to self-determination and self-government. The requirement that tribal remedies be exhausted prior to cases moving into the US court system<sup>131</sup> has fundamentally altered the importance that tribal courts will have on the continued economic, social, and political development of the Indian nations.<sup>132</sup>

### *Non-Tribal Courts*

As tribes become more sophisticated in their use of the state and federal court systems, it is likely that jurisdictional battles will continue to be frequently decided through these courts. Traditionally, tribes have looked to the courts to uphold the Federal Government's responsibilities to Indians, whether these responsibilities have been spelled out in treaties or have become part of the set of implicit or explicit benefits of federal recognition. The courts, however, have recently issued a number of rulings (for example, the very narrow interpretation of terms such as "Indian Country" adhered to in the *Venetie* decision; see Appendix B of this report) that severely limit tribal jurisdiction and power. In the light of such rulings, legal scholars are beginning to urge tribes to alter their tactics of using the federal courts to uphold their rights as sovereign political entities. Though it has long been the goal of attorneys practicing Indian law to bring cases before the US Supreme Court, this "Holy Grail" of Indian law is now an objective that some view as quite detrimental to the interests of the tribes, given recent rulings handed down by the Supreme Court.<sup>133</sup>

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<sup>130</sup> As tribal courts learn to integrate common law and traditional belief into their jurisprudence they find themselves running a risk of increasingly divergent legal rulings from those likely to be upheld on appeals once remedies are exhausted at the tribal court level.

<sup>131</sup> The principle of exhaustion in tribal court was established in *National Farmers Union Insurance Companies v. Crow Tribe of Indians* (1985) and *Iowa Mutual Insurance Company v. LaPlante* (1987).

<sup>132</sup> Enderson, Douglas B. L., "The Challenges Facing Tribal Courts Today," *Judicature*, Vol. 79, No. 3, November-December 1995, reprinted and accessed on the Tribal Court Clearinghouse website, at <http://www.tribal-institute.org/articles/enderson1.htm>.

<sup>133</sup> Williams, Robert A., Jr., *The Legal Challenge*, presentation given at the "Building American Indian Nations for the 21<sup>st</sup> Century" conference, Tucson, AZ, November 12, 1999.

## The Indian Civil Rights Act

*The Indian Civil Rights Act of 1968* (ICRA) is similar to the Bill of Rights in the United States Constitution, which guarantees personal freedoms against actions of the Federal Government, and the Fourteenth Amendment to the Constitution, which extends those protections to actions of state governments. Since these federal Constitutional limitations do not apply to tribal governments, Congress adopted the Act to ensure that tribal governments respect basic rights of individual Indians and non-Indians. Significantly, the Act omits many Constitutional limitations applicable to federal and state governments, including the prohibition against established religion and the right to council for indigents. Many advocates of tribal sovereignty nonetheless saw passage of the Act as intrusive on tribal self-determination, while others supported some aspects of the legislation as appropriately constraining tribal governments.

In order to further limit the degree to which the Act functions as a federal intrusion upon tribal autonomy, persons seeking remedies to infringements of basic rights (e.g. freedom of religion) must exhaust all remedies available through the tribal court, including tribal court appeals. The US Supreme Court's decision in *Santa Carla Pueblo v. Martinez* (1978) thus limits federal intrusion upon tribal self-governance. This case involved a rule of the Pueblo making children of female members married to non-tribal members ineligible for membership. *Martinez* brought suit against the Pueblo in federal court alleging a violation of the equal protection clause of the ICRA. The Supreme Court's decision established a tribe's immunity from suit as a sovereign. More importantly, it recognized that Congress limited the federal remedy for a violation of the ICRA to a petition for habeas corpus to test the legality of detention by a tribe. According to this decision, enforcement of the Act is left almost entirely to the tribal courts.

On the civil side, cases entering the Supreme Court over the past 20 years have generally echoed law generated in the context of state-federal relations. The Supreme Court held in *National Farmers Union Insurance Companies v. Crow Tribe* (1985) and in *Iowa Mutual Insurance Company v. LaPlante* (1987) that federal courts should not exercise civil jurisdiction over activities arising on tribal lands, at least not if cases are pending in tribal courts. Supreme Court opinions arguably demonstrate greater federal deference to tribal courts than to state courts in regard to civil cases. If a tribe is found to have jurisdiction, then the Supreme Court, even when implicating federal law, cannot review its holdings on the merits. The Supreme Court issued a decision this year in *Atkinson Trading Company, Inc. v. Shirley* addressing governmental authority of tribes over non-Indians on a reservation. The decision states that tribes' authority over members is unquestioned in US Supreme Court jurisprudence. However, this decision significantly limits tribal sovereignty as it relates to tribal efforts to regulate the activities of non-members. In this case, the Supreme Court holds that, except in two limited circumstances, Indian tribes lack civil authority over nonmembers on non-Indian fee land. On June 25, 2001, the Supreme Court offered yet another opinion that limits tribal sovereignty. In *Nevada v. Hicks*, the Court held that state law enforcement officers are free to enter Indian reservations to enforce state court orders without notice to or authorization from the affected tribe and that tribal courts lack jurisdiction to hear a cause of action for violation of a party's civil rights under 42 U.S.C. & 1983. Consequently, many critics feel that the *Indian Civil Rights Act* continues to pressure tribal courts to rely on federal legal tradition.

### Sources:

Northwest Justice Project. "Indian Civil Rights Act," accessed at <http://www.nwjustice.org/docs/9202.html#a>;  
Resnik, Judith. "Multiple Sovereignties: Indian tribes, states, and the Federal Government," accessed at <http://www.tribal-institute.org/articles/resnik1.htm>;

Canby, William Jr., *American Indian Law in a Nutshell*, (St. Paul: West Publishing Co., 1988), p. 244.

## *NATIVE HAWAIIANS*

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- There are over 200,000 self-identified Native Hawaiians in the US. Roughly two-thirds of this culturally distinct population lives among the Hawaiian Islands, and the other one-third is scattered across the mainland US, primarily in the West. Native Hawaiians comprise 15% of the total population in the state of Hawaii, and that percentage has been decreasing steadily over the past 100 years.
- Like other Indigenous peoples and disadvantaged minorities in the US, Native Hawaiians are challenged by poor socio-economic conditions. Native Hawaiians disproportionately suffer from poor health, inadequate housing, and high rates of poverty and unemployment.
- Native Hawaiian political status is akin to that of American Indians for many federal programs and services, but details of Native Hawaiian history and sovereignty complicate the Federal Government-Native Hawaiian relationship. In 1993, the US government formally apologized to the Native Hawaiians for the 1893 overthrow of the Kingdom of Hawaii, and the Federal Government and Native Hawaiians are currently in the process of reconciliation. Self-determination and land are two topics of great importance in this process.
- Since the 1970s, a growing cultural renaissance has taken place among Native Hawaiians, who have made remarkable progress in establishing language immersion programs, cultural education programs and non-governmental social service organizations. In addition, there are numerous Native Hawaiian organizations advocating the re-establishment and recognition of a sovereign Hawaiian nation.

In 1990, there were approximately 211,000 self-identified Native Hawaiians living in the United States.<sup>134</sup> Of these, about 139,000 (66%) lived in the state of Hawaii, with the largest population, 92,000 (66%) living on the island of Oahu. Native Hawaiians comprise about 19% of the state's population. The median age of Native Hawaiians is 25.8 (compared to a median age of 32.6 for all state residents).

Over 72,000 Native Hawaiians live in the mainland US. The states of California (34,447), Washington (5,423), Texas (2,979) and Oregon (2,415) have the largest numbers of Native Hawaiians.

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<sup>134</sup> 1990 US Census figures, accessed at <http://www.oha.org/databook/>.

The West Coast states (California, Washington, Oregon) account for 59% of the mainland Native Hawaiian population. Vermont is home to the fewest Native Hawaiians, with a population of only 25. The absence of economic activities other than tourism continues to play an important role in driving the migration patterns of Native Hawaiians.

Table 1  
Native Hawaiian Population Distribution by Island

<b>Island</b>	<b>Total</b>	<b>Native Hawaiian</b>	
Oahu	836,231	91,967	66.29%
Hawaii	120,317	23,120	16.66%
Maui	91,361	12,350	8.90%
Molokai	6,717	3,282	2.37%
Lanai	2,426	287	0.21%
Kauai	50,947	7,510	5.41%
Nihau	230	226	--
<b>Total Island Pop.</b>	<b>1,108,229</b>	<b>138,742</b>	<b>99.84</b>
Mainland US		72,272	
<b>US TOTAL</b>		<b>211,014</b>	

Source: United States Bureau of the Census. 1990 Census of Population and Housing. Population and Housing Characteristics for Census Tracts and Numbering Areas, Honolulu, HI MSA. 1990 CPH-3-174. (Washington, 1993). United States Bureau of the Census. 1990. Census of Population and Housing. Population and Housing Characteristics for Census Tracts and Numbering Areas, Hawaii (Outside Metropolitan Areas) 1990 CPH-3-13 (Washington, 1993).

Like American Indians and Alaska Natives, Native Hawaiians suffer from economic deprivation, poor health status, low educational attainment rates, and inadequate housing. Consider some statistics and commentary excerpted from a October 2000 report prepared by the Department of the Interior and the Department of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely*.<sup>135</sup>

- *Health and Welfare* Native Hawaiians have a shorter average life span than any other ethnic group in Hawaii, and the majority of Native Hawaiians have at least one high risk factor, including a sedentary lifestyle, obesity, hypertension, smoking or acute drinking. Heart disease mortality rate for Native Hawaiians is 66% higher than for the entire state of Hawaii, and the overall cancer mortality rate is 45% higher than the state's overall rate. Children's health is especially poor. In 1995, 34% of all victims of child abuse or neglect in Hawaii were Native Hawaiian, and 65% of all newborn children referred to Healthy Start (an early intervention program) were Native Hawaiian. In terms of crime and the criminal justice system, Native Hawaiians constitute 33% of all arrests. Of all youths incarcerated in Hawaii, 51% are Native Hawaiian.
- *Economics and Housing* In 1989, 19% of Native Hawaiians were in the lowest tenth percentile income bracket (<\$15,000), and unemployment among Native Hawaiians was 1.5 times higher than the statewide rate. As of 1990, 14% of the Native Hawaiian population was below the poverty rate, and in 1997, of the 84,000 inhabitants of the islands that were receiving financial assistance, 23,000 of them were Native Hawaiian.

<sup>135</sup> See, also, *Native Hawaiian Data Book 1998*, accessed at [www.oha.org](http://www.oha.org). Many of the statistics presented by the Departments of the Interior and Justice are drawn from the Data Book.

Housing problems for Native Hawaiians compound the challenges of unemployment, poverty and ill health. Nearly 50% of Native Hawaiians experience housing problems – the highest rate of any population group in the US.

- *Education* In 1990, Native Hawaiians completed high school at a higher rate (50.7%) than the statewide average (43.7%), however, these positive trends did not continue into post-secondary education, where 27.52% of Native Hawaiians completed Associate degrees compared to a statewide average of 37.7%. Only 2.13% of Native Hawaiians completed a Bachelors degree or higher, compared to a statewide average of 5.37%.

### Who is a Native Hawaiian?

The issue of who is a Native Hawaiian is a major debate, and indeed, it is a very complicated issue. Consider some methods of classification:

- In the state of Hawaii, birth certificates indicating Native Hawaiian ancestry are issued without regard to blood-quantum, and are issued if either parent indicates Hawaiian or part-Hawaiian ancestry.
- The US Census relies upon self-identification for determining the Native Hawaiian population.
- The *Hawaiian Homes Commission Act* of 1921 defines Native Hawaiian as someone whose blood quantum is 50% or greater, based upon Native Hawaiian antecedents as of 1778.
- The *Hawaiian Apology Resolution*, passed by Congress in 1993 means “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii...”
- Native Hawaiian culture traditionally considers genealogy to be the determining factor in defining membership in the Native Hawaiian community. Other practices, such as *hanai* (adoption) and apprenticeship with cultural masters, have brought non-Natives into the Native community.

Interestingly, the only report on the percentage of Hawaiians who meet the 50% blood quantum criterion established by the *Hawaiian Homes Commission Act* of 1921 was done in 1984. It found that of 208,476 people reporting to have some percentage of Hawaiian blood, over half (127, 523) had less than 50% Hawaiian blood. The proportion of those with less than 50% increased sharply for those under 20 years old. A survey by the Office of Hawaiian Affairs (OHA) found that among Native Hawaiians, 68% disagreed with the 50% blood quantum requirement, while 19% strongly agreed with the requirement. Questions about the appropriate quantum found support for significantly lower levels, ranging from “a drop of Hawaiian blood” to 12.5%, 25-30%, and less than 50%. [Native Hawaiians responding to the survey were asked to identify their blood quantum level. Fifty percent of the respondents indicated it was less than 50%].

In 2000, the US Departments of Justice and the Interior articulated their preference for dealing with the issue of membership and identity: “In the Departments’ view, it would be preferable to empower the Native Hawaiian people to develop a community membership rule, consistent with federal law. Congress could then use Native Hawaiian membership in place of current statutory definitions. Of course, the justifiable expectations and rights of “native Hawaiians” (defined by the HHCA to mean “Any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778”) under existing law must be taken into consideration.”

Source:

*Native Hawaiian Data Book; From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process between the Federal Government and Native Hawaiians.* Prepared by the Department of the Interior and the Department of Justice (October 2000).



### *Historical Context*

Despite its complexity, it is important to gain a basic understanding of the history of Hawaii and of its indigenous population in order to understand the issues and challenges Native Hawaiians confront today.

The Native Hawaiian people have lived among these South Pacific islands for over 1,000 years, and their culture was based on a well-developed system of agriculture and aquaculture.<sup>136</sup> Initial contact between Native Hawaiians and Europeans took place in 1778 with the arrival of James Cook. In 1810, King Kamehameha I established the unified Kingdom of Hawaii to govern the Native people, and over the next 60 years, the United States entered into several treaties of peace, friendship and commerce with the Kingdom, recognizing its status as an independent sovereign.

During the late 19<sup>th</sup> century, however, the Western influence over the Kingdom of Hawaii intensified, and in 1893, the American and European plantation owners – acting in concert with the US Minister and military forces – overthrew the Kingdom. The plantation owners then formed a Provisional Government (and its immediate successor, the Republic of Hawaii), which claimed control over the Crown and Government lands of the Kingdom. The US Congress, under the encouragement of President McKinley, annexed Hawaii in 1898 without the consent of the Hawaiian people. The overthrow led to the immediate suppression of Hawaiian culture and language, land displacement, and gave rise to a host of other social, economic and cultural problems for the Native Hawaiians.

In response to the continued deterioration of the conditions experienced by the Native Hawaiians, in the late 1910s and early 1920s Congress began to return land to Native Hawaiians and promoted agriculture under federal protections. In 1921, Congress passed the *Hawaiian Homes Commission Act* (HHCA), which set aside 200,000 acres of “homelands” drawn from the “Ceded” lands (i.e., the former Crown and public lands of the Kingdom of Hawaii, estimated to be about 1.8 million acres) to be reserved for Native Hawaiian homesteading. As part of the *Hawaii Admission Act* of 1959, which established statehood, Congress transferred public lands (the Ceded lands) to the state to manage. However, the total amount of Crown and Government Lands ceded to the state of Hawaii by the Federal Government was only 1.1 million acres, plus 200,000 acres as Hawaiian Home Lands. Much of what remained from the original 1.8 million acres was withheld by the Federal Government, in part for geopolitical reasons and for the creation of National Parks.

Specifically, the *Admission Act* required that the Ceded Land Trust be used for five purposes and created a right in the United States to sue the state of Hawaii for breach of trust if the Ceded Lands Trust was used for other purposes. The *Admission Act* had the effect of restricting the use of the Ceded Land Trust for the betterment of those Native Hawaiians that met a 50% blood quantum requirement, which had been established under the HHCA. To date, the United States has never enforced the trust protections against the state. (See text box on Ceded Lands)

### *Modern Policy*

As explained above, Native Hawaiians share with American Indians and Alaska Natives similar signs of socio-economic distress and poor health relative to the non-Native population. Starting in the

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<sup>136</sup> See *From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process between the Federal Government and Native Hawaiians*. Prepared by the Department of the Interior and the Department of Justice (October 2000). This report provides an excellent overview of the history of Native Hawaiians.

1970s,<sup>137</sup> legislation was passed for Native Hawaiians to address specific problems concerning education and health. For example, the *Native Hawaiian Education Act*<sup>138</sup> was passed to fund Native Hawaiian schools and education councils to promote special education programs for Native students.

In 1978, a Constitutional Convention was called to review and revise the Hawaii State Constitution, including a review of Native Hawaiian issues. An amendment emerged from the Convention that provided Native Hawaiians with a prorata share (20%) of the revenues from the Ceded Lands Trust, as well as the creation of the Office of Hawaiian Affairs (OHA), which was charged with the responsibility of managing the revenues.<sup>139</sup> The establishment of the OHA provided the first opportunity for Native Hawaiians to regain control of their affairs, and it created a board of nine Native Hawaiian trustees who manage all property as a trust for Native Hawaiians. There have been a series of ongoing suits by OHA to recover funds from the state and arguments about which funds can be collected (e.g., whether a portion of the revenues from duty-free shops on state lands can be collected) as well as some ambiguity over what constitutes Ceded lands.

### **Ceded Lands and Native Hawaiians**

At the time of overthrow in 1893, 1.8 million acres of Crown, Government and public lands of the Kingdom of Hawaii were taken without compensation. Over the past century, these lands and the revenues generated from them have been diverted for the purpose of sustaining and supporting Native Hawaiians. The indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty over their national lands to the United States.

Most of these Ceded lands are held in trust by the state of Hawaii, which collects millions of dollars annually from the Public Land Trust. The *Admission Act*, the Hawaii State Constitution, and state law all mandate that a portion of these proceeds must go to the Office of Hawaiian Affairs. *Act 273* in 1980 and *Act 304* in 1990 set the state obligation to Hawaiians at 20% of proprietary revenue. In 1996, Circuit Court Judge Dan Heely found merit in the Office of Hawaiian Affairs' claim that the state of Hawaii may not have clear title to the Ceded lands and that the Native Hawaiian people retain a claim to these lands. To date, a trial has not been scheduled.

In 1997, the Hawaii State Legislature appropriated funds for the Department of Land and Natural Resources (DNLR) and the Office of Hawaiian Affairs (OHA) to conduct a Ceded Lands inventory. No agreement could be reached between the DLNR and the OHA on how to conduct the inventory and funds lapsed. Today, the stakeholders are negotiating how to proceed.

Source:

Office of Hawaiian Affairs, accessed at [www.oha.org](http://www.oha.org) and *From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process Between the Federal Government and Native Hawaiians*. Prepared by the Department of the Interior and the Department of Justice, October 2000.

In addition to the OHA, another state agency, the Department of Hawaiian Homelands (DHHL), was created to facilitate the use of homelands for their intended purposes. The distribution of these lands has been problematic; some of the land has been signed under long-term leases with plantation owners for agricultural uses and cannot be otherwise utilized, while some land is inappropriate for housing (for

<sup>137</sup> Although special legislation identified Native Hawaiians as an indigenous people, it was not until 1974 that Native Hawaiians began to be included in legislation designed to benefit other Natives like American Indians and Alaska Natives.

<sup>138</sup> *Native Hawaiian Education Act* 20 USC sec 7902 and *Native Hawaiian Health Care Act* 42 USC sec 11701 (HHCA).

<sup>139</sup> Another important amendment to the Constitution was that the Hawaiian language was named as an official language of Hawaii, along with English.

example, because it is poorly situated). There is a long waiting list for housing, and the provision of lots for new homes has been glacially slow.<sup>140</sup>

The 1970s also witnessed the rise of Native Hawaiians reasserting their rich culture. Indeed, the Native Hawaiian community has turned around a dark history of mistreatment by the Federal Government in efforts to revitalize their language, culture and traditions. Since the 1970s, Native Hawaiians have made remarkable progress in establishing language immersion programs, cultural education programs, and non-governmental social service organizations. The 1970s and 1980s also brought about a renewed interest in pursuing sovereignty, leading to recognition at the state level that Hawaiians deserved the right to self-determination and the establishment of the OHA.<sup>141</sup>

### *Recent Developments*

In 1993, with Public Law 103-150 – the *Apology Resolution* – the Congress and the President committed themselves to pursue a “reconciliation” between the United States and the Native Hawaiian people. The Resolution acknowledged the illegal overthrow of the Hawaiian Kingdom in 1893 and the denial of rights of Native Hawaiians to self-determination. This was followed in 1995 by the passage of the *Hawaiian Homelands Recovery Act* (HHLRA), and the State is in the process of identifying and returning or compensating for any federal lands that were originally part of the homelands set aside in 1921 but have subsequently been lost.<sup>142</sup> Moreover, the United States has recognized that the Native Hawaiians comprise a unique population based upon their aboriginal presence in Hawaii.<sup>143</sup>

### *Reconciliation – the Federal Government and Native Hawaiians*

In December 1999, a delegation of US officials met with the Native Hawaiian community to discuss the reconciliation process between the Federal Government and Native Hawaiians. Over 40 hours of public statements were heard. In October 2000, the Departments of Interior and Justice released a report titled, *From Mauka to Makai: The River of Justice Must Flow Freely*, and invited public comment.

After the report’s release, 265 Native and non-Native Hawaiian individuals and organizations submitted statements. Many of these comments addressed more than one topic. Categorizing these statements and presenting the frequency by which specific topics were raised provides useful insight to what the public – both Native Hawaiians and others – finds important in the reconciliation process.

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<sup>140</sup> “In 1921, Congress established a “Hawaiian Homes” program, a land trust of approximately 200,000 acres for homesteading by persons of 50% or more Hawaiian blood. Because of the political power of sugar interests, trust land consisted of the least-usable agricultural properties on the islands. Stories of administrative neglect of the program over decades by state and federal officials have been legion with thousands of Hawaiians waiting up to seven decades for land, to no avail.” September 10, 2000, “Tracing the Roots of Modern-Day Sovereignty Movement” by Himanee Gupta. Special to The Seattle Times.

<sup>141</sup> Establishment of the OHA followed a state constitutional convention in the late 1970s which recognized Native Hawaiians’ right to self-determination.

<sup>142</sup> This was in part a follow-up to a federal-state task force in 1983 that had examined the issue of the homelands and the problems associated with the homelands, including inappropriate withdrawals of homelands from the trust. The state in response returned land to the trust and paid for use of some of the homelands.

<sup>143</sup> See Executive Order No. 13125, Sec. 10(b), June 8, 1999 which defines “Pacific Islander” to include the aboriginal, indigenous Native people of Hawaii.

Table 2  
Tabulation of Report Comments

Topic	Count	Percentage
Sovereignty	75	29%
Land & Natural Resources	63	23.9%
Education	55	21.6%
Health	52	20.3%
Community & Economic Development	47	19.2%
Housing	43	16.9%
Self-Determination	43	16.9%
Anti-Reconciliation	18	7%
Nation-within-a-Nation	15	5.9%

Source: *From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process Between the Federal Government and Native Hawaiians.* Prepared by the US Department of the Interior and the US Department of Justice, October 2000.

Finally, in 2000, the Supreme Court heard a case (*Rice v. Cayetano*) involving whether or not non-Native Hawaiians had the right to vote for the trustees that oversaw the administration of funds under the OHA. The Supreme Court found that the restriction could not be upheld and struck down the law that permitted only Native Hawaiians to vote for trustees.<sup>144</sup> In part, the Supreme Court found that the somewhat ambiguous status of Native Hawaiians – who are not federally recognized in the same manner as American Indian tribes – meant that Native Hawaiians could not use the same arguments as did American Indians in supporting the right of American Indian tribes to decide who could vote in making tribal decisions.

#### Native Hawaiian Sovereignty

“In the Apology Resolution, Congress stated and President Clinton endorsed the official view of the Federal Government: the United States officers were wrongly involved in the overthrow of a legitimate and independent government in Hawaii and the deprivation of the rights of Native Hawaiians to self-determination.

“[T]here are numerous Native Hawaiian organizations working for re-establishment and recognition of a sovereign Native Hawaiian nation. These organizations seek to improve and uplift Native Hawaiian health, education, and standards of living and to protect religious and cultural customs, beliefs and practices. In the last 15 years there has been a wide-ranging discussion on the definition and strategies for sovereignty. Many people agree that self-determination, whatever the form, is the necessary outcome of the reconciliation process. The reestablishment and recognition of a government provides the framework for Native Hawaiians to address their most pressing political, health, economic, social, and cultural needs.”

Source:

*From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process Between the Federal Government and Native Hawaiians.* Prepared by the US Department of the Interior and the US Department of Justice, October 2000.

Several federal, state, and Native Hawaiian groups have made recommendations to the Federal Government on ways to effect self-determination. The recommendations are based in part on the view that Native Hawaiians were deprived of their right to self-determination and that they never directly relinquished their claims to their inherent sovereignty as a people. These recommendations cover the spectrum from a return to independent nationhood to a recognition of a Native Hawaiian governing body as a tribe in the fashion endorsed by Congress.

<sup>144</sup> 120 S. Ct. 1044 (Feb. 23, 2000)

**CHAPTER 2**  
**Education, Media, Arts and Culture**

## *EDUCATION*

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- The historical aim of federal Indian education policy has been the assimilation of Native children into the Western-based society by forcing them to relinquish their tribal language, culture and customs. With the passage of the *Indian Self-Determination and Educational Assistance Act* in 1975, Indian communities, however, have gained greater control over the education of their children.
- Although the past two decades have seen a 65% increase in Indian enrollment in post-secondary institutions, Indian children still represent the poorest segment of American society, and, consequently, suffer lower rates of educational attainment and higher rates of dropout. Of the approximately 500,000 Indian children enrolled in primary and secondary classrooms, over one-third will drop out, and Indian children still have the lowest educational attainment of all minority groups.
- Indian education is undergoing substantive reform. At the primary and secondary levels, Indian schools are aiming to achieve world class standards by promoting performance-based assessment and creating more culturally appropriate learning environments. At the post-secondary level, tribally controlled colleges continue, in the face of long odds, to fill an important vacuum in the need for community-based post-secondary education for Native students.

Federal education policy as it pertains to America's Indigenous peoples has, in many respects, mirrored the larger directives of the Federal Government's relationship with American Indians and Alaska Natives. While that relationship has changed over time with the prevailing political winds, the principle goals of the federal education policy directives has been the suppression of Indian identity and, at worst, the complete termination of tribes as distinct political and sovereign entities. Consequently, the purpose of federal Indian education policy has historically been focused on assimilating Native peoples into the larger Western-based society by forcing children to relinquish their tribal language, culture, and customs.<sup>145</sup>

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<sup>145</sup> The federal government's objective is perhaps best exemplified by the 25 off-reservation boarding schools built in the 1890s. Indian children attending these schools were often forcibly removed from their homes and then prevented from speaking their language, practicing their customs, and wearing traditional dress. They were generally "converted" to Western mores and practices.

Starting in the late 1960s, however, the Federal Government began withdrawing from its role as quasi-colonial overseer in favor of tribally determined development. While this shift in policy is under constant attack, the core of the self-determination movement is a commitment to allow Indians to reclaim control over the future of their communities. It came about, in no small part, through the work of Indian advocates and educators, and has made it possible for Indians to gain more control over their own, and their children's, education.<sup>146</sup>

Tribal control over education is playing out in different ways. Most significantly, Indian education is undergoing substantive reform. At the secondary and primary levels, local communities are taking over schools formerly operated by the Federal Government, and these communities are working with the Federal Government to incorporate "best practices" to improve student attainment. Schools are more readily incorporating tribal culture into the classroom, thus creating a less alienating learning environment. At the post-secondary level, Native enrollment has grown and tribal colleges have been established and continue to grow.

Education in Indian Country, however, still faces significant obstacles. Indian children represent the poorest segment of society and, consequently, bear the problems arising from such overwhelming socio-economic conditions. These conditions inevitably get played out in the classroom, as evidenced by lower rates of educational attainment and disproportionately high rates of dropout. The bombardment of popular culture serves to compound these problems. Educators working in Indian education are often underpaid relative to their "off-reservation" colleagues and confront a greater number of professional obstacles, ranging from professional isolation to substandard physical facilities.

#### *Primary and Secondary Education*

There are approximately 500,000 Indian children enrolled in primary and secondary classrooms.<sup>147</sup> Owing to both federal policy and the migration of Native Americans to off-reservation communities, these children are enrolled in several types of schools, including public, BIA, and private (largely parochial) institutions. As Figure 3 shows, most Indian children are served by public schools – schools in which Native children are, by and large, a minority and where the problems confronting Native children discussed below "are often exacerbated by the overwhelming proximity to non-Native people."<sup>148</sup>

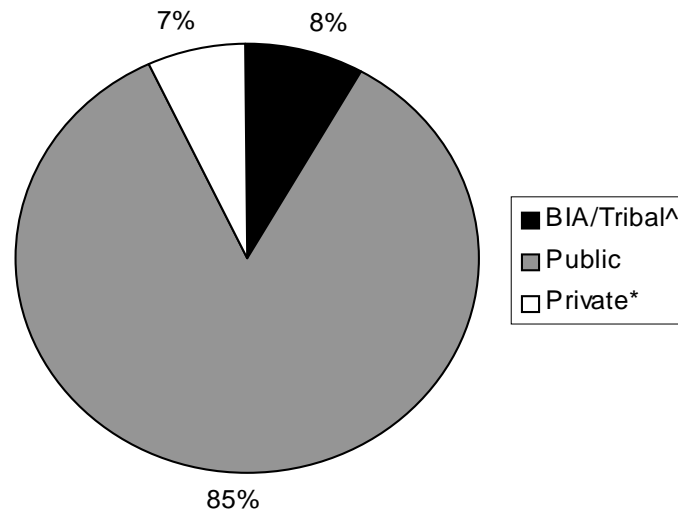
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<sup>146</sup> Indian educators were among the first to push for self-determination and, thus, cultural renewal. Administration of the Navajo Nation's Rough Rock School, in which the Navajos took control over the school from the BIA in the early 1960s, was the first "contract" arrangement between the US and a tribal government. It laid the groundwork for further contracting of educational and other services previously provided by the federal government, and ultimately led to one of the landmark legal acts of the self-determination policy – the 1975 *Indian Self-Determination and Educational Assistance Act* (PL 93-638).

<sup>147</sup> A large percentage of individuals identifying themselves as American Indian reside off-reservation. Consequently, Indian children live in varied settings and are served by several different types of schools. O'Brien, Eileen M., "The Demise of Native American Education: Part I," *Black Issues in Higher Education*, March 15, 1991, esp. pp. 16-17.

<sup>148</sup> St. Germaine, Richard D, "A Chance to Go Full Circle: Building on Reforms to Create Effective Learning," University of Wisconsin – Eau Claire, paper delivered before the National American Indian Education and Alaska Native Education Research Agenda Conference ("NAIE Conference"), Albuquerque, NM, May 30-June 1, 2000, pp. 1-2.

Figure 3  
Enrollment of American Indian and Alaska Native Elementary and Secondary Students by Type of Institution  
(1993-1994)



<sup>^</sup> Of the approximately 185 BIA schools, tribes operate more than one-half.

\* Estimate based on Eileen M. O'Brien. Most are missionary schools are located on or near reservations.

Sources: O'Brien, Eileen M., "The Demise of American Education: Part I," *Black Issues in Higher Education*, March 15, 1991, p. 17.

Pavel, Michael D., Thomas R. Curtain, and Summer D. Whitener, *Characteristics of American Indian and Alaska Native Education: Results from the 1990-91 and 1993-94 Schools and Staffing Survey*, Submitted to the United States Department of Education, National Center for Education Statistics, March 1997, p. ii.

McCoy, Melody, *Education and Tribal Sovereignty*, Native American Rights Fund, 1998.

By any measure, Indian children are at greater educational risk than any other group of children.<sup>149</sup> This is not surprising given that Indian youth are more likely to suffer from persistent poverty and its attendant sociological and physical effects. As discussed in more detail in Chapter 3, these effects are harrowing.<sup>150</sup> Less than half of Indian adolescents living in rural areas live with two parents. The death of Indian youth (ages 5 to 24) due to alcohol is *17 times* the comparable level for all races. One in five Indian children between the ages of 12 and 17 use illicit drugs – the highest rate for any ethnic group in that age class. *Five times* as many Indian children are born with fetal alcohol syndrome as are in non-Indian homes. Indian suicides are 130% of the national average. The teen birth rate is 180% of the national average. Youth gangs are prevalent and growing, along with the violence often associated with such groups. Murder rates reach par with the top 20 most violent cities in the nation.

The effects of popular culture, in general, and television, in particular, only compounds the problem. According to Dr. Richard St. Germaine, "One cannot discuss Native communities without mentioning television ...[t]he impact of [which] has dramatically modified the values system of

<sup>149</sup> See, for example, US Department of Education, *Indian Nations At Risk: An Educational Strategy for Action* (Washington, DC: US Department of Education, 1991).

<sup>150</sup> See Chapter 3 of this report, "Asset Building and Community Development," especially the subsections on Health; Crime and Substance Abuse; Housing; and Welfare.



[American Indian/Alaska Native] communities, so much so that Cable TV seems to be finishing the work of Custer.”<sup>151</sup> In addition to the impacts generally associated with television and the content of public media – for example, behavioral problems including violence – the imagery onslaught of the dominant society threatens to overwhelm Native communities’ struggles to retain their tribal customs, values, and languages. Moreover, it serves to complicate the personal tensions felt by students as they struggle between retaining their cultural heritage and the absorption of non-Indian values perceived to be required for “success” in the larger community.

Given this environment – societal arrangements that produce overwhelming poverty in a nation where the ubiquitous message of popular culture focuses on affluence – it should not be surprising that, among all the problems faced by educators, poverty, with its associated effects, was ranked number one by administrators and staff in those schools where Native American children represented a significant percentage of the student body.<sup>152</sup> As noted by one expert, “Such problems are not left on the school bus.”<sup>153</sup> Indeed, this observation is borne out by even the most cursory review of educational attainment of Indian youth:

- Indians have the highest dropout rates of all minorities. Over one-third of Native American children will leave the education system prior to obtaining a high school diploma, a rate nearly one and a half times that of other minorities.<sup>154</sup>
- While Indians account for approximately 1% of all elementary and secondary students nationwide, they represent over 3% of all dropouts.<sup>155</sup>
- Moreover, Indians are disproportionately placed in special education and learning disabled programs, and have the lowest educational attainment of all minority groups.<sup>156</sup>

These outcomes are reflective of the education environment where those schools with higher percentages of Native American students were more likely to cancel classes, to hire less qualified teachers, suffer from low student expectations, and lack parent and school board involvement.<sup>157</sup> In addition, facilities are more likely to be substandard, as evidenced by the recent government study which concluded that, in comparison to other public schools, BIA schools “were in generally poorer condition, have more unsatisfactory environmental factors, more often lack key facilities requirements [*sic*] for education reform, and are less able to support computer and telecommunications policy.”<sup>158</sup>

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<sup>151</sup> St. Germaine, NAIE conference, *op. cit.*, p. 4.

<sup>152</sup> Pavel, Michael D., Thomas R. Curtain, and Summer D. Whitener, *Characteristics of American Indian and Alaska Native Education: Results from the 1990-91 and 1993-94 Schools and Staffing Survey* (Washington, DC: US Department of Education, March 1997), p. 57.

<sup>153</sup> Communication with Richard D. St. Germaine, November 2000.

<sup>154</sup> St. Germaine, Richard D., “Drop-out Rates Among American Indian and Alaska Native Students: Beyond Cultural Discontinuity,” *ERIC Digest*, EDO-RC-96-1, November 1995 (“ERIC Digest”). See, also O’Brien, *op. cit.*; and US Department of Education, National Center for Educational Statistics, *Digest of Education Statistics 1999* (Washington, DC: US Department of Education), Table 106.

<sup>155</sup> O’Brien, *op. cit.*, p. 16.

<sup>156</sup> *Ibid.*

<sup>157</sup> Pavel, *et al.*, *op. cit.*, pp. 41-48; and St. Germaine, Richard D., “BIA Schools Complete First Step of Reform Effort,” *Journal of American Indian Education*, Fall 1995 (“BIA School Reform”).

<sup>158</sup> US General Accounting Office, *School Facilities: Reported Condition and Costs to Repair Schools Funded by Bureau of Indian Affairs*, GAO/HEHS-98-47 (Washington, DC: US General Accounting Office, December 1997), p. 2. The consequences are often significant. At Santa Fe Indian School, for example, an award from the Intel Corporation for

While the facts present a rather bleak picture, there is reason for optimism. First, self-determination has provided greater Native control over an important segment of the education marketplace – schools formerly operated by the BIA. Second, those schools are in the process of substantial renewal and reform.

The BIA-funded schools comprise approximately 185 of the more than 80,000 public schools in the United States. Today, more than one-half of the 185 schools are tribally operated. And while the percentage of American Indian and Alaska Native students who attend such schools is relatively small compared to the total number of Indian students enrolled at all schools – less than 10% – their significance remains important. In short “the education of these children represents efforts by American Indians and Alaska Natives to determine the mission, scope, and influence of their education upon their communities.”<sup>159</sup> With their emphasis on Native language, culture, and community, these institutions represent the alternatives to state-funded schools that many Native Americans imagined when they took up the cause of greater Native control over education. For example:

- Tiospa Zina, a K-12 school on the Sisseton Wahpeton reservation in South Dakota, has gained nationwide attention for its culture-based curriculum and its education model based on the family. Graduating seniors are required to take classes in Dakota language and literature, while grades K-8 take two to three hours a week in literature and culture.
- Santa Fe Indian School (SFIS), serving 19 pueblos, was taken under the direction of the All Indian Pueblo Council shortly after the passage of the *Indian Self-Determination and Education Assistance Act* in 1975. The curriculum is based on a series of interviews with tribal elders and government officials. Based on those interviews, students study such issues as water scarcity, alternative energy sources, and economic development issues.<sup>160</sup>

It should be noted that the impacts of these curricula developments are still not fully understood. Early evidence seems to suggest that local control has a positive impact on graduation rates; the effects of local control provided by the 638 contracting of BIA schools, however, is still unknown – more research must be done before the full impacts of more culturally appropriate curricula can be assessed.<sup>161</sup>

These efforts, however, represent an important component in tribal communities’ efforts to retain their language, culture, and customs, and they are now taking place in the context of a much broader school reform effort aimed at not only creating a more culturally sensitive environment, but also improving the overall quality of education.<sup>162</sup> These efforts arise out of two landmark studies which assessed the quality of education in America, in general,<sup>163</sup> and within tribal communities, in particular.<sup>164</sup>

computers and network-related facilities had to be put on hold when the only available space – located in the school’s basement – was declared unsuitable for student use.

<sup>159</sup> Pavel, *et al.*, *op. cit.*, p. 6.

<sup>160</sup> Carroll, Marguerite D, “Making the Grade: Can BIA Schools Educate Today’s Kids in Yesterday’s Classrooms?” *American Indian Report*, November 1998, pp. 12 -15.

<sup>161</sup> St. Germaine, *ERIC Digest*, *op. cit.* Communication with Timothy Begaye, National Indian Education Association, September 2000.

<sup>162</sup> Communication with Carmen Cornelius Taylor, Executive Director, National Indian School Board Association, November 2000.

<sup>163</sup> US Department of Education, *A Nation At Risk: The Imperative for Educational Reform* (Washington, DC: US Department of Education, April 1983).

Starting in 1989, leading Indian educators, including principals and administrators, federal line officers, and academics, began working with BIA-funded schools to begin a process of systematic review, restructure, and renewal.<sup>165</sup>

This reform effort is based on research identifying a set of “best practices” correlates or characteristics associated with higher-than-expected student performance, often referred to as “Effective Schools.”<sup>166</sup> These correlates would include, for example, school mission, curriculum and instruction, home-school-community relations, high learning expectations, strong instructional leadership, and cultural relevance. The first phase, now completed, examined all of the BIA schools using an instrument based on the correlates identified as critical factors of effective schools, with a written report submitted to each school. The second phase has involved individual schools working with support teams to initiate school reform planning and staff development training.

While the results are preliminary, the evidence suggests that those schools taking part in the second phase of the reform effort had increased student enrollment and attendance rates, improved staff morale, developed school improvement plans, and increased staff expectations of students.<sup>167</sup> Just as important, administrators working with the program felt that they had begun to hear a change in the “language of education” in Indian Country citing, as examples, the general move towards the implementation of more meaningful student assessment techniques, curriculum development focused on means and outcomes, and the greater diversification of teaching and educational techniques.<sup>168</sup>

### *Post-Secondary Education*

Over the last 20 years, Indians have made many advances in post-secondary education. For example, Indian enrollment in institutions of higher education has increased from 83,900 in 1980 to 138,800 in 1997, representing an increase of approximately 65% over the last two decades.<sup>169</sup> The gains may be seen across the spectrum of college and graduate programs, where the number of American Indians and Alaska Natives receiving degrees has increased by over 40%.

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<sup>164</sup> US Department of Education, *Indian Nations At Risk: An Educational Strategy for Action* (Washington, DC: US Department of Education, April 1991).

<sup>165</sup> These efforts are based on the research undertaken in the 1970s and 1980s by Rutter, Edmunds, Mortimore, and Sammonds, and others, which identified a set of school-level characteristics associated with higher-than-expected student performance. The educational approach derived from this research, which focuses on replicating the characteristics at the level of each individual school, has become known as “Effective Schooling.” It has been incorporated within the BIA’s efforts to meet the *Goals 2000: Educate America Act* of 1994. See, for example, St. Germaine, NAIE Conference, *op. cit.* Also, US Department of Interior, Bureau of Indian Affairs, Office of Indian Education Programs, *O.I.E.P. Effective Schools Annual Report 1991-92* (Washington, DC: US Department of Interior, 1992).

<sup>166</sup> St. Germaine, BIA School Reform, *op. cit.* The article provides a complete list of the BIA’s Effective Schools Correlates, p. 33.

<sup>167</sup> Each individual school chose whether to participate in the process. Upon self-nomination, they received a scholarship from the Bureau Effective Schools Team (now known as Building Exemplary Schools Together, or “BEST”), which was managed by the National Indian School Board Administration.

<sup>168</sup> Communication with St. Germaine and Cornelius Taylor, November 2000.

<sup>169</sup> Excludes non-resident aliens. US Department of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1999* (Washington, DC: US Department of Education), Table 210.

This success is tempered, however, by the continuing high dropout rate of Native Americans. It is estimated that as many as 85% of Indians drop out of college and return to their respective reservations.<sup>170</sup> American Indians living on reservations may be only half as likely as their white counterparts to persist and obtain a degree.<sup>171</sup>

Tribally operated colleges were created in response to the negative outcomes experienced by so many Native students. Growing out of the self-determination movement, there currently exist 32 such colleges in the United States, serving about 30,000 students, approximately 80% of whom are Native Americans. These colleges were created to provide educational access to reservation-based Indians who often had not believed attending college would be possible. Intended to reverse the historically dismal success rates of Native Americans in higher education, they were designed in the spirit of historically black and community colleges in all but one important respect: their mission was “to rebuild, reinforce and explore traditional tribal cultures, using uniquely designed curricula and institutional settings; and at the same time capture Western models of learning by providing traditional disciplinary courses that are transferable to four year institutions.”<sup>172</sup> Tribal colleges are thus faced with a dual mission: bringing the cultures of Native Americans into the higher education learning process and thereby overcoming the historical barriers confronting Indians in higher education while providing a solid and well-grounded learning experience.

As noted in the report put forth by the American Indian Higher Education Consortium (AIHEC), tribal colleges vary in their respective states of physical development, structures, sizes, and other pertinent characteristics. There exist, however, some common characteristics. They are principally located on remote reservations and have relatively small student bodies; most were chartered by one or more tribes, but are separate and apart from the tribal governments; all have open admissions; and all began as two-year programs. With limited exception, all are fully accredited. The vast majority are two-year colleges offering associate’s degrees, while four offer bachelor’s degrees and two offer master’s degrees.<sup>173</sup>

Located on federal trust land, tribal colleges receive little or no funding from state or local governments. Furthermore, tribal land status prevents the levying of property taxes to support higher education, which is an important source of revenue for many community colleges.<sup>174</sup> Consequently, tribal colleges rely heavily on federal funds for their core operational funding and, while the institutions have received a heretofore unprecedented \$90 million in private donations over the past decade, they remain, by all accounts, woefully underfunded.<sup>175</sup> The current federal funding per Indian student, at just under \$3,000 per year, is less than half the federally authorized amount to community colleges. Moreover, it represent only 60% of the total monies received by community colleges, which have much greater access to federal, state, and local dollars.

In addition, average faculty salaries at the tribal colleges are low. At just under \$30,000 dollars per year, these faculty members make approximately 50% less than the average salary at all public institutions and approximately 45% less than their counterparts at two-year public institutions. In

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<sup>170</sup> Daly, Beth, “On Reservations, A Failing Mission,” *The Boston Globe*, March 11, 2000, p. 1.

<sup>171</sup> American Indian Higher Education Consortium, The Institute for Higher Education Policy, *Tribal Colleges: An Introduction* (Alexandria, VA: American Indian Higher Education Consortium), February 1999, p. A-2.

<sup>172</sup> American Indian Higher Education Consortium, *op. cit.*, p. A-3.

<sup>173</sup> *Ibid.* See, also, the American Indian College Fund, accessed at <http://www.collegefund.org/main.shtm>.

<sup>174</sup> American Indian Higher Education Consortium, *op. cit.*, p. E-1.

<sup>175</sup> Daly, *op. cit.*, p. 1.

addition to facing low salaries and the challenges that arise from working in geographic isolation, the faculties of tribal colleges often suffer from a lack of training. The consequences of these hardships are apparent – high staff turnover for example, remains a problem at many of the tribal colleges.

Even in the face of such obstacles, enrollment at tribal colleges has continued to grow. In 1982 enrollment stood at 2,100. By 1995-1996, enrollment over the 12-month academic period reached 24,363 undergraduates and 260 graduate students. Between 1990 and 1996, enrollment at tribal colleges increased by 62%. While still representing less than 10% percent of the total population of enrolled Indian students, this rate of increase far surpassed the 36% increase in Indian students realized by non-tribal colleges.<sup>176</sup>

#### **Students are Benefiting from Tribal Colleges**

Liz Hopkins is a senior at Sinte Gleska University, located on the Rosebud Indian Reservation in South Dakota. Amid the substandard facilities, Ms. Hopkins takes classes in Lakota language and culture in addition to the more standard academic fare, while raising her nine-year-old son and working three jobs. Borrowing a van for her twice-weekly 230-mile trip to Rapid City for a few bulk groceries and other limited household necessities, she and her son struggle beneath the poverty line. With an on-reservation unemployment rate of 80%, jobs are scarce. Ms. Hopkins, however, expects to get a job preserving her tribe's delicate and age-old tradition of beadwork. While she anticipates making less than \$20,000 per year, that will be enough to alleviate her reliance on government food surpluses. As Ms. Hopkins says, "It's about helping myself, my family. Mostly I want to help the Lakota people."

Ms. Hopkins' goals appear to be within reach. Though the data are preliminary, the mixture of culture and academics she is exposed to seems to be working for the students attending tribal colleges. For example, a survey conducted for the Turtle Mountain Community College (located on the Turtle Mountain Reservation in Belcourt, North Dakota), found that between 1980 and 1990, 12% of its graduates were unemployed, in contrast to a reservation-wide unemployment rate of 55%. Other colleges reporting a high rate of employed graduates include Crownpoint Institute of Technology (Navajo Nation), Little Big Horn College (Crow Nation), and Oglala Lakota College (Pine Ridge Reservation). In addition, studies show a link between success at tribal colleges and success at four-year institutions. One study, for example, found that Indians who had attended Salish and Kootenai College and then transferred to the University of Montana had higher grade point averages and higher graduation rates than Indian students who had gone to the university directly from high school.

Source:

Daly, *op. cit.*, p. 1; American Indian Higher Education Consortium, *op. cit.*, p. D-3.

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<sup>176</sup> American Indian Higher Education Consortium, *op. cit.*, p. C-3.

## ***MEDIA***

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- The public media are largely ignorant of the history of tribes and thus their unique standing with the Federal Government. Non-Indians' portrayal of Native Americans has tended to reflect the views, norms and desires of the majority, non-indigenous society.
- In response, there has been a rise in Indian-owned media, and today there are approximately 600 tribal newspapers, 40 tribal radio stations, and a growing number of telecommunications programs oriented toward Indian communities.
- As the vast majority of tribal news services are financed and operated by tribal governments, Indian-owned media confront conflicts concerning the role of the press in tribal communities.

Indian Country confronts two distinctively different problems when it comes to the media. For the national media, Native Americans face a press corps and an audience largely ignorant of the histories of tribes and, thus, of their unique political status and their relationship with the Federal Government. While the themes expressed in the national media have changed as federal policy has changed, evidence shows that the national media are more likely misrepresent issues of importance to Native Americans by, for example, describing Indians in accordance with majority group norms, conceiving of all tribes as similar despite varying cultural differences, and combining the examination of Native Americans with moral judgements about them.<sup>177</sup> In particular, what have historically been missing in the national news are the voices of the tribes themselves.

One answer to this dilemma, which was recognized very early by tribes, was the creation of Indian-owned media, which would better reflect the issues and concerns of tribal communities. While offering a voice to Native Americans, tribally owned media, however, still confront a difficult question: what purpose do they play in the creation of a civil society? That is, is their purpose to serve the citizens of the tribal nation by, for example, acting as an independent forum of ideas and printing discourse of

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<sup>177</sup> See, for example, Hidaka, Masaki, *Media Coverage of Native Gaming Ventures: An Analysis of National and Regional Trends and Prescriptions for Improvement* (Cambridge, MA: John F. Kennedy School of Government, Harvard University, April 1998); and Miller, Bill G., "The Press, the Boldt Decision, and Indian-White Relations," *American Indian Culture Research Journal*, Vol. 17, No. 2, 1999.

concern to tribal citizens? Or, as some argue, would such purpose only serve to aid anti-tribal forces? Alternatively, should the tribal media strive to serve tribes by restricting their role to the diffusion of information and items of general interest? These questions are being debated today as Native-owned newspapers and other media outlets seek to define their role across and within their respective Indian nations.<sup>178</sup>

### *Non-Indian-Controlled Media*

The media, through its conveyance of information, help contribute to the construction of a civil society through the creation of what has been termed a common consciousness.<sup>179</sup> As the media inform, so too do they shape a community's social values, personal experiences, and public awareness by determining not only which issues get placed on the public's agenda, but the way those issues are portrayed. Thus, the media not only inform but they persuade. It is, therefore, relevant to ask who is doing the persuading. This question takes on particular importance as it pertains to the national media as Native Americans, "having been stripped of identity, dignity, and distinction for more than two centuries, are convinced that false media caricatures have helped rob them of their history."<sup>180</sup>

Numerous studies have analyzed the portrayal of Indians in the national press.<sup>181</sup> From images of heathen savages to noble Indians offering a reproach from the vices of Western civilization; from victims of federal policy to culturally fashionable activists; from dependent, incorrigibly corrupt societies to wealthy political insiders – these studies show that non-Indians' portrayal of Native Americans has tended to reflect the views, norms, and desires of the majority, non-indigenous society. While the depiction of Indians has changed frequently, with the swaying of tribal-federal relations and the cultural norms of the majority, one constant has been the lack of Native American voice in the stories being told.

Most recently, this phenomenon has played itself out on the issue of tribally owned gaming operations. One recent study revealed how the national media had framed this issue around corrupting campaign practices by tying gaming operations to political contributions, in general, and the "John Huang" scandal,<sup>182</sup> in particular. Largely absent from these reports were discussions concerning the legal rights of tribes, including their rights to own and operate tribal gaming operations; discussions of the limited number of such operations and the range of success of those that do exist; and discussions of the relatively poor socio-economic conditions typically found across Indian Country. Moreover, the national media largely ignored the perception of Indian leaders concerning political contributions – namely that such contributions, and the rules established by the dominant society concerning the use of such contributions, represent the mechanism by which tribes (as well as other political actors) gain access to those corridors of power historically denied to tribes.<sup>183</sup>

Contributing to the situation is what one expert referred to as "the cultural divide" that exists between the national media and tribes.<sup>184</sup> While the national, and largely non-Native, media view Native

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<sup>178</sup> See, generally, Trahant, Mark N., *Pictures of Our Nobler Selves*, First Amendment Center, 1995, accessed at <http://www.fac.org>.

<sup>179</sup> Hidaka, *op. cit.*, p. 1.

<sup>180</sup> Siegenthaler, John, in the foreword to Trahant, *op. cit.*, p. 1.

<sup>181</sup> See, for example, Miller, *op. cit.*, as well as Hidaka, *op. cit.*

<sup>182</sup> The scandal, in which Mr. Huang was portrayed as a central character, involved campaign contributions from the Chinese national government to the Democratic Party. Hidaka, *op. cit.*, p. 29.

<sup>183</sup> Hidaka, *op. cit.*, esp. p. 9.

<sup>184</sup> Communication with Liz Hill, independent journalist and public relations expert, February 2001.

Americans through the cultural lens of the dominant society, tribes and tribal leaders have often chosen silence in response to this intrusion into Native affairs, partly due to the poor historical record on the part of the press in their portrayal of Native Americans and partly due to ignorance of the newsmaking process. The result, however, is that the Native voice remains largely excluded from the national media even when the media may seek out that voice.

And while Native Americans have started to enter the professional ranks of the mainstream media, they are still underrepresented, and this lack of representation has consequences for tribes as it impacts the perspective brought by the national media to the non-Indian majority.<sup>185</sup> To draw but one example, concerning the Hantavirus epidemic of 1993 on the Navajo Nation, reporters of Native American background working for regional and national news media framed the issue as an epidemic within the political boundaries of the Nation *but not* afflicting only Navajos. That is, facts concerning the incidence of the virus showed that this was not a disease specific to the Navajo people, and Native reporters were more likely to make this important point. In contrast, *USA Today* published the following headline: “Navajo Flu Claims 11.”<sup>186</sup>

### *Indian-Controlled Media*

The prevailing question confronting Indian-controlled media focuses on the purpose of the media. As discussed above, non-Indian-controlled media have tended to disregard the everyday lives of Native Americans, while framing Native Americans and their issues of concern in the norms and values of the dominant society. Indians have seen the media from their infancy – first newspapers, then radio and television, and today internet sites – as an opportunity to give voice to their values, their concerns, and their lives, if not to the dominant society, then at least within the Native communities themselves.

For example, the Gwich'in of Arctic Village are trying to establish a low-powered FM radio station whose purpose, according to one Council member, is to help the village “talk in our own language and listen to the things that matter to the Gwich'in people.”<sup>187</sup> The purpose of the station is thus viewed by the community as a means for perpetuating local culture, strengthening community identity, and announcing general information of interest.

There exists, however, another role for Indian-controlled media – one that creates tension as they provide a voice for Native Americans in support of, and in contribution to, the maintenance of their cultural identities and political rights: providing a forum for public discourse, regardless of whether the views expressed agree or conflict with prevailing thought. Substantially lacking legal protections, and functioning in an environment where many of the news outlets operate under the direct control of the tribes, this role is fraught with the danger of crossing tribal political leaders. This is particularly true at the local level, where the preponderance of Indian-controlled media services exists.

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<sup>185</sup> Martin, Kelly Nunn “Native American Journalists Say Bias, Dubious Statistics Hold Them Back,” *Freedom Forum Online*, May 15, 2000, accessed at <http://www.freedomforum.org/news/2000/05/2000-05-15-09.asp>.

<sup>186</sup> Trahant, *op. cit.*, p. 14.

<sup>187</sup> Of course, such an operation raises another issue for Indian nations, namely the control over broadcast rights and airspace within the nations' boundaries. Currently, the Federal Communications Commission asserts control over such airspace. This issue has yet to be tested in Indian Country.



### **KILI Radio: The Voice of the Lakota Nation**

Arising out of the aftermath of the 1973 Wounded Knee demonstrations, KILI (pronounced “KEE-lee”) Radio finally took to the air in 1983. Located in Porcupine, South Dakota, on the Pine Ridge Reservation, it now boasts a signal of 100,000 watts, making it is the largest Indian-owned and -operated public radio station in America. Reaching out over 10,000 square miles, it covers an area larger than the state of Delaware.

Kili means “cool” or “awesome” in the Lakota language. And while the station may meet those standards, its mission goes much further. Its programming is almost entirely Lakota-oriented. The hundreds of public service announcements are bilingual in Lakota and English. The station’s small staff covers community events from tribal politics – including the recent political unrest and the resulting federal investigations of alleged corruption and mismanagement on the part of the tribal government – to powwows. Public hearings on important issues are broadcast live with Lakota interpreters. And, of course, it offers a range of American Indian music from traditional to modern.

A nonprofit, educational station, KILI’s staff of seven operates on a \$300,000 dollar annual budget.

For more information, see KILI radio, accessed at [www.lakotamall.com/kili](http://www.lakotamall.com/kili) and GrassRoots.Org, accessed at [www.grass-roots.org/usa/kili.shtml](http://www.grass-roots.org/usa/kili.shtml).

### *Local Media*

There are approximately 600 tribal newspapers and nearly 40 tribal radio stations.<sup>188</sup> The tension caused by the duality of purposes to which Native media serve – supporting the causes and rights of Indian nations and offering a forum for free and open discussion – is captured in the historical (and recent) experiences of the first tribally owned newspaper, the *Cherokee Phoenix*, and its predecessor, the *Cherokee Advocate*. Established in 1828, *The Phoenix*, along with its editor, Elias Boudinot, quickly found itself caught between the desires of the tribal leadership, under the direction of Principal Chief John Ross, and its desire to provide a free and open forum for public discourse. This tension concerned one of the most important legal (and disturbing historical) events in US-Indian relations: the Supreme Court decision in *Worcester v. Georgia* and the forced removal of 14,000 Cherokees from their treaty lands in Georgia, an event that came to be known as the “Trail of Tears.”<sup>189</sup>

The citizens of the Cherokee Nation were under constant and increasing pressure from the state of Georgia for their removal in order that the state’s non-Indian population could have access to the newly found mineral resources within the Nation’s borders. In the face of such pressure, the paper initially took a strong stand in favor of the Cherokee Nation’s rights and the treaty under which those rights were supposedly codified in federal law. The US Supreme Court affirmed the arguments of the Cherokees. Confronting clear evidence that President Jackson would refuse to uphold the Court’s decision, however, Boudinot argued, contrary to the position of the Cherokee Nation’s political leadership, that Cherokees had no alternative but sign a new treaty and remove themselves to Oklahoma. This position was taken even though Boudinot recognized that the “very discussion of removal was illegal (and considered treasonous),” the penalty of which under Cherokee law was death. This set off a dispute not only between Boudinot and Ross (i.e., the paper and the tribal political leadership) over the actions to be taken by the Cherokees in the face of events, but also over the role of the paper itself, whose freedom was not guaranteed under the Cherokee Constitution. While the dispute over the course of action to be taken by

<sup>188</sup> Communication with Burgess, Mike, Acting Director of the Native American Journalists Association. Also, Michel, Karen Lincoln, “Repression on the Reservation: Native American Journalists Are In A Tough Fight For Their Basic Freedoms Under The First Amendment,” *Columbia Journalism Review*, November/December 1998.

<sup>189</sup> Trahant, *op. cit.*

the Cherokees – stay and fight or sign and leave – continued, the episode seemingly ended with the state’s militia guard destroying the press.

Fast forward to 1997, where the role of the press was once again brought to the forefront when the staffers of the *Cherokee Advocate* were dismissed by the Cherokee leadership for covering allegations of wrongdoing against the Nation’s principal chief. This is not to assert that such problems are confined to the Cherokee Nation.<sup>190</sup> Employees of other tribally controlled newspapers can be and are fired for coverage considered negative or contrary to the positions of tribal leadership:

- In June 1998, Frederick Lane, editor of *Squol Quol*, the Lummi Tribe’s monthly newsletter, was fired for failing to get his articles approved by the tribal political leadership.
- In 1998, then-President of the Navajo Nation Albert Hale threatened to shut down the *Navajo Times* newspaper for its coverage of Hale’s political and personal battles.
- In October 1997, a reporter for the *Native American Press/Ojibwe News* in Minnesota was arrested by tribal police for trespassing while covering a meeting about a controversial land sale among Minnesota Ojibwe tribes.<sup>191</sup>

It is not, however, the case that tribal media are completely without protections. In limited instances, tribes have adopted written constitutions containing specific provisions for a free press within their sovereign reservation boundaries. Moreover, the *Indian Civil Rights Act* of 1968 (ICRA), which accorded certain rights of the US Constitution to Indians living under tribal governments, extends the right of freedom of the press to Indian Country. That said, many members of the Native press corps assert that most tribal provisions for free press are largely ignored. Journalists working for tribal media argue that free press guarantees as provided under ICRA offer little or no protection as tribal governments tend to view newspaper staffs as tribal employees and the media as wholly answerable to tribal government.<sup>192</sup>

### *National Media*

On the national level, there are two weekly Indian-controlled newspapers giving voice to Indian Country. *Indian Country Today* (ICT), founded in 1981 by Tim Giago as the *Lakota Times*, grew beyond its initial coverage of the Sioux nations to include Indian news from around Indian Country. In December 1998, Standing Stone Media, a corporation owned by the Oneida Indian Nation, purchased *ITC*. That transaction left *News from Indian Country* as the only national, independently owned Indian newspaper. *News from Indian Country* operates under the direction of Paul DeMain, managing editor and CEO. Following an encounter with tribal leadership that convinced him to buy the *LCO Journal* from the Lac Courte Oreilles Ojibwe tribe, Mr. DeMain has since built the circulation of the biweekly paper to approximately 8,000.<sup>193</sup> In addition to these newspapers, the *American Indian Report*, a monthly

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<sup>190</sup> As a result of the latest incident, however, the Cherokee Nation passed the *Free and Independent Press Act*, the first step on the path to a free press. With the recent elections, the Nation has established a separate office for official communications from the Nation, while a three-panel board (with two panel members appointed by the Council and the Chief, respectively, and the third selected by the two politically appointed members) has been established to oversee the newspaper. The goal of the paper’s editor is to be financially independent from the Nation.

<sup>191</sup> Michel, *op. cit.*, p. 2.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

newsmagazine published by the Falmouth Institute, covers topics from around Indian Country and the US, while *Native Americas*, a quarterly newsmagazine published by Akwe:kon Press at Cornell University, offers both investigative reporting as well as analysis and discussion covering a range of social, economic, and philosophical Native issues.

Finally, Native Americans are developing a growing number of telecommunication programs, albeit many of these are oriented towards public television and radio and picked up by local tribal affiliates of the public broadcast network. Nonetheless, organizations such as Native American Public Telecommunications have been able to develop programming, such as *Native America Calling*, oriented towards Indian communities. *Native America Calling* is a live, one-hour call-in show currently distributed to 27 Native radio stations from Alaska to New York to Florida through the American Indian Radio on Satellite (AIROS) network.

## *ARTS*

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- Most individuals and collectors think of old or historic arts and crafts as being more authentic when considering Native American artists and the work they produce. However, contemporary Native American artists have been increasingly successful producing and marketing a widening array of art forms.
- The increasing demand for Indian art, both contemporary as well as historic, has given rise to reproductions, imitations, knock-offs, and otherwise misrepresented goods. It is estimated that up to one-half of the \$1 billion of “Indian-inspired” arts and crafts sold annually in the US and abroad may not have been produced by American Indians.
- Indian art cooperatives and guilds, which have worked on behalf of Native American artisans since World War II, as well as more stringent federal legislation protecting artists and consumers, have been only marginally successful in discouraging piracy.

When considering Native American arts and artists, most individuals and collectors regard historic or traditional arts and crafts as more authentic. Increasingly, however, contemporary Native American artists have become successful at producing and marketing a widening array of art forms. Whether historic or contemporary, the important point is that all of these arts and crafts are legitimately “Indian,” as they are expressions of a Native craftsperson, group, or community’s aesthetic perspectives or utilitarian needs.

Two critical challenges define the environment in which Native American artists work. First, the integrity and economic significance of Indian-made arts and crafts are being challenged – if not compromised – by imitations. Second, and more specific to contemporary Native American artists, is the challenge of being accepted by the larger art world and overcoming its misconceptions of what constitutes “Indian art,” rather than being relegated to categories such as folk and primitive art.

### *Arts and Crafts*

American Indian artistry is viewed by many as part of a tradition that enables Native cultures to identify and express themselves. Among some Native American cultures, art forms are proprietary; that is, design, form, and function are the property of individuals, families, or clans. In other areas,

innovations and technologies may be commonly held and shared. Whether proprietary or shared, however, Indian arts and crafts – Hopi Kachina carvings, Pomo baskets, Ojibwe beadwork, Haida poles, Acoma pottery, and Osage and Potawatomi ribbon work, etc. – are all distinctive and carry with them a level of intellectual and cultural integrity. Material culture also carries with it economic value, and has been and continues to be used for intra-tribal, inter-tribal, and larger marketplace trade.

The aesthetic and economic success of such artisans has brought on a costly (although not new) problem: the introduction of fakes and forgeries into the marketplace. Today, imitations, knock-offs, and misrepresentations are taking their toll on the Indian art market as a whole with devastating impacts on individual artists. The Indian Arts and Crafts Association (IACA) estimates that up to one-half of the \$1 billion of Indian-style arts and crafts sold annually in the United States may not have been produced by American Indians. For example, Mexico-based weaving operations utilize Navajo rug designs that importers sell at a fraction of the cost of Navajo weavings.<sup>194</sup> It is estimated that 80% of the jewelry attributed to Native American craftsmanship and sold in major market centers like Gallup, New Mexico, are non-Indian-made reproductions.<sup>195</sup>

Native American artisans have not been complacent about this issue. Arts cooperatives and guilds established since the 1940s have served to educate the consumer and offer a wide array of locally produced arts and crafts. These include the Navajo Arts and Crafts Enterprise, Ramah Navajo Weavers Association, the Hopi Arts and Crafts and Silvercraft Cooperative Guild, and the Zuni Cultural Arts Council, to name but a few. These organizations have as a mission the advancement of the collective interests of the artisans by improving their members' access to the marketplace, offering business services that may not otherwise be available to individual artisans, and trying to offer some level of protection of cultural designs and authenticity.

Through the efforts of such organizations, Congress passed the *Indian Arts and Crafts Act* (PL 101-644) in 1990, a truth-in-advertising law that prohibits misrepresentation in the marketing of Indian arts and crafts, traditional and contemporary, within the US.<sup>196</sup> Most notably, the law stiffened the penalties for misrepresenting products as Indian-made. Violators now face a fine of up to \$250,000 and a possible five-year prison term, while businesses can be fined up to \$1 million. Since the law took effect there have been several remedial actions taken by the Indian Arts and Crafts Board (IACB), the agency located within the Department of Interior responsible for the implementation and enforcement of PL 101-644. Although the law allows the IACB to make recommendations regarding prosecution to the Department of Justice, and several cases are pending for referral, to date there have been no prosecutions. Part of the reason for this appears to be the lack of investigative powers on the part of the IACB.

In addition, groups such as the IACA have begun to work with tribes to patent their own trademarks. Such efforts confront their own unique set of obstacles, however. A patent cannot, for example, prevent the continued imitation of those patterns and designs currently existing in the public domain. And while the IACB is supposed to be the governmental agency responsible for facilitating the process of tribes or individual tribal artisans who are attempting to obtain a patent, federal regulations governing this process currently stymie the IACB's efforts. Moreover, many artisans find the idea of a

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<sup>194</sup> "Indian Arts Hub Takes Aim at Imposter Goods," *Indian Country Today*, January 27, 2000.

<sup>195</sup> Communication with Kathleen M'Clokey, Adjunct Professor, University of Windsor, Ontario, Canada, September 2000.

<sup>196</sup> The Act defines an Indian product as any craft or art made either by 1) a member of a federally or state-recognized Indian tribe, or 2) a non-tribal member artisan certified by an Indian tribe as such, or 3) a legally established Indian arts and crafts organization composed of members of Indian tribes. US Department of Interior, "Final Rule: Protection for Products of Indian Art and Craftsmanship (*Indian Arts and Crafts Act* of 1990, Public Law 101-664)," *Federal Register*, Vol. 61, No. 204 (Washington DC: US Department of Interior), October 21, 1996, pp. 54551-54556.

copyright culturally alien. While Navajo rugs hold no ceremonial value, they often have deep spiritual significance to the weaver. Each rug is intended to have “a life of its own,” which is why many Navajo weavers will not restore antique rugs. Thus, many weavers find the notion of a copyright contrary to the cultural integrity of their craft.

### *Contemporary Arts*

Most individuals think of the more traditional arts and crafts when considering Native American arts and artists. Today, however, Native American artists, drawing upon more contemporary themes, techniques, and styles, have risen to the forefront of their respective artistic trades. The list is rather extensive. From N. Scott Momaday to Sherman Alexie (authors), from the band Indigenous to Joanne Shenandoah (contemporary musicians), from Wes Studi to Irene Bedard (actors), from Oscar Howe to Kevin Red Star (contemporary artists), and well beyond, Indians are making their name in the world of contemporary arts.

This success is both a reflection of and a tribute to the growth of Native educational and professional institutions serving contemporary Native artists. These institutions range from tribal colleges, such as the Institute of American Indian Art, an accredited tribal college located in Santa Fe, New Mexico, specializing in the fine arts, to professional organizations such as American Indian Film Institute, which recently concluded its 23<sup>rd</sup> annual American Indian Film Festival; Atlatl, which serves to connect contemporary Native artists and art organizations through, for example, newsletters, conferences, and exhibitions; and the Native American Music Awards, which is preparing for its second annual awards ceremony.

The entry of Native Americans into the contemporary art scene has put a new twist in the debate over what constitutes “Indian” art.<sup>197</sup> At the center of this discussion resides the negotiation faced by many minority artists between their own culture, their individual voices, and the demands of the mainstream art world. Ironically, the debate today centers around the hard fought success of the first contemporary Indian artists. To many of today’s contemporary Indian artists, exposure, and thus success, is only rewarded to those willing to work in a particular style that is based on Western preconceptions of what “contemporary Indian” art ought to look like. In particular, the use of modernistic styles, namely abstract expressionism, in the late 50s and early 60s by the first Native American artists attempting to encompass a broader range of style and technique – and the eventual success of those artists – has, in turn, given rise to the development of and demand for a certain mode of expression that has itself become standardized. In short, what was once “contemporary” has now become “traditional.” Native American artists attempting to explore artistic expression beyond this particular motif hit what is referred to as the “buckskin ceiling” – the refusal of galleries and museums to accept such work.

The other side of the debate argues that while such stereotypes might exist, Native American artists must fight through non-Native definitions of what is or is not American Indian art. The survival of American Indian art depends less on adequate gallery or institutional representation than on the ability of Native Americans, in general, and contemporary Indian artists, in particular, to define themselves “beyond belonging to a certain tribe or territory.”<sup>198</sup> Native American artists must reclaim their own cultures while learning to define themselves as contemporary artists, i.e., “mediating between ethnicity

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<sup>197</sup> Shulman, Ken, “The Buckskin Ceiling and Its Discontents,” *The New York Times*, December 24, 2000, p. 37. See, also, Ambler, Marjorie, “For Native People, Art Is Not Optional,” *Tribal College Journal*, Vol. X, No. 4, Summer 1999, as well as associated articles; and Heard Museum Resource Guide, New Indian Painting, <http://www.heard.org/education/resource/nip.html>.

<sup>198</sup> Shulman, *op. cit.*

and ego.”<sup>199</sup> In this regard, the obstacles confronting today’s Indian contemporary artists are the same that confronted yesterday’s. One need only look to the letter written by Oscar Howe, one of the first contemporary Native American artists, in which he “refuted definitions of authenticity by the non-Native art world which [*sic*] would effectively deny expressions of individual creativity. Years later he [was to write], ‘So I had to concede that if Indian art were to exist I must do it as an individual effort. Indian art became an individualistic art’”<sup>200</sup> – a point of view now held by many contemporary artists.<sup>201</sup>

### **New Indian Painting and the IAIA**

In the 1950s, many Native American artists abandoned traditional styles of painting, adopting instead a style that reflected modernist movements such as Cubism and Abstract Expressionism. It became known as New Indian Painting. This new style was reflected in the larger changes being felt by Native American artists. For example, having gone off to war, tribal citizens were exposed to the rich history of Western art; Native artists (as well as non-Native) realized the benefits of improvements in technology, particularly in the print media, which allowed for better visual dissemination of art; and, unfortunately, Native artists realized the significant loss in Native culture and, hence, artistic styles, through federal policies.

At first shunned as derivative of Euro-American painting and, therefore, not authentic, the new style gave rise to an intense debate among Native American artists and those who supported them about what constituted Native American art. Individualism, in particular, became a point of contention because it was perceived as being at odds with the prevailing cultural norms of the “Indian way.”

Eventually, a new ideology of Indian art took hold, one in which valued expressions of personal creativity that were rooted in both Native tradition and modern European innovation. This philosophy was institutionalized at the Institute of American Indian Art (IAIA), founded in Santa Fe, New Mexico, in 1962. IAIA, founded by the Indian Arts and Craft Board and the Bureau of Indian Affairs, was the first government-sponsored art school for Indians. It had as its mission “to acquaint its young Indian students with an appreciation of their own tradition,” while “foster[ing] new and noteworthy creations leading to new traditions.”

Source:

Heard Museum Resource Guide, *op. cit.*

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<sup>199</sup> Shulman, *op. cit.*

<sup>200</sup> Heard Museum Resource Guide, *op. cit.*

<sup>201</sup> Communication with Kevin Red Star, artist, November 2000.

## *CULTURE*

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- “American Indian” is a single race category in the US Census, but in reality, Native American cultures are many and diverse. Today there are over 500 culturally distinct American Indian nations and communities.
- US policies of assimilation, acculturation and termination lasted well into the 20<sup>th</sup> century, and for many Native communities, resulted in the reduction or loss of ancestral lands, Native language skills, traditional practices, and local knowledge.
- Renewed differentiation from mainstream American culture has been a significant trend over the last several decades. American Indians, whether they live in rural, urban, reservation, or non-reservation areas, are researching, reclaiming, investing in, and strengthening Native knowledge and practice. Significant public policies – like the Native American Graves Protection and Repatriation Act of 1990 – have presented an opportunity for Native nations to consider their long histories and sovereignty within the context of protection of sacred sites, the disposition of objects of cultural patrimony, and the use of traditional language and artifacts.

Broadly defined, a society’s culture is “the sum total of ways of living built up by a group of human beings and transmitted from one generation to another.”<sup>202</sup> This definition stands in stark contrast to the two most typical Western interpretations of culture – that a society’s arts, letters and scholarly pursuits constitute its culture, and that culture, particularly that of non-Western societies, is something primitive, relatively static, and worth “preserving” in an unaltered state. Indeed, the broad definition, which we believe is the appropriate one for understanding Native America, suggests that the typical interpretations are, respectively, inadequate and inaccurate for they do not consider Native ideologies, theoretical operating frameworks, or means of transmitting cultural knowledge to succeeding generations. For the purposes of this report, therefore, it seems artificial to address “Indian culture” at all. *All* of the topics discussed in the foregoing and following sections and chapters constitute Indian culture.

Yet it is also the case that the phrase raises certain issues worth highlighting and that certain topics *are* best covered under the title. For example, an appreciation of the variety of Indian cultures, the

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<sup>202</sup> *Webster’s Encyclopedic Unabridged Dictionary of the English Language* (New York: Portland House, 1989), p. 353.



effects of federal policy on Indian culture, the cosmological or worldview differences between Western and Native thought, and the existence of “internal” cultural battles in Indian societies sharpens one’s understanding of American Indian societies. Additional topics that may be best addressed under the umbrella designation “culture” include the state of Native language use and revival, the practice of and protections for Native religions, Indian self-determination over cultural artifacts (including the role of museums and repatriation), and the increased recognition that Native cultural knowledge is an important part of human knowledge. Of course, in all of these discussions, we should keep the admonition of Vine Deloria and Clifford Lytle, writing in *The Nations Within*, in mind: “Culture is a most difficult subject to discuss. It is also the single factor that distinguishes Indians from non-Indians in the minds of both groups.”<sup>203</sup>

### *The Variety of Indian Cultures*

A primary reason why “Indian culture” is difficult to discuss is that there is not just *one* Indian culture. “American Indian” is a single race category in the US Census, but this grouping conceals the substantial cultural diversity found among Native communities. Members of the more than 500 federally recognized American Indian, Alaska Native, and Native Hawaiian communities can be as different from each other as citizens of Greece are from citizens of Vietnam. Citizens of the Navajo Nation (largely located in Arizona) have very different worldviews and cultural practices from citizens of the Confederated Tribes of Grand Ronde (Oregon), and Wampanoag (Massachusetts) society differs greatly from that of the Osage (Oklahoma).

There are several sources of and ways to describe this cultural variation, including geography, language, and the history of contact, as discussed below.

- *Geography* People sharing similar environments and like surroundings have often developed similar cultural traits, especially in the areas of industry and livelihood. Thus, given the broad range of geographical and attendant environmental conditions found within the contemporary political boundaries of the US, the existence of a wide variety of American Indian cultures is not surprising. Pre-European contact, Native societies would have included: farmers of the eastern forests; nomadic hunters of the plains and prairies; farmers and herders of the Southwest; seed gatherers of California and the inter-mountain “great basin”; ocean and river fishermen of the Northwest; nomadic hunters, fishermen, and foragers of the transcontinental sub-Arctic; marine animal subsistence gatherers of the Arctic; and tropical hunter-gatherers of the Hawaiian Islands.<sup>204</sup> Certainly, all of these societies have seen changes before and since European contact, but the fact remains that the cultural diversity found in Indian Country is due in part to the geographical diversity in which the societies arose.
- *Language* Linguistic differences are often associated with cultural differences, and thus it is notable that there is no universal “American Indian” language. Indeed, of the 400-plus languages spoken in the US, nearly half are Native languages. Linguists group most of these surviving North American Indian languages into six primary families: (1) Inuit and Aleut (Far North), (2) Algonquian (various tribes in the eastern forests, the Plains, and the Far West), (3) Athabaskan (the Mackenzie-Yukon Basin, the Navajos in the

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<sup>203</sup> Deloria, Vine, Jr., and Clifford Lytle, *The Nations Within* (New York: Pantheon Books, 1984), p. 250.

<sup>204</sup> Substantially derived from Driver, Harold E., *Indians of North America*, 2d ed., rev. (Chicago: University of Chicago Press, 1969), and Waldman, Carl, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985).

Southwest, and some West Coast peoples), (4) Uto-Aztecan (the Great Basin and Rocky Mountains area, the Plains, and the majority of the Pueblos), (5) Chinookan (several scattered Far Western tribes), and (6) Siouan (people in such highly separated regions as the Northeast, the Southeast, the Plains, New Mexico, and northern California).<sup>205</sup> Native Hawaiian languages constitute a seventh division. Of course, the categorization introduces but does not fully describe Native language diversity. For example, many linguistically related American Indian languages are mutually unintelligible, and different communities evidence different degrees of traditional language survival and revival.

- *History of Contact* The history and politics of contact with non-Natives further distinguish Native nations' cultures. Indeed, Native responses to the challenges and opportunities of contact with non-Native forces are legion – scholars have written volumes on the conflict, compromise, spread of disease, and demographic changes that resulted from the “Columbian Exchange.” Over time, the people of each American Indian nation (where “nation” is now generally defined at the reservation level) experienced different challenges and opportunities and met them in unique ways. These histories<sup>206</sup> further demonstrate that there is no such thing as a monolithic Indian culture.

As these distinctions demonstrate, there is not just one Indian culture. Yet, it also should be noted that one is “pan-Indian,” or a unification of certain Native ideals and practices. While pan-Indian culture may trace its roots to the Indian boarding schools of the early 20<sup>th</sup> century and find celebration on the modern pow-wow circuit, pan-Indian thought is especially evident in the political activism of the 1960s and 1970s, when Native Americans, like other sub-groups of US citizenry, rallied around basic human rights issues. Pan-Indian strategies and efforts served to protect human rights for Native people (and all Americans) and continue to preserve tribal sovereignty and nationhood.

These descriptions of the extraordinary cultural variation among the Indian nations of North America make several points clear. First, any single image that a non-Indian might have of what constitutes a “real Indian” is a bold over-simplification. For example, the Plains Indian model, romanticized by novels, movies, Presidential visits, and *New York Times* coverage, is but one view of the culture of Native America. The Armani-clad CEO of an Indian casino, the young Apache woman participating in a sunrise (coming-of-age) ceremony, the Ivy-educated tribal lawyer or Indian Health Service doctor, and the Makah whale hunter are all alternate, and equally legitimate, representations of Native culture. Second, Indian cultures are *living cultures* and, as such, contain both historical and modern elements. For instance, the leaders of the Gila River Indian Community recently labeled tribal government buildings (formerly known by their English descriptions, such as “Social Services,” “Defense Advocates,” etc.) with *O’odham* names, an exercise that entailed direct translation, the adaptation of old words to new uses, and the creation of wholly new phrases. Third, the degree of acculturation varies among Native communities. For outsiders entering a Native community, this variation is profoundly

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<sup>205</sup> For example, see Driver, *op. cit.*, pp. 25-53, especially Table 2, pp. 43-45. The table is based on Voegelin, Charles F., and Florence M. Voegelin, *Map of North American Indian Languages* (New York: American Ethnological Society, 1966).

<sup>206</sup> Most of what is known about Native North America is based on written observations and subsequent research during and following contact with European and other world powers – a body of work that is not without its biases. The archeological record also invites inferences and interpretations for understanding the longer history of Native America, and new evidence and perspectives are continually added to the record. Native knowledge, very often proprietary in nature, is a third important source for understanding the long history. Increasingly, Native scholars, operating within a variety of disciplines and interdisciplinary studies, are bridging these sources of information and making significant contributions to the discourse of history, cultural ecology, and related fields.

important. In some cases, a given non-Indian's "internal societal compass"<sup>207</sup> would provide good navigation through the culture, but in others that compass would be of limited use.

### *Cultural Genocide*

A second reason why "Indian culture" is difficult to discuss is that the topic necessarily raises the emotional issues of cultural and physical genocide. This attack on Indian cultures was largely propagated by explicit US government policies – for 200 years, assimilation and, to varying degrees, termination were core policy tenets. In the face of removal, outright Indian Wars, incarceration on the reservations, allotment of Indian land, mandatory boarding school attendance, the forced fostering of Indian children, and general social (mis)management by US government agents, Indians fought to retain the cultural bonds – rituals, beliefs, systems of social and political organization – that constituted their societies.

The rules of engagement during this long period (which commenced even before the US became an independent national entity and continued at least through the late 1960s) often required Native people to adopt an outward show of assimilation and to hide their customary practices from colonial oversight. For example, under pressure first from the Spanish and then from the US, Pueblo societies adopted many trappings of Western civilization, while simultaneously moving many of their traditional governance and religious practices underground (literally), to the *kivas*. Likewise, the Sun Dance, common to many high Plains cultures, was conducted in secret well into the 1960s, as official US policy banned the practice.

This resilience is remarkable, yet it must also be acknowledged that the US government's efforts to eradicate Indian culture were often successful. During this long period of overt discrimination, many indigenous systems of government, Indian languages, and Native religious practices atrophied and disappeared. For example:

- The Choctaw once had a highly differentiated government system, composed of three major bands in a confederacy, but many of the intricacies of this system were a distant memory by the mid-1800s, when the Oklahoma Choctaw embarked on a process of formalizing and amending their constitution.<sup>208</sup>
- In 1996, the sole remaining speaker of the Catawba language died – a phenomenon common across Native nations.<sup>209</sup>
- After a revival early in the century, concerns resurfaced in the 1990s that important Navajo healing knowledge was being lost – practicing *hatalii* (medicine men) were aging, their numbers were falling, new recruits had less time and fewer resources to turn to learn the complicated songs and sand painting arts, and a narrower assortment of ceremonies were being performed.<sup>210</sup>

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<sup>207</sup> The phrase "internal societal compass" is used to indicate the implicit assumptions about the values and goals of society that individuals instinctively use to determine impressions and appropriate behaviors in a given situation.

<sup>208</sup> See Champagne, Duane, *Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw and the Creek* (Stanford, CA: Stanford University Press, 1992).

<sup>209</sup> This fact is mentioned in Frazier, Ian, *On the Rez* (New York: Farrar, Straus, Giroux, 2000), p. 79. For more information, see the discussion of Indian languages later in this section.

<sup>210</sup> See "Wheelwright Museum of the American Indian," <http://www.insiders.com/santafe/main-attractions3.htm> (accessed February 2, 2001); "FAQs About Life on the Navajo Nation and Among the Navajo People," [http://www.ourworld.compuserve.com/homepages/larry\\_dilucchio/faq02c.htm](http://www.ourworld.compuserve.com/homepages/larry_dilucchio/faq02c.htm) (accessed February 2, 2001); Blackwood,

In sum, US policy long equated acculturation with progress, a concept voiced even in 1969 in a BIA report that stated, “Indian economic development can proceed only as the process of acculturation allows.”<sup>211</sup> To the extent that the importance of Indian culture was acknowledged, as with the passage of the *Indian Arts and Crafts Board Act*,<sup>212</sup> such efforts “encouraged both Indians and non-Indians to think of culture as primarily the artifacts produced by the ancestors of today’s Indians,”<sup>213</sup> – that is, to view Indian culture as dying or dead and in the same compartmentalized terms that Western society viewed its “culture.”

From the late 1960s onward, federal policy has been more accommodating of Indian culture. By providing mechanisms for increased tribal autonomy (particularly PL 93-638 and its amendments), modern US policy has opened the door for more explicitly Native approaches to the arts, government, education, and other societal pursuits.<sup>214</sup> Through self-determination, many Indian nations are re-invigorating their traditions and creating new, culturally appropriate practices. They are establishing health care programs that provide indigenous medicine in addition to, or instead of, Western medicine. They are changing educational systems to reflect indigenous ways of learning (with particular emphases on Native language learning). They are developing social service programs that strengthen family, clan, and tribal bonds. And, they are marrying Western science with Native knowledge to restore vital natural resources.<sup>215</sup>

But even the federal policy of self-determination retains some assimilationist pressures. For example, self-determination affords tribal governments greater control over services performed within their nations, but as implemented, the contracting and compacting processes do not encourage tribal applicants to *redesign* programs according to their specific needs and worldviews. Instead, the processes tend to promote the replication of the federal government’s management structure at the tribal level.<sup>216</sup> Similarly, policy-makers and pundits have called upon Indian nations to strengthen their court systems as a means of improving self-government and advancing economic development. Yet is it unclear whether non-Native complainants and non-Indian courts with competing jurisdictions will accept the authority of

Alisa, “Navajos Create Program to Train Youth in Traditional Ceremonies,” Associated Press, <http://wire.ap.org/> (accessed March 23, 1999).

<sup>211</sup> US Bureau of Indian Affairs, “Economic Development of Indian Communities,” in United States Congress, Joint Economic Committee, *Toward Economic Development for Native American Communities* (Washington: GPO, 1969).

<sup>212</sup> US, *Statutes at Large*, 48:891.

<sup>213</sup> Deloria and Lytle, *op. cit.*, p. 250.

<sup>214</sup> This change in policy is due in large part to the efforts of Native Americans to re-gain control over the affairs of their nations (see, for example, the Tribal Governance section of this report). Significantly, Indian educators were among the first to push for self-determination and, thus, cultural renewal. Administration of the Navajo Nation’s Rough Rock School, which the Nation took over from the BIA in the early 1960s, was the first “contract” arrangement between the US and a tribal government. It laid the groundwork for further contracting and, ultimately, led to PL 93-638.

<sup>215</sup> Programs of each of these types (and more) are described in *Honoring Contributions in the Governance of American Indian Nations, 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, March 2000), and *Honoring Contributions in the Governance of American Indian Nations, 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, April 2001).

<sup>216</sup> Certainly, compacting *allows* program redesign. As implemented by the federal government, however, the compacting process does not *promote* redesign. Because the amendments to the original statute permit tribes to compact in a piecemeal fashion (one program at a time), the end result is similar to contracting – the creation of tribal programs that closely mirror their federal precursors.

judicial systems that have strong and obvious cultural differences from the Western model.<sup>217</sup> A final example is that of tribal police departments, which, through self-determination, have replaced BIA forces in many Native communities. These departments often strengthen their ranks by sending recruits to state police academies. A useful byproduct of this training has been the increased acceptance that tribal officers receive among their municipal and state police colleagues – acceptance that may deter tribal police departments from further organizational strengthening along strictly cultural lines. In a nutshell, federal policies that increase the self-determination of Indian governments may nonetheless foster some “your government should look like our government” demands.

An additional note is that while the US national government’s policies have created more room for Indian cultures to thrive, they also have opened the door to increased assimilationist pressure from the state and local levels. For example, the Montana Association of Reservation Counties was formed in the mid-1980s, just as the federal policy of self-determination was taking hold. These 15 local governments work together to challenge tribal authority. Similarly, interest groups such as the North Central Idaho Jurisdictional Alliance and the Citizens for Equal Rights Alliance (also active in the North-Central US) lobby the federal and state governments to abolish the special standing of Natives and “treat all citizens the same.”

Today, of course, government policies are not the only, or even the primary, source of pressure on Native culture. The values, customs, and mores of popular culture provide tremendous competition for indigenous cultures. Certainly, cultures are not and should not be static, but cultural change that is not self-determined can be debilitating. It can result in the loss of valuable indigenous knowledge, in the disintegration of social norms, in the breakdown of effective governance, in a loss of social cohesion, and it can cause new social, economic, and political problems in a community. Such pressure from popular culture may be especially acute in the Native American case, where diverse indigenous cultures exist in close proximity to the dominant society, which is also one of the most technologically advanced societies in the world.

The role of technology in cultural change (both positive and negative) cannot be understated. When asked the root cause of his community’s current problems with youth, an Akimel O’odham elder from the Gila River Indian Community replied, “That,” and pointed out the window to a car. He explained that modern technology, typified for him by the automobile (and for others by television, computers, etc.), dramatically increased the volume and speed of cultural incursions from the non-O’odham world and that these incursions had destroyed the community’s traditional means of training its youth. Even in its most well intended forms, the spread of technological innovation challenges the value of Native culture, since technology favors certain languages and customs over others. For example, placing computers and internet connections in Ojibwe classrooms provides important technological training and access, but also shows Ojibwe children that the standard language for web communication is *not* Ojibwe.<sup>218</sup> On the other hand, technology is also an important contributor to cultural preservation and

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<sup>217</sup> The Navajo Nation Judicial Branch is an oft-cited success in these terms. Certainly, it has gained great acceptance among the federal and state courts of Arizona and New Mexico, despite the full integration of Navajo common law into its rulings. Yet, this standing was achieved only through intense and ongoing training of non-Native judges and lawyers by the largest Native judicial system in Indian Country – observations that make one wonder about the acceptance that would be gained by a small, less influential Indian nation’s judicial system, if it operated along distinctly non-Western lines. And, it is worth noting that an argument of exactly the kind found in the text – that Native judicial systems are “too different” – was used by Justice Souter in his concurring opinion in *Nevada et al. v. Hicks et al.* (2001): “The resulting law applicable in tribal court is a complex ‘mix of tribal codes and federal, state, and traditional law,’ which would be unusually difficult for an outsider to sort out” (p. 11).

<sup>218</sup> Joshua Fishman makes this point well in “The New Linguistic Order,” *Foreign Policy*, Winter 1998-99, p. 26: “As you read this sentence you are one of approximately 1.6 billion people – nearly one-third of the world’s population – who will use English in some form today. Although English is the mother tongue of only 380 million people, it is the language of the

revival. From the creation of a Lakota alphabet and dictionary in the early twentieth century to the digital recording of Muckleshoot elders' stories, from early photographs of American Indians using traditional tools *in situ* to high tech museum displays of Native lifeways, technology has provided and continues to provide a means by which Native Americans can combat cultural genocide.

### *A Different "Cosmology"*

Another reason why Indian culture is difficult to discuss is that non-Natives or Westerners are not prepared to "get it" (Western and Native American worldviews can be quite different), and what is available for non-Natives to "get" is sometimes superficial (Native American worldviews are often proprietary in nature, held by specific individuals, clans, and societies, thereby restricting Westerners' access to certain ideas and types of knowledge). Although it is a generalization, one thing that can be said about Native American sacred worldviews is that, in contrast to Western thought, they tend to have a deeper basis in the natural order. Most Native Americans believe that they and other humans share a relationship with the land and its other inhabitants. An examination of various Native creation stories, for example, reveals a set of beliefs in which man is but one integral part of the natural order.<sup>219</sup> The stories from the land and the landscape itself bring forth a constant reconnection between the people and higher powers and generate stronger ties between the past, the present, and the future.<sup>220 221</sup>

Several concrete examples of Native and non-Native interpretations of events, practices, and planning help clarify these worldview distinctions.

- *The Wounded Knee Memorial Ride* The Ride is an annual pilgrimage, begun in the winter of 1990, in which hundreds of Lakota people have relived the last journey of Chief Big Foot and his followers. Participants travel for days across the Plains, on horseback and in open wagons, often in frigid conditions, to Wounded Knee, a site on the Pine Ridge Reservation where the US Army's 7<sup>th</sup> Cavalry slaughtered their ancestors in 1890. Non-Natives reading the popular press might interpret the Ride as "an epilogue to a tragic event played out in archetypal images." But for the participants, the Ride is much more than that. The stories of Wounded Knee, having been passed down through the generations, connect those who came before to those who are still struggling with suffering. Hence, the lives and suffering of many modern Lakota cannot be disconnected by linear time alone from the historical tragedy. The Ride heightens this spiritual connection, commemorates the dead, and initiates a healing process for both the original

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lion's share of the world's books, academic papers, newspapers, and magazines. American radio, television, and blockbuster films export English-language pop culture worldwide. More than 80% of the content posted on the Internet is in English, even though an estimated 44% of online users speak another language in the home ... Never before in human history has one language been spoken (let alone semi-spoken) so widely and by so many."

<sup>219</sup> An examination of this sort is offered in Wilson, James, *The Earth Shall Weep: History of Native America* (New York: First Grove Press, 1999), chapter 1.

<sup>220</sup> For more complete discussions see (for example) Wilson, James, *op. cit.*, especially the Prologue and Chapter 1; Morrison, Kenneth M., "Native American Religions: Creating Through Cosmic Give and Take," in Duane Champagne (ed.), *Native America: Portrait of the Peoples* (Detroit: Visible Ink Press, 1994); Talbot, Steve, "Pluralistic Religious Beliefs," in Champagne, *Native America: Portrait of the Peoples*; and Deloria, Vine, Jr., *God is Red* (New York: Grosset and Dunlap, 1973).

<sup>221</sup> These cosmological differences underline why sovereignty over – or negotiating for some measure of control over – sacred landscapes are so important to American Indian nations.

victims of the massacre and those living today. History and the story are the same, “the past, present, and future all converge, ...[and] in an event such as the Wounded Knee Ride, commemoration of the dead is inextricably mingled with concern for the living and unborn.”<sup>222</sup>

- *The Great Lakes Indian Fish and Wildlife Commission (GLIFWC)* Viewed through a Western lens, GLIFWC might be effectively described as a highly efficient natural resource regulatory body created by Ojibwe communities bordering the Great Lakes to assist in the maintenance and regulation of communal rights to off-reservation resources. But to the member Ojibwe communities, this description would fail to capture the meaning of and need for such an institution. GLIFWC is a vehicle by which they maintain a connection to their “place,” a place foretold to them and to which their creator led them. Thus, to forgo forest rights is to forgo more than mere resources, to forgo more than access to traditional foods and medicinal plants, and to forgo more than the opportunity to practice sacred rituals and customs. It would mean a deep, cosmological disconnection from what they understand themselves, as a people, to be.<sup>223</sup>
- *National Indian Education Association (NIEA) Convention Goals* John Cheek, a Muskogee Creek who directs the NIEA, offered this description of the work planned for the organization’s October 2000 convention: “The theme of the convention is a pathway to the 21<sup>st</sup> century, taking technology and tribal tradition and merging these two ideals. We have to look to the future like we never have done before. For Indian people, there have been such strong ties to the traditions. *They never move forward without looking back*” (italics added).<sup>224</sup>

### *Internal Cultural Differences*

A final observation that complicates discussions of Indian culture is that Native societies are not immune to *internal* cultural factionalism. The struggle is often framed as “traditionalists” versus “non-traditionalists,” and sometimes the tension is even expressed in the unattractive terms of “full bloods” versus “mixed bloods.” In either case, the question is this: Around whose norms and values is the society to be organized? For example, what policies are to be implemented? What should the basis of the nation’s relationship with the federal government be? What cultural changes are to be accepted, at what rate, to what degree, and by whose consent? On the one hand, the substance of these questions and, hence, the struggles themselves, are unique to Indian Country. On the other hand, the fundamental issue is universal. “Cultural wars,” “far right,” “liberal left,” “conservative,” “pro-life,” etc., are familiar terms to anyone with a casual interest in US politics, and names aside, the disagreement is about the norms by which society is to conduct itself. The lesson is that individuals and organizations which wish to work within *any* society serve themselves well by gaining a basic understanding of that society’s internal cultural battles, instead of assuming that cultural ideas are fixed.

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<sup>222</sup> Wilson, *op. cit.*, p. xix.

<sup>223</sup> See *Honoring Contributions in the Governance of American Indian Nations, 2000, op. cit.*, for further information on GLIFWC.

<sup>224</sup> Walker, Jon, “Indian Educators Bring Record Crowd to City,” *Sioux Falls Argus Leader*, October 28, 2000, p. 1A.

### Gender Roles as Cultural Debate

Overt – and less overt – struggles for “women’s rights” characterize many contemporary Native nations. Critically, however, the battles vary between nations, and there are not always natural parallels to the battles fought in the non-Native world. In other words, it is important not to assume that cultural debates exist on this front, or that the nature of the debate is known. Only careful conversations with the women and men involved can lead to that determination.

It is nonetheless the case that questions have arisen in many Native nations about the appropriate role of women and, in particular, their appropriate role in leadership. Depending on tribal and individual circumstances, the basis for the questions varies dramatically.

Many Native traditions give women (particularly female elders) standing in important tribal decisions. In some Native nations, this matriarchal tradition has paved the way for modern female leadership (in politics, business, program management, and nonprofit management, as well as in families, clans, and tribal societies). Within other Native nations, more conservative forces may use reference to tradition to justify a lack of support for expanded women’s leadership.

The demise of warfare also has been cited as detrimental to female leadership. Pre-reservation, Native nations with strong warrior traditions offered leadership to men as “war leaders” and offered other leadership roles to women. In the reservation context, warfare was suppressed and males assumed the leadership roles once held by women.

Finally, American Indian women activists point to colonization, the treaty process, and the Indian Reorganization Act as culprits in keeping them out of power. Various European colonizers, negotiators for the US government, and early Bureau of Indian Affairs administrators assumed that Native nations operated (or desired them to operate) under the same cultural rules as they did – rules that, at the time, primarily supported male leadership. Thus, women were not included in treaty talks or as candidates for tribal office even when tribal traditions may have promoted such roles.

#### Sources:

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Prindeville, Diane-Michele, "Women's Leadership in American Indian Politics," working draft prepared for the 2002 Western Social Science Association Conference, Albuquerque, NM, April 2002;

Small, Gail, personal communication, October 2000.

Notwithstanding the difficulties in discussing Indian culture, this section now turns to several important aspects that warrant present attention. The topics include Indian language survival and revival; Native religious practice; the return, treatment, and display of cultural artifacts; and the question of ownership of indigenous knowledge.

### *Indian Languages*

Though language is just one facet of any culture, it is a critical vehicle by which to navigate within one’s culture. Indeed, given the long history of forced assimilation and acculturation in Indian Country, many Natives feel that language is especially important to preserving and reviving their cultures.



Common sentiments are that “Language is the key to cultural survival,”<sup>225</sup> and “We must know the white man language to survive in this world, but we must know our language to survive forever.”<sup>226</sup>

What is the state of language survival in Native America? One conservative estimate is that at least 75 Native languages once spoken in North America have been lost since European contact.<sup>227</sup> Moreover, “as of the 1960s, the best count for languages still spoken north of Mexico came to 175. Of these 175 languages, 136 each had less than 2,000 speakers, 34 of them with ten speakers each at most. Many speakers of these 136 languages would have been elderly at the time of the count; additionally, the children in many cases had been growing up monolingual in English. There is, therefore, little likelihood, as of the 1990s, that the 34 languages with ten or fewer speakers have survived or will survive much longer.”<sup>228</sup>

Data from the 2000 US Census may confirm these extinctions. Even among surviving languages, data from the 1990 US Census emphasize that knowledge rates among the youngest Indians are often low (see Table 3).

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<sup>225</sup> Deloria and Lytle, *op. cit.*, p. 251.

<sup>226</sup> A female elder of the Atchumawi-Atsugewi Tribe, quoted in Hinto, Leanne, *Flutes of Fire: Essays on California Indian Languages* (Berkeley: Heyday Books, 1994), p. 234.

<sup>227</sup> Silver, Shirley, and Wick R. Miller, *American Indian Languages: Cultural and Social Contexts* (Tucson, AZ: University of Arizona Press, 1997), especially pp. 7-8.

<sup>228</sup> *Ibid.*, p. 8. It should also be noted that linguists at the Piegan Institute, a Native language study center in Montana, estimate that 185 North American Native languages survived into the late twentieth century. Thus, the figures are not exact, but the point is – many American Indian languages have been lost over the last 600 years.

Table 3  
 Estimated Native Language Knowledge,\*  
 Selection of Large Native Nations (pop >1000), 1990

Tribe	Location	Age 18+	Age 5+
Zuni Pueblo	NM	96%	95%
Mississippi Choctaw	MS	95%	93%
Navajo Nation	AZ/NM/UT	92%	85%
White Mountain Apache Tribe	AZ	88%	80%
Crow Nation	MT	86%	80%
Acoma Pueblo	NM	84%	71%
Tohono O'odham Nation	AZ	84%	72%
Hopi Nation	AZ	82%	70%
San Carlos Apache Tribe	AZ	74%	56%
Gila River Indian Community	AZ	57%	42%
Oglala Sioux Tribe	SD	49%	35%
Rosebud Sioux Tribe	SD	42%	29%
Cheyenne River Sioux Tribe	SD	39%	26%
Shoshone & Arapahoe of Wind River	WY	31%	26%
Red Lake Band of Chippewa	MN	29%	23%
Seneca Nation	NY	21%	21%
Eastern Cherokee Tribe	NC	20%	17%
Turtle Mountain Chippewa Band	ND	18%	14%
Yakama Nation	WA	18%	15%
Blackfeet Tribe	MT	14%	10%
Oklahoma Cherokee Nation	OK	14%	11%
Confederated Salish and Kootenai Tribes	MT	13%	14%
Fond du Lac Band of Chippewa	MN	12%	9%
Oklahoma Choctaw Nation	OK	12%	9%
Oklahoma Muskogee/Creek Nation	OK	10%	8%
Puyallup Nation	WA	7%	6%
Osage Nation	OK	5%	6%
100 Most Populous Tribes' Average	---	<36% **	<30% **

\*These estimates are best interpreted as estimates of the percentage of individuals having some acquaintance with the Native language, as they derive from Census information on the percentage of the reservation population speaking a language other than English in the home. Significantly, the estimates should *not* be interpreted as fluency or even comfort communicating in the given language – they simply indicate that it is likely that the stated percentage of individuals sometimes use Native language as their language of choice for certain non-business communications.

\*\* Average calculated from 94 nations' data, as several tribes lack independent census listings.

Not all of the news is bad, however. The 1990s data also show an encouraging number of Native languages being spoken and a high degree of Native language knowledge among the residents of many Indian reservations. Indeed, an important recent trend is the remarkable effort under way to counter language loss. Even Indian communities that lack an obvious single Native tongue have moved toward language teaching by adopting an “official” language from among a number of contenders.<sup>229</sup> Also

<sup>229</sup> For example, members of over 20 tribes and bands from Oregon and California – including the Rogue River, Umpqua, Chasta, Kalapuya, Molalla, Salmon River, Tillamook, and Nestucca Indians – were relocated to the Grand Ronde Reservation in Oregon in the 1850s. Today, the Nation considers “Chinook” to be its Native language and teaches this language in schools and extension programs.

encouraging is the fact that many parties and methods are involved in the efforts to revive and promote Indian languages. Tribes – with the support of federal laws<sup>230</sup> – have begun their own innovative programs and often work in conjunction with other governments or with nonprofit organizations. Elementary and secondary schools (tribal, state, and private) as well as colleges and universities (especially those with significant Native enrollment) have been important partners in this effort. At the University of Arizona, for example, three Native languages and writing systems are taught (Hopi, Navajo, and Tohono O’odham); the University also is home to the American Indian Language Development Institute, a summer program now in its 26<sup>th</sup> year that serves teachers, teacher aids, language specialists, and Native speakers. And it is not just language teaching programs *per se*, but also efforts such as place names projects that help revitalize Native tongues and reinforce the indigenous knowledge behind the words.<sup>231</sup>

### **Innovative Language Programs in Indian Country**

*The Advocates for Indigenous California Language Survival* sponsor the *Master-Apprentice Language Learning Program* which pairs speakers with non-speakers of near-extinct California Indian languages and supports the relationships with materials, workshops, house calls, and very small grants.

*The Washoe Tribe Immersion School* is an ambitious attempt to train students in all grades from pre-K to 8<sup>th</sup> wholly in the Washoe language; in June 2000, the five-year-old school had 20 students, a number that will increase the number of Washoe speakers by 33%.

*The Paiute Preschool Language Immersion Program* was developed in response to the strong conviction of community leaders that very young children were the most apt language learners; in June 2000 the program served ten 3- and 4-year-olds, many of whom speak better Paiute than their parents.

*The Port Angeles High School Heritage Language Class* teaches Klallam as one of its foreign language offerings; 18 students, including non-Indians, were enrolled in the class in May 2000. Significantly, language materials were developed over the last 15 years with the support of grants from the National Parks Service and the Administration for Native Americans, the commitment of tribal elders, and the institutional guidance of the local school district.

*The Ojibwe Language Program of the Mille Lacs Band of Ojibwe* serves 350 students, from toddlers to teenagers, and has many innovative elements, including elder speakers as teacher aides, an Ojibwe choir, distance learning via closed circuit TV, and computer-administered exams.

#### Sources:

Whittemore, Katharine, “To Converse With Creation: Saving California Indian Languages,” *Native Americas*, Fall 1997, pp. 46-53;

“Tribes Eye Young To Save Languages,” *The New York Times*, June 6, 2000 (<http://www.nytimes.com/aponline/a/AP-Paiute-Preschool.html>);

Diaz, Lisa L., “Native Languages for Foreign-Language Credit,” *The Seattle Times* (<http://archives.seattletimes.com>);

*Honoring Contributions in the Governance of American Indian Nations, 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, March 2000).

### *Native Religions*

As the foregoing discussion of Native cosmology suggests, relative to mainstream US society, there is a greater fusion of the secular and non-secular in Native America. For example, it is common for

<sup>230</sup> For example, the *Native American Languages Acts* of 1990 (Public Law 101-477) and 1992 (Public Law 102-254).

<sup>231</sup> Basso, Keith, *Wisdom Sits in Places* (Albuquerque, NM: University of New Mexico Press, 1996) describes the richness of this process.

public and professional functions to open and close with prayer. Such observances may also include an offering of tobacco and the burning of sweet grass or sage, as a means of blessing and purification.

Exactly which religions are practiced and how, however, varies greatly from community to community and from individual to individual. Indeed, as a result of European contact, missionary movements, revivals, and the resilience of Native religion, we find Native Americans in each possible category of religious practice: (1) acceptance of Christianity through acculturation; (2) rejection of Christianity through the retention of traditional religious beliefs and practices; (3) reaction to Christianity and Anglo or Canadian domination through the rise of revitalization movements and new religions (such as Wovoka's Ghost Dance and Handsome Lake's Longhouse religion); (4) blending or mixture of Christian and traditional Indian religious practices and beliefs (such as the use of sage and cedar smudging in Lakota Catholic practice, and the Native American Church's emphasis on Jesus *and* traditional Indian religious views); and (5) pluralism, where forms of both Christianity and traditional or new religions are embraced (such as an American Indian who describes himself as both Longhouse and Christian).<sup>232</sup>

Despite this variety, there are several significant current issues that affect all Native practices. They include:

- *Religious Freedom* The primary battleground for religious freedom has been the use of peyote (a naturally occurring, but controlled substance because of its hallucinogenic effects) by members of the Native American Church. In 1990, the US Supreme Court ruled that the possession and use of peyote by Native American Church members was not protected under the US Constitution,<sup>233</sup> and in response, the US Congress enacted statutes in 1993 and 1994 to offer such protection.<sup>234</sup> Yet debates about appropriate drug use, equality under the law, and religious priorities remain active on the national agenda, and questions persist about the appropriateness of "one racial group practicing one religion using one controlled substance."<sup>235</sup> While the right to peyote use is safe for now, these debates and questions pose an ongoing threat to the free practice of religion by many Native Americans.
- *The Separation of Church and State* This tenet of the US Constitution has received great support and increased clarification in legal cases of the 1990s. Yet Native cosmology and worldviews often lead to practices that, while not fusing church and state, certainly go beyond the boundaries of separation advocated by mainstream society. For example, in the fall of 2000, the Eastern Band of Cherokee School Board opted to continue to broadcast a Christian prayer over the school's public address system prior to home football games, in direct contravention of a US Supreme Court decision outlawing such practices. For the Cherokee, the action reflects their sovereignty – the US Supreme Court cannot adjudicate within the Eastern Cherokee Nation. While direct challenges of this

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<sup>232</sup> Categories listed by Talbot, *op. cit.*, p. 477.

<sup>233</sup> Employment Division, Department of Human Resources of Oregon, *et al.*, v. Smith, *et al.*

<sup>234</sup> The *Religious Freedom Restoration Act of 1993* (Public Law 103-141) and the *American Indian Religious Freedom Act Amendments* (Public Law 103-344).

<sup>235</sup> Jesse, Robert, "Testimony of the Council on Spiritual Practices," Hearings of the Committee on Drugs and the Law of the Association of the Bar of the City of New York, October 10, 1995, p. 3.

lack of separation are yet to emerge, they appear likely, largely on the basis of a misunderstanding of tribal sovereignty.<sup>236</sup>

- “Access” to *Native Religions* Within Native America, as conscious government policies of cultural genocide abated, the overt practice of Native religions appears to have increased. Outside Native America, there has been a growing interest in Native religions, especially by individuals who desire spiritual experiences but have rejected Western, Judeo-Christian practices. These two forces have created a number of problems with “access,” which have to do both with metaphysical knowledge and physical sites. For example, some traditional practitioners are concerned that “fraudulent medicine men” misrepresent and commercialize their sacred rites. Contentious discussions surround the issue of whether or not non-Indians can participate in practices such as the Sun Dance or vision quest. And “New Age pilgrims” are sometimes said to compromise Natives’ access to sacred sites, especially if those sites are environmentally fragile or on treaty, but not reservation, land.

There may be no good answers to these problems, especially answers that could satisfy all Native and non-Native constituencies – in fact, that is a major reason why these concerns are an important aspect of the current renaissance in Native religion.

#### *Cultural Artifacts, Repatriation, and Museums*

Native language use and religious practice are intangible elements of Native culture, but there have been important developments with regard to the more tangible elements of Indian culture as well. In particular, the return, treatment, and display of cultural artifacts merit attention.

In 1990, Congress passed the *Native American Graves Protection and Repatriation Act* (NAGPRA), which requires museums and cultural centers receiving federal funds to inventory their American Indian holdings, make the inventories public, and at the request of tribes, negotiate the return of sacred artifacts and human remains. In essence, the Act as human rights legislation acknowledges the role and participation of tribes in the ultimate disposition and control of their cultural patrimony. For example, Indian nations now get to *choose* whether sacred artifacts should or may be held by tribal or non-tribal institutions. They can decide whether objects may be displayed publicly or not. These activities not only have increased non-tribal institutions’ knowledge about cultural artifacts,<sup>237</sup> but also have fuelled internal demands for cultural knowledge. In the San Carlos Apache Tribe, for instance, the Elders Cultural Advisory Council was tapped for its knowledge of cultural objects and engaged in the repatriation processes specified under NAGPRA. Today, museum inventories are ongoing, many tribes are active in the claims process, and more and more cultural knowledge is being elicited, interpreted, and

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<sup>236</sup> This statement is an example of the misunderstanding and possible source of legal challenges: “I do believe this interpretation is a bit off base. I think this is an attempt to elevate a federal law above the Constitution. I would not assume a Native American school would have the right to open with prayer before football games,” Robert Boston of Americans United for Separation of Church and State (a Washington, DC-based civil liberties organization), quoted in “Cherokee Nation Will Continue Prayers Before Tribal-School Games,” the Associated Press, accessed at <http://www.freedomforum.org/news>.

<sup>237</sup> Rick West, Director of the National Museum of the American Indian and a Cheyenne Indian, has summarized this process well: “Even a collection as great as ours is very spottily documented, and through this process of repatriation we’ve had people from Native communities visiting our collection who can inevitably tell us a great deal about objects that are not subject to repatriation,” quoted in Kinzer, Stephen. “Museums and Tribes: A Tricky Truce,” *The New York Times*, December 24, 2000, p. 39.

preserved by both tribal and non-tribal entities. As of May 2001, of the 1,010 NAGPRA notices logged, 702 had been published in the *Federal Register* and completed.<sup>238</sup>

Of course, there are also great challenges associated with NAGPRA. The law has no authority over private or international collections, for instance, which also house numerous sacred objects and Native remains. As to museums that are subject to NAGPRA, many have been charged with foot-dragging and with poor identification schemes, which exacerbate tensions between tribes on the appropriate patrimony of objects. The legal obligation also rests with tribes to prove ownership and a sacred cultural connection to objects, a documentation effort that can be prohibitively costly. Additionally, tribes face the costs of any legal challenges to their claims.<sup>239</sup> Even with regard to artifacts to which tribes have clear title, once they regain this cultural material, many are unequipped to preserve it appropriately themselves. Some federal agencies provide historic preservation funds, which support curatorial activities and positions, but many communities also lack adequate museum space and appropriately climate-controlled storage areas for out-of-sight objects. In March 2001, for example, the American Indians Museum Program worked with only 157 tribal museums and cultural centers.<sup>240</sup> AIMP is non-exclusive, so this number is close to the total number of tribal museums among the 550-plus American Indian and Alaska Native nations; it should be additionally assumed that only a fraction of these had appropriately equipped museum space and support staff.

Taking the broad view, however, the display of American Indian artifacts in both Indian and non-Indian museums reflects some of the most important cultural trends in Indian Country today. Indian museums' renewed authority over cultural patrimony helps ensure that tribal histories are told in a way consistent with local knowledge and protocol. Non-Indian museums that for years had stewardship over important cultural material have sometimes, and possibly inadvertently, supported cultural survival. The US Congress' 1988 decision<sup>241</sup> to establish the National Museum of the American Indian (NMAI), to move the collections of the Museum of the American Indian-Heyle Foundation to the Smithsonian and into a newly constructed Cultural Resources Center, and to allocate the last remaining museum tract on the Mall in Washington, DC for the NMAI are significant developments. And the fact that NAGPRA so prominently seeks "to reconcile two profoundly different value systems, one based on the primacy of reason and science and the other revolving around spiritual and religious values,"<sup>242</sup> shows a greater openness in mainstream society than has perhaps ever before existed to acknowledge, learn from, and perhaps even be changed by indigenous value systems.

### *Indigenous Knowledge*

As the comments about access to Native religion and the great gathering of Native American objects and reliquary into non-Indian museums demonstrate, there has long been an interest in acquiring information about Native culture. Today, there is also great interest in acquiring Native cultural knowledge.

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<sup>238</sup> Communication with John Robbins, National Parks Service, May 16, 2001.

<sup>239</sup> The most prominent challenge to date has surrounded the appropriate disposition of the remains of "Kennewick man," a 10,000-year-old skeleton found on Indian land in Washington State in 1996. Physical anthropologists have filed suit to keep Kennewick man above ground, where they hope to study him to learn more about the settlement of North America; under NAGPRA, however, the tribes of that region have the right to rebury his remains.

<sup>240</sup> Communication with Lisa Watt, American Indian Museums Program, June 18, 2001.

<sup>241</sup> PL 101-185.

<sup>242</sup> Kinzer, *op. cit.*, p. 39

Medics and chemists are one group with strong interests. According to one estimate, “a quarter of all prescription drugs sold in the United States have plant chemicals as active ingredients,” yet more than 80 percent of these drugs come from fewer than 100 plant species.<sup>243</sup> Indigenous people have long relied on the healing properties of flora and, thus, many further expansions of the Western pharmaceutical arsenal may depend on scientists’ careful attention to indigenous knowledge about the healing properties of plants. Of course, the pressure to do so *now* is especially intense, since both the number of knowledgeable people and the plant diversity they relied upon are rapidly decreasing.

Historians, archeologists and paleontologists are also paying closer attention to indigenous knowledge. In the Americas, the question of how the continents were peopled is one to which Native knowledge may be especially crucial. Ongoing discoveries across the United States suggest that more credence should be given to Native creation myths and to Indians’ oral histories. Together, for instance, the fieldwork and stories are beginning to challenge the prevailing view of (multiple) Bering Strait crossings.<sup>244</sup> On a less grand scale, the combined approach helps us understand who lived where, when and how. In other words, by embracing indigenous knowledge, we all have a richer and perhaps more accurate view of human history. Equally important, the “combined approach” that melds oral history and mythology with physical science and fieldwork provides all scientists working in these fields with an important new research methodology.<sup>245</sup>

While the importance of indigenous knowledge is finally being recognized, recognition brings its own perils. As with other Native assets, the risk is expropriation, which makes recognition of Native knowledge as hazardous as its denigration. After all, Native people have rights of ownership that must be respected and honored. On one hand, the Western economic environment is increasingly prepared to recognize intellectual property rights, but on the other hand, it has been relatively unprepared to properly credit those who are unable to come forward to challenge ownership in Western courts, or to defend cultural property whose use does not render the owner a commercial loss.<sup>246</sup> Unless Native people are proactive in claiming their intellectual and cultural property rights, and in challenging the current interpretation of Western law, the boon of outsiders recognizing the value of indigenous knowledge quickly becomes a bust.

### *Does American Indian Culture Matter?*

The view across Indian Country provided not only by this section, but also by each of the other sections and chapters of this report, shows Indian nations making a wide variety of culturally related investments. Some are seeking to better align their formal governing institutions with their informal cultural rules. Others are finding ways for their citizens to engage in traditional artistic or subsistence pursuits and still survive – even thrive – in the modern economy. Citizens themselves are learning Native languages and finding ways to reconcile ancient and modern religious practices. The list goes on – but do these investments matter?

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<sup>243</sup> Plotkin, Mark J., *Tales of a Shaman’s Apprentice: An Ethnobotanist Searches for New Medicines in the Amazon Rain Forest* (New York: Penguin Books, 1993), p. 7.

<sup>244</sup> See, for example, Parfit, Michael, “Who Were the First Americans?” accessed at: <http://www.nationalgeographic.com/ngm/0012/feature3/index.html>.

<sup>245</sup> The Navajo Nation Archeology Program is an important example of the new methodology and its significance. See the program discussion in *Honoring Contributions in the Governance of American Indian Nations, 2000, op. cit.*

<sup>246</sup> See Coffey, Wallace and Rebecca Tsosie, “Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations,” *Stanford Law and Policy Review* 12:2 (Spring 2001).

Perhaps the simple fact of their existence is evidence enough. If Indian nations with scarce resources nonetheless use those resources for purposes with strong “cultural” components, then they are probably doing more than merely differentiating themselves from the dominant society. Sociologists might argue that this re-awakening to the importance of culture (where “culture” is still broadly defined, as at the outset of this section) is important if members of each community are to develop a sense of self and a sense of belonging. These understandings then give rise to social cohesion, which may be one of the strongest tools for the long-term survival of the communities of Native America.

Indeed, quantitative research is showing that such investments in cultural institutions, organizations, and customs are well placed, presumably because of their effects on identity, cohesion, and community cooperation. For example, tribes have been able to call upon their sociocultural capacities to improve outcomes for operations as diverse as timber enterprises and low-income housing authorities,<sup>247</sup> and institutions designed with cultural appropriateness in mind have greater resonance within the community and tend to be more successful.<sup>248</sup> Overall, it appears that Indian societies that have been able to successfully synthesize the past and present – “to simultaneously animate traditional values in contemporary circumstances”<sup>249</sup> – *have* increased their probability of success and survival.

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<sup>247</sup> Jorgensen, Miriam, “Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development,” Ph.D. Dissertation, Harvard University, Cambridge, MA, June 2000.

<sup>248</sup> Cornell, Stephen, and Joseph P. Kalt, “Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache,” *Economic Inquiry*, Vol. 33, July 1995, pp. 402-426.

<sup>249</sup> Pommersheim, Frank, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley, CA: UCLA Press, 1995), p. 103.



**CHAPTER 3**  
**Asset Building and Community Development**

## ***ECONOMIC DEVELOPMENT***

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- Economic development is taking root in Indian Country, albeit unevenly across tribes and industry sectors. While there are notable successes in activities such as mining coal, selling big game hunts, operating ski and golf resorts, “e-tailing” silverwork, marketing olive oil, and building tank motors, much still needs to be done to raise incomes, improve profitability and develop economies.
- Since 1988, 198 of the 559 federally recognized tribes have entered into gaming, though 22 operations account for 56% of the total revenue generated by Indian casinos. Success in this sector is primarily due to favorable geographic location, an attribute that many Indian nations do not possess.
- Past models of “development by job creation” or “development by federal grant writing,” are on the wane, largely because of their failure. Contemporary nation-building approaches, in which tribes build their capacities to govern, and thereby encourage tribal and outsider investments, are in the ascendancy.
- Although economies throughout Indian Country are still largely dominated by the government sector, the business sector is growing rapidly. Native businesses (both on and off-reservation) grew at a rate of 93% between 1987 and 1992 as compared to 26% of all US businesses in the same period. At the same time, a Native-controlled non-profit sector is emerging to supplement private and government-led economic development.
- Numerous barriers to development continue to exist, ranging from the legal and other impediments of securitizing ownership interests to the difficulty individuals have accessing capital and developing entrepreneurial skills and financial literacy.

It is often easier to understand the newly developing economies of Indian Country by comparing them to the government-controlled economies of Eastern Europe and the former Soviet Union. Indeed, over the last century, Indian nations have been involved in the long and slow process of recovering from being part of a command-control economic system that the US government superimposed over once-vibrant traditional economies. Since the 1970s, when the Federal Government embraced the twin policies of self-determination and self-governance, a growing number of tribes have built – or are in the process of building – sustainable economies; however, Indian Country has a long way to go before economic prosperity becomes a widespread reality. But positive change is taking place.

Broadly speaking, one constant has characterized Indian reservations since their creation – poverty. On-reservation Indians were the poorest minority in America in the 1990 US Census and stretching back to the days of treaty making, a long litany of statistics documents their low participation in formal employment and their low per capita incomes. According to the BIA’s Indian Labor Force Survey, the labor force participation rate on or near reservations averaged 50% compared with a national average of 33%.<sup>250</sup> In 1990, the poverty rate for American Indians and Alaska Natives living on reservations was 51%.<sup>251</sup> However, there are heartening recent developments. Tribal efforts to assert sovereignty, new opportunities for tribal economic control under the policy of self-determination, and higher educational attainment are all important factors driving economic advancement, and the 1990s have seen the greatest improvement in tribal material welfare and fiscal health ever. While successful economic development has not taken root universally nor irreversibly, there are remarkable changes in the economic fortunes of some tribes and, therefore, in their ability to remediate longstanding social ills.

Despite the difficulty in obtaining comprehensive data,<sup>252</sup> some recent snapshots are available that capture the state of Indian economic development today. Those snapshots indicate resurgent tribal economies (particularly among those tribes located in the lower-48 states) and positive changes in social conditions both on and off reservations. Over the last decade, tribes have developed export-oriented enterprises that seek to exploit tribal comparative advantages based on natural resources, regulatory flexibility, human capital or geographic position. They have also sought to diversify their local economic bases by fostering small business creation that supplants off-reservation retail sectors. Overall, the economic and fiscal contributions of Indian reservations in the US economy are significant. In a 1998 study, it was noted that tribal governments account for \$1.2 billion in off-reservation spending for goods and services and that reservation businesses account for \$4.4 billion in off-reservation spending. The spending by tribal governments, reservation-based businesses and residents created \$246 million in tax revenue for state and local governments and \$4.1 billion in annual tax revenue for the Federal Government.<sup>253</sup>

A comprehensive analysis of Indian economic contributions to the State of Washington showed that the 27 tribes (with a combined population of 91,000), contributed \$1 billion to the state economy in 1997. Tribal enterprises in that year purchased \$865.8 million in goods and services. Washington-based tribes paid \$51.3 million in federal employment and payroll taxes and \$5.3 million in state employment and payroll taxes on a total employment of 14,000 (including non-Indians). While Indian casino gross

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<sup>250</sup> Bureau of Indian Affairs, 1997 *Labor Market Information on the Indian Labor Force: A National Report*, US Census Bureau, *Statistical Abstract of the United States: 1998* (118<sup>th</sup> Edition) (Washington, D.C.: US Census Bureau, 1998), Table 645.

<sup>251</sup> US Census Bureau, 1990.

<sup>252</sup> Little comprehensive data exist on economic activity in Indian Country between the decennial census, and existing census data are limited in that they tend to focus on individuals rather than economies. There is no “Survey of Current Business” covering Indian Country the way there is for the rest of the economy. This complaint about a shortage of information can be heard across a spectrum of issues ranging from economic development to crime rates. Policy makers and analysts in tribal and federal agencies, Congressional committee staffs, academia, intertribal organizations and even focused Indian lobbying organizations have great difficulty obtaining a robust picture of Indian Country. Two decades ago, when the BIA was much more deeply entwined in tribal government, it was able to compel (on occasion) the production of even sensitive data such as bingo revenues. Now that the BIA has spent 25 years withdrawing from that role, a vacuum remains. Some tribes are becoming quite sophisticated at monitoring their societies (see, for example, Fortune, Jimmie C., *Demographic Survey 1997*, Philadelphia, MS: Mississippi Band of Choctaw Indians, 1997). In addition, a number of private sector firms are conducting surveys for tribes and the federal government (for example, Tribal Data Resources, and Tiller Research). Nonetheless, difficulties of intertribal coordination, sensitivity about sharing data with other sovereigns, methodological variation, and the like have meant that comprehensive data on Indian Country are lacking in quantity and quality.

<sup>253</sup> Naake, Buffy, “The Economic and Fiscal Importance of Indian Reservations in the US Economy,” Center for Applied Research, Inc., *Presentation to the Native American Finance Officers Association*, June 4, 1998.

revenues of \$440 million made it the largest industry among tribes in the state, less than half of the total gross revenues of the tribes' enterprises came from gaming. While this is but one state's experience with American Indian economic development, it is reasonable to conclude that it is not uncommon.

### *Past Efforts*

While it would be expedient to exclude a description of the past failed federal economic policies as they relate to tribal economies, it is important to look at former economic development efforts in order to draw lessons for future policy making and donor involvement. One can go back over a century to uncover federal government policies that used economic, employment and poverty relief strategies as motivations for assimilationist policies that, in retrospect, accomplished little except the disintegration of the culture and dispossession of land and natural resources. Allotment of tribal land to Indian individuals beginning in 1887, for instance, was motivated by the seemingly sensible notion that Indians would be better off as self-employed homesteading farmers. That policy was an acknowledged disaster for tribes and individual Indian people, and tribes throughout Indian Country are still struggling to regain control of one of their most critical assets – land. More recently, the BIA espoused the view that Indians would develop in proportion to their willingness to abandon their Indian cultures and assimilate.<sup>254</sup> Subsequent research indicates that acculturation is not required for economic development;<sup>255</sup> indeed, indigenous cultural norms, activities and institutions are resources upon which economic development can be built.

Even when assimilation was not an issue, employment was often the cart that drove the economic development horse. The acute poverty of Indian reservations was the impetus for a federal approach to Indian economic development that focused on “getting the next project going.” Congress mandated the Economic Development Administration (EDA) of the US Department of Commerce in the 1960s “to generate jobs, help retain existing jobs, and stimulate industrial and commercial growth in economically distressed areas of the United States.”<sup>256</sup> The EDA granted capital for physical investments associated with specific projects, e.g., a building for a manufacturing facility. Other agencies had similar project-oriented approaches, with none addressing the fundamental causes of economic underdevelopment.

This “economic-development-by-project-initiation” approach failed in most places for a number of reasons. It was prone to fads of one-size-fits-all projects that were applied uniformly across Indian Country. Projects were often unsupported by competent business analyses and market feasibility studies. Investments were usually unaccompanied by the financial accountability for success that is demanded by private capital markets. No internal capacity was ever developed since outside management usually led the projects. And, most importantly, the investments were virtually always unaccompanied by a systematic approach to dealing with the underlying barriers to on-reservation economic development. Not surprisingly, the legacy of this approach is, by and large, a litany of defunct enterprises and

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<sup>254</sup> “Economic development will proceed so far as the process of acculturation allows.” US Bureau of Indian Affairs, “Economic Development of Indian Communities,” In *Toward Economic Development for Native American Communities*, Joint Economic Committee, US Congress. (Washington: Government Printing Office, 1969).

<sup>255</sup> Cornell, Stephen and Joseph P. Kalt, “Where’s the Glue? Institutional and Cultural Foundations of American Indian Economic Development,” *The Journal of Socio-Economics*, vol. 29, 2000.

<sup>256</sup> See, e.g., the Public Works and Economic Development Act of 1965 (45 U.S.C. 3121) and [www.doc.gov/eda/html/mission.htm](http://www.doc.gov/eda/html/mission.htm).

dilapidated buildings.<sup>257</sup> Few, if any, of these employment-driven initiatives survived longer than a single-cycle investment.<sup>258</sup>

The federal project development approach warped the internal tribal machinery of economic development. Tribal economic development “planners” were not in fact planners; they were (and in many cases, still are) grant seekers whose success is measured solely on the basis of how much federal largess they could direct toward their tribes. More insidiously, the federal project approach encouraged tribal elected leaders to focus on federal prerogatives, rules and approaches rather than on the task of building solid economic policies and sound governments. Internally, this process often created a destabilizing electoral dynamic: If the tribal government received grants, tribal politicians were re-elected. If not, the elected government would completely change hands and a politics of spoils would decimate the institutional memory of the tribal bureaucracy. This injurious approach to economic development has engendered dependence on the Federal Government, encouraged tribes to run their enterprises as job engines, which has too often led to bloating and bankruptcy, and created the perception that reservations are not good places for investment. For example, joint venture partners looking for investment opportunities may look elsewhere fearing unfair treatment in a contract dispute, or tribal members may choose to remain with a Fortune 500 company and not move back to the reservation due to job insecurity.<sup>259</sup>

### *New Approaches*

As described above, most of the approaches to economic development in Indian Country have been single-strategy interventions. Oftentimes, these interventions are project-driven or focused on a specific sector such as resource extraction, manufacturing or tourism. Comprehensive multi-faceted strategies are seldom used. As with the rest of the country, poverty alleviation strategies in Indian Country have focused on supplementing income through various programs such as job creation, welfare and other general assistance programs. Only within the past few years have development efforts begun to shift from this income-supplementing, or deficit-focused model, to asset-focused development strategies, in which emphasis is placed on good governance, investments, savings and wealth. New thinking on economic development argues that such asset-based strategies contribute positively to the development of a community in ways that capture both economic and non-economic benefits.<sup>260</sup>

The work of the Harvard Project has focused on a nation-building approach in which tribes assert their sovereignty by developing effective governing systems. This approach, which emerged in the mid-1980s and is based upon comparative research across a spectrum of tribal contexts, holds that successful, self-determined economic development is only possible when tribes effectively exercise their sovereignty, and back up those assertions with capable and culturally appropriate institutions of self-government. The research indicates that the best predictors of reservation economic success are *not* large natural resource endowments, high levels of educational achievement, favorable market access, or other classical economic factors. Rather, the nation-building approach contends that economic development is first and

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<sup>257</sup> For example, a spate of EDA-funded motel construction left Indian Country peppered with crumbling motels whose economic and political contexts render them incapable of maintaining the cash flow necessary to repair and maintain the physical capital. Few, if any, of these employment-driven initiatives survived longer than a single-cycle investment.

<sup>258</sup> This kind of planning took place in the context of the Great Society mindset of the administration of President Johnson.

<sup>259</sup> For a microcosmic view of this dynamic, see Miriam Jorgensen, “Nebraska Sioux Lean Beef, Parts A and B, Teaching Cases C-2 and C-3,” Harvard Project on American Indian Economic Development, Cambridge, MA., August 1990.

<sup>260</sup> Sherraden, Michael, *Assets and the Poor: A New American Welfare Policy*, 1991; and Oliver, Melvin and Thomas Shapiro, *Black Wealth, White Wealth*, 1997.

foremost a political challenge. It is only when tribes take control of reservation decision making, establish effective and legitimate governing institutions, and embrace strategic use of natural resources, education, location, capital and other assets that successful and sustainable economic development efforts emerge. Where these tribal government-oriented attributes are absent, tribal assets (e.g., an educated citizenry, natural resources, and the like) are more often squandered, failing to deliver sustainable economic performance or lasting improvements in community welfare.<sup>261</sup>

The work of First Nations Development Institute (FNDI) expands the context of tribal control of assets to a broader framework for development to encompass tribal governments, individual Native people, communities and the emerging non-profit and for-profit sectors on reservations. This asset-based development approach recognizes that tribes and Native people “own” substantial assets but have been unable to control them and, therefore, have been unable to derive the most benefit.<sup>262</sup> Once tribes control their governments, they seek ways to exercise sovereignty by creating new assets, utilizing current assets more effectively, and leveraging their existing assets more productively. However, other reservation-based institutions and individual Native people exercise control of tribal assets as well. Historically, tribal communities have seen the erosion of their governments, land, language, culture and children and thus their ability to generate wealth. The result has been poverty, dependency and disenfranchisement. In order to rebuild their communities and reservation economies, tribes must regain control over the aforementioned assets.<sup>263</sup> Self-determination and self-sufficiency are policies and ideas that not only apply to tribal governments – but to all tribal members and institutions.

#### *Government sector*

Tribal governments play the most critical role in the sustained development of tribal economies.<sup>264</sup> There are many variations on their approaches to development. Some tribes supplant federal control with central control by the tribal government; others limit tribal government involvement to the creation of semi-independent or independent tribal enterprises; and yet others facilitate a supportive environment for development outside of the government. Regardless of the chosen approach, tribal governments are learning what mix of strategies is best for their particular history, culture and circumstance. There are, however, critical factors for on-going economic activity which pertain to institutions of governance, including: (1) the extent to which tribes retain control over governmental decision-making; (2) tribal governmental capacity and performance; and (3) the degree to which their communities are attractive to tribal as well as non-tribal investors.

Tribes operating under the nation-building model have taken steps to isolate their enterprise managers from political opportunism by, for example, instituting independent boards of directors. These boards encourage the use of outside business expertise and an emphasis on profitability over job creation; however, their most important contribution seems to be the isolation of enterprise from political interference. This impact is underscored by a survey of tribal leaders from tribes owning 73 enterprises.

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<sup>261</sup> “Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations,” in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (edited by Stephen Cornell and Joseph P. Kalt, American Indian Studies Center, UCLA, Los Angeles, CA, 1993).

<sup>262</sup> First Nations Development Institute, “20 Year Report,” August, 2000.

<sup>263</sup> First Nations Development Institute, “Tribal Assets Framework,” Draft Report, December, 2000.

<sup>264</sup> Although data exists on employment in the government sector (46%), no good data exists on the extent of employment from the others. First Nations Development Institute finds that the non-profit sector overall accounts for 3% of employment, leaving the for-profit sector to account for 51% of employment. “Emerging Sector: Non-profits in Indian Country” (based on 1995-96 data), unpublished.

The survey found that enterprises independent of tribal council control were four times more likely to be profitable than those that were not.<sup>265</sup> Similarly, a statistical analysis of 70 other enterprises conducted by the National Congress of American Indians (NCAI) and the Harvard Project on American Indian Economic Development emphasizes not only the importance of these boards, but their freedom from the participation of elected leaders.<sup>266</sup>

Yet corporate governance represents only one issue that concerns a growing number of tribes. Another is the issue of dispute resolution, or the creation of tribal judiciaries. Economists have long noted the existence of fair and genuinely independent judicial systems as being pivotal to sustainable economic activity. For many tribes, the importance of tribal judiciaries has been spotlighted through experience: once tribes begin to contract heavily with non-governmental investors (either Native or non-Native), it quickly becomes apparent that unless they have established mechanisms for settling disputes fairly, investors will go elsewhere.<sup>267</sup> Across all forms of government, the presence of a neutral dispute resolution mechanism contributes substantially to economic development.<sup>268</sup> Fortunately, a growing number of tribes recognize the link between court systems and economic development and thus are making investments in these critical institutions. At the same time, however, too many Indian nations possess tribal courts that are directly linked to either legislative or executive branches, a situation that clearly discourages internal and internal and external investment. Despite positive advancements among a growing number of tribes, judicial reform and development is an area ripe for further investment.

Many Indian nations also find that effective tribal government agencies are as necessary as good corporate governance and dispute resolution mechanisms. Clear land use and zoning policies, a smoothly functioning personnel grievance system, an efficient leasing office, an expeditious business licensing process all contribute to a healthy commercial sector. Even if the tribe has asserted its sovereignty forcefully and established a good corporate board, red tape, inefficiency and incompetence can stymie economic development. A sad case in point comes from the Crow Tribe of Montana. Despite the fact that the Tribe won the right to tax on-reservation coal mining in a landmark Supreme Court victory, tribal government ineffectiveness and instability prevented the passage of a tribal tax ordinance and the rental of a post-office box.

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<sup>265</sup> Cornell, Stephen and Joseph P. Kalt, "Reloading the Dice: Improving the Changes for Economic Development on American Indian Reservations," in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, Stephen Cornell and Joseph P. Kalt, eds. (Los Angeles: UCLA, American Indian Studies Center, 1992), p. 27.

<sup>266</sup> Jorgensen, Miriam R., and Jonathan Taylor, "Patterns of Indian Enterprise Success: A Statistical Analysis of Tribal and Individual Indian Enterprise Performance, A Report to the National Congress of American Indians," (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2000)

<sup>267</sup> Under past models of economic development, neither the federal government nor many tribal governments saw fit to develop tribal courts beyond their domestic and community dispute role. This attitude is, in many ways, not surprising, as tribal courts did not really have a critical role to play in obtaining grant funding.

<sup>268</sup> In an analysis undertaken by Joseph P. Kalt and Steven E. Cornell, the presence of an independent dispute resolving body was found to be associated with a five percent lower unemployment rate, all else equal. "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," in Cornell, S.E. and J.P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, (Los Angeles: UCLA, 1992) p. 23.

### Governing Effectiveness to Promote Development and Sovereignty

Over the years, the White Mountain Apache Tribe (WMAT) developed a widely respected wildlife management department. Blessed with a well-watered reservation in otherwise arid country, the Tribe long made use of its elk, fish, and other wildlife resources for individual member sustenance. Over the last several decades, the Tribe developed an elite wildlife management operation that targets a lucrative niche in the outdoor recreation market. The Tribe sells fishing permits, rents whole lakes for retreats and conferences, and sells trophy elk hunts. These hunts are in such high demand that a bull elk permit sells for \$12,500. Since there is a six-year waiting list to buy these hunts, the Tribe annually auctions off an elk-tag to the highest bidder, and in 2000, the tag sold for a record \$38,000. All told, the Wildlife and Outdoor Recreation Division contributes about \$600,000 in net income to the Tribe's general fund, but the excellence of the Division is also a resource for defending the Tribe's sovereignty.

In the mid-1990s, the Tribe's wildlife management capacity became a key asset in a sovereignty dispute. The Tribe was in deadlock with the US Fish and Wildlife Service (USFWS) over the question of whether the *Endangered Species Act* (ESA) was applicable to the Fort Apache Reservation. The conflict nearly erupted into outright violence as the Tribe asserted its sovereignty and the Service insisted it had duties to protect species under the ESA. Despite of the conflict, the Tribe and Service were able to negotiate an agreement that a) held aside the question of who had jurisdiction, and b) allowed the Tribe to manage endangered species protection on the reservation. Essential to this agreement was the Service's acknowledgement that the Tribe had one of the premier wildlife management programs in the West. Without the demonstrated success of its wildlife management capabilities, the Tribe might never have convinced the USFWS to give ESA management authority to the Tribe. Interestingly, the WMAT-USFWS memorandum of agreement became the basis for a national policy – a Secretarial Order establishing a government-to-government relationship on tribal ESA issues.

#### Sources:

Harvard Project on American Indian Economic Development, *Honoring Nations: Tribal Governance Success Stories*, 2000;

Charles Wilkinson, "Indian Law into the Twenty-First Century: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Right-Endangered Species Secretarial Order," *Washington Law Review* 72, October 1997.

While it may be tempting to argue that tribes need to become more "Western" before they can develop economically (as the BIA did in 1969), in actuality, Indian culture must be the foundation upon which economic development is based. There are several reasons for this. First, where institutions of government are inconsistent with widely held conceptions of how authority should be distributed and exercised (a question of culture), government and its decisions are viewed as illegitimate.<sup>269</sup> Without legitimacy, governmental accountability and stability cannot develop and opportunistic economic behavior is not easily sanctioned. Conversely, where culture and institutions are aligned, the norms of behavior reinforce the functioning of government and a virtuous spiral of effectiveness and legitimacy can be established.<sup>270</sup> Second, the density of community connections – represented by a shared language and culture, for example – also has a reinforcing effect on government performance and a material effect on enterprise and thus economic success. One analysis of tribally owned forestry operations found that tribes that possess high degrees of "social capital" reap significantly higher prices for their lumber on the open market than tribes with relatively less social capital.<sup>271</sup> The rationale is that social capital can play an essential role in building accountability among tribal politicians and enterprise managers and thereby curb

<sup>269</sup> Cornell, Stephen and Joseph P. Kalt, "Where's the Glue? Institutional Bases of American Indian Economic Development," *Project Report Series 91-1*, John F. Kennedy School of Government, Harvard University, February 1991.

<sup>270</sup> For a comparison of two tribes with the same basic government form yet radically different norms of government see, Cornell, Stephen and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Modern Sioux and Apache," *Economic Inquiry*, Western Economic Association International, Vol. XXXIII, July 1995, pp. 402-426.

<sup>271</sup> Jorgensen, Miriam, R., "Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development," unpublished dissertation, Harvard University, 2000, p. 126.



rent-seeking behavior that destroys enterprise profitability. In thinking about the connection between culture and economic development, it is important to understand that “culture” is not a romantic blank check that says that Indian nations should necessarily reconstruct traditional governments or pursue national (tribal) economic development strategies with shallow cultural connections (e.g., tourism, arts and crafts, etc.). Rather, tribes should equip themselves with the institutional tools that fit today’s problems by building institutions that work for them and that match contemporary norms of legitimacy. In short, culture and economic development go hand-in-hand, but the relationship is much more fundamental than picking economic development projects that superficially address questions of Indian “culture.”

#### “The People Incorporated”

Foreseeing in 1994 that the loosening of riverboat gaming restrictions in Iowa would decimate tribal gaming revenues, the Winnebago Tribe (Nebraska) chartered Ho-Chunk, Incorporated (HCI), a tribally owned conglomerate whose name loosely translates to “The People Incorporated.” As a development corporation, its mission was to use the Tribe’s economic and legal powers to develop businesses wherever profits could be generated and eventually to employ tribal members on or near the Winnebago Reservation. For two out of an expected five years, the Tribe invested 20% of its casino profits in the company and committed to not withdrawing dividend income for five years while HCI diversified the tribal economic portfolio.

The Tribe deliberately chose to separate HCI from the Tribal Council using an independent board of directors. This board includes Council members; nevertheless, it serves as a distinct buffer between the elected leadership of the Tribe and the CEO of the corporation. This allows elected leaders to focus on their strategic role and allows HCI management to focus on making profits. To be sure, the Tribal Council is the ultimate legal authority over the corporation and sets its strategic direction, yet generally this separation of business and politics keeps the operations of the corporation from falling prey to political favoritism and opportunistic meddling.

The results are, by all accounts, remarkable. HCI has gone from zero to \$25 million in revenues in five years. Its 2000 net income was \$1.2 million, and it paid a dividend to the Tribe of 10% – nearly eclipsing the Tribe’s total pre-gaming discretionary income from leasing agricultural land. HCI has invested in hotels, real estate, a Native American tobacco and gasoline products distribution company, numerous retail grocery and convenience stores, two Internet companies, a housing fabrication company, a venture capital fund, and a telecom hardware company. Its investments span the lower 48 states and employ 250 people. In the Reservation area, virtually half of the employees are American Indian.

Source:

Harvard Project on American Indian Economic Development, *Honoring Nations: Tribal Governance Success Stories*, 2000.

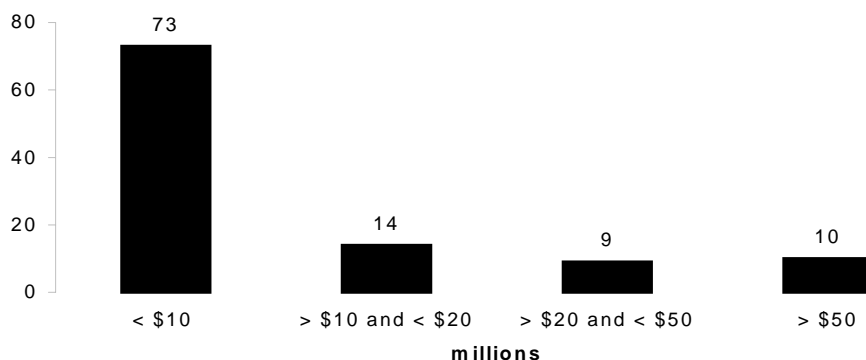
#### Gaming

Indian gaming, which is one of the two largest sources of revenue for American Indian nations, is divided into three classes: Class I is charitable gaming; Class II is high stakes bingo operations; and Class III is casino style gaming.<sup>272</sup> Currently 198 tribal governments engage in Class II and Class III gaming. It is not clear how much of the total domestic product generated by tribes can be accounted for by Indian casinos. Nonetheless, because Indian gaming is centrally regulated by the National Indian Gaming Commission (and because the industry attracts political attention), the General Accounting Office (GAO) was able to assemble a snapshot picture of Indian gaming for 1995. At that time, Indian

<sup>272</sup> The two most important underpinnings for Indian gaming are the *Cabazon* decision of 1987 and the *Indian Gaming Regulatory Act* of 1988 which legitimized tribal rights to establish gaming enterprises and provided the regulatory framework.

casinos reaped \$4.5 billion in revenue<sup>273</sup> compared with a non-Indian casino industry of \$50 billion.<sup>274</sup> Indian casino net income totaled \$1.9 billion. Interestingly, the top 13% of Indian casinos studied by the GAO accounted for 59% of the total revenue generated by casinos in the study.<sup>275</sup> Thus, the vast majority of tribes are generating only modest income from gaming. The median casino facility brought in \$4.9 million in 1995 net income,<sup>276</sup> and the amount transferred to tribes was less than \$20 million for more than 80% of the tribes observed (See Figure 4). In more recent figures provided by the National Indian Gaming Association, the 1999 Indian gaming revenue was \$8.26 billion or 10% of the total gaming industry. Twenty-two tribal operations account for 56% of the revenue. The total number of jobs in Indian gaming was 200,000.<sup>277</sup>

Figure 4  
Distribution of Funds Transferred from Indian Gaming Operations to Tribes  
Number of Tribes, 1995



Source: United States General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry*, May 1997, p. 14.

Thus, while gaming has been the “new buffalo” for a number of tribes, gaming is having only a limited effect on economic development, especially large, rural tribes. For example, even though gaming allowed the Standing Rock Sioux Tribes (SRST) of South Dakota to *double* its on-reservation employment by adding about 300 jobs, the overall effect on its reservation labor pool of 4,000 has been modest.<sup>278</sup> Thus, for the SRST, gaming alone is unlikely to sustain the economic development needs of the large reservation population.

The unevenness of gaming revenue distribution across tribes is borne out by a recent Associated Press analysis of the gaming tribes and their populations (see Figure 5). A disproportionately large share of the total casino revenue in Indian Country accrues to tribes that represent a disproportionately small

<sup>273</sup> US General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry*, May 1997, p. 6.

<sup>274</sup> *Ibid.*, 15.

<sup>275</sup> US General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry*, May 1997, at 15, 17-18. The GAO studied the 1995 revenues of 178 of 281 Indian gaming facilities operating in the United States as of December 1996.

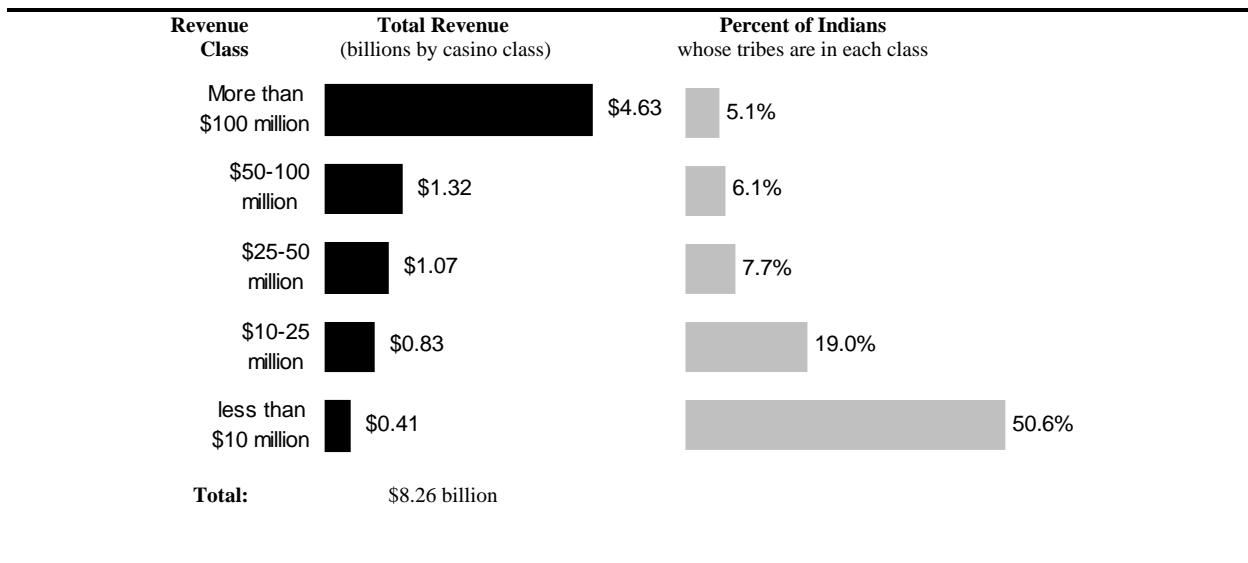
<sup>276</sup> US General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry*, May 1997, at 9.

<sup>277</sup> National Indian Gaming Association, “Indian Gaming Facts,” NIGA Library and Resource Center, [www.indiangaming.org/library/index/html](http://www.indiangaming.org/library/index/html), February 2001.

<sup>278</sup> Cornell, *et.al.*, p. 54.

share of the Indian population; giving lie to the widely held notion that Indian gaming is making all Indians wealthy.

Figure 5  
Distribution of Indian Casino Revenues and Associated Tribal Populations, 1998



Notes: Approximately 32% of Indians are members of tribes that do not have any gaming operations. Percentages do not sum to 100% because some tribes have gaming operations in more than one category.

Source: The Associated Press, "A Breakdown of Indian Casino Revenues," August 31, 2000, 16:12 EDT.

Contrary to popular notions found in the mainstream media, the proliferation of Indian gaming has not reversed the fortunes of Indian Country. Evidence clearly indicates that gaming has had a predominantly positive impact. Despite the skewed distribution of revenues, gaming has contributed to positive changes in on-reservation social conditions. For example, across the period 1989-1996, tribes that eventually compacted with states for casino-style gaming began the period with higher self-reported reservation area unemployment (averaging 41%) than tribes that did not compact by the end of the period (averaging 33%).<sup>279</sup> By 1995, tribes that had decided to compact with states reported an average of 28% unemployment whereas tribes that did not compact reported 32%.<sup>280</sup> Similarly, participation in the USDA's Food Distribution Program on Indian reservations increased 57.3% on reservations without gaming, yet it only increased 8% on reservations with gaming over the period from 1990 to 1997.

Gaming, however, has also led to a variety of potentially negative consequences. The compacting requirement has led to greater state involvement in tribal issues – a predicament that some feel infringes upon the government-to-government relationship tribes share with the Federal Government. Gaming has also led to efforts (that have been unsuccessful to date) to tax tribal gaming revenues and apply means testing to tribes for purposes of federal programs and appropriations. Furthermore, the vagaries of Congressional will regarding Indian gaming raises questions as to whether or not gaming rights are subject to revocation (as many gaming tribes believe), which if true would necessitate the need

<sup>279</sup> Under the Indian Gaming Regulatory Act (IGRA), tribes and states must come to agreement on the terms under which Indian gaming will develop (25 USC s2710 (d)).

<sup>280</sup> Cornell, *et.al.*, 58.

for diversification, the creation of other assets, and more comprehensive economic development strategies.

### *The For-Profit Sector*

Although economies throughout Indian Country are still largely dominated by the government sector, the business sector is growing rapidly. In 1982, roughly 13,000 small businesses generated \$500 million in on-reservation revenues. Although not directly comparable, the 1992 Survey of Minority-Owned Enterprises Report issued by the US Department of Commerce identified 102,234 total firms owned by American Indians and Alaska Natives. Native businesses grew at a rate of 93% between 1987 and 1992 as compared to 26% of all US businesses in the same period.<sup>281</sup> Although the report does not specify whether these firms were located on or off-reservation, as a whole, they generated \$8.5 billion in revenues.<sup>282</sup> A study by the North Dakota Native American Business Development Program found that 80% of the Indian businesses in the state of North Dakota were created post-1980.<sup>283</sup>

The evidence from the non-Indian economy indicates that *new* job creation is highly dependent on small businesses – in fact, the vast majority of new jobs in the US economy are created by small businesses. Even where tribal governments have established profitable tribally owned enterprises, tribal governments are confronting the reality that the pace of tribally controlled enterprises cannot keep pace with the growth of the labor force, which continues to be strengthened by higher high school graduation rates.<sup>284</sup> To be certain, there is growing recognition that development of the private sector must happen with or without the support of tribal government, and often, in spite of tribal government. One example of this comes from the Pine Ridge Indian Reservation in South Dakota, which, in 1989 had a poverty rate of 67%, a median household income of \$10,600<sup>285</sup> and a politically unstable tribal government. The Lakota Fund, a Native-controlled non-profit, has provided technical assistance and over 400 loans to 250 businesses over a period of 14 years. A new Native chamber-of-commerce at Pine Ridge is creating a voice for the small-business person and a platform for pushing tribal government to support the private sector needs. In this case, the non-profit sector is, in many respects, sparking economic development on this reservation widely known for its economic development failures.

While the nascent reservation business sector is growing, there are a number of obstacles to its expansion and sustainability. First, the processes by which entrepreneurs start businesses on reservations can be tortuous, political and uncertain. At Navajo, for example, a new business must complete a checklist of between 15 and 36 items (depending on who is counting).<sup>286</sup> Second, oftentimes businesses have to start everything from scratch because the tribe lacks zoning ordinances, land use plans, physical infrastructure, and streamlined leasing arrangements. Third, tribal entrepreneurs need seed capital, on-going business assistance and financial management training. Fourth, small businesses can fall prey to political opportunism if they operate in an environment where the institutions of governance are weak.

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<sup>281</sup> US Department of Commerce, *Survey of Minority-Owned Enterprises Report, 1987-1992*.

<sup>282</sup> If only 40% of these businesses were located on reservations, that would still amount to over 40,000 businesses and \$3.4 billion in revenues.

<sup>283</sup> Native American Business Development Program, “Native American Economic Assessment,” North Dakota Department of Economic Development and Finance, undated.

<sup>284</sup> Charles P. O’Hara, Tribal Planner, White Mountain Apache Tribe, personal communication.

<sup>285</sup> US Department of Commerce, *1990 Census of Population*.

<sup>286</sup> See, e.g., Northern Arizona University, Center for American Indian Economic Development, “Doing Business on Arizona Indian Lands,” 2000.

Much development can occur in the private for-profit sector if the tribal government provides a nurturing and supportive environment and then makes a concerted effort to get out of investors' way. Tribes throughout Indian Country, including the Mississippi Band of Choctaw, the Mille Lacs Band of Ojibwe, and the Confederated Tribes of the Flathead Reservation, have come to this realization, and have consequently taken steps to encourage private sector development.

### *The Non-Profit Sector*

A Native-controlled non-profit sector is beginning to demonstrate a critical role in reservation and Native economic development by supplementing and complementing private and government initiatives. A recent survey of Native nonprofits found that economic development, employment, and jobs were identified in these entities' top ten areas of focus.<sup>287</sup> Another study found that Native nonprofits engaged in economic and community development (12.1%) is more than three times the percent of all nonprofits (Native and non-Native) involved in these fields.<sup>288</sup>

While the activities of Native non-profit organizations are varied, several trends and specific initiatives highlight the role that these organizations play in economic development:

- The growth of the private sector on some reservations has given rise to non-profit business associations (e.g., Coeur d'Alene Tribe and Oglala Sioux Tribe).
- There are an increasing number of Tribal Business Information Centers (TBICS) on reservations. These are sometimes outside the purview of tribal government, and most provide skills training, technical assistance and informational resources for Native entrepreneurs.
- Tribal colleges are becoming more engaged in business development activities, and some (e.g., Salish-Kootenai, Fort Peck and Fort Belknap) have established small business assistance centers to complement tribal government efforts. Other non-profits (e.g. American Indian Business Leaders) serve students interested in or studying business.
- Nonprofits are emerging to serve tribal and Native community economic development financing efforts. Examples include the Affiliated Tribes of Northwest Indians' creation of a development corporation with a financing arm; First Nations Oweesta Corporation's loan and grants programs that support tribal government and Native non-profits; the Seventh Generation Fund's grants to grassroots organizations; and the Four Times Foundation's equity grants to small businesses.

These efforts represent only a handful of the innovative non-profit initiatives taking place throughout Indian Country. Others include Native Action, which supports the Northern Cheyenne Tribe by advocating on tribal citizens' behalf for the establishment of on-reservation financial institutions; the White Earth Land Recovery Project, which generates income through the sale of reservation-grown and processed food and other products; the Native American Women's Health Education Resource Center on the Yankton Sioux Reservation, which capitalizes on their vast culturally appropriate health resources to generate income for the organization; and Zuni Entrepreneurial Enterprises, which provides training and employment opportunities for disabled tribal members through the operation of various enterprises.

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<sup>287</sup> First Nations Development Institute, "Emerging Sector: Non-Profits in Indian Country," (based on 1995-96 data), unpublished.

<sup>288</sup> Native Americans in Philanthropy, "Down But Not Out: The Nonprofit Sector in Native America and the New Federalism," September 1999, p. 16.

There are also a growing number of Native and tribal philanthropic organizations that are emerging which provide a still small, but increasing amount of funding for economic and community development efforts.<sup>289</sup> A 1994 study conducted by Native Americans in Philanthropy found that the number of Native grantmakers had grown to 22 from only three in 1973, accounting for more than \$7 million in charitable giving.<sup>290</sup> Tribal governments are also starting these efforts as well, either structured within the tribal government itself or as separate non-profit entities (see Intertribal Relations). As more Native and reservation-based non-profits develop, new sources of funding will be necessary to support their work. One resource may be this new subsector of Native and tribal philanthropy.

In any discussion about the rise of Native nonprofits, it must be noted that in some instances Native nonprofits and their activities create challenges for and tensions with tribal governments. The relative newness of both tribal governance structures and Native nonprofits can lead to misunderstandings about each other's role in the reservation economy. Given the growing diversity and pluralism in tribal societies, Native nonprofits can serve as alternative voices, represent divergent views and challenge tribal government policies and programs. These challenges may serve to improve tribal government programs or create divisiveness.

### *Informal Sector*

A fourth and still vital sector of many reservation and Native economies is the informal or "underground" economy.<sup>291</sup> Given the underdeveloped nature of the formal economies in Indian Country, it is through this sector that many Native people subsist and survive, demonstrate amazing creativity and productivity, and maintain many traditional economic activities.

One study of the informal sector on the Pine Ridge Indian Reservation indicates that its citizens were engaged in over 100 different types of productive activity not accounted for by any formal mechanism.<sup>292</sup> And when this activity was quantified, it accounted for more in monetary terms than the total amount of welfare and assistance dollars coming onto the reservation.<sup>293</sup> The Dine', or Navajo Nation, is home to a large informal sector with flea markets that attract not just sellers of used household goods but sellers of hay, livestock, tires, fruits, vegetables, home-made food-stuffs, arts and crafts. Many other reservations have similar productivity in the informal sector. Native entrepreneurs represent a tremendous resource upon which to build small business and some American Indian nations have begun to direct resources to their enterprises. The Hopi Foundation has helped to start Gentle Rain Designs, a community-based non-profit enterprise that provides an outlet, and in some cases, a physical location, for Hopi women engaged in sewing. The Lakota Fund on Pine Ridge initiated both a peer-group lending and technical assistance program for "micro-entrepreneurs" and a small loan fund for individuals.

### *Challenges to Economic Development*

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<sup>289</sup> Currently, the Intertribal Council of Arizona is pursuing the development of the Intertribal Foundation of Arizona.

<sup>290</sup> Native Americans in Philanthropy, "Survey of Grant Giving by American Indian Foundations and Organizations," undated but based on 1994 data, p. 2.

<sup>291</sup> The informal sector is also known as cottage industry or underground economy. It includes both monetized and non-monetized economic activity that goes uncounted and unrecognized in the formal economy. It includes subsistence activities, barter and trade, illegal activities such as drug sales and bootlegging, sweat equity, unpaid work, and the like.

<sup>292</sup> Sherman, Richard T., "A Study of Traditional and Informal Sector Micro-Enterprise Activity on the Pine Ridge Indian Reservation," September 1988.

<sup>293</sup> *Ibid*

### *Infrastructure*

Around Indian Country, the oft-identified “silver bullet” for economic development is infrastructure: “if only we had infrastructure, we’d attract more business.” While this notion is intuitively appealing – especially since business developers typically inquire about highway access, electricity rates, capacity, and the like – it may often be misplaced. Over the long run, economic development has to pay for the infrastructure it depends on. In places lacking both infrastructure and economic development, there is a very real question of “what comes first, the chicken or the egg?” Did underdevelopment lead to a lack of investment in infrastructure or did a lack of infrastructure preclude the possibility of development? For example, a lack of infrastructure did not forestall the development of the Black Mesa Coal Mine on the Navajo and Hopi reservations in the middle part of the last century. Rather, the potential for development justified an investment in coal slurry pipeline, roads, wells, and other infrastructure. Conversely, few electricity-intensive businesses have expressed interest in developing the Cheyenne River Reservation. A major obstacle has been the imposition of some of the highest federal utility charges in the West, despite the presence of a hydroelectric facility on the Missouri River.

Although there is great variation among reservation economies, it is generally the case that a lack of infrastructure is more of a symptom of economic underdevelopment than a cause of it. Insufficient infrastructure can stem from several causes. First, it may be symptomatic of deeper economic obstacles, such as geography and income. Telephone penetration rates in Indian Country, for example, reflect the remote location of many reservations and the unprofitability associated with low numbers of customers per mile of wire deployed. Similarly, low penetration rates for the Internet may well indicate that families do not have the disposable income necessary to afford computers and modems. Second, insufficient infrastructure may indicate a failure of government – tribal, state or federal – to spend in proportion to need. For example, tribes may lack the clear jurisdiction to collect and spend taxes related to infrastructure use (e.g., fuel taxes for road repair). Alternatively, the Federal Government may fail to meet its trust responsibility by spending less in various tribal programs in proportion to its state infrastructure expenditures.

In sum, whether insufficient infrastructure is a symptom or cause of underdevelopment depends critically on local conditions, competing investment opportunities, and the relative capital investment of competing jurisdictions. Notwithstanding the foregoing, there is one area of infrastructure development that has captured the attention of tribes and motivated a vigorous policy debate, the “Digital Divide,” or the gap between the telecommunication “have” and “have-nots.” The penetration of the Internet is quite uneven in Indian Country. There are tribes that have not deployed tribal government e-mail yet, and there are tribes that buy Internet start-ups (e.g., Ho-Chunk, Inc. of the Winnebago Tribe owns *Indianz.com* and *AllNative.com*). Some tribes have even tackled telephone penetration by taking over the telephone utility.<sup>294</sup> All told, the data seems to indicate a payoff to usage, if not economic development of tribal investments in electronic infrastructure.<sup>295</sup>

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<sup>294</sup> The Gila River Indian Community bought their local phone distribution company and was able to increase penetration from less than 30% to more than 80%. “Indian Country: Falling into the Digital Divide,” [www.indianz.com/SmokeSignals/headlines/showfull.asp?](http://www.indianz.com/SmokeSignals/headlines/showfull.asp?) accessed on January 15, 2001.

<sup>295</sup> See, e.g., National Technology Administration, US Department of Commerce, *Falling Through the Net: A Report on the Telecommunications and Information Technology Gap in America*, (Washington: July 1999), p. 38.

### *Human Capital*

There is no more significant an asset to tribes than Native people themselves. Tribes will only be as successful and competent as their citizens. It follows that education (recruitment and training), technical training, and hands-on experience (both on and off-reservation) support economic development efforts. These efforts are strengthened when combined with strategies to recognize, learn from and integrate the vast wealth of traditional knowledge from elders and traditional leaders.

The need for skilled employees in all aspects of economic activity is critical. Because of high rates of unemployment, “work until the grant runs out” experience, and common incidences of political nepotism, a large segment of the workforce has been unable to develop consistent workplace experience and a career path. For years, the Federal Government has underwritten job training skills and education programs for adults and children. But without related economic opportunities, these efforts have either been wasted or led to “brain drain” where new or existing talent flows off-reservation.

Many notable efforts to address employment needs have taken place in tribal colleges and schools. With degree programs in business, health care, tribal management and other technical fields, tribal colleges and schools have begun to address the need for educating tribal members to work in specific industries. Some tribal colleges have even begun to fill the void of Native-based curricula.<sup>296</sup> In addition, both BIA and tribal K-12 schools have initiated economic development and business curricula. Schools have also been the source of unique partnerships with non-profit organizations. The American Indian Science and Engineering Society, for one, has increased the number of Native youth in these related fields and facilitating placements in a variety of large and small off-reservation corporations. Groups such as American Indian Business Leaders (AIBL) are working with K-12 teachers to develop curricula and train other teachers in the unique aspects of reservation economic development and its interaction with tribal cultures. Tribes with gaming and hospitality industries have begun to institute workforce development programs through tribal colleges.

Yet there remains a significant need across industries and sectors for managers with experience and education. As tribes take over the management of enterprises, they are seeking talented managers of their own. The need for managerial talent in tribal colleges, health care institutions, small businesses, community development organizations, and reservation institutions remains pronounced.

Finally, tribal government leaders themselves need significant capacity building to better implement a nation-building approach. Many have never held a job. Of those that have, most employment experience has been in government rather than private business. With more control of tribal government comes increased responsibility and accountability. While leaders are seeing the consequences of their decisions and actions and learning from these experiences, more effort and opportunity must be directed to the capacity of tribal leadership.

### *Financial Capital*

Between \$17.65 and \$56.5 billion in annual capital needs goes unmet in Indian Country across the following sectors: infrastructure, community facilities, housing, and enterprise development.<sup>297</sup> The

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<sup>296</sup> Two instructors at different tribal colleges recently collaborated to develop curriculum based on case studies of Native businesses. Lansdowne, Michele and Lisa Little Chief Bryan, “American Indian Entrepreneurship: Curriculum and Case Studies,” Salish-Kootenai College, 2000.

<sup>297</sup> First Nations Development Institute, “Scope and Scale of Need for Capital in Indian Country,” 1999.



estimated range of capital need – two to seven times the gaming *gross* revenue reported in Figure 5 – is based, in large measure, on bringing Indian Country to parity with annual investment levels in surrounding non-Indian societies.<sup>298</sup> When one considers that the surrounding non-Indian capital sectors do not need to support the capital needs of societies that have suffered decades, if not centuries, of social underinvestment, these numbers appear conservative. Economic development in Indian Country needs capital not simply to bring tribes on par with off-reservation communities' level of annual investment, but to address historic backlogs in areas such as educational attainment, poor health, and crime.<sup>299</sup>

To address the substantial shortage of capital in Indian Country, efforts are being made on both the demand and supply sides of the market. Tribes engaging in the nation-building approach are making their reservations more receptive to capital by lowering political risk. They are instituting mechanisms for neutral dispute resolution and developing effective bureaucratic capacities. At the same time, increasing numbers of tribal and individual businesses, a growing need for home-ownership, larger numbers of Indian people in college, and increasing consumer purchases are driving up the demand for particular types of capital, none of which are readily available or easily accessible.

On the supply side, unfair lending practices, the difficulty of collateralizing assets held in trust by the US government, and low penetration of banking facilities in Indian Country continue to limit the supply of capital.<sup>300</sup> Nonetheless, tribes are increasingly able to work around or overcome these supply impediments. First, some tribes, with successful businesses, have ploughed profits back into the economy (e.g., their assets are generating income which are then used to create new assets).<sup>301</sup> Second, tribes are increasingly gaining control over their own assets, (e.g., tribal trust accounts held and managed by the BIA) or other outsiders (e.g., banks that held tribal deposits but did not loan to tribal governments or members). Third, tribes and tribal enterprises are increasingly surmounting barriers to commercial debt (e.g., via creative securitization of enterprise assets other than lands held in trust by the Federal Government) and are even issuing public debt on Wall Street (e.g., the Mohegan Tribe, the Grand Traverse Band). Fourth, more than a dozen tribes or Indian individuals now directly control commercial

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<sup>298</sup> For example, FNDI estimates small business investment needs by conducting a “missing business analysis” which compares actual Indian business sectors in a given state with the average business formation of that state. Citing ONABEN: A Native American Business Network study, FNDI reports 52,600 “missing” Indian businesses whose start-up equity needs are estimated to be \$158 million and whose total capital requirements are estimated to be \$2.1 billion. First Nations Development Institute, 1999, pp. 5-6.

<sup>299</sup> Furthermore, on reservations with high population densities located in areas of much lower, shrinking population density (e.g., the reservations of the Northern Plains), it may be the case that the equilibrium capital stock per capita might actually be higher than that of immediate surrounding communities. Rural America, in other words, may not be the appropriate benchmark for judging the on-reservation annual capital stock. For these three reasons, parity with off-reservation annual investment levels would mean a protracted recovery from those social investment deficits, and FNDI’s estimated range might be an understatement.

<sup>300</sup> For discussion of these and additional barriers to lending perceived in Indian Country, see First Nations Development Institute, “CRA Research Efforts: A 38-State Study of Financial Services, Banking and Lending Needs in Native Communities,” 1998. The Treasury Department is attempting to address lending barriers in Indian Country through a lending study being conducted by the Community Development Financial Institutions (CDFI) Fund. The CDFI fund was created in 1994 “to promote economic revitalization and community development through investment in and assistance to community development financial institutions. [Its] activities are intended to provide greater access to capital for urban, rural, and Native American communities that face serious social and economic problems.” *CDFI Fund FY 1997 Annual Report*, accessed at [www.treas.gov/press/releases/docs/cdfi97.htm](http://www.treas.gov/press/releases/docs/cdfi97.htm).

<sup>301</sup> Tribes are nearly universally concerned that gaming is susceptible to being legislated away as numerous proposals have been made at the state and federal level to weaken or eliminate the legal underpinnings of gaming. Accordingly, tribes are focused on diversification away from gaming as an economic development strategy. See, e.g., 1996 Annual Report of the Sault Ste. Marie Tribe of Chippewa Indians, and Cornell, et.al.

banks,<sup>302</sup> and there are two credit unions that are “owned” largely by Native shareholders. The Native American National Bank has recently been established to serve a broad set of the lending needs of Indian Country by making loans to tribal banks and community development corporations.<sup>303</sup>

In response, there is a movement to create Native community development financial institutions (CDFIs)<sup>304</sup> that would assist in capital formation and financing needs at the local and regional level. To date, there are over two dozen of these mostly new CDFIs, some of which are organized within tribal government and others that are structured as non-profit entities. Their focus is primarily on small business lending and technical assistance, but there is a growing interest in starting CDFIs that focus on housing development and ownership as well as land purchase and consolidation and credit associations.<sup>305</sup> The capital for these efforts comes largely through private philanthropic program-related investment loans, religious investors, socially responsible investors, and a growing number of bank investments.

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<sup>302</sup> “When Credit is Due: The Debate Over the Direction of Indian Banking,” *American Indian Report*, November 1999, pp. 18-19.

<sup>303</sup> Approximately 15 tribes are initially expected to invest in the holding company that will operate the Native American National Bank. “Another American Indian Bank,” *Indian Country Today*, April 26, 2000 at B2.

<sup>304</sup> The term community development financial institutions is used to describe the types of entities rather than the formal Community Development Financial Institutions funded and certified through the Treasury Department CDFI Fund, although these types of entities may receive this funding and designation.

<sup>305</sup> First Nations Oweesta Corporation is currently working with ten such efforts. The Montana Rural Development Finance Initiative is working with seven tribes to start loan funds. Non-Native groups such as ACCION, the Neighborhood Reinvestment Corporation and others are also working with tribes and Native communities to support these efforts.

### **The Lakota Fund**

The Lakota Fund started as a First Nations Development Institute project in 1987 and was spun off to be a wholly community-owned Lakota non-profit organization in 1991. Virtually all of its board, employees and clients are resident members of the Oglala Sioux Tribe on the Pine Ridge Reservation, home of the poorest county in the 1990 Census. Despite operating in one of the most resistant pockets of privation in the country, the Fund was and remains a significant innovator of Indian economic development approaches. The Fund was among the first to replicate in the US the success of micro-lending programs innovated in the Third World. Under its Circle Banking Project, the Fund teaches financial literacy to a self-selected lending circle whose members then become co-debtors on each other's microloans (less than \$1,000). The Fund also provides ongoing problem solving and technical assistance to circle members as their microenterprises encounter challenges.

The lending circles play a vital role in economic development because they operate in congruence with Lakota cultural norms rather than in opposition to them, allowing members to build and use wealth on their own terms. One borrower, for example, uses her funds for materials to make two quilts at a time. One she sells in order to buy more materials and to make her debt payments. The other she gives away, since "the traditional measure of wealth was not how much you could accumulate, but how much you had to give." According to former Director Gerald Sherman, this is one of the attributes of the circles that makes them more successful than other lending approaches that have been introduced to the Reservation.

The Fund stands out for directly addressing many of the obstacles to economic development that arise out of individuals' needs and constraints. Elsie Meeks, another former Director, observed that an initial loan of \$250 to a recovering alcoholic mother of five began a transformation that resulted in a growing custom beading business, which gave greater financial security to the family. The mother is now sober, Chairperson of her circle, and an example in her community. In this case study, the Lakota Fund demonstrates its ability not just to make capital accessible and productive, but also to help overcome obstacles to economic development individual by individual and thereby attain the ultimate goal of economic development – the transformation of lives.

The Fund's innovation also extends to the creation of a small business loan program for loans between \$1,000 and \$25,000, the construction of 13,000 sq. ft. of badly needed retail and office space, the development of a unique cooperative home building program, and even governmental capacity-building. An example of the latter is the way in which the Lakota Fund's operations highlighted the fact that the Oglala Sioux Tribe lacked a bankruptcy code. The Fund worked with tribal government in developing the code, which has subsequently improved opportunities not only for Fund clients, but also for the Tribe and its members overall.

#### Sources:

Sustainability in Action: Profiles of Community Initiatives Across the United States, Revised/Updated edition: June 1998 (Urban and Economic Policy Division, US EPA: CONCERN, Inc.;

Community Sustainability Resource Institute, 1998), see [http://sustainable.org/casestudies/SIA\\_PDFs/SIA\\_South\\_Dakota.pdf](http://sustainable.org/casestudies/SIA_PDFs/SIA_South_Dakota.pdf);

The Lakota Fund, "About the Fund," <http://www.lakotafund.org/about.htm>, February 2, 2001.

### *Legal and Legislative Challenges*

As noted above, one of the key underpinnings of Indian economic development is the ability of tribes to control their most significant asset – sovereignty. Much, if not all, economic development in Indian Country depends on tribes' sovereignty over natural resources, their ability to set their own regulatory standards, and their ability to tax. Unfortunately, legislative proposals and fears that US courts may overturn long-established legal principles in favor of non-Indian interests has threatened the recognition of tribes' inherent sovereignty. Consequently, the long-term ability of tribes to compact with states for casino operations, create their own tax incentive policies, and generally exercise their sovereignty as a tool of economic development are potentially vulnerable to future legal changes.

As attacks on Indian sovereignty have risen in Congress, state legislatures, and the courts, tribes have sought to create a measure of stability by avoiding court battles (or at least harmful precedents) in favor of negotiated government-to-government agreements (see Tribal-State Relations). Tribes have also stepped up their lobbying efforts and presence in Washington, D.C. (see Tribal-Federal Relations). Notwithstanding these and other efforts to reduce political and legal uncertainties – and the attendant higher hurdle rates for investment in Indian Country – tribes continue to struggle with forces outside of Indian Country creating barriers to economic development.

### *The Challenge of Nation-Building*

Around the country, tribal governments are engaged in a process of decolonization. Eschewing their long-imposed role as extension agents of federal anti-poverty programs, they are engaging in the task of genuine self-rule with all of its related challenges for institution building. Tribal courts that can adjudicate fairly contracts with outside investors are in need of development.<sup>306</sup> BIA-written constitutions that are incongruent with community norms of acceptable authority, lack internal coherence, and contribute to the resolution of disputes in chaotic or even violent fashion, need to be revised to provide orderly and culturally legitimate processes of government. Tribal corporations whose very activity is subject to opportunism must have the high quality and independent boards of their non-Indian competitors. In short, successfully developing tribes assert their sovereignty and back that up with effective governing institutions that match their cultures.<sup>307</sup>

One area of growing interest and attention in Indian Country is constitutional reform. Many tribes are engaging in constitutional reform. A large number of other tribes, however, are only beginning to understand the legacy of the *Indian Reorganization Act* and its obstruction of well-functioning indigenous political processes. When tribes squarely face the question of constitutional reform they engage in a complicated collective action problem. Moreover, they must do so with little in the way of either constitutional theory or a roadmap of how to navigate their difficult political and cultural choices. In the face of their pressing social and economic problems and the difficulty of engaging in reform, many tribal leaders have lowered their sights on constitutional reform, leaving to subsequent leaders this important work of decolonization.<sup>308</sup> For tribes seeking creative ways to re-envision the foundations of their governments, they must often do so in geographic or technological isolation. New ways must be developed for tribes to learn about the structure and responsibilities of unique tribal reform bodies, such as the Navajo Nation Office of Government Development or the Cherokee Nation Constitution Convention Commission.

### *Alaska*

As with many realms of Native life, economic development has its own unique challenges in Alaska. The corporate and tribal structures created by the Alaska Native Claims Settlement Act (ANCSA) (see Land) puts Alaska Natives in a completely different relationship with the assets forming the basis of economic development. Specifically, each Alaska Native covered by ANCSA is a

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<sup>306</sup> While this is a critical element of tribes' continuing social and economic development, it tends not to receive the attention it merits. Congress, for example, recognized the importance of tribal courts in legislating a program to enhance their professional and administrative capabilities, yet left the program without appropriations for the better part of a decade. Similarly, until recently the Indian legal profession was generally attracted to advocacy and litigation rather than to adjudication since the route to professional prestige was frequently seen as defending one's client in the Supreme Court.

<sup>307</sup> For example, see, Cornell and Kalt, *Dice, op. cit.*

<sup>308</sup> In one case, a tribe amended its constitution no less than three times in a decade but only to change the rules governing *muskrat hunting*.

shareholder in one of 13 regional corporations and a shareholder in one of more than 200 village corporations.<sup>309</sup> Of the ANCSA settlement assets, regional corporations own the subsurface rights and the timber while the village corporations own surface rights to modest amounts of land in the vicinity of their villages. Tribes – the entities to which most Alaska Natives ascribe their civic identity – hold few, if any resources. Often they own only the village sites.

Corporations and the individual Alaska Native shareholders, therefore, own the vast majority of assets retained by Alaska Natives under ANCSA. By contrast, in the lower forty-eight states such assets are typically owned by the tribe, which then has the power to develop those assets. Moreover, unlike the states and the tribes in the lower forty-eight states, Alaska Native tribal governments do not have the power to tax the corporations developing Native assets.<sup>310</sup>

On the one hand, this arrangement (and a revenue-sharing requirement between the 13 regional corporations) allows the wealth of natural resource assets to flow to individual Alaska Natives when the companies are profitable. On the other hand, the fact that the Native Corporations are chartered under Alaska state law requires that the corporations uphold a fiduciary duty to their shareholders. Thus, it is difficult for the regional corporations to undertake social or community service delivery and entities charged with delivering these services – the tribes – are virtually dependent on federal and state programs for funding. There are rare instances where villages have been able to create corporations. The Loudon Tribal Council of Galena, AK, for example, created the Yukaana Development Corporation to contract with the US Air Force to clean up pollution left in the community since World War II. In addition, some governments operating on behalf of Alaska Natives have benefited from payments in lieu of taxes from joint venture partners. The Red Dog mine in the NANA region contributes such payments to the Northwest Arctic borough, which was created by the Native communities in northwest Alaska.

The ANCSA model has constrained the village governments to near total reliance on the “Standard Model” discussed above under which the tribal governments function largely as conduits for federal programs.<sup>311</sup> Efforts by tribes to engage in a nation-building approach – such as the Native Village of Venetie’s policy of taxing contractors working on the reservation – have been thwarted by court decisions and a hostile state legislature. Tribal efforts to support the subsistence hunting and fishing economy have been stymied by gridlock between the state and the Federal Government over wildlife management and by sudden declines in fish and wildlife populations. Thus, the prognosis for self-determined economic development in village Alaska is quite bleak. Not only do Alaska Natives have to contend with uncommon remoteness, high costs of goods, and lack of adequate infrastructure, but they must also contend with entrenched and substantial institutional barriers.

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<sup>309</sup> 43 USC s1601, *et seq.*

<sup>310</sup> The Metlakatla Indian Community on the Annette Island Reserve is the exception to this general pattern as it has a reservation with a government empowered with powers similar to those of tribes in the lower-48 states. There are also a handful of tribal corporations created after ANCSA, yet their capitalization is minuscule by comparison to the ANCSA corporations’ collective assets.

<sup>311</sup> Given the very small size of many villages, quite a few have delegated administrative authority over federal programs to regional non-profit corporations such as the Tanana Chiefs Conference. These organizations then orchestrate the delivery of services from central locations. For a more detailed treatment of the challenges of self-governance in Alaska, see Cornell, Stephen, Jonathan Taylor, Kenneth Grant, Victor Fischer, and Thomas Morehouse, “Achieving Alaska Native Self-Governance: Toward Implementation of the Alaska Natives Commission Report Final Report - AFN Version,” the Economics Resource Group, Inc., Cambridge, MA, May 1999.

## *HEALTH*

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- While the health of American Indians and Alaska Natives has improved in the last century, significant disparities still exist on a number of indicators of personal health and in access to public health infrastructure and services. The types of health conditions affecting American Indians and Alaska Natives have also changed over time, from primarily infectious diseases to chronic diseases, such as diabetes, heart disease, obesity and cancer, which have significant behavioral components – thus, a more comprehensive, community-based approach to health care in Indian communities is needed.
- The Indian Health Service (IHS) has been the primary federal agency charged with addressing Indian health until 1975 when tribes were allowed to assume management of their health care programs. The Indian health system, which now includes Indian Health Service programs, contract care services, tribally-managed programs, and urban Indian programs, is experiencing numerous challenges due to increased health care costs, significant under-funding, population growth, changing health needs, health manpower shortages and aging facilities.
- By taking over the administration of their health care delivery systems from the IHS through contracting or compacting, tribes are able to reduce regulation, increase financial flexibility, consolidate and redesign programs, and access new programs and funds. While tribes' satisfaction with their health care systems rises with their discretion over programs and direction, significant financial and structural barriers continue as challenges to success. Improvements in the capacity of tribes and Indian communities to improve the health of American Indian and Alaska Native people will help to reduce health disparities in this population.

The health of Native Americans has changed dramatically over time. Prior to contact with European cultures, the Native American people on this continent had organized societies with their own traditional forms of medicine and health care. Health was considered, in general, to be a balance of body, mind and spirit, and traditional Indian medicine addressed the whole person's health in its treatments and practices. Following contact with Europeans and colonization of this continent with dramatically different immigrant cultures, which resulted in a significant shift from a traditional to a more Western culture, the lifestyles and health status of American Indians and Alaska Natives have changed dramatically over the past 200 years. While the efforts of the Federal Government to meet its trust responsibility to provide health care for American Indians and Alaska Natives have resulted in improvements in the health of Indian communities, significant health disparities still exist. These

disparities exist in the context of a changing Indian health system: an ongoing transition of the management of Indian health programs from the Indian Health Service to tribal governments and significant under-funding continues to create challenges for Indian health programs. The brightest spot in the health picture, as with so many other things in Indian policy, is the initiative and innovation demonstrated by tribes that have taken over the administration of their health care delivery systems. Self-administering tribes are making notable improvements in delivery and are increasingly satisfied with the results. In addition, the role of communities in improving the health of American Indians and Alaska Natives is growing increasingly important with the growing rates of chronic diseases.

### *Health Status*

In certain critical ways, the status of American Indian health is much better than it was 20 years ago. Infant mortality is down 60% from the early 1970s to the early 1990s. Tuberculosis is down 80%; gastrointestinal disease is down 76%; death due to unintentional injuries is down 56%; and maternal mortality is down 70% over the same two decades.<sup>312</sup>

While these gains are properly characterized as progress, disparities still exist between the health of American Indians and Alaska Natives and the US general population.<sup>313</sup> For example, while there was a 60% reduction in infant mortality, American Indians and Alaska Natives experience the second highest infant mortality rate of any ethnic group in the US (averaging 120% of the national rate) and the highest rate of Sudden Infant Death Syndrome.<sup>314</sup> Similarly, while Native Americans saw the aforementioned drop of 80% in tuberculosis incidence, the age-adjusted death rate for IHS service area Indians from the disease was 633% higher than the US average over the period 1994-96.<sup>315</sup>

The physical health conditions affecting American Indians and Alaska Natives have changed over time, from mostly infectious diseases in the early 20<sup>th</sup> century to primarily chronic diseases in the beginning of the 21<sup>st</sup> century. For example, type 2 diabetes now stands at twice the national rate – a rate characterized as epidemic in proportion – even though this type of diabetes was only seen rarely in the 1940s.<sup>316</sup> Among some tribes like the Pima tribes of Arizona, the rate of diabetes is the highest in the world.<sup>317</sup>

The rates of other chronic diseases are increasing rapidly, including cardiovascular disease, hypertension, obesity, and cancer. All of these conditions have significant behavioral components to their etiology and treatment, such as dietary factors and physical activity. The lifestyles of American Indians and Alaska Natives have changed dramatically from the more traditional lifestyles with healthier diets and significant physical activity to a more Western lifestyle with high fat/high calorie/high carbohydrate foods and physical inactivity. As a result, the rates of obesity and chronic diseases have increased over time in

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<sup>312</sup> Satcher, David, “Statement of David Satcher, M.D., Ph.D., Surgeon General of the United States and Assistant Secretary for Health, before the Committee on Indian Affairs, US Senate,” [http://indian.senate.gov/1998hrgs/0521\\_ds.htm](http://indian.senate.gov/1998hrgs/0521_ds.htm), May 12, 1998.

<sup>313</sup> In part, this is due to the fact that rates are improving for all race/ethnic groups over time.

<sup>314</sup> *Ibid.*

<sup>315</sup> Indian Health Service, *Regional Differences in Indian Health, 1998-99* (Washington, DC: Indian Health Service, 2000), p. 71.

<sup>316</sup> Roubideaux, Yvette, “Statement of Yvette Roubideaux, M.D., M.P.H., President, Association of American Indian Physicians, before the Senate Committee on Indian Affairs, On the Reauthorization of the Indian Health Care Improvement Act,” May 10, 2000. Roubideaux, Yvette, Using Diabetes Education Program Criteria to Evaluate the Quality of Diabetes Care in Indian Health Programs,” <http://www.uchsc.edu/sm/nerc/yvetrabs.htm>, September 11, 2000.

<sup>317</sup> Satcher, *op. cit.*, p. 2.

Indian communities. This has resulted in significant challenges in the Indian Health System, which was developed primarily to deal with acute, urgent and infectious diseases. Now that chronic diseases are more common, there are additional demands on the health care system that include the need for additional services and health care professionals to deal with the many complications of chronic diseases, as well as the need for more community health services and activities.

The mental health status of American Indians and Alaska Natives has also improved over time, but significant disparities still exist as well. Though there have been signs of decline in alcohol abuse over the last 20 years, the problem contributes to an estimated three-quarters of unintentional injury deaths to Indians and is a contributing factor in domestic violence, motor vehicle accidents, cirrhosis, suicide, homicide, and fetal alcohol syndrome.<sup>318</sup> Nationally, Indian deaths from cirrhosis are 310% of the all-races level.<sup>319</sup> The death of Indian youth (ages 5 to 24) due to alcohol is *17 times* the comparable level for all races.<sup>320</sup> Nationwide, teen cigarette use stands at 180% of the national average (see Appendix C, indicator 11). In 1994, 40% of Indian adults across the country used tobacco – the highest rate of any group.<sup>321</sup> Countrywide, Indian suicides are 130% of the national average.<sup>322</sup> The teen birth rate is 160% of the national average.<sup>323</sup> Indian motor vehicle accident deaths occur at twice the national rate (see Appendix C, indicator 31). In total, the years of potential life lost – a measure of premature deaths – was 95 years per thousand for American Indians in the IHS service population, against only 55 years per thousand for the US all-races population.<sup>324</sup> The mental health challenges in Indian communities relate to the significant social, economic and cultural challenges and disparities that still exist, along with a health care system that often cannot provide the needed services due to under-funding.

### *Policy Responses*

As a result of numerous treaties, court decisions and subsequent legislation, it is generally recognized that the Federal Government has a trust responsibility to provide health care for American Indians and Alaska Natives through federally recognized tribes. The *Snyder Act of 1921* and the *Indian Health Care Improvement Act of 1976* provide the authorization for the Federal Government to appropriate funding for Indian health care. The Indian Health Service (IHS), which is an agency within the Department of Health and Human Services, was established in 1955 to provide health care services in Indian communities, and is a comprehensive primary care-oriented system that operates health care facilities around Indian Country and in urban areas. Since the *Indian Self-Determination and Educational*

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<sup>318</sup> See, e.g., Statement of David Satcher, Surgeon General, and Conway, Hooper, Morgan, and Sauri, “American Indian and Alaska Native Health,” *Current Bibliographies in Medicine*, 96-6 (Bethesda, MD: National Library of Medicine, 1996).

<sup>319</sup> Centers for Disease Control and Prevention, *Health, United States, 2000 With Adolescent Health Chartbook* (Maryland: US Department of Health and Human Services, 2000), Table 30.

<sup>320</sup> Allen, W. Ron, “W. Ron Allen, President, National Congress of American Indians, Senate Committee on Indian Affairs, Oversight Hearing on the Unmet Health Care Needs in Indian Country,” May 21, 1998.

<sup>321</sup> *Ibid.*

<sup>322</sup> Centers for Disease Control and Prevention, *op. cit.*, Table 30. This ratio is even more stark when put in the larger national context. The Surgeon General considers the suicide rate of all Americans to be at a critical level:

Suicide is a serious public health problem. In 1996...suicide was the ninth leading cause of mortality in the United States...[The] number is more than 50% higher than the number homicides. US Public Health Service, *The Surgeon General's Call To Action To Prevent Suicide* (Washington, DC: US Public Health Service, 1999).

<sup>323</sup> Centers for Disease Control and Prevention, *op. cit.*, Table 8.

<sup>324</sup> “Years of Potential Life Lost (YPLL) is a mortality indicator which measures the burden of premature deaths. It is calculated by subtracting the age at death from age 65 and summing the result over all deaths.” Indian Health Service, “Regional Differences in Indian Health” (Washington, DC: Indian Health Service, 1997), p. 52.



*Assistance Act of 1975* (P.L. 93-638), tribes have been allowed to assume management of their health care programs from the Federal Government.<sup>325</sup> As a result, each year Congress appropriates funds to the Indian Health Service for direct IHS service delivery sites and also for tribes that have contracted with the IHS to self-administer their health care. In 2001, the overall IHS budget was \$2.6 billion, of which over 40 percent was directed to tribal P.L. 93-638 self-governance contracts or compacts.

However, the Indian health system is severely under-funded, with per capita health expenditures less than half that of the US general population (IHS Service Population \$1351 vs. US Population \$3766).<sup>326</sup> Tribal leadership recently estimated that the overall level of funding needed for the Indian health system is actually closer to \$18 billion. Even though according to the 1990 Census roughly half of the Indian population lives off-reservation, only approximately 1% of the IHS budget is dedicated to urban Indian health programs. Urban Indians have had to rely much more on state and federal programs (e.g., State Child Health Programs, or SCHIPs, and Medicare/Medicaid) or on private sector insurance, programs that play a much more modest but increasing role for Indians on or near reservations.<sup>327</sup>

The Indian Health System is facing significant challenges as it tries to raise the health status of American Indian and Alaska Native communities. For two decades or more it has witnessed an increasing service population, rising per-patient demand for services, increasing costs of labor and goods, and stagnant budgets.<sup>328</sup> Recently, pressure has been added to keep costs down (in keeping with managed care trends) and increase reimbursements from third-party providers (e.g., private insurers, Medicare).<sup>329</sup> The real, per capita budget of the IHS – i.e., the budget adjusted for inflation and service population growth – has actually been falling over time.<sup>330</sup> These forces have combined to produce an aging physical infrastructure (the *average* IHS facility is 32 years old)<sup>331</sup> and low morale and high turnover of health professionals.<sup>332</sup> The IHS recently underwent an organizational review to try to respond to these challenges, but the underlying problem in the Indian health system is the significant under-funding and lack of availability of adequate services to meet the growing health care needs of American Indians and Alaska Natives.

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<sup>325</sup> Roubideaux, Yvette, “Current Issues in Indian Health Policy: A Background Paper for the Conference – Native American Health and Welfare Policy in an Age of New Federalism,” Udall Center Publications #99-1 (Tucson, AZ: Udall Center for Studies in Public Policy, 1998).

<sup>326</sup> Indian Health Service Year 2001 Profile, Indian Health Service, Rockville MD, April 2001.

<sup>327</sup> Roubideaux, Yvette, “Current Issues in Indian Health Policy: A Background Paper for the Conference – Native American Health and Welfare Policy in an Age of New Federalism,” Udall Center Publications #99-1 (Tucson, AZ: Udall Center for Studies in Public Policy, 1998), pp. 4, 10.

<sup>328</sup> Trujillo, Michael H., “Challenges and Change, State of the Indian Health Service,” <http://www.ihs.gov/PublicInfo/Publications/StateIHS.asp>, September 11, 2000.

<sup>329</sup> Roubideaux, “Current Issues in Indian Health Policy,” *op. cit.*, p. 1.

<sup>330</sup> Sinclair, Michael R., “The Role of Private Foundations: Testimony of Michael R. Sinclair, Ph.D., Senior Vice President, Henry J. Kaiser Family Foundation, before the Committee on Indian Affairs, United States Senate Hearings on Unmet Needs for Native Americans,” May 21, 1998; Dixon, Mim, Yvette Roubideaux, Brett Shelton, Cybthia Mala, and David Mather, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management* (Denver, CO: National Indian Health Board, 1998), p. 3.

<sup>331</sup> Trujillo, Michael H., Assistant Surgeon General, Director, Indian Health Service, “Oral Statement before the Interior Appropriations Subcommittee of the Senate Appropriations Committee of the United States Senate,” March 1, 2000.

<sup>332</sup> About one-third of the health care practitioners in the IHS turn over every year. Communication with Yvette Roubideaux, Clinical Assistant Professor, University of Arizona College of Public Health, January 26, 2001.

*Self-Determination*

One of the promising areas of change in Indian health is observable in the tribal management of care under self-determination contracting and self-governance compacting.<sup>333</sup> In the 2001 IHS budget appropriation, \$467 million was contracted and \$637 million was compacted to tribes.<sup>334</sup> Figure 6 shows that tribes have, since the passage of P.L. 93-638, made substantial progress in taking over the management of a number of Indian Health Service facilities.

Figure 6  
IHS and Tribally Operated Medical Facilities, October 1998

	IHS	Tribally Operated <sup>1</sup>	
		Contract	Compact
Hospitals	37	3	9
Health Centers	59	98	57
School Health Centers	4	1	2
Health Stations	44	60	16
Alaska Village Clinics	-	16	144

Note:

<sup>1</sup> "Tribally operated" also refers to programs operated by consortia of tribes.

Source: *Regional Differences in Indian Health, 1998-99* (Washington, DC: Indian Health Service, 2000), p. 19.

In 1998 the National Indian Health Board conducted a national survey of tribal leadership to assess the impact of tribal management of Indian health programs. According to this detailed survey of tribal health directors and tribal chairpersons, tribes' satisfaction with their health care systems was higher if they had more discretion over programs.<sup>335</sup> For example, tribes served directly by the IHS were less satisfied with the quality of their health care than tribes under contracts, and tribes operating under contracts were not as satisfied as those operating under compacts. The number of programs in operation, the number of facilities in place, the prioritization of preventative programs, the integration of programs, and the total payments collected from third parties was higher in tribes who managed their own health care programs.

In sum, the more control and discretion a tribe had over its health care resources and service delivery systems, the more satisfied it was with the quality of service and the innovation in programs.<sup>336</sup> More informally, tribes also report that the self-government compacting approach: (1) reduces regulation, (2) increases financial flexibility, (3) allows the consolidation and redesign of programs, and (4) increases access to new programs and funds.<sup>337</sup> Not surprisingly, tribal leaders predict in surveys that they will increase in the future their compacting and contracting and decrease their reliance on the IHS.<sup>338</sup> Additional research of more than 100 tribes, 23% of which switched from IHS to tribal management,

<sup>333</sup> For a more complete discussion of compacting and contracting, see the Tribal Governance section of this report.

<sup>334</sup> Indian Health Service Year 2001 Profile, Indian Health Service, Rockville MD, April 2001.

<sup>335</sup> Dixon, *et al.*, *op. cit.*, p. 7.

<sup>336</sup> *Ibid.*

<sup>337</sup> Allen, "W. Ron Allen, President, National Congress of American Indians, Senate Committee on Indian Affairs, Oversight Hearing on the Unmet Health Care Needs in Indian Country," *op. cit.*, p. 3.

<sup>338</sup> Dixon, *et al.*, *op. cit.*, p. 10.

indicates that the less responsive the IHS area office was to the tribe, the more likely it was that the tribe would take over health care.<sup>339</sup>

### *Challenges Ahead*

There are considerable challenges to meet as the transition continues from IHS-operated health care systems to tribal systems. Within IHS, there will continue to be staffing reductions as contracting and compacting continue to shift the IHS's budget from direct operations toward self-governance approaches. Moreover, tribes will have to be vigilant to ensure that the gradual devolution of IHS duties and funds to the tribes does not dissolve the Federal Government's trust and treaty obligations to provide health care to Indians. And, of course, there will be a continuing tension between the IHS's mission and its low funding levels. As important, there will be an increased need for coherent intertribal data collection and for continuing the unified approach of seeking appropriations from Congress via the IHS; otherwise compacting and contracting tribes put Congress in the position of being lobbied by multiple tribes each with its own method of calculating and reporting health status. The need for public health surveillance and advocacy efforts are still needed at a national level to ensure that improvements can be made in the Indian health system over time. The most significant need is for more resources, services and funding.

More efforts are also needed to help tribes assert their right to self-governance and self-determination in the area of health care. Experience with P.L. 93-638 has shown already that many tribes have been successful in improving the health in their communities by designing their health care programs to better meet their community's needs. Given the rising rates of chronic diseases and the significant role of social, economic, behavioral, lifestyle and community factors in the changing health status of American Indians and Alaska Natives, a more community oriented, public health approach to health is needed in Indian communities. Fortunately, the trend toward greater self-governance in Indian Country transfers more decision-making power and control to tribes, affording greater congruence with community priorities and more room for innovation. Building the capacity of individuals and communities to address the disparities in the health of American Indians and Alaska Natives needs to be a top priority for the 21<sup>st</sup> century. Indian people knew how to be healthy in their traditional ways in the past, and they now have a chance to restore balance to their communities and regain their health and well-being through self-governance, self-determination and community/public health efforts.

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<sup>339</sup> Adams, Alyce, "The Road Not Taken: How Tribes Choose Between Tribal and Indian Health Service Management of Health Care Resources," *Indian Culture and Research Journal* 24:3, 2000, pp. 21-38.

## *CRIME AND SUBSTANCE ABUSE*

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- For Indian Country, both the current status and the trends in crime and substance abuse are quite alarming – and in stark contrast to the situation in non-Indian America where these social problems are in decline.<sup>340</sup> For example: alcohol factors into five of the ten leading causes of mortality for American Indians; one in five Indian children between the ages of 12 and 17 uses illicit drugs; the rate of crime victimization experienced by Indian women is 50% higher than that reported by black males; and American Indians are incarcerated at a rate 38% higher than the national per capita rate. Remarkable Indian population growth compounds the difficulty of addressing these problems.
- A number of tribes are undertaking preventative programs and restorative approaches to crime. Although it is not necessarily well-suited to addressing the multiple and interacting problems associated with crime and substance abuse, the Federal Government is also increasing its funding and efforts in this area.

In Indian Country, as in many other societies, a complicated interrelationship exists between criminal justice policy, substance abuse prevention, and the socio-economic health of the young. In Indian Country the status quo and the trend are quite alarming – in stark contrast to the situation in non-Indian America, where crime and substance abuse are in decline. A volatile mixture of despair and lack of opportunity, burgeoning youth populations, and inadequate police resources contribute to what can only be described as a crisis. Of all the challenges that faces tribes, these may be the most troubling and daunting.

### *Status*

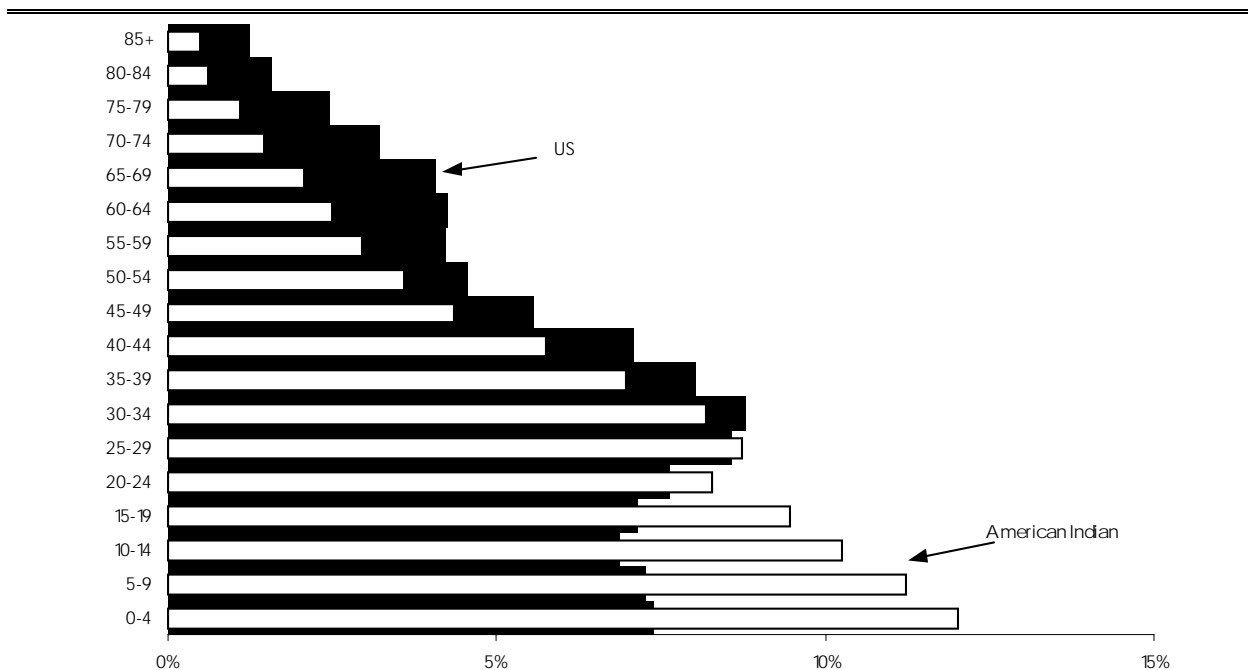
Oddly, one of the most favorable trends in Indian Country – the recovery of tribal populations – contributes to the problems of crime and substance abuse. As Assistant Secretary of Indian Affairs Kevin Gover noted in 1998, it is remarkable that in contrast to the historical policies of warfare and assimilation aimed at diluting or destroying Indian populations, American Indians are today the youngest and fastest

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<sup>340</sup> For an expression of this alarm, see, Gover, Kevin, “Kevin Gover, Assistant Secretary – Indian Affairs, Department of the Interior, before the 55<sup>th</sup> Annual National Congress of American Indians,” Myrtle Beach, SC, October 20, 1998.

growing ethnic group in the US.<sup>341</sup> The challenge presented by this good news, however, is that this population growth is only two decades old and it does not appear to be losing momentum. The median Indian age is 22 years of age (versus 30 years of age for the general population) – fully *half* of the Indian population is younger than the typical college graduation age.<sup>342</sup> As Figure 7 demonstrates, the baby boom in Indian Country is significant, and tribes that have had difficulty getting economic development going heretofore face an accelerating demographic challenge: They must create jobs at a pace that keeps up with the number of children reaching maturity.

Figure 7  
Indian and US All Races Population by Age Class, 1990



Source: Indian Health Services, 1997 Trends in Indian Health (Washington, DC: Department of Health and Human Services, 1997).

In the absence of adequate economic activity, many reservation children find themselves growing up in a dispiriting environment laden with social, economic, and health problems. It is a difficult environment to grow up in:

- Less than half of Indian adolescents living in rural areas live with two parents.<sup>343</sup>
- Alcohol factors into five of the ten leading causes of mortality for American Indians.<sup>344</sup>

<sup>341</sup> *Ibid.*

<sup>342</sup> Indian Health Service, “Comprehensive Health Care Program for American Indians and Alaska Natives: Indian Health Today,” <http://www.ihs.gov/NonMedicalPrograms/Profiles/profileIHToday.asp>, September 11, 2000.

<sup>343</sup> Children and Youth Family Consortium Electronic Clearinghouse, “The State of Native American Youth Health,” February, 1992, <http://www.cyfc.umn.edu/Diversity/nativeamer.html>, p. 2.

<sup>344</sup> Joseph-Fox, Yvette, “Statement of Yvette Joseph-Fox, Executive Director, National Indian Health Board, on S.1507, the ‘Native American Alcohol and Substance Abuse Program Consolidation Act of 1999,’” October 13, 1999, p. 2.

- Death due to accident is two to three times as likely as for non-Indians.<sup>345</sup>
- Suicide occurs at nearly twice the US rate in the IHS service population.<sup>346</sup>
- Nationally, one in five Indian children between the ages of 12 and 17 uses illicit drugs – the highest rate for any ethnic group in that age class.<sup>347</sup>
- On the reservations, youth gangs are prevalent and growing, along with the attendant violence often associated with such groups.<sup>348</sup>
- One in four Indians between the ages of 18 and 24 becomes a victim of a violent crime, and the rate of violent victimization of Native Americans reaches twice the national average.<sup>349</sup>
- The rate of crime victimization experienced by Indian women is 50% higher than that reported by *black males*.<sup>350</sup>
- American Indians are incarcerated at a rate 38% higher than the national per capita rate.<sup>351</sup>
- Even though the murder victimization rate of American Indians nationwide is very similar to the non-Indian rate,<sup>352</sup> the murder rates on some reservations have reached par with (and have even exceeded) those of the top 20 most violent cities in the nation.<sup>353</sup>
- American Indian women are more than twice as likely to be raped by a domestic partner than non-Indian women.<sup>354</sup>

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<sup>345</sup> See Appendix C indicator 30.

<sup>346</sup> See Appendix C indicator 35.

<sup>347</sup> US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, “Summary of Findings from the 1999 National Household Survey on Drug Abuse” (Washington, DC: US Department of Health and Human Services, 2000), [www.samhsa.gov/oas/oasftp.htm](http://www.samhsa.gov/oas/oasftp.htm).

<sup>348</sup> A 1998 survey of 132 tribes unveiled an estimated 375 gangs with 4,650 members. The number of drive-by shootings witnessed by the Salt River Pima-Maricopa Community skyrocketed from one to 55 in two years. The Menominee Reservation police report two organized gangs establishing themselves and juvenile arrests increasing 293% in four years (while adult crime only increased 45%). Nessi, Dom, “Statement of Dom Nessi, Acting Director, Office of Economic Development, Bureau of Indian Affairs, Department of the Interior, before the Committee on Indian Affairs, United States Senate, Hearing on Native American Youth Activities and Initiatives,” May 26, 1999; US Department of Justice, Report of the Executive Committee for Indian Country Law Enforcement Improvements, *FINAL REPORT to the Attorney General and the Secretary of the Interior* (Washington, DC: US Department of Justice).

<sup>349</sup> Greenfield, Laurence A., and Steven K. Smith, *American Indians and Crime* (Washington, DC: US Bureau of Justice Statistics, 1999), p. vii.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

<sup>353</sup> “In 1995, for example, the murder rate on the Ft. Peck Reservation in Montana, was more than twice that of New Orleans, one of the most violent cities in the United States. During 1996, the people on America’s largest reservation, the Navajo Nation, endured 46 non-negligent homicides, resulting in a rate which would place it among the top 20 most violent cities.” The Executive Committee for Indian Country Law Enforcement Improvements, “Final Report to the Attorney General and the Secretary of the Interior” (Washington, DC: Department of Justice, Criminal Division, 1997).

These facets of reservation life do not, of course, reflect the full picture of Indian communities, and there are some surprising countervailing facts. For example, despite the great prevalence of alcohol abuse, no other ethnic group abstains from drinking to the same extent Indians do.<sup>355</sup> Moreover, community bonds are strong – strong enough to keep people on the reservations despite chronic lack of opportunity. Emblematic of those ties are survey data in which nearly 80% of Indian teens report that their families care about them a great deal and that they would turn to a family member if they had a problem. Indeed, about the same proportion report that they are happy and “not depressed.”<sup>356</sup> Notwithstanding these bright spots in the picture of community life, most observers of Indian Country would agree that there is a crisis in public safety, if not a serious breakdown in Indian family integrity.<sup>357</sup>

### *Policy Responses*

Criminal enforcement is administered in a number of different ways in Indian Country. In what are called Public Law 280 states, the state has jurisdiction over criminal enforcement on the reservations.<sup>358</sup> Otherwise the default option is for the BIA to handle policing. Of course, like all services provided by the BIA, criminal justice may be taken under tribal control under a PL 638 contract or a self-governance compact. There are also a handful of tribes that fund their own police departments.

As Table 4 shows, the resources available in Indian Country (for the BIA’s own direct management or for use under a contract or compact) do not compare favorably to what outside non-Indian jurisdictions deploy – the BIA under-deploys officers and under-spends. Comparable low-density rural jurisdictions come the closest to the Indian Country resource base; however, it could easily be argued that the appropriate benchmark ought to be the high-crime areas in the right-most column. Other costs of providing criminal protection in Indian Country – such as the relative capital intensity of serving a high-crime, albeit low-density population – may drive the true cost of providing the same quality public safety coverage higher still, making the deficit in Indian Country even more pronounced.

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<sup>354</sup> Greenfield and Smith, *op. cit.*, p. 3.

<sup>355</sup> Joseph-Fox, October 13, 1999, *op. cit.*, p. 2.

<sup>356</sup> Children and Youth Family Consortium, *op. cit.*, p. 2, 3.

<sup>357</sup> See, e.g., US Department of Justice, Report of the Executive Committee for Indian Country Law Enforcement Improvements, *op. cit.*

<sup>358</sup> PL 83-280.

Table 4  
Resources Available to Reservation Police Departments

	Indian Country	Comparable Rural Jurisdictions	National Average	Comparable High-Crime Jurisdictions
Officers per 1000 capita	1.3	1.8-2.0	2.3	3.9-6.6
Dollars per capita	\$83	\$104	\$131	-
Dollars per employee	\$36,000	\$43,400	\$48,200	-

*Source:* Wakeling, Stewart, Miriam Jorgensen, Susan Michaelson, Manley Begay, Francis X. Hartmann, and Joseph P. Kalt, "Policing on American Indian Reservations: A Report to the National Institute of Justice" (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000), p. 17.

In addition to punitive (and deterrent) measures traditionally associated with non-Indian policing and adversarial judicial proceedings, a number of tribes have undertaken both preventative programs and restorative justice approaches to crime. The Winnebago Tribe of Nebraska puts troubled youth to work on a bison herd owned by the tribe.<sup>359</sup> The Navajo Nation applies traditional restorative justice approaches to dispute resolution in its Peacemaker Court.<sup>360</sup> The Navajo also incorporate the principles of *K'e* into their court system, and have thus integrated traditional culture, more standard alcohol prevention activities, and clinical care to actually reduce chemical abuse.<sup>361</sup> At Grand Traverse, trained peacemakers not only help resolve disputes, they join troubled youth on week-long, Outward Bound-style trips that build discipline and confidence.

Nonprofits are also engaging this problem. Indian Dispute Resolution Services, a California NPO, conducts about ten youth leadership development sessions annually that teach young Indians conflict resolution techniques, personal ethics, and leadership. It has also introduced "compensation circles" into non-Indian public school classrooms where children of the Hoopa Valley Tribe attend. The compensation circles are a traditional restorative justice mechanism that was embraced by the non-tribal school teachers as a way of mediating disputes and resolving disciplinary issues in school.<sup>362</sup>

The Federal Government is also making efforts to address the multiple, interacting problems associated with crime, youth, and substance abuse. The Department of Health and Human Services is integrating approaches across health and social programs. The Assistant Secretary of Interior Indian Affairs, the Commissioner of the Administration for Native Americans, and the Director of the IHS sponsored a youth conference that, among other things, introduced federal and tribal officials to national youth organizations such as UNITY Inc., Indian Youth of America, the Boys and Girls Club of America, and others.<sup>363</sup> The Department of Justice has supported tribal efforts to develop "Tribal Healing to

<sup>359</sup> Nessi, *op. cit.*, p. 1.

<sup>360</sup> Also see discussion of courts in the Tribal Governance and Politics section of this report.

<sup>361</sup> Lincoln, Michel, "Statement of Michel Lincoln, Deputy Director, Office of the Director, Indian Health Service, Department of Health and Human Services, before the Senate Committee on Indian Affairs," October 13, 1999.

<sup>362</sup> Communication with Stephen Haberfeld, Acting Director, Indian Dispute Resolution Services, January 31, 2001.

<sup>363</sup> *Ibid.*



Wellness Courts,” which, like their non-Indian counterparts, the “drug courts,” integrate treatment, non-adversarial approaches, and sanctions, albeit with traditional and community-based approaches.<sup>364</sup>

Nonetheless, despite this increasing consolidation and coordination, tribes still confront their crime and criminal justice problems with fractured funding sources and program agendas. For example, there are six programs alone in the Department of Justice that fund tribal law enforcement and criminal justice. As Wakeling *et al.* point out, the fractured resources and mandates coming from Washington serve to distract – if not frustrate – tribes in their efforts to design and implement programs that are both locally designed and comprehensive in scope.<sup>365</sup> Thus, while there is a great deal of work to be engaged on the criminal justice front, tribes have to exert extra effort against the prerogatives and fractionation of services and funding from the Federal Government.

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<sup>364</sup> Tribal Law and Policy Institute, *Healing to Wellness Courts: A Preliminary Overview of Tribal Drug Courts* (Washington, DC: US Department of Justice, 1999).

<sup>365</sup> Wakeling, *et al.*, *op cit.*, p. 84.

## *HOUSING*

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- Notwithstanding federal treaty and statutory obligations to provide adequate housing to Indians, American Indians live in housing that is eight times more likely to be in substandard condition than the average American's. American Indians are also more likely than average to face problems of affordability and overcrowding.
- Recently reformed Indian public housing laws give tribes greater administrative and policy flexibility, allowing them to spend federal funds as block grants under programs of their own design.
- The move toward self-governance approaches raises the premium on good governing capacity within tribes. While the federal Department of Housing and Urban Development (HUD) may have specialized knowledge that would be of use to tribes, HUD is neither institutionally capable of nor appropriately designated for the kind of institutional capacity development that research indicates is required for effective tribal housing development.

John F. Kennedy observed in a 1960 campaign speech that “housing conditions on Indian reservations are a national shame.” Shortly thereafter – on the basis of a 1961 opinion of the Interior Solicitor – the Federal Government redirected its urban low-income housing policies promulgated under the 1937 *Housing Act* to Indian reservations. Notwithstanding the fact that some observers characterize the Indian versions of these urban housing programs as their most successful rendition,<sup>366</sup> the status of Native American housing remains deplorable in comparison with national averages. Recently, federal programs were radically overhauled in favor of an approach that leaves tribes in control much the way PL 638 did for BIA and IHS programs. Consequently, the future status of the Indian housing crisis rests with the tribes and upon the effectiveness of their governments.

### *Status*

1990 Census data indicate that the amount of Indian housing deemed to be inadequate was five to eight times greater than the amount of inadequate non-Indian housing. On tribal lands, 28% of Indian households were found to be overcrowded or lack adequate plumbing and kitchen facilities compared

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<sup>366</sup> Biles, Roger, “Public Housing on the Reservation,” *American Indian Culture and Research Journal*, 24:2, 2000, pp. 49-50.

with 5.4% of national households. When the physical structure, heating, and electrical equipment conditions are included, approximately 40% of on-reservation Indian housing is characterized as inadequate, compared with only 5.9% of the national households. Outside tribal lands, housing conditions faced by Indians improve somewhat, yet they also lag the national averages. The proportion of Indian-occupied housing suffering from overcrowded conditions and lacking adequate plumbing and kitchen facilities is 14% in counties surrounding reservations and 9% in other metropolitan and non-metropolitan areas.<sup>367</sup>

Of course, the national picture masks substantial regional variation. At the most basic level, the definition of the “Indian housing problem” varies along the dimension of reservation land-base integrity. In areas where reservations are substantially checkerboarded – i.e., privately held (see the Land section of this report) – the problem is more one of affordability than shortage or poor quality. Oklahoma, for example, has the lowest share of physical deficiencies, yet one of the highest shares of affordability problems (21%).<sup>368</sup> As the Urban Institute noted, “Unlike almost all others, the Tribal Areas of Oklahoma have large private land areas within them and a land tenure system that has tended to foster the emergence of private housing markets.”<sup>369</sup>

Even in areas where the problem is characterized as one of shortage and low quality rather than affordability there is tremendous variation. In Alaska, the physical deficiency (overcrowding and facility deficiencies) rate is 63% and in Arizona-New Mexico it is 61%. Around the rest of Indian Country, overcrowding is a critical problem, but the incidence of facility deficiencies is less pronounced. Moreover, those reservations that are characterized as having relatively large populations, having a relatively large number of non-Indians landowners within the political boundaries of the reservation, and being relatively close to urban economies have a physical deficiency rate of 12% and affordability problem rates averaging 21%. In contrast, those reservations having none of those characteristics have physical deficiency rates of 52% and affordability problems in only 10% of their units.<sup>370</sup>

By 1997, tribal governments (and occasionally states) had, under HUD rules, created 201 Indian Housing Authorities (IHAs) to meet the demand for Indian Housing. That year IHAs reported management of approximately 69,000 housing units and had another 10,000 under development. In addition, Indian households had acquired title to another 8,700 units using federal home purchase assistance. All told, by the mid-1990s, federal housing comprised 25% of the total housing stock on tribal lands, while federally supported construction accounted for more than 80% of new reservation-based construction.<sup>371</sup> Despite this substantial effort by the Federal Government – an effort that contrasted sharply with the decline of federal involvement in urban and other housing programs – the need for housing in Indian Country at the end of the decade was acute. In 2000, the National American Indian Housing Council estimated the need to be 200,000 units, or more than two times the federally

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<sup>367</sup> These observations are based on 1990 Census tabulations and though HUD and others try to extrapolate on the needs and conditions based on demographic trends and the like, no more current data as comprehensive as the census exist. Observers of the Indian housing deficiency assert that the general patterns are fairly stable over time. Kingsley, Thomas, Maris Mikelsons, and Carla Herbig, *Housing Problems and Needs of American Indians and Alaska Natives* (Washington, DC: US Department of Housing and Urban Development, 1996), p. vii; communication with Jacqueline Kruszek, US Department of Housing and Urban Development, Office of Native Programs.

<sup>368</sup> A housing affordability problem is here defined as a payment requiring more than 30% of the tenant’s income.

<sup>369</sup> Kingsley, Mikelsons, and Herbig, *op. cit.*, p. xi.

<sup>370</sup> Kingsley, Mikelsons, and Herbig, *op. cit.*, pp. xi-xii.

<sup>371</sup> *Joint Hearing Before the Committee on Indian Affairs, US Senate, and the Committee on Banking, Housing, and Urban Affairs, US Senate, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session, June 20, 1996, as cited in Biles, op. cit., p. 57.*

provided stock of units and about 20 times the annual development rate sustained by the IHAs at the middle of the decade.<sup>372</sup>

### *Policy History*

As implied above, the application of urban federal housing programs to Indian Country began in earnest in the Kennedy Administration. Starting with the *Snyder Act* in 1921, the BIA had been authorized to provide housing assistance on reservations, but it was not until three decades after the establishment of Depression-era housing policies that the Federal Government really began to address the needs of the non-urban Indian population. By the last decade of the century, a broad portfolio of programs was in place, most of which were administered by HUD.<sup>373</sup> In addition, the IHS supported (and continues to support) home construction by building sanitation infrastructure, and the BIA assists in real estate functions (for example, leasing, easements, and appraisals) and by underwriting road systems.<sup>374</sup>

These programs operate in a challenging context. The remoteness and limited human resources of many tribal communities raise labor costs from a general maximum of 50% of housing costs to 65% of costs.<sup>375</sup> The lack of suitable land and the severity of the climate add to the costs of maintenance and upkeep. The wage rates mandated for Indian housing projects by the Bacon-Davis statute and, in some cases, the difficulty in meeting Indian-preference hiring requirements also raise construction and maintenance costs. And vandalism, tenants' neglect, and unpaid rent put financial pressure on the IHAs whose collections are generally rededicated to maintenance and operations.<sup>376</sup>

Beginning in the early 1990s with the congressionally mandated National Commission on American Indian, Alaska Native, and Hawaiian Housing, and following with the HUD-sponsored review of housing data and needs in Indian Country, the Federal Government engaged a re-assessment of housing programs directed at Indian Country.<sup>377</sup> Among other things, this review concluded that:

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<sup>372</sup> National American Indian Housing Council (NAIHC), "Indian Housing Data: State of Indian Housing Fact Sheet," <http://naihc.indian.com/housingdata.htm>.

<sup>373</sup> The *Mutual Help Homeownership Program* combined a contribution of land, labor, and materials from the tribe and the occupant with federal outlays in a lease/purchase arrangement. The *Home Improvement Program*, run by the BIA, targeted the lowest-income households, and is primarily focused on home maintenance, repair, and expansion. The *Rental Program* in Indian Country operated very similarly to the national Public Housing program. IHAs received grants to purchase home sites or to buy and renovate existing homes for subsequent rental to low-income families. The *Section 8 Certificate and Voucher* programs assisted low-income tenants in renting private sector housing. HUD payments made up the difference between the market rent and the tenant's ability to pay (capped at 30% of income). *HOME Block Grants* were available to tribal governments for housing assistance programs of their own design. Indian Community Development Block Grants are also available, and they can be applied to certain housing development activities. *Finance Assistance* was made available through federal mortgage insurance programs ("Section 248") and via federal loan guarantees ("Section 184").

<sup>374</sup> Kingsley, G. Thomas, Virginia E. Spencer, John Simonson, Carla E. Herbig, Nancy Kay, Maris Mikelsons, and Peter Tatian, *Assessment of American Indian Housing Needs and Programs: Final Report* (Washington, DC: US Department of Housing and Urban Development, 1996), pp. 104-112.

<sup>375</sup> England-Joseph, Judy A., "Native American Housing Challenges Facing HUD's Indian Housing Program," Statement before the Committees on Indian Affairs and Banking, Housing, and Urban Affairs, US Senate, March 12, 1997, GAO/RCED-97-105 (Washington, DC: General Accounting Office, 1997), p. 5.

<sup>376</sup> *Ibid.*, pp. 5-10.

<sup>377</sup> See National Commission on American Indian, Alaska Native, and Hawaiian Housing, *Building the Future: A Blueprint for Change* (Washington, DC: National Commission on American Indian, Alaska Native, and Hawaiian Housing, 1992); National Commission on American Indian, Alaska Native Hawaiian Housing, *Supplemental Report and Native American Housing Improvements Legislative Initiative* (Washington, DC: National Commission on American Indian, Alaska Native Hawaiian Housing, 1993); Kingsley, Mikelsons, and Herbig, *op. cit.*; Kingsley, Spencer, *et al.*, *op. cit.*; and Mikelsons,

- There was a continuing need for housing assistance – particularly more efficiently coordinated assistance.
- Legislation needed to be passed to allow HUD to make block grants out of housing programs so that tribes would have more discretion and authority to spend the money in order to customize housing programs to local circumstances and priorities.
- As resource allocation decisions were devolved to tribes, there was a need for federal support for “capacity building” to effectuate better tribal execution of housing programs.<sup>378</sup>
- Greater Indian access to housing programs outside of tribal areas was needed to address their needs for better affordable housing.<sup>379</sup>

Among the frustrations of the existing policy arrangement was the often-contentious relationship between the tribal governments (i.e., elected tribal councils), HUD, and the IHAs. Ostensibly, the tribal councils were in charge of the IHA boards via powers of appointment; however, HUD regulations and practices granted substantial resources and operational independence to the IHAs and, in the eyes of many councilors around Indian Country, gave too much power without enough accountability to the local communities. Though the regulations allowed IHAs to innovate and design programs outside existing program guidelines (see note 373), IHA directors complained that as long as HUD regulations prevented IHA staffs paid out of HUD funds from working on non-HUD programs, there would be no opportunity to innovate at the IHAs. Finally, both IHA directors and outside observers complained that tribal councils were too meddlesome in IHA affairs (see, for example, note 378) and that many tribal governments were incapable of enforcing collection of overdue rents and Mutual Help payments or were incapable of maintaining minimum standards of accountability.<sup>380</sup>

More generally, HUD’s translation of the country’s urban housing programs to remote Indian reservations left much to be desired. Diverse examples, some of which are common, others extreme, make the point. “Subdivisions” of HUD housing – complete with streets, sidewalks, and driveways – were constructed in the remote prairie at the end of long dirt roads that could not connect with the subdivision because the muddy roads were two feet or more below the subdivision street level. Tight clusters of housing in which residency was assigned by lottery went against the grain of local custom and created or worsened problems with gang violence, teen drug use, and the like.<sup>381</sup> One-size-fits-all HUD rules obstructed the utilization of millennia-old pueblo construction techniques. Most importantly, the HUD approaches had done little to address the lack of private mortgage financing on the reservations.<sup>382</sup>

Maris, Karl Eschbach, Virginia E. Spencer, and John Simonson, *Housing Problems and Needs of Native Hawaiians* (Washington, DC: The Urban Institute, 1995).

<sup>378</sup> The Urban Institute acknowledged that “a fractious political relationship between IHAs and tribal officials” is “widely perceived as the greatest constraint on the capacity of IHAs to meet the housing needs of Native Americans effectively.” Nonetheless, its emphasis in capacity building was on “staff training, technical assistance, and information dissemination” rather than on tribal institutions of governance. Kingsley, Spencer, *et al.*, *op. cit.*, pp. 217, 220.

<sup>379</sup> Kingsley, Spencer, *et al.*, *op. cit.*, pp. xxvi-xxvii.

<sup>380</sup> Biles, *op. cit.*, and Kingsley, Spencer, *et al.*, *op. cit.*, both give this diagnosis of the IHA-HUD-Council interplay.

<sup>381</sup> Biles, *op. cit.*, p. 58.

<sup>382</sup> Kingsley, Spencer, *et al.*, *op. cit.*, p. xxv. See also the discussions of land control and collateralization in the Land and Economic Development sections of this report.

By the mid-1990s, most participants in the arrangement under which federal Indian housing programs were administered agreed that it was ripe for reform.

Congress initiated reform when it passed the *Native American Housing Assistance and Self-Determination Act of 1996* (NAHASDA).<sup>383</sup> Similar in spirit to PL 93-638 – the Act that had initiated the federal policy of Indian self-determination 21 years earlier – NAHASDA essentially turned the programs HUD had been administering into a block grants that tribes could apply for. As early as 1992, HUD had been “deregulating” its programs by combining some of them into mini-block grants. This legislation freed nine of HUD’s 14 programs for combination under block grants. Tribally Designated Housing Entities (TDHEs) could now submit one-year and five-year plans to HUD stating their goals, objectives, needs, activities, and resource requirements; in return, HUD would let tribes design and implement the programs on their own. HUD was to write rules implementing the program, but was interrupted by scandal.

In December 1996, the *Seattle Times* published a series of Pulitzer Prize-winning articles examining HUD programs on reservations around the country. It reported 29 incidents of corruption, self-dealing, and misspending of federal funds across a number of IHAs that had been operating under deregulation promulgated first under Secretary Kemp and then under Secretary Cisneros. The articles asserted that HUD’s loosening of regulations in favor of self-determined housing policy had created an “anything goes” atmosphere – albeit without putting the misspending in the larger context of the effective IHAs around Indian Country.<sup>384</sup> In congressional hearings the subsequent year, HUD’s Inspector General reported that the Department believed that waste, fraud, and mismanagement were much more prevalent in Indian housing programs than in HUD’s standard programs.<sup>385</sup> An internal HUD investigation later found the *Seattle Times*’ coverage to be “generally accurate.”<sup>386</sup>

Apart from the question of how much of the Indian housing efforts were appropriately tarred with the *Times*’ brush, the effect of the articles was to interrupt the Federal Government’s focus on NAHASDA implementation regulations substantially and to put HUD in a much more delicate position of balancing accountability for its funds against tribal self-determination.<sup>387</sup> As the then-Chairperson of the Board of the National American Indian Housing Council aptly put it:

I, as an Indian leader, realize that accountability is one of the most critical factors facing Indian housing today. I’m not talking about accountability to HUD, I’m talking about

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<sup>383</sup> PL 104-330.

<sup>384</sup> Nalder, Eric, Deborah Nelson, and Alex Tizon, “The Tulalips: Despite \$92,000 Income, Couple got Federal Aid to Build 5,300-square-foot House,” *The Seattle Times*, December 1, 1996; Nalder, *et al.*, “Tribal Housing: From Deregulation to Disgrace,” *The Seattle Times*, December 1, 1996; Nalder, *et al.*, “State by State Examples of Mismanagement and Abuse,” *The Seattle Times*, December 1, 1996; Nalder, *et al.*, “South Dakota: ‘Vicious’ Politics Gets the Blame for Nepotism,” *The Seattle Times*, December 3, 1996; Nalder, *et al.*, “From Deregulation to Disgrace: Tribal Housing,” *The Seattle Times*, December 3, 1996; Nalder, *et al.*, “Tribal Housing: From Deregulation to Disgrace,” *The Seattle Times*, December 5, 1996; Marchman, Kevin E. “Series on Indian Housing Overlooked HUD’s Gains,” *The Seattle Times*, December 19, 1996; Johnson, Jacqueline, “Indian Housing and the American Dream,” *The Seattle Times*, January 10, 1997; and Taylor, Chuck, “Reporters’ Relentless Pursuit of Facts won Times 2 Pulitzers,” *The Seattle Times*, April 8, 1997.

<sup>385</sup> Susan Gaffney, Inspector General, US Department of Housing and Urban Development, as quoted in Biles, *op. cit.*, p. 58.

<sup>386</sup> *Ibid.*

<sup>387</sup> It should be noted that while the *Seattle Times* expose was a backdrop for the rulemaking process, it was the mandated negotiated rulemaking process that extended the time required to publish a final rule. Even at that, the final rule was published much quicker than rules developed by other agencies working in Indian Country when negotiated rulemaking was mandated.

accountability to our very own people. The accountability is to ourselves, while having the strength to pursue our visions and make them a reality.<sup>388</sup>

As with so much affecting Indian development, the challenge for at least those 29 tribes identified by the *Times* articles was to build governments that are capable of self-policing.

### *Challenges Ahead*

Federally assisted Indian housing has a “remarkably low vacancy rate of 6%,” and the need is currently assessed at 200,000 homes.<sup>389</sup> Clearly, the need for assistance continues, and so, too, will treaty obligations and trust responsibility continue to oblige the Federal Government’s involvement in this area of policy. Moreover, the goal of tribes (and of Congress and HUD) of allowing greater program innovation at the tribal level remains as high a priority as ever. Thus, the Federal Government finds itself in the awkward position of trying to step out of its relationship as paternalistic administrator of the reservations while trying to discharge its duty to meet its obligations to Indians (as is so often the case for federal agencies in the Self-Governance Era).

Research recently completed by Miriam Jorgensen of pre-NAHASDA IHA performance indicates that once regional economic and other variations are taken into account, the effectiveness of an IHA (as measured by HUD’s Administrative Capacity Assessment (ACA) score<sup>390</sup>) is best predicted by the quality of the institutions of governance a tribe enjoys. The caliber of formal tribal institutions such as the independence of dispute resolution mechanisms, the effectiveness of tribal bureaucracies at paying down debts, and the form of government a tribe has are positively and significantly correlated with higher ACA scores.<sup>391</sup> In particular, this research offers further evidence to the fact that a key ingredient of successful program management (like successful economic development) lies in the strength of tribal governing institutions.

Clearly, the nation-building agenda is not easily shoehorned into the mandate of the federal housing program, flexible as it may be. Though the TDHEs may be allowed to direct program funds toward “capacity building,” the kind of capacity building indicated by Jorgensen’s research (and by the *Seattle Times* articles) requires, perhaps, judicial reform or constitutional reform, personnel system re-design, grievance procedures, internal auditing and inspection capabilities, and the like. These areas of “capacity” are well outside the jurisdictional and professional scope of TDHEs’ executive directors (and of HUD, for that matter).

Given the past failures of federal experimentation in the creating of Indian institutions of governance (e.g., the IRA), it is clear that HUD should eschew all but the most minimally interventionist roles in the process of nation building, much as it may feel such work is indicated by its experience, the *Seattle Times* articles, or Jorgensen’s work. Ironically, HUD operating under NAHASDA may be able to provide the wherewithal – i.e., the flexibility and the funding – for tribes to effectuate a good deal of

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<sup>388</sup> Johnson, *op. cit.*

<sup>389</sup> Biles, *op. cit.*, p. 59; Marchman, *op. cit.*; NAIHC, *op. cit.*

<sup>390</sup> ACA scores are not an ideal measure of IHA effectiveness. On the other hand, they originally were promulgated by HUD to describe housing authorities’ capacity to administer their tasks and thus are at least an oblique measure of effectiveness. A previous HUD commissioned report, the Urban Institute Study by Knigsley et al relied on ACA’s as a measure of IHA effectiveness; the Jorgensen research merely follows suit. Alternative statistically analyzable measures are unavailable.

<sup>391</sup> ACA scores encompass the development, modernization, administration, financial management, occupancy, and maintenance performance of IHAs. Jorgensen, Miriam, “Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development,” *op. cit.*, Chapter 4.

“capacity building” of both the managerial and the nation-building variety. Nevertheless, the fact remains that HUD and the TDHEs are in the business not of repairing political systems, but of delivering housing assistance effectively. In the places around Indian Country where the TDHEs have struggled with political interference or with bureaucratic malfeasance, they will be critically dependent on nation-building approaches that re-introduce accountability into tribal government, yet they will be institutionally hampered in trying to drive that process forward.

Moreover, continued effort will have to be directed at the structural problems obstructing the development of more fluid on-reservation housing markets. Infrastructure deployment is a critical obstacle to constructing new homes. Moreover, land fractionation and the difficulties of collateralizing trust lands thwart the operation of efficient mortgage markets (see the Land and Economic Development sections of this report). In sum, tribal housing efforts will have to do more than tinker with HUD programs as they adapt them to local conditions under their newfound flexibility under NAHASDA. They will have to adopt comprehensive land, infrastructure, and capital access approaches. Taken together with the government institution-building discussed above, these challenges facing Indian housing are formidable.



## ***WELFARE***

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- Recent statistics indicate Indians participate in income welfare at roughly twice the national rate (see Figure 2 and Appendix C, indicator 51).
- The challenges of economic development in Indian Country and the legacy of generations of poverty and poverty program-dependence confound tribal efforts to make family life sustainable off the welfare rolls.
- Even though many reasonable public policy arguments would militate for carefully crafted, Indian-specific provisions of the welfare reform act, tribes were added as an afterthought and they continue to suffer from underfunding and poorly designed policy.
- While some tribes had been adjusting their anti-poverty efforts by taking advantage of modest federal self-government legislation, the arrival of welfare reform has rapidly challenged the administrations and economies of a host of tribes.

Given the poverty and unemployment characteristic of so many Indian communities, it is no surprise that Indians participate in public assistance at multiples of the national average rate (see Figure 2 and Appendix C indicator 51). While Congress afforded tribes some room for experimentation in the early 1990s, the more recent round of welfare reform has ushered in a host of changes affecting tribes and tribal welfare recipients without affording much time for transition or resources for tribes to develop effective approaches. It is not yet clear how welfare reform will ultimately affect tribes, and generally speaking, there is a good deal of trepidation in Indian Country that it will affect reservation communities negatively.

### *Status*

As of 1997, the proportion of all Native Americans living below the poverty level (25%) was almost twice that of the United States (13%). That year, the labor force participation rate on the

reservations stood at 50% compared with a national average of 33%.<sup>392</sup> In 1997, Native Americans had a median income of \$29,200 versus \$37,005 for the US as a whole (see Figure 1). This relative economic privation was even more pronounced in certain subsets of the Indian population. In the 1990 Census, Indians on reservations had median incomes of \$12,459 compared with the nationwide Indian average of \$19,900.<sup>393</sup> And within specific regions of the country, reservations were even poorer. For example, the BIA reported the jobless rate for the Aberdeen area (encompassing North and South Dakota) as 71% in 1997.<sup>394</sup>

This relatively low economic attainment translates into high welfare participation rates. In the 1990 Census, on-reservation Indians participated at four times the national rate in public income assistance programs. In 1997, the rate of Indian participation in Temporary Assistance for Needy Families (TANF) – the successor to Aid for Families with Dependent Children (AFDC) – was twice the national average. In 1994, tribal member eligibility for school lunch subsidies stood at just under twice the national rate (see Appendix C indicator 53).

### *Policy Responses*

On the reservations, tribal governments administered federal programs originating in the Departments of Labor (largely job training), Health and Human Services (for example, AFDC), and Interior (for example, BIA general assistance and employment assistance). When these programs were initially introduced to the reservations in the 1960s and 1970s during the War on Poverty, they greatly altered the size of tribal governments. The Zuni Pueblo, for example, went from nine employees during most of the 1950s to 54 by the end of the '60s. The Community Action Program (funded by the federal Office of Economic Opportunity) became the largest component of tribal government (33 employees) and a major share of the budget.<sup>395</sup> Across most reservations, the Great Society programs had a similar effect on tribal government: they directly increased the number of tribal employees.<sup>396</sup> As helpful as these programs may have been for their clients and for the expansion of jobs on the reservation, the on-reservation administration of these programs entailed hiring tribal members to administer programs designed, implemented, and monitored from Washington, DC. Thus, while tribal governments were greatly expanded in size, they were not given a commensurate increase in governing power since discretion over program design – including the ability to customize and innovate solutions tailored to local priorities, values, and circumstances – was constrained by federal rules.

The first loosening of these constraints was made possible by the passage of the *Indian Employment, Training and Related Services Demonstration Act* of 1992 (PL 102-477). Under PL 477,

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<sup>392</sup> Bureau of Indian Affairs, *Labor Market Information on the Indian Labor Force*, *op. cit.* US Census Bureau, *Statistical Abstract of the United States: 1998*, *op. cit.*, Table 645.

<sup>393</sup> In 1989 dollars. US Census Bureau, *Statistical Abstract of the United States: 1999*, *op. cit.*, Table 54; US Census, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas*.

<sup>394</sup> Bureau of Indian Affairs, *Labor Market Information on the Indian Labor Force*, *op. cit.*

<sup>395</sup> Ferguson, T. J., E. Richard Hart, and Calbert Seciwa, "Twentieth Century Zuni Political and Economic Development in Relation to Federal Indian Policy," in *Public Policy Impacts on American Indian Economic Development*, C. Matthew Snipp, ed. (Albuquerque, NM: Native American Studies, Institute for Native American Development, University of New Mexico, 1988), pp. 113-44, as cited in Cornell, Stephen E., "'We Gotta Get Somethin' Goin' Around Here!': Welfare Reform, Job Creation, And American Indian Economies," unpublished monograph prepared for the symposium on "Empowering American Indian Families: New Perspectives on Welfare Reform," Washington University, St. Louis, MO, May 5-6, 2000.

<sup>396</sup> Some indirect private sector employment must have accompanied the increased federal spending of the Great Society programs, as the tribal government purchasing power increased. Such induced multiplier effects appear to be *de minimis* around Indian Country and are certainly not adequate to employ those still seeking work.

tribes could self-nominate to become “demonstration tribes” under an arrangement in which the tribe could combine as many of a designated set of employment, job training, skill and opportunity development and related programs as it wanted to into one program. One of the main benefits of this arrangement was that tribes could save considerably on administrative overhead because the BIA became the central clearinghouse for statistical and financial reporting and they could combine programmatic reports at a substantial savings of paperwork. More importantly, the Act gave to the secretaries of the relevant departments (HHS, Labor, and Interior) the power to waive statutory and regulatory requirements affecting the covered programs so long as such a waiver would not violate the Indian-specific provisions of the relevant law or policy.<sup>397</sup> In other words, tribes would not necessarily be bound to follow federal statutes and regulations directed at the states. Thus, tribes could, on their own initiative, begin to overcome the inefficiencies of the Federal Government’s one-size-fits-all translation of Great Society programs to Indian Country.

As with other programs taken under tribal control under PL 638, tribal assertions of greater discretionary authority over federal programs under PL 477 tended to improve program effectiveness. While the number of tribes and Alaska Native organizations participating in the PL 477 arrangement was modest (22) even after six years, those that did participate all reported improved effectiveness: higher numbers of job placements and more client program completions. In addition, the overhead savings created by reducing client records from one per program to one per client were re-dedicated to client services.<sup>398</sup> Thus, while PL 477 did not engender the widespread innovation that PL 638 did across Indian Country, and while it only addressed the employment training side of welfare and not AFDC or general assistance, it did usher an orderly transition to tribally managed anti-poverty programs.

A few tribes that did undertake a PL 477 reorganization were somewhat braced for the radical transformation that was ushered in by welfare reform – they were able to fold welfare reform into their existing job training agreements.<sup>399</sup> In general, however, the arrival of welfare reform to Indian Country was an abrupt policy change and the consequences for tribal government, tribal welfare recipients, and Indian poverty may not be clear for years.

The *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (PRWORA) passed into law in August of 1996.<sup>400</sup> The Act overhauls a number of welfare programs, putting greater emphasis on work and support for work (e.g., child-care and child support enforcement). Among other things, it replaces AFDC with TANF. TANF is administered via block grants to the states and tribes under rules that allow considerable flexibility of operation and program design within certain defined constraints. Most salient among these constraints is the requirement that recipients receiving assistance for at least two years participate in some form of work (subsidized or not) and that recipients cannot receive federal welfare payments for more than a cumulative total of five years.

The response of tribal leaders to PRWORA was strong and concerned. Quickly after its passage, NCAI issued a “Tribal Leaders Statement” acknowledging the harmful effects of welfare and the benefit of having tribes in control of TANF and other programs, but very critical of how it would affect tribes:

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<sup>397</sup> PL 102-477, § 7.

<sup>398</sup> US Department of Labor, Employment and Training Administration, Division of Indian & Native American Programs, “Public Law 102-477 at a Glance,” <http://www.wdsc.org/dinap/html/477gIncl.html>.

<sup>399</sup> The Sisseton-Wahpeton Sioux Tribe, for example, has integrated its TANF program into its PL 477 approaches. Grey, Andrew, Tribal Chairman, Sisseton-Wahpeton Sioux Tribe, “Prepared Statement before the Senate Committee on Indian Affairs: Public Law 102-477 and Welfare Reform,” April 14, 1999.

<sup>400</sup> Public Law 104-197.

Tribal governments strenuously object...to the means by which this “opportunity” [to manage TANF] is being provided. After decades of federal support for state-controlled “welfare” systems, with no meaningful consultation or negotiation with tribes and with no resources made available, tribal governments are faced with coping with the disruptions and dislocations of “welfare reform” legislation... Immediate and severe impacts on tribal members and tribal governments clearly are going to occur and the means for tribal governments to intervene to mitigate the potential damage is [sic] not provided.<sup>401</sup>

Subsequent technical amendments to PRWORA in the *Balanced Budget Act* of 1997 addressed some tribal concerns, yet a number of pressing issues remain that pertain to funding levels, employment capacity, and incentives stemming from the program.

Generally speaking, the effects of PRWORA on welfare rolls have been less pronounced in Indian Country than they have been in the country at large. From 1994 to late 1999, the welfare caseloads fell from 5.5 million to 2.3 million.<sup>402</sup> And while state caseloads from 1994 to 1998 fell 46% (in the 33 states the US Department of Health and Human Services identified as having federally recognized tribes), the TANF caseloads including an American Indian or Alaska Native (AI/AN) in those states fell only 38.8%.<sup>403</sup>

Moreover, there is tremendous heterogeneity in the rate of change in AI/AN caseloads. Wisconsin saw a 92% decrease in AI/AN TANF cases from 1994 to 1998, yet Minnesota saw a 21% increase.<sup>404</sup> Surprising as it may seem that AI/AN rolls would increase, the phenomenon may be even more pronounced on the reservations. The data just noted are for all cases in a state, regardless of reservation residency, and anecdotal information is beginning to indicate that easier access to locally (i.e., tribally) administered TANF, and more culturally sensitive tribal TANF may account for that.<sup>405</sup>

Of course, welfare reform is about more than declining caseloads. Welfare recipients can leave the rolls by a host of means, not all of which are sustainable for their families. Unfortunately, Indian TANF recipients participate in unsubsidized work at lower-than-average rates, and as with much of the non-Indian former welfare population, Indian TANF recipients tend to be employed at wage rates well below the poverty line.<sup>406</sup> These facts of welfare reform implementation combine with a relative lack of economic opportunities on many reservations to increase the risks that Indians dropping off the rolls will

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<sup>401</sup> National Congress of American Indians, “Tribal Leaders Statement: Implementation of Pub. L. 104-193, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” October, 1996, <http://www.ncai.org/indianissues/WelfareReform/Welfare%20Reform%20back%20ground/tribalpubstatement.htm>.

<sup>402</sup> US Department of Health and Human Services, “Temporary Assistance for Needy Families (TANF) Program: Third Annual Report to Congress,” August 2000, <http://www.acf.dhhs.gov/programs/opre/annual3.doc>, p. 3.

<sup>403</sup> Hicks, S.L., and E.F. Brown, “The Future of Welfare Reform: Considerations for Reauthorization Investing in Indian Families and Communities,” unpublished monograph, October 25, 2000.

<sup>404</sup> Administration for Children and Families, Office of Planning, Research, and Evaluation, “Temporary Assistance for Needy Families (TANF) Program: Third Report to Congress” (Washington, DC: US Department of Health and Human Services, 2000), p. 170.

<sup>405</sup> Hicks and Brown, *op. cit.*, p. 13.

<sup>406</sup> *Ibid.* Note that many observers consider the official poverty line to be an understatement of a family’s ability to sustain itself over the long term. See, e.g., Citro, Constance, and Robert T. Michael, eds., *Measuring Poverty: A New Approach*, Panel on Poverty and Family Assistance: Concepts, Information Needs, and Measurement Methods, Committee on National Statistics, Commission on Behavioral and Social Sciences and Education, National Research Council (Washington, DC: National Academy Press, 1995).

fall to critical levels of poverty with nothing to fall back on. It could easily be argued that the long-standing backlog of social investment in Indian Country would mean that welfare reform in tribal communities would be more expensive than in other places and require more than the usual support services. For example, interviews with TANF recipients on three Arizona reservations indicate that they are one-third less likely to have had previous job experience as the average welfare family,<sup>407</sup> yet they favor living on the reservation two to one.<sup>408</sup> Unfortunately, the tribes were an afterthought to PRWORA, and as one consequence they actually receive less funding than their counterparts.

### *Funding*

Tribes are able to take over TANF administration from the states.<sup>409</sup> However, in a peculiar exception to the general approach to devolution, not all of the in-place program funding automatically goes to tribes: state matching funds that had contributed to the provision of welfare on reservations are not required to go to tribes that take over TANF. As a result, tribes are wary of self-administering TANF because, much as they may want to engage in culturally and locally appropriate policy innovations, they face the prospect of doing so with fewer resources than are currently being dedicated to the problem. Essentially, welfare reform is a mandate with risky funding, if not an outright unfunded mandate. Indeed, of the 26 tribes or tribal consortia that had opted to take over TANF by September 2000, only nine came from states that had not pledged to commit state matching funds to tribal TANF programs – the bulk of them are casino tribes.<sup>410</sup> Less than one eighth of the 559 federally recognized tribes were seeking to implement welfare reform nearly three years after its passage.<sup>411</sup>

Tribes are able to adjust the TANF program in ways states cannot (e.g., by changing the minimum participation rates or by defining unpaid subsistence, artistic, or ceremonial work as eligible employment). Thus, tribes must weigh the financial risk of taking over TANF against the demonstrable benefits of a self-governing approach. An added risk is that tribes choosing not to manage their own TANF programs will be at the mercy of state policies that may be geared toward much different economic circumstances.<sup>412</sup>

### *Employment*

While the overall AI/AN welfare rolls seem to be dropping around the country, on reservations rolls do not appear to be dropping significantly.<sup>413</sup> In contrast to the extremely tight labor markets in most US urban areas, lack of economic opportunity is among the key characteristics of the environment facing

<sup>407</sup> Only 46% of the sample had previous work experience, whereas the national average is 75%.

<sup>408</sup> The study also reported that transportation and child care are severely inadequate, that nearly half the recipients are not able to buy the food they need for their families, and that three-quarters of the recipients do not have high school diplomas. Pandey, S., M. Zhan, S. Collier-Tenison, and K. Hui, "How are families on reservations faring under welfare reform?" Working Paper 2 (St. Louis, MO: Kathryn M. Buder Center for American Indian Studies, Washington University, 2000).

<sup>409</sup> States administered welfare programs on Indian reservations, including AFDC, prior to PRWORA.

<sup>410</sup> US Department of Health and Human Services, "Characteristics of Approved Tribal TANF Programs, September 20, 2000, <http://www.acf.dhhs.gov/programs/dts/tcht922.pdf>, January 14, 2001.

<sup>411</sup> Allen, W. Ron, "Testimony of W. Ron Allen, President, National Congress of American Indians, before the US Senate Committee on Indian Affairs Regarding the Implementation of Welfare Reform in Indian Country," April 14, 1999.

<sup>412</sup> For example, states have the flexibility to shorten TANF time limits, and while it could be appropriate in booming market contexts to do so, tribal governments on impoverished reservations may prefer to do otherwise.

<sup>413</sup> Drummond, William, "Welfare and the Navajo, Part One," *Morning Edition* (Washington, DC: National Public Radio, September 21, 1998). See, also, Grey, *op. cit.*, p. 2.

welfare-to-work initiatives in Indian Country. Given that tribes have long had good reason to reduce unemployment and raise incomes but have been unable to do so, it is not reasonable to expect that the intensification of the need to do so added by welfare reform will alter reservation economies substantially in the short run. Thus, when the time limits on welfare benefits begin to take effect, Indian individuals will, in all likelihood, face very difficult choices about staying on the reservations. As a result, reservation communities could well see another wave of emigration unless tribal fiscal resources and existing non-TANF programs make up for the loss of federal funds.

### *Capacity*

Around the country, state welfare agencies are undertaking one of the most radical changes in welfare the country has experienced. Tribes that choose to take over TANF are choosing to do so from a standing start. In contrast to the experience and expertise the states have developed by administering federal welfare programs (some of which were underwritten by federal technical assistance and administrative subsidy), tribes have virtually no prior experience in administering AFDC, let alone the newer TANF. The Federal Government has not appropriated funds for the adequate development of tribal welfare reform programs either.

In addition, taking over TANF intensifies a tribe's need for effective political, constitutional, and bureaucratic structures. As one TANF client on the Navajo reservation stated at hearings conducted by the tribal government,

What are you going to do with all this money that's supposed to be ours? When you get that cash assistance money, are you going to just go behind [the seat of government in] Window Rock and then distribute the money yourselves?<sup>414</sup>

While it is inappropriate to attribute too much policy significance to one remark made on one reservation, the concern that tribal governments will be strained to distribute welfare checks equitably and efficiently may be legitimate in a number of contexts around Indian Country. Since tribes have not run TANF or AFDC programs before, they may well lack the computer, managerial, and political systems to deliver welfare checks while keeping errors, mismanagement, and misappropriation to acceptably low levels.

### *Perverse Incentives*

Under the Act (as amended), months spent by a TANF recipient on an Indian reservation with a jobless rate of 50% or greater do not count against the five-year cap on benefits. As of the 1990 Census, 27% of the tribal land areas in the US met this criterion and therefore would not face the direct consequences of the TANF time limits if their circumstance were unchanged.<sup>415</sup> Despite the benefits of this exemption to the most resistantly poor reservations, more likely than not this provision will bring a number of unintended bad consequences for tribes.

- First, it adds a layer of administrative cost as information must be kept by states and tribes regarding residency of recipients – records that were heretofore not systematically

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<sup>414</sup> Drummond, William, "Welfare and the Navajo, Part Four," *Morning Edition* (Washington, DC: National Public Radio, September 24, 1998).

<sup>415</sup> National American Indian Housing Council and Norm DeWeaver, Indian and Native American Training Coalition, "The Impact of Welfare Reform on Tribally Designated Housing Entities" (Washington, DC: National American Indian Housing Council, 1999), note 9.

tracked for the purposes of determining eligibility. Currently, few states appear to track this information.<sup>416</sup> Neither do the tribes appear to collect accurate data on persons not employed as frequently as required by this provision of the law.

- Second, off-reservation welfare recipients face a stronger incentive to move to “exempt” reservations to collect welfare benefits as they approach their maximum time limits. This incentive may lead to the pooling of the most difficult-to-treat welfare clients on the most desperate reservations, depending, of course, on labor market factors such as distances to jobs, the attractiveness of family and cultural ties, and the availability of housing. *And* the incentive applies equally to Indian and non-Indian TANF recipients alike.<sup>417</sup>
- Third, at the margin, this provision distorts incentives for tribal governments. While the economic difference between 48% and 52% joblessness is probably minimal to most families on a reservation (both rates greatly exceed the US unemployment rate of the Great Depression), community well-being will be radically different under TANF time limits. Tribes sitting close to the cutoff point of 50% unemployment will face a difficult choice between a) letting the economic development chips fall where they may, or b) exerting diligent efforts to get economic development going, knowing their success will restart all of their TANF recipients’ benefits clocks. Depending on how often the benchmark joblessness numbers are re-determined for a tribe, the perverse situation could arise where a tribe manages to get economic development going for a few years only to see economic activity evaporate once its TANF recipients’ clocks have run out. Fundamentally, the presence of this abrupt threshold in the welfare reform law adds unnecessary risks to the general development of tribal communities at or near the threshold.

Despite its flawed treatment of Indian Country, welfare reform may offer some benefits to tribes. There is anecdotal evidence that child support enforcement may be on the rise, for example.<sup>418</sup> Moreover, in states that have made commitments to contribute funds to TANF or they formerly contributed to AFDC programs on the reservations, the tribes have an opportunity to construct new and culturally customized approaches to the task of sustaining their people. The cloud around this silver lining nonetheless remains: Welfare reform’s consequences on Indian reservations may be intense, abrupt, and negative, and will certainly demand more of the tribes’ institutions of government. Indeed, though federal policy seems to be well-intentioned and gives tribes the option of self-management of reform, it fails to address the need tribes have to build their institutional capacity to cope with reform.

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<sup>416</sup> *Ibid.*, p. 8.

<sup>417</sup> *Ibid.*

<sup>418</sup> Federal funding for child-support enforcement *first* became available to tribes with the promulgation of interim tribal child-support enforcement regulations in August, 2000. Hicks and Brown, *op. cit.*, p. 20

## *URBAN INDIANS*

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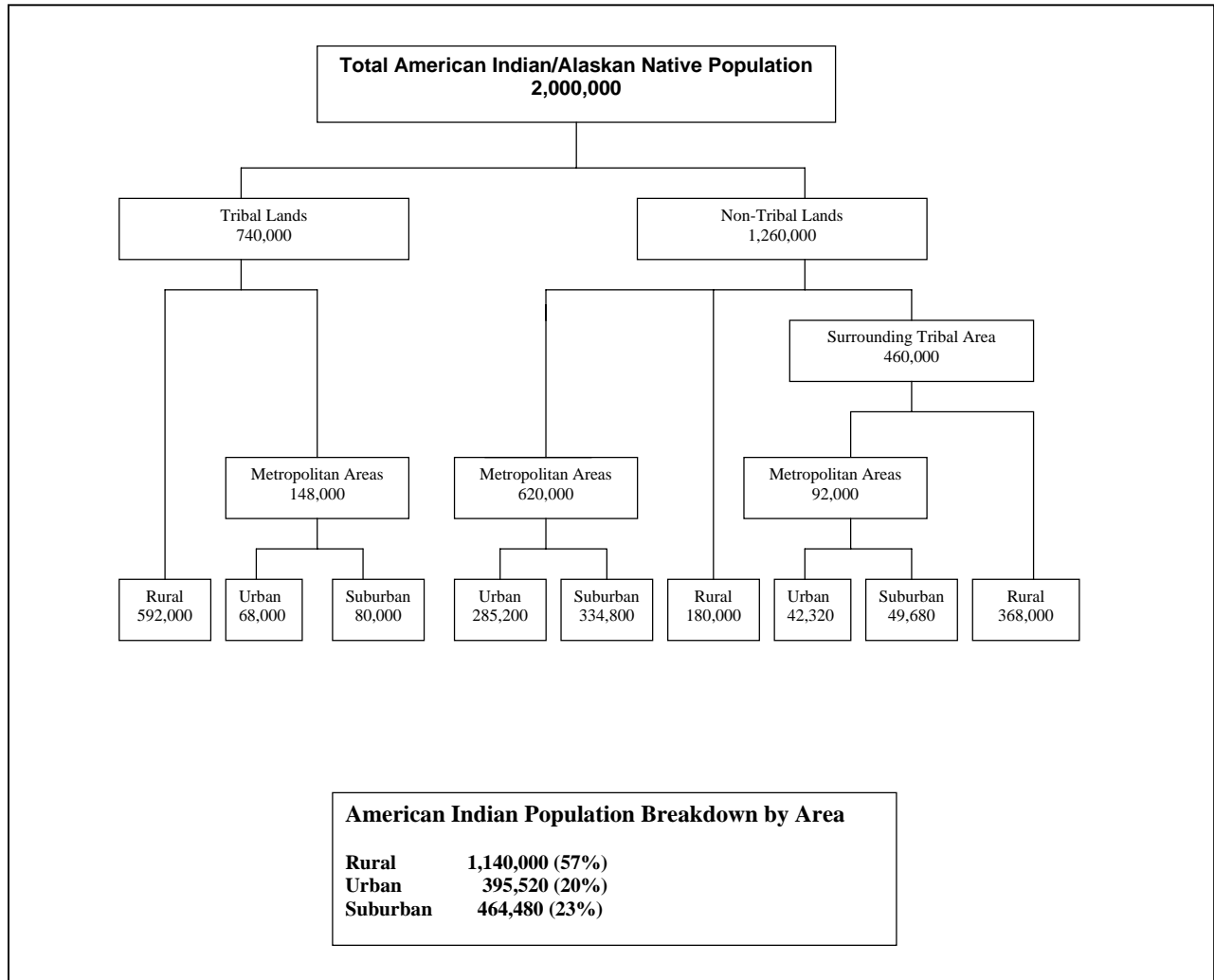
- About 60% of self-identified American Indians and Alaska Natives reside off-reservation, and almost 50% (620,000) of the total non-reservation Native population lives in urban areas – the consequence of inadequate economic opportunities on reservations, re-identification, and the federal relocation programs of the 1950s to 1970s.
- While there are now intergenerational families of urban Indians and a growing suburban Indian population, many would prefer to move back to tribal lands if there were ample job opportunities. Urban Indians frequently move between reservations and cities, and the general direction of migration is constantly shifting.
- Like other minority groups, urban Indians are disproportionately prone to suffer from socio-economic distress. For example, the unemployment rate of urban Indians is 2.4 times that of urban whites; the poverty rate is 3.9 times that of urban whites; and urban Indians are 1.7 times as likely to lack a high school diploma as urban whites. Employment, health, and housing are three issues of prominent importance to urban Indians.
- While the socio-economic conditions of urban-based Indians are marginally better than their on-reservation counterparts, urban Indians are under-served by federal assistance programs, largely because federal Indian policy focuses on tribal political *entities* rather than on Native American *individuals*. This predicament raises the issue of collective versus individual Indian rights, an issue ripe for further examination.
- Nonprofit urban Indian community centers, which are funded through a variety of sources, seek to meet many of the under-served needs of urban Indians, including health, employment training, housing, culture and welfare. Since they are not governmental entities, however, urban Indian centers struggle to provide services that tribal and federal agencies provide to reservation-based Indians.

In 1990, 740,000 (37%) of the approximately two million American Indian and Alaska Native population nationally lived in HUD-defined tribal areas (a generic term it uses for American Indian Reservations, Alaska Native Villages, and other special type of jurisdictional areas that represent ongoing



centers of tribal culture). Of the 1,260,000 (63%) Native Americans and Alaska Natives that lived on non-tribal lands, more than one-third (460,000) lived in counties surrounding reservations, and the remaining 800,000 lived neither on tribal lands nor in a county contiguous to tribal lands.

Indians living on any of these three types of land (tribal, surrounding tribal, neither) could be classified as living in rural, suburban, or urban communities. However, the proportion of the population living in each community type varies by land type. For Indians living in tribal areas or on lands surrounding tribal areas, approximately 20% live in a metropolitan area, while 80% live in rural areas. For Indians living on lands that meet neither of these criteria, 80% live in urban areas and 20% live in rural areas. For any Indians living in metropolitan areas, the split is 46% urban and 54% suburban.



Finally, summing up the populations by community type instead of by land type yields these estimates:

- The number of American Indians and Alaska Natives living in urban areas (on both tribal lands and non-tribal lands) totaled 395,520, or 20% of the total AI/AN population;

- American Indians and Alaska Natives living in suburban areas numbered 464,480 (23%); and,
- American Indians and Alaska Natives living in rural areas numbered 1,140,000 (57%).

As Table 5 indicates, cities in California, Oklahoma, and Arizona possess the highest populations of American Indians and Alaska Natives.

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Table 5  
Cities with the Largest Native American Populations

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City	Native American Population
Los Angeles/Riverside/Anaheim, CA	128,262
Tulsa, OK	72,426
Oklahoma City, OK	68,941
San Francisco/Oakland/San Jose, CA	59,232
New York, NY (including Northern New Jersey)	58,062
Phoenix, AZ	57,135
Seattle/Tacoma, WA	45,569
Minneapolis/St. Paul, MN	34,694
San Diego, CA	31,526
Tucson, AZ	29,982

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Source: Albuquerque Native American Coalition. Adapted from "Urban Indians Want a Share of Funds," *Indian Country Today*, April 19, 2000.

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Federal policies and the search for economic opportunity seem to be the primary motivators for Indians to reside in urban areas. The BIA's Relocation Programs, such as the *Voluntary Relocation Program* of 1952, sparked a mass migration of Indians to the cities with promises of vocational training, relocation assistance, medical care, and job placement assistance. Between 1952 and 1972, the BIA resettled more than 100,000 reservation Indians, most of who were processed through centers in Chicago, Cleveland, Dallas, Denver, Los Angeles, Oakland, San Francisco, San Jose, Seattle, Tulsa, and Oklahoma City.<sup>419</sup> Although the Federal Government ended its relocation programs in the 1970s and the trend of urbanization has slowed, migration to the cities remains significant. For example, in the seven-county metropolitan area of the cities of Minneapolis/St. Paul, the percentage change in the American Indian population between the years 1960 and 1990 was 705%; and the percentage change between 1980 and 1990 was 149%.<sup>420</sup> From the mid-1970s onward, the Federal Government did not actively encourage relocation; thus these statistics are largely reflective of "purely voluntary" relocation.

Despite the Federal Government's promises for improved livelihoods, the urbanization of American Indians has not been easy, and Indians who have moved from their reservations to urban centers have struggled to fit into foreign economic, institutional and social systems. More pointedly, Indians living in the cities find that the problems of on-reservation living are not left behind simply because they reside in an urban environment. As Figure 8 illustrates, like other minorities, American Indians located in urban areas tend to suffer disproportionately relative to whites. In particular, the 1990

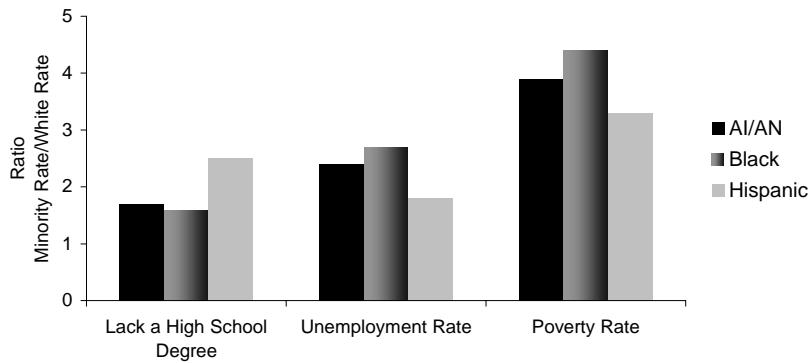
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<sup>419</sup> Kingsley, Mikelsons, and Herbig, *op. cit.*, p. 92.

<sup>420</sup> "State of the City" Report, City of Minneapolis Planning Department, 1993. Accessed at <http://www.airpi.org/hsgsect1.html>. In comparison, during the time period 1960-1990, the percentage change of the white population was 140% and the percentage change of the African American population was 332%.

data reveal that the unemployment rate for urban Indians was 2.4 times that of urban whites; the urban Indian poverty rate was 3.9 times that of urban whites; and the percentage of urban Indians lacking a high school diploma was 1.7 times that of urban whites.

Figure 8  
Measures of Urban Socio-economic Distress



Source: *Housing Problems and Needs of American Indians and Alaska Natives*, The Urban Institute, prepared for the US Department of Housing and Urban Development, May 1996, Table 4.5. Data collected from 15 large MSAs, which contain an Indian Community Center and an IHS funded urban health program.

To put these statistics in a more localized context, consider the socio-economic conditions of the American Indians and Alaska Natives living in the San Francisco Bay area. According to the 1990 US Census, there are more than 40,000 Natives representing nearly 240 tribes living in the greater San Francisco Bay area, and as the chart below indicates, they lag behind the general population across a number of indicators.

Table 6  
American Indians & Alaska Natives in the San Francisco Bay Area 1990

	American Indians	General Population
No High School Diploma	23%	17.3%
Unemployment Rate	8.8%	5.2%
Per Capita Income	\$14,034	\$19,629
Poverty Rate	15%	9%
% Homeownership	40%	57%

Source: "Community Mobilization Project: A Strategic Plan for American Indians in the San Francisco Bay Area," United Indian Nations, Inc. 1996. Data collected from the 1990 US Census.

These statistics echo the hardship found among urban Indian communities throughout the United States. For example, data for 1996 show that Alaska Natives living in Anchorage have a 76% high school graduation rate, the lowest of any ethnic group in the city, while 21.9% of Alaska Natives live below the poverty level – the highest incidence of poverty among all Anchorage-dwelling ethnic groups. As might be expected from these indicators, the level of income typically attained by Alaska Natives living in Anchorage is the lowest of all the reported groups.<sup>421</sup>

<sup>421</sup> Mark Fogarty, "Urban Indians: Hope and Hopelessness," *American Indian Report*, September 1999, pp. 13-15.

Despite the large populations of American Indians and Alaska Natives living in urban areas, it is important to note that many would prefer to return to tribal lands rather than remain in the metropolitan areas where they now reside. The reasons for dissatisfaction with urban life are varied, but include the desire to maintain family ties, return to ancestral lands, overcome homesickness, and ensure the ability to practice Native religions.<sup>422</sup> A testimony of one urban-based Indian is telling:

“At home, people are always talking about half-breeds...blood quantum is a big issue. That isn't something that we deal with as much here [in the urban area]. It's more about enrollment. When I go home I always feel really welcome but I know that I could never live there. [It was] my grandmother's and mother's dream to always move back [to the reservation]. They consider it as home. As I get older I think about it in the same way my parents do. It's hard to give up the convenience of this place. But I don't want to die here.”<sup>423</sup>

Even for Indians with a strong motivation to leave the cities to return to their reservations, oftentimes their economic needs outweigh their social desires – so they remain in the cities.<sup>424</sup> As described below, however, the growing economic success of tribes throughout Indian Country, coupled with the effects of welfare reform, may be strengthening urban Indians' incentives to leave the cities.

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<sup>422</sup> Kingsley, Mikelsons, and Herbig, *op. cit.*, p. 96. According to this survey of Indian community center directors, 64% of the Indians within their communities would prefer to relocate back to reservation areas.

<sup>423</sup> American Indian Policy Center, *American Indians and Home Ownership, Section One: Policies and Practices*, 1999, accessed at [www.http://www.airpi.org/hsgsect1.html](http://www.airpi.org/hsgsect1.html).

<sup>424</sup> A practice common for significant numbers of Indians who prefer spending time on-reservation is to alternate residences between the cities and tribal lands. This practice of living substantial amounts of time in both environments is also common among those who can maximize social benefits by alternating residence between the cities and tribal lands, as well as those engaged in seasonal work. As a result of this net migration, statistics collected on the number of urban Indians are possibly impacted by the flow of individuals into and out of the cities, but the magnitude of this impact is unknown.

### **Native Self-Identification and Reservation-to-City Migration**

*Excerpts From: "Changing Identification Among American Indians and Alaska Natives"*

"The census-enumerated American Indian population dispersed rapidly between 1930 and 1990. Changes in the ethnic classification account for most of the change. In the 1980 count, ten states with historically large Indian populations account for 53% of births of Indians between the ages of 10 and 80, compared with 72% of the first enumerations of the same cohorts. Migration further reduced the share of these states to 46% of Indian residents in these cohorts. Study of the dispersal of the Indian population should focus primarily on the new emergence of the expression of Indian identity, rather than on migration from former population centers.

"Changes in identification for Indian populations native to new Indian regions account for the largest portion of the diminished share of the Indian population that lives in old Indian regions. A significant fraction of the Indian population native to eastern regions, and particularly in California in the West, was enumerated in past censuses with some non-Indian race, even in the self-identification censuses of 1960 and 1970. About one half of Indians native to the West who were between ages 10 and 80 in 1980 must have been enumerated with some non-Indian race in the first enumeration after birth. This is true of at least 70% of the Indians native to the eastern new regions.

"These results suggest that the reservation-to-city migration model has diminishing relevance in accounting for the presence of substantial populations of Indians in urbanized areas outside of old Indian regions. A minority of the Indian population of new Indian regions are in-migrants from old Indian regions. Others are descended from consistently identified Indian groups native to new Indian regions. A substantial portion, however, are newly identified Indians native to the new Indian regions themselves."

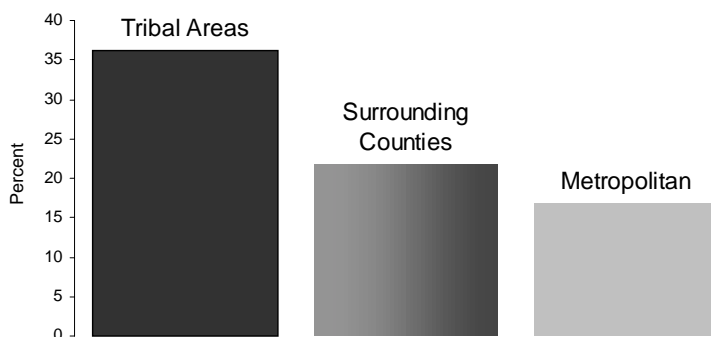
Source:

Eschbach, Karl, "Changing Identification among American Indians and Alaska Natives," *Demography*, Vol. 30, No. 4, November 1993.

### *Employment and Economic Opportunity*

Indians who reside in the cities rather than on tribal lands often do so in order to increase employment prospects and to realize a standard of living that has not generally been attainable on reservations. This appears to be happening: 1990 US Census data reveal that leaving tribal lands does contribute to the prospects of achieving economic success. Figure 9 shows that more than 35% of Indians living in IHS-designated tribal lands live below the poverty line. Those Indians living in counties adjacent to tribal lands fare better, as they experience a 22% poverty rate. Better still, urban Indians, living in metropolitan areas, display a poverty rate of "only" 17% (in comparison to 11.5% for the non-American Indian and Alaska Native reported by HUD).

Figure 9  
American Indian and Alaska Native  
Poverty Rates



Source: *Housing Problems and Needs of American Indians and Alaska Natives*, The Urban Institute, prepared for the US Department of Housing and Urban Development, May 1996, Table 3.7. Data collected from 15 large MSAs, which contain an Indian Community Center and an IHS funded urban health program.

While Indians living in metropolitan areas have significantly lower poverty rates than reservation-based Indians, migration from reservations to urban areas creates an important – and disturbing – trend. When Indians leave the reservations seeking better jobs, tribes are forced to cope with a shrinking pool of human talent. Such migration, in turn, frustrates tribes’ ability to develop sustainable economies that rely upon the existence of a skilled reservation workforce. Typically referred to as the “brain drain,” this phenomenon is common to developing nations worldwide, and the Native nations of the US are no exception. Indian attorneys, financial analysts and computer programmers are often lured to the cities from the reservations by the prospect of higher-paying jobs and the provision of services that cannot be found in the more rural reservation areas.<sup>425</sup> Less skilled Indian workers may migrate to urban centers in search of low-skilled jobs and increased educational opportunities – both of which are relatively difficult to find in rural or reservation settings.

The direction of migration may be changing, however, and numerous tribal leaders have commented that their reservation populations are growing at alarming rates. Two factors may be driving this phenomenon: welfare reform and the improving economic conditions found on Indian reservations. Early indications are that welfare reform programs may alter the flow of Indians from the reservations to urban centers. As benefits begin to expire, a number of tribal members return to the reservations in search of social services offered by tribes (see the Welfare section of this report). Support systems on many reservations are already strained to serve the existing reservation populations, and are likely to be further strained if the migration to tribal homelands reaches levels that some tribal authorities anticipate.<sup>426</sup> The second factor that may be contributing to the migration of urban Indians back to their reservations is economic development. Anecdotal evidence suggests that as tribes make advances in economic development – through both gaming and other endeavors – larger numbers of urban Indians return to their ancestral homelands. For tribes such as the Gila River Indian Community (Arizona), Mille Lacs Band of Ojibwe (Minnesota), the Confederated Tribes of Grand Ronde (Oregon), and the Grand Traverse Band of

<sup>425</sup> They may also be being “pushed” off reservations by tribal political instability and an absence of economic opportunities – both of which may provide compelling incentives to move to urban areas.

<sup>426</sup> Communication with Rock Gobert, Jr., former Land Board Chairman of the Blackfeet Tribal Business Council. It is also possible that the migration of people will be off-reservation (see the Welfare section of this report).

Ottawa and Chippewa Indians (Michigan), their respective tribal governments are challenged to cope with a rapidly expanding reservation population.

### *Health*

Urban Indians suffer from inadequate access to quality health care. Though a majority of Indians live off-reservation, IHS funding to service this population accounts for only 1% of the annual IHS budget.<sup>427</sup> Even for programs and services for which there are line items in the IHS budget, urban Indian health programs receive few allocations. For example, although there are provisions in the IHS budget for adolescent substance abuse treatment, contract support costs, and environmental health programs, estimates indicate that only 22% of the funding level required to adequately serve the health needs of the urban Indian population is being provided.<sup>428</sup> Since 1972, the IHS has gradually increased its support for health-related activities in off-reservation settings, and today, the IHS funds 34 urban Indian health organizations operating in 41 sites throughout the country. These programs undertake a number of activities, ranging from the provision of outreach and referral services to the delivery of ambulatory and outpatient health services.<sup>429</sup> (See also the section on Health in this report.)

Although the IHS urban health programs serve large numbers of Indians, their services are not comprehensive. Indians living in some major urban centers, such as New York City and Los Angeles, are vastly under-served.<sup>430</sup> Due to the large numbers of Indians residing in the cities, and the relative emphasis of the IHS' services on reservation-based populations, recent studies indicate that only 20% of the total Native population is able to access the services provided by the IHS.<sup>431</sup> Approximately 100,000 American Indians are not able to access hospitals, health clinics, or contract health services administered by the IHS and tribal health programs because either they do not meet IHS eligibility criteria or they reside outside of IHS and tribal service areas.<sup>432</sup> Eligibility for IHS care is determined under federal statute and regulation and therefore depends largely – but not exclusively – on membership in a federally recognized tribe on or near a reservation.

According to a report commissioned by the Kaiser Family Foundation in 1997, public programs such as Medicare and Medicaid are playing an increasingly larger role in the financing of care for Native Americans living in urban areas.<sup>433</sup> Interestingly, the cost of services provided to Medicaid beneficiaries by an IHS or tribal medical facility are matched by the Federal Government at a 100% rate; thus the state

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<sup>427</sup> Mary Pierpoint, "Urban Indians Want a Share of Funds," *Indian Country Today*, April 19, 2000. Also see the statement of Ron Morton, Executive Director of the San Diego American Indian Health Center, Oversight Hearing before the Senate Committee on Indian Affairs on "A Partnership For A New Millennium: Addressing the Unmet Health Care Needs in Indian Country," May 21, 1998, accessed at [http://indian.senate.gov/1998hrsg/0521\\_rm2.htm](http://indian.senate.gov/1998hrsg/0521_rm2.htm).

<sup>428</sup> Morton, *op. cit.*

<sup>429</sup> IHS-94 Activity/Mechanism Budget Summary, Department of Health and Human Services, Public Health Service – Indian Health Service, accessed at [www.ihs.gov/adminmngrrsources/budget/cj2001/urban.pdf](http://www.ihs.gov/adminmngrrsources/budget/cj2001/urban.pdf).

<sup>430</sup> The IHS health center nearest to New York is located in Cherokee, NC, according to Fogarty, *op. cit.*, pp. 13-15. According to the Henry J. Kaiser Family Foundation website, accessed at <http://www.kff.org/content/2000/1525/American%20Indians.pdf>, Los Angeles County is not served by a single Native American health clinic.

<sup>431</sup> The Henry J. Kaiser Family Foundation website, accessed at <http://www.kff.org/content/2000/1525/American%20Indians.pdf>.

<sup>432</sup> IHS-94 Activity/Mechanism Budget Summary, *op. cit.*

<sup>433</sup> Schneider, Andy, and JoAnn Martinez, "Native Americans and Medicaid: Coverage and Financing Issues," The Center on Budget and Policy Priorities for the Kaiser Commission on the Future of Medicaid, accessed at <http://www.kff.org/content/archive/2101/polbren3.html>.

is not required to contribute any of its own funds toward the cost of care. This provision does not apply to urban Indian programs that are not IHS or tribal providers. Therefore, urban Indian facilities face greater challenges in adapting to the rapidly expanding managed care environment, as states have the incentive to maximize Natives' use of IHS and tribal providers.

### *Housing*

Obtaining adequate housing is particularly challenging for Indians living in urban centers. Many who leave the reservation are searching for economic opportunities not available in more rural areas, and the relatively high cost of rental housing in even low-cost cities is a strain on the budgets of these new arrivals. Purchasing housing is seldom a realistic option, particularly in places such as the San Francisco Bay area, the fourth most populous Indian urban center<sup>434</sup> (see Table 5), and the most expensive housing market in the country. In fact, as of 1990, only about 40% of American Indian households in the Bay area owned their home, compared to 57% of all Bay-area households. Further, 46% of low-income (<\$20,000) Native American homeowners and 73% of low-income Indian renters paid more than 35% of their income on housing costs.<sup>435</sup>

Moreover, urban Indians' housing is deplorable. Unlike other minority groups, American Indians have made little progress in overcoming the poverty from which they suffered upon arrival in the metropolitan areas. The strikingly low income levels at which the first waves of urban Indians began their lives as city residents have translated into overcrowded living conditions, low home ownership rates, a community living in the oldest housing stock available, and high levels of urban Indian homelessness. See Figure 10 for a sample of measures of housing distress among urban Indians.

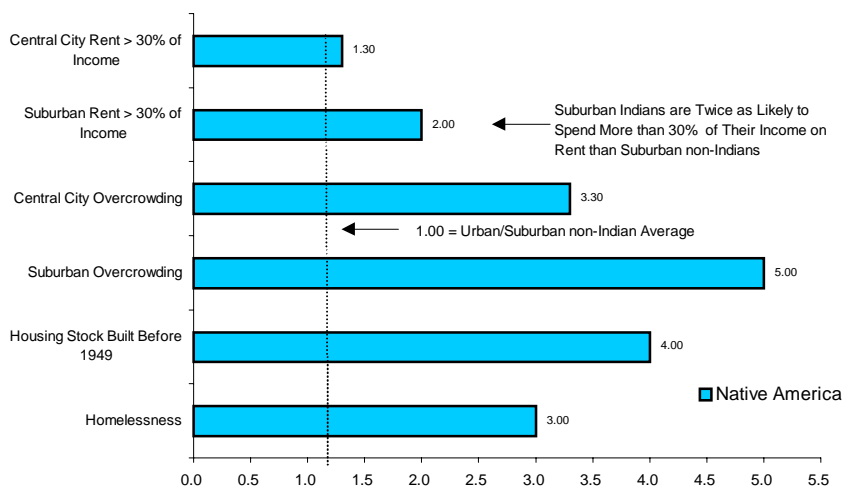
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<sup>434</sup> The San Francisco Bay area received an extremely large influx of Natives during the federal government's relocation efforts during the 1950s, as there were relocation centers established in San Francisco, San Jose, and Oakland.

<sup>435</sup> "Community Mobilization Project: A Strategic Plan for American Indians in the San Francisco Bay Area," United Indian Nations, Inc. 1996. Data collected from 1990 US Census.



Figure 10  
Measures of Urban and Suburban Indian  
Housing Distress



Source: *Housing Needs of Urban Native Americans Fact Sheet*, Center for Community Change, compiled from *Housing Problems and Needs of American Indians and Alaska Natives*, The Urban Institute, prepared for the US Department of Housing and Urban Development, May 1996.

As is the case for reservation-based Natives, the federal policy response to the housing needs of non-reservation American Indians and Alaska Natives is coordinated through HUD, though policies that affect urban Indians are significantly different. Throughout the 1990s, HUD has made strides in working with tribes on a government-to-government basis (e.g., NAHASDA) and is affording new opportunities for tribal governments to take a lead role in designing policy solutions (see the Housing section of this report). Since the majority of tribal governments limit services to tribal citizens living on or near their respective reservations, however, these federal-tribal advances tend not to benefit urban Indians. In reality, the federal approaches to urban Indian housing are largely indistinguishable from other approaches to dealing with other socio-economically distressed urban communities – a testament to the fact that urban Indian communities are not categorized as political entities the way tribes are. In some states, such as Minnesota, policy-makers have recognized the deficiencies of federal policy approaches, and thus have developed urban Indian housing programs that provide both homeownership (through below-market interest rate financing) and rental housing opportunities for low- and moderate-income American Indians. Again, such programs are directed towards communities or individuals and not towards urban Indians as a politically distinct group.

While federal policy approaches to urban Indian housing are largely indistinguishable from approaches for dealing with other low-income populations, several trends in the urban Indian population affect their housing needs and status. These include mobility and multigenerational urban Indian households.

Mobility rates for urban Indians are higher than for non-Indians in metropolitan areas.<sup>436</sup> Thirty-seven percent of Indian households in central cities moved to a different house within the same county from 1985 to 1990, whereas only 30% of non-Indian households moved during the same period. While 22% of Indian households in central cities moved to a different house in a different county, only 12% of non-Indians did. As the report notes, “[t]his mobility, between metropolitan areas and tribal areas, may have both positive and negative effects on the socio-economic and housing circumstances of urban Indians. If frequent trips are made to Indian areas that are far away (thereby necessitating a lengthier stay), both housing and job stability may be adversely affected. On the other hand, frequent trips to nearby Indian areas that can be made without interruption to employment or tenancy may minimize feelings of alienation and cultural isolation while not adversely effecting living standards.”

Another factor that affects urban Indian housing is the emergence of urban Indian families that, for the first time, are multigenerational. Many urban Indians prior to the 1980s found themselves in the cities as a result of the relocation efforts of the Federal Government and, as such, were first-generation city dwellers. Today, however, a growing number of Indians have been raised exclusively in metropolitan settings and do not think of themselves as having a reservation to “return” to. Like the mobility factor explained above, the effects of multigenerational urban Indian families on housing issues are not yet entirely clear.

#### *Urban Indian Community Centers*

As discussed in the Tribal-Federal Relations section of this report, federal Indian policy focuses on tribal political *entities* rather than on Native American *individuals*. When an individual Indian lives off-reservation, treaty rights ostensibly attach to the individual Indian and remain in place in the non-reservation environment. However, many Indians who reside in urban areas find that they are effectively cut off from the support systems and social structures that are available on-reservation. The denial of services or programs for individuals who leave the reservations for cities is a major debate in Indian Country, and individual Indians have fought for such services – at times to the point of litigation. The issue of individual versus collective Indian rights is ripe for further examination, and represents a “hot-button” issue for many urban Indians who have encountered the denial of services that would have been provided if they lived on the reservation.<sup>437</sup>

Many urban Indians and others believe that the issue of collective versus individual rights is an ironic predicament, since it was the Federal Government’s relocation programs that facilitated the rapid growth of the urban Indian population in the first place. While there appears to be a growing movement within the Federal Government to recognize and address the “invisible Indian Country,” these efforts are complicated by the fact that many federal programs and policies are based on treaties and provision of resources and services to Indians on or near reservations. One example of this, as noted above, is in the area of health care, where eligibility for IHS care is predicated on membership in a federally recognized tribe on or near a reservation. The government-to-government relationship tribes share with the Federal Government is, therefore, a double-edged sword – it appropriately recognizes the sovereign status of Indian nations, but at the same time, it makes the Federal Government ill-equipped to deal with Indians as individuals.<sup>438</sup>

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<sup>436</sup> Kingsley, Mikelsons, and Herbig, *op. cit.*, pp. 94-96.

<sup>437</sup> Communication with Sydney Beane, Senior Community Development Specialist at the Center for Community Change.

<sup>438</sup> This issue raises important questions about the suitability of federal programs being, in effect, predicated on blood quantum.

In response, since the late-1950s onward, urban Indian community centers have sprung up to address the needs of American Indians living in the more populous cities of the US.<sup>439</sup> These nonprofit organizations, like other civil society actors around the world, play an important role in filling many of service provision gaps left behind by limited or absent governmental involvement. Their role in the lives of urban Indians is especially important given that most federal programs are directed toward tribes as political entities, rather than individual American Indians or Alaska Natives. In many ways, urban Indian community centers serve as a proxy – albeit with limited effectiveness – for tribal governments, though urban Indian centers are not recognized as political entities and thus, are not able to access the same funds as their governmental counterparts. Typically, urban Indian centers rely upon a mixture of federal, state, foundation, and individual sources for funding.

Most metropolitan centers with significant Indian populations (e.g., Anchorage, Boston, New York City, Chicago, Minneapolis/St. Paul, Phoenix, Seattle, etc.) have community centers that cater to the needs of American Indians and Alaska Natives. These urban Indian centers' constituencies and service populations range in size: the American Indian Community House serves an estimated 27,000 Native Americans representing over 72 different tribes in New York City; the service population of the Southern California Indian Center is more than 100,000 and spans 7,000 square miles; and the Native American Indian Center of Boston, Inc., serves about 6,000 Indians in the greater Boston area. Likewise, the missions and service offerings of urban Indian centers are diverse. Some, like the Nebraska Urban Indian Medical Center, embrace a specific focus, while others, like the Minneapolis American Indian Center or the American Indian Center of Chicago, administer a multitude of programs and services.

To gain a better appreciation for the range of activities that urban Indian community centers are engaged in, consider some of the services that specific centers provide:

- *Employment and Training Programs.* The Minneapolis American Indian Center (Minnesota) was established in 1975 and offers classroom training to unemployed or underemployed Indian clients within a 71-county area. In addition to providing remedial education and/or GED preparation, the Center arranges for its clients a short-term work assignment with an employment agency, and provides on-the-job training, counseling, and job development and placement services.<sup>440</sup>
- *Education Programs.* Formed in 1970, the United Indians of All Tribes Foundation (Seattle, Washington) offers both Head Start and ECEAP programs to children of low-income families. The Early Childhood Education Programs are culturally relevant, focus on the whole child, and encourage family involvement. In addition, the Foundation offers kindergarten programs that include Indian cultural activities, as well as a childhood development center for developmentally delayed or disabled Native children.<sup>441</sup>
- *Health Services.* The American Indian Community House (New York, New York), created in 1969, has a health department staffed by Community Health Representatives, whose work includes health education, medical and dental referrals, community outreach, and the development of Native American-specific health-oriented programs. Other

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<sup>439</sup> One of the oldest urban Indian centers is the American Indian Center in Chicago, which began formal operations on November 1, 1953. Arndt, Grant, “ ‘Contrary to Our Way of Thinking’: The Struggle for an American Indian Center in Chicago, 1946-1953,” *American Indian Culture and Research Journal, Special Edition: American Indians and the Urban Experience*, Vol. 22, No. 4, 1998, pp. 117-134.

<sup>440</sup> The Minneapolis American Indian Center can be accessed at <http://www.maicnet.org>.

<sup>441</sup> The United Indians of All Tribes Foundation can be accessed at <http://unitedindians.com>.

programs within the department include: mental health, a youth council and theater project, food and clothing banks, and free daily hot lunches during the weekday for all community members. It also has a women's wellness circle project.<sup>442</sup>

- *Cultural and Heritage Programs and Activities.* Many urban Indian centers host community gatherings to bring together their constituents to celebrate Native American traditions. Because the constituency of nearly every urban Indian center is multi-tribal, centers often rely upon "pan-Indian" activities (e.g., intertribal powwows), though many also engage in tribe- or region-specific cultural activities.

The summaries above only scratch the surface of the programs that urban Indian centers administer. Some of the larger centers also have foster care recruitment and placement programs that seek to place Indian children in Indian families in accordance with the *Indian Child Welfare Act*; some have programs that target urban Indians living with HIV or AIDS; and yet others have established museums, art galleries, and theaters.

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<sup>442</sup> The American Indian Community House can be accessed at <http://www.aich.org>.

### **The Southern California Indian Center: An Example of Urban Indian Community Development**

Founded in 1968, the Southern California Indian Center, Inc. (SCIC) is a community-based organization that serves the 100,000-member American Indian community of greater Los Angeles. SCIC's mission is fourfold: (1) to promote, foster and encourage programs for the general welfare, education, and social benefit of American Indians; (2) to establish and maintain education, cultural, economic, and recreational programs for American Indians; (3) to eliminate barriers of discrimination of race, religion, and gender; and (4) to educate and broaden the knowledge of the American public on Indian issues and culture, regarding its unique positive contributions to American society. To this end, SCIC has developed education programs, senior citizen services, Indian child and family services, and employment and training programs.

In addition to these programs and services, the SCIC is currently participating in a national urban Indian community development project. The project works with a number of urban Indian community-based organizations and local organizations in an effort to foster a national support system for development and to enhance the capacity of local community-based organizations. Specifically, through a Community Development Corporation it established, the SCIC is simultaneously engaged in three sets of activities:

*Affordable Housing Development* – the SCIC is advocating to be designated as a Housing Authority by HUD, which would give it access to new sources of funding. When this process is complete, the SCIC will develop 50 housing units for seniors and 50 units for single Indian parents.

*Community Economic Development* – the SCIC is organizing an Empowerment Fair that will bring together urban Indians, college recruiters, banking representatives, and speakers from the Small Business Administration to help educate and spark community development.

*Workforce Development* – collaborating with the Eyapaha Institute,\* the SCIC is establishing a curriculum and training program to provide a springboard for its clients to propel themselves into professional careers in the entertainment and multimedia industries.

The SCIC and its institutional partners believe that empowering urban Indians requires a holistic approach to community development. Bolstering the supply of affordable housing, matching the under- and unemployed with job opportunities, and developing a capable workforce through training are all important goals in their own right, but it is only when such efforts are coordinated that sustainable community development can take hold.

Sources:

\*The Eyapaha Institute is a nonprofit organization established in 1998 to create job training programs and employment opportunities for American Indians, Alaska Natives, and Native Hawaiians who are interested in the entertainment and multimedia industry.

This mini-case study is substantially derived from communication with the Paula Starr, Executive Director of the SCIC, as well as from the SCIC website, accessed at <http://www.indiancenter.org/>.

*Self-Determination for Tribes and its Effect on Urban Indians*

With large percentages of American Indians living off the reservations, there is debate over how much attention, effort and funding should appropriately be directed toward the reservation population. As discussed above, policy in the US has long been focused on tribal political entities rather than individual Indians. This concentration is prevalent to such a degree that non-reservation Indians are sometimes referred to as the “forgotten majority.” Has too little consideration been paid to the needs of urban Indians?

From the broad view formed in the preparation of this report, the answer is clearly “yes;” too little attention has been paid to those residing away from the reservations, but additional efforts centering on urban Indians should not come at the expense of continued support of tribal political entities and the reservations. There are a number of reasons for these conclusions. First, community centers are unable to address all of the needs of urban Indians – much work remains. Second, many of the problems faced on the reservations flow to and from the cities as individuals migrate from reservations to urban centers and back again. Third, strong individuals contribute to the self-determination and the self-sustaining capacities of the tribes. Finally, individual Indians benefit from stronger Indian nations.

Community centers serving Indians living in the cities are, by and large, staffed by dedicated individuals deeply interested in assisting Indians who have left the reservations. However, a number of the centers focus on an extremely wide range of issues that urban Indians struggle with in their efforts to thrive in a town or metropolitan environment, and few staff members are able to provide expert assistance in every area of need. In addition, a lack of resources and rampant socio-economic distress constantly threaten to overcome some portion of the urban Indian centers. Home ownership, a critical measure of family achievement, is but one facet of urban living that many Indian community centers cannot adequately assist with.<sup>443</sup> As discussed in the Housing section of this report, lack of homeownership and substandard living conditions spill over and exacerbate the myriad other social dilemmas affecting Indians. The difficulties faced by community center staff in assisting urban Indians achieve homeownership, e.g., technical training sufficient to navigate the mortgage market in a low-income neighborhood, are mirrored in their attempts to address other issues faced by off-reservation Indians.

The measures of socio-economic distress discussed throughout this report are encountered by individual Indians in the cities as well as on the reservations. Migration to and from the cities is often an attempt to escape these community ills, but is not effective when similar problems are simply repeated in the new setting. Substandard housing, drug and alcohol abuse, high unemployment (due to a lack of jobs on the reservations and due to a lack of skills in the cities), lack of reliable transportation and isolation are all frequently cited as hardships faced by Indian regardless of their place of residence. The problem of isolation illustrates what, initially, seems to be a counterintuitive example of this phenomenon. Rural isolation attendant to reservation living is well documented and widely accepted, even among mainstream Americans who spend little time pondering the realities of life as an American Indian. Unfortunately, moving to an urban setting does not easily solve the problem of isolation. The broader community often does not understand Indians who have been transplanted to urban settings, and the misconception of “all

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<sup>443</sup> Communication with Sydney Beane at the Center for Community Change, and Rosemary Richmond at the American Indian Community House.

Indians being taken care of by the federal government” persists.<sup>444</sup> The isolation felt by Indians living in the cities has been best documented in studies of Indian students and the difficulties they face while attempting to join the conventional educational community.<sup>445</sup>

Strong individual Indians benefit their tribes, even if those individuals happen to dwell within urban centers. Numerous tribes actively embrace their membership regardless of domicile, and better educated and economically capable individuals are able to give back to the reservation communities by sharing the skills, experiences and leadership qualities developed in interactions with urban populations and institutions such as schools and places of employment. Additionally, community development is increasingly taking place in a context of regional zones dominated by a hub town or city. Capable Indian leadership familiar with the social, political and economic mechanisms of these urban centers are best suited to guide reservation populations in their increasing contacts, partnerships and conflicts with municipal citizenry. These beneficial outcomes accrue to tribal political entities when their talented individuals reside off-reservation, and are even more directly helpful as migration back to the reservations continues.

Likewise, stronger Indian nations clearly benefit individual Indians, even when those individuals reside off-reservation. The most obvious benefit for tribal members able to easily travel back “home” to the reservations are site-specific services, such as health or dental care, that are only available at particular on-reservation locations. Additional benefits are those available to off-reservation members regardless of domicile, such as educational assistance grants or loans. Self-determination for the tribes benefits all Indians taking advantage of these programs, as more capable administration of these federally funded resources at the tribal level often assures more efficient service delivery.

Further, stronger Indian nations provide a stronger sense of tribal identity, particularly for those living off-reservation and facing the lack of identity and sense of isolation so often encountered in the cities. This sense of tribal identity is partially an outgrowth of pride in Indian citizenship – after decades of shame over Indian heritage, this is a welcome change in some circles – partially a result of tribes’ increasing sophistication in dealing with state and federal governments, and partially a testament to the strong family ties maintained by many Indian families who are split between on- and off-reservation homes.

There are many organizations focused on serving the urban Indian population. The list below is but a small sample of those serving Indian Country in late 2001, and is not intended as an endorsement of any specific organization. It is instead intended to serve as a starting point for those wishing to learn more about building strong Indian nations by creating and fostering strong individual Indians.

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<sup>444</sup> Communication with Sydney Beane at the Center for Community Change.

<sup>445</sup> See, for example, Butterfield, Robin “Blueprints for Indian Education: Improving Mainstream Schooling,” Education Resources Information Center, accessed at <http://www.ael.org/eric/digests/edorc942.htm>, and Lin, Ruy-Lin, Deborah LaCounte, and Jeanne Eder, “A Study Of Native American Students In A Predominantly White College,” *Journal of American Indian Education*, Volume 27 Number 3, May 1988.

*Sample of Urban Indian Organizations*

<b>Organization</b>	<b>Address</b>	<b>Phone</b>	<b>Fax</b>	<b>Web</b>
American Indian Center of Chicago	1630 West Wilson Chicago, IL 60640	773-275-5871		<a href="http://www.aic-chicago.org">www.aic-chicago.org</a>
American Indian Center of Indiana	7128 Zionsville Rd. Indianapolis, IN 46268	317-347-5160		<a href="http://www.americanindiancenter.com">www.americanindiancenter.com</a>
American Indian Center of South Carolina	4004 Rosewood Drive Columbia, SC 29205	803-790-8214		<a href="http://www.angelfire.com/sc/americanindiancenter/">www.angelfire.com/sc/americanindiancenter/</a>
American Indian Community Center	905 East Third Avenue Spokane, WA 99202-2246	509-535-0886	509-534-7210	
American Indian Community House, NYC	708 Broadway 8th Floor New York, NY 10003	212-598-0100	212-598-4909	<a href="http://www.aich.org">www.aich.org</a>
American Indian Education Center of Cleveland	PO Box 605157 Cleveland, OH 44105-0157	216-341-0000		<a href="http://community.cleveland.com/cc/AIECI">http://community.cleveland.com/cc/AIECI</a>
American Indian Graduate Center	4520 Montgomery Blvd. NE Suite 1-B Albuquerque, NM 87109-1291	505-881-4584		
American Indian Society of Washington DC	PO Box 6431 Falls Church, VA 22040-6430	703-231-6466		<a href="http://www.tuscaroras.com/ais/index.html">www.tuscaroras.com/ais/index.html</a>
Baltimore American Indian Center	13 South Broadway Baltimore, MD 21231	410-675-3535		<a href="http://www.tuscaroras.com/jtwigle/baic/index.html">www.tuscaroras.com/jtwigle/baic/index.html</a>
Minneapolis American Indian Center	1530 E Franklin Ave Minneapolis, MN 55404	612-879-1700	612-879-1795	<a href="http://www.maicnet.org">www.maicnet.org</a>
Minnesota Indian Women's Resource Center	2300 15th Ave South Minneapolis, MN 55404	612-728-2000	612-728-2039	<a href="http://www.miwrc.org">www.miwrc.org</a>
NAES College	NAES College 2838 West Peterson Chicago, IL 60659	773-761-5000		
National Native American AIDS Prevention Center	436 14th Street Suite 1020 Oakland, CA 94612	510-444-2051	510-444-1593	<a href="http://www.nnaapc.org">www.nnaapc.org</a>
Native Men's Residence (Toronto)	14 Vaughn Road Toronto, ON M6G 2N1	416-652-0334	416-652-3138	<a href="http://www.nameres.org">www.nameres.org</a>



Nebraska Urban Indian Medical Center	1935 Q Street Lincoln, NE 68503	402-434-7177		
North American Indian Center of Boston	105 S Huntington Ave Jamaica Plain, MA 02130	617-232-0343	617-232-3863	<a href="http://www.bostonindiancenter.org">www.bostonindiancenter.org</a>
San Diego American Indian Health Center	2630 1st Avenue San Diego, CA 92103	619-234-2158	619-234-0206	<a href="http://www.sdaihc.org">www.sdaihc.org</a>
Seattle Indian Center	611 12th Ave South, Suite 300 Seattle, WA 98144	206-329-8700	206-328-5983	<a href="http://www.seattleindiancenter.com">www.seattleindiancenter.com</a>
Seattle Indian Health Board	PO Box 3364 Seattle, WA 98114	206-324-9360	206-324-8910	<a href="http://www.sihb.org">www.sihb.org</a>
Southern California Indian Center	10175 Slater Ave Suite 175 Fountain Valley, CA 92708-4702	714-962-6673	714-962-6343	<a href="http://www.indiancenter.org">www.indiancenter.org</a>
Tacoma Indian Center	1556 Market Street Tacoma, WA 98402	253-593-2707	253-593-2608	
The Denver Indian Center	4407 Morrison Rd. Denver, CO 80219	303-936-2688		<a href="http://www.alphacdc.com/dic/">www.alphacdc.com/dic/</a>
The Native Project	1803 West Maxwell Spokane, WA 99201	509-325-5502	509-325-9839	
United Indian Nations, Inc.	1320 Webster Street Oakland, CA 94612	510-763-3410	510-763-3646	<a href="http://www.uin.net">www.uin.net</a>
United Indians of All Tribes Foundation	Discovery Park PO Box 99100 Seattle, WA 98199	206-285-4425		<a href="http://www.unitedindians.com">www.unitedindians.com</a>
Young Canada Works for Urban Aboriginal Youth		613-563-4844 ext. 25		

## *LAND*

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- Even though the reservation system has borne bitter fruit in the past, land remains for Indians a hallmark of identity, a barometer of community integrity, and a resource for ongoing cultural and socio-economic recovery. There are 311 reservations scattered throughout 36 states, and in the continental US, 55 million acres are under BIA trust jurisdiction (45 million in tribal trust and 10 million in individual Indian trust status.) In Alaska, which does not have reservations, Native corporations control 44 million acres.
- The fractionation of land interests and the historical alienation of Indian lands by non-Indians create difficult land management burdens and jurisdictional complexity, both of which challenge tribal economic development, land management and home ownership. For example, the difficulty of collateralizing lands held in trust by the US government on behalf of tribal and individual owners frustrates lending on reservations.
- Through innovative land-use planning, tribes are increasingly ameliorating conflicts with other jurisdictions, facilitating economic development and expanding their cultural and political dominion.
- Agriculture is a dominant and increasing form of land use on trust land, yet for structural reasons having to do with collateralization, fractionation, lack of technical assistance and bureaucratic obstacles, Indian agriculture remains an undercapitalized and unproductive endeavor in comparison with non-Indian benchmarks.

Table 7  
Indian Land Designations

Official Census Name Designation	Number	States	Number of States
Reservation (federal)	202	AL, AZ, CA, CO, CT, FL, IA, ID, KS, LA, ME, MI, MN, MS, MT, NC, ND, NE, NM, NV, NY, OK, OR, RI, SD, TX, UT, WA, WI, WY	30
Rancheria	53	CA	1
Pueblo	20	AZ, NM, TX	3
Reservation (state)	12	CT, GA, MA, MI, NJ, NY, SC, VA	8
Community	9	AZ, CA, MI, MN, NM, WI	6
Colony	9	CA, NV	2
Other	6	AK, CA, FL, ME, MN	5
TOTAL:	311		36
Alaska Native Villages*	229	AK	1

Note: These totals do not encompass geographic areas over which tribes have jurisdiction over Indians or programs serving Indians (see note 450).

\* The 1990 Census enumerates 218 Alaska Native Areas, yet as of 2001 there are 229 federally recognized tribes in Alaska.

Source: US Bureau of the Census, Geographic Division, special tabulation of American Indian Reservation and Trust Land Areas as defined in US Census, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas*, p. A-2; Cornell, *et al.*, *Alaska Native Self-Governance*, pp. A-1 - A-8.

Indians have always derived political, economic, nutritional, cultural, and spiritual sustenance from the land. Indian land boundaries define what is (and is not) under tribal jurisdiction across a host of policy issues. Land controlled by Indians fosters economic development by supplying minerals, game, farmland, and timber, by supporting taxing authority, and by providing business and home sites. Indian lands house, among other things, the remains of ancestors and their artifacts, the cornerstones of worldviews, and even moral lessons from the past.<sup>446</sup>

Indeed, as bitter as the history of reservations and life on them may have been, Indian lands remain an integral core of modern Indian policy, economy, and identity. To appreciate the special regard of modern Indians for the land, consider the following:

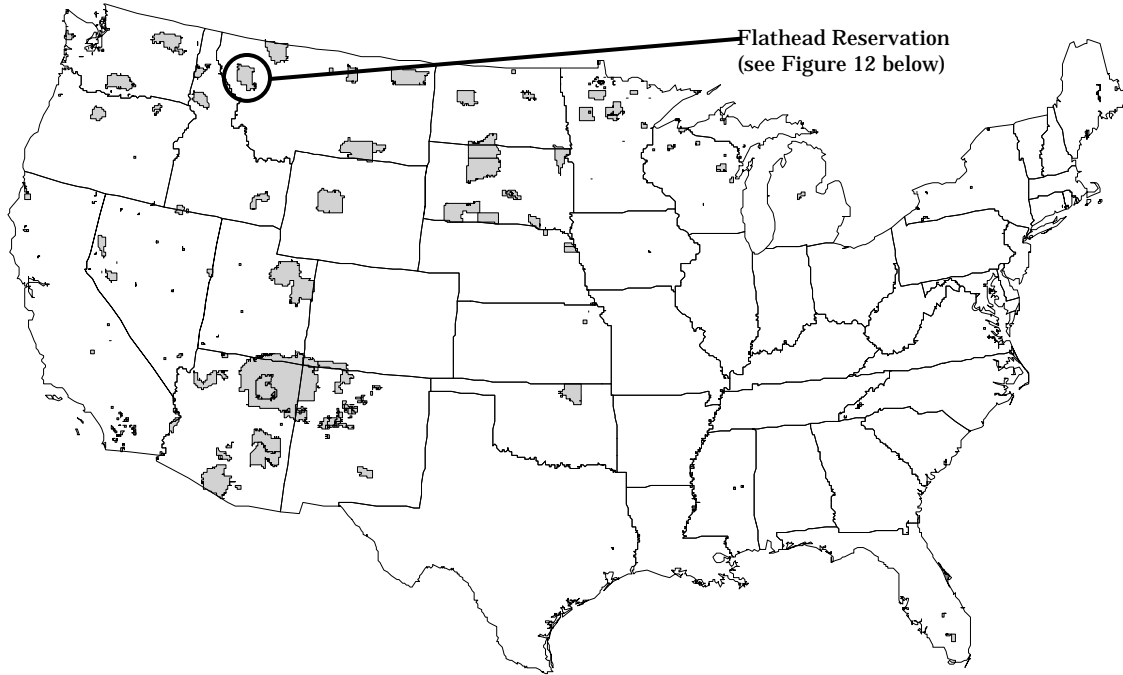
- Many of the Lakota tribes have turned down a Supreme Court judgment of \$106 million in 1980 for the wrongful alienation of their lands, holding out, instead for the prospect of the return of their sacred Black Hills.<sup>447</sup> The funds, untouched and earning interest since 1980, now total more than \$380 million.
- The Navajo generally eschew the federal definition of their reservation boundaries, defining their homeland instead as the land between their four sacred mountains.
- Nearly 30 years into a costly battle over the Sandia Mountains (New Mexico) that had its origins the middle of the 19<sup>th</sup> century, Governor Stewart Paisano of the Sandia Pueblo

<sup>446</sup> See, e.g., Basso, Keith H., *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque, NM: University of New Mexico Press, 1996) for a discussion of how geographic names offer moral lessons.

<sup>447</sup> Egan, Timothy, "The Nation: Mending a Trail of Broken Treaties," *The New York Times*, June 25, 2000.

reflected, “How ever long it takes to get that mountain protected or get it back, we’re willing to continue the fight.”<sup>448</sup>

Figure 11  
Indian Land Areas of the Lower 48 States



Note: Numerous Indian land areas (e.g., scores of California rancherias) are too small to appear on a national-scale map. For more detail, see <http://www.gdsc.bia.gov/products/default.htm#lands1>.  
Source: US Bureau of the Census.

### *Status*

The legacy of past federal Indian land policies and continuing federal duties over Indian lands create a complicated set of property rights and jurisdiction that stymie tribal objectives in critical areas such as economic development, land management, and home ownership. While an overview of reservation lands (e.g., the shaded areas in the map of Indian lands) in Figure 11 leaves the impression that tribes rule a relatively large land area, the ownership of reservation land is often divided among tribes, individual Indians, non-Indians, the Federal Government and state and county governments.

<sup>448</sup> “Pueblo Continues Sandia Mountain Fight,” *Indianz.com*, December 13, 2000, accessed at <http://www.indianz.com/SmokeSignals/Headlines/showfull.asp?ID=law/12132000-2>, January 12, 2001. Note that while a number of high-profile land claims such as this one still command substantial media attention (e.g., the claim of the Oneida Nation of New York), the great tide of land claims that peaked in the mid-twentieth century has ebbed substantially.



Upon the making of treaties (or the making of executive order reservations), Indian aboriginal property rights were converted into reservation property held in trust by the Federal Government on behalf of tribes.<sup>450</sup> As trustee, the Federal Government has obligations to manage the lands for the tribes' benefit (e.g., to prevent alienation, to obtain market values for resources on the lands). Up until the passage of the *Indian General Allotment Act* of 1887,<sup>451</sup> the vast majority of these lands were held and managed directly by the Federal Government for the tribes. The *Allotment Act* is largely responsible for creating the status quo of multitudinous property rights and jurisdictions commonly referred to as "checkerboarding." The Act divided reservations into tribal lands, individual allotted lands, and "surplus" lands. The Federal Government auctioned off the surplus lands to all comers. A large number of the individual allotments – though meant to establish Indian family farms – devolved to non-Indian individuals and off-reservation governments as they fell prey to encumbrances, tax liens, bankruptcy, and outright swindles.<sup>452</sup> While the consequences of this policy vary from reservation to reservation, in aggregate, the result was the passing of nearly two-thirds of Indian lands into non-Indian ownership between 1887 and 1934, when the Act was repealed. In that period, 90 million of 138 million acres passed into non-Indian hands, and typically the land remaining in Indian hands was of lower quality – 20 million of the 48 million remaining in Indian hands was desert or semidesert.<sup>453</sup>

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<sup>450</sup> Indian lands fall into a number of categories some of which are universal (e.g., trust lands) and others of which arise out of specific regional histories such as California rancherias, New Mexico pueblos, and state-recognized reservations (e.g., the Catawba Reservation, South Carolina). Still other Indian rights to land arise out of treaty stipulations (e.g., off-reservation traditional and customary hunting areas around the Chippewa tribes). In the 1990 Census, the US Census enumerated three broad categories of Indian land:

- 1) Federal American Indian reservations are "areas with boundaries established by treaty, statute, and/or executive order and recognized by the Federal Government as territory in which American Indian tribes have jurisdiction."
- 2) "State reservations are lands held in trust by State governments for the use and benefit of a given tribe."
- 3) "Trust lands" which are added to Federal "reservation" land counts if they are "tribal trust lands and inhabited individual trust lands located outside of the reservation boundary." (Note that much of the Census's "Federal American Indian reservation" lands are legally *trust* lands.)

The Census also tabulates data for "Tribally Designated Statistical Areas" and "Tribal Jurisdictional Statistical Areas," which recognize areas where tribes have jurisdiction over Indians or over the provision of services to Indians without having jurisdiction over land. Table 7 shows the Census's enumeration of the first two categories of land and lists the number of federally recognized Alaska Native Villages. US Census, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas*, p. A-2.

<sup>451</sup> Also known as the *Dawes Act*.

<sup>452</sup> Wilkinson, *American Indians, Time and the Law*, *op. cit.*, p. 20.

<sup>453</sup> Canby, *op. cit.*, p. 22.

### Commonly Asked Questions about Property Rights and Trust Relationship

#### *Do Tribes Have Property Rights?*

Rights created in treaties, statutes and executive orders are property rights, for example, the rights to hunt, fish, or gather on lands ceded to the United States. There are also judicially-recognized reserved rights created by actions of the United States, for example the right to water for an Indian reservation arising from the creation of Indian reservations. These kinds of rights are property rights which are entitled to the same protection from taking just as other citizen's property rights are under the 5<sup>th</sup> Amendment of the United States Constitution.

#### *What is the Federal Indian Trust Responsibility?*

The Federal Indian Trust Responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). It was first discussed by the US Supreme Court Chief Justice John Marshall in *Cherokee Nation v. Georgia*, (1831). Over the years, the trust doctrine has been the center of numerous other Supreme Court cases. It is one of the most important principles in federal Indian law.

The federal Indian trust responsibility is a legally enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings between the United States and the tribes.

Source: *American Indian and Alaska Natives*, Office of American Indian Trust, September, 1999, Page 8.

Today, about 55 million acres are under the BIA's trust jurisdiction in the lower 48 states,<sup>454</sup> compared with 70 million in overall reservation and trust acreage.<sup>455</sup> Alaska Native corporations and villages hold an additional 44 million acres, making the total acreage under Indian control (100 million acres) equivalent in size to all wilderness areas in the National Wilderness Preservation System.<sup>456</sup> Of the 55 million trust acres, 45 million are in tribal trust and 10 million are in individual Indian trust. The remainder is in Indian, non-Indian, and federal, state, or local government fee-simple land. Some reservations, such as the White Mountain Apache Tribe's Fort Apache Reservation are primarily composed of trust lands (only five out of 1.6 million acres are fee simple). Others are heavily allotted. For example, the Cheyenne River Sioux (South Dakota), Flathead (Montana) and Nez Perce (Idaho) reservations are 47%, 48%, and 88% owned by non-Indians, respectively.<sup>457</sup> In addition, a number of reservations contain modest federal, state, and local municipal lands as well. The Pine Ridge Reservation, for example, contains within its boundaries the Badlands National Park.

Several attributes of this checkerboard arrangement confound tribal development.

<sup>454</sup> See, e.g., Bureau of Indian Affairs, "Lands Under the Jurisdiction of the Bureau of Indian Affairs as of December 31, 1996," accessed at <http://www.doi.gov/bia/realty/area.html>.

<sup>455</sup> US Bureau of the Census, Geographic Division, special tabulation of American Indian Reservation and Trust Land Areas as defined in US Census, *op cit*.

<sup>456</sup> First Nations Development Institute, "Native American Lands."

<sup>457</sup> Tiller, Veronica E. Velarde, *American Indian Reservation and Trust Areas* (Washington, DC: US Department of Commerce, Economic Development Administration, 1996), pp. 555, 401, 338.

- *Fractionation* through inheritance, the *Allotment Act* has left tribes and Indian individuals with vast numbers of miniscule ownership interests in trust lands (in the extreme, summing only to square inches). While the *Indian Land Consolidation Act* of 1983 has reduced fractionation somewhat, the pace of consolidation under that Act has been far exceeded by continuing fractionation.<sup>458</sup> This problem confounds tribal land management initiatives and burdens the Federal Government with record-keeping costs.<sup>459</sup>
- *Jurisdiction* is substantially complicated by non-Indian ownership. Recently, courts have cut back on tribal government jurisdiction over non-Indian lands on reservations (see the Legal section of this report), and thus, tribal governments are forced to defer to non-Indian authorities on the reservation or expend resources cross-deputizing and jointly managing with off-reservation governments. While substantial innovation in partnering with other governments is developing in Indian Country, jurisdictional uncertainty continues to cloud investment decision-making, law enforcement, and resource management.
- *Taxation* by non-Indian governments of on-reservation fee lands raises hurdles to tribal land integration efforts since those governments increasingly insist that the tribes make them whole if the tribal purchases are from tax-paying landowners. Moreover, in certain states both the state and the tribe assert authority to tax the same investments (e.g., pipeline rights-of-way), and the resulting double-taxation of investment further discourages economic development.
- *Collateralization*, despite a number of innovative Indian efforts, is difficult, if not impossible, to effectuate on trust land, and thus remains a problem to individual Indian owners. As a legal matter, federal trust obligations create a very high threshold for lands to be alienated from tribes through repossession of non-performing loans. As a behavioral matter, the legacy of the *Allotment Act* and a widely shared unwillingness to put additional Indian lands at risk makes individual land owners averse to encumbering lands. Thus, such basic ingredients of economic and community development as home ownership and securitized lending face hurdles higher than would otherwise be the case (see the Economic Development and Housing sections of this report).
- *Control* of land by landowners is rendered difficult by both fractionation and BIA approval processes. The former problem arises when, for example, 100 acres passes to four heirs of equal interest. Instead of each owning 25 acres, each owns a 25% interest in the property. Particularly in properties where the interests are held among numerous small holders, the collective action problems of assembling a controlling interest are burdensome and time-consuming. The latter problem arises where the BIA has to approve disposition of land, e.g., under a lease. As trustee, the Secretary has a fiduciary

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<sup>458</sup> Consolidation by tribal governments under the Act was curtailed by a Supreme Court ruling that struck down the escheat provisions of the law (*Babbitt v. Youpee* (117 S. Ct. 727, 1997)). Subsequent amendments to the Act reform the process of consolidation and encourage tribal acquisition, yet the amendments remain untested in effect and law (*Indian Land Consolidation Act Amendments of 2000*, PL 106-462). US General Accounting Office, *Indian Programs: Profile of Land Ownership at 12 Reservations, Briefing Report to the Chairman, Select Committee on Indian Affairs, US Senate*, GAO/RCED-92-96BR (Washington, DC: US General Accounting Office, February, 1992), p. 2.

<sup>459</sup> On a sample set of 12 reservations, 83,000 land tracts are associated with 1.1 million records, 60% of which are for “small” ownership interests – as small as one 400,000<sup>th</sup> of one percent. *Ibid.*, pp. 1-2.



duty to oversee land disposition. Thus, trust landowners cannot develop lands without what turn out to be lengthy reviews, and this stymies development.

### *Current Efforts*

Notwithstanding these obstacles, tribes have made strides in the Self-Determination Era to reduce “checkerboarding”, increase lending, reduce double taxation, or otherwise work around the harmful effects of “checkerboarding.” Despite being irked at having to “buy back what was stolen from Indians” – and at a premium, at that – tribal councils around the country are purchasing both on- and off-reservation lands at an unprecedented pace. The Confederated Tribes of the Warm Springs Reservation (Oregon), for example, were in possession of only about 60% of their 650,000-acre reservation when they began repurchasing their reservation in the 1960s; today virtually all of it is in Indian hands. The Grand Traverse Band of Ottawa and Chippewa Indians (Michigan), had 12½ acres to its name shortly after its re-recognition by the Federal Government in 1980; today it owns more than ten times that much.<sup>460</sup> Gaming revenues account for much of this reacquisition, yet as the Warm Springs example indicates, rebuilding reservation land bases has been a priority for decades.

In addition, a decade-old intertribal group, the Indian Land Working Group, has helped to coordinate Indian policy efforts on a federal and tribal basis. It has convened the annual Land Consolidation Conference, conducted a number of studies, presented congressional testimony, coordinated the development of legislation, and generally served as an information clearinghouse for legal opinions, technical assistance, and best practices.<sup>461</sup>

Finally, individual Indians have joined a class-action lawsuit against the BIA demanding an accounting of the trust assets the Federal Government has been holding on Indians’ behalf for a century-and-a-half or more. It is hoped that the outcome of this suit will be the development of a full accounting of Individual Indian Monies accounts and an ample record-keeping infrastructure in the BIA. Both will be essential for the future accountability of trust land leasing, valuation, and payments. (See also textbox in section on Tribal-Federal Relations.)

### *Managerial Capacity-Building*

In addition to directly confronting land integration issues through purchases, tribes have developed land-use planning approaches that serve to enhance tribal control over lands already in their control and, when done in coordination with other jurisdictions, serve to minimize jurisdictional disputes. Such approaches can take the form of conventional municipal land-use zoning, regulation, or planning. For example, the Gila River Indian Community (Arizona) land-use planning department zones, regulates, and manages current and future uses of the reservation. Or, land-use planning approaches can take more traditionally oriented forms, such as the Navajo Nation’s grazing rights arrangements. Increasingly, tribal land management takes the form of cooperative agreements with off-reservation jurisdictions – agreements that simultaneously reduce conflict and litigation, increase government-to-government cooperation, and acknowledge the sovereign powers of the reservation government.<sup>462</sup>

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<sup>460</sup> Weeks, George, *Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians* (Peshawbestown, MI: Grand Traverse Band of Ottawa and Chippewa Indians, 1992), pp. 18, 21; communication with George Bennett, Chairman, Grand Traverse Band of Ottawa and Chippewa Indians, July 1999.

<sup>461</sup> See, e.g., Indian Land Working Group, *Land Consolidation Manual* (Fredericksburg, VA: First Nations Development Institute, 1997).

<sup>462</sup> The Swinomish Indian Tribal Community, for example, has instituted a Cooperative Land Use Program consisting of a Memorandum of Understanding, a Draft Comprehensive Land Use Plan, and a Memorandum of Agreement negotiated with

Tribes are also expanding their influence beyond the strict property boundaries of their reservations. From the Northwest Indian Fisheries Commission to the Great Lakes Indian Fish and Wildlife Commission,<sup>463</sup> tribes and intertribal organizations are undertaking the cooperative management of off-reservation resources, many of which were promised under treaties yet heretofore not available to the entitled Indians. Similarly, tribes have been developing their own internal managing capabilities to such an extent that they are filling vacuums left by state and federal land managers off the reservations. So, the Nez Perce (Idaho) manage the re-introduction of endangered gray wolves over 13 million acres of federal land in their traditional non-reservation territory,<sup>464</sup> the Confederated Tribes of Grand Ronde (Oregon) manage a watershed that extends onto US Forest Service Land under a cooperative agreement with the Service, and the Alaska Native Village of Quinhagak polices non-Indian sportsmen in a critical watershed outside their village lands.<sup>465</sup>

On a cultural level, the Elders Cultural Advisory Council of the San Carlos Apache Tribe is recording with other Apache tribes their collective knowledge of the on- *and* off-reservation Apache place names as a way of preserving not only the Apache heritage (see note 446), but hopefully the places themselves.<sup>466</sup> And the activity is not an indulgence in nostalgia: The place names are entered into a state-of-the-art geographic information system and used to guide on-reservation forest management policy and to influence developers off the reservations.

#### Sacred Land

“A Crow chief, told that the government owned his land, said that they could not own it because the first several feet down consisted of the bones of his ancestors and the dust of the previous generations of Crow people. If the government wanted to claim anything, the chief continued, it would have to begin where the Crow people’s contribution ended (p. 253).”

The above story highlights the importance of recognizing that Native Americans are part and parcel of the land physically. It is impossible to talk about Native American culture and history without discussing the land and their relationship to it. Native tribes are shaped and taught by the land they inhabit. The peculiarities of their respective areas produce certain basic forms of personality and social identity that could not be produced in any other way. Tribes do not necessarily own the land, as non-natives perceive ownership. The human occupants of the land are only one of many interrelated and connected inhabitants.

Source: Deloria Jr., Vine, *For this Land: Writings on Religion in America* (New York, NY: Routledge, 1999)

In the arena of economic development, difficulties with collateralization traditionally have been circumvented for tribal investment through federal loan guarantees. However, that approach is not fully satisfactory, as it cannot cover the full scope of investment needs – public or private. Some innovation is

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Skagit County. The arrangement streamlines the approval of economic activity on the reservation by avoiding inter-jurisdictional conflict in a heavily checkerboarded context. See, e.g., Zaferatos, Nicholas C., “Cooperative Strategies to Overcome Jurisdictional Conflicts in Tribal Community Planning, a Case Study of the Swinomish Indian Tribal Community,” *Planning and Law Division Newsletter*, The American Planning Association, July/August 2000.

<sup>463</sup> Both of these organizations are multi-tribe membership organizations.

<sup>464</sup> Harvard Project on American Indian Economic Development, *Honoring Nations: Tribal Success Stories, 1999*, *op. cit.*, pp. 4-5.

<sup>465</sup> Cornell, Taylor, Grant, Fischer, and Morehouse, *op. cit.*, pp. 40-44.

<sup>466</sup> See [http://www.ksg.harvard.edu/hpaied/h\\_final2.htm](http://www.ksg.harvard.edu/hpaied/h_final2.htm).

taking place wherein tribes agree to pick up loan obligations in lieu of putting Indian lands up as collateral; nonetheless, this remains a stubborn problem in Indian Country (see the Economic Development section of this report).

### *Land-into-Trust*

Currently, the placing of land into trust (whereby Indians, having purchased fee-simple lands, petition the Federal Government to place the land in its holdings of Indian assets) is one of the biggest controversies facing tribes. Tribes find it advantageous to designate lands to be taken into trust in order to eliminate double-taxation, to assert undisputed jurisdiction, and to prevent future alienation (not to mention to restore their homelands). Yet opposition arises from neighboring non-Indian jurisdictions concerned about the aforementioned loss of property tax revenue. In addition, the entry of tribes into the gaming industry has provoked the states' suspicion that land-into-trust applications will result in the proliferation of Indian casinos.<sup>467</sup> Thus, the combination of these opposing interests has delayed the process by which the Secretary of the Interior makes land-into-trust determinations and has thereby obstructed the orderly (re-) integration of tribal land bases.

### *Agriculture*

In terms of area covered, agriculture is the most important use of trust land. Of the 55 million acres of trust land, it is estimated that 47 million acres are used for grazing and growing crops. More specifically, estimates suggest that Indian agricultural land falls into to the categories of rangeland (approximately 34 million acres), dry farmland (approximately 3.3 million acres), irrigable farmland (approximately 1.4 million acres), and potentially irrigable farmland (1.1 million acres).<sup>468</sup> Indian operations range from large tribal enterprises growing high-value tree crops, such as the Gila River agricultural enterprise in Arizona, to individual Indian ranchers running small herds in South Dakota.<sup>469</sup>

Agriculture is also a growing area of Indian activity. The most recent census data available on agriculture shows an increase in both the number of American Indian farms and the total acreage. The number of farms operated by American Indians grew from 7,134 in 1987 to 8,346 in 1992, and the total acreage grew from 45.7 million acres to 48.4 million acres correspondingly.<sup>470</sup> Most of this acreage is found on reservations.<sup>471</sup>

Despite being an increasingly important use of land, it *appears* that Indian agriculture is relatively unproductive; nonetheless, it is impossible to assess the commercial viability of Indian agriculture directly.<sup>472</sup> A number of indicators point to a sector that is undercapitalized and hobbled by regulation and

<sup>467</sup> The Indian Gaming Regulatory Act (IGRA) requires that Indian casinos operate on trust lands, and since geographic location, (i.e., proximity to an urban center) is an important driver of casino profits, tribes – particularly remote ones – face strong incentives to take land into trust in areas not necessarily contiguous with their existing reservations.

<sup>468</sup> Communication with Ross Racine, Intertribal Agricultural Council, August 14, 2000. The difference in estimates and total used for grazing likely reflects forestlands that are also used as grazing areas for livestock but are not considered rangeland.

<sup>469</sup> These examples are drawn from Smitman, Gregory, "Intertribal Agricultural Council Perspectives on the History and Current Status of American Indian Agriculture," *American Indian Culture and Research Journal* 22:3, 1998, pp. 173-85.

<sup>470</sup> US Census of Agriculture 1992, Table 37, accessed at <http://www.nass.usda.gov/census/>.

<sup>471</sup> Dismukes, Robert, Joy Harwood, and Susan Bentley, *Characteristics and Risk Management Needs of Limited-Resource and Socially Disadvantaged Farmers*, Agriculture Information Bulletin No. 733 (Washington, DC: Commercial Agriculture Division, Economic Research Service, and Risk Management Agency, US Department of Agriculture, April 1997).

<sup>472</sup> There is a lack of good and current information on Indian agriculture. The only comprehensive data source that covers American Indian farms is the US Census of Agriculture. However, the data reported by the Census differs from that drawn

property rights problems. To take just one example of capitalization, the BIA built a series of irrigation projects starting in the late 1800s, yet today only 62 of the 160 federally initiated projects are considered operable. What little funds Congress appropriates for the projects can typically be consumed by just one or two projects' needs.<sup>473</sup>

Indian farmland also is disproportionately engaged in lower-valued uses. Indian farms are more oriented toward the lower returns of livestock than US farms are, and they typically generate smaller amounts of revenue. Of the farms operated by American Indians, 30% received most of their farm sales from crops, and 70% from livestock, whereas 55.2% of all US farm sales in 1992 were in livestock and 44.8% were in crops. In addition, 80% of all Indian farms had sales of less than \$25,000 in agricultural products. By comparison, only 60% of all US farms had sales less than \$25,000.<sup>474</sup> Some of the orientation toward livestock may be a result of geography: few of the reservation land areas shown in Figure 11 are in the crop-intensive central continent or California Central Valley, and much of the land area is found in the more arid regions of the country.

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from other, more comprehensive, surveys. For example, the Intertribal Agricultural Council (IAC) conducted a joint survey with the National Agricultural Statistics Service (NASS) of Indian farms in Montana. The IAC-NASS survey reported 900 farms and ranches operated by American Indian farmers in 1994, while the Bureau of Indian Affairs indicated 579 full-time farms. The Agriculture Census reported 431 American Indian farms in Montana in 1992. One possible explanation for the discrepancy is that the census may count a reservation, which may contain many different farmers, as one farm. Dismukes, *et al.*, *op. cit.*, p. 14. See also discussion of data issues in the textbox "The Collection of Data in Indian Country," in the Tribal Governance and Politics section of this report.

<sup>473</sup> Racine, *op. cit.*

<sup>474</sup> Dismukes, *et al.*, *op. cit.*; Economic Research Service (ERS), *Limited-Resource Farmers: Their Risk Management Needs in Agricultural Outlook* (Washington, DC: US Department of Agriculture, 1997).

### Oneida Community Integrated Food Systems (OCFIS)

The Oneida Tribe of Indians of Wisconsin established OCFIS to combat the high rates of unemployment, poverty and diabetes on their reservation.\* OCFIS is a self-sufficient, naturally grown food system that is based in tradition and is entirely community operated. In cooperation with this vision, the OCFIS aims to decrease diabetes, reduce incidents of obesity, provide training for community members in retail and agriculturally related businesses and begin small business development on the reservation. The System is comprised of three main components.

Oneida Food Distribution Program/Food Pantry Provides food packages for eligible households, and nutrition education to improve the quality of life in the community.

Oneida Tsyunhe'hkw^ Center In partnership with its customers, the Center provides natural products and dietary information to advance the health of the Oneida Nation members and surrounding communities. The 83-acre site includes organic gardens, a greenhouse, natural grazed chickens, beef steers and other assorted small animals. The Center represents the cultural branch of OCFIS with classes on Holistic Health and Traditional ways.

Oneida Nation Farms The farms produce, distribute and sell the finest quality beef, bison and other farm products. The farms consist of three distinct, but interrelated components: Oneida Cash Crop Operations, Oneida Natural Beef/Bison Program and the Oneida Apple Orchard. The Tribe's herd currently consists of 600 black Angus steers and more than 45 buffalo. The farms aim to provide superior products at lower costs to members of the Oneida Nation and to other interested constituents

\* The unemployment rate for the Oneida Reservation is currently 16% , more than 30% of the Oneida citizens have incomes below the poverty level, and the Oneida Health Center states that one in two Native Americans on the Oneida Reservation is struck with diabetes.

Source: Correspondence with OCIFS.

Further depressing returns to Indian agriculture, non-owners (i.e., lessees) operate much of the agricultural land owned by American Indians (both by tribes and by individuals). Most Indian agricultural land is used for grazing (to raise livestock), and it is estimated that 20% of grazing land is leased to non-Indians, while 70% of the cropland is leased to non-Indians.<sup>475</sup> While no comprehensive comparison exists of leasing proportions on Indian and non-Indian lands that controls for market conditions and geographic influences that would drive leasing up in Indian contexts, a small snapshot compiled by the General Accounting Office (GAO) highlights the disproportionate tendency for Indian lands to be leased. In that study of 16 BIA irrigation projects, 61% of the trust land was leased, yet only 1% of the non-trust land was leased.<sup>476</sup> One reason a large amount of Indian land is leased stems from the problem of collateralizing trust land discussed above. Without ready access to capital, Indian owners eschew direct operations in favor of leasing to operators who can mobilize the equipment and seed capital.

The orientation of Indian agriculture toward leasing also stems from the aforementioned difficulty coordinating multiple-interest owners where land is heavily fractionated. That is, fractionated owners may find it easier to agree on lease terms than to agree on strategies and tactics as long-term joint operators of farms. Even so, leasing itself may be rendered impossible by fractionation in certain contexts. Lease requirements in Oklahoma, for example, require 100% approval before any land can be leased, which is a practical impossibility when many owners are involved. Consequently, one million acres of Indian

<sup>475</sup> Dismukes, *et al.*, *op cit.* The most recent comprehensive survey of Indian agriculture was done in the late 1980s. That survey showed a similar proportion of land leased to non-Indians. In 1986, 65% of Indian agricultural land was leased to non-Indians, and one-third of the grazing land was leased to non-Indians. Smitman, *op cit.*

<sup>476</sup> General Accounting Office, *BIA Should Streamline Its Processes for Estimating Land Rental Values*, Report to the Subcommittee on Interior and Related Agencies, Committee on Appropriations, US Senate, GAO/RCED-99-165 (Washington, DC: US General Accounting Office, June 1999), p. 33.

agricultural land in Oklahoma lie fallow each year.<sup>477</sup> Furthermore, BIA approval processes, which can be cumbersome, may frustrate leasing, and on occasion are inaccurate in a way that discourages leasing (i.e., where rental rates are set too high).<sup>478</sup>

While lease payments are significant – they generated \$56.2 million in 1997 for American Indian individuals and tribes<sup>479</sup> – leasing may well provide diminished economic opportunity to tribes and individuals relative to self-operation. First, lessors forgo employment opportunities for their family members or tribal members, as the case may be. Second, while lessors shed some commodity market price risk, they also do not participate in higher returns when they materialize. Third, there is always the potential that Indian lessors do not receive fair market value for their land. Finally, leased farmland will generally be less productive than owner-operated land, all other things being equal, since lessees do not face the full incentives to undertake investments in the long-run productivity of the land.

Not only is Indian agricultural land leased more often, it is disproportionately idled. Again, it is difficult to quantitatively estimate how much of this type of land may exist; nonetheless, recent information from several investigations of Indian irrigation projects operated by the BIA conducted by the General Accounting Office indicates substantial idle agricultural land. In a detailed investigation of the Wapato irrigation project on the Yakama Reservation, the GAO found in 1996 that approximately 20% of the acreage within the irrigation project was not being farmed, and the majority of this idle acreage was owned by American Indians.<sup>480</sup> According to BIA officials, most non-Indian farm owners farm their lands rather than renting them out, yet trust land is generally not farmed unless it is leased.<sup>481</sup>

A direct investigation of the economic returns to American Indian farmers and ranchers, while somewhat dated, demonstrates the toll that undercapitalization, owner control problems, and leasing take on financial returns to Indian agriculture. Using data from the last comprehensive survey done in 1987, the study showed that, on average, the ratio of agricultural output from Indian trust land to comparable land was 54%.<sup>482</sup> In many cases, the value was less than 10%. In sum, Indian agriculture is in great need of structural reform.

In response to the diminished performance and to prodding by Indian farmers in the courts, the Federal Government has been increasing its supportive role of Indian agriculture. With enactment of the *American Indian Agricultural Resources Management Act* in 1993, leasing arrangements for Indian agricultural land were to be modified to relax requirements for landowner approval, and more technical assistance to Indian farmers, ranchers, and tribes was to be made available. To date, however, the Act has

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<sup>477</sup> Racine, *op cit*.

<sup>478</sup> GAO, *BIA Should Streamline Its Processes*, *op. cit.*, p.3.

<sup>479</sup> *Ibid.*, p. 27.

<sup>480</sup> General Accounting Office, *BIA's Management of the Wapato Irrigation Project*, Report to Congressional Requesters, GAO/RCED-97-124 (Washington, DC: US General Accounting Office, May 1997).

<sup>481</sup> GAO, *BIA Should Streamline Its Processes*, *op. cit.*, p. 33.

<sup>482</sup> The study compared agricultural output using BIA data for 39 Western reservations and their agricultural production and land base with the 1987 US Agricultural Census data on agricultural production and land base for farmers in surrounding counties. The BIA data include grazing lands while the county data exclude grazing lands. The authors were unable to correct for the quality of land as there was insufficient information. For example, the value of agricultural output from the Yakama reservation in 1987 was \$24.72 per acre, while the value for the surrounding county was \$857.45, (or the value earned on reservation was 3% of the value earned on surrounding lands). Anderson, Terry, and Dean Lueck, "Agricultural Development and Land Tenure in Indian Country," in T. L. Anderson (ed.), *Property Rights and Indian Economies* (Lanham, MD: Rowman and Littlefield, 1992).

not been implemented fully.<sup>483</sup> The USDA has also developed a series of programs aimed at increasing awareness of federal agricultural assistance available to Indians.

Despite these efforts, however, many argue that there is much more the USDA can do to support American Indians. Funding for Indian programs within the Department of Agriculture has fallen significantly in recent years from \$261.5 million in 1993 to \$171 million in 1999.<sup>484</sup> In addition, regulations of the USDA make it difficult for Indian operators to access many USDA programs.<sup>485</sup> Finally, a class-action lawsuit brought by American Indian ranchers against the USDA alleges that the Farm Services Agency (FSA) has been discriminatory in its treatment of Indian farmers and that they are foreclosing on Indian trust lands.<sup>486</sup>

Those making a living from agriculture in Indian Country also face many of the same difficulties that non-Indian farmers and ranchers face: generally low commodity prices, higher input prices for fertilizer, seeds, and machinery, and the move towards larger, more capital-intensive farming operations.

Notwithstanding the aforementioned obstacles, Indian agriculture remains a fruitful avenue for economic exploitation. Because so much Indian land is used in agriculture and because such a significant proportion of it is leased, idle or undercapitalized, the economic gains for Indian families from reform are likely to be substantial. Furthermore, the renewable nature of farming and ranching may mean agriculture faces less political resistance than other forms of economic development from both within Indian communities and without.<sup>487</sup> Continuing restrictions in the management of federal lands may reduce a competing source of supply – cattle grazing on public lands – and thereby enhance the competitive position of Indian farmers near those lands. Finally, if the USDA does carry through on its commitments to increase support to Indian farmers and ranchers, it could have a significant impact upon the economic viability of Indian farming and ranching. In sum, Indian agriculture may warrant greater policy and analytical attention than it has recently received.

### *Alaska*

Land distribution and use in Alaska are at the core of ongoing tensions within the Alaska Native community over which governing and development arrangements are most appropriate for addressing the acute social crisis in Native villages. The *Alaska Native Claims Settlement Act* of 1972 (ANCSA) reserved Native title to 44 million acres of Alaska in exchange for settling aboriginal title claims that

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<sup>483</sup> According to Ross Racine of the IAC, regulations for implementation have been proposed, but they fall short of what the Act requires.

<sup>484</sup> Twole, Charles, *Government-Wide Federal Funding for Indian Programs as of FY 2000, President's Budget* (Washington, DC: Department of the Interior, 2000).

<sup>485</sup> According to Ross Racine, one of the problems is that participation in many USDA programs requires the operator to have a lease of a minimum length, such as seven years. This requirement is incompatible with some lease terms – for example, BIA regulations in the Anadarko region forbid leases longer than three years.

<sup>486</sup> “When Indian farmers and ranchers go to FSA, we’re confronted with staff who are indifferent, unconcerned and unresponsive to our needs. The program services are poor; the delivery of services is bad. We’re made to wait long hours. We’re told there are no available loans. We’re told our credit is bad. If we do get a loan, we’re told our loans can’t be restructured or renegotiated. All we want is the same treatment afforded to white farmers and ranchers. If there is one farmer or rancher anywhere in this country who has gotten their loans restructured 4 or 5 times then we want the same consideration for our loans - nothing more, nothing less. We have not been treated fairly by the USDA. The history of FSA with tribes is the same throughout Indian country.” Chairman Tex G. Hall, Fort Berthold Tribe, speech to Intertribal Agricultural Council, Oklahoma City, Oklahoma, November 18, 1999.

<sup>487</sup> Racine, *op cit.*

obstructed, among other things, the construction of the Trans-Alaska Pipeline System. In contrast to the lower-48 states where “Indian” land is held either by individual Indians (fee simple or in trust) or by the Federal Government (in trust for the tribe), Alaska Native land holdings were placed virtually entirely under the control of corporations established on behalf of Alaska Natives (“Native corporations”). With limited exception, all Alaska Natives born before December 18, 1971, are shareholders in one regional corporation and in one village corporation (in addition to being a member of an Alaska Native village).<sup>488</sup> The regional corporations retain title to all timber and sub-surface resources. The village corporations retain title to non-timber surface rights. With limited exceptions, Alaska Native village governments retain little or no control over the land base and, thus, little or no local control over economic development.

State and federal law charges the corporations with earning profits for shareholders. Informally, they are also called upon to meet the dire socio-economic needs of Alaska Natives. Yet while the regional corporations have formed charitable foundations, the fiduciary requirements of Alaska law (under which the corporations are chartered) keep the management focused on profit maximization. The corporate ownership of land and resources and the inherent corporate focus on profits (as opposed to social investment) have engendered a divide between the corporations and the villages over, among other things, the best and most appropriate use of land. The corporations tend to focus on the generation of revenues and, thus, the extraction of the natural resources, while the villages tend to focus on the necessity of maintaining the land base for cultural and subsistence purposes. Moreover, the villages are virtually entirely dependent on federal transfers for resources, since the profits of the Alaska Native corporations flow through to individual shareholders and virtually never through the village government treasuries. Village governments, obviously, do not own the Native corporations; neither do they tax them.

Some villages such as the Alaska Native Village of Fort Yukon, have – by shareholder vote – transferred land in their village corporations to their village governments in an effort to give the village governments some wherewithal to effectuate economic development. The results of this transfer and others like it are not yet apparent, and some have argued that transfers risk the ultimate alienation of land because of legal protections that inhere to Native corporations’ assets. Interestingly, one Native region, NANA, has merged its regional and village corporations and adopted a non-Indian governmental structure – an Alaska Borough – affording tax revenue derived from the corporations and more coordinated control of land and development than would otherwise be the case.<sup>489</sup> Notwithstanding these innovations, the acrimony over whether the ANCSA approach to land ownership is appropriate threatens to intensify as the social crises in Alaska Native villages deepen.

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<sup>488</sup> One of the effects of ANCSA is that Alaska Natives born after December 18, 1971 are disenfranchised. Although amendments were made to include “afterborns,” the majority of ANCSA corporations have not amended their organic documents to include children born after December 18, 1971.

<sup>489</sup> See Cornell, Taylor, Grant, Fischer, and Morehouse, *op. cit.*, pp. 60-67.



## *NATURAL RESOURCES*

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- Despite the historical, cultural and economic importance of natural resources to tribes, the tribes' ability to utilize their resources to meet their development needs appears to be diminishing.
- To avoid the often volatile and apparently declining prices associated with commodity resource products, tribes have to invest in value-added production and marketing, both of which require scarce tribal capital resources. In the face of burgeoning youth populations, it may not be viable for tribes to rely solely on natural resource extraction as they may have in the past.
- Notwithstanding these general trends in natural resource markets, many tribes are creating new products and brands. More importantly they are engaging in more collaborative and creative ways of protecting their natural resource endowments for future generations.
- Alaska Natives' rights to natural resources are ambiguous due to unresolved access issues, particularly surrounding subsistence. Much of the extractive (i.e., subsurface and timber) resource conflict has been resolved, yet questions remain about whether Alaska Native Regional Corporations are extracting resources at unsustainable rates due to shareholder incentives to maximize dividends.

As noted in the section on Land, American Indian reservations cover more than 55 million acres in the continental United States. Native Villages and Corporations account for an additional 44 million acres in Alaska.<sup>490</sup> In addition to the natural resources on reservation lands, some tribes possess rights to resources beyond reservation and Alaska village boundaries. These additional rights have been re-affirmed through treaties,<sup>491</sup> or through adjudication of land and other claims.<sup>492</sup> The result is that tribes

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<sup>490</sup> In comparison, the federal government oversees 600 million acres of public lands. DeBrule, Deborah, "Natural Resources vs. Financial Resources," *American Indian Report*. October, 2000, pp. 26-27.

<sup>491</sup> There are 60 treaties that contain some form of rights to off-reservation resources. These resources and rights are treaty-specific. US Forest Service, *Forest Service National Resource Book on American Indian and Alaska Native Relations*, FS-600 (Washington, DC: US Forest Service, April, 1997).

<sup>492</sup> Through the treaty process, tribes often ceded land to the federal government in exchange for peace, protection, and other guarantees, such as the right to hunt, fish, and gather on the newly "ceded lands." These rights were affirmed in an early Supreme Court decision (*US v. Winans*, 1905). In some cases, most noticeably the Pacific Northwest, treaties specifically guaranteed tribes the right to hunt and fish in their "usual and accustomed places." In other cases, tribes have retained their

have access to a variety of natural resources including timber and non-timber forest products, fish and game, coal, oil and gas, hard rock minerals, and water.

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Figure 13  
Natural Resources (excluding Alaska)

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• Acres of Grazing Range	44,298,390
• Number of natural lakes and ponds	5,770
• Acres of developed oil, gas and, mineral resources	765,706
• Percentage of United States Coal Reserve	30
• Percentage of United States uranium deposits	40
• Percentage of United States oil and natural gas deposits	4

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Source: Patrick Durham, "Snapshot of Indian Country," Native American Fish and Wildlife Society, June 18, 1999.

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Despite the historical, cultural and economic importance natural resources have had for tribes, the ability to utilize those resources has often been restricted by the legacy of federal policies aimed at limiting a tribe's jurisdiction of its own land and resources. This legacy has resulted in complex ownership patterns within many reservation boundaries and intense jurisdictional conflicts. Other factors including the diverse cultural beliefs that exist within tribes about the use of natural resources, the lack of funding available to manage resources, and market demand and pricing have also influenced natural resource development in Indian Country.

#### *Factors Affecting the Utilization of Natural Resources by Tribes*

Tribal norms about the use of different resources vary significantly between tribes. Take forestry, for example. The Menominee Tribe in Wisconsin has a well-established and very successful timber operation. The Tribe actively manages its forests to optimize the community's multiple uses of the forest resources. The tribe maintains the timber operations while allowing for the citizens' more traditional uses, such as hunting, fishing, and outdoor recreation. The Taos Pueblo, in contrast, has elected not to harvest its timber resources for commercial purposes. Similar differences exist across tribes with respect to wildlife. Several of the Apache tribes in the Southwest operate extremely successful big-game trophy hunting operations marketed to affluent non-Indian hunters, while the Crow Tribe in Montana refuses to allow non-Indians to hunt on the reservation. In sum, the utilization and development of tribal natural resources reflect tribal prerogatives which are a matter of culture, values, the operation of community decision-making mechanisms, market forces.

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rights to hunt and fish over lands removed from the initial reservation. (See, for example, *Menominee Tribe v. United States*, 1968.)

Regardless of the tribal views on the utilization of resources, however, tribes do share some common challenges:

- *The Legacy of Past Federal Policies.* Tribal management is often frustrated by various non-tribal regulatory actions which either serve to limit or question the authority of the tribe to regulate resources located within the political boundaries of the reservation (See Environment).<sup>493</sup> For tribes with “checkerboarded” reservations (See Land), it is especially difficult for the tribe to regulate hunting and fishing activities. In addition, federal legislation, such as the *National Environmental Policy Act*, the *Endangered Species Act*, and the *Clean Air Act* introduce uncertainty over tribes’ rights concerning the use of their lands; lands that often contain a disproportionately large share of pristine resources.<sup>494</sup>

In addition, the Federal Government’s role as trustee can also create problems by requiring government approval for leases and grants of rights-of-way. When tribes choose to utilize their resources for economic purposes, their efforts are often also confounded by complex ownership patterns. For example, the rights to such assets may be held by the tribe or by individuals in the tribe, as in timberlands found on both tribal trust lands and on an individual Indian’s fee-simple lands. And oftentimes, multiple owners hold title to a given parcel.<sup>495</sup> In the case of mineral deposits, the tribe may own the rights to the underground deposits but none of the land (as is the case for the oil reserves of the Osage in Oklahoma). In other cases, the tribe may hold the land but not the underlying deposits (as is the case in parts of the Southern Ute reservation). In Alaska, a village corporation may own the surface rights while a regional corporation owns the sub-surface rights. In addition, the resources may lie outside the reservation and access must be negotiated with third parties, such as the harvest salmon for tribes in the Pacific Northwest. Finally, tribal attempts to assert their rights over their resources are often met by resistance from other parties, creating additional costs through litigation.<sup>496</sup>

The expansion of Federal environmental legislation is one of the most important challenges facing tribes in their management of natural resources. These actions inevitably raise jurisdictional questions, and thus often serve to complicate tribes’ abilities to regulate natural resource use. In addition, the Federal Government, as trustee, must approve leases involving the use of Indian-owned resources by non-Indians. Many believe this is conflict of interest, the agency that is responsible for protecting Native interest, the Department of the Interior, is also the agency that is obligated to

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<sup>493</sup> For example, tribes have the legal authority to regulate non-Indians’ hunting and fishing on tribal lands within the reservation boundaries, but cannot regulate non-Indians’ hunting on non-Indian land. The Supreme Court affirmed the right of tribes to regulate hunting and fishing by non-members on tribal lands in *New Mexico v. Mescalero Apache Tribe* (1983). However, in *Montana v. United States* (1981), the Supreme Court stated that the Crow Tribe could not regulate hunting and fishing by non-members over non-Indian lands within the Crow reservation.

<sup>494</sup> For example, the settlement of reserved water rights for the Colorado Ute Tribe involved the development of a large irrigation project called Animas-La Plata. Shortly before construction commenced, however, and without any tribal consultation, the USFWS issued an opinion reducing the amount of water the project could use to one-third of the settlement because any more water withdrawn from the river would impact the endangered squawfish. Williams, Susan, and Rachel Montoya-Lewis, “Federal Indian Water Rights: Fundamentals and New Developments in Federal Indian Water Law,” *Native Americas*, Summer 2000, pp. 20-27. And, although tribal lands comprise only a small fraction of the US land base, Indian lands contain 49% of the threatened or endangered fish species, 26% of the bird species, and 22% of the mammal species.

<sup>495</sup> See the section on Land in this report for more discussion on ownership patterns of landholdings in Indian Country.

<sup>496</sup> The Jicarilla Tribe enacted a severance tax on oil and gas production on non-Indian lessees that was challenged and resolved in the tribe’s favor by the Supreme Court in *Merrion v. Jicarilla* (1982). Tribes still continue to have to go to court to have their rights recognized; more recently, tribes in the Pacific Northwest recently had their right to harvest shellfish on private beaches upheld by state court.

promote non-Native development interests - often on the same land.<sup>497</sup> The Federal oversight of contracting not only entails bureaucratic hurdles, but also injects feelings of ill will—feelings that in many cases may be well-placed since evidence supports the notion that the government is a less effective steward of tribal resources than tribes themselves.<sup>498</sup> Perhaps more significantly, as trustee, the Federal Government is responsible for managing revenues derived from Indian-owned resources. As described in the Legal section of this report, the Federal Government is currently being sued over its mismanagement of these funds (i.e., trust monies).

- *Internal Differences.* Differences often exist *within* tribes on the management and utilization of tribal natural resources. For some tribes, younger generations advocate for the potential economic development opportunities that come with the commercial exploitation of the resources, while elders believe that the cultural significance of those resources is paramount. The differences are not only generational but may exist culturally within tribes depending on the level of adherence to traditional ways. Attitudes about appropriate resource use are also shaped or affected by political considerations: tribal leaders are often pressured to push for immediate economic gains at the expense of responsible stewardship.
- *Inadequate Funding.* Funding available for managing natural resources are substantially less than what is needed. A Congressional Research Service report shows that between 1982 and 1996, funds in the BIA for natural resources functions fell by an annual average of \$1.1 million in constant terms (i.e., funding was \$15.2 million lower in absolute terms in 1996 than in 1982, correcting for inflation).<sup>499</sup> While there exists no definitive survey on the financial need of tribes in the management of their resources, a report prepared by the BIA that analyzed the funds provided under the Tribal Priority Allocation placed the aggregate annual shortfall at approximately \$350 million.<sup>500</sup> The bulk of this shortfall, over \$292 million, was in forestry.<sup>501</sup> The most comprehensive study to date of Indian forestlands, *An Assessment of Indian Forests and Forest Management in the United States* (1993), stated that an additional \$121 million was required annually to put resource management and planning on Indian forestlands on par with that of the National Forests.<sup>502</sup>
- *Market demand.* The market opportunities for natural resources are clearly important factors in determining the economic viability of natural resource development. The outlook for large-scale

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<sup>497</sup> Guardia, Valerie, *Saving Endangered Species on Indian Lands*.

<sup>498</sup> The Navajo Nation has launched a suit over the terms the federal government set and approved when the royalty rate for its long-term coal contract with Peabody Coal was readjusted in 1984. (Clark, Nancy, "The 600 Million Dollar Mine," *RedEarth Magazine*, Spring 2000, p. 28.) Barsh has pointed out that the emphasis in federal policy has been in providing access to public resources at low cost and questions whether under such an arrangement tribes can expect to receive fair compensation for their resources. (Barsh, Russell, "Indian Resources and the National Economy: Business Cycles and Policy Cycles, in Lyden and Legters (eds.), *Native Americans and Public Policy* (Pittsburgh, PA: University of Pittsburgh Press, 1992), pp. 193-221.) See, also, Krepps, *op. cit.*

<sup>499</sup> Walke, Roger, *Indian-Related Federal Spending Trends, FY 1975-1996* (Washington, DC: Congressional Research Service, The Library of Congress, February 13, 1995), p. 15. This study looked at the change from 1975 to 1996 as well and also compared the change in budget for natural resources under the Department of Interior to other agencies such as the National Park Service. From 1982 to 1996, funds spent on natural resource functions in DOI increased by \$50 million annually over the same period (or, in other words, \$753 million in constant 1993 dollars). Over the period 1975 to 1996 natural resources budgets under the BIA shows a slight upward trend.

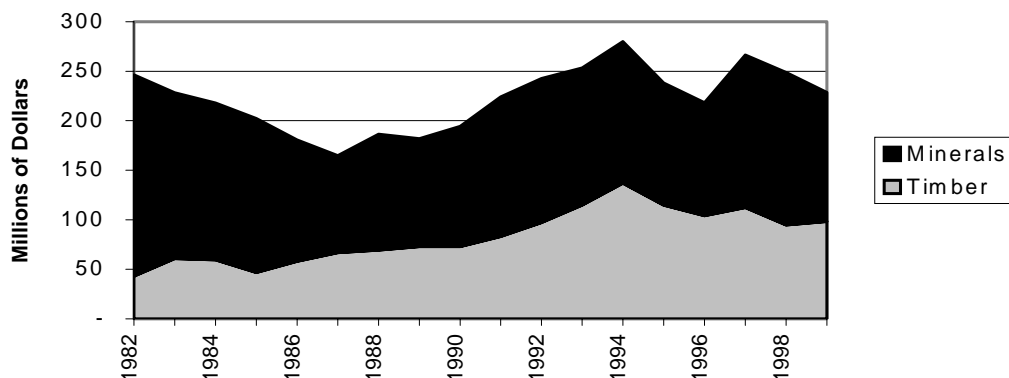
<sup>500</sup> See the Tribal-Federal Relations section of this report for a description of TPA funding.

<sup>501</sup> Tribal Workgroup on Tribal Needs Assessments, *op. cit.*, p. 52. See, also, US Department of Interior, Bureau of Indian Affairs, *Report on Tribal Priority Allocations*, accessed at <http://www.doi.gov/bia/tpa/TPARept.pdf>.

<sup>502</sup> Evergreen, *op. cit.*, p. 11. The IFMAT report can be viewed at [www.conbio.rice.edu/nae/docs/assessment.html](http://www.conbio.rice.edu/nae/docs/assessment.html).

traditional natural resource production is unfortunately not promising. Resource products are increasingly commoditized and prices are not on a systematic upward trend—if anything they are on a volatile downward trend. Harvest levels for timber have remained relatively constant while prices have fallen. Commercial wild salmon fisheries face very low-price competition from salmon farms and diminishing stocks. Figure 14 shows, in 1982 dollars, that the revenues generated by mineral and timber resources to both tribes and individual allottees since 1982 have been relatively constant. Similarly, employment data show that the percentage of American Indians employed in extractive resource industries shrank between 1980 and 1990.<sup>503</sup> What potential does exist in these areas for the tribes depends upon their ability to realize additional value out of existing resources by moving to higher value-added levels of the production chain or by utilizing better production technologies. Such development, however, requires scarce investment capital or significant investments in product differentiation and branding. Without such investment, tribes will continue to struggle to employ their burgeoning youth populations. In many places, tribes are recognizing that their resource industries cannot generate the job growth necessary to employ their graduating high school classes.

Figure 14  
Annual Revenues from Timber and Mineral Leases  
(1982 \$)



Sources: Producer Price Index for all goods: Bureau of Labor Statistics; Timber volumes and values: BIA, Division of Forestry, Special Compilation; Mineral lease revenues: *Report on Receipt From Federal and American Indian Leases*. Minerals Management Service, US Department of the Interior, 1999.

### Outlook For Energy

Much of tribes' recent efforts in the area of energy have focused on improving financial returns, exercising governmental powers, and directly engaging in project development.<sup>504</sup> The current

<sup>503</sup> According to the US Census, the percentage of American Indians employed in extractive industries (agriculture, forestry and fisheries, and mining) fell from 10.7% of all total American Indian employment in 1980 to 7.5% in 1990 Table 1 in Tootle, Deborah. "American Indians: Economic Opportunities and Development," 1997. In Swanson, Linda, *Racial/Ethnic Minorities in Rural Areas: Progress and Stagnation, 1980-1990*. Rural Economy Division, Economic Research Service, USDA. Agricultural Economic Report no. 731.

<sup>504</sup> According to Richard Wilson, former Division Chief of the BIA Minerals and Energy Division, states still have the right to tax mineral development on Indian land. In some cases, this has led to some extreme forms of gerrymandering so that Indian mineral lands are incorporated into a distant taxing authority's district. State taxation limits the ability of tribes to fully realize the revenues from their resources by imposing additional costs of production on Indian lands and potentially discouraging production.

deregulation of electricity markets in the US presents tribes with new opportunities to build power plants on tribal lands. Moreover, tribes may enjoy a regulatory advantage in siting such facilities.<sup>505</sup> In addition, a number of leases and pipeline and transmission rights-of-way are due for renewal over the next few years, presenting tribes with the opportunity to renew these agreements on better terms.<sup>506</sup> Taking advantage of these opportunities, however, requires that tribes develop the capacity to attract and manage the capital required for sustaining the energy developments now located on the reservations.<sup>507</sup>

In addition, tribes also face their own energy needs. The disparity between the existing use of tribal resources and the needs of the tribes can be striking. A study conducted by the US Department of Energy found that over 14% of all Indian homes on reservations did not have access to electricity, compared to just over 1% of all US households. The report also noted that 61 reservations, containing half of all Indians living on reservations, held the potential to produce renewable energy (wind, solar, geothermal and biomass) at competitive prices.<sup>508</sup> According to the Council of Energy Resource Tribes (CERT), 50,000 members of the Navajo Tribe do not have regular electric service, while tribal energy resources in that part of the Southwest supply 20% of Southern California's electricity needs.<sup>509</sup> The Four Corners Power Plant, feeding the Southwest energy market, is fueled with Navajo coal. Beneath the transmission lines running to Las Vegas lie numerous Navajo homes lacking electricity.

### *Outlook for Forestry*

In managing their forests, tribes face many of the same issues confronting managers of non-Indian forestlands. In the intermountain West (the area lying between the Cascades and the Rocky Mountains), tribes, like state and federal governments, now oversee forests characterized by outbreaks of disease and pests, with the potential for catastrophic wildfires. Tribes are attempting to address these problems by restoring forest types that were originally found in these areas. However, this type of activity is costly and requires increased management expertise and technical assistance.

An area that has received growing attention in the forest industry has been that of certification of forest products. While there exist different certification schemes, all operate on the basic idea that certification should reflect principles of sustainable forestry, and that if forest products producers want to market their product as certified, they have to show that the timber was produced in a sustainable manner. NGOs first introduced this idea and have supported perhaps the best-known certification system, which

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<sup>505</sup> For example, the Fort Mojave Tribe is currently building a 500-megawatt power plant on the reservation in a joint venture with Calpine, a developer and operator of power plants. The company will own the plant and pay rent to the Tribe along with water fees. The attraction of locating on the reservation for the company is due to the fact that it was able to reach a favorable tax deal with the Tribe and that Arizona, unlike Nevada and California, does not levy a possessory interest tax (which leads to double taxation). (Clark, Nancy, "PowerPlan," *RedEarth Magazine*, Spring 2000, p. 29.)

<sup>506</sup> Communication with Don Wharton, of the Native American Rights Fund. Also, see Fixico, Donald, "The Council of Energy Resource Tribes," in *The Invasion of Indian Country in the Twentieth Century: American Capitalism and Tribal Natural Resources* (Boulder, CO: University Press of Colorado, 1998), Chapter 8.

<sup>507</sup> Tom Mill and Gerry Vurciaga consult with American Indian tribes regarding the opportunity for tribes to become engaged in power generation. Vurciaga foresees a real opportunity for tribes, given that tribes have both the resources (land, water, and potentially energy resources) and the unique regulatory structure through federal tax credits, possible tax-exempt financing, and other benefits tribes enjoy. However, Vurciaga notes "The thing that amazes me most is that opportunities are so ripe for tribes. And the tribal capacities at this point do not match with the tribal opportunities." (Clark, Nancy, "Perfect Vision," *RedEarth Magazine*, Summer 2000, p. 17.)

<sup>508</sup> "Energy Consumption and Renewable Energy Development Potential on Indian Lands," <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/ilands.pdf>.

<sup>509</sup> CERT, *National Tribal Energy Vision*, Workshop Report (Denver, CO: Council of Energy Resource Tribes, 1999).

was developed by the Forest Stewardship Council (FSC). To date, three Indian tribes have met the criteria for the FSC system. Some tribes have concerns, however, about the additional costs that may be imposed by having to meet certification criteria, which can involve creating detailed harvesting and management plans that can be extremely data-intensive.

### **An Example of Resource Stewardship**

In 1992 the Confederated Tribes of the Warm Springs Reservation, located in Oregon, began a three-stage collaborative project with the Environmental Defense Fund (EDF) to promote sustainable economic development within the Deschutes River Basin. One of the goals of the project was the maintenance of the ecosystems found within the area. The Deschutes River is a major tributary to the Columbia River and provides spawning grounds for salmon; it also provides the eastern boundary of the reservation and is an essential part of the ecosystem for the reservation and the surrounding area.

Warm Springs, along with the EDF, developed a strategy aimed at improving water quality and water management. To this end, they created the Deschutes River Basin Conservancy, an inter-jurisdictional organization designed to provide integrated management of the entire basin (of which the reservation covers 7%). By thinking innovatively, the Tribe was able to develop a model that combined the expertise of the Tribe with that of external organizations, for an outcome that all parties had hoped to achieve – an improved ecosystem for the entire Deschutes River Basin.

#### **Sources:**

*Restoring the Deschutes River: Developing Partnerships and Economic Incentives to Improve Water Quality and Instream Flows* (EDF and The Confederated Tribes of the Warm Springs Reservation of Oregon, 1995.)

### *Non-Timber Forest Products*

Non-timber forest products (NTFPs) refer to products found in the woods other than timber. These can range from medicinal herbs to mushrooms to decorative floral products. The market for some of these products has developed rapidly in past ten years. Tribes view this as both an opportunity and a potential threat. While the creation of markets for these products may offer opportunities for employment and revenues, there are concerns that servicing these markets could also lead to the depletion of such resources.<sup>510</sup> In addition, many tribes have concerns over the appropriation of tribal knowledge regarding certain products and how they are used. As pressure grows to develop these resources, so do concerns on the part of American Indians and Alaska Natives over exploitation and the inability to continue gathering these traditional resources.<sup>511</sup>

### *Water Rights*

For tribes in the arid portion of the Western states, reserved water rights may be one of the most important resources they hold.<sup>512</sup> Even if the tribes do not use the water themselves, the rights to such

<sup>510</sup> The Quinault Nation (on the Olympic Peninsula in Washington) recently conducted an enforcement exercise in patrolling tribal lands and in one week made 119 arrests of non-tribal members illegally picking on tribal lands. Eison, Jared, Resource Protection Officer, Quinault Nation, “Non-Timber Forest Products: the Quinault Story,” in *Final Proceedings of the 24<sup>th</sup> Annual ITC Conference*, *op. cit.*, pp. 249-288.

<sup>511</sup> Jorgenson, Carol, Assistant Forest Supervisor, Tongass National Forest, “Special Forest Products in Alaska,” in *Final Proceedings of the 24<sup>th</sup> Annual ITC Conference*, *op. cit.*, pp. 300-303.

<sup>512</sup> Water rights in the Western US are appropriative; that is, a user gains their right through the appropriation of water. The older the appropriation, the more senior the right. In a landmark case that is the *sine qua non* of Indian water law, *US v. Winters* (1908), the Supreme Court ruled that in establishing reservations, the federal government had also reserved water rights at the same time. These rights had not vanished even if tribes had not utilized them. However, quantifying these rights has proved to be a time-consuming and litigious process.

water may offer new sources of revenue if the rights can be marketed to other potential users. This is an open question, as the market for such rights is not fully developed and, if even if they were, it is not clear whether tribes could legally lease water to off-reservation, non-Indian uses.<sup>513</sup> Tribes are also pursuing the opportunity to participate in energy production from hydropower development.<sup>514</sup>

### *Outlook for Other Resources*

Several tribes have utilized the tribal landscape to provide outdoor-based recreational opportunities. These include ski operations run by the Mescalero Apache and the White Mountain Apache, respectively. In addition, several tribes run wildlife operations that offer some of the most desirable hunting and fishing opportunities in North America. These include the trophy elk hunts offered by the White Mountain and Mescalero Apache Tribes and trophy mule deer hunts by the Jicarilla Apache Tribe. There is also interest in tourism by some tribes,<sup>515</sup> although it is not clear how much economic benefit this may bring to tribes, since such business tends to be seasonal in nature and workers in this industry are generally poorly paid.

#### **Using the Regulatory Process to Tribal Advantage**

The Federal Energy Regulatory Commission (FERC) is responsible for licensing and re-licensing non-federal dams in the US (licenses for dams last between 30 to 50 years and must be renewed when they expire). Under federal legislation, FERC is required to take into consideration the environmental impact of hydro-electric power on fish and wildlife habitat. In addition, it must also take into account tribal concerns when licensing or re-licensing dams located within reservations.\* FERC has been sued by several tribes in Washington state over the impact of dams upon fish habitat. The Nisqually Tribe recently reached an agreement with Tacoma Public Utilities over re-licensing two dams on the Nisqually River. Arising out of litigation initiated by the tribe, the agreement assured the protection of habitat through a guarantee minimum of in-stream flows. The Tribe also received compensation in the form of a permanent guarantee of funds from the utility to maintain and operate a proposed fish hatchery. In turn, the Tribe agreed to support the Utility in its re-licensing procedure. The Tribe feels that they and the Utility, originally having a very adversarial relationship, now have a very cooperative arrangement.

\*Section 4(e) of the *Federal Power Act* as amended states: "That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." (16 USC S 797e).

Sources:

As quoted in Brown, Jovana, "Salmon, Tribes and Hydropower Dams in the US Puget Sound," Center for World Indigenous Studies, 1999, accessed at [www.cwis.org/fwj/41/jbsalmo.html](http://www.cwis.org/fwj/41/jbsalmo.html).

### *The Role of Intertribal Organizations in Natural Resource Management*

The last 20 years have seen the rise of intertribal organizations dedicated to specific resource issues in Indian Country. Such organizations include the Intertribal Timber Council (ITTC), the Council

<sup>513</sup> Williams and Montoya-Lewis, *op. cit.*, pp. 26-27.

<sup>514</sup> The Warm Springs Tribe, for example, is in the process of purchasing an interest in the hydropower facilities located on the reservation in Oregon from the current owner PG&E with the option of eventually acquiring a majority interest. The Confederated Salish Kootenai Tribe in Montana now owns the dam found on the reservation; it has leased the dam to the local power company, with the right to assume control in 2040.

<sup>515</sup> "Another market that is particularly well-adapted to expansion in rural and Native Alaska is eco-tourism, which has grown over the last few years and now includes small, but persistent, markets in all parts of the state." Part III, Community Development, in Volume III of the Alaska Natives Commission's Final report, accessed at [www.alaskool.org/resources/anc\\_reports.htm#top](http://www.alaskool.org/resources/anc_reports.htm#top).



of Energy Resource Tribes (CERT), the Native American Fish and Wildlife Association (NAFWS), the Intertribal Agriculture Council (IAC), the National Tribal Environmental Council (NTEC), and the Inter-Tribal Bison Cooperative (ITBC). Other organizations have a regional focus, such as Mni Sose (focusing on tribal water rights in the Missouri Basin), the Columbia River Inter-Tribal Fish Commission (CRITFC), the Northwest Indian Fisheries Council (NWIFC), and the Great Lakes Intertribal Fish and Wildlife Commission (GLIFWC).

These organizations often provide a vehicle for identifying issues of concern to tribes and providing an intermediary between non-tribal agencies and Indian tribes. In some cases, these organizations create institutional linkages over issues of mutual interest. For example, CERT organized a workshop with the Intertribal Energy Network (made up of the Affiliated Tribes of Northwest Indians, All Indian Pueblo Council, Inter Tribal Council of Arizona, Mni Sose Intertribal Water Rights Coalition, and the Southern California Tribal Chairmen's Association) to develop policies and a strategic vision for possible energy development given the regulatory changes in the electricity market.<sup>516</sup>

These intertribal groups can be extremely effective vehicles for assisting tribes in leveraging scarce resources around their issues of concern. As noted by Charles Wilkinson:

“Let’s not forget what great inventions tribal leaders conceived of when they established intertribal councils. The councils leverage tribal resources on specialized issues such as timber, fish, and wildlife, energy, education, bison, and several others. They consolidate policy and legal expertise, economic analysis, scientific research, and lobbying capabilities. They are a way to convene tribal leaders who are focused on a particular set of issues, build common positions, and make those positions into policy and law. Yet at the same time, the intertribal councils preserve the independence of each individual sovereign so that every tribe retains its own staff and decision making capability.”<sup>517</sup>

As one might expect, there can be some tension between tribal communities and these pan-Indian organizations.<sup>518</sup> However, their staying power over time speaks to their value to their membership, whether it is technical information sharing, policy coordination, or other shared purposes.

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<sup>516</sup> CERT, *National Tribal Energy Vision*, Workshop Report, 1999.

<sup>517</sup> “The Modern Sovereignty Movement and the Critical Role of Tribal Leadership,” ITC Leadership Lecture, in *Final Proceedings of the 24<sup>th</sup> Annual ITC Conference*, *op. cit.*, pp. 63-64.

<sup>518</sup> Communication with Gail Small. LaDuke, Winona, “Native Environmentalism,” *Cultural Survival Quarterly*, Vol. 17, No. 4, 1994. For a description of some of the same issues involving CERT, see Fixico, *op. cit.*, Chapter 8. Niwot.

### The Mni Sose Intertribal Water Rights Coalition

This intertribal group was first formed in 1988 by several tribes in the Missouri River Basin to protect and preserve tribal water rights in the Basin and to use those water rights to promote tribal economies. In 1993 the group became a nonprofit and now has 26 of the 28 tribes in the basin as members. The organization, with staff of three, has been extremely successful in seeking and acquiring a share of the hydroelectric power generated within the basin. Many of the dams were built on tribal lands, and as part of compensation for those lands, the Federal Government had offered the tribes a share of the generated power. The Coalition pursued that promise, and after several years of negotiation, brokered an agreement that determined how much power each tribe would receive and the mechanism by which tribes would receive their electricity. It is anticipated that the power to be delivered will provide 50% of current members' demand and will provide a base for further development.<sup>519</sup> Tribes in the Upper Great Plains will start receiving their power in 2001, and by 2004 the program will eventually extend over the entire area covered by the Western Area Power Administration (all western states with the exception of Washington, Oregon, Idaho, and Oklahoma; and the western portions of Minnesota, Iowa, Kansas and Texas).

Source: Musick, Kelly, "Water Wattage," *RedEarth Magazine*, Spring 2000, pp. 16-19.

### *Alaska Natives and Alaskan Resources*

While Alaska Natives share many of the same concerns about natural resources, there are specific issues that are unique to Alaska. These differences stem from the legal structure that governs natural resource ownership and use by Alaska Natives and from the predominantly rural and relatively strong subsistence orientation of Alaska Native villages.

The mix of ownership and government powers over resources in Alaska flows from the *Alaska Native Claims Settlement Act* of 1971 (ANCSA), which attempted to meet federal treaty responsibilities to the Alaska Native population while settling land claims issues in Alaska for the purposes of opening up federal and state land for oil and gas development. In contrast to the system of reservations in the lower-48 states, ANCSA established 12 regional, four urban, and over 200 village Native corporations, which received cash and acreage.<sup>520</sup> In addition, a principal intent of the Act was to affirm the right of Alaska Natives to resources for subsistence purposes.<sup>521</sup> Although both regional and village corporations received land and cash, village corporations only received surface rights; the regional corporations, whose territory included the villages, retained the sub-surface rights.<sup>522</sup> Alaska Natives living in villages received 100 shares in both the village corporation and the regional corporation.<sup>523</sup> A 13<sup>th</sup> corporation was established later for Alaska Natives living outside the state.

<sup>519</sup> Communication with Don Wharton.

<sup>520</sup> The total land base was initially 44 million acres, and the total funds were \$962.5 million. The acreage has increased because some land selected by corporations was unavailable due to competing claims; in response, the amount of land granted was increased. As of today, corporations have selected approximately 85% of the land to which they were entitled. Communication with Steve Colt.

<sup>521</sup> While such language was dropped from the final legislative language, the final House-Senate Conference Committee Report that accompanied ANCSA explained clearly that Congress expected that both the Secretary of Interior and the State would "take any action necessary to protect the subsistence needs of the Alaska Natives." From *Alaska Native Subsistence*, accessed at [www.narf.org](http://www.narf.org).

<sup>522</sup> Under ANCSA, the regional corporations operate under a unique revenue-sharing agreement in which 70% of the net profits from timber or any sub-surface resource are shared among all the regional and village corporations.

<sup>523</sup> Under the Act, only those Alaska Natives born before December 18, 1971 received shares in these corporations in exchange for the extinguishing of Native land claims. This was subsequently modified to permit regional corporations, if they so wished, to issue additional shares, which a few have done.

The governmental bodies with some form of jurisdictional control in Alaska include municipalities and boroughs, traditional Alaska Native governments, as well as the state and federal interests that exist on their respective lands within Alaska. This mix of institutions creates an additional layer of complexity to resource management issues compared to what is faced by Indian tribes in the lower-48 states, where many disagreements over tribal lands and resources tend to be defined by the long-established (but sometimes contentious) relationship between tribes and the Federal Government.<sup>524</sup>

As has been pointed out elsewhere, resource development can have an enormous impact upon local villages, but under the current ownership structure, most villages have little say in regional corporation decisions. The dual nature of resource ownership, where the village corporation owns the surface rights and the regional corporation owns the subsurface rights, creates a conflict. Those shareholders no longer living within the village often desire to exploit the natural resource base for financial returns, while Natives living in the villages often prefer such resources be maintained to preserve subsistence activities or for governmental purposes.<sup>525</sup> This conflict has led to extensive litigation.<sup>526</sup> In general, these cases debated who controlled the rights to sub-surface deposits such as sand and gravel – did the regional corporation have the right to utilize it without first obtaining permission from the village corporation which controlled the surface right? Litigation appears to have declined over time as regional and village corporations reached a *modus vivendi*.<sup>527</sup> However, differences brought about by the regional distribution of benefits and costs from resource development are still present. The proposal to drill in the Arctic National Wildlife Refuge, for example, is supported by the local regional corporation but opposed by some of the neighboring regional corporations. Some communities have taken steps to reconcile these differences. For example, the Northwest Arctic Borough has taken the step of using zoning laws to ensure that subsistence uses by the local villages within the lands held by the corporation take precedence over all other uses.

In attempting to maintain control over their own communities, Alaska Natives face many problems. For example, both growing populations and greater cash needs make increasing economic activity a priority.<sup>528</sup> However, the small size of most villages, their remote location, and the jurisdictional complexities discussed above all serve to complicate matters. The regional corporations, whose mission is to provide for the economic welfare of their shareholders, have shown mixed success in generating economic activity for Alaska Natives.<sup>529</sup> According to one report, they “have consumed much fuel and

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<sup>524</sup> It should be emphasized that Alaska Natives enjoy the same status as federally recognized American Indians, but that the village and regional corporations created by ANCSA do not have the same rights that are attached to tribal lands in the US.

<sup>525</sup> Initially, the US government patented 22 million acres to the village corporations and 16 million acres to the regional corporations; USC sections 1611, 1613 (1978).

<sup>526</sup> Examples of such litigation include: *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1979); *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994); *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727 (9th Cir. 1988); and *Leisnoi, Inc. vs. Stratman*, 154 F.3d 1062 (9th Cir. 1998).

<sup>527</sup> Not all is quiet, however. In some cases, village corporations in Southeast Alaska have logged parcels of land they held that were contiguous to other villages, leading to litigation between village corporations. Communication with Steve Colt.

<sup>528</sup> “Whereas all Alaska Native communities at one time enjoyed self-sufficient, subsistence economies relying on their own human and natural resources to provide for their population, the introduction of non-Native lifestyles and modern technology rapidly escalated cash needs, while opportunities to earn cash failed to grow along with those needs. This led to reliance on a transfer economy, dependence on the government, and resulting negative social and psychological consequences, which prevail today.” Page 88, Volume III of the Alaska Natives Commission’s Final Report accessed at [http://www.alaskool.org/resources/anc\\_reports.htm](http://www.alaskool.org/resources/anc_reports.htm) - top.

<sup>529</sup> The report notes that over the course of the study period, 1973 to 1993, dividends paid to shareholders averaged \$155 per year, and that the main financial benefits enjoyed by Native Alaskan were accrued to those employed at a corporation through wages and salaries (Colt, *Two Views of the “New Harpoon,” op. cit.*).

generated much heat but did little to move Alaska Native economic development down the track.”<sup>530</sup> A recent analysis has shown that for the regional corporations, most of the cash they have generated has come from resource development (oil and gas and timber), while they lost money in local business ventures (defined as investments in other types of business such as hotels, real estate, etc., within Alaska).<sup>531</sup> This dynamic presumably places a continued reliance on resource development to maintain positive cash flow.<sup>532</sup> The report also notes that one regional corporation has emphasized job creation rather than generating profits and has been quite successful.

There are also other areas of concern in Alaska regarding resources. In the 1970s, the state introduced limited entry into the salmon fishery, which required participants to have a permit in order to fish for salmon. While Alaska Natives initially received licenses, over time these licenses have taken on a positive value and there has been a reduction in the number of licenses held by Alaska Natives (with the concomitant effect on fishing opportunities). Introducing this approach elsewhere has raised concerns that this type of regulation will become a barrier to entry as Alaska Natives become unable to afford to participate in a fishery. In response, some experimental programs have introduced Community Development Quotas (CDQs), where a portion of the harvest is allocated to a particular community rather than to an individual. The evidence so far suggests that this is a fruitful approach.<sup>533</sup>

As elsewhere, the investment opportunities for development of natural resources, with the exception of oil and gas, are poor. Timber harvests, one of the main sources of revenue for village and regional corporations, have fallen in recent years, and one report suggested that harvests will fall sharply when Sealaska, the regional corporation with most of the commercial timber holdings in Alaska, exhausts its timber inventories between 2002 and 2007.<sup>534</sup> Regional corporations have recently been turning their attention towards investments outside of Alaska such as joint ventures with telecommunications companies to bid for spectrum.<sup>535</sup>

### *Subsistence*

Entwined in all these issues is the issue of subsistence. While ANCSA was silent on the issue of subsistence (with the exception of the committee language), Congress in 1980 enacted the *Alaska National Interest Lands Conservation Act* (ANILCA), which designated federal lands in Alaska as

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<sup>530</sup> Colt, Steve, *Two Views of the “New Harpoon”*: *Economic Perspectives on Alaska’s Regional Corporations* (Anchorage, AK: Institute of Economic and Social Research, University of Anchorage, 1998).

<sup>531</sup> Further work by Steve Colt suggests that recent financial performance of the regional corporations has improved sharply since 1993, and the poor economic results from earlier years reflect the fact that most early investments were made in Alaska and caught in the economic downdraft the state has suffered for much of the past 20 years. More recently, some Alaskan corporations have done very well through investments in telecommunications companies, with one corporation paying a dividend of over \$100,000 from recouping a successful investment in Voicestream stock. Communication with Steve Colt.

<sup>532</sup> This can be seen in the recent debate over the Arctic National Wildlife Refuge, in which the oil and gas development would benefit the local Native corporation which has few other sources of potential revenue.

<sup>533</sup> The CDQs were initially awarded to six different joint ventures formed by partnerships between 62 Alaskan villages and six different corporations. “Community Development Quotas shared by Western Alaskans in the form of Bering Sea pollock royalties were hailed as a resounding success. During the program’s first year, all groups receiving their CDQs met or exceeded their goals in terms of employment, training, and investment.” *Anchorage Daily News*, 1994, as quoted on Page 108, Volume III, of the Alaska Natives Commission’s Final Report accessed at [http://www.alaskool.org/resources/anc\\_reports.htm](http://www.alaskool.org/resources/anc_reports.htm) - top.

<sup>534</sup> Knapp, G., *Native Timber Harvests in Southeast Alaska*, General Technical Report PNW-GTR-284 (US Department of Agriculture, Pacific Northwest Research Station, February, 1992).

<sup>535</sup> Communication with Steve Colt.

national parks, refuges, forests and other conservation units. Within ANILCA, Title VIII required that subsistence uses by “rural Alaska residents” be given priority over all other (sport and commercial) uses of fish and game on federal public lands in Alaska.<sup>536</sup> For many Alaska Natives, subsistence hunting, fishing, harvesting, and gathering is a vital source of their income and also an integral part of their culture.<sup>537</sup> While ANILCA restored hunting and fishing rights of Alaska Natives, the inclusion of non-Natives rights to subsistence activities in the Act has resulted in Alaska Natives’ loss of commercial entry permits for salmon fisheries through sales to non-Natives. The state itself has been reluctant to acknowledge the existence of tribes; as such acknowledgment has implications for jurisdictional control over and the use of Alaska’s natural resources.<sup>538</sup> Recently, Governor Tony Knowles has acknowledged the existence of federally recognized tribes in Alaska, although the state legislature refuses to do so.<sup>539</sup> It is not surprising that the management of resources remains unresolved as of today.

***Katie John, et al., v. United States and Alaska***

While the issue of guaranteeing Alaska Native rights to traditional resources has been constant since the US first bought Alaska from the Russians in 1867, the starting point for the latest battle over subsistence is the case filed by Katie John in 1984. Ms. John asserted her right to resume fishing at the family fish camp located in what had become a national preserve. As the case progressed through the courts, the Alaskan Supreme Court in 1989 found that state law which gave rural residents, Native as well as non-Native, priority use (i.e., subsistence priority) violated the state Constitution, which guarantees equal access to Alaska’s resources to all Alaskans. With the state unable to find a solution, the Federal Government took over management of game resources on federal lands, a job previously left to the state. The Federal Government did not take over fisheries (which are the most important subsistence resource measured in terms of harvest volumes) as the Katie John case was still before the courts. In 1994, The Supreme Court, finding in favor of Katie John, stated that the Federal Government had an obligation to manage fisheries for subsistence purposes. Congress, however, through the provision of various moratoria, prevented the Federal Government from taking any action in terms of fisheries until 1999, at which point it assumed management over navigable waters in Alaska.<sup>540</sup> More recently, the Governor of the state of Alaska, Tony Knowles, has appealed the Katie John decision, arguing that an earlier Alaskan Supreme Court decision gives the state authority over navigable waters. Alaska Natives are considering asking Congress to take direct action rather than attempting to find some cooperative solution involving the state’s participation.

Sources:

Native American Fish and Wildlife Society, “Alaska Natives Shift Subsistence Fight to Washington, DC,” *From the Eagle’s Nest*, 13(1), pp. 5, 7.

<sup>536</sup> Of the 85,698 Alaska Natives in 1990, 62% of Alaska Natives (about 52,000) lived in village Alaska.

<sup>537</sup> “Our subsistence lifestyle—hunting, fishing, trapping and food gathering is at the core of Alaska Native tribal existence. We Alaska natives have continued to enjoy to this day, the elements of this subsistence lifestyle that have been passed on to us by our ancestors and thus endured, ‘from time immemorial.’ The Alaska Native traditional subsistence lifeways are characterized, in part, by the teaching and passing on of: respect for the environment, the fish and wildlife, survival and harvesting skills, tribal ceremonies, spiritual beliefs, sharing trading and bartering, and other cultural values. It describes, in a very real sense, who our ancestors were and who we are and what we intend to pass on to those who come after. Our tribal way is to show concern, by our actions, for the wellbeing of those who will come after.” Excerpted from Loescher, Robert W., President/Chief Executive Officer of Sealaska Corporation, “Native Subsistence Rights – Where Are We,” speech/paper presented to The Alaska Federation of Natives Political Leadership Summit, February 16, 1999.

<sup>538</sup> Some Alaska Natives worry that unless innovative and drastic changes take place that put tribes in control over subsistence activities, the salmon fisheries will no longer exist as they have in the past.

<sup>539</sup> The Governor’s Administrative Order 186, signed in December 1999, states that Alaska formally acknowledges federally recognized tribes in Alaska.

<sup>540</sup> An excellent timeline illustrating various developments in the subsistence debate can be found by accessing <http://www.alaskool.org/frmsetprojects.htm> and following the links for subsistence and the subsistence timeline.

Attempts to meet obligations to Alaska Natives by relying on a rural preference has not worked; furthermore, such a classification excludes those Alaska Natives that find themselves living in Anchorage or other urban areas.<sup>541</sup> Federal control does not appear to be a satisfactory solution for either Alaska Natives or the state, yet efforts to develop an alternative approach have not worked, in part because of the political complexity that has developed over the years and the opposition to the recognition of tribal rights by the state. Today, the issue of how to ensure that Alaska Natives can pursue their right to engage in subsistence activities, given an inability to reach a solution at the state level, has meant increasing frustration for Alaska Natives.

### Yup'ik

Despite the battles over subsistence, there are success stories involving Alaska Natives and wildlife. One such example is the Qavilnguut Caribou Herd, found in the Qavilnguut Mountains bordering western Alaska. Yup'ik villages in the surrounding area had utilizing the caribou for subsistence purposes. State and federal game managers originally paid little attention to the herd, believing it to be an extension of a larger herd and, therefore, not requiring special management attention. However, in 1984, these officials changed their minds and determined that the herd was a unique herd. Because of what they thought was the herd's small size, they closed all hunting in order to prevent what they felt would be the extirpation of the herd. Alaska Natives living in the villages disagreed; from what they saw, the herd was substantially larger. The herd remained closed to hunting throughout the remainder of the 1980s despite the growth that villagers saw in numbers, which state and federal managers initially refused to acknowledge. Initial attempts by villages to petition the state to reopen the hunt were unsuccessful, and it was not until one village, Kwethluk, sued and won in federal court that the hunt resumed. Shortly thereafter, the village leaders called for the cooperative development of a management plan with state and federal agencies. Today, the 18 Yup'ik villages work with both the Alaska Department of Fish and Game and the US Fish and Wildlife Service in a working group to determine population levels, establish harvest levels, and decide the allocation of permits and the timing of seasons, among other matters. In the process, there have developed institutional linkages and a level of trust between village leaders and state and federal managers.

#### Sources:

This example is drawn from Spaeder, Joseph, "The Qavilnguut (Kilbuck) Caribou Herd: An Alaskan Example of Cooperative Management; A Report to The Eighteen Participating Yup'ik Villages and AK Department of Fish and Game & US Fish and Wildlife Service," 1995;

*Co management in Alaska: A Viable Alternative to Dual Management under ANILCA?* Sponsored by the Alaska Native Law Section, Alaska Bar Association. March 4, 1997.

The Alaska Biological Sciences Center, in the United States Geologic Service, has identified several emerging resource issues in Alaska. Most of these issues involve Alaska Natives and include: increased demands placed upon federal management of subsistence; issues related to the remaining selection of land by regional corporations in conservation units and other management areas; industrial pollution in the Beaufort, Bering, and Chukchi Seas; and amendments to the upcoming renewal of the Migratory Bird Treaty to allow harvesting in the spring.<sup>542</sup> More general issues include the lack of economic opportunities in most Native Alaska Villages, with little prospect for increased economic development given the trends affecting resource development. At the same time, many villages face increasing populations and a rise in the number of young people. Under such circumstances, fish and game resources will only become more important in sustaining village life for Alaska Natives as these resources also come under more pressure from both population growths within villages as well as external pressure from outside.

<sup>541</sup> Most recently, a federal judge characterized the Kenai Peninsula, which contains several towns considered urban areas, as rural so that any residents within the region, no matter where they lived, would have equal access to hunting and fishing opportunities (although they may also have to meet other criteria depending upon the relative abundance of the fish or game they wish to catch).

<sup>542</sup> See [http://www.absc.usgs.gov/about\\_absc.htm#](http://www.absc.usgs.gov/about_absc.htm#).

## *ENVIRONMENT*

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- Tribes face a multitude of environmental risks and damages that are the result of federal neglect, bad federal policy, federal mismanagement, and the operation of market and other forces upon tribes. The range of environmental issues is as wide for tribes as it is for any other class of jurisdiction—nine Superfund sites are found on or adjacent to Indian reservations and more than 200 "Formerly Used Defense Sites" have been identified in 100 Indian communities.
- These environmental risks not only fall on a socioeconomically disadvantaged group (i.e., on-reservation Indians) they fall on tribal governments whose jurisdiction over environmental issues is made complicated by land checker-boarding and uneven consideration in federal law. Some tribal authority is strong, relatively well-funded and well-defined and other tribal authority is weak, under-funded, and ill-defined.
- Despite the challenges presented by history and jurisdictional complexity, tribes are building the internal capacities to develop, implement, monitor, and enforce their own environmental standards in much the same way states do, yet on Indian terms.

The more than 550 federally recognized Indian tribes face a host of environmental challenges unique to their own contexts. Tribes variously cope with non-point source water pollution, decaying waste handling facilities, noxious exotic species, wildlife habitat loss, mine tailings, military waste, and even Superfund sites. Notwithstanding the specific challenges tribes face individually, they also confront a number of common challenges. Tribes all struggle with the legacy of historical federal mismanagement of environmental problems. Notwithstanding recent dramatic increases in funding, tribes all operate with inadequate funding in some realm of environmental policy. Tribes all confront uneven legal treatment of tribal powers across different environmental media. Tribes all manage environmental problems in a multi-jurisdictional policy context wherein federal, state, and local policymaking takes place.

Both the federal government and tribes are working to overcome the legacy of past policies and to address the emerging environmental challenges on reservations. In various ways, the federal government has institutionalized recognition of tribal sovereignty and acknowledged the importance and value of involving tribes in all stages of the development and implementation of national environmental policy. And while the overall need for federal resources remains great, funding for certain environmental programs has increased substantially. Tribes, for their part, are building their own bases of expertise,

enhancing their regulatory capacities, and addressing complex multi-jurisdictional pollution problems in cooperation with off-reservation governments.

### *The Historic Context*

A variety of federal policies have contributed to the environmental challenges tribes currently face. The *Allotment Act* resulted in dispossession, checker-boarding, and fractionation that today hobbles tribal efforts to establish coherent environmental jurisdiction (see the Land section). Federal policies have also often demonstrated little regard for traditional Indian uses of and relationships to the land and have thereby resulted in activities that have permanently altered tribal landscapes and traditional practices. For example, the creation of the National Park system in the late nineteenth century led to the exclusion, or in some cases the removal, of Indian tribes from their traditional hunting and gathering areas and pushed them toward unfamiliar and, ultimately, destructive land uses.<sup>543</sup>

Similarly, the division of land into individual allotments under the *Allotment Act* encouraged the onset of European-style agriculture into Indian Country with deleterious consequences:

...under the direction of agency farmers, intensive farming replaced shifting cultivation, row agriculture replaced variable mound planting, monoculture replaced intercropping, and leveled fields replaced flood plane farming. In the Northeast, Great Lakes, and Northwest, forests gave way to Indian and settler fields. In Oklahoma and on the High Plains, Indians and agents cleared, plowed, and planted large areas in a succession of monoculture crops. Well drilling, irrigation, dry land farming techniques, and unbounded optimism helped government officials and Indians expand cultivation into the arid zones of the basin and range country. Fences, pest and weed controls, and introduced cultigens flattened once-diverse field biotas. Where Indians would not take up farming, whites bought or leased the fields.<sup>544</sup>

The over-cropping and the lack of crop rotation and fertilization in the early 1900s dramatically reduced land productivity in the American West. Tens of thousands of acres were made sterile due to improper irrigation that brought alkali to the surface of the thin western soils.<sup>545</sup>

Domesticated European livestock further depleted Indian lands. Native animal species such as bison were unable to compete with the livestock and were eventually pushed off reservation lands. Poor federal management of introduced animals led to overgrazing problems. During the later half of the 1930s, Federal officials were forced to institute drastic livestock reduction programs on many reservations to stop the degradation that was occurring due to overgrazing. Notwithstanding federal recovery efforts, some ravaged areas such as on the Navajo and Tohono O'Odham reservations never recovered. Today, tribes are faced with tough decisions about how best to use the land in light of the high rates of erosion, degradation and the introduction of invasive noxious plant species.<sup>546</sup>

More recently, tribes have witnessed more modern environmental degradation on or near their lands. Neighboring municipalities have failed to control upstream water pollution (e.g., Sandia Pueblo and Albuquerque). Department of Defense operations spanning a quarter century have left Arctic

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<sup>543</sup> Spence, Mark David, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (New York, NY: Oxford University Press, 1999)

<sup>544</sup> Lewis, David Rich, "Native Americans and the environment: A survey of twentieth-century issues," *American Indian Quarterly*, (Summer 1995), Volume 19, Issue 3 (internal footnote omitted).

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid.*



Villages to contend with scores of dumps. The Hanford Nuclear Reservation threatens nearby tribes (see below). In sum, like many poor communities around the country, Indian Tribes find themselves confronting problems of someone else's making with diminished capacity to address the problems. Yet, unlike many other poor communities, Tribes face their problems with added jurisdictional complications.

### *Current Challenges*

The historical legacy of past federal policies leaves several common challenges for tribes today. These challenges are briefly discussed below.

- *Environmental Contamination.* Some tribes are located in areas that have experienced high levels of contamination and environmental degradation, and many tribal lands not already contaminated are under the immediate threat of potential contamination. Some tribes find themselves neighbors to an as-yet-unremediated superfund site, such as the Elem Indian Colony or the Sulphur Bank Rancheria in California. Other tribes find themselves burdened with Superfund sites on tribal homelands, as is the case for the Quapaw in Oklahoma.<sup>547</sup> Tribes along the Columbia River fear the potential environmental catastrophe posed by waste generated at the Hanford Nuclear Reservation. Department of Defense (DOD) activities have compromised Indian lands across the country. Those in Alaska, in particular have suffered from DOD activities.<sup>548</sup> Further compounding their concerns, Alaska Natives, despite their remote location, are facing serious problems from increased levels of persistent organic pollutants (POPs). Alaska Natives are concerned about their ability to maintain traditional lifestyles given the level of POPs such as polychlorinated biphenyl's (PCBs) and dioxin found in animal tissues.<sup>549</sup> The issue of Arctic pollution is the top priority of the Arctic Council as well as being under consideration for a global agreement aimed at curbing the production of POPs.

Steps are being taken to address some of the environmental contamination problems on Indian reservations. The DOD is required by law to identify and remediate those sites on Indian lands where it has caused environmental damage.<sup>550</sup> The Department has already issued a report identifying such sites and has started clean-up efforts.<sup>551</sup> One Alaskan Village has even utilized this program to its economic advantage. The Loudon Tribal Council formed the Yukaana Development Corporation (YDC) to access available funds to clean up contamination created by the US Air Force Station at Galena.<sup>552</sup> The YDC successfully sub-contracted on the initial remediation work in 1997 and has subsequently built upon its experience and worked on other remediation projects. The Awkwesasne in St. Regis faced the environmental problems associated with a large aluminum smelter on the St.

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<sup>547</sup> Lynch-Castillo, Karen, "Quapaw Tribe Pushes for Environmental Clean-up," *From the Eagle's Nest* 13(1), Native American Fish and Wildlife Society, pp. 1, 6-7.

<sup>548</sup> "Alaska has the added burden of being home to numerous Cold War military sites that are contaminated with hazardous substances like PCBs and dioxins. Some bases are located in rich fishing areas like Adak and the St. Lawrence Islands." Dobbyn, Paula, "Contaminated Game Has Natives Worried," *Anchorage Daily News*, May 2, 2000.

<sup>549</sup> "Alaska Natives are starting to avoid their traditional foods out of fear that wild fish and game species are contaminated with pesticides, heavy metals and other toxins, Native delegates told an international conference on Arctic pollution in Anchorage on Monday." *Ibid.*

<sup>550</sup> Public Law 103-335.

<sup>551</sup> The report is entitled *Department of Defense Report to Congress on Environmental Impacts to Native American Lands* and can be accessed at <https://denix.cecer.army.mil/denix/Public/Native/Reports/Lands/lands.html>.

<sup>552</sup> Galena is approximately 270 miles west of Fairbanks in the interior of Alaska.

Lawrence River and have been proactive in building the institutional capacity to develop an aggressive program to press for clean-up of contaminated sites.<sup>553</sup>

#### Environmental Contamination in Indian Country

- The United States Department of Defense lists Formerly Used Defense Sites (FUDS) on tribal lands. About 100 tribes have reported over 200 FUDS on their reservations. Two-thirds of these sites are in the state of Alaska;\*
- The EPA administers the “Superfund” program, which addresses the clean-up of what they consider to be the most seriously contaminated sites in the United States. There are 1,212 sites that are listed on their National Priority List. Of those, nine are on or immediately adjacent to Indian lands. The EPA is working with another 21 tribes who are indirectly being affected by “Superfund” sites not located on their reservations;\*\*
- In 1985, the Council of Energy Resource Tribes (CERT) surveyed 25 reservations for active and inactive hazardous waste generators, storage, and disposal sites. They survey discovered 65 hazardous waste disposal sites on just those 25 reservations. The BIA has located an additional 24 potential hazardous waste sites on reservations.\*\*
- In 1979, a United Nuclear uranium mill tailings pond gave way spilling 100 million gallons of sludge into the Rio Puerco River. Navajos are still not able to use the water. \*\*\*

#### Sources:

\* Patrick Durham, memo entitled “Snapshot of Indian Country,” Native American Fish and Wildlife Society.

\*\* Lauren Wenzel, “Environmental Risk in Indian Country,” located on the EPA website: <http://www.epa.gov>.

\*\*\* David Rich Lewis, “Native Americans and the environment: A survey of twentieth-century issues,” *American Indian Quarterly*, Summer 1995, v.19, Issue 3.

- *Air and Water Quality*. Several tribes in Southern California are located in non-attainment areas under the Clean Air Act.<sup>554</sup> In those areas, tribes are required to purchase permits if they hope to attract industry that could potentially emit emissions—i.e., they face yet another hurdle to potential economic development. Fortunately for tribes, some regions are incorporating tribes into the partnerships undertaking the air quality management. The Western Regional Air Partnership (WRAP), which addresses visibility concerns for the Colorado Plateau, is involving tribes in the planning process and attempting to ensure that tribes will receive allocations of air permits if such a

<sup>553</sup> “With initiation of the air and water quality programs, the Tribe’s Environment Division steam-rolled itself into a position so that no one would be able to ignore it. Finally, government agencies and industries alike would have to deal with the Tribe on a government-to-government basis. As meetings progressed between the Tribe and EPA, it became clearer in which direction the Tribe was going. Jim Ransom, the first Director of the Environment Division said, ‘We are looking to create our own water and air quality standards. And we want a water-monitoring system in the St. Lawrence River, as it is our drinking source.’ Soon after, the Tribe was busy formulating its own standards. These standards known as ARARS, or Applicable or Relevant and Appropriate Standards, were developed for the specific needs of the reservation. By 1990, the Division has gained much ground in the fight to clean up the water, soil and air of the Mohawk Territory. The community was awakened to the real risks associated with toxic waste and the deteriorating effect it was having on the culture as a whole. Eventually self-reliant, the Division was able to do its own environmental sampling, monitoring and assessing. It also developed a multimedia program that helped assess and examine the community’s environmental needs and concerns.” Swamp, Lawrence. Environment Division – St. Regis Mohawk, *Tribe Driven by Necessity: The St. Regis Mohawk Tribe Develops Environmental Expertise*, accessed at: <http://www.northnet.org/earth/driven.htm>.

<sup>554</sup> The *Clean Air Act* requires firms that create new emissions in a non-attainment area to purchase sufficient credits from other firms in the same area.

policy is pursued.<sup>555</sup> This approach is much more palatable to tribes, not only because they face economic development challenges quite apart from permit issues, but also because they have a very deeply held perception that the environmental problems at issue "grew up around them" and were not of their making.

With respect to water quality, in 1986, Americans for Indian Opportunity (AIO) conducted a survey of environmental needs in Indian Country. Of the forty-eight tribes that responded, many cited water quality as their main concern. Of those that responded:

- 65% depend solely upon groundwater for their water supply;
- 31% depend upon a combination of surface and groundwater;
- 17 tribes reported violations of EPA drinking water standards; and,
- 9 reservations reported outbreaks of waterborne disease.

Off-site sources of pollution often pose a threat to reservation groundwater supplies. For example, cyanide heap-leach mining in Montana is polluting water on the Fort Belknap Reservation and industrial waste dumps surrounding the St. Regis Indian reservation are polluting the St. Lawrence River that the Akwesasne Tribe relies on for fish. A 1990 Indian Health Service (IHS) survey identified more than 112,000 homes on Indian lands and Native Alaska villages that are in need of piped indoor drinking water and over 64,000 homes in need of sanitation facilities at a total cost of \$495 million.<sup>556</sup> The EPA estimates that there are over 340 tribes that are clearly eligible for federal funding to help develop their own environmental programs to confront these issues; to date only 14 tribes have developed their own drinking water quality standards.<sup>557</sup>

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<sup>555</sup> See [www.wrapair.org](http://www.wrapair.org) for further information on this project as well as for a list of the tribes that are participating. According to Michael Connolly, initial plans excluded the consideration of any kind of tribal allocation until the inequity was brought to the attention of the non-Indian planners involved. Communication with Mike Connolly.

<sup>556</sup> Indian Health Service, 1990, *Trends in Indian Health*. Rockville, Maryland.

<sup>557</sup> Felicia Marcus, Region IX EPA Administrator, in a speech given before the National Tribal Environmental Conference, accessed at <http://www.ntec.org>.

### Tribal Sovereignty and Water Quality

- The Isleta Pueblo in New Mexico, located on the Rio Grande, set water quality standards approved by the EPA, which were more stringent than the State's. The City of Albuquerque, located 15 miles upstream from the Pueblo, held a permit for a wastewater treatment facility that did not meet those standards. The City objected to the Pueblo's actions and sued the EPA, arguing that the Pueblo did not have the authority to set more stringent standards than the State. The 10<sup>th</sup> Circuit Court of Appeal in 1997 rejected the City's arguments and upheld the Pueblo's right to set such standards when EPA issues the permits they must hold.
- The 9<sup>th</sup> Circuit Court of Appeals in Montana in 1998 upheld the right of the Confederated Salish-Kootenai Tribe to set water quality standards that non-members living on private lands within the reservation would have to meet
- The Penobscot and Passamaquoddy Tribes are currently fighting to keep federal oversight of water quality in Maine. The Tribes argue that the state is incapable of regulating the paper companies because of the important economic role they play in the state. The paper mills, along with several other key industries are responsible for polluting the rivers that the tribes rely on for fish and other culturally significant products. Both tribes face proportionally higher rates of cancer compared to the rest of Maine, a state that already has the highest cancer rate in the United States.

- *Waste Disposal.* Attempts to site landfills and hazardous waste facilities (including nuclear waste dumps) on Indian land have created controversies around Indian Country. Some applaud the potential economic opportunity these ventures offer while others decry the long-term environmental consequences of these plans. Examples of tribes pursuing the economic opportunities of waste disposal include the Campo of California, who agreed to site a 600-acre landfill; and the Skull Valley Goshute in Utah (who lack natural resources and reside in a remote location that offers few economic opportunities), which is currently considering whether to accept a nuclear waste storage facility on tribal land.<sup>558</sup> The Campo effort is being hampered by lawsuits brought by outsiders, including several environmental groups. The initiative is currently on hold, although in the planning and development stages it did provide funds sufficient to start several tribal environmental management programs. Further complicating matters, the federal government is in the process of promulgating more stringent standards on landfills, which are expected to affect rural communities disproportionately because rural landfills generally cost more to bring up to standard.<sup>559</sup>

The Eastern Band of Cherokee, instead of treating these higher standards as an obstacle, decided to capitalize on the opportunity. They closed their existing landfill, which would have been prohibitively expensive to upgrade, and created a waste transfer station that handles solid waste not only from the reservation, but also from surrounding non-Indian communities. This allowed the Band to not only reap the environmental benefits from proper waste disposal, but also allowed the Band to generate employment and attract new revenues. In 1990, the Rosebud Sioux Tribal Council approved a 5,700-acre landfill. The project was estimated to be large enough to handle all the waste of the United States. The Tribe would receive one dollar per ton of trash—much needed revenue for an economically depressed tribe. Similar dumps elsewhere, however, were receiving \$80 per ton.

<sup>558</sup> Information about the proposed facility can be found at [www.skullvalleygoshute.org](http://www.skullvalleygoshute.org).

<sup>559</sup> Communication with Jerry Pardilla, President, National Tribal Environmental Council.

In addition to taking in solid waste as an economic development proposition, tribes must also meet the substantial solid waste needs of their own communities. There are an estimated 1,100 dumpsites on Indian lands that are not in compliance with current regulations. In 1999, the Tribal Solid Waste Interagency Workgroup was established to bring them into environmental compliance or to close them, yet of the estimated \$126 million required for the undertaking, only \$4.1 million has been budgeted to-date.<sup>560</sup> Tribes also face the problem of illegal dumping, which can be a problem where waste transfer stations are few and far between and tipping fees may discourage proper dumping. On the Navajo reservation, the Navajo Environmental Protection Agency recently uncovered 465 illegal dumps. The Agency estimates that it will cost over \$30 million to clean them up.<sup>561</sup> Tribes are also confronting the potential threats to their reservations from waste sites located in neighboring communities. Tribes located near the Waste Isolation Pilot Project (WIPP) site in Carlsbad, New Mexico are concerned about the shipment of radioactive waste across 14 tribal homelands and the potential environmental impact of a spill; their concerns are further compounded by outstanding questions of responsibility in the case of an accident.

- *Absence of tribal policies and institutional capacities.* Few tribes have developed environmental regulations that protect their resources. Even fewer have the institutional capacity to enforce them once they are developed. Because many tribes are struggling just to meet the basic needs of their citizens, environmental protection has been given a lower priority in many tribes. Insufficient financial resources and inadequate managerial experience have also hampered enforcement efforts for tribes that do have regulations in place. Some tribes such as the White Mountain Apache Tribe are mentoring youth for future careers in environmental management. This Tribe instituted a sales tax on fishing and hunting permits, and a portion of the tax revenue is used to provide scholarships to youth that are pursuing environmental degrees in college.
- *Environmental Justice.* The pursuit of environmental justice in Indian Country is rendered complex by tribal status as sovereigns within the American constitutional system. This is immediately apparent from the US EPA's basic definition of environmental justice:

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.<sup>562</sup>

Environmental justice in Indian Country reasonably entails the "fair treatment and meaningful involvement" of Indian *governments* in policymaking, and indeed, the EPA has been relatively more advanced than many other agencies outside the US Department of the Interior in embracing the government-to-government relationship the federal government has with tribes. In addition, environmental justice in Indian Country entails addressing the legacy of federal policies and

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<sup>560</sup> The funds are being sourced from a cooperative arrangement of several different federal agencies: The Environmental Protection Agency; Department of Interior; US Department of Agriculture Rural Utilities Service; Department of Defense; Indian Health Service; and Housing and Urban Development. Bad Wound, Barbara, "Waste Cleanup Planned for Indian Country," *Indian Country Today*, August 23, 2000.

<sup>561</sup> Rushlo, Michelle, "Navajo Rangers Combat Illegal Dumps," *Tucson Citizen*, October 25, 1999, p. 2C.

<sup>562</sup> US Environmental Protection Agency, Office of Enforcement and Compliance Assurance, "Environmental Justice," accessed at <http://es.epa.gov/oeca/main/ej/>.

mismanagement that leaves many Indian communities bearing a "disproportionate share of the negative environmental consequences" of industrial, municipal, and commercial operations. Thus, to the extent that Indian communities suffer disproportionate environmental harms, they are appropriately concerned that environmental *injustice* needs to be redressed by federal and other policy. Note however, that because they retain their status as *governments*, Indian tribes are unique among the communities in the US that may be vulnerable to environmental injustice in that they are also policy making bodies whose actions can themselves advance or retard environmental justice. Thus, tribes are not only likely victims of environmental *injustice*, but uniquely, they are also potential exponents of environmental *justice*.

### *Federal and Tribal Efforts to Address Current Challenges*

The recognition of the rights of tribes as sovereign nations has greatly contributed to the development of environmental programs throughout Indian Country. Tribes still must contend with numerous legislative and court threats to their sovereign rights, but both the federal government and tribes are working to overcome these challenges. The efforts of the federal government and tribes to work more closely together has resulted not only in a shift of practice but a complete change in mindset. The federal government has realized the importance and value of involving tribes in all stages of policy development and implementation, and the tribes are recognizing the value of combining traditional knowledge with western-based science.

In recent years, a number of federal agencies have created offices tasked with interacting directly with tribes.<sup>563</sup> The Environmental Protection Agency (EPA), for example, created the American Indian Environmental Office (AIEO) to work directly with tribes on EPA issues. Over the past few years, the EPA has been proactive in responding to tribal concerns by creating both institutional structures that incorporate tribal concerns into policy-making, as well as substantially increasing funding for tribal programs.<sup>564</sup> The National Environmental Justice Advisory Council (NEJAC), an advisory committee to the EPA, created an Indigenous Peoples Subcommittee. In addition to their role advising NEJAC, the committee takes a role in advocating for tribal involvement in federal environmental decision-making. In 2000, the committee developed a *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision-Making*. The *Guide* was developed to address concerns raised about the lack of effective consultation and collaboration by all federal agencies with tribes.<sup>565</sup> The impact of the *Guide* on other federal agencies has yet to be determined, but it is an important step in the education of federal agencies on how best to work with tribes and highlights the importance of tribal input into federal agency policies.

Following President Clinton's *Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments* in April 1994, a series of specific policies for dealing with tribes was established within the respective agencies of the federal government.<sup>566</sup> The President also signed a subsequent Executive Order to address environmental and health concerns for low-income and minority communities that made explicit provisions for American Indians and Alaska

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<sup>563</sup> The AIEO can be accessed at <http://www.epa.gov/indian/>.

<sup>564</sup> According to Rodges Ankras, of the AIEO, funding for tribal programs in the EPA increased from \$37 million in 1994 to \$180 million in 2000 – all the more striking given budget trends for Indian programs in other areas.

<sup>565</sup> The guide can be found on the NEJAC website at: <http://es.epa.gov/oeca/main/ej/nejac/index.html>.

<sup>566</sup> This was supplanted by Executive Order 13084 in 1998. See the Tribal-Federal Relations section of this report.

Natives.<sup>567</sup> Federal land agencies such as the National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service have created tribal liaison posts to deal with tribes and their issues more directly. In 1997, the Secretary of the Interior, Bruce Babbitt, and a group of tribal leaders signed a Secretarial Order<sup>568</sup> addressing the application of the ESA/1973 on tribal lands. Drawing from an agreement signed in 1994, between the White Mountain Apache Tribe of Arizona and the United States Fish and Wildlife Service, tribes and the federal government were able to strike a compromise. All parties involved recognized the common interest in maintaining healthy ecosystems while acknowledging the unique status of Indian lands and the federal interest in protecting endangered species.<sup>569</sup> The Secretarial Order is illustrative of both the growing sophistication of tribal leaders and the willingness of tribes and the federal government to recognize a common concern and draw upon tribal expertise to proactively address a contentious issue involving tribal sovereignty.

In conjunction with the efforts of federal agencies to work more closely with tribes, a shift towards higher-level, more sophisticated land-use planning is currently underway. This shift is due, in part to the recognition of the integrated nature of many environmental and resource issues. For example, the Clean Water Action Plan, an initiative by the EPA, is addressing water quality issues by restoring watersheds.<sup>570</sup> This integrated approach that addresses water quality issues through habitat restoration, parallels the traditional wisdom of tribes who have long believed in, "...seeing wholes, recognizing patterns and interrelationships, and learning how to structure human actions accordingly."<sup>571</sup> An important element in this approach is the integral role tribes play in these activities. Ecosystem management does not stop at reservation borders, and tribes and their environmental managers are playing an increasingly critical role in the success of these integrated projects. The potential success of these integrated approaches relies on the continued involvement of tribes at all stages of development, implementation and evaluation. It is vital that the federal government continues to recognize the inherent value of incorporating tribes and their knowledge of their own environments.

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<sup>567</sup> In 1994, the President signed Executive Order 12898 on *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. The specific provisions for American Indians and Alaska Natives are found in section 6-606 of the Order.

<sup>568</sup> *American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act*, signed June 5, 1997.

<sup>569</sup> More information on the process and compromises made during the formation of this agreement can be found in Wilkinson, Charles F., "Indian Tribal Rights-Endangerment Species Secretarial Order," *Washington Law Review*, October 1997.

<sup>570</sup> For example, the Clean Water Action Plan is an initiative by the EPA to restore water quality through the restoration of watersheds, which requires understanding "the connection between land use and water quality." Wandermoer, Catherine, "Remarks on the Clean Water Action Plan," before the 4<sup>th</sup> Annual Intertribal Environmental Council, Tulsa, Oklahoma, June 1, 1999. This is a significant shift in emphasis from the *Clean Water Act*, which focuses on large scale fixed discharges such as factories and municipal sewage treatment plants.

<sup>571</sup> Columbia River Inter-Tribal Fish Commission, *A Tribal Tradition of Sound Fisheries Management*, Wy-Kan-Ush-Mi Wa-Kish-Wit, Spirit of the Salmon: The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes, Volume I, 2-4 (1995).

### Shaping the Policy Debate: The Northwest Tribes and the Recovery of Pacific Salmon

In the Pacific Northwest, tribes have been in the forefront of bringing attention to the declining salmon populations. Increasing development, the building of dams for hydropower and water diversion for irrigation have all contributed to the decline of salmon populations in the Pacific Northwest. The decline has reached such a critical level that some salmon runs have been placed on the endangered species list under the ESA/1973. The salmon have long been an essential part of the culture and economy of tribes throughout the Pacific Northwest and their decline has directly resulted in lost economic and cultural opportunities for the tribes in the region.\* Tribes first pursued litigation to gain their lost treaty rights to harvest salmon in western Washington in the early 1970s. In 1974, the Boldt decision granted them 50% of the harvestable surplus.\*\*

Several subsequent decisions followed the Boldt decision, which awarded similar rights for the Columbia River tribes. Tribes working individually and through intertribal organizations such as the Columbia River Inter-Tribal Fish Commission (CRITFC) and the Northwest Indian Fisheries Council (NWIFC), and participating in inter-jurisdictional organizations such as the Pacific Fisheries Management Council (which regulates coastal waters off of Washington, Oregon and California), have helped to craft policies that recognize tribal interests in the recovery of the salmon. Tribes were also an integral part of the renewal of the Pacific Salmon Treaty in 1999, a bilateral national agreement between Canada and the US governing the harvest of salmon. Today, Pacific Northwest tribes shape the larger policy debates that are increasingly focused on basin-wide efforts to restore fisheries habitat and thereby salmon returns. Several different recovery options have been proposed, but tribes are arguing that the option with the greatest chance of success, breaching the dams, has not been given enough consideration.

On September 13, 2000, the Chairman of the Nez Perce Tribal Executive Committee testified before the Senate Subcommittee on Fisheries, Wildlife, and Water. The Honorable Sam Penney stated, "I would like to say that the alarm on the extinction clock has gone off long ago. Neither the salmon, nor the tribes, nor the people of the Northwest have the time to delay breaching the four lower Snake River dams and implementing the 'major overhaul' the United States' operation of the hydrosystem needs. I am deeply disappointed the United States has chosen to ignore its treaty and trust obligations."\*\*

\* In 1985, 20 different tribes were able to catch 5.3 million salmon over a fishing period that lasted nine months. In 2000, the tribes anticipated that they would harvest no more than 500,000 over a two-week period. Tirado, Michelle, "The Salmon People: Tribes in Crisis," *American Indian Report*, July 2000.

\*\* The Boldt decision is known for the federal district judge that initially rendered the decision in *United States v. Washington*, 384 F. Supp. 312. The decision was appealed and upheld by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (1979).



## APPENDIX A Table of Acronyms

ADR – Alternative Dispute Resolution  
AFDC – Aid for Families with Dependent Children  
AFN – Assembly of First Nations  
AI/AN – American Indian or Alaska Native  
AIEO – American Indian Environmental Office  
AIHEC – American Indian Higher Education Consortium  
AIM – American Indian Movement  
AIROS – American Indian Radio on Satellite  
AITC – Alaska Inter-Tribal Council  
ANA – Administration for Native Americans  
ANILCA – Alaska National Interest Lands Conservation Act  
ANCSA – Alaskan Native Claims Settlement Act

BAR – Branch of Acknowledgement and Research  
BIA – Bureau of Indian Affairs

CBD – Convention on Biological Diversity  
CDFI – Community Development Financial Institutions  
CDIB – Certificate of Degree of Indian Blood  
CDQs – Community Development Quotas  
CERT – Council of Energy Resource Tribes  
CFR – Code of Federal Regulations  
CRITFC – Columbia River Intertribal Fish Commission

DOD – Department of Defense  
DOI – Department of the Interior

ECOSOC – Economic, Cultural and Social Committee  
EDA – Economic Development Administration  
EDF – Environmental Defense Fund  
EO – Executive Order  
EPA – Environmental Protection Agency  
ESA/1973 – Endangered Species Act of 1973

FNDI – First Nations Development Institute  
FSA – Farm Services Agency  
FSC – Forest Stewardship Council  
FY – Fiscal Year

GAO – General Accounting Office  
GEF – Global Environmental Facility  
GLIFWC – Great Lakes Indian Fish and Wildlife Commission

HCI – Ho-Chunk, Incorporated  
HHS – Health and Human Services  
HUD – Department of Housing and Urban Development

IAC – Intertribal Agriculture Council  
 IACA – Indian Arts and Crafts Association  
 IACB – Indian Arts and Crafts Board  
 IAIA – Institute of American Indian Art  
 ICBEMP – Inter-Columbia Basin Environmental Management Program  
 ICRA – Indian Civil Rights Act  
 ICT – *Indian Country Today*  
 ICWA – Indian Child Welfare Act  
 IDA – Individual Development Account  
 IGRA – Indian Gaming Regulatory Act  
 IHAs – Indian Housing Authorities  
 IHCIA – Indian Health Care Improvement Act  
 IHS – Indian Health Service  
 IITC – International Indian Treaty Council  
 INAP – Indian and Native American Employment and Training Program  
 IRA – Indian Reorganization Act  
 IRM – Integrated Resource Management  
 ILO – International Labor Organization  
 ILRC – Indian Law Resource Center  
 ITBC – Inter-Tribal Bison Cooperative  
 ITTC – Intertribal Timber Council  
 IUCN – International Union for the Conservation of Nature  
  
 LCIS – Legislative Commission on Indian Services (Oregon)  
  
 MSAs – Metropolitan Statistical Areas  
 MOU – Memorandum of Understanding  
  
 NAFWS – Native American Fish and Wildlife Association  
 NAGPRA – Native American Graves Protection and Repatriation Act  
 NAHASDA – Native American Housing Assistance and Self-Determination Act  
 NAIHC – National American Indian Housing Council  
 NASS – National Agricultural Statistics Service  
 NCAI – National Congress of American Indians  
 NEPA – National Environmental Policy Act  
 NIEA – National Indian Education Association  
 NIGA – National Indian Gaming Association  
 NIGC – National Indian Gaming Commission  
 NGO – Non-Governmental Organization  
 NPO – Non-Profit Organization  
 NTEC – National Tribal Environmental Council  
 NTFFPs – Non-Timber Forest Products  
 NWIFC – Northwest Indian Fisheries Council  
  
 OAIT – Office of American Indian Trust  
 OAS – Organization of American States  
 ONABEN – Oregon Native American Business & Entrepreneurial Network  
 OSG – Office of Self-Governance  
  
 PL – Public Law  
 PCBs – Polychlorinated Biphenyls

POPs – Persistent Organic Pollutants  
PRWORA – Personal Responsibility and Work Opportunity Reconciliation Act of 1996

RAIPON – Russian Association of Indigenous People of the North  
RRCA – Resources and Recovery Conservation Act

SCHIPs – State Child Health Programs  
SCIC – Southern California Indian Center, Inc.  
SFIS – Santa Fe Indian School  
SRST – Standing Rock Sioux Tribe

TANF – Temporary Assistance for Needy Families  
TARs – Tenant Accounts Receivables  
TAS – Treatment as a State  
TDHEs – Tribally Designated Housing Entities  
TPA – Tribal Priority Allocations  
TRIPS – Trade Related Aspects of Intellectual Property Rights

UNCHR – United Nations Commission on Human Rights  
UNITY – United National Indian Tribal Youth  
UNPO – Unrepresented Peoples Organization  
US – United States  
USC – United States Code  
USDA – US Department of Agriculture  
USET – United South and Eastern Tribes  
USFS – US Forest Service  
USFWS – US Fish and Wildlife Service

WCIP – World Council of Indigenous Peoples  
WIPP – Waste Isolation Pilot Project  
WGIP – Working Group on Indigenous Populations  
WRAP – Western Regional Air Program  
WTO – World Trade Organization  
WWF – World Wildlife Fund

## APPENDIX B

### Timeline of US-Indian Relations<sup>572</sup>

#### 250 YEARS OF LEGISLATIVE ACTS, COURT DECISIONS, AND FEDERAL INDIAN POLICIES<sup>573</sup>

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<sup>572</sup> The time periods set out in this timeline correspond to the timeline found in Cornell, Stephen, *The Return of the Native: American Indian Political Resurgence* (New York, NY: Oxford University Press, 1990), p. 14. Note that many alternative timelines are available, including, for example, the one maintained by the Office of American Indian Trust (OAIT), within the Department of the Interior (DOI), found at <http://www.doi.gov/oait/docs/timeline.htm>. Entries in this timeline marked with an asterisk (\*) are quoted from American Indian Policy Center, *To Build a Bridge: An Introduction to Working with American Indian Communities* (St. Paul, MN: American Indian Policy Center, 2000). Used with the permission of the American Indian Policy Center.

<sup>573</sup> The sample cases, legislation, and policies contained in this timeline represent only a small portion of relevant materials. For a more comprehensive treatment, see Getches, David H., Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, Fourth Edition (St. Paul, MN: West Group, 1998).

## Historical and Legislative Review

### Federal Indian Policy

#### 1776-1870 THE FORMATIVE YEARS

##### 1778 First treaties between newly established US government and Indian nations

*Formalized a government-to-government relationship between Indian tribes and the newly formed US government.*

##### 1790 Non-Intercourse Act, 25 USC §177 (Trade and Intercourse Act)

*Placed the management of trade, diplomatic relations and land cessions involving Indians exclusively in the hands of the US government.*

##### 1820s & 1830s US Supreme Court Chief Justice John Marshall's "Trilogy" of cases

- 1823- *Johnson v. McIntosh*, 21 US (8 Wheat) 543. *Held that tribal sovereignty was impaired by colonization but not disregarded.*
- 1831- *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1. *Described tribes as "domestic dependent nations" and maintained that tribal-federal relationship "resembles that of a ward to his guardian." Marshall recognized Indian nations as "distinct political communities, having territorial boundaries within which their authority is exclusive."*
- 1832- *Worcester v. Georgia*, 31 US (6 Pet.) 515. *Held that tribes do not lose sovereign powers by becoming subject to the power of the US, and established that state laws do not apply in Indian Country. This established a government-to-government relationship.*

##### 1824 Bureau of Indian Affairs established

*Housed within the Department of War and later moved to the Department of Interior, the BIA was established to manage Indian affairs.*

##### 1830 Indian Removal Act, 4 Stat. 411-412

*Congress authorized the President to remove Indians from their homelands in the eastern portions of the US, resulting in huge forced migrations such as the Cherokee's "Trail of Tears."*

#### 1871-1927 ALLOTMENT & ASSIMILATION

##### 1871 The Treaties Statute, 25 USC §71

*With a little known rider on an appropriations bill, Congress unilaterally ended treaty-making with Indian tribes.*

##### 1885 Major Crimes Act, 18 USC §§1153

*Mandated federal jurisdiction over major felonies committed on Indian lands.*

**1887 General Allotment Act (also known as the Dawes Act), 25 USC §§331-354**

*Resulted in the allotment of tribal lands to individual Indians and made Indians individual landowners for the first time.*

**1908 Winters v. United States, 207 US 564**

*The basis for all Indian water law, the Court found that when the Fort Belknap lands were reserved by an 1888 agreement, the water rights were reserved by implication.*

**1924 Indian Citizenship Act, 8 USC §1401b**

*An attempt by the US government to assimilate Indians into the mainstream by giving them the rights and privileges of American citizenship (although many did not want US citizenship).*

**1928-1952 INDIAN REORGANIZATION****1928 Meriam Report**

*Documented the failure of the policies of the Allotment period, and led to the 1934 passage of the Indian Reorganization Act.*

**1934 Indian Reorganization Act (also known as the Wheeler-Howard Act), 25 USC §§461-479**

*Formally ended Indian Allotment; under the Indian Reorganization Act (IRA) many tribes were encouraged or coerced into adopting "IRA Constitutions," which imposed a Western-style tribal council governmental form on the reservations.*

**1946 Indian Claims Commission Act, 25 USC §70**

*Established the Indian Claims Commission to hear land claims suits, which could then be appealed to the Supreme Court.*

**1948 Congress defines "Indian Country", 18 USC §1151**

*Established the boundaries of jurisdiction by defining "Indian Country" as:*

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;*
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within the limits of a state; and,*
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.*

**1953-1967 TERMINATION ERA****1953 83 H.C.R. 108, 83 H.R. 444**

*Congress began adopting policies aimed at terminating tribes. Eventually, over 100 tribes or bands were terminated.*

**1953 Public Law 83-280, 18 USC §§1162a**

*Granted states criminal and limited civil jurisdiction on reservations, without the consent of the tribes. Originally adopted by five states: California, Nebraska, Minnesota (with the exception of the Red Lake Reservation), Oregon (except Warm Springs Reservation), and Wisconsin. Alaska was added in 1958. Nine other states later ratified the law to invoke application of PL 280 within their borders. PL 280 was eventually amended to require the consent of tribes prior to a state assumption of jurisdiction.*

## **1968-1981 INDIAN SELF-DETERMINATION**

### **1968 Indian Civil Rights Act, 25 USC §1301 et seq**

*ICRA imposed civil rights requirements on tribal governments, not including a prohibition against established religion and the right to counsel for indigents. Furthermore, the Act amended PL 280 to require the consent of tribes in order for the states to assume jurisdiction over Indian Country.*

### **1970 Recommendation for Indian Policy**

*President Nixon categorically renounced the termination policy of the US government and mapped out the steps leading to self-determination for tribes.*

### **1971 Alaska Native Claims Settlement Act, 43 USCA §§1601-1628**

*Established 12 regional, four urban and over 200 village Native corporations. In return for the forfeiture of aboriginal title to most of the state of Alaska, the corporations received land selection rights to 44 million acres and money payments totaling \$962.5 million. Individual Alaska Natives received shares in the corporations' money and acreage holdings.*

### **1972- Indian Education Act, PL 92-318, 86 Stat. 334**

*Provided funding for urban and reservation Indian education programs, educational training programs for teachers of Indian children, fellowships for Indian students in certain fields, and basic research in Indian education.*

### **1975 Indian Self-Determination and Education Assistance Act, 25 USC §§450-450n, 455-458e, PL93-638**

*Directed the Secretary of the Interior to contract with tribes to "plan, conduct and administer programs" under the Indian Reorganization Act of 1934. It included programs in education, health, and human services. The Act reinforces tribal self-determination and administration of social programs on Indian reservations.*

### **1978 Indian Child Welfare Act, 25 USC §1901 et seq**

*ICWA required state courts to follow guidelines for out-of-home placement of Indian children and requires notification to the child's tribe. Moreover, the Act established minimum federal standards for the removal of Indian children from their families by giving tribal courts the ability to act according to tribal law.*

### **1978 American Indian Religious Freedom Act, 92 Stat. 469**

*Preserved the rights of American Indians to practice traditional religious beliefs.*

### **1978 Oliphant v. Suquamish Tribe, 435 US §191**

*The Court ruled that tribal criminal jurisdiction over non-Indians was not stripped by treaty or statute, but was inconsistent with their status as dependent sovereigns. Thus, tribes were found to not possess criminal jurisdiction over non-Indians.*

### **1980 Alaska National Interest Lands Conservation Act, 16 USC §3101 et seq**

*ANILCA established various conservation units in Alaska to preserve lands and waters with significant cultural and historic values. It also required management of these public lands to take subsistence concerns of rural residents (Native and non-Natives) into account.*

## **1982-2000 SELF-GOVERNANCE**

### **1982 Tribal Tax Status Act, 96 Stat. 2607**

*Empowered tribes with many of the federal tax advantages states possess, such as the right to issue tax-exempt bonds for governmental purposes.*

### **1982 Indian Mineral Development Act, USC §2101**

*Allowed tribes to negotiate and sign minerals development agreements with substantially reduced involvement of the BIA.*

### **1987 California v. Cabazon Band of Mission Indians, 480 US 202**

*By finding that states could not prohibit tribes from engaging in gaming activities when the states themselves sponsored such activities, the Supreme Court opened the door for casino-style gambling on Indian reservations.*

### **1988 Indian Gaming Regulatory Act, 25 USCA §§2701-2721**

*Articulated that Indian tribes, as sovereign nations, possess the right to establish and operate gaming facilities to promote tribal economic development and self-sufficiency. Congress requires states to negotiate compacts in "good faith" with Indian tribes.*

### **1988 Self-Governance Demonstration Project, PL 100-472**

*Established a self-governance demonstration project that gave leaders of a limited number of tribes the freedom to allocate funds among tribal programs, unlike previous federal funding schemes. This experimental project gave the participants unprecedented latitude in guiding governmental decision-making.*

### **1990 Native American Graves Protection and Repatriation Act, 25 USC §§3001-3013**

*Restored the rights of tribes to control disposition or possession of Native American human remains and funerary objects excavated or discovered on federal or tribal. Also created a system for tribes to reclaim items held by museums or other institutions throughout the US.*

### **1990 Duro v. Reina, 495 US 676**

*The Court held that tribes do not have criminal jurisdiction over non-member Indians on reservation lands. The result of this ruling was that no authority (tribal, state or federal) had jurisdiction over criminal cases when crimes were committed on Indian lands.*

### **1991 Indian Tribal Justice Recognition Act of 1991, 1991 S. 963; 102 S. 963**

*As known as "The Duro Fix," Congress overrode the Supreme Court's ruling in Duro v. Reina by affirming the power of tribes to exercise criminal jurisdiction within their reservations over all "Indians" (member and non-member).*

### **1994 The Tribal Self Governance Act of 1994, PL 103-413**

*Established self-governance for tribes beyond the initial test-case participants of the 1988 pilot project.*



**1998 Alaska v. Native Village of Venetie Tribal Government, 118 S.Ct. 948**

*The Supreme Court held that lands established under the Alaska Native Claims Settlement Act were not established solely for Indian people and therefore did not constitute "Indian Country," as defined by Congress in 1948 (18 U.S.C. §1151). The ruling prevented villages from taxing and otherwise regulating economic activity taking place within the boundaries of the villages.*

**1999 Minnesota v. Mille Lacs Band of Chippewa Indians**

*Supreme Court affirmed that the 1855 Treaty had no bearing on the tribe's rights to hunt, fish and gather in the 1837 ceded territory. More importantly, the decision made clear that other governments, particularly states, cannot maintain exclusive control of natural resource use and management.*

## APPENDIX C

### Data Sources for Figure 1 and Figure 2

\* All AI/AN on or near Indian Lands in FIGURE 1 and FIGURE 2 refers to socio-economic statistics described below where the American Indian and/or Alaska Native population is: a) located on a reservation or on trust land, b) located within an IHS service area, c) located within a BIA-designated tribal service area, or d) classified as a "rural" AI/AN.

#### **1. Teen Birth Rate**

*United States:* 4.6, 1998

*American Indians:* 8.4, 1998

*Definition:* The birth rate for teenage mothers is reported as the percent of live births to females under the age of 18.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 8.

#### **2. Low Birth Weights**

*United States:* 7.6, 1998

*American Indians:* 6.8, 1998

*United States:* 7.3, 1994-96

*IHS Service Area Users:* 6.0, 1994-96

*Definition:* The rate for low birth weight babies represents the percent of births with a weight of less than 2,500 grams. The data for Indian Health Service Area users includes those American Indians and Alaska Natives residing in counties on or near Federal Indian reservations. The Indians residing in the service area comprise about 60 percent of all Indians residing in the United States.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 12. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 3.2.

#### **3. High Birth Weights**

*United States:* 10.3, 1994-96

*IHS Service Area Users:* 12.7, 1994-96

*Definition:* The rate for high birth weight babies represents the percent of births with a weight greater than 4,000 grams. High birth rates may be a complication of diabetic pregnancies. For IHS Service Area description, see Table 2.

*Source:* Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 3.3.

#### **4. Children Abused or Neglected**

*United States:* 17.2, 1995

*American Indians on or near Reservation and Trust Lands:* 33.4, 1995

*Definition:* The number of children abused or neglected is identified as the number of confirmed cases of child abuse or neglect per 1,000 of the population under 18. The American Indian statistic only includes children 14 or younger.

*Source:* Bureau of Justice Statistics, American Indians and Crime, (Washington, DC, US Department of Justice, February 1999).

#### **5. Childhood Immunizations**

*United States:* 79.0, 1998

*American Indians:* 78.0, 1998

*United States:* 77.0, 1994-96

*IHS Service Area Users:* 88.0, 1994-96

*Definition:* For 1998, childhood immunizations is reported as the percentage of 19 to 35 month old children fully immunized. For 1994-96, the childhood immunization rate is the percent of Indian children residing in IHS service areas, 0 to 27 months of age who are fully immunized. The figure for the US all races was for children 19-35 months fully immunized in 1996. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 73. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 5.32.

#### **6. Live Births Receiving Early Prenatal Care**

*United States:* 82.8, 1998

*American Indians:* 68.8, 1998

*United States:* 81.3, 1994-96

*IHS Service Area Users:* 66.5, 1994-96

*Definition:* The percent of live births with early prenatal care is reported as the percentage of live births in which prenatal care began during the 1st trimester. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 6. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 3.4.

**7. Single Parent Families with Female Head**

*United States:* 16.5, 1995

*American Indians:* 26.6, 1995

*United States:* 16.0, 1989

*American Indians on Reservation and Trust Lands:* 32.9, 1989

*Definition:* The Percent of Single Parent Families with Female Head measures the percentage of single parent family households maintained by a female.

*Source:* US Bureau of Census, Table 4. Projected number of Households by Type, Race and Hispanic Origin: 1995 to 2000, May 1996.

[www.census.gov/population/projections/nation/hh-fam/table4n.txt](http://www.census.gov/population/projections/nation/hh-fam/table4n.txt). US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Table 6.

**8. Single Parent Families**

*United States:* 21.5, 1995

*American Indians:* 35.3, 1995

*United States:* 20.5, 1989

*American Indians on Reservation and Trust Lands:* 44.0, 1989

*Definition:* The Percent of Single Parent Families measures the percentage of single parent family groups per all family households.

*Source:* US Bureau of Census, Table 4. Projected number of Households by Type, Race and Hispanic Origin: 1995 to 2000, May 1996.

[www.census.gov/population/projections/nation/hh-fam/table4n.txt](http://www.census.gov/population/projections/nation/hh-fam/table4n.txt). US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Table 6.

**9. Teen Alcohol Use in Past Month**

*United States:* 18.6, 1999

*American Indians:* 21.0, 1999

*Definition:* This statistic represents the percentage of persons aged 12 to 17 reporting past month use of any alcohol.

*Source:* Substance Abuse and Mental Health Services Administration, Summary of Findings from the 1999 National Household Survey on Drug Abuse, (Department of Health and Human Services, 2000), Table G.30.

**10. Teen Illicit Drug Use in Past Month**

*United States:* 10.9, 1999

*American Indians:* 19.6, 1999

*Definition:* This statistic represents the percentage of persons aged 12 to 17 reporting past month use of any illicit drug.

*Source:* Substance Abuse and Mental Health Services Administration, Summary of Findings from the 1999 National Household Survey on Drug Abuse, (Department of Health and Human Services, 2000), Table G.14.

**11. Teen Cigarette Use in Past Month**

*United States:* 14.9, 1999

*American Indians:* 26.8, 1999

*Definition:* This statistic represents the percentage of persons aged 12 to 17 reporting past month use of cigarettes.

*Source:* Substance Abuse and Mental Health Services Administration, Summary of Findings from the 1999 National Household Survey on Drug Abuse, (Department of Health and Human Services, 2000), Table G.39.

**12. Substance Abuse Treatment Facility Clients**

*United States:* 0.4, 1997

*American Indians:* 1.5, 1997

*Definition:* This statistic reports the percentage of persons aged 15 and older admitted into a substance abuse treatment facility normalized by all persons aged 15 and older.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 237. US Bureau of the Census, Statistical Abstract of the United States: 1998 (118th Edition), (Washington, DC: US Bureau of the Census, 1998), Table 21.

**13. Adult Incarceration**

*United States:* 6.3, 1997

*American Indians on or near Reservation and Trust Lands:* 8.7, 1997

*Definition:* The Adult Incarceration rate reports the number of adults (persons over the age of 18) in federal or state prison per 1,000 resident adult population.

*Source:* Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999). US Bureau of the Census, State and Metropolitan Area Data Book, 1997-98 (5th Edition), (Washington, DC, US Bureau of the Census, 1998), Table A-17.

**14. Arrests**

*United States:* 44.5, 1998

*American Indians:* 70.6, 1998

*Definition:* Persons Arrested represents the number of adults arrested over 18 per 1,000 population age 20-84.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43.

**15. Juvenile Arrests**

*United States:* 47.5, 1998

*American Indians:* 43.9, 1998

*Definition:* Juveniles Arrested represents the number of juveniles (persons 10-17 years of age) arrested per 1,000 population age 10-19.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43.

**16. Arrests for Violent Crime**

*United States:* 2.1, 1998

*American Indians:* 2.7, 1998

*United States:* 2.8, 1996

*American Indians on or near Reservation and Trust Lands:* 2.9, 1996

*Definition:* For 1998, this statistic represents the number of adults arrested for violent crimes (not charges) over age 18 per 1,000 population age 20-84. The 1996 statistics represent the number of adults arrested (not charged) for violent crimes per 1,000 adult population. Violent crimes include: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **17. Juvenile Arrests for Violent Crimes**

*United States:* 2.1, 1998

*American Indians:* 1.6, 1998

*United States:* 4.5, 1996

*American Indians on or near Reservation and Trust Lands:* 2.9, 1996

*Definition:* For 1998, this statistic represents the number of adults arrested for violent crimes (not charges) over age 18 per 1,000 population age 20-84. The 1997 statistics for Youth Arrests for Violent Crimes measure the number of juveniles (persons 10-17 years of age) arrested for violent crimes per 1,000 population aged 10-19. Violent crimes include: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **18. Arrests for Driving Under the Influence**

*United States:* 5.0, 1998

*American Indians:* 9.2, 1998

*United States:* 5.5, 1997

*American Indians on or near Reservation and Trust Lands:* 10.7, 1997

*Definition:* For 1998, this statistic represents the number of adults arrested for driving under the influence over age 18 per 1,000 population age 20-84. The 1997 statistics for Arrests for Driving Under the Influence measure the number of arrests (not charges) for driving or operating any vehicle while under the influence of liquor or narcotic drugs per 1,000 adult population.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **19. Arrests for Liquor Law Violations**

*United States:* 1.8, 1998

*American Indians:* 6.0, 1998

*United States:* 2.6, 1997

*American Indians on or near Reservation and Trust Lands:* 7.3, 1997

*Definition:* For 1998, this statistic represents the number of adults arrested for liquor law violations over age 18 per 1,000 population age 20-84. The 1997 statistics for Arrests for Liquor Law Violations measure the number of arrests (not charges) for all federal, state, or local liquor law violations per 1,000 adult population.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **20. Arrests for Drunkenness**

*United States:* 2.6, 1998

*American Indians:* 7.9, 1998

*United States:* 2.7, 1997

*American Indians on or near Reservation and Trust Lands:* 7.5, 1997

*Definition:* For 1998, this statistic represents the number of adults arrested for drunkenness over age 18 per 1,000 population age 20-84. The 1997 statistics for Arrests for Drunkenness measure the number of arrests (not charges) for public drunkenness per 1,000 adult population.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **21. Drug Arrest Rate**

*United States:* 5.1, 1998

*American Indians:* 3.3, 1998

*United States:* 5.9, 1997

*American Indians on or near Reservation and Trust Lands:* 3.4, 1997

*Definition:* For 1998, this statistic represents the number of adults arrested for drug abuse violations over age 18 per 1,000 population age 20-84. The 1997 statistics for Drug Arrests measure the number of arrests (not charges) for drug offenses per 1,000 adult population.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 21. US Federal Bureau of Investigation, Crime in the United States, 1998, (Washington, DC: US Department of Justice), Table 43. Bureau of Justice Statistics, American Indians and Crime, (US Department of Justice, February 1999).

### **22. High School Graduates**

*United States:* 75.2, 1989

*American Indians:* 65.5, 1989

*United States:* 75.2, 1989

*American Indians on Reservation and Trust Lands:* 53.8, 1989

*Definition:* The percent of high school graduates represents the percent of the total population over the age of 25 who have a high school diploma (includes equivalency) or higher.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Tables 54, 267. US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Table 7.

### **23. College Graduates**

*United States:* 20.3, 1989

*American Indians:* 9.4, 1989

*United States:* 20.3, 1989

*American Indians on Reservation and Trust Lands:* 3.9, 1989

*Definition:* The percent of college graduates represents the percent of the total population over the age of 25 who have a bachelor's degree or more.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Tables 54, 267. US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Table 7.

### **24. High School Dropouts**

*United States:* 2.7, 1993-94

*American Indians:* 3.1, 1993-94

*Definition:* The dropout rate measures the percent of students enrolled in 9 through 12 who dropped out in 1993-94 academic year.

*Source:* Research Triangle Institute submitted to US Department of Education, Characteristics of American Indian and Alaska Native Education: Results from the USDE 1990-91 and 1993-94 Schools and Staffing Surveys, Table B40.

### **25. Students Retained in Grade**

*United States:* 6.5, 1993-94

*American Indians:* 17.2, 1993-94

*Definition:* The retained in grade rate measures the percentage of students retained in grade in 1993-94 academic year.

*Source:* Research Triangle Institute submitted to US Department of Education, Characteristics of American Indian and Alaska Native Education: Results from the USDE 1990-91 and 1993-94 Schools and Staffing Surveys, Table B40.

### **26. Life Expectancy**

*United States:* 75.8, 1994-96

*IHS Service Area Users:* 71.1, 1994-96

*Definition:* Life expectancy is measured as the expectation of length of life at birth, reported in years. For IHS Service Area description, see Table 2.

*Source:* Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.37.

### **27. Mortality Rate**

*United States:* 481.4, 1996-98

*American Indians:* 460.9, 1996-98

*United States:* 503.9, 1994-96

*IHS Service Area Users:* 699.3, 1994-96

*Definition:* The age adjusted mortality rate is reported as the deaths per 100,000 resident population. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 29. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.1.

### **28. Infant Mortality**

*United States:* 7.4, 1995-97

*American Indians:* 9.2, 1995-97

*United States:* 7.6, 1994-96

*IHS Service Area Users:* 9.3, 1994-96

*Definition:* The age adjusted infant mortality rate measures the number of infant deaths under one year of age, excluding fetal deaths per 1,000 live births. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 20. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 3.11.

### **29. SIDS Death Rate**

*United States:* 87.1, 1994-96

*IHS Service Area Users:* 204.0, 1994-96

*Definition:* The age adjusted mortality rate for sudden infant death syndrome measures the number of infant deaths per 100,000 live births. For IHS Service Area description, see Table 2.

*Source:* Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 3.28.

### **30. Accident Deaths**

*United States:* 30.1, 1998

*American Indians:* 55.6, 1998

*United States:* 30.5, 1994-96

*IHS Service Area Users:* 92.6, 1994-96

*Definition:* The age adjusted accidental death rate reports deaths caused by unintentional injuries reported per 100,000 resident population. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.18.

### **31. Motor Vehicle Accident Deaths**

*United States:* 15.6, 1998

*American Indians:* 31.8, 1998

*Definition:* This statistic reports the age adjusted accidental death rate as caused by motor vehicle accidents reported per 100,000 resident population.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30.

### **32. Diabetes Mellitus Mortality**

*United States:* 13.6, 1998

*American Indians:* 29.6, 1998

*United States:* 13.3, 1994-96

*IHS Service Area Users:* 46.4, 1994-96

*Definition:* This statistic reports the number of deaths from diabetes mellitus per 100,000 population adjusted for age. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.24.

### **33. Heart Disease Mortality**

*United States:* 126.6, 1998

*American Indians:* 97.1, 1998

*United States:* 138.3, 1994-96

*IHS Service Area Users:* 156.0, 1994-96

*Definition:* This statistic reports the number of deaths from cardiovascular disease per 100,000 population adjusted for age. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.28.

### **34. CVA Mortality**

*United States:* 25.1, 1998

*American Indians:* 19.6, 1998

*United States:* 26.7, 1994-96

*IHS Service Area Users:* 30.5, 1994-96

*Definition:* This statistic reports the number of deaths from cerebrovascular accident per 100,000 population adjusted for age. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health

Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.29.

### **35. Suicide**

*United States:* 10.4, 1998

*American Indians:* 13.4, 1998

*United States:* 11.2, 1994-96

*IHS Service Area Users:* 19.3, 1994-96

*Definition:* This statistic reports the age adjusted suicide rate per 100,000 population. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999 (US Department of Health and Human Services, 1999), Chart 4.19.

### **36. Cirrhosis Deaths**

*United States:* 7.2, 1998

*American Indians:* 22.0, 1998

*United States:* 6.7, 1994-96

*IHS Service Area Users:* 48.7, 1994-96

*Definition:* This statistic reports the number of deaths from cirrhosis/alcoholism per 100,000 population adjusted for age. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999 (US Department of Health and Human Services, 1999), Chart 4.23.

### **37. HIV Deaths**

*United States:* 4.6, 1998

*American Indians:* 2.2, 1998

*United States:* 15.6, 1994-96

*IHS Service Area Users:* 6.2, 1994-96

*Definition:* This statistic reports the number of deaths from human immunodeficiency virus infection per 100,000 population adjusted for age. For IHS Service Area description, see Table 2.

*Source:* Centers for Disease Control and Prevention, Health, United States, 2000 With Adolescent Health Chartbook, (Maryland: US Department of Health and Human Services, 2000), Table 30. Indian Health Services, Regional Differences in Indian Health 1998-1999, (US Department of Health and Human Services, 1999), Chart 4.36.

### **38. Owner-Occupied Homes**

*United States:* 66.9, 1999

*American Indians:* 45.9, 1999

*United States:* 64.2, 1989

*American Indians on Reservation and Trust Lands:* 67.0, 1989

*Definition:* The percent of owner-occupied homes represents the number of owner-occupied housing units as a percent of occupied housing units.

*Source:* US Department of Housing and Urban Development, American Housing Survey for the United States, 1999 (US Census Bureau, October 2000), Table 2.1. Census CD + Maps (Geolytics, Inc., 1996-1998) (US 1990 Census Data).

### **39. Homes with Severe Physical Problems**

*United States:* 2.0, 1999

*American Indians:* 3.0, 1999

*Definition:* The percent of occupied homes with severe physical problems represents the number of occupied housing units with any of the five problems: plumbing, heating, electric, hallways, upkeep.

*Source:* US Department of Housing and Urban Development, American Housing Survey for the United States, 1999 (US Census Bureau, October 2000), Table 2.1.

### **40. Homes with Moderate Physical Problems**

*United States:* 4.7, 1999

*American Indians:* 9.3, 1999

*Definition:* The percent of occupied homes with moderate physical problems represents the number of occupied housing units with any of the five problems that are not classified as severe: plumbing, heating, kitchen, hallways, upkeep.

*Source:* US Department of Housing and Urban Development, American Housing Survey for the United States, 1999 (US Census Bureau, October 2000), Table 2.1.

### **41. Homes Below Poverty Level**

*United States:* 13.9, 1999

*American Indians:* 24.9, 1999

*Definition:* The percent of homes below poverty level represents the percent of occupied housing units in which the residents' income falls below the poverty level.

*Source:* US Department of Housing and Urban Development, American Housing Survey for the United States, 1999 (US Census Bureau, October 2000), Table 2.1.

### **42. Homes Lacking Complete Plumbing**

*United States:* 1.1, 1989

*American Indians:* 6.0, 1989

*United States:* 1.1, 1989

*American Indians on Reservation and Trust Lands:* 20.2, 1989

*Definition:* The percent of homes lacking complete plumbing measures the number of occupied homes lacking complete plumbing normalized by all occupied homes.

*Source:* Census CD + Maps (Geolytics, Inc., 1996-1998) (US 1990 Census Data).

### **43. Households with Telephone**

*United States:* 94.1, 1998

*American Indians:* 83.4, 1998

*United States:* 94.1, 1998

*American Indians in Rural Areas:* 76.4, 1998

*Definition:* The percent of households with telephone measures the number of homes with telephones. The

statistic for all Native America includes telephone penetration in urban and rural American Indian households where the statistic for rural American Indians only includes those individuals in rural areas.

*Source:* Craig, Evans, The Native Digital Divide: A Review of Online Literature, The Native American Distance Education Community website, <http://www.eot.ahpcc.unm.edu/Community>, 1999.

### **44. Households with Computers**

*United States:* 42.1, 1998

*American Indians:* 34.3, 1998

*United States:* 42.1, 1998

*American Indians in Rural Areas:* 26.8, 1998

*Definition:* The percent of households with computers measures the number of homes with personal computers.

The statistic for all Native America includes personal computer penetration in urban and rural American Indian households where the statistic for rural American Indians only includes those individuals in rural areas.

*Source:* Craig, Evans, The Native Digital Divide: A Review of Online Literature, The Native American Distance Education Community website, <http://www.eot.ahpcc.unm.edu/Community>, 1999.

### **45. Households Using the Internet**

*United States:* 26.2, 1998

*American Indians:* 18.9, 1998

*United States:* 26.2, 1998

*American Indians in Rural Areas:* 12.8, 1998

*Definition:* The percent of households using the internet measures the number of homes internet access. The statistic for all Native America includes internet penetration in urban and rural American Indian households where the statistic for rural American Indians only includes those individuals in rural areas.

*Source:* Craig, Evans, The Native Digital Divide: A Review of Online Literature, The Native American Distance Education Community website, <http://www.eot.ahpcc.unm.edu/Community>, 1999.

### **46. Median Household Income, 1989\$**

*United States:* 28,906, 1989

*American Indians:* 19,900, 1989

*United States:* 28,906, 1989

*American Indians on Reservation and Trust Lands:* 12,459, 1989

*Definition:* Nominal household income.

*Source:* US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Tables 54, 743. US Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics: American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1993).

### **47. Median Household Income, 1997\$**

*United States:* 37,005, 1997

*American Indians:* 29,200, 1997

*Definition:* Nominal Household income.

*Source:* Pollard, Kelvin M. and William P. O'Hare, "America's Racial and Ethnic Minorities," Population Bulletin, Vol. 54, No. 3 (Population Reference Bureau, September 1999). US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 742.

#### **48. Labor Force Non-Participation Rate**

*United States:* 32.9, 1997

*American Indians on or near Reservation and Trust Lands:* 49.8, 1997

*Definition:* The labor force non-participation rate represents the percent of the noninstitutional civilian labor force, over the age of 16, currently not participating in the labor force (not employed). The American Indian rate given is for American Indian enrolled members or members from other tribes who lived on-or-near the reservation and who were eligible to use the tribes' BIA funded services.

*Source:* Bureau of Indian Affairs, 1997 Labor Market Information on the Indian Labor Force: A National Report. US Bureau of the Census, Statistical Abstract of the United States: 1998 (118th Edition), (Washington, DC: US Bureau of the Census, 1998), Table 645.

#### **49. Poverty**

*United States:* 13.3, 1997

*American Indians:* 25.0, 1997

*United States:* 13.5, 1989

*American Indians on Reservation and Trust Lands:* 50.7, 1989

*Definition:* The poverty rate measures the percent of the population living below the poverty level. The poverty level is assessed using the poverty index, based solely on money income and does not reflect the fact that many low income persons receive non-cash benefits.

*Source:* Pollard, Kelvin M. and William P. O'Hare, "America's Racial and Ethnic Minorities," Population Bulletin, Vol. 54, No. 3 (Population Reference Bureau, September 1999). US Bureau of the Census, Statistical Abstract of the United States: 1999 (119th Edition), (Washington, DC: US Bureau of the Census, 1999), Table 760, 766. US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Table 13.

#### **50. Child Poverty**

*United States:* 18.3, 1989

*American Indians:* 38.8, 1989

*United States:* 18.3, 1989

*American Indians on Reservation and Trust Lands:* 54.2, 1989

*Definition:* The child poverty rate measures the percent of the population under 18 living below the poverty level.

*Source:* Census CD + Maps (Geolytics, Inc., 1996-1998) (US 1990 Census Data). US Census Bureau, 1990 Census of Population, General Population Characteristics, American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1990), Tables 6, 13.

#### **51. TANF Recipients**

*United States:* 3.2, 1998

*American Indians:* 5.8, 1998

*Definition:* Recipients of TANF measures the number of recipients of Temporary Assistance for Needy Families per 1,000 population.

*Source:* Department of Health and Human Services, Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 1998, Tables 12 & 24.

#### **52. Households Receiving Public Assistance**

*United States:* 7.5, 1989

*American Indians on Reservation and Trust Lands:* 31.6, 1989

*Definition:* Households receiving public assistance measures the percent of households receiving public assistance income per all households.

*Source:* US Bureau of the Census, 1990 Census of Population, Social and Economic Characteristics: American Indian and Alaska Native Areas, (Washington, DC: US Bureau of the Census, 1993), Table 12. Census CD + Maps (Geolytics, Inc., 1996-1998) (US 1990 Census Data).

#### **53. School Lunch Program Recipients**

*United States:* 32.9, 1994

*American Indians:* 49.6, 1994

*United States:* 32.9, 1994

*American Indians in BIA and Tribal Schools:* 90.1, 1994

*Definition:* This statistic measures the percentage of students receiving free or reduced-price lunches in 1993-94. The All Native America statistic represents all American Indians attending public and BIA and tribally operated schools. The reservation specific statistic measures those students in BIA and tribally operated schools.

*Source:* Research Triangle Institute submitted to US Department of Education, Characteristics of American Indian and Alaska Native Education: Results from the USDE 1990-91 and 1993-94 Schools and Staffing Surveys, Table B38.