Calendar No. 409

106TH CONGRESS, 1st Session | SENATE | REPORT 106–219

PROVIDING TECHNICAL AND LEGAL ASSISTANCE TO TRIBAL JUSTICE SYSTEMS AND MEMBERS OF INDIAN TRIBES, AND FOR OTHER PURPOSES

NOVEMBER 8, 1999.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1508]

The Committee on Indian Affairs, to which was referred the bill (S. 1508) to provide technical and legal assistance to tribal justice systems and members of Indian tribes, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

The substitute amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Tribal Justice Technical and Legal Assistance Act of 1999".

SEC. 2. FINDINGS.

The Congress finds and declares that—

(1) there is a government-to-government relationship between the United States and Indian tribes;

(2) Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands;

(3) the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed in the United States as a whole;

(4) in any community, a high rate of violent crime is a major obstacle to investment, job creation and economic growth;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands;

(7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency;

(8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation;

(9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems;

(10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and

(11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.

SEC. 3. PURPOSES.

The purposes of this Act are as follows:

(1) to carry out the responsibility of the United States to Indian tribes and members of Indian tribes by ensuring access to quality technical and legal assistance.

(2) To strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indian tribes.

(3) To strengthen tribal governments and the economies of Indian tribes through the enhancement and, where appropriate, development of tribal court systems for the administration of justice in Indian country by providing technical and legal assistance services.

(4) To encourage collaborative efforts between national or regional membership organizations and associations whose membership consists of judicial system personnel within tribal justice systems; non-profit entities which provide legal assistance services for Indian tribes, members of Indian tribes, and/or tribal justice systems.

(5) To assist in the development of tribal judicial systems by supplementing prior Congressional efforts such as the Indian Tribal Justice Act (Public Law 103–176).

SEC. 4. DEFINITIONS.

For purposes of this Act:

(1) ATTORNEY GENERAL.—The term "Attorney General" means the Attorney General of the United States.

(2) INDIAN LANDS.—The term "Indian lands" shall include lands within the definition of "Indian country", as defined in 18 U.S.C. 1151; or "Indian reservations", as defined in section 3(d) of the Indian Financing Act of 1974, 25 U.S.C. 1452(d), or section 4(10) of the Indian Child Welfare Act, 25 U.S.C. 1903(10). For purposes of the preceding sentence, such section 3(d) of the Indian Financing Act shall be applied by treating the term "former Indian reservations in Oklahoma" as including only lands which are within the jurisdictional area of an Oklahoma Indian Tribe (as determined by the Secretary of Interior) and are recognized by such Secretary as eligible for trust land status under 25 CFR part 151 (as in effect on the date of enactment of this sentence).

(3) INDIAN TRIBE.—The term "Indian tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native entity, which administers justice or plans to administer justice under its inherent authority or the authority of the United States and which is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their status as Indians.

(4) JUDICIAL PERSONNEL.—The term "judicial personnel" means any judge, magistrate, court counselor, court clerk, court administrator, bailiff, probation officer, officer of the court, dispute resolution facilitator, or other official, employee, or volunteer within the tribal judicial system.

(5) NON-PROFIT ENTITIES.—The term "non-profit entity" or "non-profit entities" has the meaning given that term in section 501(c)(3) of the Internal Revenue Code.

(6) OFFICE OF TRIBAL JUSTICE.—The term "Office of Tribal Justice" means the Office of Tribal Justice in the United States Department of Justice.

(7) TRIBAL JUSTICE SYSTEM.—The term "tribal court", "tribal court system", or "tribal justice system" means the entire judicial branch, and employees thereof,

of an Indian tribe, including, but not limited to, traditional methods and fora for dispute resolution, trial courts, appellate courts, including inter-tribal appellate courts, alternative dispute resolution systems, and circuit rider systems, established by inherent tribunal authority whether or not they constitute a court of record.

TITLE I—TRAINING AND TECHNICAL ASSISTANCE, CIVIL AND CRIMINAL LEGAL ASSISTANCE GRANTS

SEC. 101. TRIBAL JUSTICE TRAINING AND TECHNICAL ASSISTANCE GRANTS.

Subject to the availability of appropriations, the Attorney General, in consultation with the Office of Tribal Justice, shall award grants to national or regional membership organizations and associations whose membership consists of judicial system personnel within tribal justice systems which submit an application to the Attorney General in such form and manner as the Attorney General may prescribe to provide training and technical assistance for the development, enrichment, enhancement of tribal justice systems, or other purposes consistent with this Act.

SEC. 102. TRIBAL CIVIL LEGAL ASSISTANCE GRANTS.

Subject to the availability of appropriations, the Attorney General, in consultation with the Office of Tribal Justice, shall award grants to non-profit entities, as defined under section 501(c)(3) of the Internal Revenue Code, which provide legal assistance services for Indian tribes, members of Indian tribes, or tribal justice systems pursuant to federal poverty guidelines that submit an application to the Attorney General in such form and manner as the Attorney General may prescribe for the provision of civil legal assistance to members of Indian tribes and tribal justice systems, and/or other purposes consistent with this Act.

SEC. 103. TRIBAL CRIMINAL ASSISTANCE GRANTS.

Subject to the availability of appropriations, the Attorney General, in consultation with the Office of Tribal Justice, shall award grants to non-profit entities, as defined by section 501(c)(3) of the Internal Revenue Code, which provide legal assistance services for Indian tribes, members of Indian tribes, or tribal justice systems pursuant to federal poverty guidelines that submit an application to the Attorney General in such form and manner as the Attorney General may prescribe for the provision of criminal legal assistance to members of Indian tribes and tribal justice systems, and/or other purposes consistent with this Act. Funding under this title may apply to programs, procedures, or proceedings involving adult criminal actions, juvenile delinquency actions, and/or guardian-ad-litem appointments arising out of criminal or delinquency acts.

SEC. 104. NO OFFSET.

No Federal agency shall offset funds made available pursuant to this Act for Indian tribal court membership organizations or Indian legal services organizations against other funds otherwise available for use in connection with technical or legal assistance to tribal justice systems or members of Indian tribes.

SEC. 105. TRIBAL AUTHORITY.

Nothing in this Act shall be construed to—

(1) encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws;

(2) diminish in any way the authority of tribal governments to appoint personnel;

(3) impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government;

(4) alter in any way any tribal traditional dispute resolution fora;

(5) imply that any tribal justice system is an instrumentality of the United States; or

(6) diminish the trust responsibility of the United States to Indian tribal governments and tribal justice systems of such governments.

SEC. 106. AUTHORIZATION OF APPROPRIATIONS.

For purposes of carrying out the activities under this title, there are authorized to be appropriated such sums as are necessary for fiscal years 2000 through 2004.

TITLE II—INDIAN TRIBAL COURTS

SEC. 201. GRANTS.

(a) IN GENERAL.—The Attorney General may award grants and provide technical assistance to Indian tribes to enable such tribes to carry out programs to support—

(1) the development, enhancement, and continuing operation of tribal justice systems; and

(2) the development and implementation of—

(A) tribal codes and sentencing guidelines;

(B) inter-tribal courts and appellate systems;

(C) tribal probation services, diversion programs, and alternative sentencing provisions;

(D) tribal juvenile services and multi-disciplinary protocols for child physical and sexual abuse; and

(E) traditional tribal judicial practices, traditional tribal justice systems, and traditional methods of dispute resolution.

(b) CONSULTATION.—In carrying out this section, the Attorney General may consult with the Office of Tribal Justice and any other appropriate tribal or Federal officials.

(c) REGULATIONS.—The Attorney General may promulgate such regulations and guidelines as may be necessary to carry out this title.

(d) AUTHORIZATION OF APPROPRIATIONS.—For purposes of carrying out the activities under this section, there are authorized to be appropriated such sums as are necessary for fiscal years 2000 through 2004.

SEC. 202. TRIBAL JUSTICE SYSTEMS.

Section 201 of the Indian Tribal Justice Act (25 U.S.C. 3621) is amended—

(1) in subsection (a), by striking "1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "2000 through 2007";

(2) in subsection (b), by striking "1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "2000 through 2007";

(3) in subsection (c), by striking "1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "2000 through 2007"; and

(4) in subsection (d), by striking "1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "2000 through 2007".

PURPOSE

The purpose of S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999, is to authorize the Department of Justice to use appropriated funds to: (1) award grants to national and regional organizations whose members are tribal justice system personnel to provide training and technical assistance for the development of tribal systems, and (2) award grants to non-profit legal services providers to provide civil and criminal legal assistance to tribal members or judicial systems.

BACKGROUND

Most Native Americans continue to live in abject poverty and as with similarly situated groups, crime rates are high and access to civil legal assistance is poor. Along with other factors, stable tribal governments and healthy tribal economic depend on strong and well-ordered tribal courts and judicial systems. For many Indian communities, Indian Legal Services (ILS) providers fill the void by providing basic civil legal assistance to qualifying individuals.

In addition to this assistance, ILS entities assist tribal governments in developing their justice systems by providing a variety of services including training court personnel, and strengthening the capacity of tribal courts to handle both civil and criminal matters. Together with tribal governments, ILS organizations work to establish and maintain confidence in tribal justice systems.

Adequate funding has long been recognized as one of the key ingredients for the development of effective Indian tribal justice systems. In 1941 John Collier, then-Commissioner of Indian Affairs, stated that "[t]he lack of adequate appropriations for the support of the courts and for the maintenance of an adequate police force have handicapped the administration of justice." In its final report issued in 1977, the American Indian Policy Review Commission noted the importance of tribal justice systems and urged that Congress provide sufficient funding for the establishment and development of justice systems.

In 1991, the United States Commission on Civil Rights issued its report [1] on the implementation of the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 et seq., nothing the need for adequate funding for tribal justice systems. In 1993, the Indian Tribal Justice Act, 25 U.S.C. 3506 et seq., was enacted to provide support for Indian tribal courts and for other purposes, but funding appropriated under the Act has not been sufficient to meet the needs across Indian country.

A. CRIME AND LAW ENFORCEMENT

For years the Committee on Indian Affairs has focused its attention on tribal courts, juvenile justice, gang activity, and law enforcement on Indian lands.[2] In 1997, the U.S. Department of Justice published a report showing that while crime rates generally have fallen throughout the nation, federal and tribal law enforcement agencies reported that crime in Indian communities is rising.[3] In October, 1997, the Executive Committee for Indian Country Law Enforcement Improvements issued its Final Report to the Attorney General and the Secretary of the Interior.[4]

In response to these reports, the Administration proposed its "Law Enforcement Initiative for Indian Country" stressed the need for more law enforcement and justice resources. In 1997 through the current fiscal year, Congress responded by increasing funding to provide for additional FBI agents, tribal law enforcement officers, juvenile detention centers and tribal courts. The funding request for the Initiative for FY2000 is $124 million, with the bulk of funds slated for Department of Justice (DoJ) law enforcement purposes, $5 million for DoJ's tribal courts initiative and $10 million for the Bureau of Indian Affairs (BIA) for tribal courts.

B. CIVIL LEGAL MATTERS

Every year, Indian tribal courts and courts personnel handle large caseloads: the Navajo Nation court system processed over

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[1] The Indian Civil Rights Act—A Report of the United States Commission on Civil Rights, June, 1991.

[2] See for example the following Committee hearing records Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights Entitled "Indian Civil Rights Act", S. Hrng. 102–496; Indian Tribal Justice Act, S. Hrng. 103–76; Tribal Justice Act, S. Hrng. 104–332; Juvenile Justice in Indian Country, S. Hrng. 105–140; Criminal Gangs in Indian Country, S. Hrng. 105–341; and Department of Justice/Department of the Interior Tribal Justice Initiatives, S. Hrng. 105–705.

[3] See also American Indians and Crime, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, February, 1999, NCJ 173386.

[4] See Report of the Executive Committee For Indian Country Law Enforcement Improvements—Final Report to the Attorney General and the Secretary of the Interior, October 31, 1997.

25,000 cases; the Gila River Indian Community (AZ) handled more than 3,000; the Colville Tribal Court (WA) dealt with nearly 2,000 cases; and the Ft. Peck Tribe (MT) processed over 3,100 cases in 1997. Though the 1993 Indian Tribal Justice Act authorized nearly $50 million dollars to support tribal justice systems, adequate funding under the Act has not been requested or appropriated. Stepping into this breach, civil legal assistance to individuals and other forms of legal aid are often provided by non-profit ILS organizations, which receive their funding from the federal Legal Services Corporation (LSC).[5]

C. UNITED STATES "RULE OF LAW ASSISTANCE" TO FOREIGN NATIONS

Since 1945, the United States has spent billions of dollars in overseas assistance to boost foreign economics and cultivate democracy around the world. These funds have included assistance for physical infrastructure, education, health care and private sector development.

The U.S. has also recognized the importance of well-functioning justice systems. A major component of the U.S. foreign development strategy is "Rule of Law Assistance" provided to assist in the development of foreign judicial and justice systems.

The General Accounting Office (GAO) reports that from 1993 to 1998, Congress appropriated $970 million for foreign "rule of law programs", with $75 million slated for foreign courts. Funding made available under this program is for legal, judicial, and law enforcement purposes in both the civil and criminal contexts.[6]

D. S. 1508 AND BUILDING STRONG TRIBAL JUSTICE SYSTEMS

The Indian Tribal Justice Technical and Legal Assistance Act of 1999 is intended to complement existing efforts to support tribal courts, such as the 1993 Indian Tribal Justice Act which is "housed" in the Department of Interior. The bill is not intended to supplant the 1993 Act or other authority such as the Snyder Act of 1921, 25 U.S.C. § 13.

S. 1508 authorizes the Department of Justice to award grants to legal services and non-profit organizations to help build the capacity of tribal courts and justice systems, and provides a 4-year authorization of appropriations with grant amounts subject to the availability of annual appropriations. S. 1508 authorizes the Attorney General, in consultation with the Office of Tribal Justice (OTJ) in the Department of Justice, to provide funding for 3 categories of activities:

1. Training and Technical Assistance: Section 101 authorizes grants to national or regional organizations whose members are tribal justice system personnel to provide training and technical assistance for the development, enrichment and enhancement of tribal justice systems;

2. Civil Legal Assistance: Section 102 authorizes grants to non-profit legal services providers to provide civil legal services to tribal members or tribal justice systems; and

[5] See Legal Needs and Services in Indian Country—1998 Report to the Legal Services Corporation.

[6] See Rule of Law Funding Worldwide: FY 1993–1998, GAO/NSIAD–99–158, June 1999.

3. Criminal Legal Assistance: Section 103 authorizes grants to non-profit tribal legal services provider to provide criminal legal assistance to tribal members of tribal justice systems.

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO S. 1508

The amendment in the nature of a substitute to S. 1508 makes two changes to the bill as introduced. The first amendment, deals with funding for activities related to the administration of tribal justice and tribal courts by Department of Justice (DoJ) pursuant to the Joint Department of Interior-Department of Justice Law Enforcement Initiative begun in 1997. As part of the FY 2000 Commerce, Justice and State (CJS) Appropriations bill, the House subcommittee refused to provide funding for these activities because, in the opinion of the House subcommittee, they lacked authorization. The amendment to S. 1508 is proposed to eliminate any confusion over the authorization for the DoJ to fund and carry out these programs and activities.

The second amendment authorizes appropriations under the 1993 Indian Tribal Justice Act, from FY2001 through FY2007. The current authorization for appropriations under the 1993 Act will expire with the end of fiscal year 2000.

LEGISLATIVE HISTORY

S. 1508, the Indian Tribal Justice System Legal and Technical Assistance Act of 1999, was introduced on August 5, 1999 by Senator Campbell, and was referred to the Committee on Indian Affairs where a hearing was held on September 29, 1999.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On October 12, 1999 the Committee on Indian Affairs, in an open business session, adopted an amendment in the nature of a substitute to S. 1508 by a unanimous vote of the members present and ordered the bill, as amended, reported favorably to the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that the Act may be cited as the "Indian Tribal Justice Technical and Legal Assistance Act of 1999."

Section 2. Findings

This section contains eleven findings and declaration, including: a recognition of the government-to-government relationship between the United States and Indian tribes; that Indian tribes are responsible for exercising governmental authority over Indian lands; that the rate of violent crime in Indian country is twice the national rate and poses an obstacle to investment, job creation and economic growth; that tribal justice systems are essential for ensuring the health, safety and political integrity of tribal governments and have been repeatedly recognized by the federal government as the most appropriate forums for the resolution of disputes over personal and property rights on Indian lands; enhancing tribal justice systems and improving access to them advances the federal policies

of self-determination and economic self-sufficiency; tribal court personnel membership organizations have served a critical role in providing necessary training and technical assistance for tribal justice systems; and Indian legal services programs have provided cost effective legal assistance to Indian people and contribute to the development of tribal justice systems and tribal jurisprudence.

Section 3. Purposes

This section sets forth five purposes for the Act, including: to carry out the responsibility of the United States to Indian tribes and members of Indian tribes to ensure access to quality technical and legal assistance; to strengthen and improve the capacity of tribal justice systems; to strengthen tribal governments and tribal economies; to encourage collaborative efforts between organizations of tribal justice system personnel and non-profit entities which provide legal assistance for Indian tribes, their members and tribal justice systems; and, to assist in the development of tribal justice systems by complementing prior Congressional efforts such as the Indian Tribal Justice Act.

Section 4. Definitions

This section sets forth definitions for the following terms: Attorney General, Indian Lands (including Indian reservations and former Indian reservations in Oklahoma), Indian tribe, judicial personnel, non-profit entities, Office of Tribal Justice and Tribal Justice System.

TITLE I—TRAINING AND TECHNICAL ASSISTANCE, CIVIL AND CRIMINAL LEGAL ASSISTANCE PROGRAMS

Section 101

Tribal Justice Training and Technical Assistance Grants. This section provides authorization for the Attorney General to make grant awards to national or regional judicial system personnel membership organizations and associations to provide training and technical assistance for the development, enhancement and enrichment of tribal justice systems, subject to the availability of appropriations and in consultation with the Office of Tribal Justice.

Section 102. Tribal civil legal assistance grants

This section provides authorization for the Attorney General to make grant awards to non-profit entities which provide civil legal assistance services for Indian tribes, members of Indian tribes or tribal justice systems, subject to the availability of appropriations and in consultation with the Office of Tribal Justice.

Section 103. Tribal criminal assistance grants

This section provides authorization for the Attorney General to make grant awards to non-profit entities which provide criminal legal assistance services for Indian tribes, members of Indian tribes or tribal justice systems, subject to the availability of appropriations and in consultation with the Office of Tribal Justice.

Section 104. No offset

This section prohibits any federal agency from using funds provided to Indian tribal justice system organizations or Indian legal services organizations pursuant to this Act as an offset to funds otherwise available for use in connection with technical or legal assistance to tribal justice systems or members of Indian tribes.

Section 105. Tribal authority

This section provides that nothing in this Act shall be construed to: diminish the inherent sovereign authority of an Indian tribe to determine the role of its tribal justice system in its tribal government, the authority the tribal government to appoint personnel or the apportionment of authority within the tribal government; alter traditional tribal dispute resolution fora; or, imply that a tribal justice system is an instrumentality of the United States or diminish the trust responsibility of the United States.

Section 106. Authorization of appropriations

This section authorizes the appropriation of such sums as may be necessary for fiscal years 2000 through 2004.

TITLE II—INDIAN TRIBAL COURTS

Section 201. Grants

This section provides that the Attorney General may award grants and provide technical assistance to Indian tribes for the development, enhancement and continuing operation of tribal justice systems including: code development; the development of inter-tribal courts and appellate systems; probation services, sentencing and alternative sentencing and diversion programs; juvenile justice services and multi-disciplinary protocols for child physical and sexual abuse; and, traditional tribal justice practices and dispute resolution methods. The Attorney General may consult with the Office of Tribal Justice or other appropriate federal officials and promulgate regulations to carry out this Title of the Act. Such sums as may be necessary are authorized to be appropriated for fiscal years 2000 through 2004.

Section 202. Tribal justice systems

This section amends 25 U.S.C. § 3621 (P.L. 103–176, Section 201) to extend the authorization for appropriations from fiscal year 2000 to fiscal year 2000 through 2007 for the Office of Tribal Justice Support and the annual update of the survey of tribal justice systems, base support funding for tribal justice systems, the administrative expenses for Tribal Judicial Conferences.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The cost estimate for S. 1508 as calculated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 25, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 1508—Indian Tribal Justice Technical and Legal Assistance Act of 1999

Summary: S. 1508 would authorize funding for programs that support tribal justice systems. The bill would authorize the appropriation of $464 million over the 2000–2007 period, including $58 million already authorized for 2000, for the Secretary of the Interior to carry out certain provisions of the Indian Tribal Justice Act. S. 1508 also would authorize the Attorney General to make grants to organizations to develop and strengthen tribal justice systems. CBO estimates this effort would cost about $5 million annually, assuming appropriation of that amount. In 1999, neither the Department of the Interior (DOI) nor the Department of Justice (DOJ) received any appropriations to implement programs that would be authorized by S. 1508.

Based on information from DOI and DOJ, CBO estimates that implementing S. 1508 would cost $232 million over the 2000–2004 period, assuming appropriation of the authorized amounts. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 1508 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: For purposes of this estimate, CBO assumes that S. 1508 will be enacted early in fiscal year 2000 and that the authorized amounts will be provided for each year. Estimates of outlays are based on historical spending patterns for similar programs. The estimated budgetary impact of S. 1508 is shown in the following table. The costs of this legislation fall within budget functions 450 (community and regional development) and 750 (administration of justice).

	By fiscal years, in millions of dollars—				
	2000	2001	2002	2003	2004
SPENDING SUBJECT TO APPROPRIATION					
Spending on Tribal Justice Systems Under Current Law:					
Authorization Level [1]	58	0	0	0	0
Estimated Outlays	41	13	2	0	0

	By fiscal years, in millions of dollars—				
	2000	2001	2002	2003	2004
Proposed Changes:					
Estimated Authorization Level	5	63	63	63	63
Estimated Outlays	5	46	59	61	61
Spending on Tribal Justice Systems Under S. 1508:					
Estimated Authorization Level	63	63	63	63	63
Estimated Outlays	46	59	61	61	61

[1] The 2000 level is the amount authorized under current law. Thus far, no appropriations have been provided for 2000.

Basis of estimate: S. 1508 would authorize the appropriation of $58 million a year for fiscal years 2000 through 2007 for the Secretary of the Interior to establish and operate the Office of Tribal Justice Support. Under current law, $58 million is already authorized in 2000 for this work, but no funds have been appropriated thus far. The purpose of the office would be to develop, operate, and enhance tribal justice systems and traditional judicial practices of tribal governments. Based on information from DOI, CBO estimates that implementing this provision would cost $207 million over the 2000–2004 period, assuming annual appropriation of the authorized amount.

S. 1508 also would authorize the Attorney General to make grants to organizations representing personnel of tribal judicial systems and to nonprofit organizations providing legal services to tribes. The Attorney General would provide grants and technical assistance to tribes to assist them in developing and operating tribal justice systems and related programs. Based on information from DOJ, CBO estimates that implementing these provisions would require an annual appropriation of $5 million, and would result in spending of $25 million over the 2000–2004 period.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 1508 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Megan Carroll.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The Committee has concluded that enactment of S. 1508 will create only de minimis regulatory or paper work burdens.

Executive Communications

At the hearing on S. 1508 on September 29, 1999, the President of the Legal Services Corporation, John McKay and Mark Van Norman, Director of the Office of Tribal Justice in the Department of Justice, appeared and testified before the Committee in support of S. 1508. In addition Kevin Gover, Assistant Secretary for Indian Affairs in the Department of the Interior submitted a written statement for the record of the hearing, also in support of S. 1508. The

statements of President McKay, Director Van Norman and Assistant Secretary Gover follow:

STATEMENT OF JOHN MCKAY, PRESIDENT, LEGAL SERVICES CORPORATION

Good morning, Chairman Campbell and distinguished members of the Senate Indian Affairs Committee. Thank you very much for the opportunity to testify on S. 1508, the Indian Tribal Justice System Technical and Legal Assistance Act of 1999. The Legal Services Corporation ("LSC" or "the Corporation") appreciates your invitation to offer our comments on this legislation.

Because this opportunity to appear before the Senate Indian Affairs Committee is a unique opportunity for the Corporation, let me provide the Committee with some background on LSC.

The Legal Services Corporation is a private, non-profit corporation established by Congress in 1974 to seek to ensure equal access to justice under the law for all Americans. Our mission is to promote access to our system of justice to improve opportunities for low-income people throughout the United States by providing high quality civil legal representation to those who would otherwise be unable to afford it. The Corporation provides grants to local legal services programs to address critical legal problems for eligible clients and their families in every state and county in the United States.

LSC is headed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. By law, the Board is bipartisan: no more than six members may be of the same political party. Local programs are governed by their own Boards of Directors, which set priorities and determine the types of cases that will be handled by the program, subject to restrictions set by Congress. A majority of each local Board is appointed by local bar associations. One-third of each local Board is composed of client representatives appointed by client groups. Programs may supplement their LSC grants with additional funds from state and local governments, IOLTA (Interest on Lawyer Trust Accounts) programs, other federal agencies, bar associations, United Way and other charitable organizations, foundations and corporations, and individual donors. They further leverage federal funds by involving private attorneys in the delivery of legal services for the poor, mostly through volunteer pro bono work. LSC-funded programs do not handle criminal cases, nor do they accept fee-generating cases that private attorneys are willing to accept on a contingency basis.

I should note that, pursuant to congressional direction in 1996, LSC funded programs are prohibited from engaging in class actions, challenges to welfare reform, collection of court-awarded attorneys' fees, many types of lobbying, litigation on behalf of prisoners, and representation of undocumented and other categories of aliens.

The Legal Services Corporation strongly supports S. 1508, legislation recently introduced by Chairman Campbell. This bill would authorize the Attorney General to award grants to national or regional tribal justice system organizations or non-profit entities that provide legal assistance services for tribes and tribal members for the purpose of improving tribal judicial systems through training, technical assistance, and civil legal and criminal assistance. LSC appreciates that the thirty Indian Legal Services (ILS) programs that receive LSC funding are specifically included as eligible entities to whom the Attorney General may award grants for civil legal and criminal assistance programs under Sections 102 and 103 of the bill.

Since 1968, ILS programs have been performing essential capacity building services to many tribal courts across the country, and have provided representation of Indian individuals in those courts. ILS programs have assisted tribes in such activities as the development of tribal courts, development of written tribal codes, and training of tribal judges and lay advocates, as well as provided legal representations to individual Native people and, in some cases, where permitted under the LSC Act and governing regulations, to tribal governments themselves.

An important theme of the Senate Indian Affairs Committee this year has been the facilitation and enhancement of strong tribal government, reservation infrastructure and economic opportunities for American Indians, Alaska Natives and Native Hawaiians. Just as the staggering poverty and unemployment statistics of many tribal reservations are an anomaly to the glowing reports of the economic health of America, so too the lack of equal access to the courts for many poor, small, rural and/or tribal communities undermines the overall level of confidence in our justice system. Without the full participation of the individuals in these communities and all others who must rely on our justice system to access the rights guaranteed to them through the Constitution, our nation's promise of "equal justice under law" is illusory.

Whether greater confidence in tribal courts is achieved through the provision of training or through technical or civil legal assistance, the broad goal of ensuring equal access to justice through equipping tribal justice system personnel with additional skills and tools will benefit individuals, local businesses, contractors of various services, school districts, and local governments—in short, these steps will benefit entire communities, Native and non-Native.

The legislation's goal is also consistent with the intent of the Committee in a number of bills it has considered this year to maximize resources and to encourage partnerships. LSC recognizes that its funding alone is not sufficient to meet the vast unmet legal needs of low-income people in this nation, particularly in the Native American community. Any additional sources of funding can only

benefit the ability of ILS programs to serve eligible Indian tribes and individuals who cannot afford legal assistance. LSC views the additional direct tie between LSC Indian Legal Services programs and the Department of Justice that would be authorized under this Act as an exciting opportunity to strengthen legal assistance to Native Americans.

On behalf of LSC, thank you for this opportunity to comment on S. 1508. The Corporation supports this initiative, and urges the Committee to take favorable action on the bill in the near future.

STATEMENT OF MARK C. VAN NORMAN, DIRECTOR, OFFICE OF TRIBAL JUSTICE

Good morning, Mr. Chairman and Members of the Committee. I am Mark Van Norman, Director, Office of Tribal Justice, Department of Justice. Thank you for inviting me to testify on S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999.

In our view, S. 1508 would complement the joint Justice-Interior Indian Law Enforcement Improvement Initiative. The bill would promote the development of sound tribal justice systems by increasing resources for training and technical assistance. In addition, the bill would provide adjunct civil legal assistance to impoverished tribal members which would be significant in relation to civil rights, child custody matters, housing, social services, and other areas. Tribal members are often underserved in these areas. The bill would enhance criminal legal assistance to indigent Indian defendants and impoverished families and young people in the tribal justice systems, which, in addition to being desperately needed now, seems only fair in view of the increases in funding for tribal law enforcement. In our view, improving assistance to Indian communities in these areas would improve the administration of justice in tribal courts and enhance our overall efforts to improve tribal law enforcement and justice systems.

I. Government-to-government relations

Let me begin by emphasizing the fundamental principles that guide the work of the Department of Justice with Indian tribes, before discussing the problems of violent crime among American Indians, and our current efforts to assist tribal courts and justice systems.

Congress and the Executive Branch acknowledge the importance of working with Indian tribes within the framework of government-to-government relations when tribal self-government, tribal land and resources, treaty rights, or other tribal rights are concerned. Federal Government-to-government relations with tribal governments are rooted in historical treaty relations and the ongoing trust responsibility of the United States. President Clinton recently affirmed that:

> Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.[1]

Similarly, Congress has declared that the Federal trust responsibility "includes the protection of the sovereignty of each tribal government."[2]

II. Violent crime and law enforcement in Indian country

In addition to the Federal Government's trust relationship with Indian tribes, the United States' basic responsibility to preserve public safety for residents of Indian communities derives from federal statutes, such as the Indian Major Crimes Act and the General Crimes Act,[3] that provide for federal jurisdiction over felony crimes, such as murder, rape, robbery, and serious assaults by or against Indians in Indian country. The U.S. Attorneys prosecute such felony crimes in most of Indian country. Tribal police and law enforcement agencies serve as first responders to Indian country crimes and assist the FBI and the BIA in responding to and investigating felony crimes. Tribal courts and prosecutors try and punish misdemeanor Indian crimes. Thus, an effective tribal criminal justice system is an essential adjunct to effective Federal law enforcement in Indian country.[4]

While crime rates have fallen throughout the Nation, federal and tribal law enforcement agencies report that violent crime in Indian country is rising. The Bureau of Justice Statistics (B.J.S.) explained in its report, American Indians and Crime (1999), that American Indians have the highest violent crime victimization rates of any group in the Nation. From 1992–1996, the violent victimization rate for American Indians (124 violent crimes per 1,000) was more than twice the rate for the Nation as a whole (50 per 1,000).[5] Violence against American Indian women is severe.[6] American Indians suffer 7 rapes or sexual assaults

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[1] Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (1998); 63 Fed. Reg. 27655 (1998).

[2] 25 U.S.C. sec. 3601.

[3] 18 U.S.C. secs. 1152 and 1153.

[4] Under Public Law No. 83–280, the Congress delegated to some states criminal jurisdiction overs Indians in Indian country, and in those states, Indian tribes retain inherent authority over misdemeanor crimes by Indian offenders and often serve as the first responders to Indian country crime.

[5] Alcohol use is strongly associated with crime among American Indians. In 55% of violent crimes against American Indians, the victims report that the offender was under the influence of alcohol, drugs, or both. In addition, the 1996 arrest rate for alcohol related offenses (driving under the influence, liquor violations, etc.) among American Indians and Alaska Natives was more than double that of the general population.

[6] The BJS report details violence among victims age 12 and over. In addition, BJS statistics are derived from American Indian households throughout the Nation, in reservation and off-reservation settings. Reports from the FBI, BIA, and tribal law enforcement agencies indicate that

Continued

per 1,000 compared to 3 per 1,000 among Blacks, 2 per 1,000 among whites, and 1 per 1,000 among Asians. Child abuse and neglect are also serious problems among American Indians. The National Child Abuse and Neglect Data System of the Department of Health and Human Services reports that the rate of substantiated child abuse and neglect among American Indian children was the highest of any group in 1995 (the most recent year for which statistics were available).[7]

Violent crime by juvenile offenders and Indian youth gangs is on the rise in many Indian communities. The number of Indian youth in Bureau of Prisons (BOP) custody has increased by 50% since 1994. Demographics contribute to the growing problem of juvenile delinquency and violence in Indian country. throughout the Nation, the median age of American Indians is 24.2 years compared with 32.9 years of other Americans. On many Indian reservations, roughly half of the population is under 18 years of age.

In 1997, recognizing the severity of violent crime problems in Indian country, the President directed the Attorney General and the Secretary of the Interior to develop a plan to improve public safety and criminal justice in Indian communities. The DOJ/DOI Executive Committee on Indian Country Law Enforcement Improvements found that tribal police and criminal justice systems face severe shortages among police, criminal investigators, detention, and court staff and resources. Tribal law enforcement agencies also lack basic communications and information equipment and technology. The Navajo Nation, the largest land based Indian tribe with 17 million acres of land, has 0.9 police officers per 1,000 compared with 2.3 officer per 1,000 in off-reservation communities. the Attorney General and the Secretary approved the Executive Committee's findings and recommendation to increase law enforcement assistance to tribal governments. In response, the Administration established the Indian Law Enforcement Improvement Initiative. In Fiscal Year 1999, Congress appropriated $89 million for the Justice Department for grants to Indian tribes for tribal law enforcement officers, equipment, detention centers, juvenile justice programs, and tribal courts, and for more FBI agents in Indian country. For Fiscal Year 2000, the Administration has requested $124 million for the Justice Department for the Indian Law Enforcement Improvement Initiative, including $5 million for tribal courts.

III. Tribal courts, criminal and civil justice

Under the longstanding Federal policy promoting self-government for Indian tribes, the United States has con-

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the violent crime problems on many of the large western Indian reservations may be worse than these overall national rates.

[7] Rates were calculated on the number of children age 14 or younger because they account for at least 80% of the victims of child abuse and neglect.

sistently promoted the development of tribal courts. Under the Indian Reorganization Act of 1934, for example, Congress encouraged Indian tribes to develop and ratify written constitutions and in assisting Indian tribes under the Act, the Secretary of the Interior encouraged tribal governments to develop tribal courts.[8] Similarly, the Indian Civil Rights Act affirms tribal court jurisdiction over crimes by Indians in tribal territory.[9] Tribal courts also have recognized authority over civil matters, such as dometic relations,[10] probate,[11] torts,[12] housing,[13] debt, collection,[14] environmental regulation,[15] business activities on Indian lands,[16] management of Indian lands and natural resources,[17] and other matters. Congress has declared that tribal courts are "appropriate forums for the adjudication of disputes affecting personal and property rights" and "for ensuring public health and safety and the political integrity of tribal governments." [18]

Recognizing the evolving role of tribal courts within our Federalist system, the Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court, has written:

> Today, in the United States we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. * * * The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation.[19]

Under the Indian Self-Determination Policy, tribal court systems have been rapidly expanding to serve their communities. In 1978, there were "71 tribal courts, 32 CFR

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[8] 25 U.S.C. sec. 476. For example, the Constitution of the Hopi Tribe provides that the Hopi Tribal Council shall have the power to: "set up courts for the settlement of claims and disputes, and for the trial and punishment of Indians within the jurisdiction charged with offenses against [tribal] ordinances." Hopi Tribe Const. Art. VI, sec. 1(g). Before the Indian Reorganization Act a few Indian tribes had established tribal courts based on the Anglo-American model, see *Talton* v. *Mayes,* 163 U.S. 376 (1896) (determinations as to the meaning of Cherokee law on grand jury proceedings "were matters solely within the jurisdiction of the courts of that nation"), while other Indian tribes had Courts of Indian Offenses operated by the Department of the Interior, 25 C.F.R. part 11, or traditional dispute resolution systems. K. Llewelyn & E. Hoebel, The Cheyenne Way (1987) at 111–113 (describing traditional Cheyenne law).

[9] 25 U.S.C. sec. 1301 ("'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial [including] the inherent power of Indian tribes to * * * exercise criminal jurisdiction over all Indians").

[10] *Fisher* v. *District Court,* 424 U.S. 382 (1976); *United States* v. *Quiver,* 241 U.S. 602, 603 (1916); *cf. John* v. *Baker,* 982 P.2d 738 (Ak 1999) (Although Alaska Native Claims Settlement Act lands are not "Indian country" for 18 U.S.C. sec. 1151 purposes, Alaska Native villages are federally recognized Indian tribes with concurrent jurisdiction over tribal members).

[11] 25 U.S.C sec. 2205.

[12] *Gesinger* v. *Gesinger,* 531 N.W.2d 17(SD 1995).

[13] *Northwest Production Credit Association* v. *Smith,* 784 F.2d 323 (1986).

[14] *Williams* v. *Lee,* 358 U.S. 217 (1959).

[15] *Montana* v. *EPA,* 137 F.3d 1135 (9th Cir.) cert. denied, 119 S. Ct. 275 (1998).

[16] *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Kerr-McGee* v. *Navajo Tribe,* 471 U.S. 195 (1985).

[17] *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324 (1983).

[18] 25 U.S.C. sec. 3601.

[19] Hon. Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, "Lessons from the Third Sovereign: Indian Tribal Courts," The Tribal Court Record (1996) at 12, 14.

courts, and 16 traditional courts."[20] Today, there are over 250 tribal courts, including intertribal court systems like the Nevada Intertribal Court of Appeals, which serves 24 Indian tribes. Tribal court dockets are increasing dramatically. In 1996, the Honorable William C. Canby, Jr., Senior Circuit Judge, United States Court of Appeals wrote that:

> The tribal courts are doing a huge business, and we in the federal and state judiciary could not do without them. The courts of the Navajo Nation this year will decide about 25,000 civil and criminal cases, and this figure does not include traffic offenses, juvenile matters, alternative traditional court proceedings, or appeals. The smaller Gila River Indian Community Court decided 3,200 cases last year. A disappearance of the tribal court system would be a major disaster, not just for the tribes and their courts, but for our whole national system of civil and criminal justice.[21]

In our policy on government-to-government relations with Indian tribes, the Justice Department has pledged to "support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems." See 61 Fed. Reg. 29424 (1996). In 1995, the Justice Department helped to coordinate an academic conference and an articles symposium on tribal courts, and the Attorney General explained:

> While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. * * *
>
> Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members. * * * The integrity of and respect for tribal courts are critical for encouraging economic development and investment on the reservation by Indians and non-Indians alike.
>
> Tribal courts are also important vehicles for helping to resolve family problems. They can bring families together and hold parents and children accountable to themselves, each other, and the community.[22]

The Justice Department supports the BIA's efforts to provide assistance to tribal courts, and with our departmental

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[20] U.S. Civil Rights Commission, The Indian Civil Rights Act (1991) at 29.

[21] Hon. W.C. Canby, Jr., "Tribal Courts, Viewed From A Federal Judge's Perspective," The tribal Court Record (1996 at 16–17.

[22] Hon. J. Reno, Attorney General of the United States, "A federal commitment to tribal justice systems," 79 Judicature 113, 114 (1995).

mission of strengthening and assisting state, local, and tribal law enforcement and justice systems, we have begun complementary efforts to support and assist tribal courts and justice systems throughout the Nation. The Justice Department is working to promote cooperation between the Federal, tribal, and state court systems. For example, the Justice Department has sponsored Federal-Tribal judicial training on child sexual abuse cases, and the Office for Victims of Crime (OVC) is working with the University of North Dakota to fund scholarships for tribal judges to attend OVC training workshops on other issues related to crime victims. The National Judicial College, which provides training courses for Federal and state judges, is developing a special curriculum for tribal court judges under a Justice Department grant. Similarly, recognizing the significance of traditional tribal justice systems, the Office of Juvenile Justice and Delinquency Prevention will sponsor a workshop on traditional tribal justice at the Mississippi Band of Choctaw's tribal headquarters in November 1999.

The Justice Department has also included a number of tribal courts in grant programs generally available to state, local, and tribal justice systems, like the Drug Courts Program (DCP). For example, the Hualapai Tribal Court of Arizona used a DCP grant to establish a "Wellness Court" to assist tribal members who are chronically involved in the criminal justice system due to nonviolent alcohol-related offenses. Several Alaska Native villages, which suffer from high levels of alcohol abuse, have initiated similar DCP efforts. For Fiscal Year 1999, the Drug Courts Program has made 7 planning grants and 2 implementation grants to Indian tribes, totaling $506,448 out of its $40 million national program.[23]

In addition, when planning the Indian Law Enforcement Improvement Initiative, tribal courts were facing rapidly increasing caseloads and we recognized that the influx of funding for tribal police officers would inevitably increase tribal court caseloads further. So, the Justice Department included a tribal court program as an essential part of the overall initiative to fight violent crime and promote public safety. For Fiscal Year 1999, Congress appropriated $5 million under the Justice Department Tribal Court program "to assist tribal governments in the development, enhancement, and continuing operations of tribal justice systems." Demonstrating the high level of need for this program, 181 Indian tribes submitted applications for funding under this program. From among these applications, on behalf of the Office of Justice Programs, the Bureau of Justice Assistance (BJA) is awarding 15 large tribal court enhancement grants ranging up to $100,000, 15 small tribal court enhancement grants ranging up to $50,000, and a

[23] In Fiscal Year 1998, DCP awarded Indian tribes 13 planning grants and 8 implementation grants totaling $2,321,000 out of a $30 million national program, and in Fiscal year 1997, DCP awarded Indian tribes 13 planning grants and 9 implementation grants totaling $1,000,000 out of a $30 million national program.

number of tribal court planning grants of up to $30,000. In addition, BJA will award substantial tribal court technical assistance grants and one or more tribal court technical assistance providers.

As noted above, for Fiscal Year 2000, the Justice Department has requested $5,000,000 for the Tribal Court Program. We recognize that "tribal courts play a vital role in tribal self-government," [24] and we view the Department's Tribal Court program as a very significant component of the overall joint Justice-Interior initiative to improve tribal law enforcement and justice systems to address violent crime in Indian communities.

The Bureau of Indian Affairs provides baseline funding for tribal courts through the Indian Self-Determination Act. In FY 1999, the BIA had just over $11 million for tribal courts through this program and the Administration has requested nearly $14 million for FY 2000.[25]

IV. S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999

As noted above, in our view, S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999, would complement the joint Justice-Interior Indian Law Enforcement Improvement Initiative, and we have several specific comments in relation to the provisions of the bill.

In regard to the findings, we suggest that finding (3) be redrafted as follows: "the rate of violent crime victimizations committed againist American Indians is more than twice the national rate of violent crime victimizations." This will ensure that the finding better reflects the results of the BJS Report on American Indians and Crime (1999). In regard to tribal self-sufficiency, we recognize that many Indian tribes suffer high unemployment rates and economic deprivation and sound tribal court systems are an essential part of the tribal governmental infrastructure necessary to attract business to Indian communities. Addressing the White House Conference on Building Economic Self-Determination in Indian Communities on August 5, 1998, the Attorney General said: "[I]t is important * * * to focus attention on tribal courts and * * * to give them the resources necessary to do the job."

In regard to Section 101, Tribal Justice Training and Technical Assistance Grants, we recommend that Indian tribes be among the membership of national or regional membership organizations and associations receiving grants hereunder. For example, the National Congress of American Indians (NCAI) is a national membership organiation consisting of Indian tribes, and NCAI may well be an appropriate technical assistance provider for tribal justice training.

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[24] *Iowa Mutual Ins. Co.* v. *LaPlante,* 480 U.S. 9, 14 (1987).

[25] Due to program cuts and reprogramming, BIA funding for Tribal Courts has declined from just over $15 million in FY 1995 to just over $11 million in FY 1999.

In regard to Section 102, we recommend inserting Indian tribes as eligible grantees because some Indian tribes are developing legal advocacy offices for tribal members in the area of violence against women and other areas. Consistent with the principle of government-to-government relations, Indian tribes should also be included to provide governmental and community services to Indian communities under their jurisdiction. In addition, to avoid duplication in the provision of services to Indian communities, we recommend that non-profit entities be required to submit a statement of support from the tribal government with jurisdication over the Indian community or communities to be served, or a statement demonstrating that there is no duplication of or conflict with existing tribal government services in the area.

In regard to Section 103, similar changes should be made to promote consistency with the principle of government-to-government relations and to avoid duplication of services. Moreover, where there is funding for the public defense of indigent defendants in the Federal courts under the Criminal Justice Act, tribal courts are not receiving funding under that Act. Accordingly, it would be appropriate to ensure that funding under this section is primarily directed to enhancing the public defense of indigent defendants in tribal courts. We are available to work with the Committee's staff on these issues, if that would be of assistance.

V. Conclusion

In conclusion, American Indian communities face serious problems of rising violent crime, including violence against women, gang activity, juvenile deliniquency, and child abuse. Federal and tribal law enforcment officials in the field report that poverty and alcohol abuse are substantial contributing factors to these problems. Justice and Interior have undertaken the Indian Law Enforcmenet Improvement Initiative to address these crime problems. S. 1508 would complement our overall inititative.

Tribal courts are also an important part of the tribal governmental infrastructure necessary to build economic self-sufficiency in Indian communities. This bill would enhance the development of strong tribal courts, and thereby, promote the long-term goal of economic self-sufficiency for Indian communities.

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC.

DEPARTMENT OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES

Purpose: to reaffirm the Department's recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations and to reaffirm adherence to

the principles of government-to-government relations; to inform Department personnel, other federal agencies, federally recognized Indian tribes, and the public of the Department's working relationships with federally recognized Indian tribes; and to guide the Department in its work in the field of Indian affairs.

I. INTRODUCTION

From its earliest days, the United States has recognized the sovereign status of Indian tribes as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Our Constitution recognizes Indian sovereignty by classing Indian treaties among the "supreme Law of the land," and establishes Indian affairs as a unique area of federal concern. In early Indian treaties, the United States pledged to "protect" Indian tribes, thereby establishing one of the bases for the federal trust responsibility in our government-to-government relations with Indian tribes. These principles continue to guide our national policy towards Indian tribes.

A. The executive memorandum on government-to-government relations between the United States and Indian tribes

On April 29, 1994, at a historic meeting with the heads of tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American tribal governments" and issued a directive to all executive departments and agencies of the Federal government that:

> As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

President Clinton's directive requires that in all activities relating to or affecting the government or treaty rights of Indian tribes, the executive branch shall:

(1) operate within a government-to-government relationship with federally recognized Indian tribes;

(2) consult, to the greatest extent practicable and permitted by law, with Indian tribal governments before taking actions that affect federally recognized Indian tribes;

(3) assess the impact of agency activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;

(4) remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of the tribes; and

(5) work cooperatively with other agencies to accomplish these goals established by the President.

The Department of Justice is reviewing programs and procedures to ensure that we adhere to principles of respect for Indian tribal governments and honor our Nation's trust responsibility to Indian tribes. Within the Department, the Office of Tribal Justice has been formed to coordinate policy towards Indian tribes both within the Department and with other agencies of the Federal Government, and to assist Indian tribes as domestic dependent nations within the federal system.

B. Federal Indian self-determination policy

President Clinton's executive memorandum builds on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents affirmed the fundamental policy of federal respect for tribal self-government. President Johnson recognized "the right of the first Americans * * * to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government basis" for dealing with Indian tribes. President Bush recognized that the Federal Government's "efforts to increase tribal self-governance have brought a renewed sense of pride and empowerment to this country's native peoples."

II. PRINCIPLES OF INDIAN SOVEREIGNTY AND THE TRUST RESPONSIBILITY

Though generalizations are difficult, a few basic principles provide important guidance in the field of Indian affairs: (1) the Constitution vests Congress with plenary power over Indian affairs; (2) Indian tribes retain important sovereign powers over "their members and their territory," subject to the plenary power of Congress; and (3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where congress has provided otherwise.

III. DEPARTMENT OF JUSTICE RECOGNITION OF INDIAN SOVEREIGNTY AND THE FEDERAL TRUST RESPONSIBILITY

The Department resolves that the following principles will guide its interactions with the Indian tribes.

A. The sovereignty of Indian tribes

The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the Untied States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance.

The Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the

United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes. For example, the Department reviews proposed legislation, administers funds that are available to tribes to build their capacity to address crime and crime-related problems in Indian country, and in conjunction with the Bureau of Indian Affairs and tribal police, provides essential law enforcement in Indian country. The Department represents the United States, in coordination with other federal agencies, the litigation brought for the benefit of Indian tribes and individuals, as well as in litigation by Indian tribes or individuals against the United States or its agencies. In litigation as in other matters, the Department may take actions and positions affecting Indian tribes with which one or more tribes may disagree. In all situations, the Department will carry out its responsibilities consistent with the law and this policy statement.

B. Government-to-government relationships with Indian tribes

In accord with the status of Indian tribes as domestic dependent nations, the Department is committed to operating on the basis of government-to-government relations with Indian tribes.

Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes. Each component will conduct such consolation in light of its mission. In addition, the Department has initiated national and regional listening conferences and has created the Office of Tribal Justice to improve communications with Indian tribes. In the Offices of the United States Attorneys with substantial areas of Indian country within their purview, the Department encourages designation of Assistant U.S. Attorneys to serve as tribal liaisons.

In order to fulfill its mission, the Department of Justice endeavors to forge strong partnerships between the Indian tribal governments and the Department. These partnerships will enable the Department to better serve the needs of Indian tribes, Indian people, and the public at large.

C. Self-determination and self-governance

The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law

enforcement systems, tribal courts, and traditional justice systems.

D. Trust responsibility

The Department acknowledges the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. In a broad sense, the trust responsibility relates to the Untied States' unique legal and political relationship with Indian tribes. Congress, with plenary power over Indian affairs, plays a primary role in defining the trust responsibility, and Congress recently declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601.

The term "trust responsibility" is also used in a narrower sense to define the precise legal duties of the United States in managing property and resources of Indian tribes and, at times, of individual Indians.

The trust responsibility, in both senses, will guide the Department in litigation, enforcement, policymaking and proposals for legislation affecting Indian country, when appropriate to the circumstances. As used in its narrower sense, the federal trust responsibility may be justifiable in some circumstances, while in its broader sense the definition and implementation of the trust responsibility is committed to Congress and the Executive Branch.

E. Protection of civil rights

Federal law prohibits discrimination based on race or nation origin by the federal, state and local governments, or individuals against American Indians in such areas as voting, education, housing, credit, public accommodations and facilities, employment, and in certain federally funded programs and facilities. Various federal criminal civil rights statutes also preserve personal liberties and safety. The existence of the federal trust responsibility towards Indian tribes does not diminish the obligation of state and local governments to respect the civil rights of Indian people.

Through the Indian Civil Rights Act, Congress selectively has derived essential civil rights protections from the Bill of Rights and applied them to Indian tribes. 25 U.S.C. § 1301. The Indian Civil Rights Act is to be interpreted with the respect for Indian sovereignty. The primary responsibility for enforcement of the Act is invested in the tribal courts and other tribal fora. In the criminal law context, federal courts have authority to decide habeas corpus petitions after tribal remedies are exhausted.

The Department of Justice is fully committed to safeguarding the constitutional and statutory rights of American Indians, as well as all other Americans.

F. Protection of tribal religion and culture

The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. The Department seeks to ensure that American Indians are protected in the observance of their faiths. Decisions regarding the activities of the Department that have the potential to substantially interfere with the exercise of Indian religious will be guided by the First Amendment of the United States Constitution, as well as by statutes which protect the exercise of religion such as the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

The Department also recognizes the significant federal interest in aiding tribes in the preservation of their tribal customs and traditions. In performing its duties in Indian country, the Department will respect and seek to preserve tribal cultures.

IV. DIRECTIVE TO ALL COMPONENTS OF THE DEPARTMENT OF JUSTICE

The principles set out here must be interpreted by each component of the Department of Justice in light of its respective mission. Therefore, each component head shall make all reasonable efforts to ensure that the component's activities are consistent with the above sovereignty and trust principles. The component heads shall circulate this policy to all attorneys in the Department to inform them of their responsibilities. Where the activities and internal procedures of the components can be reformed to ensure greater consistency with this Policy, the components head shall undertake to do so. If tensions arise between these principles and other principles which guide the component in carrying out its mission, components will develop, as necessary, a mechanism for resolving such tensions to ensure that tribal interests are given due consideration. Finally, component heads will appoint a contact person to work with the Office of Tribal Justice in addressing Indian issues within the component.

V. DISCLAIMER

This policy is intended only to improve the internal management of the Department and is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.

JANET RENO,
Attorney General.

STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS

Mr. Chairman and members of the Committee, I am pleased to submit the following statement for the record concerning S. 1508, the Indian Tribal Justice Technical and Legal Assistance Act of 1999. The Department of the Interior supports S. 1508. I have outlined a few issues for your consideration within my statement.

INTRODUCTION

Tribal justice systems are an essential component of tribal governments. They provide the means to enforce public safety laws in Indian Country, provide for the welfare and safety of Indian children and other tribal community members; and safeguard the political integrity of tribal governments. The tribal justice systems also ensure that economic development and self-determination efforts of a particular tribe are viable and trustworthy. In today's modern society with the need to promote tribal self-sufficiency while preserving cultural values, the tribal justice systems help bridge the gap between what are sometimes seen as competing interests and provide the balance that is part of the historical and traditional concepts of a tribal lifestyle through peacemaking efforts and alternative dispute resolution notions. However, the resources to assist tribes in the development of these concepts is solely lacking.

Currently, there are over 250 tribal courts throughout Indian Country. The Bureau of Indian Affairs (BIA) has received inquiries from other tribes and tribal consortiums who want to establish new court systems or improve existing justice systems. Although the BIA provides base funding to all of these tribal justice systems, it is clear that tribal justice systems still need to reach the degree of competence and sophistication necessary to handle the types of cases currently being brought in Indian Country.

CURRENT CRIMINAL ENVIRONMENT IN INDIAN COUNTRY

Violent crime is increasing in Indian Country at an alarming rate. In February of this year the Department of Justice, Bureau of Justice Statistics released the results of a survey of crime in Indian Country and found that American Indians are victimized by violent crime at a rate of more than twice the general population in America. Violence against Indian women is especially appalling where seven out of every 1,000 American Indian women are raped or sexually assaulted each year. This number is over three times the sexual assaults suffered by white women in this country and two times the number suffered by black women. This statistic is even more appalling when you consider that the 2.3 million American Indian population of the United States represents just under one percent of the total population of this country. The BIA An-

nual Law Enforcement Report also indicates an increase in forcible rape cases from 1997 to 1998 of 19 percent and an overall increase of violent crime in Indian Country of 56 percent. Although the Major Crimes Act mandates that most violent crimes are characterized as felonies and are to be handled in federal court by the United States Attorneys Office; tribal communities must still be on the forefront of addressing causes and explore solutions for this type of behavior. The prevalent of violent crime presents obstacles to job creation, investment and economic growth in tribal communities and the stated purpose of the Act to strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indians will certainly assist tribal communities through their justice systems to take affirmative steps to deter this type of activity from occurring in their communities.

Alcohol and substance abuse related criminal activity is also up in Indian Country and has been the bane of Indian existence since its introduction into tribal communities. According to the Bureau of Justice Statistics, 55 percent of the violent crimes committed against American Indians were committed by an offender who was under the influence of alcohol, drugs or both. The report includes data on an increase in DWI cases of 56.8 percent from 1997 to 1998 in Indian Country, with 10,180 DWI offenses in 1997 and 15,967 DWI cases in 1998. Tribal justice systems are the natural conduit for monitoring this type of activity within the communities and for the coordination of efforts among the various community service providers who professionally address this type of behavior.

Juvenile crime and delinquency is on the rise as well as child abuse and neglect cases in Indian Country. The National Child Abuse and Neglect Data System of the Department of Health and Human Services reports that between the years 1992 to 1995, American Indian children were subjected to abuse and neglect an average of 3 times that among Asians. These two ethnic groups experienced increases in child abuse and neglect cases for children under the age of 15. Gang related activities on Indian reservations are on the increase and reports from the FBI, BIA and tribal law enforcement agencies indicate that overall violent crime on many Indian reservations are worse than the national average.

ANALYSIS OF S. 1508

Section 2: Findings. We are in complete agreement with the Congressional findings. These findings have been relevant and applicable since the development of tribal justice systems. Tribes have used BIA base funding for all tribal governments, special funds for tribal court projects, and funds from other federal agencies that offer tribal justice funding on a competitive grant basis to fund their Tribal courts over the years.

Section 101: Tribal Justice Training and Technical Assistance Grants. The BIA supports the award of grants described in this section to national or regional membership organizations whose membership consists of judicial system personnel. These organizations will most likely consist of tribal court judges and other tribal justice personnel who will have knowledge of the current issues facing tribal systems and will be in an excellent position to develop the type of specialized training and technical assistance that will enrich, improve and enhance tribal justice systems.

Section 102: Tribal Civil Legal Assistance Grant, and Section 103: Tribal Criminal Assistance Grants. These two sections will help to promote the concept of equal and fair justice in Indian Country by promoting grant awards to non-profit organizations that provide legal services to Indian tribes, members of tribes tribal justice systems as provided in Sections 102 and 103 of the bill. The notion of basing accessibility on these services pursuant to federal poverty guidelines will address the need for competent representation for people who cannot otherwise afford legal representation.

Section 104: No Offset and Section 105: Tribal Authority. The BIA is in full support of these sections. Section 105, in particular, tracks the mission statement of the Department and the BIA's obligations to Indian Tribes. It also clearly recognizes the unique status of Indian tribal governments and the desire of the Federal Government to support ongoing tribal efforts to improve their existing tribal justice systems.

RECOMMENDATIONS

Last year, the Department of Justice, as part of the President's Initiative on Law Enforcement in Indian Country, offered two types of grant awards to tribal courts. These awards totaled $5 million. These awards were designed to address the areas of development and enhancement of Tribal Courts; providing technical assistance for tribal courts and the development of a national tribal court resource center. Any non-profit organization, unit of government, tribal government, court, tribal judicial system or academic institution could apply for these awards. The awards are based on grant periods from 18 to 24 months and range from a minimum of $50,000 for continuing operation and enhancement grants to a maximum of $500,000 for the creation of a national tribal court resource center. Tribes are eager to be funded through these grants.

With the anticipated increase in criminal caseloads in tribal courts resulting from the President's Initiative on Law Enforcement in Indian Country, the proposed legislation will help Tribes in meeting the increased caseloads to develop and fund programs designed to address the causes of criminal behavior and develop solutions to prevent such activity from occurring in Indian communities. We recommended the inclusion of Tribal Justice systems as eligi-

ble applicants for receipt of awards to non-profit organizations. Tribal Justice system should be on the forefront of the list of eligible grantees since they are not only confronting the issues facing their communities, but are struggling to develop solutions to address these issues.

CONCLUSION

The BIA has been working in a cooperative effort with DOJ since the President's Initiative on Law Enforcement in Indian Country to assist tribes in obtaining law enforcement equipment and personnel. The BIA has also provided technical assistance to tribal justice systems through DOJ's Office of Tribal Justice by providing tribal court program reviews and follow up where necessary as well as providing assistance in the development of criteria for the grant award process for both the tribal court and juvenile initiatives sponsored through DOJ. The BIA will continue to provide this type of technical assistance to DOJ and welcomes the additional challenge of working with other federal agencies or non-governmental offices in their efforts to assist tribal justice systems.

Thank you, Mr. Chairman, for the opportunity to provide this statement on S. 1508. I look forward to working with you and the Committee on further discussions concerning this important piece of legislation for Indian Tribal Justice systems.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes to existing law made by the bill are required to be set out in the accompanying Committee report. The Committee finds that enactment of S. 1508 will result in the following changes in existing law. The matter to be deleted is indicated in brackets **[]** and bold face type. The matter to be inserted is indicated in italic.

25 U.S.C. § 3621. Tribal Justice Systems

(a) OFFICE.—There is authorized to be appropriated to carry out the provisions of Section 3611 and Section 3612 of this Chapter, $7,000,000 in each of the fiscal years **[1994, 1996, 1997, 1998, 1999 and]** *2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007.* None of the funds provided under this subsection may be used for the administrative expenses of the Office.

(b) BASE SUPPORT FUNDING FOR TRIBAL JUSTICE SYSTEMS.—There is authorized to be appropriated to carry out the provisions of Section 3613 of this Chapter, $50,000,000 in each of the fiscal years **[1994, 1996, 1997, 1998, 1999 and]** *2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007.*

(c) ADMINISTRATIVE EXPENSES FOR OFFICE.—There is authorized to be appropriated, for the administrative expenses of the Office, $500,000 in each of the fiscal years **[1994, 1996, 1997, 1998, 1999 and]** *2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007.*

(d) ADMINISTRATIVE EXPENSES FOR TRIBAL JUDICIAL CONFERENCES.—There is authorized to be appropriated, for the administrative expenses of tribal judicial conferences, $500,000 in each of the fiscal years **[1994, 1996, 1997, 1998, 1999 and]** *2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007.*

Report of The Executive Committee

For

Indian Country Law Enforcement Improvements

FINAL REPORT

To

The Attorney General

And

The Secretary of the Interior

October 1997

U. S. Department of Justice
Criminal Division

Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

October 31, 1997

EXECUTIVE SUMMARY

MEMORANDUM FOR: **THE ATTORNEY GENERAL AND THE SECRETARY OF THE INTERIOR**

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Kevin V. Di Gregory
Deputy Assistant Attorney General

Hilda A. Manuel
Deputy Commissioner of Indian Affairs

Co-Chairs: Executive Committee for Indian Country Law Enforcement Improvements

SUBJECT: Final Report of the Executive Committee for Indian Country Law Enforcement Improvements

PURPOSE: To provide the Attorney General and the Secretary with the analysis, findings, and options for improvements prepared by the Executive Committee in accordance with the Presidential DIRECTIVE ON LAW ENFORCEMENT IN INDIAN COUNTRY of August 25, 1997.

TIMETABLE: The President has requested options from you by December 31, 1997.

DISCUSSION:

There is a public safety crisis in Indian Country. In recognition of this, President Clinton asked both of you "to work with tribal leaders to analyze law enforcement problems on Indian lands [and to] provide [the President] with options for improving public safety and criminal justice in Indian Country." The

urgency of the situation required completion of this report by October 31, 1997, so that it could be included in the next budget cycle. An "Executive Committee for Indian Country Law Enforcement Improvement" was formed to help carry out this mandate.[1] Its views and findings are in the attached Report. Generally, the Executive Committee, in consultation with the Tribes, examined the issues and problems and determined that (1) a substantial infusion of resources into Indian Country law enforcement is essential, and (2) the delivery of law enforcement services must be consolidated and improved.

U.S. Attorneys led a series of tribal consultations on Indian Country law enforcement across the country during September and early October of 1997. In the lower 48 states, a total of 205 of the 332 Tribes (62 percent) participated in these consultations. There was a general consensus among the Tribes on the following issues:

- Law enforcement in Indian Country, as it presently exists, often fails to meet basic public safety needs.
- Serious and violent crime is rising significantly in Indian Country -- in sharp contrast to national trends.
- The single most glaring problem is a lack of adequate resources in Indian Country.
- Although the system must change, Indian hiring preferences and contracting/compacting guarantees must be protected under any new structure.[2]
- The fragmented criminal justice system results in poor coordination, which can be remedied only by consolidating services under one authority.
- Tribal governments do not consider the FBI to be an appropriate management structure for this purpose.[3]

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[1] This Committee includes tribal leaders and representatives from DOI and DOJ. See the full list at Tab H.

[2] Of all issues discussed by the Executive Committee, tribal leaders held the strongest views on these two issues. The Tribes have made it very clear that assurances are mandatory that present contracting/compacting and Indian preference policies will continue.

[3] The FBI, however, will continue to play an important role in Indian Country, and no proposal envisions any change in their statutory authority.

The Executive Committee recommends the following two options for your consideration:

OPTION A

Consolidate the three major law enforcement programs under the line and budgetary authority of BIA's Office of Law Enforcement Services (OLES). DOJ will assist OLES by expanding the availability of technical assistance and training.

OPTION B

Transfer all three major law enforcement programs in BIA (criminal investigations, uniformed police, and detention services) to DOJ, maintaining Indian hiring preference and contracting/compacting authority. DOJ will create liaison positions to assure that community accessibility and tribal input on local law enforcement issues and priorities are maintained.

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Indian Country Law Enforcement Improvements

REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS

October 31, 1997

A. INTRODUCTION

There is a public safety crisis in Indian Country. Leaders from the federal and tribal governments have examined the law enforcement problems and determined that a substantial infusion of resources into Indian Country law enforcement is essential. This report discusses the issues and presents two options that address these problems.

Basic law enforcement protection and services are severely inadequate for most of Indian Country. This problem affects more than 1.4 million people who depend on the federal government for these services.[4] Simply put, many American citizens living on Indian reservations do not receive even the minimum level of law enforcement services taken for granted in non-Indian communities. According to a 1997 census estimate by the Indian Health Service (IHS), there are 1,429,800 Indians residing on or adjacent to Indian reservations, allotments, and dependent Indian communities governed by federally-recognized Tribes. In the lower 48 states, these communities are spread across approximately 56 million acres, with millions of additional acres in Alaska. American Indians are one of the fastest growing minority groups in the nation, yet rank at the bottom of all minority groups in terms of life expectancy. Unfortunately, violence and crime are

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[4] Today, federal law enforcement is the only protection for victims of violent felonies in most of Indian Country. The federal government has a basic responsibility to preserve public safety in all of Indian Country. In general, this responsibility derives from the unique trust relationship between federal and tribal governments, as well as specific statutory provisions such as those that mandate exclusive federal jurisdiction for "major crimes," including murder, rape, robbery, and child abuse. (See 18 U.S.C. § 1152-1153). Moreover, the 1994 Crime Act has expanded federal criminal jurisdiction in Indian Country in such areas as guns, violent juveniles, drugs, and domestic violence. In states covered under 18 U.S.C. § 1162 (P.L. 280), such as California and Alaska, baseline law enforcement services are provided by the state, and Indian Tribes have concurrent authority over crimes by Indians.

contributing factors. According to a 1996 IHS report,[5] the homicide rate for Indian males is almost three times higher than the rate for white males.

A reported crime in Indian Country is twice as likely to be violent as compared to crimes reported elsewhere in the United States. In contrast, there are fewer than half as many law enforcement officers per capita.[6] This is not a new situation; the problems addressed in this report developed over decades.[7] In the early 1990s, however, federal agencies with law enforcement responsibilities initiated an effort to re-examine and evaluate the federal government's role in ensuring public safety on America's Indian reservations.

The first step in addressing this process was President Clinton's Executive Memorandum on Government-to-Government Relations With Native American Tribes (April 28, 1994). Shortly thereafter, the historic 1994 Listening Conference was held in Albuquerque. There, the Departments of Justice, Interior, and Housing and Urban Development heard the concerns of tribal leaders. Issues of public safety and crime on reservations were recurring themes. As a direct response to the Listening Conference, the Attorney General created the Department's Office of Tribal Justice and issued the Department's Policy on Indian Sovereignty and Government-to-Government Relations (June 1, 1995). To address tribal concerns and improve law enforcement in Indian Country, a number of initiatives were undertaken, including the assignment of additional FBI investigators and federal prosecutors to Indian Country, and targeted Bureau of Indian Affairs (BIA) law enforcement projects. Furthermore, in November 1995, the Department of Justice launched the Indian Country Justice Initiative, an inter-departmental project specifically intended to explore and address the broad array of public safety needs in Indian Country.

As these efforts were implemented and continued to develop, some basic problems became apparent. The most glaring deficiency is a chronic lack of law enforcement resources in Indian Country. This realization lead to a series of informal meetings between the BIA and DOJ, and a preliminary tribal consultation on this issue was initiated in June 1996. As the discussions

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[5] Homicide and Suicide Among Native Americans (1979-1992) at 17. A report by The Indian Health Service in cooperation with the National Center for Injury Prevention and Control (1996).

[6] Based on data from FBI Uniform Crime Reports and BIA Annual Law Enforcement Reports.

[7] See, for example, the Report of the Task Force on Indian Matters, U.S. Department of Justice, October 1975.

expanded, new participants brought new information. It became clear that the law enforcement problems in Indian Country are severe.

In recognition of this, President Clinton asked the Attorney General and the Secretary of the Interior "to work with tribal leaders to analyze law enforcement problems on Indian lands [and to] provide [the President] with options for improving public safety and criminal justice in Indian Country." The Attorney General and the Secretary in turn appointed an "Executive Committee for Indian Country Law Enforcement Improvement," charged with carrying out this mandate.[8] The urgency of the crisis in Indian Country required completion of this report by October 31, 1997, so that any options selected that require additional funds could be included in the President's budget request for FY 1999. The views and findings of the Executive Committee follow.

B. THE CONSULTATION PROCESS: FINDINGS

Pursuant to the President's Directive, the Attorney General requested that the U.S. Attorneys with Indian Country jurisdiction hold consultations with tribal leaders. A series of tribal consultations about Indian Country law enforcement was held across the country during September and early October of 1997. In the lower 48 states, a total of 205 of the 332 Tribes (62 percent) participated in these consultations.[9] Specific issues common to the consultation process are discussed at Tab F. A general consensus was reached on the following issues:

- Law enforcement in Indian Country, as it presently exists, often fails to meet basic public safety needs.

- Serious and violent crime is rising significantly in Indian Country -- in sharp contrast to national trends.

- The single most glaring problem is a lack of adequate resources in Indian Country. Any solution requires a substantial

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[8] This Committee includes tribal leaders and representatives from DOI and DOJ. See the full list at Tab H.

[9] This figure does not include Alaska, which has a large indigenous population and 226 Tribes. However, only one small Tribe in Alaska (the Metlakatla) is under federal jurisdiction. Alaska does have tribal police and a serious crime problem. While Alaska Natives represent 16 percent of the state's population, they account for 34 percent of the prison population. According to Crime Reported in Alaska 1995 (Alaska Department of Public Safety), death rates for Alaska Native males from homicide and legal execution were 2.3 times those of white males.

infusion of new money in addition to existing funds under the current tribal priority allocation (TPA) system.

- Although the system must change, Indian hiring preferences and contracting/compacting guarantees must be protected under any new structure.

- The current criminal justice system is fragmented, and the resulting poor coordination can be remedied only by consolidating investigative, police and detention services under one authority.

- Tribal governments do not consider the FBI to be an appropriate management structure for the consolidated law enforcement services.

C. THE LAW ENFORCEMENT CRISIS IN INDIAN COUNTRY

Rising Crime

Americans have come to expect protection of their basic rights, a sense of justice, and freedom from fear. A responsive, professional criminal justice system makes this possible. Uniformed police officers handle complaints, maintain order, and make arrests. Professional investigators handle serious or complex crimes. Jails and prisons house offenders; many provide appropriate treatment and other programs. Nearby magistrates set bail and judges hear cases. Probation officers make recommendations to the court and supervise probationers as well as those released from prison. To a large extent, what we take for granted exists only in a rudimentary form or does not exist at all for the 1.4 million Native Americans who live on or near Indian lands. Today, many Indian citizens receive police, investigative, and detention services that are not only inadequate, but also suffer by comparison to this country's poorest jurisdictions.

Information from the FBI, the BIA, U.S. Attorneys, researchers, and tribal leaders themselves depicts a stark contrast between public safety in Indian Country and the rest of the United States. Nationwide, for example, violent crime has declined significantly between 1992 and 1996. The overall violent crime rate has dropped about 17 percent, and homicides are down 22 percent. For the same time period, however, the BIA reports that homicides in Indian Country rose sharply.[10] Some Tribes have murder rates that far exceed those of urban areas known for their struggles against violent crime. In 1995, for example, the murder rate on Ft. Peck Reservation in Montana was more than twice that of New Orleans, one of the most violent

[10] Based on data from FBI Uniform Crime Reports and BIA Annual Law Enforcement Reports.

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.

Other violent crimes, such as gang violence, domestic violence, and child abuse have paralleled the rise in homicides. During fiscal years 1994 - 1996, 84 percent of the FBI Indian Country cases opened (4,334) involved either crimes of violence (48%) or the sexual or physical abuse of a minor child (36%) Violent Indian gangs, who model themselves after their urban counterparts, are a frightening new reality on many reservations. Drug abuse now has been added to the problems caused by alcohol

There is broad consensus among law enforcement professionals and U.S. Attorneys in Indian Country that the situation is serious and merits urgent attention. Indeed, there is concern that available statistics understate the magnitude of the problem in many areas of Indian Country. A major finding of a recent DOJ Inspector General report on Criminal Justice in Indian Country[11] was that there is a pervasive "lack of reliable crime statistics in Indian Country...." Moreover, while law enforcement resources have been increased and deployed effectively throughout the United States, BIA resources actually have been reduced in Indian Country during the past few years.[12]

Indian Country is extraordinarily diverse in terms of size, geography, enrollment figures, government structure, resources, culture, language, traditions, and law enforcement capabilities. What has become common to too many Tribes is increasing violence, including juvenile crime, gangs, drug abuse, and the physical or sexual assault of children. Problem statements addressing specific criminal justice issues are included as Tabs A through D.

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[11] Report No. 96-16, September 1996. For example, in 1996 only 32 percent of the Tribes submitted official crime reports to the BIA. Much information comes from informal surveys.

[12] According to the BIA Office of Law Enforcement Services, more than 100 positions were lost during the 1995 RIFs. This includes 30 criminal investigators, 55 police officers, 16 jailers, and other essential support personnel. These BIA funding cutbacks also cause parallel reductions in law enforcement services provided by the Tribes. Although those lost were permanent personnel, the three-year grants by the COPS Office have helped increase the uniformed police presence on some reservations.

Deficient Resources

One of the most telling indicators of inadequate law enforcement services in Indian Country is the chronic shortage of personnel. For example, the 1996 UCR statistics show 2.9 officers per 1,000 citizens in non-Indian communities under 10,000.[13] The equivalent ratio in Indian Country is 1.3 officers per 1,000 citizens -- less than one-half the per capita coverage in small communities outside of Indian Country. Approximately 1,600 BIA and tribal uniformed officers must patrol the 56 million acres of tribal lands in the lower 48 states. On the 17.5 million acres owned by the Navajo Nation, the ratio of officers to citizens is only 0.9 per 1,000. Remote areas, poor roads, and no backup not only result in poor service to the people, but also stressful and dangerous jobs for the officers. On the Navajo Nation alone, two officers were killed in the line of duty in the last two years while patrolling alone.

In FY 1998, only 78 full-time BIA criminal investigators and the full-time equivalent of 102 FBI agents are available to investigate violent and serious crimes nationwide.[14] Although there are about 90 tribal investigators, they often handle tribal code cases and seldom appear in federal court except as witnesses. The total investigative capacity for Indian Country is inadequate, especially given the rise in violent crime. As an interim measure, DOJ has requested additional FBI agents and Assistant U.S. Attorneys in Indian Country to help handle the higher Indian caseload.

Detention services also suffer from grossly inadequate resources. There are 70 jails, including detention and holding facilities, located on 55 reservations. Most were designed to hold between 10 and 30 inmates, were built in the 1960s and 1970s, are outdated, do not offer sufficient bed space for current needs, do not meet jail or building codes, and present a threat to the health and safety of inmates. Only 10 of the 55 jails are juvenile facilities, even though bed space demand for juvenile offenders is rising rapidly. Many Indian Country jails house both adults and juveniles. Funds are not available for

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[13] Using the 1990 census, the BIA reports that only 24 of the 558 federally-recognized Tribes numbered more than 10,000. Hence, this is the nearest possible comparison.

[14] Although the FBI has assigned additional agents to help compensate for the loss of BIA criminal investigators, they normally work out of resident agencies or satellite offices that are not close to the Tribes they serve. For example, agents assigned to the FBI office in Gallup, N.M., report that it is not unusual to travel three to six hours for a single witness interview.

renovation and new construction, and very little is available to maintain existing buildings.

Jail operations are also poorly funded. Staffing levels fall far short of those required for adequate inmate supervision, thus creating a threat to the welfare of the community, staff, and inmates. Funds for needed inmate programs, such as education and substance abuse treatment, are virtually non-existent. Resources for equipment and supplies are such that, in some jails, inmates receive no blankets or mattresses and no basic hygiene items, such as soap or toothpaste. Staff sometimes buy these basic items with their personal funds. Finally, staff receive little or no training for the responsibilities and liabilities they face because (1) staffing levels are so low the jails cannot afford to lose an officer temporarily, and (2) funds are not available to travel to and attend the Indian Police Academy.

Funding Indian Country Law Enforcement

The Executive Committee's funding determination is a minimum figure necessary to bring law enforcement in Indian Country up to a basic level of services. Each Tribe's current law enforcement TPA allocation will form the baseline for that Tribe's law enforcement budget. Because this total figure represents the minimum amount needed to address these problems, funds must be dedicated solely for law enforcement services. Among the factors that will be considered in allocating these funds are the following:

- Serious and violent crime rates and trends
- Population and distribution
- Geographic size, accessibility and infrastructure
- Current sworn force and existing law enforcement resources

DOJ program grants and other assistance will continue as a separate funding source that complements community outreach, victim assistance and other programs related to basic law enforcement efforts. As a consequence of improvements to law enforcement services, a corresponding increase in funds is needed for judicial systems, especially tribal courts. As a first step, DOJ is requesting $10 million for FY 1999 and BIA is asking for $11.1 million to aid tribal courts through a variety of programs.

D. OPTIONS TO IMPROVE LAW ENFORCEMENT SERVICES

Numerous options to improve law enforcement in Indian Country were explored during consultations with the Tribes. Based on these consultations, the Executive Committee refined the

range of possibilities and present for consideration the following two options. Both options assume significant funding increases above existing tribal allocation funds for law enforcement. Also, Option B assumes that Congress will give DOJ the necessary authority to contract/compact with Tribes and to offer Indian hiring preference.

The Tribes expressed little interest in options such as splitting functions between the Justice and Interior Departments or maintaining the status quo. Also, as a variation of the DOJ Option, the Tribes expressed no interest in placing all of the law enforcement responsibilities within the FBI. Some wanted no changes at all, just additional funds. A few others requested that Tribes be provided directly with sufficient funds for all law enforcement services. One variation on the BIA option was advanced by the Navajo Nation.[15] Accordingly, we have narrowed the options to two.[16] Also, based on feedback from the Tribes, the Executive Committee recommends designation of individuals to function as liaisons between each Tribe and the federal (and local) law enforcement community to improve accessibility and tribal input on local law enforcement issues and priorities. These persons could work out of U.S. Attorneys' offices or the appropriate field structure.

The options presented below include commentary that may be helpful to the deliberative process.

OPTION A

Consolidate the three major law enforcement programs under the line and budgetary authority of BIA's Office of Law Enforcement Services (OLES). DOJ will assist OLES by expanding the availability of technical assistance and training.

Commentary

- Standardizes and consolidates BIA's currently bifurcated law enforcement administrative structure. Presently, criminal

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[15] The Navajo Nation favors the BIA option but suggests "that OLES be elevated within (DOI) to a level equal with the several bureaus in (DOI), such as BIA, Bureau of Reclamation, Land Management, etc." In addition, the Navajo Nation believes that a DOJ office should be created to provide "a comprehensive interface between the DOI/BIA and USDOJ...to ensure coordination of the full range of services needed to support an enhanced law enforcement system in Indian Country."

[16] Once an option is selected, a performance plan that will establish goals and measures of results will be developed, as mandated under the Government Performance Results Act (GPRA).

investigators work within a professional law enforcement organization, headed by managers with law enforcement training. In contrast, BIA uniformed police and detention staff report to that reservation's BIA superintendent, who generally has no law enforcement background.[17] The elimination of fragmented responsibilities for law enforcement within BIA would allow BIA to build on its collective experience in delivering Indian Country law enforcement services.

- Contains some of the same advantages of the DOJ Option, while allaying concern that the BIA is being dismantled.
- Allows for the uniform application of standards, policies, and procedures within BIA law enforcement components.
- A preliminary BIA analysis indicates that this consolidation may be possible under the 1990 Indian Law Enforcement Reform Act, thus eliminating the need for new legislation.
- Because of the diverse mandate of the Department of the Interior, BIA may be unable to obtain or sustain adequate funding for law enforcement unless Congress requires a separate funding stream for that purpose.

OPTION B

Transfer all three major law enforcement programs in BIA (criminal investigations, uniformed police, and detention services) to DOJ, maintaining Indian hiring preference and contracting/compacting authority. DOJ will create liaison positions to assure that community accessibility and tribal input on local law enforcement issues and priorities are maintained.

Commentary

- Moves the law enforcement function to the Department with primary responsibility for federal law enforcement. This assures that professional standards for investigative, police, and detention services in Indian Country would be met.
- Brings the full array of all DOJ resources to bear on the deplorable condition of Indian Country law enforcement.

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[17] This problem was highlighted in an Oversight Hearing before the Subcommittee on Native American Affairs on the Indian Law Enforcement Reform Act, March 18, 1994. H.R. Doc. No. 103-74, p.50.

- Helps insulate Indian Country law enforcement from budget cuts that may affect a more multi-function Department such as Interior.

Implementation Overview

Under Option A, the Interior Secretary would direct the consolidation of criminal investigators, uniformed police, detention services, and other related law enforcement activities under BIA/OLES. The Indian Law Enforcement Reform Act of 1990 appears to provide the Interior Secretary with the required authority. Necessary legislation would be identified and requested.[18] OLES would begin efforts to upgrade their training capacity. DOJ would establish a liaison mechanism with BIA and would support BIA's efforts through technical assistance and training. Also, DOJ would continue its existing grant programs to Tribes.

Under Option B, DOJ would ask Congress for enabling legislation to create a new Indian Country Law Enforcement Bureau, including authority to contract/compact with Tribes and to offer Indian hiring preference. A small headquarters and six field offices would be established. Simultaneously, the Interior Secretary would direct the consolidation of services as stated above. As part of an overall implementation plan, the ability to increase training capacity quickly is a priority. Also necessary are criteria for funding within program categories. Following Congressional approval, the functions, as well as both law enforcement and administrative personnel from OLES, would be transferred into the new DOJ bureau.

Under both options it would be necessary to develop a budget implementation plan and hire new staff.

G. ESTIMATED COSTS AND STAFFING ISSUES

Under any option, significant additional resources will be required to address the chronic and pervasive problems confronting law enforcement efforts in Indian Country. Additional resources are needed to create an effective uniformed police presence, to investigate major crimes in Indian Country, and to augment law enforcement management, administration, and oversight functions. In addition, resources are badly needed for a basic adult and juvenile detention capacity in Indian Country, including the construction, renovation, and operation of detention facilities. Where it is appropriate, funds are needed

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[18] This may include whether technical corrections are needed in the Indian Law Enforcement Reform Act of 1990. For example, one area of interest is Sec. 5, 25 U.S.C. § 2804, relating to cross-deputization agreements.

to contract for additional detention space. Imbedded in the options are several resource-related considerations which are discussed below, along with a discussion of cost estimates.

Basic Law Enforcement Needs

Given the current estimated population in Indian Country (1,429,800), a total of at least 4,290 sworn officers are needed to provide a minimum level of coverage comparable to that in rural America. Of that amount, about 15 percent should be criminal investigators and 85 percent should be uniformed officers. Adjusting for the fact that Indian lands in P.L. 280 states generally require only limited services from federal criminal investigators, a total of 496 criminal investigators and 3,647 uniformed officers are needed in Indian Country.[19] Therefore, an increase of 226 (from 270 to 496) criminal investigators and 2,047 (from 1,600 to 3,647) uniformed officers would be necessary to meet minimum standards. These increases will be necessary regardless of whether the law enforcement officers remain within a reorganized BIA or are assigned to a new DOJ agency. Also, clerical and support staff eventually would be needed at a level commensurate with the increase in sworn officers.

Additional Assistant U.S. Attorneys (AUSAs) are needed to support the increase in criminal investigators. Based on current standards in Indian Country, 1 AUSA is needed for every 3 investigators. Therefore, an additional 75 AUSAs (and commensurate support positions) are required to support an increase of 226 criminal investigators.

Detention

Detention needs in Indian Country involve funding for (1) operations, including staff, equipment, and supplies; (2) facilities, including maintenance, renovation, and new construction; (3) inspection and oversight; and (4) training and technical assistance. Most of the 70 jails in Indian Country are old, unsafe, and do not meet basic code requirements. At the same time, demand, especially for juvenile bed space, is rising. Initial costs for construction and renovation can be phased in over several years. The average, expected life of a jail is

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[19] At 15%, the number of criminal investigators needed would be 644. However, this figure was reduced to 496 to take into account the 23% of tribal population that is covered by P.L. 280 and thus would not need additional federal criminal investigators. For example, approximately 100,000 Alaskan Natives would be eligible for additional police officers, but not a corresponding increase in criminal investigators, because the state is responsible for criminal investigations.

about 30 years, and most Indian Country jails were built in the 1960s and early 1970s. Once complete, however, about 80 percent of the budget should be for staffing. Funds are needed for augmenting current staffing and upgrading staff capabilities through training and technical assistance.

Training

It is imperative that law enforcement officers receive full and appropriate training. The range of training options must include curricula and certification for investigators, first responders, jailers, and support staff. Currently, there is no site that can accommodate the needed training programs. Moreover, the training capacity must increase to accommodate a surge in students. Thus, a police academy is needed to handle current and future training needs. While adequate curricula exist, an appropriate site must be identified, such as a recently closed military facility. See Tab E for further discussion.

Contracting

In 1974, Congress passed, and the President signed, into law the Indian Self-Determination and Education Assistance Act (P.L. 93-638).[20] As amended, this law allows Tribes to enter into contracts for services in Indian Country that the BIA and some other federal agencies perform on Indian lands. Since 1995, the majority of Tribes have contracted all or part of their law enforcement programs, and all funds related to the contracted activity are provided to the Tribe. This includes funding for personnel, operating costs, and the indirect costs of performing the law enforcement function (such as personnel benefits, procurement, facilities management, and so on). For the most part, law enforcement funds are mixed with all other contracted/compacted funds and can be shifted to other needs as determined by the Tribe.

Under any option, the practice of contracting/compacting services must be preserved because it is central to tribal self-determination. Therefore, if the law enforcement function is transferred to DOJ, P.L. 93-638 must be amended to allow the Attorney General to enter into contract agreements with the Tribes. In addition, mechanisms must be put into place to ensure that law enforcement funds are used only for law enforcement purposes.

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[20] Title I, § 102, 102 Stat.2285, as amended by P.L. 103-413, P.L. 103-435, and P.L. 103-437.

APPENDIX

TAB A

JUVENILE CRIME AND GANG ACTIVITY

There are two realities that have fueled the rise of juvenile crime on Indian lands during the past several years. First, after decades of stable birth rates, the fertility rate in Indian Country began to rise sharply during the 1970s. The 1990 Census reports that, while 26 percent of all Americans were under the age of 18, 34 percent of the Indian population was in this age group. The Census Bureau estimates this trend will continue, with a projected Indian population of 4.3 million by the year 2050. In the Gila River Indian Community in Arizona, an area struggling with gang problems, approximately one-half of the population is projected to be under 18 by the year 2000.

Second, the old termination policies and the constraints of reservation life have made economic sufficiency and traditional culture more difficult to sustain. American Indian communities confront difficult social and economic conditions not generally characteristic of other U.S. communities.[21] Chronic unemployment, low levels of educational attainment, geographic displacement, and family disruption help foster the rise in juvenile crime now confronting Indian Country.

Dealing with Indian Country juvenile crime is complex. Intelligence on Indian youth gangs can be extremely difficult to gather in light of overlapping jurisdictions, geographic remoteness, and understaffed and overworked FBI, BIA, and tribal law enforcement. Where detailed records are kept, the news is not encouraging. A 1997 BIA survey, with 132 participating Tribes, estimates 375 gangs with approximately 4,650 gang members on or near Indian Country. Tribal police on the Menominee Reservation in Wisconsin report two organized gangs and a 293 percent increase in juvenile arrests between 1990 and 1994; for the same period, there was only a 45 percent increase in adult arrests.

Despite similarities, the development and characteristics of urban street gangs appears unlike Indian gangs. Most gangs in Indian Country are not motivated by economic enterprise to the same extent as urban street gangs, but can be as dangerous or more so as they undertake violent acts to acquire status within their ranks. Some of the Indian gang violence can be shocking:

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[21] BIA Strategic Plan, August 1997.

- In 1996, a man on the Laguna Pueblo was bludgeoned with a beer bottle, stabbed 72 times, then left with a ritualistic triangle carved on his side.

- Also in 1996, on the Laguna Reservation, the nine police officers (who must patrol one-half million acres) were assaulted 34 times, often by juveniles.

- In the Salt River Pima-Maricopa community in Arizona, the number of drive-by shootings rose from 1 in 1992 to 55 in 1994.

- In October 1996, five members of the East Side Crips Rolling 30s were indicted under the RICO statute with predicates that included murder, arson, and witness intimidation. All, who were members of the Salt River Pima-Maricopa Community in Arizona, were convicted on May 9, 1997.

Few detention facilities exist in Indian Country that are suitable for juveniles. In short, juvenile delinquents can be arrested, but the lack of detention facilities, probation officers, social services, and other needed programs perpetuates the problem. Not surprisingly, juvenile recidivism in Indian Country is very high. Those programs which are in place are often understaffed and lack adequate funding. As existing juvenile facilities are frequently at capacity, juvenile offenders are often kept overnight and then released to their parents. The Omaha Tribal Prosecutor in Nebraska reported that $30,000 was spent in 1996 housing juveniles at the Wayne, Nebraska, detention center; more than $180,000 has been spent housing juveniles during the first three quarters of FY 1997, which represents a 500% increase in costs.

TAB B

SEXUAL AND PHYSICAL ABUSE OF CHILDREN

Child abuse has no cultural or socioeconomic boundaries and permeates all societies. Despite the lack of accurate reporting, child abuse is undisputedly one of the most prevalent crimes in Indian Country. According to BIA figures from 1993 to 1995, child sexual abuse is among the top three crimes reported in Indian Country.[22] Indeed, in 1990, after hearings on hundreds of documented child sexual abuse cases at the Hopi, Navajo, and North Carolina Cherokee Indian Reservations, Congress enacted the Indian Child Protection and Family Violence Prevention Act.[23]

To improve our response to these crimes, federal agencies have attempted to improve the protocols for crime reporting, victim services, background checks, and training. For example, within the Navajo Nation, FBI and the Navajo Division of Public Safety have implemented a Safe Trails Task Force. The New Mexico Safe Trails Task Force has five agents and three criminal investigators from the Navajo Division of Public Safety. Eighty percent of the task force's caseload involves the sexual or physical abuse of children. The caseload is so high that the FBI investigates only sexual abuse involving children under the age of 12. Even so, as of October 1997 the Phoenix Division Task Force reported 127 open child sexual abuse cases, in addition to 83 homicide cases. Other felony sexual abuse matters are referred to the Tribe for investigation and subsequent referral to the U.S. Attorney's Office.

Other efforts include memoranda of agreements between federal, state and tribal authorities to streamline the reporting and investigation of child abuse. Since 1995, pursuant to a formal agreement between FBI and OLES, fingerprint checks have been conducted on tribal employees whose duties and responsibilities allow them regular contact with or control over Indian children.

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[22] For example, in the BIA Phoenix area, which includes Nevada, 131 sexual abuse offenses out of 413 total offenses were reported in calendar year 1995. This figure does not reflect all incidents, since fewer than half of the Tribes provided crime data during those years.

[23] Codified at 18 U.S.C. § 3201 et seq. Congress expressly found that throughout Indian Country there was gross under-reporting of child abuse, repeated incidents of child abuse perpetrated by federal employees, a complete failure by the federal government and Tribes to conduct criminal background checks for child care providers and teachers, and de minimis funding of counseling and other victim services.

An inherent difficulty in child sexual abuse investigations is the lack of physical evidence. In one study, experts found that in more than 85 percent of all child sexual abuse cases there was no physical evidence of abuse. Defense attorneys frequently attack interviews of children as suggestive, and investigations are often criticized as inadequate.

Despite attempts to quell child abuse through increased training, multidisciplinary approaches, and prosecution, child abuse continues to threaten Indian Country's most precious resource. Under-reporting continues to mask the toll that child abuse continues to take in Indian Country. Children are reluctant to disclose sexual abuse because of fear and retaliation. Particularized training is necessary to recognize signs and symptoms consistent with child abuse. Support systems must be in place for those victims and their families who come forward. For example, in a recent case, a child victim and her family were forced out of their community and had to live in a hotel for over nine months while they awaited trial of the defendant, a prominent tribal leader.

Like child abuse cases nationwide, most child abuse cases in Indian Country involve a family member, acquaintance, or other authority figure. Recently, a jailer was convicted of sexually molesting a 14-year-old inmate. Now, at an increasingly disturbing rate, more juveniles are committing sexual crimes against children.[24] One of the most egregious pedophile cases in history involved a non-Indian school teacher employed by BIA boarding schools. Non-Indians pose unique problems for Indian communities because tribal law enforcement has no criminal jurisdiction over them.

Treatment for both victims and offenders, especially juveniles, are limited. Facilities available through BOP contractors, Federal Probation, and the Tribes, cannot accommodate the disturbing increase in these cases. Given that child abuse occurs at an alarming rate, the issue for the federal government, in meeting its trust responsibility to Indian people, is to ensure that the needed prevention and intervention capabilities increase accordingly.

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[24] Examples include a 16-year-old step brother who sneaked into his seven-year-old step sister's bedroom each night to fondle her under her pajamas; two cousins, one 14, the other 16, who sodomized two neighborhood children because "they thought it would be fun;" a 14-year-old boy who, left to babysit an eight-year-old girl and her six-year-old brother, threw the girl down to the floor and raped her; and two 16-year-old brothers who raped girls in the community and then tattooed them. Other tragic examples of child abuse abound.

TAB C

SUBSTANCE ABUSE

Alcohol remains the most pervasive substance abuse problem in Indian Country. Its destructive effects range from homicides to fetal alcohol syndrome. Although data are incomplete, there is broad consensus among Indian Country law enforcement personnel that the vast majority of violent assaults on children, spouses, and others involve excessive alcohol consumption.

Substance abuse, and our lack of an effective response, directly contribute to rising violence on Indian lands in America. Compounding the problems related to alcohol abuse is the growing use of illicit drugs, especially marijuana and methamphetamine, primarily among young people. The drug problem is spreading -- it is no longer confined to a few reservations near urban areas. Informal surveys of law enforcement officers and prosecutors indicate that a significant percentage of thefts and violent crimes in Indian Country are related to drug or alcohol abuse.

Federal investigators agree that marijuana and methamphetamine are the illicit drugs of choice in Indian Country. Marijuana is often cultivated in remote areas of Indian Country, for later distribution both on and off Indian lands.[25] In addition, the BIA reports an alarming trend of methamphetamine manufacture and consumption on Indian lands. In 1996 alone, BIA seized two clandestine methamphetamine labs, including 12 gallons of methamphetamine oil.

Indian Tribes face unique impediments to effective drug enforcement in that Tribes have no jurisdiction to prosecute non-Indians who commit crimes on Indian lands. As a result, only state and federal courts have jurisdiction to prosecute non-Indians who sell illicit substances on the reservation. However, because the quantities are usually below minimum thresholds for federal prosecution, and because state courts are not often receptive to such prosecutions for a variety of reasons, many non-Indian traffickers operate with impunity.

Tribal justice systems often lack the resources to deal with these cases effectively. The tribal obstacles are twofold: statutory and financial. First, the Indian Civil Rights Act limits tribal criminal sentences to no more than one year in custody and a $5,000 fine, regardless of the crime. This maximum sentence has little deterrent value.

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[25] In 1995, BIA seized 13,793 cultivated marijuana plants from many Indian reservations throughout the United States. Almost as many (11,884) were seized in 1996.

Second, and more importantly, only a small percentage of the 558 federally-recognized Tribes have the resources actually to incarcerate convicted offenders because few Tribes have access to affordable detention facilities.

Tribal judges can adjudicate offenders, but lack viable options because of inadequate detention facilities, intermediate sanctions, and substance abuse treatment programs. Many drug offenders are put on tribal probation, yet there are not enough probation officers to handle the growing caseloads.

Federal prosecution is also problematic. Local drug organizations are aware that most U.S. Attorneys' offices simply do not have the resources to handle large numbers of small marijuana or methamphetamine cases. In addition, some federal judges perceive that such cases are inappropriate for adjudication in federal courts. Unfortunately, the reality is that drug trafficking activities on a reservation may have a disproportionate impact in relation to the size of the community and the quantity of drugs being distributed. A trafficker whose weekly supply is a couple of pounds of marijuana and some "crank" (methamphetamine) can create significant problems in a small rural community where jobs and constructive activities are scarce.

Without the range of prevention, intervention, and enforcement tools that are common in non-Indian communities, Indians must rely more on federal drug enforcement. One positive development is that more U.S. Attorneys who have Indian lands within their districts are more sensitive to the special drug enforcement needs of Indian Tribes. Where possible, minimum drug thresholds are relaxed for Indian Country cases. Thus, Indian Country U.S. Attorneys have made an effort to target the worst offenders on reservations and file federal cases that can make an impact beyond the immediate effects on the individual defendants.[26]

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[26] For example, the U.S. Attorney's office in the Eastern District of Wisconsin recently coordinated an extensive investigation of a drug trafficking organization on the Menominee reservation. The investigation included the first Title III wiretap on an Indian reservation, culminating in two multi-count indictments charging 27 people with various federal narcotics offenses, including ten who are subject to five-year mandatory minimum penalties. Similarly, on September 4, 1997, 22 individuals were arrested on federal drug trafficking charges resulting from a seven-month, joint-agency undercover investigation on the Pine Ridge Reservation in South Dakota. The marijuana purchased in that investigation will expose some defendants to five-year minimum sentences. Other U.S. Attorneys' offices, especially in the Southwest, are also making an effort

TAB D

DETENTION

Detention operations in most Indian Country jails fall far short of basic professional and BIA detention standards. This results from a chronic shortage of operating funds, training, and technical assistance. Operations are substandard in such critical areas as staff and inmate safety; inmate supervision and management; inmate services and programs; fire safety; hazardous substance control; sanitation and pest control; and preventive maintenance. The design of many of these old jails presents diverse health hazards, including an inability to isolate inmates with communicable diseases such as tuberculosis. Most jails do not have written operations policies and procedures, nor do they have adequate systems of documenting operations.

On average, about 80% of a jail's operating budget is dedicated to staffing, but most Indian Country jails have insufficient staff to perform all security, custody, and ancillary functions inherent to jail operations. If staff cannot supervise inmates, they also cannot prevent escapes, suicides, assaults, and vandalism. Moreover, of all law enforcement personnel in Indian Country, detention officers receive the lowest pay and the fewest career opportunities, conditions which contribute to extreme staff "burnout" and high turnover. Detention staff also suffer from inadequate training because staffing levels are low and people cannot be spared to attend training, and because training costs are relatively high. There is a pervasive lack of funding, equipment, and supplies for such areas as security, safety, sanitation and hygiene, inmate services and programs, record keeping, and jail administration. Finally, little technical assistance has been available to Indian Country jails from the federal government.[27]

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to coordinate investigations, search warrants, and federal indictments directed at drug traffickers on Indian reservations.

[27] The BIA has only one detention specialist position, which has proven inadequate to provide the level of service needed to help jail staff effectively manage and operate their facilities. Additional technical assistance has been provided through the Justice Department's National Institute of Corrections (NIC). NIC, however, has a very limited budget which must provide technical assistance and training to prisons, jails, probation, parole, and community corrections facilities nationwide. Services to Indian Country jails constitute only a small percentage of NIC's yearly assistance.

Deficient jail operations are accompanied by completely antiquated and inadequate jail structures, which contribute to high suicide rates.[28] Most Indian Country jails were designed without consideration for their population: facilities usually were built with a high-security design, while the population typically consists of misdemeanants who are usually cooperative when sober. Most inmates in Indian Country jails are sentenced for misdemeanor offenses, usually related to alcohol-abuse. Although inmates can be sentenced for up to one year for a tribal offense (and longer for multiple counts), most serve less than one year. A minority of inmates are felony offenders who are held until they are transferred to federal facilities.

Most Indian Country jails are in such poor condition that they are out of compliance with building codes as well as professional and BIA jail standards.[29] As part of its technical assistance program, NIC has conducted reviews of some Indian Country jails and cited serious physical plant deficiencies in terms of safety, security, and conditions of confinement. Although tribal judges have been commended for innovative sentencing to community service and their use of alternative sanctions, many Indian Country jails are extremely crowded, especially on weekends and during tribal celebrations, and bed space is scarce. Even worse off are Tribes which lack facilities altogether and must transport prisoners to other locations.

This broad array of detention problems is a direct result of inadequate funding. In the critical area of construction, for example, no new construction funds were appropriated for fiscal years 1996 and 1997. In the past nine years, the BIA has been able to construct only five jails and provide limited repairs to others.

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[28] Most Indian Country jails are of a linear design, meaning cells are arranged in a row and sit at right angles to a corridor. Bars or security doors separate the cells from the corridor. Staff observe the inmates in their cells by "patrolling" the corridor at irregular intervals. This design has proven to be a hindrance to even the most basic of jail operations, including inmate observation, supervision, and management. Under ideal conditions staff would patrol the corridor at least every 30 minutes. Staffing levels often result in patrol intervals that are much longer.

[29] In 1995, the BIA contracted with a consultant to conduct needs assessments on 34 BIA-owned facilities. The firm concluded that many facilities are beyond repair and should be replaced. The BIA's Division of Safety Management, the Indian Health Service, and some tribal courts have recommended or ordered that facilities be repaired or closed. Very recently, the Federal Court, District of Colorado, ordered the BIA to make major repairs to the BIA jail on the Ute Mountain Ute Reservation.

TAB E

TRAINING NEEDS

Presently, most uniformed police officers attend the BIA Indian Police Academy (IPA) at Artesia, New Mexico. It is a satellite facility of the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, operated by the Department of the Treasury. The basic police officer course is run three times a year for 16 weeks. Each session has 50 students, with 52 beds available at the IPA during any one time. A waiting period of one year currently exists to receive training at the IPA.

According to the IPA staff, the attrition rate of new officers is approximately 50 percent. In addition, of the officers who graduate, approximately 50 percent leave Indian Country law enforcement within two years.

No present federal law enforcement academy, including the Glynco facility, can train the number of officers projected for this initiative. Either creating a new training facility to replace the current IPA, or acquiring a second academy will be necessary. The need for a greater capacity reflects both the projected surge of new law enforcement officers and the high turnover rate among Indian Country police officers.

Any new facility should be accessible to land and air transportation. The facility could be associated with a university or tribal college that could be used as a resource and means for attendees to obtain college credits for courses received. Ideally, it should be large enough for a driving course and a firearms range. In addition, the new academy could be affiliated with a laboratory structure that can address the forensic needs of Indian Country.

Tribal police and detention officers are often sent to the training academies of various states. A component of any new training unit should be created to help certify that these officers meet federal standards. In addition, this group should work with the police officer standards training (POST) commission of each state so that training received by officers at the IPA is accepted by that state.

TAB F

SUMMARY OF PRELIMINARY CONSULTATIONS WITH TRIBES

The Executive Committee has summarized below the concerns expressed by the Tribes during the recent consultation process. We have chosen to express those concerns as questions.

TRIBAL CONCERNS

Q. Contracting/Compacting. If the functions are moved to DOJ, what would happen to self-determination and self-governance compacting?

A. If functions are transferred, DOJ will seek the necessary legislation to protect the rights of Tribes to contract or compact in much the same way as they now do under BIA. DOJ believes that this is a necessary prerequisite.

Q. Indian Preference. Given the restrictive Supreme Court interpretation of the Indian Preference clause, would DOJ need and seek statutory authorization for Indian hiring preference?

A. As a necessary part of legislation enabling the transfer, DOJ will seek such legislation.

Q. Scale of Possible Transfer. Could specific agencies or Tribes opt in or out of the transfer of certain functions to DOJ? Or will any transfer be nationwide?

A. Opting in or out would be organizationally unmanageable and would conflict directly with our overarching goal of reducing the fragmentation and diffusion of law enforcement services that now compromise their effective delivery.

Q. P.L. 280. Do these proposals envision any changes in 18 U.S.C. § 1162?

A. In order to stay focused on securing essential funds to improve law enforcement services through a more responsive organizational structure, we do not plan to ask for any changes in P.L. 280.

Q. Tribal Criminal Jurisdiction. Would centralization of law enforcement functions, especially in DOJ, further erode tribal criminal jurisdiction?

A. We do not believe that centralization of law enforcement functions, either in BIA or in DOJ, will erode tribal criminal jurisdiction. Our goals of strengthening both federal and tribal law enforcement at the same time are

compatible. For example, tribal officers (whether provided directly or by contract) not only maintain order and enforce tribal codes, but also are the typical "first responders" to serious crimes that may fall under federal jurisdiction.

Q. Trust Responsibility. If there is a transfer, what happens to the trust responsibility that now rests with the BIA?

A. That trust responsibility binds the entire Executive Branch, not just BIA. Reflecting that trust responsibility, DOJ has written a Directive (June 1, 1995) that guides its work in Indian Country and **will remain in force** regardless of who the next Attorney General may be. At the same time, we recognize that there are always transitional issues associated with any government reorganization.

Q. Funding Formula. What funding formula will DOJ use to assign law enforcement personnel? Will the financial status or land area of Tribes be considered?

A. We have no firm answers to this at such an early stage. Violent crime rates, size, and population will be among the factors considered. However, the Justice Department has taken a position on "means testing." In a July 22, 1997 letter to Senator Stevens, DOJ "strongly opposed" the "means testing" provision in Section 118 of the Interior Appropriations Bill as "contrary to the United States' longstanding protection of tribal self-government and the Federal trust responsibility...."

Q. Funding. How much additional money is being requested by category (detention, investigators, etc.)? Does this amount change much depending on which agency is mandated to carry out these responsibilities?

A. See the section on Cost Estimates supra.

Q. Law Enforcement and TPA Accounts. If funds in the "638" law enforcement contracts are unused, will they revert to the TPA allocation system and be available for other non-law enforcement programs or will the funds simply be returned to the Treasury?

A. Each Tribe's current law enforcement TPA allocation will form the baseline for that Tribe's law enforcement budget. Additional funds, representing the 350% increase over five years proposed by the Executive Committee, will supplement this baseline amount. Also, we will recommend that the Administration seek "no year" funding authority for these funds so that they may be reserved for law enforcement purposes.

Q. Training. How will BIA or DOJ increase access to training for law enforcement officers?

A. There will be adequate funding to train all additional officers and investigators at a federal or appropriate state facility. (See Tab E.)

Q. Tribal Courts. Is DOJ considering a request for oversight of tribal court programs? What is planned to strengthen tribal courts?

A. No, that responsibility will remain with BIA. DOJ is requesting $10 million for FY 1999 and BIA is asking for $11.1 million to aid tribal courts through a variety of programs, including drug courts, special grants, and technical assistance.

Q. Law Enforcement Responsiveness to Local Needs. If investigative and local police functions are centralized in DOJ, how will each Tribe be able to express their views on law enforcement problems and priorities? Will ICIS or OLES investigators investigate tribal crimes?

A. DOJ plans to create liaison positions to assure that community accessibility and tribal input on local law enforcement issues and priorities are maintained. Also, community policing will be emphasized. Federal investigators will continue to investigate serious crimes. Uniformed officers will continue to enforce tribal laws. Whether the subsequent case is presented in federal or tribal court is, and will continue to be, a prosecutorial decision.

Q. DOJ Cultural Sensitivity. If there is a transfer, how will DOJ compensate for its lack of demonstrated experience with Indian Country law enforcement issues?

A. Under Attorney General Reno's leadership, DOJ has worked hard to improve law enforcement in Indian Country. Assistant U.S. Attorneys have been designated as tribal liaison; the Office of Tribal Justice was created in 1995 to serve as liaison with tribal governments; the Criminal Division has developed a pilot program to improve coordination of Indian Country law enforcement matters; the FBI has established an Office of Indian Country Investigations and has dedicated increased manpower to fight violent crime; and the COPS Office as well as the Office of Justice Programs have substantially increased assistance to Indian Country. Finally, U.S. Attorneys have been prosecuting serious crimes in Indian Country since passage of the Major Crimes Act in 1885.

Q. Impact on BIA. Would a transfer of law enforcement functions to DOJ impair BIA's ability to fulfil their broad mandate as the focal point for government-to-government relations between the United States and Indian Tribes?

A. No. Currently, DOJ works closely with BIA in its central role in fulfilling the federal trust responsibility and will continue to do so regardless of whether BIA law enforcement functions are transferred to DOJ. BIA will remain the core Indian agency in the Executive Branch.

Q. Youth Crime and Treatment. Many Tribes are concerned that more must be done to help at-risk youth and to treat offenders, when appropriate, and reintegrate them into the Tribe. Does DOJ plan to help in this area?

A. Although not the focus of this initiative, DOJ is asking for $30 million in FY 1999 for drug testing and treatment, as well as prevention and intervention for Indian youth.

Selected Excerpts

- Albert Hale, President, Navajo Nation: "...the threshold issue is expanding the ability to 638 contract over to the Department of Justice."

- Gregg Bourland, Chairman, Cheyenne River Sioux Tribe: "...these kids think that they're above the law. 'I'm sixteen years old. I'm above the law. I'm in a gang, but they're going to baby me around in tribal court.'"

- Eddie Tullis, Chairman, Poarch Creek Band of Creek Indians: "I am of the opinion that law enforcement is such a complicated issue that if you have the investigative services on one side and then you have the uniformed police officers in another, you're asking for some real conflicts to develop from an operational point of view."

TAB G

OUTCOMES OF THE CONSULTATIONS
TRIBAL PREFERENCES

BIA		*ICIS*	
Formal Responses	**Informal Responses**	**Formal Responses**	**Informal Responses**
Arizona *Colorado River *Navajo Nation *Salt River Pima-Maricopa *White Mountain	*Arizona* Pascua Yaqui	*Arizona* *Tohono O'odham	*Alabama* *Poarch Creek
California Cortina Rancheria	*Iowa* Meskwaki Tribe	*Colorado* Ute Mountain Ute	*Minnesota* Leech Lake
Nevada Duck Valley	*Louisiana* *Chitimacha *Coushatta *Tunica-Biloxi	*Idaho* *Nez Perce	*Montana* *Fort Peck

*Denotes contracting or compacting tribes for any and all law enforcement functions (including 6 self-funded tribes)

BIA *ICIS*

Formal Responses	**Informal Responses**	**Formal Responses**	**Informal Responses**
Oklahoma Caddo Tribe *Cherokee Chickasaw Nation *Choctaw Nation *Kaw Tribe Modoc Tribe *Muscogee(Creek) *Pawnee Tribe Seminole Tribe	*Minnesota* Upper Sioux	*Maine* *Passamaquoddy Pleasant Point *Passamaquoddy Township *Penobscot	*Nevada* **Inter-Tribal Council** Battle Mountain Carson Colony Dresslerville Colony *Duckwater Elko Colony *Goshute Paiute UT/NV Moapa River South Fork Stewart Colony Summit Lake *Walker River Wells River Winnemucca Colony Woodfords Colony Yomba Colony *Yerington Colony **Representing Council** *Ely Indian Colony *Fallon Colony Fort McDermitt Lovelock Colony *Pyramid Lake *Reno-Sparks Colony *Te-Moak W. Shoshone *Washoe

BIA		ICIS	
Formal Responses	**Informal Responses**	**Formal Responses**	**Informal Responses**
Washington *Colville *Yakama	*Mississippi* *Choctaw	*New Mexico* *Taos Pueblo	*South Dakota* *Cheyenne River
	Nebraska Winnebago Tribe *Omaha Tribe	*North Dakota* Three Affiliate Trbe Turtle Mountain *Sisseton-Wahpeton Spirit Lake Nation Standing Rock Sioux	*Washington* *Lower Elwha
	New Mexico *Acoma Pueblo Cochiti Pueblo *Isleta Pueblo Jemez Pueblo *Laguna Pueblo Mescalero Apache *Ramah *San Juan Pueblo *Sandia Pueblo *Santa Ana Pueblo Santo Domingo Pueblo Zia Pueblo *Zuni Pueblo	*Oklahoma* *Absentee Shawnee	*Wisconsin* *Menominee
	Oklahoma *Cheyenne-Arapaho Miami Tribe *Wyandotte	*South Dakota* *Oglala Sioux	

BIA		*ICIS*	
Formal Responses	**Informal Responses**	**Formal Responses**	**Informal Responses**
	Oregon *Burns Paiute *Coquille Community *Grand Ronde *Siletz *Umatilla *Warm Springs	*Washington* *Quinalt	
	South Carolina Catawba Tribe		
	Washington *Swinomish *Squaxin Island *Puyallup *Skokomish *Upper Skagit *Port Gamble S'Klallam		

NO POSITION

Arizona
*Ak-Chin
*Cocopah
*Fort McDowell
*Fort Mohave
Gila River
Havasupai
Hopi
Hualapai Tribe
*Kaibab-Paiute
Quechan Tribe
*San Carlos Apache
San Juan Southern Paiute
Tonto Apache
Yavapai-Apache
Yavapai-Prescott

California
*Hoopa Valley
Mooretown
Pit River Tribe
Quartz Valley
Redding Rancheria
Tule River
Twenty-Nine Palms
Wiyot Tribe

Colorado
*Southern Ute

Florida
*Miccosukee
*Seminole Tribes

Idaho
*Coeur D'Alene
Shoshone-Bannock Tribes

Kansas
*Iowa
*Kickapoo
*Prairie Band Potawatomi
*Sac and Fox

Michigan
*Bay Mills Chippewa
*Grand Traverse
*Hannahville
*Keweenaw Bay Indian Community
*Lac Vieux Desert
Little River Band
*Little Traverse Bay Bands
*Saginaw Chippewa Tribe
*Sault Ste. Marie

Minnesota
Bois Forte
Fond du Lac
Grand Portage
Lower Sioux
*Mille Lacs
Prairie Island Community
*Red Lake Band
Shakopee
White Earth

Montana
*Blackfeet
Crow
*Fort Belknap
Northern Cheyenne
*Rocky Boy
*Salish and Kootenai

Nevada
*Las Vegas Colony

New Mexico
*Jicarilla Apache
Nambe Pueblo
*Picuris Pueblo
*Pojoaque Pueblo
San Ildefonso Pueblo
*Santa Clara Pueblo
*Tesuque Pueblo

New York
Cayuga Nation
*Oneida
Onondaga
Seneca Nation
*St. Regis Mohawk
Tonawanda
Tuscarora Nation

North Carolina
*Eastern Cherokee

Oklahoma
Alabama Quassarte Tribal Town
Chickasaw Nation
*Citizen Band Potawatomi
*Comanche Tribe
*Iowa
*Kickapoo Tribe
*Ponca
*Sac and Fox
Seneca-Cayuga Tribe
Thlopthlocco Tribal Town

South Dakota
*Crow Creek Sioux
Flandreau Santee Sioux
Lower Brule
*Rosebud
Yankton

Texas
Alabama-Coushatta
Kickapoo
*Tigua (Ysleta del Sur Pueblo)

Utah
Paiute Indian Tribe
Uintah and Ouray

Washington
*Kalispel
*Makah
Spokane

Wisconsin
*Oneida
Stockbridge-Munsee

Wyoming
Eastern Shoshone
Northern Arapaho

TAB H

EXECUTIVE COMMITTEE (EC) FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENT (FORMERLY ICIS)

LIAISON WITH CONGRESS, THE WHITE HOUSE, AND CABINET OFFICERS
David Ogden (DOJ) and Anne Shields (DOI)

THE EXECUTIVE COMMITTEE

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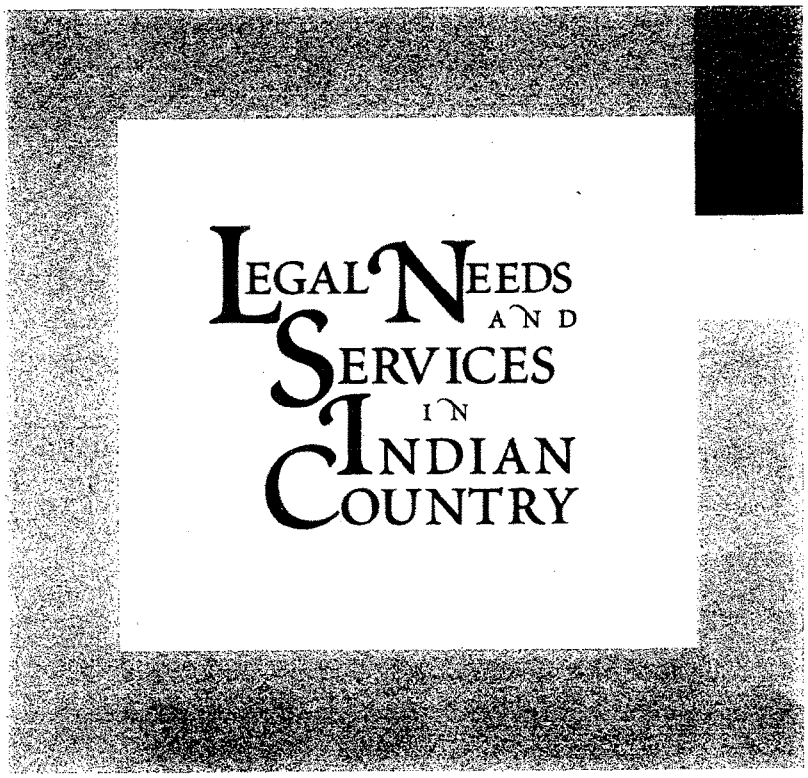
* Enrolled tribal members.



1998 Report to the Legal Services Corporation

Final Draft ▪ January 1999 ▪ Eric Dahlstrom, Esq. ▪ Randolph Barnhouse, Esq.

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I am a listener, said the American Indian.
The White Man does not ask Me what I think.
The White Man thinks he's always right.
No chei nu ca bache coo Whace.
Let every American Indian make it clear.
We are not interested in being made over as White Men or White Women.
Nor of the White Race.
We are what we are.
Being Indians and members of the American Nations.
And as citizens we are seeking justice
within the law of our American Nation.

WA WA CALACHAW BONITA NUNEZ, "SPIRIT WOMAN,"
QUOTED IN SPIDER WOMAN'S GRANDDAUGHTERS:
TRADITIONAL TALES AND CONTEMPORARY WRITING
BY NATIVE AMERICAN WOMEN, (PAULA GUNN ALLEN, ED. 1989).

1. PURPOSE OF REPORT

For close to 35 years, the federal government has annually appropriated approximately 2% of the national legal services budget for programs and components serving Native Americans. In 1996, however, funding was cut by 30% to $6 million dollars causing a major financial setback for Indian Legal Services offices. Because the Legal Services Corporation (LSC) has relied upon ongoing analysis of the need to fund specialized legal services for Native Americans in its planning decisions, the Corporation funded this study of the Legal Needs of Native Americans. This Report will examine the role of the federal government in the provision of legal services to low-income Native Americans and tribes. It will describe the unique legal needs of Native Americans and the special difficulty of meeting those needs.

Were funding not a limitation, it would have been valuable to collect more specific data on Indian legal needs via nation-wide sampling of tribes and tribal communities. The American Bar Association, for example, secured major funding to produce a large-scale national survey of the legal needs of Americans in two decades. While research and analysis of such areas as the underutilization of basic field programs by Native Americans in areas with substantial Native American populations may have been helpful, it was beyond the scope of this project. Yet, with a significantly less expansive approach, this Report was able to capture findings on some of the successes that access to Indian Legal Services has provided a people living amidst often brutal economic realities. Moreover, it sets out the challenges ahead in devising a less costly and more efficient mechanism for ensuring that the U.S. government honors its solemn trust responsibility to protect the legal rights of Indian tribes and its moral obligation to ensure equal access to justice for the most vulnerable of America's poor.

II. EXECUTIVE SUMMARY

For well over a quarter century, Legal Services Corporation has provided access to justice for dozens of small, low-income Indian tribes and thousands of individual Native Americans. Annual appropriations from Congress since 1966 have funded the work of Indian Legal Services offices throughout the United States, principally in Midwestern and western states. Some of the stories that can be told by impoverished tribes seeking legal services help are uniquely impressive and defy written description when one recalls their starting point and the lack of resources available to them.

Consider, for example, the case of the Confederated Tribes of the Grand Ronde Community of Grand Ronde, Oregon. Fourteen years, ago the Grand Ronde were a "terminated" tribe whose tribal members each had been given the grand sum of $32 when tribal lands were sold upon severance by the federal government, unilaterally, of their trust relationship. Today, the Grand Ronde, whose federal recognition was restored in 1983 with the assistance of a small Indian Legal Services office, has a new tribal health center, its own tribal court and a charitable foundation which recently made a sizeable donation to the Oregon Museum of Science and Industry.

Such success has been made possible by the U.S. Congress' consistent funding the past 34 years of legal services for Indian and Alaskan Native tribes and individuals. This Report is a study of the history of federal funding of the Indian Legal Services programs and components, and gives insight on the rationale for the federal government's continued commitment. The following are some of the highlights of this Report.

A. THE UNITED STATES GOVERNMENT HAS A SPECIAL OBLIGATION TO PROVIDE NATIVE AMERICANS WITH MEANINGFUL ACCESS TO THE LEGAL SYSTEM.

The relationship between Indian nations and the United States is unique in a number of respects. Indians are one of the political groups identified in the U.S. constitution. The U.S. Supreme Court has noted that the distinction is "political rather than racial in nature."[1] The federal Indian relationship is one of the most important concepts underlying federal Indian law and the constitutional powers of Congress to ratify treaties and regulate commerce with Indian tribes provide the legal basis for its role as trustee. As the United States began to represent tribal interests through the U.S. Attorney as land titleholder and trustee, it adopted laws extending its authority to control the legal interests of Indians and Indian tribes. It also delegated to a number of federal agencies, including the Legal Services Corporation, special duties relating to Indian affairs at the same time.

B. NATIVE AMERICANS HAVE UNIQUE LEGAL NEEDS THAT ARE BEST MET BY SPECIALIZED LEGAL PRACTITIONERS.

The special legal needs of Native Americans do not arise out of an economic or racial classification. Rather, they derive from the unique legal status of Native Americans and tribal governments' structure. Their experience in America for the past half-millennia has been one of struggle to maintain a separate identity, to remain Native peoples, communities and cultures, yet at the same time to seek justice within the law. This desire of Native peoples and tribes to remain distinct and autonomous has driven the unique mission of Indian Legal Services programs. The very nature and complexity of Indian legal services makes it extremely difficult and professionally dangerous for the legal generalist to accept a case with Indian law implications.

C. NATIVE AMERICANS FACE A NUMBER OF BARRIERS WHEN SEEKING ACCESS TO JUSTICE.

Poverty among tribal communities continues to be a factor in adding to a plethora of legal issues faced by Native Americans. Continued language and geographic barriers are problems, as is the dif-

ficulty of recruiting and retaining culturally-sensitive attorneys who are able to understand and interact within another culture. And, even though other parts of the country are seeing an increased private bar involvement, this continues to be sorely lacking in reservations and their tribal communities.

D. OVER THE PAST THIRTY YEARS, THE UNITED STATES HAS CONSISTENTLY RENEWED ITS COMMITMENT TO PROVIDING LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS.

The history and mission of the Indian Legal Services programs is distinctive for one primary, overarching reason: the history of Indian tribes and Indian peoples in the geographic area now occupied by the United States is unique among all minority populations in America. Indian people and tribes enjoy a distinct political status within the federal governmental structure. Since 1966, Congress has identified specific funds to help meet the legal needs of Native Americans. Indeed, the LSC Act of 1974 acknowledged the *unique* and complex issues confronting Native American clients and the federal government's obligations to earmark specific funding for Indian legal services in addition to basic field grants.[2]

E. THE NATIVE AMERICAN PROGRAMS FUNDED BY THE LEGAL SERVICES CORPORATION PROVIDE LOW-COST AND EFFECTIVE ACCESS TO LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS WHO MAINTAIN A CONNECTION TO INDIAN COUNTRY OR THEIR TRIBAL GOVERNMENT.

Indian Legal Services programs have established themselves as effective advocates for Indian people in their struggle for cultural and economic survival. Significant achievements have been made in the protection of the sovereign status of Indian tribes and in the preservation of their natural resources, treaty rights, and family structures. By coincidence, these programs came into existence at about the same time the new and long-awaited policy of Indian self-determination and the reaffirmation of the federal trust responsibility were announced. The successes of Indian Legal Services programs are truly remarkable given the modest level of funding.

F. THERE ARE SIGNIFICANT UNMET LEGAL NEEDS IN INDIAN COUNTRY.

Because their lives are so heavily regulated by a maze of federal laws, executive orders, treaties, administrative and court rulings, the political and legal problems of Indian people create a laundry list of unmet needs that continues to grow, rather than disappear. In the current federal Indian policy era known as the "Self-determination Era", tribes have been called upon to do more for themselves in all aspects of their social and political lives. The dramatic increase in tribal government responsibility has not been matched by increased funding.

G. FEDERAL FUNDING OF NATIVE AMERICAN LEGAL SERVICES IS NECESSARY TO MAINTAIN ACCESS TO JUSTICE FOR NATIVE AMERICANS.

The conflict of power between states and tribes as sovereigns creates a hostile environment for any expectation that block grant funding to states would be awarded to tribes. Gaming revenues are not a resource because not all tribes have gaming operations, the majority of gaming operations have produced modest returns, and gaming income has only touched the surface of funding critical tribal infrastructure needs, such as water and sewer lines, Headstart, Meals on Wheels, medical and dental clinics, etc. Through the efforts of Indian Legal Services programs, major strides have been made in achieving recognition and protection of the unique rights of Native Americans conferred by federal law.

SUMMARY OF FINDINGS

1. The United States government has a special obligation as trustee to provide Native Americans meaningful access to the legal system.

2. The United States government should maintain the current level of commitment to funding legal services for low-income Native Americans.

3. The unique specialized legal needs of Native Americans cannot be met except by specialized legal practitioners.

4. The Native American programs funded by the Legal Services Corporation provide low-cost and effective access to legal services for low-income Native Americans who maintain a connection to Indian country or tribal government.

5. Over the past 30 years, the United States has maintained a small, but effective commitment to providing legal services for low-income Native Americans.

6. Continued funding of Indian Legal Services at 2 1/4% of the national commitment is needed to maintain minimal access.

III. DISCUSSION OF FINDINGS

A. THE UNITED STATES GOVERNMENT HAS A SPECIAL OBLIGATION TO PROVIDE NATIVE AMERICANS MEANINGFUL ACCESS TO THE LEGAL SYSTEM.

1. In general.

Federal law has created the unique legal status of Native Americans and tribes. Federal Indian law permeates the legal rights and responsibilities of Native Americans, and, thus, the lawyer's task of representing Native Americans and Indian tribes. The difference between Native Americans and non-Native Americans is a difference created in federal law that:

(a) adds to the frequency and complexity of the legal disputes which affect Native Americans, and which are absent from the lives of non-Indians; and

(b) prevents lawyers from giving minimally competent legal advice to Native Americans or tribes on most matters if they do not have specific expertise in tribal and federal Indian law.

The legal principles underlying federal Indian law today have a long history developed in tandem with the earliest colonization and nation building in North America. Federal Indian law grew out of the legal, moral, and religious doctrines used to justify the Age of Discovery, the Law of Nations, Imperialism, and Manifest Destiny.[3] The religious and political doctrines that were developed during the Crusades, and refined during the Renaissance, were then applied to justify European settlement and dominion over the native societies in the colonies in North America. This rationale found its way into the most fundamental legal doctrines adopted in North America. The Colonial governments first, and then the United States government, obtained possession of lands previously under the domain of Native Americans, mostly through the application of law which was used to legitimize the process of "discovery." Discovery was then followed by annexation of Indian lands. The law, much more than military strength, was the most effective mechanism used to gain control of Indian land resources.[4]

The earliest enactment of the Continental Congress in 1783, and later the Northwest Ordinance of 1787, established the national policy on dealing with Indian tribes. The national policy declared Indian property, rights, and liberty were inviolate to unconsented invasions or disturbances. From the earliest date, the Constitutional Convention also established that it was a matter of national policy that the power to regulate commerce with the Indian tribes belongs to the federal government. The early debates in the Constitutional Convention covered the most fundamental legal issues of the new nation, including the development of property and contract law in the colonies, as well as the relationships between tribes, state government, and the federal government. The debates at the Convention resulted in three Constitutional provisions concerning Indian affairs: Article 1, Section 2, which refers to Indians not taxed; the Indian Commerce Clause; and the Treaty Making Clause.

The Constitution assigned relations with Indian tribes to the list of national tasks, both expressly in the Indian Commerce Clause and implicitly in the Treaty Clause. In one of its earliest acts, Congress adopted the Indian Trade and Intercourse Act of 1790,[5] which required federal approval for any sale, or purchase of Indian lands. The Act was designed to end the practice of state governments maintaining diplomatic relations with, or purchasing land from, tribal governments. The federal government had a fundamental need to establish title in lands that had largely been acquired from Indian tribes. Thus, *Fletcher v. Peck*, 10 U.S. (6 Branch) 87 (1810) first established the legal principles which allowed the court to declare that the rights of the colonists over Indian land were superior to the rights of Indian tribes, the original occupiers. Shortly thereafter, *Johnson*

v. MacIntosh, 21 U.S. (8 Wheat.) 543 (1823), extended the doctrines from *Fletcher* into three interwoven principles of federal Indian law: the existence of Indian occupancy title, the "discovering" nation's exclusive right of extinguishing Indian title, and the requirement of Indian consent for such extinguishment to be effective.

These early federal law doctrines still recognized substantial legal rights in Native American tribes as governments and as landowners. In time, however, the relationship between tribes and the U.S. government changed from one of co-equal sovereigns into a relationship of trustee over "dependent domestic" nations. That transition was accomplished in the courts, or was at least legitimated by the courts. Federal law seemingly protected the property rights of Indian tribes against encroachment by non-Indians; but at the same time the courts could not, as a practical matter, provide any effective remedy to prevent encroachment. Thus, when Chief Justice Marshall declared illegal the taking of vast tracts of Cherokee land in Georgia, President Andrew Jackson hotly responded, "Now let him enforce his judgement." The painful and arduous removal of Cherokee from their homelands following Jackson's pronouncement is known today as the *Trail of Tears*. [6]

Throughout the 18th and 19th centuries, and continuing well into the 20th century, Native Americans were neither federal nor state citizens. Without ever being conquered, in fact, tribes were conquered *de jure* by a simple declaration of the Supreme Court of the United States. In the late 19th century, Indian tribes were declared by the Court to be subject to the "*plenary power*" of Congress. "The *plenary power* over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Kagama v. United States*, 118 U.S. 375 (1886). By this simple statement, Indian tribes were simultaneously made subject to the political exigencies of Congress and were denied access to the courts for protection against any excesses by Congress. The "*plenary power* doctrine" dominated federal Indian law through the late 19th and the early 20th centuries. From the time of Kagama through the 1920's, Indian tribes lost hundreds of millions of acres of land and the sovereign authority of Indian tribes and Indian tribal courts was severely diminished. This was not accomplished by warfare, but through actions of the political departments, sanctioned afterwards by the courts.

The modern reassertion of tribal sovereignty was contemporaneous with the publication of Professor Cohen's 1942 Handbook of Federal Indian Law in which he commented:

> "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."

Cohen recognized and reaffirmed three fundamental principles of federal Indian law:

(1) Every Indian tribe possesses, in the first instance, all the powers of a sovereign state;

(2) Conquest has rendered the tribes subject to the legislative power of the United States and, in substance, terminates the tribe's external sovereignty, for example, its power to enter into treaties with foreign nations, but does not by itself affect the tribes' internal sovereignty, that is, the powers of self-government; and

(3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save those expressly qualified, full powers of internal sovereignty are vested in the Indian tribe and in their duly constituted organs of government. In the 19th century, law was a principle tool of genocidal extermination. In the 20th century, law became the major weapon in the preservation and extension of Native culture and history.

The legal status of Native Americans today remains unique. Congress continues to exercise significant power over Native Americans and Indian lands. Indian tribes continue to exercise powers of self-government and frequently exercise delegated federal power. Entire volumes of the United States Code [25 U.S.C.] and Code of Federal Regulations (25 C.F.R.) are dedicated to the regulation of Indians, a distinction not shared by any other ethnic or political group in this country.[7] A lawyer cannot understand, and certainly cannot adequately advise or represent, a Native American concerning almost any legal right or dispute that arises on or near Indian land without a good working understanding of this complex federal Indian law.

2. The federal government has a long history of regulating Native Americans' access to justice. As Native Americans and tribes were absorbed into the federal framework, the federal government — as part of its dominance over tribes — unilaterally took control over lawyers representing Native Americans and tribes. The United States controlled lawyers serving Indians for many generations before the U.S. government began to view "access to justice" as a federal responsibility for non-Indians.

In the earliest court cases of the Colonial and Constitutional days, the tribes were represented by their own private attorneys. However, as the United States asserted its control over Native American resources, it began to directly represent tribal interests through the U.S. Attorney as land titleholder and as trustee for Indian tribes and individual tribal members. In 1893, the United States adopted what is now codified at 25 U.S.C. § 175, enabling the United States Attorney to assert rights on behalf of tribes, with or without specific tribal consent. This law followed the enactment of legislation in 1871 by which Congress outlawed any further treaties with Indian tribes. 25 U.S.C Section 71 (Repealed May 21, 1934). Thereafter, many important property and liberty rights of Indian tribes and Indians were prosecuted or defended by the U.S. Attorney.

That the United States had the authority to act on behalf of tribes in the most important matters of tribal natural resources was confirmed in court cases. Yet, tribes were unable to force the U.S. government to fulfill any duty on their behalf, even in cases of gross conflict of interest between the interests of the Indian tribe and other interests of the United States. The U.S. appeared to have unfettered authority and discretion over Indian affairs. While the role of the United States as trustee for tribes is often viewed as a benefit to Indians, it has also justified vast powers in the United States that have been exercised to benefit the federal government or non-Indians to the detriment of Indians. The authority of the U.S. to control the legal interests of Indians and Indian tribes continues today and can create significant conflicts of interest between the rights and interests of individual tribal members, the rights and interests of tribes, and the competing rights and interests of the United States. This conflict is not new and is, in fact, a source of ongoing controversy.

The federal government continues to exercise pervasive control over Indian land, other tribal natural resources, individual tribal members, and the lawyers representing tribes. For example, a transfer of Indian land without federal consent is void. 25 U.S.C. §81 (1958). A person who enters into such a contract may commit a federal crime. 18 U.S.C. § 438 (1994). Lawyers for tribes are also subject to federal control. 25 U.S.C. §476 (1994) and 25 C.F.R., §89 (1982). It is a federal crime to represent an Indian tribe without the prior approval of the United States. 18 U.S.C. §438 (1994). The selection of counsel and the terms of a contract with an attorney are regulated closely by the United States government. 25 C.F.R. §89. Federal authority over attorneys who seek to represent Indians or Indian tribes can be abused, especially when the subject matter of the representation involves asserting positions adverse to those maintained by the United States.

3. Legal representation provided by the federal government is often inadequate. The U.S. government was the source of legal representation in Indian country for over 100 years before the creation of the Office of Economic Opportunity (OEO) or the Legal Services Corporation. Unfortunately, reliance on the federal government for legal representation has proven inadequate for tribes of a number of reasons:

(1) The U.S. often does not actively participate in all parts of the case; [8]

(2) The U.S. often has potential or actual conflicts of interest; [9]

(3) The U.S. cannot represent all tribes when the tribes' positions are in conflict;[10]

(4) The U.S. has limited resources; [11]

(5) Other federal agencies may have conflicts with tribes;[12]

(6) The U.S. is not held to a fiduciary standard in asserting the claims of Indians and Indian tribes on whose behalf it appears in a trust capacity. [13]

In recent times, tribes have claimed that the United States has exercised its pervasive control over legal representation of Indian tribes more for its own benefit than to protect the interests of Indian tribes. The federal government has now at least attempted to address the conflict of interest by establishing the Office of Federal Trust Responsibility in the Department of Interior. A conflict of interest is also an express ground for the United States to justify funding separate attorneys for an Indian tribe in Indian water rights matters.[14]

B. NATIVE AMERICANS HAVE UNIQUE LEGAL NEEDS THAT ARE BEST MET BY SPECIALIZED LEGAL PRACTITIONERS.

1. In general.

The legal needs of Native Americans are frequently grouped with other disadvantaged groups who have "special needs," including ethnic and racial minorities, the elderly, veterans, and migrants. At a certain level, low-income Native Americans have legal problems similar to all low-income people, and, as a result, have a need for programs using basic field funding from LSC. In addition, however, low-income Native Americans have a host of legal needs unique to their political status as tribal members. Such legal needs are not based upon the fact that Native Americans are "especially needy," although Native Americans as a class are the poorest demo-graphic group in the United States, and this extreme poverty exacerbates their legal problems. Nor do the special legal needs of Native Americans arise out of an economic or racial classification. Rather, they derive from the unique legal status of Native Americans and tribal governments.

The need for specialized legal services also flows from the unique nature of the body of law commonly referred to as Indian law. Arising from the landmark cases of *Cherokee Nation*[15] and *Worcester v. Georgia*, the field of Indian law is a nearly two-hundred year chronology of legal anomaly, exception, and deviation from general norms applied to a class of entities that the Supreme Court continues to recognize as "domestic dependent nations."[16] Indian law is an independent and complex field, based on treaties, and myriad federal statutes, as well as the rules of law of the various sovereign tribes. Special expertise is almost always necessary to provide competent representation to Indian clients. Because of the small number of Indian clients they serve, legal service offices, as a whole, are unable to develop the expertise in Indian law to provide adequate representation.

Moreover, Indian law focuses on the evolution of relationships between Native Americans and the United States, the sovereign states, local and municipal governments, private landowners, regulators, businesses, and individuals who either do business in Indian country, engage in activities that directly affect rights reserved by Indian tribes under treaty or through executive order, or otherwise have interests in land, resources, property or relationships (familial, legal, personal) that are or may be subject to the regulation or control of a federally recognized Indian tribe. The nature and complexity of Indian legal issues make it very difficult and professionally dangerous, for the legal gener-

alist (whether a private attorney or publicly funded legal services attorney) to undertake representation of any interested party in a case which implicates Indian issues. Hence, the need for specialized practitioners schooled in the nuances of Indian law. This is true both for those who can afford to retain legal counsel, as well as those who cannot.

C. NATIVE AMERICANS FACE A NUMBER OF BARRIERS WHEN SEEKING ACCESS TO JUSTICE.
From the inception of LSC, there has been a recognition that American Indian and Alaskan Native individual tribes have exceptional need for legal services due to a variety of factors, some of which Congress itemized in section 1007 (h) of the Legal Services Act. Such factors included barriers described below, which still exist today:

1. Poverty.
A significant barrier to justice for Indians flows from the depth and breadth of poverty in Indian country. By all indicators, Native Americans are among the poorest and most disaffected of all groups tracked by the Census Department. Several reservation counties—such as Shannon County on the Pine Ridge Reservation, Buffalo County on the Crow Creek Reservation, Ziebach County on the Cheyenne River Reservation, and Todd County on the Rosebud Reservation—are among the poorest in the United States; indeed, the poorest county in the United States is Shannon County, the home of the Pine Ridge Reservation. (Bureau of the Census, U.S. Department of Commerce, PRD 9 Capital, 1979 County Per Capita Income Figures, 1980 Census.) According to the 1995 Census Bureau Report on Status of American Indians' Housing on Reservations:

- About one in five American Indian households on reservations lacked complete plumbing facilities in their homes—hot and cold piped water, a flush toilet, and a bathtub or shower. This compared with less than 1% of all households nationally. About six of every 10 American Indian homeowners on the Navajo Reservation did not have complete plumbing.
- About 18% of American Indian households on reservations in 1990 did not have complete kitchens, i.e., a sink with piped water, a range or cookstove, and a refrigerator. In 1950, about 20% of all U.S. households lacked complete kitchens. By 1990, only 1% of households nationally was without one or more of these amenities.
- The majority of American Indian homes on reservations (53%) did not have a telephone. This was true for only 5% of all households nationally
- When it comes to motor vehicles, 22% of American Indian households on reservations did not have one in 1990. Nationally, 12% of all U.S. households were without a vehicle.
- Although rarely used nationally, wood was used to heat one out of every three American Indian homes on reservations in 1990. Bottled, tank, or LP gas and electricity, at 22% and 19% respectively, were the next most commonly used fuels. In 1940, 23% of U.S. households used wood as fuel, but since 1950, wood fuel has been used very little at the national level.

Whether measured by per capita income, school dropout rates, infant mortality, suicide rates, or any other indicator, the fact is that life in Indian country —particularly for Indian youth—continues to be marked by poverty, rural isolation, cultural isolation, and high degrees of social and political disaffection.

In 1992, the University of Minnesota released a report, "The State of Native American Youth Health", sponsored by the Indian Health Service and the Maternal and Child Health Bureau, which surveyed nearly 14,000 American Indian and Alaskan Native youth, 12-17 years of age, from 50 different tribes located in rural/reservation areas in 15 states. Among the report's findings, published in the March 25, 1992, issue of the Journal of the *American Medical Association* were:

- Nearly one in six of those surveyed had attempted suicide—a rate four times higher than adolescents in the general U.S. population. Suicide rates for 10-14 year olds are approximately four times higher than that for all races.
- The death rate for American Indian/Alaskan Native adolescents is twice that of adolescents

of other racial/ethnic backgrounds. Unintentional injuries and suicide account for nearly 75% of the total death rate.

- 18% of the total sample reported that they have been a victim of physical or sexual abuse or both types of abuse, with 26% of the female population reporting being physically and/or sexually abused.
- 24% reported being obese, often a precursor to diabetes. 15% of the high school students reported smoking cigarettes daily, and one in six boys use smokeless tobacco daily.

In terms of general statistics, the report provided comparative data extracted from the *American Journal of Clinical Nutrition*, (Vol. 53) 15:35-42, June 1991, and U.S. Congress, Office of Technology Assessment, *Indian Adolescent Mental Health*, Washington, D.C. U.S. Government Printing Office, 1990:

- Over twice as many American Indian/Alaskan Natives fall below the poverty line compared to the U.S. All Races while the proportion graduating from high school or college is less than half all other groups.
- A decade ago, the median household income for Native Americans was $11,471 compared with $16,841 for all races. There is no evidence that over the last decade the gap has narrowed.
- Alcohol abuse and alcoholism with its entire sequel are legend. Today, Native Americans have a rate of alcoholism six times that of all races in America.

This high incidence of poverty and social isolation necessarily gives rise to higher than average needs for social and legal intervention. Such needs coupled with the unique legal context within which they rise, provide ample reason for singling out Native people and Indian tribal governments for highly focused and specialized legal assistance.

Poverty is not limited to individual Native people. To the contrary, and despite some very notable exceptions, the vast majority of Indian tribes are extremely poor, rely on federal governmental subsidies for basic operating expenses, and are unable to provide the essential infrastructure necessary to stimulate critical tribal economic development initiatives

These factors cause an exponential increase in legal problems to levels substantially beyond what one would expect in a comparable population elsewhere. This associated demand for legal representation occurs in divorce and other domestic relations problems, defense against criminal charges in tribal court, probate, credit and related consumer matters, and public entitlements.

2. Lack of Private Bar.
Historically, only tribes with valuable land claims against the United States, or those who could pay for lawyers from revenues derived from natural resource development, had access to legal counsel and representation. Attorneys in small towns bordering Indian reservations usually represented interests inimical to those of the tribe and its membership, and thus were unavailable to represent tribes. Until the late 1960's, there were almost no Indian people trained as attorneys in the United States. Individual Indian people simply went without legal representation in their dealings with the world outside the reservation boundary, and, indeed, within the reservations, too.

3 Language.
Many clients served by legal services programs are non-English speaking, but among the Indian service population, there is a major difference: there are many tribal languages spoken, which are not taught in schools. Rare is the attorney who is fluent in the clients' language on Indian reservations. As a result, additional staff must be employed to bridge the language barrier in each client community. In some service areas, interpreters in each language are required because there is no commonality among the languages. For example, a bilingual Hopi employee is not able to interpret for a Navajo client. Translation is usually done by bilingual staff who have other primary responsi-

bilities (such as legal secretaries, receptionists and tribal court advocates). As a consequence of the time consumed in interpreting, programs must hire additional staff so other support functions can be effectively accomplished.

The essential effect of the language barrier is that even routine matters involve considerably greater time expenditure than in other legal services contexts. That, in turn, requires a larger staff and associated personnel costs. Moreover, each of the Native languages is typically oral and exceedingly complex. As a matter of illustration, Navajo were used in World War II as "Code Talkers" to send top secret messages in the Navajo language between American units in Asia. It was a code that was never broken. Finally, from a linguistic viewpoint, there are no similar elements between Indian languages and English. Very few English legal or other concepts are easily translated. Imagine, for example, an Anglo attorney attempting to explain to a Navajo client, through an interpreter, the implications of the federal Truth in Lending Act. Attorneys frequently experience long delays in client and witness interviews while the interpreter valiantly tries to convey what, from an Anglo point of view, seems to be a relatively simple matter.

4. Cultural Barriers.
Reaching a basic cultural knowledge base is essential in the attorney-client relationship so that there is no misunderstanding about the client's objective and the attorney's legal approach. There are no analogs in Anglo-American jurisprudence for Native American principles of land ownership, dispute resolution and scores of other legal concepts. It simply takes an attorney more time to gain a fundamental sense of these ideas to enable her/him to effectively represent the client's interests and explain the parameters of available legal remedies.

David Getches, the founding director of the *Native American Rights Fund*, has spoken from personal experience:

> "Probably the most difficult problem for attorneys in their representation of Indians is understanding Indian cultural values and translating them into legal action. The lawyer must turn his tools to achieving Indian objectives in a non-Indian legal system - the same system which has produced laws and practices which conflict with traditional values . . . What may appear to be simply a taking of land or deprivation of fishing rights assumes greater importance when it is seen in the context of the Indians' struggle to retain their culture. A land base is essential to maintenance of social structures, religious beliefs, and traditional practices . . . Likewise; the ability to continue traditional occupations such as hunting, fishing and gathering foods may be the only means of preserving a vestige of their culture. When Indians fight for these rights . . . they are fighting for their existence as Indian people... In order to comprehend the dimensions of Indian cases, attorneys must appreciate their importance to the client." [17]

Noted author and professor, N. Scott Momaday (Kiowa) spoke eloquently to the same thought in an article, "Native American Attitudes to the Environment," in *On Nature*, page 115:

"You cannot understand how the Indian thinks of himself in relation to the world around him unless you understand his conception of what is appropriate, particularly what is morally appropriate within the context of that relationship. The Native American ethic with respect to the physical world is a matter of reciprocal appropriation, appropriations in which man invests himself in the landscape, and at the same time incorporates the landscape into his own most fundamental experience...This appropriation is primarily a matter of imagination which is moral in kind; I mean to say that we are all, I suppose, what we imagine ourselves to be. And that is certainly true of the American Indian. (The Indian) is someone who thinks of himself in a particular way and his idea comprehends his relationship in the physical world. He imagines himself in terms of that relationship and others. And it is that act of imagination, that moral act of imagination, which constitutes his understanding of the physical world."

Against this backdrop, then, with the stakes so enormously high, it is easy to understand the challenge of gaining and keeping the trust and confidence of individual Indian and tribal clients. That trust and understanding is a very precious commodity which when damaged is not easily restored.

5. Geographic Barriers.
Clients, as well as witnesses, often live in very isolated areas of the reservation, a long distance from the nearest town and far removed from paved roads and without access to telephones or transportation. Their legal counselors are frequently compelled to travel more than 100 miles to contact clients and witnesses over roads, which might be impassable due to mud or snow. If, as is often the case, the client or witness does not speak English, an interpreter must accompany the attorney. Whereas acquiring the needed information might be a five-minute office visit in other environments, for Indian Legal Services programs it can consume a full day on the part of two staff members.

In addition, distance considerations dramatically increase the cost of cases for other reasons. Court appearances, no matter how abbreviated, are time-consuming events. For example, the federal court in Utah is located in Salt Lake City which is some 550 miles from one Indian Legal Services office in Mexican Hat, Utah. Because there is no available air transportation, the trip must be made by vehicle and can mean a three-day trip of 1,100 miles. Aside from the extra expenditure of attorney time and energy, expenses for mileage, per diem and lodging commonly can exceed a modest travel budget.

The State of Alaska presents striking problems. There, Native people occupy 225 villages that are mainly located along the coastline or near the Yukon and Kuskokwim rivers. These villages are not connected to roadways, and service to the village-based clients is always by airplane or boat. In order for lawyers and clients to attend judicial and administrative hearings, travel distances often exceed several hundred miles. A single office of Alaska Legal Services may serve an area of 25,000 square miles. The daily work of providing food for the family table is a highly-regulated activity for Alaska Natives. The extensive federal enclaves created for wildlife protection, national forests, and national park development encompass most of the traditional hunting and fishing sites.

Moreover, required research materials are often only available at law schools located in major metropolitan areas. Trips to these locations are necessary to conduct essential research and use telefax and phones. As with court appearances in these locations, one hour of research can take as much as three days of attorney time and program expense. Finally, adequate legal supervision requires managers to spend many days throughout the year traveling to branch offices to oversee legal work.

As a result, it is not at all uncommon for an Indian Legal Services attorney to log more than 10,000 business miles annually in the course of representing clients, resulting in direct personnel and travel expense, which is extraordinary, compared to costs elsewhere. Although telephones are used whenever practical to reduce travel costs, the net result can be an annual expense, which substantially exceeds the communications costs in other practice situations. To further compound these logistical problems, many Indian Legal Services clients have no phone and no nearby access to public phones.

6. Other barriers.
For programs representing either individual Indians or tribes, there are additional challenges. Foremost among these is the unpopularity of representing Indian rights against established interests in the dominant society. Nowhere is this better demonstrated than in the treaty fishing rights cases in Washington, Michigan and Wisconsin, beginning in the 1970's and continuing today, involving the competition between Indian fishers and non-Indian commercial and sports fishers.

D. OVER THE PAST 30+ YEARS, THE UNITED STATES HAS CONSISTENTLY RENEWED ITS COMMITMENT TO PROVIDING LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS.

1. Congress recognizes unique legal needs of Native Americans.
Congress' recognition of the need for specialized civil legal services to Indians and Indian tribes is consistent with a history of addressing unique needs that arise from the legal and political status of Indians. Legislation singling out and providing specialized or unique human and social services to Native Americans is the norm rather than the exception. Thus, specialized programs have been developed for educational assistance, income assistance, food and nutrition assistance, tribal government operational assistance, tribal court development, child welfare services, health services, natural resource development, and a host of other related concerns affecting the quality of life in Indian country.[22]

On top of these basic issue areas, however, are another layer of Indian law issues affecting the lives of individual Indian people. These include tracts of Indian allotted land on reservations, enforcement of the federal trust responsibility to individuals, Indian child custody cases, Indian Health Services, Indian Education and Housing benefits, protection of religious sites and access to sacred materials such as eagle feathers and peyote, all of which involve the knowledge of a complex tangle of federal statutes and regulatory schemes. Whereas fifteen or twenty years ago it was thought possible for one lawyer to keep abreast of the full body of what is considered "Indian law," today the task is nigh impossible. The late Justice Felix Frankfurter referred to it as "the vast hodge-podge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, confusions and injustices of the law governing Indians lay concealed."

In recognition of these additional legal needs, studies were conducted at the direction of LSC to explore these circumstances and recommend solutions for addressing these needs. As a result of such studies and other needs assessments, funding for Indian Legal Services has historically proceeded under a different formula than funding for basic field programs.[18] LSC boards have also come to recognize and appreciate the role and purpose of Indian Legal Services programs by focusing regulatory attention on uniquely Indian issues. For example, 1007 (h) of the LSC Act allows criminal representation in tribal courts and 1010 (c) of the Act permits specified expenditure of funds received from tribes or foundations designed to benefit Indians. Finally, LSC regulations provide exceptions for representing Canadian Indians who have a unique citizen relationship with the United States.[19]

2. History of Indian Legal Services.
When the first Indian legal services programs were funded by the federal OEO office, it was the first time that low-income Native Americans had any significant experience being represented by private, non-government lawyers. During its first year, OEO funded four Indian Legal Services programs as part of the initial effort to create local programs: the Cheyenne River and Rosebud programs in South Dakota, the Zuni program in New Mexico, and the DNA-People's Legal Services program serving the Navajo reservation in Arizona, New Mexico, and Utah. Three more programs were created in 1967 (Leech Lake in Minnesota, Choctaw in Mississippi, and Papago in Arizona), and one, California Indian Legal Services, in 1968. Two more were created in 1971: Wind River in Wyoming and Fort Berthold in North Dakota. The Indian Law Support Center, part of the Native American Rights Fund, was created in 1971 to provide backup support and research for ILS offices across the country.

In 1972, OEO estimated that, at most, 10% of the client-eligible Native American population was being served by these programs. However, with the creation of LSC in 1974 came new opportunities for the expansion of the Indian Legal Services community. The LSC Act was adopted with special provisions concerning Indian Legal Services:

- Indian Legal Services programs may represent criminal defendants in tribal court;
- Indian Legal Services programs may use tribal funds for any purpose for which they are appropriated.

- Prior client board membership reflecting Native American communities is"grandfathered";
- 1007H Study of Special Legal Needs of Native Americans and other groups are mandated.

In 1975, Michigan Indian Legal Services was created, and, that same year, pursuant to the mandate of Congress in Section 1007 (h) of the LSC Act, a study was commissioned by Legal Services Corporation to assess the unique legal and access needs of Native Americans. Prepared by the law firm of Getches and Green, Boulder, Colorado, the *Tosco Report*, as it was later known, concluded, in part that:

a) Legal services for Native Americans should encompass all native or aboriginal people including "unrecognized" or "terminated" tribes;

b) The field of federal Indian law is complex and based upon the unique relationshipwhich exists between the federal government and tribes and individual Indians. That relationship is characterized by quasi-sovereign tribes with a government-to-government relationship between tribes and the federal government;

c) The relationship is further defined by treaties between tribes and the United States from the 19th century. From this background a multitude of legal precepts are derived which result in the complexity and uniqueness of Indian law;

d) The status of Indians and tribes is further colored by unique cultural, economic, and religious institutions which affect how Indians live and relate to the non-Indian society, particularly the Anglo-American system of justice;

e) Providing effective legal services to Indians and tribes costs more than in an urban or non-Indian rural setting. The complexity of typical Indian law litigation and theextreme geographical isolation of Indian clients both contribute to higher costs.[20]

In September of 1976, a study, "American Indians, Their Need for Legal Services," was completed by consultant Joan Lieberman. Two months later, Lieberman was hired as a management specialist in the Denver Regional office and asked to do additional research on Indian issues. In a letter to the Zuni Legal Aid program director dated November 8, 1976, Lieberman explained that her original report had been commissioned because the Corporation staff in Washington felt that they had "little or no information on which to make budget determinations for Indian programs now or in the future." Her report found there were over 185 Indian reservations without any substantial access to legal services and recommended a major expansion of funding for Indian Legal Services to cover the unserved tribes, as well as funding for representation to unrecognized and terminated tribes. The study also recommended funds to serve the urban Indian population by pointing to the problems in capturing a true picture of Indian clients served:

> "I am not certain how many non-Indian low-income people you may be assisting because they reside on or near the reservations or communities you serve, or how many of your clients may consider themselves Indians, but are not enrolled in a tribe and thus would not show up in BIA population estimates. Nor can I tell you how many clients may travel from other areas to seek your assistance because there is no legal services program on their reservation."[21]

By the end of 1976, the Corporation had created an Indian desk responsible for the administration of the unique circumstances and needs of Indian programs. This office found that the perceived higher costs of Indian Legal Services was accounted for by such circumstances as:

- "More than 370 treaties, 500 federal laws, and 5,000 federal regulations apply to only Indians." with the result that Indian programs were "...averaging five or more open cases at any one time per client family."
- "Having to argue in five forums...requires programs to purchase and maintain extensive state, federal, administrative and Indian law libraries."

The Indian desk managed the creation of the remainder of the Indian component programs in a plan "to cover all remaining reservations in two years (1978 and 1979)..." However well-intentioned, this plan did not see its goals reach fruition.[22]

The year 1980 was the high water mark of federal funding for Native American legal services. There were now 176 attorneys and advocates in Indian Legal Services programs. But, by 1981 funding of Indian Legal Services was reduced by 12.5 % across the board as a result of general federal cutbacks. In the report of the Select Committee on Indian Affairs of the United States Senate, June, 1981, 97th Congress 1st Session, "Analysis of the Budget Pertaining to Indian Affairs Fiscal Year 1982: at page 22, the Senate Committee not only reported that the Indian Legal Services programs provide "*exceptional services*", but that the historic problem of providing a fair level of services to Indian communities surfaced whenever federal funds were block-granted to states. The Report also documented that attorneys working with Indian Legal Services programs had become "***...an integral part of the tribal legal and judicial processes...***" and "***...contributed greatly to the development of the on-reservation judicial systems.***"

By 1984, there were at least 78 tribes that still had no access to Indian legal services, and by the following year, some Indian Legal Services offices were struggling to keep the doors open. While the Native American population eligible for legal services was estimated at 560,000 out of a total population in excess of one million, the total staff of Native American programs—-as a result of the federal cut backs—was reduced more than 20%, a cut from 316 employees in 1981 to approximately 250 in 1985. Among those to take note was Congressman Morris Udall who stated that the Native American Rights Fund's Indian Law Support Center provided "...*effective assistance for Native American Legal Services programs.*"

During the last decade of the twentieth century, Indian Legal Services programs were singled out by other notable legislators, such as Senator John McCain, for making a "*major contribution*" to the development of the legal system in Indian country. Despite such recognition, funding for Indian Legal Services programs was cut in 1996 by over three million dollars as part of general LSC budget reduction. The vital support and research of services of the Indian Law Support Center were eliminated along with other support centers serving the legal services community. The cuts caused a major reduction in the number of attorneys available to represent low-income clients, not just individual Indians, but also a number of small, low-income tribes, which rely on Indian Legal Services for legal representation.

3. Indian Legal Services Today

American Indian tribes and Alaska Native tribes and individuals represent a sizeable group in contemporary American society. In the United States today, there are believed to be more than 2,000,000 people claiming Native American ancestry and membership in a tribe. These 2 million plus people belong to 319 tribes in 32 of the "lower 48" American states, and there are another 223 tribal and village governments in existence as functioning cultural and social entities, though not recognized by the United States in a formal, political sense. This number includes tribes whose political status was "terminated" by Congress in the 1950's and never restored. There are also approximately 200,000 client-eligible people of Native Hawaiian ancestry in the Hawaiian archipelago.

During the three decades since free legal services have been made available to tribal governments, the tribes have, for the most part, been attempting to overcome the effects of racial and religious discrimination, alcoholism, ill-health and inadequate housing, high unemployment, and the oppressive weight of a federal bureaucracy that has little willingness to give more than lip-service to tribal self-determination. A good number of tribes have made significant progress despite the shifting and inconsistent federal commitment to economic self-sufficiency for Indian people. Some tribes have progressed slower than others due to factors such as geographic isolation, protracted litigation of complex issues of tribal status (especially regarding the Alaskan tribes and the Native Hawaiians), and simply because the need for Indian legal services far outstrips the resources of existing programs.

The 1988 *American Indian and Legal Services*, Kickingbird and Sepulvado report to the Legal Services Corporation correctly noted a disparity in funding levels among the various Native American programs and components. There are a number of historical reasons for this disparity, the most significant being LSC's expansion funding policies. There were different LSC policies in place at different points in time affecting LSC's Native American expansion efforts. The consequences of these differences in LSC expansion policies coupled with subsequent LSC and Congressional actions resulted in the current situation wherein programs and components created after 1978 continue to be funded at a lower level than other Native American LSC programs and components created prior to 1978.

E. THE NATIVE AMERICAN PROGRAMS FUNDED BY THE LEGAL SERVICES CORPORATION PROVIDE LOW-COST AND EFFECTIVE ACCESS TO LEGAL SERVICES FOR LOW-INCOME NATIVE AMERICANS WHO MAINTAIN A CONNECTION TO INDIAN COUNTRY OR THEIR TRIBAL GOVERNMENTS.

I. Delivery issues.

To appreciate the effectiveness of Indian Legal Services programs, it is helpful to understand the circumstances and environment in which such programs operate. Like other legal services programs, each Indian Legal Services provider sets priorities as required by the Legal Services Corporation. A board with Native American representation, including, in some cases, representation from the Native American bar, define community needs and expectations and advise on allocation of limited resources in the face of infinite demand for services. Programs range in size from the million-dollar DNA program to small components such as the Indian project at Legal Aid Society in Omaha, Nebraska. Some programs and components only represent Indian tribes; others only represent individual members of tribes and not the tribal governments themselves, and some programs represent both tribal governments and individual members.

For programs representing individual Indian people, the responsibility brings substantial challenges. Indian people were first made citizens of the United States by Congress in 1924. As citizens, they have the rights of any other citizen under the laws of the United States, including the right of access to a host of state and federal programs benefiting other Americans, such as the various Social Security programs. They, of course, have the usual legal needs of other Americans in areas involving domestic relations, housing, education, general health, mental health, and the special concerns of seniors and youth, among others. But because Indian legal services programs are, in many instances, the only attorneys available to people—Indian, or, non-Indian—on reservations, these programs often are faced with providing legal representation in traditionally "basic field" areas of specialization.

For programs and components representing client-eligible tribes, the challenges of providing general legal counsel are enormous. As noted earlier, Indian tribes are governments with a full array of responsibilities and obligations to the reservation communities they serve. Attorneys representing tribal governments must wear a number of hats simultaneously in order to advise their clients at any time on a plethora of legal issues. Local issues include local government law, police powers, administrative and regulatory authority, land use planning and environmental regulation and enforcement, and the development of tribal courts. "External" issues included relationships with state and federal governments, their executive, legislative, and judicial branches, enforcement of the federal "trust" responsibility, protection of the sovereign rights of tribes expressed in treaties, executive orders, and other federal enactments, and water rights and other natural resource protection challenges.

For historic reasons, tribes are not as wealthy as states and, yet, serve populations with far greater percentage levels of unemployment and poverty. The financial demands now facing tribes, coupled with limited tax and other revenue, make it virtually impossible for tribes to offer tribal members services beyond what can be provided with federal funding.

Indian legal services lawyers who represent tribal governments also confront issues arising out of the inherent tension between States' rights and the sovereignty of Indian tribes under federal law. Such issues arise most frequently in federal litigation seeking to affirm the exercise of jurisdiction and authority that is the sovereign prerogative of tribal governments. As more precise case-by-case distinctions are drawn by the courts, the resolution of these conflicts depends less on established principles of Indian law than on the ability of tribes, through the assistance of competent legal counsel, to develop effective regulatory mechanisms and a comprehensive legal framework for tribal economic initiatives. All of this effort is ultimately directed to the dual, and related, goals of tribal economic self-sufficiency and self-government.

For those legal services lawyers who work both for individual Indians and small Indian tribal governments, the difficulty lies in the conflicts that can arise when any government asserts regulatory authority over its citizens, and those citizens object to or rebel against the hand of authority.

Because of the remote and rural areas in which most Indian Legal Services programs are located, recruitment of qualified attorneys is difficult. Staff must have good transportation, and often are faced with unforeseen car repairs because of the bad roads. Unlike legal services attorneys working in the inner city who can escape to a comfortable home in the evening, Indian Legal Services staff do not have nearby access to the usual cultural accoutrements they may have had before moving to the reservation. Lawyers with Indian programs generally become a part of the community in which they live because of the distance between it and the nearest town. The attorney not only lives in and becomes a part of the community, but his or her family lives there, and his or her children are educated in the community. Educational opportunities on reservations are notoriously inadequate, although, in some places, there has been some improvement. Additionally, the lack of housing and job opportunities on reservations for the non-attorney spouse married to the legal services attorney present other hardships in recruiting and retaining attorneys.

2. Effectiveness of Indian Legal Services programs.
Federally-funded Indian legal services providers have been critical to the ability of both tribes and individual Native Americans to assert and enforce a broad range of civil legal rights and prerogatives, many of which exists solely as a consequence of their status as Native people and sovereign Native governments. Examples include:

- Allowing Alaska's Native people to protect subsistence hunting and fishing rights.
- Asserting the rights of Indian purchasers to rehabilitation of poorly constructed federally subsidized housing.
- Protecting the right of disabled and elder tribal members to receive federal SSI benefits without first having to forfeit income from trust property.
- Assisting tribes develop welfare reform and child support codes and other mechanisms for implementation.
- Asserting the right of tribes to protect tribal cultural artifacts, burial sites and their freedom of religion.
- Obtaining federal recognition for "terminated tribes" and developing tribal infrastructure, including tribal codes and ordinances.
- Ensuring entitlement to specialized health and social services, which were inappropriately denied by the Bureau of Indian Affairs.
- Securing enrollment in individual Indians' tribes of origin.
- Assisting in the start-up of domestic violence programs through the writing of codes and representation of families, including youth who are victims of it.
- Protecting the integrity of Indian families and tribal rights under the Indian Child Welfare Act.

In 1985, the Senate (Select) Committee on Indian Affairs of the United States formally recognized the LSC Native American line as an "*outstanding*" and "*essential service*" to America's aboriginal peoples. This Committee found:

- The Indian Legal Services component of the Legal Services Corporation provides an exceptional service within the Indian country. The bulk of the Indian population serviced by Indian Legal Services programs and components reside in isolated rural settings on reservations; a large percentage of the service population has English as a second language or is non-English speaking.
- On many of the reservations, there is no access to a private bar; the cultural distinctiveness of the service population, their societal institutions and the complex nature of Indian law require special skills and sensitivities not available elsewhere.
- It (the Native American line) is a cost-effective program performing an essential service with no practical alternative available. Indian Legal Services programs must be maintained.[23]

An important, but often overlooked role performed by Indian legal services, is that which they provide within the Native American community of encouraging tribal members to consider a degree in the field of law. Only fifteen years ago, there were only a handful of Indian law practitioners. Today, there are several hundred, many of whom started in an Indian legal services program and moved on to work for tribal governments, federal agencies and private law firms.

F. THERE ARE SIGNIFICANT UNMET LEGAL NEEDS IN INDIAN COUNTRY.

This Report describes the work of Indian Legal Services in Indian country throughout the United States. This work has been and continues to be profoundly important in the development of Indian law and the provision of legal assistance to client-eligible tribes and individuals. However, these 29 underfunded and understaffed programs cannot meet the enormous legal needs of the low-income tribes and individuals.

Additionally, while no one has had the luxury to undertake a comprehensive assessment of the unmet legal needs, it is safe to say that all the Indian Legal Services programs and components turn away deserving cases due to lack of resources. The following list describes some of the factors that result in significant unmet legal needs in Indian country:

- In the current federal Indian policy era known as the "Self-Determination Era," tribes are called upon to do more for themselves in all aspects of their social and political lives. This dramatic increase in tribal government responsibility has not been matched by an equivalent growth in available legal counsel.
- The uniquely high rates of unemployment and underemployment on Indian reservations create an unabated demand for individual representation of low-income Native Americans.
- The vast majority of Indian tribes are in remote or rural areas with no significant economic development opportunities, nor uniform commercial codes to encourage business enterprise initiatives on the reservation.
- Indian Legal Services attorneys are typically " the only game in town" in these rural areas. If there are other attorneys in the area, they are often the county attorneys with adverse or conflicting interests or they may be culturally disinterested or professionally uncomfortable with the field of Indian law.
- There are numerous Indian tribes who, after having been "terminated" by the federal government in earlier eras, have had their "federal recognition" status restored within the past twenty years. These tribes and their members continue to struggle with the rebuilding of their legal infrastructures and the panoply of legal rights and responsibilities.

- Tribal courts are in an unprecedented growth phase throughout much of Indian country (due, in part, to the Self-Determination policy) and the growing sophistication of tribal governments. However, as the tribal courts grow, there is no parallel growth in the number of available attorneys in those reservation communities. Indian Legal Services attorneys have creatively sought to help by assisting with the drafting of legal codes and procedures, and by training and providing back-up support to lay advocates for the courts. However, at the current staffing and funding levels, access to legal representation is not keeping pace with the growth of tribal courts. The result is that many individuals go to tribal court without representation.
- In those tribal communities where there has been both development of a tribal court system and modest economic development, there are emerging areas of tribal law that have increased the need for legal representation within the tribe. Examples include tribal employment law, business law, and housing law.
- Vast geography compounds the problem of underserved tribes and their members. For example, in Nebraska the Indian Legal Services office has historically been staffed by a single attorney whose area included three Indian reservations—one of them being over a hundred miles away. In recent years, a fourth tribe was added when its federal recognition was restored. This resulted in the reconstruction of a new tribal government and an influx of Indian people returning to rebuild their tribe. There was no increase in the Indian Legal Services budget.
- Due to recently passed federal legislation, there is now a legal mechanism for the reciprocal enforcement of child support orders between tribal courts and state courts. While this is a positive development, it puts increased demand on tribal courts and requires that tribal members make use of these interjurisdictional enforcement mechanisms. Indian Legal Service attorneys, with already overflowing caseloads, simply do not have the resources to devote to making this well-conceived system work as it was intended.
- Tribal courts that exercise criminal jurisdiction over Indian people typically have one or more prosecutors. It is equally typical that they do not have a public defender to represent the accused. Some Indian Legal Services offices have taken on the role of serving as defense counsel for indigent Native Americans in tribal courts—at least to the extent their budgets and other case priorities allow. Where Indian Legal Services offices have kept their priorities focused on civil legal matters, it is common for criminal defendants to go to tribal court with no legal representation at all.
- Recently-enacted federal legislation in areas of family domestic violence—Violence Against Women Act; Victims of Crime Act—recognize the mutual enforcement of tribal and state court orders. While such laws have been favorably received by tribes, they have placed significant demand upon tribal courts, which are not budgeted to hire attorneys general to do this work.
- In Alaska, a remnant of the "Termination Era" survived legally until 1971. Some 3,000 Native Allotments are still unresolved throughout the state. These parcels of land represent the last chance for individual ownership of traditional food gathering sites. Because these lands are held in trust by the federal government, the Bureau of Indian Affairs provides limited funding for the legal services program to be the sole provider of legal representation.

The above list is not intended to be comprehensive in the description of unmet legal needs in Indian country. It simply presents some of the factors and conditions that indicate the scope of the problem that Indian Legal Services offices struggle with while attempting to provide access to justice. The unmet need is so overwhelming that Indian Legal Services offices, in setting their local priorities, must make hard choices, which invariably result in many worthy cases going unassisted.

G. FEDERAL FUNDING OF NATIVE AMERICAN LEGAL SERVICES IS NECESSARY TO MAINTAIN ACCESS TO JUSTICE FOR NATIVE AMERICANS.

1. State funding mechanisms cannot be relied upon to support legal services for Native Americans. Indian people have historically been underserved by both federal and state-administered programs. However, in recent history the failure of state-administered programs to provide services to Indian people has been particularly egregious. Under a state block grant administration with limited federal oversight provisions, it is likely that this historical hostility by some state governments to their Indian citizens would continue, and that individual Native Americans would be discriminated against, ignored and/or neglected. Additionally, states may be tempted to use tribal access to block grant funds as leverage to persuade tribes to negotiate away other rights and interests that they and their members have, placing an unrelated and politically-motivated price on access to federal funds that no other recipients are required to pay.

States have repeatedly failed to provide services to on-reservation Native Americans while at the same time receiving federal funds based on population estimates that include tribal members and reservation residents. To a large extent, the states' refusal to provide services expresses an unwillingness to utilize scarce resources on a people they do not consider to be eligible for state benefits. For example, in a case brought by DNA against the State of Utah to compel Utah to provide schools for children on the reservation, the state argued that "its lack of power on the reservation counsels against finding any duty on its part to provide education services on the reservation."[24] Another example is the failure of both Arizona and Utah to provide child support enforcement services to residents of the Navajo Nation.

Even when states do not purposefully discriminate against Native Americans, their insensitivity to and lack of awareness of the unique economic and cultural conditions which exist in Native American communities exacerbates each state's inability to properly implement block grants for people living on reservations. For instance, the unemployment rate on the Navajo Nation is much higher, and results from different factors, than the unemployment rate in off reservation areas. Fifty-eight percent of the potential labor force on the Navajo Nation in Arizona is unemployed and only twenty-seven percent of all Navajos in Arizona earn more than $7,000 a year according to the Indian Service Population and Labor Force Estimates, 1993 Report, Bureau of Indian Affairs (BIA). This high unemployment rate results from a combination of factors including lack of commercial businesses on the reservation, cultural ties that bind Navajos to rural and remote areas, education and language barriers, and logistical factors.

Arizona recently demonstrated this states' insensitivity to Native American issues when it requested the AFDC requirements for an experiment which included a 24-hour cap on benefits. The U.S. Department of Health and Human Services expressed its concern that the waiver, as written, would inappropriately terminate the benefits of Native Americans without high school diplomas, living without transportation in inaccessible, rural areas of reservations. In response, Arizona stated that individuals can choose where they reside and that its proposal was consistent with "America's practice of moving in order to secure or retain employment." Arizona chose to ignore centuries of history, culture, and tradition that tie Native Americans to their homelands, and to ignore a whole segment of Americans with values other than those expressed by the state.

Because states consistently have demonstrated an inability or unwillingness to meet and understand the needs of their Native American citizens—and, in some instances, have been openly hostile to supporting tribal justice where it would conflict with their own interests—giving states block grants or funds for legal services will fail to ensure that the unique needs of Native Americans are met.

2. Gaming Revenues cannot be relied upon to fund Indian Legal Services.
Gaming has been a blessing and a curse for Native Americans. Although a few, smaller tribes have profited from gaming enterprises: the majority of gaming operations have produced modest returns, not all tribes have adopted gaming as a resource development tool, and funds from gaming have only scratched the surface of the poverty facing most Native Americans. "Survey of Grant Giving by

American Indian Foundations and Organizations," a report recently released by Native Americans in Philanthropy, notes that gaming on Indian reservations has yet to significantly lower the high levels of poverty endemic to Indian people nationwide. Indeed, poverty among Native Americans remains four times higher than the national average. The report found that poverty among Indians has actually risen during the past decade of the gaming boom and, now, more than half of all reservation Indians live below the poverty level. According to the report, among the reasons for disparity between perception and reality is that "the big success stories in gaming are the exceptions rather than the rule." Of the more than 200 tribes with gaming establishments in 1993, two tribes accounted for almost a third of the $2.6 billion in gaming revenues. The 100 tribes with the smallest casinos and bingo halls averaged less than $5 million each in 1993. Small tribes located near major urban areas have benefited the most from the gaming boom. For many of them, gaming has reduced or eliminated unemployment and has provided a substitute for shrinking federal funds. However, the combined population of the three most successful gaming reservations is less than 500. Nine of the ten largest reservations (where half—218,000 of the 437,000—reservation Indians live) have seen an increase in poverty during the 1980's.

For the country as a whole, the percentage of Indians living on reservation who live below the poverty rate has increased from 45% of the population in 1980 to 51% today. The isolation of many Native communities precludes viable gaming operations. The Philanthropy report also noted that the needs of reservation Indians are so great that, "even if, for the sake of argument, all the Indian gaming revenue in the country could be divided equally among all the Indians in the country, the amount distributed ($3,000 per person) would still not be enough to raise Indian per-capita income (currently $4,500) to anywhere near the national average of $14,400."

Furthermore, gaming revenues are not a true indicator of wealth because "gaming revenues represent gross income; while some Indian gaming operations are spectacularly successful, with a profit margin of up to 40% of revenues, most are only marginally profitable." And, it is difficult for the two tribes with extremely successful operations to act as "financial saviors" to other tribes for a number of reasons, including the long-term probability that gaming revenues will cease to meet current levels. Even if tribal governments were structurally organized to be grantmakers, the priority on meeting local needs, the huge level of demand, the limited number of successful tribes, and the same systemic challenges that have kept the federal government, with its billions of dollars of resources, from lifting its poorest citizens, on-reservation Indians, out of the crushing poverty with which they live, have all combined to limit the scope of gaming's economic benefits to this country's Native people. It is unrealistic to expect tribes to budget funding for legal services for tribal members at a point when re-building tribal infrastructure—water and sewer lines, health services, Headstart, Meals on Wheels, even libraries—are critical priorities.

3. Tribal Block Grants would not be an effective funding mechanism for Indian legal services. Because of the unique and distinct nature of the 500 plus tribes in the United States, the extent to which each tribe could or should be involved in the delivery of legal services differs dramatically. There is no way that Congress can legislate for all of the different tribes or guarantee that individual Native Americans and Alaskan Natives receive services regardless of which governmental entity actually administers the services.

Although tribal involvement in the delivery of legal services is important, it exists under the current funding mechanism for Indian Legal Services, and varies greatly according to the particular tribe and its government, its population, its land base, its resources and wealth, and its culture and traditions. For example, the Navajo Nation and Hopi Tribes have complex governmental infrastructures that administer services to individual tribal members, yet each supports funding of an independent non-profit legal services program to serve its members. There are smaller tribes that rely on independent programs for tribal representation. And, there are multiple tribes served by a single component program whose larger funding base permits more effective and efficient administration of service. Between these two extremes are an entire spectrum of tribes that have developed close working relationships with locally-controlled programs based on unique factors inherent to each tribe and its people.

Finally, people must have access to legal counsel independent of state and tribal government to ensure that both governments treat individuals in a lawful, fair, and efficient fashion. These are only a few examples of how complicated defining service areas and service populations could be for purposes of tribal block grant funding.

4. Federally-funded Indian Legal Services is the single most viable approach.
If the three approaches discussed above can not meet the challenge of funding Indian Legal Services, the question arises whether or not there is an approach that would meet the need without requiring prohibitive sums of money. Quite simply, the single best model for providing meaningful legal assistance to low-income tribes and Indian people may be the current system of federally-funded Indian Legal Services. This delivery system, with its 34-year track record of unprecedented accomplishments, works well—except for being drastically underfunded.

It works well because it has the flexibility to focus on the most pressing legal needs in each tribal community. Local boards of directors and experienced staff make flexibility possible. A major ingredient in this system is the independence of these offices. By virtue of receiving their primary funding through the Legal Services Corporation, they can operate independent of state political interests (which may well be contrary to tribal interests) and tribal politics (which also may be self-serving in ways that are not consistent with the fundamental principle of access to justice). The relatively deep federal pocket, besides having a legal and moral nexus through the federal trust relationship, is, by virtue of its depth, a much more stable funding source than the tribal treasuries.

The currently-designed Indian Legal Services offices possess the Indian law expertise, the institutional memory and the cultural sensitivity to provide access to justice in Indian country. The biggest drawbacks to the current system are the historic underfunding of legal services and the periodic budgetary and regulatory attacks by Congress. Nonetheless, these offices have survived. If supplemental funding can be found to further support their work, Indian Legal Services can continue to provide a major contribution of justice in the increasingly complex world of Native America.

IV. CONCLUSION

The ability of Indian Legal Services programs and their employees to deliver effective and meaningful legal representation to Indian people and tribal clients in the environment described above - indeed to have *succeeded* at it for over 30 years, against all odds - is one of the truly remarkable achievements in the entirety of the history of the Legal Services movement in America. The final measurement of the success of these lawyers and advocates can only be whether Native peoples and tribes in America are given the right to be free to remain distinct people, culturally and politically, and to seek to secure their sense of justice within the American system of government. The question for policy makers is whether it is possible to provide access to meaningful legal services in Indian country without funding Indian Legal services.

An estimated 40 percent of this country's Native American population of over 2 million persons is eligible for services from Indian Legal Services programs. And, unlike urban areas in America where there is a private bar which can assist in meeting the legal needs of the poor, there is simply no private bar resource in Indian country. In the past 30 years, Indian Legal Services has become an integral part of the promise of equal access to justice. Given the historical special obligation of the United States to this unique political and minority group, it is unacceptable, and a violation of the United States' trust duty to Native American people, to consider at this point in our history the elimination, or diminishment, of Indian people's most reliable access to the American system of justice, paticularly given the momentum building among tribes today to become economically viable in the American societal promise of equity and justice for all.

It remains vitally important that Indian Legal Services be funded with a healthy and specific portion of the Legal Services Corporation budget. The current reduced Legal Services Corporation budget should be increased to more realistically match the legal needs of low-income groups and individuals. Additionally, exploration of supplemental funding from other federal sources, as well as independent private or foundation sources, is encouraged to continue this most basic attribute of a civilized society—access to justice.

As America grows and matures, it must attend to all its citizens—not least of which are the culturally diverse and politically unique Native Americans for whom the provision of legal assistance is a vital component of tribal and individual integrity.

V. LEGAL SERVICES CORPORATION FUNDED INDIAN PROGRAMS AND COMPONENTS AS OF MAY 1997

1. Alaska Legal Services
2. Pinal & Gila Counties Legal Aid Society (Arizona)
3. Community Legal Services, Inc. (Arizona)
4. Papago Legal Services, Inc. (Arizona)
5. Southern Arizona Legal Aid, Inc.
6. DNA-People's Legal Services, Inc.
7. California Indian Legal Services, Inc.
8. Colorado Rural Legal Services, Inc.
9. Native Hawaiian Legal Corporation
10. Idaho Legal Aid Services, Inc.
11. Pine Tree Legal Assistance, Inc. (Maine)
12. Michigan Indian Legal Services, Inc.
13. Anishinabe Legal Services, Inc. (Minnesota)
14. Montana Legal Services Association
15. Legal Services of North Carolina, Inc.
16. Legal Assistance of North Dakota, Inc.
17. North Dakota Legal Services, Inc.
18. Legal Aid Society, Inc. (Nebraska)
19. Southern New Mexico Legal Services, Inc.
20. Indian Pueblo Legal Services, Inc. (New Mexico)
21. Nevada Legal Services, Inc.
22. Oklahoma Indian Legal Services, Inc.
23. Oregon Legal Services Corporation
24. Dakota Plains Legal Services, Inc.
25. Texas Rural Legal Aid, Inc.
26. Utah Legal Services, Inc.
27. Northwest Justice Project (Washington)
28. Wisconsin Judicare, Inc.
29. Wind River Legal Services, Inc. (Wyoming)

FOOTNOTES

1. Morton v. Mancari, 535 (1974).

2. 42 U.S. 2996 et seq.

3. Robert A. Williams, "The American Indian in Western Legal Thought" (1990).

4. Frank Pommersheim, "Braid of Feathers: American Indian Law and Contemporary Tribal Life" (1995).

5. Petra T. Shattuck and Jill Norgren, "Partial Justice: Federal Indian Law in a Liberal Constitutional System," at 28-29 (1990).

6. Robert N. Clinton, Tribal Courts in the Federal Union, 26 Willamette L. Rev. 841, 855-856 n. 41 (1990).

7. Indeed, Indians have their own Civil Rights Acts, 25 USC Sections 1301-1326, and the Child Welfare Act, 25 USC 1901-1963.

8 That the United States has not been anxious to assert the interests of tribes in cases where the relief requested might significantly interfere with the interests of non-Indian private property holders is best demonstrated in the case of east coast tribal land claims, most notably the claims of the Oneida Indians of New York (see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 611 (1974) (private counsel files suit to assert tribal claims for trespass on federally protected land)), and the Passamaquoddy and Penobscot Indians of Maine. In fact, it was an LSC-funded program (Pine Tree Legal Assistance) that was forced to sue not the trespassing private property.

9. This reticence to assert and enforce Indian property rights does not apply only to cases involving tribal claims. It occurs with frequency in the case of individual Native lands. For example, Washington States' LSC grantee, the Northwest Justice Project, currently represents individual Native Americans in an effort to protect trust property from continuing trespass by non-Indians. Demand has been made upon the United States to appear and defend the integrity of the NJP client's right to use the land free from trespass. To date, the United States has not appeared. *Folk v. Bureau of Indian Affairs* (administrative demand made upon BIA to protect trust lands from continuous trespass by the public and private parties, and to seek appropriate damages).

10. Substantial opportunity exists for inter-tribal disputes on critical issues. Washington State has a large number of Indian allotments that remain in the control o f individual allottees and their heirs. Cases involving the unauthorized use, occupancy, trespass, appropriation, and destruction of such land are not rare, and the presence, of the United States as "trustee" cannot adequately insure that all such interests are effectively represented, particularly in cases where the interests of tribes and individual members are at odds. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987) (LSC-funded legal services program forced to sue the Unites States to protect the property interests of individual Indians claiming fractional ownership shares of previously allotted lands which, under the Indian Lands Consolidation Act, were to escheat to the tribe without compensation.)

11. The United States does not always have the resources to meet the needs of all small, poor tribes. It has sometimes been necessary for legal services staff to begin the research and investigation of a potential claim before the Justice Department will become involved. And, in some cases as noted above, the United States declines ever to take a position, forcing the tribes to rely on legal service representation if the matters are to be adjudicated at all. Even when the United States has a "commonality of interest...in the proceeding or on the issue", it may not have the resources or interest to advance the tribe's position, and the tribe will be left to its own devices to ensure effective assertion of its claim.

12. *Mountain Village Residents' Homebuyers' Committee, et al., v avcp Housing Authority and HUD*, (D. Alaska No. A-0046 Cia).

13. For a number of years, an Evergreen Legal Services attorney has worked with the Senate Indian Affairs Committee to insure meaningful and appropriate protection of income earned from Indian trust property form being considered in determining eligibility for Social Security Disability and SIS benefits.

14. Chilkat Indian Village V. Johnson, 870 F. 2nd 1469 (9th Cuit 1989), on remand Nos. J-84-024, A-085 Cia. (Federal District Court); Chilkat Indian Village, IRA v. Johnson, 20 Ind. L. Rptr. 6127 (Calcite Indian Village Tribal Court Nov. 3, 1993).

15. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831).

16. *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832).

17. Getches, David H., "Difficult Beginnings for Indian Legal Services," 1972, National Indian Law Library, Boulder, CO.

18. Native American Expansion Funding Guidelines, 44 Fed. Reg.74, 946 (1979).

19. Congressional Reg H.R. 3480, Reauthorization, June 17, 1981 debate.

20. Tosco Foundation, Getches and Greene, "Legal Services Corporation: American Indian Population Study, October 1978.

21. Lieberman, Joan C., Legal Services Corporation, "American Indians: Their Need for Legal Services," September, 1976.

22. Senate Select Committee on Indian Affairs, 99th Congress, First Session, "Federal Programs of Assistance to American Indians," Committee Printing 1985.

23. In the 1996 Budget, Congress required "equalization" for most programs and services, but continued to use historic funding levels to determine grants for Native American programs. Still, total funding for the Legal Services Corporation was not based on a formal or any other objective criteria.

24. Eight-two percent of Navajo Nation residents speak Navajo as their primary language, and eight and one half percent of all members of the Navajo Nation do not speak any English. [See 1990 Census, Population and Housing Characteristics of the Navajo Nation].