AMERICAN INDIAN POLICY REVIEW COMMISSION

FINAL REPORT

Task Force No. 3

Federal Administration and Structure of Indian Affairs

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PREFACE

The Task Force on Federal Administration and Structure of Indian Affairs, acknowledging the challenges set before them by Congress, has collected and reviewed data from a broad spectrum of Indian issues and set down recommendations for change which will improve relations between the American Indian and the United States government.

The Task Force further acknowledges that prior accomplishments resulting in significant progress have been made and that the present federal system does contain elements which enhance Indian affairs; but this report will address itself primarily to those specific policies, practices and procedures which have been pinpointed to be most in need of change or elimination.

During its twelve-month existence, the Task Force has sought to answer the question: "What do Indians want?"

In order to answer this question, the Task Force has met with over one hundred representatives of tribal governments; solicited documents from hundreds of individuals, organizations and tribal governments. We have conducted five joint hearings with other Task Forces and the full Commission at nine localities in the United States. We have collected thousands of pages of testimony, historical and legal data, and have reviewed the historical policies and positions of Indian nations and tribes from the early beginnings of

the United States with major focus on the last seventy-five years.

The Task Force has sought to emphasize Indian views and perspectives on every issue treated in our report. We have relied on both the contemporary and historical views of Indians to base our recommendations. In many instances, we have depended on the interpretations of the laws as made by the Supreme Court.

An important part of researching and developing a report such as this is the extent to which individuals offer assistance and advice. Many people, both Indian and non-Indian, offered help and encouragement in the preparation of this report. Of special note are those who took interest in seeing that this report covered all possible sources of information. Sherwin Broadhead, William Veeder, Gene Joseph, Jack Peterson, Wendell George, Ken Hansen and Suzanne Harjo are such people.

Review and exchanges of information by members of other Task Forces has helped considerably. A special report requiring collection of tribal material was financed in conjunction with other Task Forces, coordinated by Lee Cook, organized and written by Dianne Pierce, Agnars Svalbe, Carole Wright, Laurel Rule and John Kough.

Special and valuable research papers were prepared by the Core Staff and Research Staff. We thank Gil Hall, SuZanne Ahn, Jenice Bigbee, Dennis Carroll and Dick Shipman for their

special studies and analyses.

Very significant contributions have come from Indian tribal leaders who presented testimony at hearings and meetings which serve to support our recommendations.

In addition, the American Indian Law Center, University of New Mexico School of Law, prepared a special report (Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs) which the Task Force utilized as support data of several of our recommendations.

For all the help, we wish to extend our sincere appreciation; this effort would not have been possible without them.

INTRODUCTION

Pursuant to Public Law 93-580, the Task Force on Federal Administration and Structure of Indian Affairs was primarily charged with the responsibility to conduct:

1. "a review of the policies, practices and structure of the federal agencies charged with protecting Indian resources and providing services to Indians: Provided, that such review shall include a management study of the Bureau of Indian Affairs utilizing experts from the public and private sector"; [Section 2, paragraph 2]

2. "an exploration of the feasibility of alternative elective bodies which could fully represent Indians at the national level of government to provide Indians with maximum participation in policy formation and program development". [Section 2, paragraph 5]

In accordance with these inquiries, it was later determined that the Task Force should (as a secondary consideration), conduct:

3. "an examination of the statutes and procedures for granting federal recognition and extending services to Indian communities and individuals". [Section 2, paragraph 3]

In accordance with these general areas of inquiry, the Task Force focused its attention on four specific subject areas:

1. Administration of the Trust: This subject area concentrates on the Department of Interior and Department of Justice. Inquiries were aimed at how these departments perform their duties to manage and legally protect Indian rights, property and resources. We demonstrate how the current policies and practices of these departments affect Indian nations, tribes and people, and how the structure of Interior and Justice subordinate Indian affairs and contribute to ineffective methods of tribal land and resource management and protection. We assert the need for immediate changes in the present policies, practices and procedures within these departments. We furthermore assert the need to make major structural changes.

2. Delivery of Services: In this area, we have concentrated on the policies, practices and structure of both the Executive Branch and the Legislative Branch as they relate to administering programs intended to assist Indians to become self-sufficient. This inquiry has included a review of statutes, agency regulations, as well as the historical evolution of federal Indian delivery systems. We have reviewed the historical and present-day views of Indian nations and tribes regarding the character and methods of service delivery most suitable to their needs. We show in our report how the present delivery systems are confused and damaging to tribal interests and how a system could be established to fully serve Indian needs.

3. Management of the Bureau of Indian Affairs: We have focused on the historical development of the Bureau of Indian Affairs, its present-day operation and the views and experiences of Indians regarding the Bureau's policies, practices and structure. We have reviewed the difficulties experienced by Bureau personnel and Indian tribes which flow from the subordination of Indian affairs within the Department of the Interior. We show in our report how the present structure, location and practices of the Bureau of Indian Affairs harm Indian nations and tribes with the consequent need to separate Indian affairs from the functions of the Department of the Interior.

4. Feasibility of Alternative Indian Elective Bodies: This subject area is treated as a distinct matter. We reviewed the historical-political relationships between Indian nations and the United States and sought knowledgable Indian opinions to determine the feasibility of a national Indian elective body. Our review necessarily depended heavily on the official views of tribal governments and numerous individuals, largely because of the total lack of experience anywhere in the national government or the general public. Due to the newness of this subject, it was possible only to review various alternatives which may be considered by tribal governments and the national government. By examining the experience of the Micronesian trust territory in its efforts to establish an elective system, we show how a process

might be initiated to determine the actual political status of Indian tribes and the method by which Indians participate directly in the policy making and program development activities of the national government.

In addition to the above mentioned areas of specific inquiry, the Task Force became primarily responsible for a study of the Bureau of Indian Affairs management systems. In accordance with the charge contained in PL 93-580, Sec. 2, paragraph 2, we initiated a separate "Management Study of the Bureau of Indian Affairs". Details of the internal management of the BIA is fully covered in this study with a special emphasis on the budget and planning process, management information systems, personnel management and a review of previous management studies. This study is not treated in the body of the report, but is rather attached as a supplement to our analysis.

The hypothesis used to shape this report is that a new Indian policy can be derived from an understanding of U. S. policy and actions toward Indians and an understanding of Indian policies and views regarding the United States. By placing U.S. policies against Indian policies, it becomes possible to define policies, practices and structures which serve the interests of Indians and the national government.

The standards of interpretation we have used are those of the United States Supreme Court. We have taken the recorded policies and views of tribal governments as expressed

in resolutions and position papers as representations of the Indian view. Added to this Indian view we have taken the analysis of knowledgable scholars and tribal representatives as major contributions to our findings. The combined total of our own inquiries and the expressed views in tribal governments and the national government is contained in our report.

I. SUMMARY OF FINDINGS REGARDING FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS

A. General Overview

The Congress, when it enacted Public Law 93-580, determined that:

> "...the policy implementing this relationship has shifted and changed with changing administration and passing years, without apparent rational design and without a consistent goal to achieve Indian self-sufficiency."

In so recognizing the shifting character of federal Indian policy, the Congress recognized the dilemma of administering federal Indian relations and the confusion surrounding two hundred years of law-making, administrative and legal interpretations in Indian affairs.

The principal reasons for this condition are identified as follows:

1. The Congress of the United States, while determining how the American Indian should be dealt with, has deviated from time to time by enacting legislation which has reduced lands, disturbed tribal governments, and threatened termination of tribal existence.

2. The Bureau of Indian Affairs restricted by the Department of the Interior, is guilty of ineffective practices, weak in Indian advicacy and under such control, is unable to adequately plan, supervise and perform the functions for which it was designed.

3. The Department of the Interior is the most guilty when exercising the trust responsibility. This duty requires the highest degree of skill, care and diligence, but political pressures, conflicts of interest and administrative neglect of duty all counteract realization of this end.

4. The Justice Department reflects the same neglect of duty; administrative delay, conflicts of interest and cases handled at such a low level of organization all contribute to this neglect.

5. Departments and Bureaus of the federal government outside the Interior and possibly Indian Health Service have no concern for nor see any obligation to the American Indians' trust status and entitlements required through treaties and other special Indian laws; other than an Indian Desk, there is little or no organized delivery mechanism to include Indian concerns in the normal operation.

The inconsistencies in federal law, policies and practices in relation to Indian nations and tribes reflect a profound disregard for the rights of Indians to remain a separate people. The United States can be said to have four major policies toward Indian nations and tribes:

1. The utmost good faith shall always be observed toward the Indians;

2. Their lands and property shall never be taken from them without their consent;

3. Laws founded in justice and humanity shall,

from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them;

4. The sovereign, inherent right of self-government of Indian nations and tribes shall be respected and protected by the United States.

The principles of "utmost good faith", Indian consent, and U.S. protection of Indian rights and property have been embodied in major legislative acts of Congress progressively:

Northwest Ordinance of 1787;
Trade and Intercourse Acts of 1790, 1791, 1802 and 1834;
The Snyder Act of 1924;
Indian Reorganization Act of 1934;
Menominee Restoration Act of 1973; and
Indian Self-Determination and Education Act of 1974.

Treaties, agreements and the aforementioned favorable major Acts of Congress combine to attest to the consistent intent of Congress to abide by humane laws. Congress, however, has set its own pattern of inconsistency by enacting legislation which resulted in violating treaties, agreements and its major legislative policies. These contrary legislative enactments sought to:

1. Exterminate and remove Indians from their homelands without their consent (i.e., Indian Removal Act of May 28, 1830);

2. Individualize tribal lands and destroy the tribal community and culture (i.e., Act of March 3, 1847 and the General Allotment Act of 1887);

3. Assimilate Indians into the general population and terminate the U.S. responsibility to preserve, protect and guarantee Indian rights and property (i.e., Seven Major Crimes Act of 1924, House Concurrent Resolution 108 in 1953, Public Law 83-280).

The Judicial Branch of the government has, perhaps, been more consistent in its interpretation of the vast body of Indian law. From the landmark case of Worcester v. Georgia, 31 U.S. 515 (1832), to Winters v. United States, 207 U.S. 564 (1908) and more recently, U.S. v. Washington, 384 F. Supp. 312 (1974), the courts have consistently recognized the sovereignty of Indian tribes and nations as well as their inherent right of self-government. The courts have consistently upheld Indian paramount rights to land and resources. Such court rulings have frequently been hindered "after the fact" thereby causing problems when attempts to correct encroachments are initiated by Indians.

The courts, though never withdrawing from supporting the historical pattern of asserting Indian sovereignty and the inherent right of self-government, have been responsible for allowing erosion of tribal independence and the exercise of self-government. Numerous decisions of the Supreme Court have diminished tribal powers by asserting the right of the United States to legislate the internal affairs of Indian tribes without proper authority through "just and lawful wars" (Northwest Ordinance, 1787).

The Executive Branch has exercised, with few exceptions, consistent policy of forced assimilation of Indian populations, diminishment of tribal land base and exploitation of Indian rights and property. These policies have rarely shifted to reflect the good faith policies or major Congressional Acts and the large body of favorable judicial decisions.

None of the three great branches of government operate entirely isolated from each of the others. It appears, however, in the broad area of Indian affairs, the Executive Branch has most consistently violated the four principles of good faith embodied in legislation and judicial decisions.

Indian tribes and people, in contrast to the federal government, have consistently urged that the United States abide by the more than three hundred treaties and agreements. Indians have frequently insisted that the United States abide by its own laws. Indians view their relations with the U.S. as best outlined in the Northwest Ordinance which reflects tribal claims of sovereignty, self-government, and the right to be represented in any action of the United States which affects the lives, rights and property of Indians.

The most destructive policies of the United States toward Indians have been "forced assimilation" and "termination". Both policies have been aimed at the same end: destruction of the tribal community and the transfer of Indian lands and resources from Indian control to non-Indian

ownership. Almost every action of the federal government in Indian affairs from the beginning of the republic has been seen by Indians to be directed at the elimination of Indians, their culture and their property. Despite well-intentioned legislative enactments, Indians carefully search for any hidden elements which will lead to the termination of U.S. responsibilities to protect Indian rights and property.

Even though the courts have consistently held that the United States owes a responsibility to preserve, protect and guarantee the rights and property of Indian nations and tribes, they continue to exist under the threat of destruction.

In this perpetual state of uncertainty and the continuing threats to the existence of Indian nations, tribes and people which the United States must remove, Indians must be assured of perpetual protection by the United States and their perpetual right to exist as Indians with their governments, culture, special rights, lands and resources intact without the threats of liquidation, forced assimilation and termination.

If Congress enacted a policy which removed the threat of "forced assimilation" and "termination", it is the belief of Task Force #3 that many of the difficulties associated with transferring responsibilities to the tribes will be eliminated; the United States could renew its willingness to act in good faith toward Indian nations and

tribes; and a new Indian policy will have been set in law which insures the healthy growth of Indian communities and the full opportunity of Indians to exercise their inherent rights as a people. This will allow a stronger base upon which to administer Indian affairs.

We turn now to a summary review of our findings relative to the practices, procedures and structures of Federal Administration of Indian Affairs. The major focus of this review is on how the Executive Branch and Congress function to carry out the provisions of treaties and agreements. Furthermore, we are concerned with how the United States can match its good promises to Indian nations and tribes with equally good acts. We believe as Chief Joseph once said:

> "Good words do not last long unless they amount to something... I am tired of talk that comes of nothing. It makes my heart sick when I remember all the good words and all the broken promises."

B. Administration of the Trust

being used by one or more tribes. In a follow-up study conducted by the University of New Mexico Indian Law Center, it was concluded that Indians were not being supplied with adequate information about federal programs and that tribes continue to experience difficulty securing assistance from these programs because of inadequately trained personnel at the tribal level.

We find that the New Mexico study and the NCTO study reveal a consistent pattern that supports the results of current inquiries of Task Force #3. We find the following:

1. Numerous statutes are promulgated by Congress and executed by the Executive without consideration of their applicability to tribal governments - nor are these statutes consistently inclusive or exclusive of tribal government eligibility.

2. Inquiries and research have provided factual information which reflect a widespread lack of knowledge, awareness and understanding as well as inaccurate information within federal agencies regarding the legal and political status of Indian nations, tribes and people. Federal agency personnel tend not to understand the U.S. trust responsibility owed to tribes. They do not consider their agencies as having a similar responsibility to preserve, protect and guarantee Indian rights and property. These circumstances have led to frequent infringements on Indian rights.

3. Federal agencies do not provide a direct means for tribes to make their future funding needs known before appropriation requests are presented to Congress. This creates uncertainty concerning future program services and a less than adequate means for planning program changes and program expansion.

4. Federal agencies have little or no organization other than an "Indian Desk" to guarantee adequate and equitable delivery of services to Indians either as citizens or as governmental entities.

5. There continues to be, in spite of studies conducted in recent years, an inequitable delivery of technical assistance and services to Indian tribes. Tribes equipped with capable technical staff and financial resources are more successful than smaller, less well-developed tribes in preparing basic proposals to secure funds for federal program assistance.

6. Federal Regional Offices are geared to serve well prepared "state and local governments" but experiences reported by Indians indicate that they are generally an inadequate and inappropriate vehicle for delivering services and assistance to Indian nations and tribes. Tribes have very little political competitive power when attempting to secure funds through this medium.

7. Federal agencies do not coordinate their efforts to develop guidelines and regulations, resulting in

a complex maze of standards, procedures and accounting systems which heavily burden tribal government administrative capabilities. When different agencies create programs which are similar to one another, different guidelines are often developed for the same kinds of activity. It becomes difficult for tribes, under these circumstances, to develop coordinated and comprehensive programs at the local level.

8. When various governmental programs are required to be governed by boards, authorities and committees at the local tribal level, the tribal government is weakened and tribal council controls are minimal.

Consideration has been given to a system of delivering services through a single agency in order to reach urban, non-reservation and all Indians wherever they may be physically located. Location does not diminish the obligation of the United States to provide such services to American Indians.

D. The Management of the Bureau of Indian Affairs

The Bureau of Indian Affairs was originally founded as a kind of diplomatic arm of the Congress, responsible for treating and conducting trade with the Indian nations and tribes. Since being first assigned to the War Department and then placed under the Secretary of the Interior in 1849, it has become the major influence in the lives of the Indian nations and people.

The Bureau of Indian Affairs was charged with the responsibility of managing the United States' responsibilities to Indian tribes and all matters arising from Indian affiars. However, it has become the agency which manages the affairs of Indians -- by its actions, it influences how Indians will live, use their land and very importantly, how Indians will be governed. Indian tribes have opposed this "paternalism" for many years but in spite of frequent changes made in policy and structure, paternalism persists.

The Bureau of Indian Affairs has become a massive bureaucracy with nearly 18,000 employees. It operates with a complex and contradictory manual that has not been updated totally for nearly ten years. There is no adequate system for reporting to Congress or Indian tribes how monies are expended and whether they are expended in accordance with specific needs of tribes and the intent of Congress.

The Bureau of Indian Affairs has been regarded by Indians as both a friend and an enemy -- a friend because it symbolizes the continuing responsibilities of the United States to Indians - an enemy because the Bureau has not consistently prevented the erosion of Indian rights and property and has, on occasion, been responsible for the erosion of these rights and property.

The Bureau of Indian Affairs has also, on occasion, involved itself directly in tribal elections to elect "suitable Indian leaders"; mismanaged Indian funds, tribal and individual leases; and acted in concert with private commercial interests to use Indian natural resources for the benefit of non-Indians.

The Bureau of Indian Affairs has disrupted Indian families through inadequate family considerations in its relocation programs and has allowed Indians to continue in a state of poverty by withholding the direct expenditure of federal monies for Indian benefit. The Task Force further finds that:

1. The Bureau of Indian Affairs does not have a <u>systematic, long-range program planning capability</u> -- it does not arrange its technical and service priorities in accordance with the future needs of an planned development for Indian communities.

2. The Bureau of Indian Affairs is staffed with employees, some of whom are not committed to the development of Indian lands and resources for tribal benefit. They are frequently unprepared and unsympathetic to effectively work for the interests of the tribes. The employees often lack current

knowledge of resource development techniques and other modern professional expertise is lost in older career employees because updating of professional skills are not required, as practiced in private activities. They often lack a basic understanding of the tribes they serve and the needs of those tribes by not considering themselves as part of the "Indian community" life.

3. When local agency superintendents are requested to take immediate action to protect a tribe's resources of land interests, they are found to not have sufficient authority to take action, nor do any emergency procedures exist. This reflects inadequate delegation of proper authority at the proper level of organization. In some cases, superintendents are reluctant to assume authority for lack of clarity and understanding.

4. When an Indian tribe or individual needs to resolve a problem involving individual Indian monies, education and health services or land ownership, they must depend on a complex system of appeals through the various levels of the Bureau. This system is cumbersome and inefficient and usually serves as a block to problem-solving.

5. The Bureau's resource management and economic development assistance activities are deficient and do not provide adequate potential for Indian use of Indian land and resources. This is especially true in the mineral and surface lands leasing programs.

6. Indians want to exercise control over Indian schools though they are prevented from doing so because of a reluctance of the Bureau to encourage Indian parent and tribal government influence in this area of Indian life.

7. The Bureau of Indian Affairs is misinterpreting and is inconsistently applying the "Indian preference" requirements. This reflects adversely on the ability of the Bureau to perform at any satisfactory degree of effectiveness and discourages qualified Indians from applying for positions in the Bureau of Indian Affairs.

8. The budget system (Band Analysis) provides an eighteen-month span of estimating needs without a realistic goal of long term needs of the tribe. The Band Analysis provides only a small margin for decisions and on less than half of the Bureau of Indian Affairs budget. There are more programs not banded than are on the Band and the Indian tribes do not even see or know what the unbanded programs contain.

9. A centralized data processing system is being updated, but various other offices are establishing minicomputers without regard to the central plan. This will be expensive, undermine the central activity, duplicate or deprive the central system of bureau-wide data.

10. The Central Data System provides certain data, but comparative information to determine if the funds are distributed in accord with tribal needs as justified to Congress

is not provided. Neither are these adequate checks and balances to determine if equitable use of funds to Indian tribes is being achieved.

The Task Force recognizes there are three specific detailed investigations being conducted simultaneously with federal administrative policies and practices being reviewed in detail. These are not entirely available to the Task Force. However, such data will supplement this report and will be available to the Commission for their use in the Final Report to Congress. These studies are: (1) Federal contracting; (2) Federal budget; (3) BIA Management Study.

Having a Task Force member participate in establishing and conducting these studies has allowed certain elements to be coordinated with other reviews conducted directly by our Task Force.

B. Feasibility of Alternative Indian Elective Bodies

Indian nations and tribes seek to exercise their right of self-government and all sovereign powers of any nation or state. The courts and Congress have recognized tribal sovereignty -- the Indian tribes' right to govern themselves. On at least two very early occasions, the United States invited Indian nations and tribes to join the confederation of states and send delegates to Congress, but tribes chose to remain independent nations.

The Supreme Court has said that the United States is the trustee for Indian nations and tribes after the fashion of a greater power protecting, but not dissolving, the interest of a lesser power. While this may be the proper relationship between the United States and the Indians, the actual state of affairs suggests that the United States is occupying Indian territory and using Indian territory in a fashion of a colonial power. Indeed, Indian lands and people are ruled by a "government department" in much the same way Britain ruled its colonial empires.

We further find that:

1. It is not considered by Indian tribes and people to be desirable for the United States to create a political institution for Indians through which Indian nations and tribes may officially participate directly in the national policy-making and program development activities of the U.S.

government. But rather, it is an internal Indian decision whether such efforts should be initiated and how a tribe will retain its own sovereign identity in any such organization. Since each state, county, and municipality deals as a separate entity within the federal structure, so do Indian nations feel they should be permitted the same privilege to deal directly, as necessary.

2. The more than three hundred Indian nations and tribes (including Alaska Natives) represent diverse social, cultural and political units which have only just begun developing extra-territorial institutions and alliances which constitute loose political entities among tribal governments.

3. There is no clearly defined position among Indian nations or within the national government concerning the political status of Indian nations and tribes.

4. Following are four alternate methods for establishing direct tribal participation in the national government as discussed at two special meetings of Task Force #3:

a. Election of Indian voting or non-voting delegates to the U.S. Congress from four Indian-created states or territories: Northwest, Southwest, Midwest and Southeast.

b. A tribally-created "Union of Indian Nations" which exercises varying degrees of governmental authority dependent on the extent that Indian nations and tribes lend their own powers to it.

c. Election of an Indian Board of Representatives or Commissioner empowered to define U.S. policy toward Indian nations and direct the program development activities and coordinate with all departments of the federal government as they relate to Indian interests.

d. Recognition of Indian tribes in a manner similar to the trust relations between the federal government and Micronesia.

5. Tribal efforts with national Indian organization support to initiate legislation within the national government are impaired by an administrative system and legislative system which does not have adequate capability, experience, or knowledge to decide Indian needs and interests much less the right to do so without Indian consent.

6. An Indian tribe may be defined as being a small nation which had its documented origin prior to the coming of European explorers and whose descendents have continued its cultural and political existence. An Indian nation may exercise governmental powers over those persons who naturally are or who join and express allegiance to that established Indian nation. An Indian nation exists if it is recognized by the majority of Indian nations around whose areas such pre-European history has identified.

7. An Indian is a native person who has primal allegiance to an Indian nation, who is entitled to be or who has (by formal procedure or birth) been officially accepted

as being a member by appropriate Indian authorities within a distinct Indian nation.

8. Congress does not have a unified method for overseeing the Executive as to whether it "carried out" legislative enactments as actually intended when concerned with Indian affairs.

9. The unilateral extension of citizenship to Indians by the United States did not greatly enhance the rights of Indians. In some areas, it has been interpreted as a means for eroding tribal rights, sovereignty and preventing the exercise of self-government.

10. The total Indian population is not grouped in any location in sufficient numbers to have even the slightest influence in the policy-making or program development activities of the United States government for Indians. Indians, as a result, do not have direct representation in the national government.

11. Indian nations and tribes require substantial financial and technical assistance to subsidize tribal governments because of their small revenue base and should a national alliance be voluntarily developed, substantial financial assistance to facilitate the operation thereof would be necessary. Such plans advanced include an annual grant similar to the Canadian plan or by establishing a "permanent trust fund" from which the proceeds of earnings could be directly available to the appropriate Indian

organization.

12. Indians do not have an effective method to redress grievances when the United States violates Indian rights or usurps tribal powers, especially as they consider such relations within the jurisdiction of the Legislative Branch.

13. In excess of ten Congressional committees exercise jurisdiction over matters related to Indian affairs, many of which are not adequately informed about United States/Indian relations.

F. Principal Recommendations

In order to remove the continual threat of termination of the trust, we recommend that:

1. Congress enact a law which formally affirms the continuing United States responsibility to preserve, protect and guarantee Indian rights and property. This policy should not permit the liquidation of Indian lands and resources or terminate the trust relationship with any Indian tribe, but should affirm a perpetual trust relationship.

In order to provide a more common point of assembling data on Indian affairs and establish a basis for improved consistency by the Congress, we recommend that:

2. Congress create a full Committee on Indian Affairs in the House of Representatives and a full Committee on Indian Affairs in the Senate. These will replace the two Subcommittees on Interior and Insular Affairs in the House and Senate.

a. Each full Committee should have a staff experienced in Indian affairs in sufficient number to insure that Committee members will have access to maximum informed assistance. The Committees should have the usual power of oversight and power to review all legislation which may have impact on Indian nations, tribes and people.

It would be naive to assume that the Secretary of the Interior would suddenly become aware of his trust responsibility to the Native American people. Historically, he has

been allowed to deal with Indians under rules and regulations that weigh heavily against any rights or benefit Indian tribes or individuals may have. The Secretary of the Interior has not fulfilled his duties as the trustee. Indeed, the Secretary of the Interior has been permitted to be despotic with his authority. Therefore, in order to remove serious "conflicts of interest" problems, separate administrative layers, and to provide administrative control and legal counsel for Indian advocacy, we recommend that:

3. Congress establish an "Independent Agency for Indian Affairs". The authority and responsibility for matters relating to Indian affairs or arising out of relations with Indian nations and tribes shall be removed from the Department of Interior and vested in the Independent Agency. The Independent Agency for Indian Affairs should be devoted to technical assistance, primary service delivery, program development assistance and legal protection of Indian rights and property.

a. The Independent Agency be empowered to coordinate all the activities of the federal government in response to the overall program needs of Indian nations, tribes and people.

In accordance with this power, the Independent Agency be mandated to participate in all program and budget planning activities of other federal agencies, bureaus and departments whose programs are available to the citizens of

the United States to provide for adequate funding for American Indian tribes and people.

b. The Independent Agency include a legal department responsible for providing legal protection of Indian rights and property. The legal part of the Independent Agency be authorized to serve as the counsel to advise the Agency. The Agency have the option to initiate litigation with approval of and on behalf of Indian nations and tribes, or when appropriate, recommend that the Department of Justice provide supplemental services.

c. The Independent Agency have a "Commissioner" as its head, appointed by the President of the United States, subject to Senate confirmation. The Agency head should be appointed from a roster of candidates recommended by the Indian community. The head of the Agency should be appointed for a fixed term.

d. The Independent Agency be mandated by Congress to design an Agency budget, program and accounting system in a fashion which permits full and direct tribal participation in all elements of every program being provided for their benefit by the United States. The Congress's mandate should include a requirement that a detailed "national Indian budget" be drawn up in addition to an Independent Agency budget.

e. The Independent Agency be structured so that there are two levels of administrative authority, i.e., Central Office and the Agency Office at the tribal level. The

present Area Offices of the Bureau of Indian Affairs shall be abolished and replaced with regional administrative and, as appropriate, technical assistance offices, without line authority.

f. The Independent Agency be mandated to develop long range as well as short term tribal development programs which will reflect the annual funding needs for human and natural resources of each tribe. This program should be projected for at least 10 years and as each budget is submitted, a new year is added to the projection. The long range plans should be updated with the idea of providing a dependable approach to tribally projected goals in the short and long term needs.

g. The Independent Agency be charged with establishing an Agency Office for each reservation, Pueblo, band, rancheria and Alaskan district. In the case of smaller communities, a local office extension of an Agency should be established at each locality to provide technical assistance, services and protection. This should exist to recognize tribes as separate entities with diverse social and economic requirements.

4. Congress enact an "American Indian Tribal Government Assistance Act" through which direct appropriations for tribal governmental needs are met in the fashion of revenue sharing.

5. Congress <u>not</u> enact any laws to organize an Indian elective body for purposes of representing Indians in policy and program development activities.

G. Transitional Recommendations

The Task Force on Federal Administration and Structure of Indian Affairs believes that several immediate actions must be taken by Congress and the Executive Branch to improve present Indian administration and bring about more vigorous protection and assistance to Indian tribes while major changes in administrative arrangements are being made. Therefore, we recommend that:

1. A "Special Action Office for Indian Affairs" be created under the direction of the President. This Special Office be charged with the responsibility of planning and directing the administrative transactions of Indian affairs into the Independent Agency for Indian Affairs.

a. The Special Action Office be directly responsible to the President and Congress with full participation of tribal governments.

b. The Special Action Office be charged with the responsibility for developing a plan for organizing the Independent Agency for Indian Affairs and executing the administrative transition subject to the approval of Indian tribal governments through an acceptable system of participation, and Congress.

c. The Special Action Office be authorized to review and comment on any actions of the Secretary of the Interior and the Commissioner of Indian Affairs which impact on Indian tribes and nations during the transition.

d. The Special Action Office be authorized to develop a plan for employment through a special Indian Service Regulations to replace Civil Service Commission Regulations for the Independent Agency.

e. The Special Action Office be authorized and adequately funded to exercise its duties for a two-year period from the point of beginning.

f. The Special Action Office be directed to develop a government-wide plan for the institutionalization of Indian Impact Statements which would be required of any government agency or state government which intends to initiate actions which will impact on the lives and property of Indians.

2. The Bureau of Indian Affairs be immediately authorized to fund Indian programs by direct grant to tribal governments, tribal programs and where warranted, to Indian assistance organizations in addition to contracts.

3. All authority presently vested in the Area Office of the Bureau of Indian Affairs be distributed between the tribal government and the local agency as a result of negotiations between the tribal government and local agency superintendent.

4. Tribal governments be permitted to participate in the selection and employment of Agency Superintendents and Branch Chiefs. This process must be established in accordance with a negotiated agreement between the Commissioner and each tribe. Prior agreement and determinations of

qualifications, experience and position requirements should be accomplished.

5. The Bureau of Indian Affairs submit a full report of budget totals and budget breakdown to each tribal government and the appropriations committees before the appropriations processes begin.

6. In both administrative and judicial proceedings, Indians be assured competent, independent counsel. The extent that a tribe cannot afford counsel, the government should undertake to finance representation.

7. In cases free of conflicting government interest, the government fulfill its responsibilities under federal law to represent Indian tribes. This representation be under the direction of the client, not the government.

8. The budget system known as "The Band Analysis" be revised so that tribes may determine and participate in the formulation of all program items conducted by or for them on their reservation or for their benefit. This should provide for separate office budgets for each level of the Bureau of Indian Affairs.

CHAPTER 1.

ADMINISTRATION OF THE TRUST

A. Review of the Policy

The relations between Indians and the United States have been historically dictated by the nature of Indian land ownership and the unquenchable desire of U.S. citizens to use and occupy Indian lands. The Department of the Interior and the Department of Justice have become the primary instruments of the United States government responsible for both transferring Indian land to non-Indian ownership and, paradoxically, responsible for protecting and guaranteeing Indian interests in the land and resources. This conflict of missions has been the subject of numerous studies and analyses with the frequent conclusion being that it is nearly impossible for these two agencies to serve both the interests of the United States and the interests of Indians. Yet, in spite of these conclusions, the conflict has persisted for over one-hundred-twenty-seven years since the establishment of these departments.

To remedy this conflict, administrative and policy alternatives must be found. A closer look at the nature of Indian land ownership and the development of Indian trust administration is, therefore, warranted.

At the time of the first settlements by Europeans on the North American continent, no less than five powers (Britain, France, Netherlands, Spain and Sweden) laid claim to the sovereignty over the eastern seaboard. The Europeans justified their occupation and colonization of the New World by asserting the need to extend the knowledge of Christianity to the native inhabitants and to bring the infidels and savages living in the New World to human civility and to a settled and quiet government. The Catholic and Protestant monarchs both asserted title to the land, however, they differed in the sources of title.

> "...the former derived their title from the Pope who made the donation for the purpose of extending the kingdom of Christ; and the latter occupied the territory under the same pretence, without a grant; but neither asserted that prior discovery gave any right to the soil." 1 / [Emphasis added.]

The right to occupation was therefore derived through the Pope and from the obligation to Christianize the native population. Most importantly, the right of occupation was derived from permission granted by tribes settled on the land. The nature of European title was that of "use and occupancy" and, as Blunt points out, native title was viewed

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1 / Blunt, Joseph. A Historical Sketch of the Formation of the Confederacy Particularly with Reference ... The Jurisdiction of the General Government over Indian Tribes and the Public Territory. p.11

in the same manner:

> "In the British provinces, although individual instances may be found in which Indian rights were violated; their title to the soil was always respected by the public authorities. It was not, indeed, regarded as a fee simple, which cannot properly belong to wandering tribes in a hunter state. But that they had a right to territory within certain boundaries and that they were treated with by the colonial governments from the first settlement of the country until those governments became independent of the Crown, to induce them to transfer and sell their title to the whites, are incontrovertible facts." 2 / [Emphasis supplied.]

When the colonies of the various European powers began to grow and expand, conflicts erupted between them as they encroached into one another's territorial limits. It was at this point that the principle of "the right of prior discovery" was strongly asserted particularly when claims of title could not be supported by actual occupation. For over three hundred years conflicts between the European powers erupted time and time again as a result of the uncertain limits of each territorial claim. From the time of the first settlements to 1795, the purpose of the colonies evolved from mere missionary outposts of Christianity to outposts of commercial enterprise. With that change came a radical alteration in the nature of European title to the land. The purchase of Indian lands and their subsequent occupation by Europeans for an extended period of time had caused the evolution of European title from that of "use and occupation" to a status of "fee" which was vested in the

2 / Ibid, p. 11-12.

Crown and colonies and later, the United States. There was no similar change in the recognized Indian interest in territory. Indian title continued to be characterized as being one of "mere use and occupancy". The tribes' right to exercise sovereignty over their own territory, was to a considerable extent, impaired or diminished -- and their title of use and occupancy was considered by the Europeans to be extinguished either by conquest or by purchase.

The myth that Indian title is not one of possessory interest and "merely one of use and occupancy" grew out of an arrogant belief that Indians are "incompetent" to hold and control land. The ancient religious belief that Indians are "infidels, barbarous, uncivilized savages" survives to this day, though these views are expressed in more subtile ways.

The myth that Indians do not retain full title to their lands and all interests in natural resources, but have only temporary use until that title and those interests are extinguished by conquest or purchase was perpetuated by the U.S. courts. In 1810, the Supreme Court held "that the nature of Indian title, which is certainly to be respected by all courts, until it is legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State." 3 /

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3 / Fletcher v. Peck, 6 Cranch 142 (1810).

In a later Supreme Court decision, the character of Indian title was described as follows:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with legal as well as just claim to retain possession of it, and use of it according to their own discretion; but their right to complete sovereignty, as independent nations, were necessarily diminished. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to covey a title to the grantees, subject only to the Indian right of occupancy.
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> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy... to give also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the Crown or its grantees. The validity of title given by either has never been questioned by our courts, it has been exercised uniformly over territory in possession of the Indians. The existence of this power must negate the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it." 4 /

As Cohen points out in a paper titled "Original Indian Title": 5 /

4 / Johnson and Graham's Leases v. McIntosh, 8 Wheat. 572-90 (1823).

5 / Cohen, Felix S. Original Indian Title, Minnesota Law Review (1947).

"... a federal grant of Indian land would convey an interest, but this interest would not become possessory interest until the possessory title of the Indians was terminated by the federal government." 6 /

The only method by which Indian possessory title could be terminated by the federal government was, and is today, through obtaining Indian consent and the right of purchase.

It was against this historical background that the primary responsibility for managing the United States' relations with Indian nations and tribes was transferred from the War Department to the newly-created Department of the Interior on March 3, 1849. The new Department was created by consolidating the functions of the Patent Office, General Land Office, accounting authority for officers of the courts, Department of Indian Affairs 7 / and the Pension Office under the supervisory powers of the Secretary of the Interior.

With the transfer of the Department of Indian Affairs from the War Department, the Secretary of the Interior not only assumed the supervisory responsibility in relation to the Commissioner of Indian Affairs, 8 / but the role as the

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6 / Ibid, p. 294.
7 / Organized pursuant to an Act of Congress, June 30, 1834.
8 / Established pursuant to an Act of Congress, July 9, 1832. Providing that the Commissioner of Indian Affairs under the direction of the Secretary of War shall "have the direction and management of all Indian Affairs, and of all matters arising out of Indian relations..."

the primary agent of the United States responsible for protecting the rights and property of Indian nations and tribes. 9 /

From the very outset, the mission of the Department of the Interior came into conflict with the mission of the Indian agency placed within it. There had been substantial conflict between the mission of the War Department (to open up lands for white settlement up to the west banks of the Mississippi) and the mission of the Indian Service (direct and manage all Indian affairs and all matters arising out of Indian relations to preserve peace and friendship with Indian nations and tribes). The same conflict emerged within the Department of the Interior.

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9 The enactment of the Northwest Ordinance by the Continental Congress in 1787 spelled out the intent of Congress that the U.S. shall protect Indians from external encroachments on their rights and property when it stated that "... laws founded in justice and humanity shall, from time to time, be made for preventing wrongs being done to them..."
Subsequent legislative enactments demonstrate the intention of Congress to regulate U.S. citizens in trade and intercourse with Indian tribes (Trade and Intercourse Act. First Cong. Sess.II Chapt. 33,34. July 22, 1790) (Trade and Intercourse Act, 23rd Cong. Sess. I, Ch. 161, June 30, 1834, 4 Stat. 729), as a clear effort to protect Indians from "wrongs done to them. Presidental authority was required for enforcement of these Acts to be carried out by the Secretary of War. And the obligation of the U.S. to protect Indian tribes and nations is firmly established in the courts: Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), and U.S. v. Kagama, 118 U.S. 375, 383-84 (1886).

The Department of the Interior's major function had emerged as the broker of Indian lands. The objective was to transfer as much of the ceded Indian land into private ownership as possible while rapidly extinguishing Indian title to non-ceded lands for the same purpose. Commissioners for the Indian Service were selected with regard to their commitment to this objective while token recognition would be given to the U.S. obligation to protect Indian rights and property against encroachments.

The Executive Branch, through the Department of the Interior, continued to carry out the War Department policy toward Indians of removal, confinement, suppression of violence and appeasement. The policies and practices of the War Department were built on militarism and destruction of a racial minority -- reflecting the views of the old Indian fighter, General Andrew Jackson. The Interior Department's policies were only slightly modified from those of the War Department though the end results were the same -- destruction of Indian tribes and people.

Congress had successfully exercised the dominant authority for Indian affairs until General Andrew Jackson became President. Election of the "old Indian fighter" marked the beginning of increased control of Indian affairs policy in the Executive and the decline of Congressional power to set policy -- to regulate relations between Indians and the United States. John Collier illustrates

this point in his book, Indians of America. 10/

> "In 1828, Andrew Jackson was elected President. He was a 'borderer' and had been a famous Indian fighter. Immediately he put through Congress an Act called the Indian Removal Act which placed in his own hands, the task of leading or driving all Indian tribes to some place west of the Mississippi River." 11/

The "plenary power" of Congress to regulate relations between the United States and Indians 12/ had been dealt a serious blow. The Executive Branch had emerged as the dominant force in Indian affairs and sought to strengthen its hold by becoming the "expert" in all matters associated with Indians. The Congress had become a rubber stamp to the designs of the Executive. Though Congress had been a party to the violation of treaties in the past, it seemed to cast aside its solemn constitutional charge and its policies of respect for Indian rights and territories. It seemed to embrace General Francis C. Walker's view concerning honor toward Indians. Writing in 1871 as Commissioner of Indian Affairs, he said: "When dealing with savage men, as with savage beasts, no question of national honor can arise. Whether to fight, to run away, or to employ a ruse, is solely a question of expediency."

Theearly 1870's found the Interior policy-makers in the midst of a dilemma. They had successfully reduced Indian territory to tiny enclaves segregated from non-Indian

10 / Collier, John. Indians of America. 1947
11 / Ibid. p. 122.
12 / Constitution of the U.S., Article 1, Sec. 8, Clause 3.

populations and instituted a policy of non-interference. The question was whether this policy ought to continue or a policy of civilizing and assimilation ought to be emphasized... a policy which would require dismantling Indian reservations and reservation life. John L. Freeman wrote in his 1952 doctoral dissertation, the following observation about this period.

> "Having relieved the Indians of most of their land, having confined them to reservations and forced or bribed them to remain peaceful, the United States was confronted with the problem of whether to continue a system which would minimize the necessity of further adjustments by Indians, yet was an apparently unending system conflicting with American individualistic ideals, or to take individualizing steps which would end the system, yet which might involve more difficult adjustments for the Indians than ever before. The moral burden of what the United States had been doing to the Indians finally caught up with the policy makers..." 13/

The solution to the dilemma was generated by Interior policy-makers who offered the General Allotment and Citizenship Act of 1887. 14/ Between the two policy options, the choice was made in favor of civilization and ultimate assimilation. Survival of the fittest, the doctrine of social Darwinism, was the ruling system of thought. The view was that Indians ought to be given a freedom of choice on the same basis of other citizens. Each Indian ought to have the freedom to compete, to assume responsibility and participate in the national economy the same as all citizens.

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13 / Freeman, John L. The New Deal for Indians, p. 39.
14 / 24 Stat. 338.

The flaw of this system of thinking was that Indians were given the choice of surviving in a white and foreign world or die out as a people. Many Indians chose the latter. Indian societies which had been weakened as a result of protracted wars or neglect by the government which promised to protect them were now being forced to make a final choice -- either become "white men" or suffer the consequences.

The role of the Department of the Interior as the prime agent of the United States carrying out the national government's responsibility to protect the rights and property of Indian tribes and people, had clearly been set aside by the policy-makers. Prior to 1870, the only methods by which Indians were protected against non-Indian encroachments on Indian tribal or individual rights was through military policing actions or by direct action of the courts. Neither method proved as a fully successful means for enforcing laws or protecting Indians.

On June 22, 1870, Congress created the Department of Justice. 15/ Its function was to represent the national government in the federal court in cases of exceptional gravity and importance. The Department of Justice thus became the legal arm of the Executive and each of its Departments. Since the Secretary of the Interior was obligated to protect Indian rights and property, Congress provided

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15 / 16 Stat. 162; 28 U.S.C. 501, 503.

a means for the Secretary to protect them by enacting legislation designed to permit legal action. 16/

Specific statutory authority was enacted to permit the Department of Justice to represent Indians in all suits at law and equity. The U.S. Code provides that:

> "In all States and Territories where there are reservations or allotted Indians, the United States district attorney shall represent them in all suits at law and equity." 17/

Because of the broadness of this provision, it is probable that this factor explains the failure of the Department of Justice to adopt a consistent policy on when the U.S. district attorneys appear in courts on behalf of the Indians. It is surely the case that not until 1932 did the Department of Justice begin setting out its policies regarding the representation of Indians. 18/ The defense of Indian rights and property in courts of law then became the responsibility of both the Departments of Interior and Justice. Claims by Indians against another party or by another party against Indians demanded specific action first on the part of the

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16 / Act of March 3, 1893, 27 Stat. 612, 631.
17 / U.S.C. 25, Section 175.
18 / Justice Department File No. 90-2-012-1. Memo of July 29, 1932, defends litigation relating to oil royalties or other mineral rights and represents Indians in suits involving federal and state taxes. Justice Department File No. 90-2-012-1. Memo of July 29, 1932, representing Indians in matters relating to their allotments or reservations or to property over which Congress has provided United States supervision.

Department of the Interior and secondly, by the Department of Justice to defend Indians in legal matters "in which the United States has an interest." 19/

By statute, 20/ and by judicial decisions, 21/ the United States has obligated itself to preserve, protect and guarantee the rights and property of Indian nations, tribes and people. This obligation is frequently called the "trust responsibility". Executive authority for administering or managing the trust has been vested almost entirely in the Secretary of the Interior and the Commissioner of Indian Affairs. Carrying out the duties of the trustee (United States), the Secretary, Commissioner and their delegates are required to perform their duties with care, skill and diligence commensurate with their professional capacities. 22/ Though the Secretary of the Interior is the prime agent of the trustee (U.S.), there is no statute, court decision or statement otherwise in law that the trust responsibility is limited only to the Department of the Interior. Indeed, any agent of the United States, when carrying out the U.S. trust responsibility, is required to perform such duties with the highest degree of care, skill and diligence.

19 / Cohen, Felix S. Handbook of Federal Indian Law, p. 252.
20 / 16 Stat. 162; 28 USC 501, 503, Trade and Intercourse Acts, Northwest Ordinance.
21 / Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832); United States v. Kagama, 118 U.S. 381 (1886).
22 / Bureau of Indian Affairs, Veeder, Wm., Federal Trust Responsibilities for Managing Indian Forests with Points and Authorities in Support, Memo of Sept. 19, 1968, ii.

> "Performance of that trust has historically related, and now relates, to the entire gamut of human and community life. They are required to perform their duties as agents of the nation with the highest degree of good faith, solely for the benefit of the Indians." 23/

Officials of the Department of Justice, though not the prime agent of the trustee, are bound to that same requirement of professional conduct.

In 1934, Commissioner John Collier announced a New Policy toward Indians which radically departed from the administrative policy of the Executive Branch. Instead of a "policy of confinement" or a policy of "Indian civilization and assimilation" - both of which had failed - Collier advanced a policy of federal protection, strengthening of self-government, economic and technical assistance and coexistence. For the first time since the founding of the United States, the Executive Branch had formulated the rights and property of Indians instead of the clear policies of genocide aimed at the total destruction of Indian tribes and people. The Indian Reorganization Act of 1934, 24/ for the first time since the Executive Branch assumed the dominant role in Indian affairs, it was seeking to diminish its own influence and power over the Congress and Indian tribes. Indian tribes were to receive vigorous protection by the United States government; they were to be recognized

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23 / Ibid, p. ii
24 / Act of June 18, 1934, 48 Stat. 987, codified at 25 U.S.C. § 476, et seq. (1963).

as having formal governments with full powers of governance within the exterior boundaries of their territories and co-exist with non-Indian neighbors. 25/

The Chairmen of the Indian Affairs Committees in the House and Senate both seemed initially willing to support the Indian Reorganization Act but, as more of Collier's proposals became clear, their eager support began to evaporate. In Freeman's review of this period, the reason for this diminished support in Congress is plain:

> "Basic... was the question of the goal of the policy: Were Indians to be made 'full-fledged citizens' by this process? Some Committee members were wary of setting up Indian groups which would never be touched, never be broken up, never bear the same responsibility as their white neighbors. They were wary of any policy which might move back into Indian group life any Inidans who had grown accustomed to living apart from Indian group life. Behind this was the basic Congressional doubt: Will Indians ever be assimilated?" 26/

In 1934, it was the Congress which asserted the policy of assimilation which had been so disastrous to Indians and their livlihood and not the Executive Branch. For that reason, a major effort on the part of the Executive to conform to long-standing Congressional policies to protect Indian tribes and people was dealt a vigorous blow. The Congress had come down in support of outmoded Executive

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25 / The Development of Collier's IRA Policy 75, 56-:-588, 395, 50660-45-120. Federal Archives and Records Service, Fort Worth, Texas. Indian Service Policies; Galley One, p. 1

26 / Freeman, John L. The New Deal for Indians, p. 132.

policy failures by reasserting the policy goal of "civilization and assimilation." A point never fully appreciated in Congress was that while Collier was urging a strengthened tribal government and tribal responsibility, he was also attempting to redress the balance of power between the Executive and the Congress. On this point, Collier urged that Congress establish a broad policy which would insure full expression of the Congressional plenary power over Indian affairs as originally intended in the Constitution. 27/

Collier had said before the House Committee that the Indians had been subjected too long to the whims of the Commissioner or theSecretary of the Interior, caused by Congress's delegation of its plenary powers over Indian affairs to the Department and the Bureau. 28/ In Collier's view, the broad discretionary power vested in the Secretary and the Commissioner should be redistributed in two directions: to the Indians and to the Congress.

> "Policy had fluctuated with each new Commissioner. Only Congress could give basic stability, within which Indian tribes could go as 'fast and as far' as they wanted toward self-responsibility, with the burden of proof on the Commissioner to show why they should not." 29/

27 / Constitution of the United States, Article I, Sec. 8, Clause 3.
28 / Congress of the United States, Hearings of the House Indian Affairs Comm. on HR 7902, 73rd Cong. 2nd Sess. p. 37.
29 / Freeman, John L. The New Deal for Indians, p. 28.

Collier's advanced views went unheeded by the Congress though a substantially modified version of the Indian Reorganization Act did pass into law. After the death of President Roosevelt, Collier's observations regarding an unstable policy associated with changing Secretaries and Commissioners re-emerged after his departure. In succeeding years following the New Deal Era, the Department of Interior eased into a "new" policy guided in part by the conclusions of the Hoover Commission, 30/ a body established to reorganize the Executive Branch. It provided the first formal definition for what became the Termination Era. The sense of Congress agreeing with this policy came in the form of House Concurrent Resolution 108. 31/ The Termination Policy had become the new phrase to describe the civilization and assimilation policies of the 19th and early 20th Centuries.

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30 / 1947.
31 / HCR 108, 83rd Congress, 1st Session (1953).

B. Review of Practices and Procedures

The Department of the Interior and later the Department of Justice had become the principal governmental departments responsible for carrying out the United States' trust responsibilities as regards the protection of Indian rights and property. The principle that guided the development of practices and procedures in the administration of Indian affairs was based on an interpretation of Chief Justice Marshall's landmark decision which contained this description of U.S. relations with Indian tribes and people:

> "They may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian." 32/ [Emphasis supplied.]

The guardian-ward metaphor used by Justice Marshall was widely interpreted by the Executive and the Judiciary to imply that Indians were in a state of helplessness and "incompetence". Given this state of affairs, the Executive, through the Department of the Interior, translated the guardian part of the metaphor to mean it was the obligation of the United States to supervise and regulate the internal and external affairs of Indian life. This interpretation of the guardian-ward relationship gave rise to the promulgation of administrative procedures and practices which effectively reduced Indian

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32 / Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

reserved territories and communities to a status of colonies controlled by a government department. The authority of the Department of the Interior to control Indian land and resources is thought by the agency administrators to be absolute. Indeed, broad interpretations of the Interior Secretary's powers permit an absolute exercise of power which has rarely, if ever, been checked by the Congress.

The Secretary and the Commissioner of Indian Affairs could exercise absolute power within the scope of their authority. Such power over a people could not be exercised even by the President of the United States and is contrary to the very principles and values on which the creation of the United States rests. The powers of the Secretary and the Commissioner over Indian affairs have been used to benefit private, non-Indian interests and the economic and strategic interests of the United States. 33/ On rare occasions has the power of the Secretary been used to fully benefit the interests of Indian nations and tribes. This is demonstrated by the extremely complex procedures developed within Interior designed to "protect the interests of the tribes."

33/ Case examples here demonstrate this point as do the numerous case examples recorded in recent Senate and House hearings including the Subcommittee on Administrative Practices and Procedures hearings on Indian resource protection and administrative conflicts of interest, 92nd Cong., 1st Sess.

1. Procedure for Redress by Way of Administrative Remedy

Due to the extremely broad discretionary powers of the Secretary of the Interior, many decisions regarding boundaries, ownership of land, eligibility of an Indian for services and the authority of tribal governments to act are made in the Department of the Interior. Procedures within the Department tend to allow the Secretary to exercise administrative, judicial and legislative powers at whim without checks on the misuse of powers.

The Department of the Interior has assumed the role of caretaker of Indian lands and resources. Such a role dictates the procedures for using Indian lands and resources. The procedure for gaining consent by the Secretary of the Interior leads to an administrative determination. A request for such a determination may eminate from a tribe or an individual Indian or from within the Department of the Interior. The procedure for Indians to gain an administrative determination involves the following steps:

[1] Request that an agency superintendent take action;

[2] Request that an Area Office Director take action;

[3] Request that the Commissioner of the Bureau of Indian Affairs take action;

[4] Request that the Secretary of the Interior take action.

The Office of the Solicitor is included in this process at every stage after the superintendency. The Office of the Solicitor is asked at the regional level by the Area Director to legally interpret whether authority exists to respond to a tribal request. If such authority is found lacking, then the Commissioner is asked to make a determination. The Indian Affairs Division of the Solicitor's office is then asked to render an opinion regarding the power of the Commissioner to respond to the request. If the Commissioner is found lacking in authority, then the Secretary is charged with the responsibility of making a determination. If the Secretary is not satisfied that he has sufficient authority, then the Interior Solicitor is asked to render an opinion. At each stage of an administrative determination, the Solicitor's opinion or legal interpretations tend to be controlling. As a consequence, administrative determinations or administrative policy tend to be determined by the Solicitor's office throughout. If an Indian tribe is not satisfied with a final administrative determination, then the alternatives include legislation or judicial relief. The Secretary's determinations become final unless overturned by the Congress or the courts. As a practical matter, the courts have avoided participating in questions related to Secretarial decisions. For the tribe or individual Indian, the last resort becomes the legislative process.

The procedure for gaining an administrative determination is open to numerous opportunities for subjective decision-making. The process for administrative determinations is predicated on an assumption of objectivity and the full commitment of personnel to carry out their duties with the higest degree of care, skill and diligence. With so many levels of decision-making and the widely varying degrees of competence among personnel, the subjective decision becomes the norm rather than the exception.

2. Conflict of Interest

To complicate the procedure for solving problems or gaining administrative determinations, the Department of the Interior is obligated to carry out two missions which are in essential conflict with one another. The Department must serve the public interests in its management of lands and the use of resources like coal and water. Similarly, the Interior Department is obligated to carry out the United States trust responsibility to preserve and protect Indian lands and resources. When the public interests compete with the interests of Indian tribes, then the Department of the Interior is faced with a conflict of interest. While such conflict of interest is generally inherent to any government agency when it deals with public matters, it is not appropriate for the

United States to permit its public interests to compete with the interests of Indian nations and tribes. 34/

The consequence of the Secretary of the Interior having the primary responsibility for carrying out the trust obligations to Indians while having the major responsibility for the management and conservation of public property and resources is a bias against the conflicting property rights of Indian tribes. 35/ Administrative conflicts of interest hinder the effective discharge of the United States' trust responsibility. This is illustrated by the following examples:

SAN JUAN-CHAMA PROJECT

The Bureau of Reclamation developed a plan to divert thousands of acre feet of water from rivers and streams in Colorado, west of the Continental Divide to the Rio Grande River in New Mexico, east of the Divide to increase the supply of water for the City of Albuquerque, New Mexico. The waters

34 / This point is made clearly by Professor Reid P. Chambers in a study prepared for the Subcommittee on Administrative Practices and Procedures, 91st Cong., 2nd Sess., Jan. 1972. "This conflict then, is not one which properly can be resolved through the process of balancing conflicting interests. Such balancing procedure within the Executive Department is desirable where compelling public policies are being balanced; this, of course, is the method by which public policy is formulated. But, private rights, which the U.S. is obligated as a fiduciary to defend, cannot be so balanced against conflicting public purposes. The government's relationship to the Indians is, in this respect, unique in character." p. 236. (Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest.)

35 / Ibid, p. 237.

that were to be diverted either passed through or were adjacent to Indian lands. Both the Bureau of Reclamation and the Bureau of Indian Affairs were charged with the responsibility for the water diversion plan. Throughout the course of the study, neither agency sought to determine the future impact of the San Juan-Chama diversion on the various Indian tribes. The only recognition given to the needs of these tribes is contained in a single paragraph of the overall study which notes that the tribes do have rights to the water, but no quantitative studies had been conducted to determine the future Indian need for water. No effort was made by either the agencies or the Secretary of the Interior to determine the future needs of the Indian tribes. Congress was never advised that the interests of the Indian tribes may be violated by the diversion of waters away from their reservations. Because of this failure, the Indians now have inadequate water resources with which to develop their reservations.

The emergent needs of these tribes for water give rise to demands that the tribes' water rights be protected by the Secretary of the Interior. The Bureau of Reclamation's response has been that the tribes' rights to water have been "inversely condemned" by Acts of Congress authorizing the San Juan-Chama Project. The failure to inform Congress about the rights and interests of the Indian tribes in the first instance is now being covered by further deceptions which suggest that the past wrongs can only be corrected by "buying the tribes'

rights" to water. The Indian tribes involved need water for agricultural development. To "inversely condemn" the Indian tribes' rights to the use of water may serve the public interest but it most surely does not serve the needs of the Indians.

QUILEUTE LANDS AND BOUNDARIES 36/

The Quileute Tribe had been told by the Bureau of Indian Affairs that the Quileute Reservation included two parcels of land amounting to a little over 590 acres. The two parcels were separate and surrounded by the Olympic National Park administered by the National Park Service. The Tribal Council had begun plans to build new homes on the Reservation, but discovered that the space needed for their homes included lands being administered by the National Park Service. Many of the older members of the Tribe had asserted that the reservation was actually much larger and that the National Park was illegally operating within the exterior boundaries of the Reservation.

For several years, the Tribal Council discussed the matter with BIA officials and the National Park Service, but nothing had been accomplished toward resolving the Tribe's land problem. After conducting a thorough land title and boundary study at their own expense, the Tribal Council concluded that the National Park was indeed illegally occupying

36 / Task Force #3 Meeting with Governor's Indian Advisory Council, State of Washington, April 1976; Earl Penn, Vice Chairman, Quileute Tribal Council.

tribal land. With its documentation of facts, the Tribal Council sought a Secretarial determination to settle the increasingly heated dispute.

After a forty-day period of waiting, the Quileute Tribal Council was advised by the Solicitor's office that the Olympic Park had been created by Presidental proclamation which specifically noted that the boundaires of the Park would be established "excluding the Quileute Reservation". In the opinion of the Solicitor, the Quileutes were advised no irregularities had indeed occurred, therefore, the Secretary would have to decide in favor of the National Park. The Tribe protested that their study had not been carefully examined by the Solicitor's office and urged them to review the materials. The Tribal Council had been informally advised that the Solicitor's office was reluctant to recommend favorable treatment of the Quileute Tribe because "at least twelve other tribes would seek similar return of their lands" thereby setting a precedent. After a period of several months, numerous trips across the continent to Washington, D.C. and substantial expenses drawn from the Tribal Treasury, the Quileute Tribal Council received a prepared opinion from the Solicitor's office which agreed with the Tribe's original study.

In 1976, the Quileute Tribe continues to urge the Secretary to act in their favor; no land has been transferred back to the Tribe; and the Quileute boundary remains unmarked and unrecognized fully by the Secretary. The Tribe's economic

and social future remains uncertain because of the failure of the Secretary to act while the public interests in the Park continue to be served.

The Quileute Tribe's experiences are typical of what the Omaha Tribe has undergone. The Quechan Tribe was similarly treated to the "Pandora's box argument" which asserts that favorable administrative treatment of one tribe results in other tribes making similar claims. In the balance is the existence or extinction of Indian tribes.

Examples of this sort are repeated throughout hearings conducted by the Subcommittee on Administrative Practices and Procedures. 37/ The Havasupai dispute with the Forest Service, 38/ the reclaiming of Pyramid Lake by the Pyramid Lake Paiute Tribe, 39/ and the Klamath Tribe's loss of a major fisheries resource 40/ attest to the great violence done to tribes by the failure of the Department of the Interior to vigorously perform its duties as the prime agent of the trustee.

Millions of acres of land have been taken from Indian tribes as a result of administrative oversight and billions of dollars worth of Indian resources have been confiscated by means of practices like "inverse condemnation". Because

37 / U.S. Congress, Hearings of the Subcommittee on Administrative Practices and Procedures, 92nd Cong., 1st Sess., Federal Indian Protection of Resources.
38 / Ibid, p. 1194
39 / Ibid, p. 1243; p. 1322.
40 / Ibid, Part 2.

there are no safeguards against confiscation of Indian lands and resources by the private sector or government agencies, Indians are forced to seek judicial review of instances where confiscation occurs. As noted above, the administrative procedure is difficult and complicated and depends wholly on the "discretion" of the Secretary of the Interior. Failure in the administrative procedure frequently gives rise to resorting to the courts.

3. Procedure for Redress by Way of Legal Remedy

The Department of Justice enters the arena of Indian affairs when circumstances arise which require legal protection of Indian rights and property. Actions of the Department of Justice designed to legally protect Indian rights and property are predicated on two major decisions: (1) Secretarial approval of an Interior-developed "litigation report" which requests the Justice Department's action and (2) a determination by the Attorney General or his delegates that sufficient grounds exist for initiating litigation. 41/

It is the practice within the Department of Justice to consider litigation relating to Indian resources after a "litigation report" has been submitted by the Interior Solicitor's office and when the proposed litigation does not involve a suit against the United States.

41 / Miles Flint, Chief of the Indian Section of the Division of Land and Resources, Department of Justice. Interview conducted by Rudy Ryser, Task Force #3, January, 1976.

For an Indian tribe, the question of filing a suit against a state, commercial interest or private citizen normally requires an effort to "exhaust all administrative remedies". Failing this, a request is made of the Bureau of Indian Affairs to seek judicial relief. The Bureau of Indian Affairs then requests the Office of the Solicitor to draft a "litigation report". The "litigation report" is routinely sent to the Assistant Attorney General of the Land and Natural Resources Division of the Justice Department and then to the Chief of the Indian Section. Within this section, the "litigation report" is reviewed by one or more of the nine lawyers. The following practice is used to determine whether litigation will be initiated: 42/

- Determine what is being requested;
- Determine whether or not information is fully provided that would warrant the requested action;
- If there is insufficient information, the report is returned to the Interior Solicitor's office with a request for additional details;
- If there is sufficient information, the Chief of the Indian Section notifies the U.S. Attorney that a request has been received and a request is made for "another view". The U.S. Attorney may provide information about the political circumstances and the locality of the proposed litigation as well as information about any Supreme Court decisions that may have a potential impact upon the judges in the local court;
- The Indian Section then acts as the plaintiff in the court on behalf of the Department of the Interior.

42 / Ibid.

There is no procedure within the Department of Justice that requires administrators or lawyers to communicate with Indian tribes who may be affected directly by proposed litigation. 43/

The sole contact with Indian tribes during the early stages of litigation is "presumed" by Justice Department officials to be made by the Solicitor's office in Interior. However, there is no procedural method or requirement for the Solicitor's office to be in touch with tribes before or during the litigative processes. The presumption is made that the BIA is in contact with the affected tribes. It is the BIA which complains frequently about not having knowledge of litigation either before or during the initiation of court proceedings and seems least able to communicate with tribes regarding the legal protection of their rights and property because they lack information.

The major concession made on the matter of contacting tribes is that after litigation has begun, officials of the Justice Department's Land and Natural Resources, Indian Section and Interior's Solicitor's office point out that tribal lawyers are contacted with the presumption that they will inform their clients. 44/

43 / Ibid.
44 / Interview with Miles Flint, January, 1976; Interview with Alan Palmer, Office of the Solicitor, January, 1976.

U.S. Attorneys and Solicitors in the various field and regional offices are procedurally the first Justice and Interior officials who become involved in the process of developing a legal case to protect Indian rights and property. Most regional and field solicitors regard their clients as being either the BIA of the Department of the Interior. Their actions on any case are pursuant to a request presented by the BIA Area Office Director or an official of the Interior Department. Direct access to the field solicitor by tribes is generally considered inappropriate although on matters related to tribal constitutions, tribal ordinances and elections, field solicitors have provided direct assistance to tribal governments. 45/

The administrative development and subsequent initiation of a legal case that affects an Indian nation or tribe's interest may take from three to seven years to complete. 46/ During that time, the number of lawyers who

45 / Hearing testimony provided by Area Directors and Field Solicitors in the AIPRC Task Force Hearings, Superior, Wisconsin, Missoula, Montana, and Anadarko, Oklahoma. "... most U.S. attorney offices feel they are over-burdened with litigation right now and I don't think they are looking for a lot of additional litigation. They feel that Indian treaty rights and Indian rights are complex and they are, and are long time litigation and consequently, it takes, it seems to be, an inordinate length of time for Justice to make a decision whether he is going to participate in a law suit". (Kent Tupper, Tribal Counsel, Minnesota Chippewa Tribe, AIPRC Joint Meeting, Superior, Wis., Vol. I, p. 110.

46 / Miles Flint interview, January 1976.

served as counsel in a case may be several. This is due to a substantial turn-over rate in employment among lawyers who work for the Justice Department's Indian Section, or Land and Natural Resources Division and Interior's Solicitors office. Though lawyers are paired up on individual cases, the case load and the varying degrees of experience in Indian law combined with a new set of faces contribute to the lengthy period during which an Indian case is handled. 47/

Though procedures exist in both the Justice and Interior Departments to legally and administratively protect and manage Indian lands and resources, Indian nations and tribes regard those procedures as complex, cumbersome, and too time-consuming. 48/

> "...if there is going to be a trust responsibility, then there's got to be a shorter procedure for tribes or bands that want to request legal assistance because many times it takes two years to get approval to commence participation." 49/

If an Indian nation cannot depend on direct legal protection by the Interior and Justice Departments, then private counsel must be secured. The Department of the Interior is authorized to provide support to tribes for independent legal counsel, but to provide such assistance, the Indian nation must be financially unable to pay a lawyer from their own treasury.

47 / Ibid. The Indian Section is carrying 230 to 235 Indian cases with a legal staff of nine lawyers.

48 / Kent Tupper, Tribal Counsel from Minnesota Chippewa Tribe, AIPRC Joint Task Force Hearing, Superior, Wisc., Vol. I.

49 / Ibid, p. 119

In two recent instances when requests were made for the Secretary to financially assist a tribe to hire legal counsel, the Secretary denied the requests. 50/ Denial of those requests permitted encroachments on tribal land because there was no administrative or legal remedy. As a consequence of this and other blocks to tribal efforts to protect themselves, Indian nations and tribes have sought legal assistance from organizations like the Native American Rights Fund, 51/ and the National Congress of American Indians. For those tribes that have their own revenue sources, tribal legal counsels are hired to initiate legal actions to protect tribal rights and property. At an estimated rate of twenty-five million dollars a year, 52/ Indian nations and tribes pay from their own treasuries to protect themselves from state encroachments, commercial and federal government confiscation of Indian lands, resources and rights.

C. Review of the Trust Administrative Structure

The administrative and legal procedures outlined in the previous section are reflected in the structures of both the Interior and Justice Departments. Indian affairs is structurally totally within the Bureau of Indian Affairs at a level equal to the level of the Assistant Secretaries for energy and minerals, fish, wildlife and parks, and the Assistant Secretary for Land and Water Resources. The Commissioner of

50 / The Cheyenne Tribe and Nisqually Tribe.
51 / A federally funded legal aid agency.
52 / For the year of 1975.

Indian Affairs, unlike the Assistant Secretaries, is directly responsible to the Secretary of the Interior. As a matter of course, the Commissioner relies to a large extent on the Office of the Solicitor for direction on matters related to administrative powers and definitions of legal authorities of the Commissioner. The principal elements of the Indian affairs structure in the Department of the Interior includes therefore: the Office of the Secretary, Office of the Solicitor and the Office of the Commissioner of Indian Affairs. Elements of each of these offices extend to eight regions for the Office of the Secretary; eight regions for the Office of the Solicitor; and twelve regional offices for the Bureau of Indian Affairs.

Including the local agencies of the Bureau of Indian Affairs, there are four different levels of administration. Without counting the levels of authority within each of the primary levels, it becomes immediately clear that from the tribe to the Secretary of the Interior, there are numerous points at which communications can fail. For each level, a maze of authorities to act is delegated from the Secretary of the Interior. This poses serious problems for tribal governments and agency superintendents when administrative or legal problems emerge at the local level. Throughout the chain, it is not always clear who has authority to act. And as one superintendent put it:

"Invariably this takes a lot of time and in the interim, frustration is building up at the tribal level, agency level and the area office level.

* * * * * *

"I believe that a good percentage of tribal and individual Indians' frustrations could be eliminated at the agency level with adequate personnel with adequate authorities." 53/

The frustration of tribes with the present structure was voiced by a representative of the Oneida Tribe in this way:

"Weary of paternalistic decision-making by federal employees, unilateral action by the BIA without timely notice to the Oneida Trust Committee, inefficiency, mismanagement and absurdity within the Area Office in Minneapolis, we are submitting our testimony in hopes that it will help to end the continuous emasculation of Indian self-determination by the BIA administrative policy regulations." 54/

Similar frustration was aimed at the Solicitor's office:

"...we've got to find a way of overcoming the conflict of interest that exists in the Solicitor's office in the Interior of adjudicating resource problems. This is primarily based on tribal assets. If you look back at the record you see that most of the resources were lost, not by legislation; some were lost by the Allotment Act, but a lot of them were lost by Secretarial decisions and you can recite chapter and verse of decisions where this has occurred." 55/

These remarks are reflected in the positions of numerous Indian nations and tribes that Indian affairs ought to be separated from the Department of the Interior. 56/

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53 / Correspondence from Steven (Bud) Lozar, Superintendent of the Western Washington Agency, BIA, to Rudolph Ryser, Task Force #3, April 6, 1976.

54 / Norbert Hill, Jr., Oneida Tribe, AIPRC Joint Task Force Hearing, Superior, Wisc. Vol I, p. 7.

55 / Thurman Trosberg, Salish Kootenai Confederated Tribes, AIPRC Joint Task Force Hearing, Missoula, Mont., Vol.II, p. 32.

56 / See Chapter 2C Review of the Structure of the Bureau of Indian Affairs.

The Department of Justice is structured with Indian affairs being primarily dealt with at the division and sectional level. 57/ Protection of Indian resources is one important charge of the Land and Natural Resources Division, but the actual work of the Division-Indian Affairs is carried out in the Indian section. The Civil Rights Division and the Indian Claims Commission are also charged with responsibilities in Indian Affairs. There are no regional or local offices specifically charged with Indian affairs activities. The central focus of activities is in the Washington, D.C. based offices of the Justice Department.

The structure tends to reflect how Indians conclude that the Department of Justice is not suited to dealing with their interests. One tribal member expressed this view in this way:

> "... the Department of Justice can refuse to advocate in favor of tribal interests even in instances where there is no apparent conflict of interest to inhibit its advocacy. *** The core of the problem is that the lawyers in the Department of Justice did not perceive themselves to be advocates for either the tribe or the Department of Interior, but instead as legalistic, bureaucratic defenders of the Justice Department." 58/

The structure of the Justice Department reveals a low commitment to legal protection of Indian rights and property. Similarly, the structure reveals a high degree of

57 / Because of lack of cooperation in the Department of Justice, the Task Force was unable to conduct a thorough review of these elements.

58 / Ada Deer, Menominee, AIPRC Joint Task Force Hearing, Superior, Wisconsin, Vol. II, p. 106.

inaccessibility. The combination suggests a need for a major structural change which may be achieved by separating the primary legal functions of the Justice Department concerned with Indian affairs and creating a legal capability solely concerned with Indian legal protection. 59/

The structures of both Justice and Interior Departments show Indian affairs to be subordinate to other functions. The structures demonstrate how blocks can occur to prevent a systematic and forthright advocacy of Indian interests. It also shows how Indian affairs trust administration is fragmented and diffused with no specific and concentrated action possible. Continued inclusion of trust administration as an important function of the Justice and Interior Departments will not solve the many administrative problems which flow from structural problems. To shift boxes within the organizational structure may ease problems and increase effectiveness, but such changes will not relieve the basic conflict of missions which arises in these agencies. Separation of the primary functions in Indian affairs from the two agencies into a single independent agency seems the only responsible alternative. 60/

59 / U.S. Congress, Subcommittee on Indian Affairs Hearing, Indian Trust Counsel, 92nd Congress, First Session.
60 / U.S. Congress, AIPRC Hearing, Structure of the Bureau of Indian Affairs, Denver, Colorado.

CHAPTER II

THE BUREAU OF INDIAN AFFAIRS

A. Review of Policy

The existence of administrative mechanisms solely concerned with the relations of the United States with Indian nations and tribes within the national government extends over a period of two hundred years. A year before the Declaration of Independence (July 12, 1775), the Continental Congress created three Departments of Indian Affairs: the Northern, Middle and Southern. Twelve Commissioners were appointed to make treaties with the Indians in order to keep their peace and friendship. 1 / In the Articles of Confederation, the Congress was vested with "the sole and exclusive right and power of... regulating the trade and managing all affairs with the Indians..." 2 / By so creating the Departments of Indian Affairs, it was intended (nor was it attempted) that Congress should regulate the internal affairs of the Indian nations. 3 / In 1825, Joseph Blunt 4 /

1 / Journal, Continental Congress, Vol. 2, p. 175.
2 / Articles of Confederation, Par. 4 of Article 9.
3 / Worcester v. Georgia, 6 Peters (1832) where Chief Justice Marshall ruled "To construe the expression 'managing all their affairs' into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from a construction which has been uniformly put on them."
4 / Blunt, Joseph, Historical Sketch - The Jurisdiction Over Indian Tribes.

reviewed the Articles of Confederation provisions which provided that Congress had the sole authority to regulate trade and manage all affairs with the Indians and concluded as follows:

> "All our intercourse with the Indians, so long as they continued to be independent, was in the way of trade, or in making treaties, and these were placed under the control of the general government. It was not contemplated... that Congress should have any legislative power over the Indians; but that it should have the exclusive power to regulate the trade, and to make treaties with them." 5 /

Indeed, Congress did not take steps to regulate the internal affairs of Indian nations and tribes for over one hundred years after the Articles of Confederation. 6 /

The three Departments of Indian Affairs were directly responsible to the Congress though on occasion, they were given some direction by the Board of War, but no formal delegation of authority was made by Congress. 7 / Congress first formally delegated some of its authority over Indian affairs to General George Washington when it directed the Commissioners for the Northern Department, on May 17, 1779, to consult with him on matters related to treaties and take their direction from him. 8 / This was done because of the increasing tendency of the Indian nations in the north to aid and support the British military. The precedent had, thus, been set for the military to execute legislative policy

5 / Ibid, p. 93.
6 / Schmeckebier, Laurence F., The Office of Indian Affairs, 1927, p. 15.
7 / Ibid.
8 / Journal Continental Congress, Vol. 14, p. 600.

regarding Indian affairs.

In 1786, Congress adopted an ordinance reorganizing the Department of Indian Affairs into two departments - the Southern and the Northern. Each department was declared to have a superintendent whose duty it was to report to the Secretary of War. The superintendents were authorized to issue licenses to trade and live among Indians. This administrative system continued in force beyond the adoption of the U.S. Constitution with one modification: the Congress, on August 7, 1789, established the War Department 9 / headed by a Secretary whose duties would include matters "relative to Indian affairs". 10/ The first formal expression of the duties of superintendents was laid down by Congress in the Trade and Intercourse Act of July 22, 1790. On July 9, 1832, Congress passed an Act to provide for the appointment of a Commissioner of Indian Affairs who "under the direction of the Secretary of War... have the direction and management of all Indian affairs and of all matters arising out of Indian relations..." 11/

As the major responsibility for regulating trade and managing all matters related to Indian affairs was increasingly delegated to the Department of Indian Affairs and the

9 / First Congress, Sess. I. Ch. VII (1 Stat.L. 49).
10 / Ibid. Section 1
11 / Twenty-Second Congress, Sess. I, Ch. 174 Sec. I.

Secretary of the War Department, the Congress began to fall silent. It began to react to requests made by those administering Indian affairs, rather than giving direction to them. Control over the administrative instruments it had created had begun the slow decline. The War Department's policies of Indian removal, confinement and destruction had come into violent conflict with the policies of the civilian Department of Indian Affairs which were still aimed at peaceful trade and intercourse with the Indian nations. Employment of Army officers as superintendents served as a means of extending War Department policies into the Indian Service which began to serve as a direct opportunity to regulate and control the lives of Indian nations and their people. Superintendents who were the providers of protection and federal government subsidies and goods to tribes -- these being agreed to in treaties -- became the coercive arm of the War Department. By withholding protection or withholding goods, Indians were forced to accept the dictates of the War Department. Large tracts of land were "ceded" to the United States by Indians who had been starved into submission.

The successful removal of Indians to the west of the Mississippi River marked the end of a bloody and violent stage of Indian administration which had begun with the placement of Indian affairs in the War Department and the presidency of Andrew Jackson. "The avaricious disposition

in some of our people to acquire large tracts of (Indian) land, and often by unfair means..." 12/ which Congress had failed to prevent, had been actively endorsed by President Jackson and the War Department - an agency thought to be the instrument which would enforce Congress' laws to protect Indians from non-Indian encroachments.

B. Review of Practices and Procedures

1. Budget

Section 476 of 25 U.S.C.: "The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of Budget and the Congress."

The Bureau of Indian Affairs presently utilizes the Band Analysis system to prepare the federal Indian budget, but Indian tribes indicate their dissatisfaction with this system for various reasons:

a. Due to constraints set down by the Office of Management and Budget, tribes have consistently been denied the total projected expenditure within specific categories. Even though the tribes call for increases in available financial resources, particularly in light of the current inflation in this country; their repetitive requests have gone unheeded.

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12 / Blunt, Joseph, p. 113. From the Report of a Committee relative to Indian affairs... August 3, 1787.

"Well, there is a system within the Bureau that allows us to anticipate future needs of the tribe and basically, it's the BPD system, or the Band Analysis. However, that system does not work to an advantage because of the limitations that are usually placed by the Office of Management and Budget on the amount of dollars that a tribe or the Bureau can ask for." 13/

b. Tribes are led through the "consultation" procedure and prioritization of program needs established only to have changes made within the Bureau or OMB before the request reached the Appropriations Committee.

"Three years ago, we requested $350,000,000 for road improvements for FY 77 upon receipt of 1977 Band Analysis. We found that somewhere between the Portland Area Office and Washington, D.C., they chose to (without any discussion with the Makah Tribe or the Western Washington Agency Office) cut that budget $60,000.00 again imposing a hardship to complete or work with long range plans of development on the Reservation. " 14/

From a different perspective, an Alaskan community states:

"... The Bureau of Indian Affairs seems to have adopted the position that an annual 'band' analysis will result in the identification of community needs. This is not the case. It is not the case because the Band Analysis requires an identification of available total resources as well as an identification of future national social and economic decisions to adequately prepare and implement a budget based on needs. ***

"What we can predict is that the substitution of Area Office priorities for local needs will result in deficiencies which can only be reduced through local planning. ***

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13 / Richard M. Balsiger, Asst. Area Director for Community Services, Portland Area Office, BIA: AIPRC Hearing - Joint Task Forces, Missoula, Mont. Vol. II, p. 145, April 19, 1976.

14 / Makah Indian Nation, prepared testimony for AIPRC Hearing, Denver, Colorado, May 8-9, 1976, p. 15.

"We find it discouraging to deal with individuals who are unaware of total Bureau funding and total Bureau programs in attempting to develop effective programs." 15/

c. Due to shortfall of actual allocations in one program area, tribes are forced to take money from another program in spite of the fact that both programs are greatly needed.

d. The budget estimations and priorities established through the Band system are made two years ahead of time, but by the time the allocations reach the tribe, the priorities may have changed and more money is required.

e. Administrative costs and overhead are siphoned off out of the total allocation, thus resulting in a considerable shortfall of actual service money reaching the tribe.

"I think that, you know, probably there should be less money spent on administration and more money going to tribes to do the things that they see fit with, not a whole bunch of strings attached on how to spend the money." 16/

f. For tribes under a multi-tribal agency, the Band system poses several problems compounding their expressed dissatisfaction: (1) Not all the tribes, even though in close proximity, have the same priority rating; (2) All the tribes have to agree on the prioritization of programs. In the case that they don't agree, the BIA Area Director sets

15 / Metlakatla Indian Community, Annette Islands Reserve, Alaska, prepared testimony for AIPRC Hearing, Denver, Colo., May 8-9, 1976, p. 5.

16 / Fred Dakota, Keweenaw Bay, AIPRC Joint Task Force Hearing, Superior, Wisconsin, Vol II, p. 36-37.

the priorities; (3) Once the allocations are made, tribal favoritism and competition result in an inequitable distribution of funds.

The BIA budget procedure has failed miserably and as one inter-tribal group states:

> "It has been said that Indians are like the canary in the coal mine. Just as the canary is carried into the mine to test the air, so Indians are subjected to expedient and changing policies which reflect or presage national policy. When the canary dies, it is time to abandon the mine. Similarly, when a policy such as the Band Analysis is tested on Indians and fails, it is time to shift gears in policy formulation." 17/

2. Contracting

Steady progress toward self-determination has been made over the years which allows tribes to contract BIA services. As more tribes increase their capabilities in assuming BIA functions, they express the need for changes within the present procedures.

A Tlingit-Haida representative summed up their concerns in this fashion:

> "One of the areas that we do have concern in our contracting with the Bureau of Indian Affairs, we felt we were contracting for the management of the Southeast Alaska Agency, and we found the Bureau putting us in a position where they are managing the services provided through the Bureau through a contract because they are inflexible in letting go of the management tools that they have provided in BIA Manuals. In every contract that we have developed with the Bureau of Indian Affairs they incorporate the manuals that the

17 / Northwest Affiliated Tribes, AIPRC Hearing, Denver, Colo., May 8-9, 1976 Vol. 1, p. 39.

Bureau uses for management and expect us to follow through, utilizing the same Bureau manuals. We feel that management is at risk. We would like to take the Bureau manuals and put them where they belong and manage our programs, taking the risk and utilizing the published rules and regulations." 18/

The innovative atmosphere which is becoming more prevalent in Indian communities cannot be fully realized or utilized unless BIA is willing to enhance rather than smother it with endless involved rules and regulations.

For tribes who have a limited revenue, the reimbursable nature of their contracts imposes hardships which three individual tribes documented through testimony at AIPRC hearings.

(1) Borrowing money to start the contract program:

"...the reimbursement system of contracting hurts those tribes which have limited resources because they are forced to borrow money at high interest rates in order to begin implementation of their contract program. The contract funds, of course, do not cover these interest payments and further, they do not cover inflationary cost increases in supplies and materials." 19/

(2) Keeping enough money in the bank to carry the contract until the reimbursement arrives:

"Most of these contracts we receive are reimbursable contracts which kills small tribes because we have to keep enough money in our checking account for three months to carry all these contracts." 20/

(3) Securing a loan to meet payroll schedules:

18 / Elias Reyes, Tlingit-Haida, AIPRC Hearing, Denver, Colorado, May 8, 1976, Vol. II, p. 144.
19 / Bernice White, Muckleshoot, AIPRC Hearing, Denver, Colorado, May 8-9, 1976, Vol. IV, p. 573.
20 / Richard Belmont, Suquamish, AIPRC Hearing, Denver, Colorado, May 8-9, 1976, Vol.III, p. 424.

"But when reimbursement is held up and it's sometimes as long as thirty days, sometimes it's no fault of the contractor. We have to go to the bank... to secure a loan so that we don't have to put these young men out of our training program." 21/

By passing P.L. 93-638, Congress demonstrated its willingness to have tribes take control of more of their affairs. Although the tribes welcome this opportunity, they realized the importance of studying all the ramifications of the Act, particularly when the BIA was responsible for developing the regulations for the Act.

"Although PL 93-638 gives opportunity for tribes to contract services, the law still permits the Bureau of Indian Affairs to retain the larger portion of administration and programming." 22/

BIA's roles as technical assistant in contract negotiations and as contract enforcer have shown BIA to be remiss in its duties. The Mescalero Apache Tribe cited instances where Bureau Forestry personnel not only negotiated timber contracts below the market value, but also did not monitor the contractor's logging practices. Both negligences resulted in considerable revenue loss to the Tribe. For tribes who depend on timber revenues to "pay their bills", such mismanagement cannot go unchecked.

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21 / Kenneth O. Tiger, Director, Seminole Nation Indian Action Team, AIPRC Joint Task Force Hearing, Muskogee, Oklahoma, Vol. I. p. 240.

22 / Violet LeBeau, Indian Businessman's Association of South Dakota, AIPRC Hearing, Denver, Colorado, Vol. III, p. 309.

3. The Line of Authority

The delegation of authority within BIA structure has not only perpetuated a bureaucratic system which is not designed to meet the day-to-day needs and emergency crisis among Indian nations, but has also given too much authority to area office administrators instead of local agency staff. The criticisms arising out of Indian country can best be summed up as it was in a title of one of the chapters of Our Brother's Keeper: The Indian in White America, written in 1969:

"The BIA - a Terminal Case of Bureaucracy" 23/

Indian people have tired of the "administrative delays, indecisiveness, foot-dragging and over concern with technicalities in the Bureau of Indian Affairs." 24/

The Area Office staff has been delegated too much authority by the Central Office and basically serve as a "bottle neck" designed and motived to systematically undermine Indian self-development progress. One Area Director was described as a "super-administrator" 25/ by a newly-elected tribal leader who was formally employed as a superintendent within BIA. The virtual power to veto Indian programs and to dole out program monies has made Area

23 / Cahn, Edgar S. (Editor); Our Brother's Keeper: The Indian in White America, October 1969, p. 147.
24 / Ibid., p. 148. Umatilla statement in 1966 to Commissioner Bennett in Spokane, Washington.
25 / Trimble, Al, AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. II, page 252.

Directors the main threat to Indian self-realization. Tribal leaders across the country have been calling for more local agency authority, a strengthening of agency superintendency, and direct line authority between the Central Office and local agency, which would eliminate the need for Area Office.

There has come a moment in Indian history when excuses, abuses and incompetency will not be tolerated nor perpetuated within a bureaucracy responsible for the future welfare of Indian people. A history clearly indicative of the failure of BIA to promote and encourage tribal continuity is a blatant expose of facts, not heresay.

4. Management of Resources

> "From the past, through the present, to the future, the Indians believe in harmony with nature and in life, in the sacredness of all things -- people, animals, plants, earth, stones, and water -- in their properties. A person guards an inheritance of natural resources and passes it on to the next generation, undiminished and uncorrupted." 26/

The paramount concern of Indian people with the preservation of their natural resources has brought to national attention the clearly established pattern of mismanagement within BIA. Not only have BIA personnel overseen large "land grabs" by non-Indian private and public interests, they have secondarily overseen large losses of the water, minerals, timber and human resources closely associated with the land.

26 / Alvin Josephy, Jr., The Murder of the Southwest, July, 1971, Audubon Magazine, Reprinted on p. 831, Part 3, Subcommittee on Administrative Practices and Procedures Hearing.

Additionally, at a time when tribes are striving to develop economically, they are shortchanged by BIA technical advisors. Tribal leaders have repeatedly brought to the attention of the President, Secretary of the Interior, BIA Commissioner of Indian Affairs, Congress, and the general public, numerous instances of mismanagement. These are cited here.

LAND:

> "... the Oneidas have suffered much and have been divested of their lands and rights by a trustee who has all but sponsored unsupervised losses of lands which were guaranteed by treaty which 'pledged that the Oneida lands shall be secured forever'. ***
>
> "A valuable property was recently lost near the Green Bay Municipal Airport. Allotted land from our tribe was adjacent to tribally held land and was condemned for 'public use' on October 3, 1973." 27/

This statement is a common reflection of the attitude of many tribal leaders who have seen their land base diminished.

The Creek Nation cited the following figures to demonstrate numerically the diminishment of their land base:

> "1840 - Creek Nation composed some 6 million acres;
> 1906 - Prior to allotment, we had 3 million acres;
> 1976 - 150,000 acres under trust responsibility." 28/

Another means utilized by BIA to guarantee the further shrinkage of tribal trust land is illustrated here:

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27 / Purcell Powless, Oneida Tribe. AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. II, p. 180-182.

28 / Ed Mouss, Creek Nation, AIPRC Joint Task Force Hearing, Muskogee, Oklahoma, Vol. II, p. 67.

"Soon after World War II, why, many of the people sold land but it wasn't because they wanted to sell, but they were more or less forced to sell. They forced patents on them classifying certain ones as competent Indians and then they were given their patents and in a short period of time, why they lost their lands through heavy indebtedness." 29/

With the passage of the 1887 General Allotment Act, problems of heirship fractionation emerged. This then has served as another indirect means for non-Indians to get their hands on Indian lands.

"Another impediment to progress is the heirship problem which has caused such fractionation of allotments that on many reservations, the land sits there unimproved and in many cases, the land is sold out of Indian ownership which in turn creates the checkerboard jurisdictional problem." 30/

At a time when tribes are moving toward economic self-realization and development of their natural resources, reacquisition of their land base becomes a top priority item. Provisions were set down in the 1934 Indian Reorganization Act 31/ which were never fully instituted by the BIA and

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29 / Bill Minthorn, Board of Trustees, Confederated Tribes of Umatilla Indian Reservation, AIPRC Joint Task Force Hearing, Yakima, Wash. Feb. 3-4, 1976, Vol. III, p. 482.

30 / Elmer Savilla, Quechan, AIPRC Hearing, Denver, Colorado, May 8-9, 1976, Vol. I, p. 24.

31 / Act of June 18, 1934, 73rd Cong., S.3645, §5, "The Secretary of the Interior is hereby authorized in his discretion to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights to lands within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians. *** For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year. ***"

as a result, there is little or no funding available to tribes to accomplish this goal. They then are forced to go outside the BIA to find what little funding they can to buy land.

> "The money we do have, we're pouring into land acquisition and it leaves us nothing for tribal management. In fact, the tribal management is running all from the revenue sharing..." 32/

The Crow Tribe in Montana also feels the need to have more money made available for land reacquisition:

> "... the Crow Tribe's land base which is depleting fast. This is nothing but another scheme of big 'grab' for Crow Indian lands with its rich coal and other mineral deposits by non-Indians. At the present time, there are over one hundred applications for patent in fee land sales on file in Billings Area Office or Bureau of Indian Affairs. ***
>
> "I hope and pray the higher federal officials back in Washington, D.C. who make final decisions on these Indian land sales will give an extension of reasonable time and provide for the Crow Tribe to exercise their preferential rights to purchase these Indian lands that are up for sale. ***
>
> "In the Reader's Digest of January 1955 issue, it stated to the fact that only 21 percent of the Crow Indian lands are being utilized by the Crow Indians themselves. The other 79 percent is controlled by the ever competitive white farm and livestock operators who have all the monetary breaks from all the local banks and federal loaning agencies at their convenience and having all the best chances of buying or leasing of Crow Indian lands, thereby making a good living for themselves and their families. Nothing has ever changed much since 1955 in the business of financing for Crow Indians to buy lands or to go into farming and livestock raising enterprise successfully. ***

32/ William Wildcat, Lac du Flambeau, AIPRC Joint Task Force hearing, Superior, Wisc. Vol. II, p. 69.

"The Crow Tribe or individual members must be given an opportunity to purchase the lands when the individual allottees sell them. In order to preserve the dwindling Indian holdings, the federal government must adopt an augmented loan program to the tribes for this purpose." 33/

In order to develop comprehensive land use plans, the importance of clearly delineated boundaries arise, especially where, in many cases, surveys have not been done since the establishment of the reservation.

"Our Reservation has not been surveyed since the original survey by which the boundaries of the Reservation were established. We are aware that additions after the establishment of the reservation were made and later removed from our jurisdiction." 34/

Additional support for this stance was offered by the Affiliated Tribes of Northwest Indians:

"There are a lot of tribes..., have not had their boundary surveyed and identified within the last twenty or thirty or forty years. There is a discrepancy among the Department of Interior on the boundaries compared to what the State feels it is, compared to what the Indian feels it is, and compared to what the Bureau of Indian Affairs feels it is." 35/

With this confusion over where the exact boundaries lie, Indian lands are subject to encroachment by non-Indians:

"In some instances, because of the deterioration of corner markers, non-Indian farmers have encroached year after year upon Indian owned lands so that now there are instances of 30 to 40 foot encroachments on Indian owned lands." 36/

33/ Ray Bear Don't Walk, Sr., Crow Tribe. Letter transmitted to Ernest Stevens, Director, AIPRC, March 29, 1976.

34/ Bernice White, Muckleshoot, AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. IV, p. 572.

35/ Cal Peters, Affiliated Tribes of Northwest Indians, AIPRC Hearing, Denver, Colo., May 8-9, Vol. I, p. 48.

36/ Hilary Skanen, Coeur d'Alene Tribe, Prepared testimony for AIPRC Hearing, Denver, Colo., May 8-9, 1976, p. 2.

MINERALS:

The interrelationship between the utilization of minerals from reservation land, water rights, and non-Indian benefits from this "exploitation" were voiced to Senator Edward Kennedy in 1972:

> "In the simplest terms what is happening in the Four Corners Indian Country can be stated as follows: Navajo lands are being stripped for Navajo coal. Navajo coal is being used to generate electricity at a series of huge power plants located on or nearby the Navajo Nation. Vast amounts of Navajo water are being used to cool the generators and transport the coal. The famous Navajo sky is being clouded by pollution from the smoke stacks. Much of the electricity produced is scheduled to be used to pump millions of acre feet of water into central Arizona. *** Thousands of acres of Navajo Nation lands are being, and are slated to be, stripped for the coal. These leases were all signed years ago with the aid and comfort of the Bureau of Indian Affairs." 37/

Similar situations exist in Indian country all in the name of "Progress", "economic development", and more recently, "securing the nation's future due to the energy crisis". Indian tribes are now more than ever the target of non-Indian interest groups who exert powerful political pressures on the Department of Interior, Commissioner of Indian Affairs, and Congress.

An additional startling fact is the land reclamation problem -- the end result of the mining of minerals. A reclamation policy does exist in the federal government but has not been properly implemented:

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37 / Peterson Zah, Deputy Director, Dinebeiina Nahiilna Be Agaditahe, Inc. (DNA, Inc), before the Subcommittee on Administrative Practices and Procedures, Part 3, p. 735.

"... I ask this Subcommittee to question not the principles of reclamation policy of this country, which policy was established by the Act of Congress of June 7, 1902 (32 Stat. 388), but to question the manner in which the policy has been implemented by the Secretary of Interior in regard to the trust obligations which the Congress has assumed in regard to the American Indian and was delegated to the Secretary." 38/

To compound this failure on the part of the national government, those large mining companies who strip the land have failed to live up to their promises of reclamation:

"I'm here today to present some information on reclamation. The reason is because many people believe that strip mining is destroying the land, at the same time they believe that this strip mining will be corrected, that the land will be restored, that the land will be put back so that the people once again can use it.

"The information that I have today shows that this is not the case. The information shows that Peabody Coal is not actually capable of reclaiming the land, and that they have no intention of fully reclamating our land." 39/

This situation then leaves the tribe to initiate and finance their own reclamation of land at considerable financial expense to them:

"In making reference to land on our reservation... this land has been mined out and the only way that land is going to be reclaimed is by us as Indian people and at our expense as well as monies that we can receive from federal agencies.***All that is left there is tumbleweeds." 40/

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38 / George Crossland, Native American Legal Defense Fund, before Subcommittee on Administrative Practices & Procedures Committee on the Judiciary, U.S. Senate, Federal Protection of Indian Resources, Part 1, Oct. 19-20, 1971, Washington, D.C., p. 145.

39 / Mitchell Fowler, Economic Advisor, Committee to Save Black Mesa, before Subcommittee on Administrative Practices and Procedures, Part 3, p. 753, Window Rock, Az., Jan. 3, 1972.

40 / Kesley Edmo, Shoshone-Bannock, AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. II, p. 162.

Tribes are not only forced to sell their minerals at prices far below the current market value, but additionally have to "foot the bill" for restoring and making use of their exploited land. It is no wonder that tribes are crying "mismanagement".

HUMAN RESOURCES:

Closely tied to the development of natural resources on the reservations is the development of the human resource element. The Creek Nation stated very simply:

> "The trust relationship requires that the federal government protect our lands and with the coming of self-determination, the Creek Nation will eventually need to better know how to protect, develop and expand our lands. In order to do so, we must have development of human resources who can technically handle all aspects of self-determination." 41/

The trust relationship is viewed as a two-pronged responsibility in the resource area: natural and human. The two are not mutually exclusive, but require that the BIA consider the importance of each and begin to devote more time and money to the "people":

> "... I feel that the Bureau programs and services should be directed toward people and not toward the land. Certainly there are some responsibilities that the Bureau has toward trust land; but most of their funds, I feel, should be directed toward the people." 42/

As part of the "forced assimilation" and "termination" policies of the federal government, the BIA was instrumental in moving people off the reservation into training

41 / Ed Mouss, Creek Nation, AIPRC Joint Task Force Hearing, Muskogee, Oklahoma, Vol. II, p. 81.
42 / Chief Overton James, Chickasaw Tribe, AIPRC Joint Task Force Hearing, Muskogee, Oklahoma, Vol. II, p. 27.

programs which did little to adequately prepare Indians for the non-Indian job market. Relocation has meant many different things to Indian people and has been cited as the reason for high rates of unemployment, alcoholism, suicides, and drop-out rates among Indian youth. An additional criticism of relocation is that the training does not guarantee the Indian trainee a job once he has graduated. The tribal solution is to keep their people on the reservation, train them to take over jobs which contribute to the development of the tribal natural resources and maintain the population base of the reservation. This fact is demonstrated by the following statement:

> "They (federal government) should provide training on that reservation... don't ship 'em out some place else. Let the tribe do it. Train 'em right there and you're gonna have a heck of a lot better program." 43/

Tribal surveys have also demonstrated the viability of this on-reservation training:

> "Our reservation is capable of development that will allow our people to maintain themselves on our reservation. Of the one-third of our members who live off our reservation, our surveys show that over 75 percent would like to come home if they economically could." 44/

43 / Fred Dakota, Keweenaw Bay, AIPRC Joint Task Force Hearing, Superior, Wisconsin, Vol. II, p. 36.

44 / Roger Jim, Yakima Indian Nation, AIPRC Task Force #3 Inter-Tribal Meeting, Ft. Hall Reservation, February 26, 1976, prepared statement, p. 19.

5. Education

The provision of educational services for Indian people was one of the basic rights set down in treaties between Indians and the federal government beginning with the December 2, 1794 Treaty negotiated with the Oneida, Tuscarora and Stockbridge Indians. 45/

The growing enrollment of Indian students in higher educational institutions shows a dramatic shift away from vocational training toward professional training. A major criticism of the BIA is reflected in a numerical break-out by the American Indian Scholarships, Inc., who reported to AIPRC that in 1975, there were 25,000 Indian students requestiong $107,300,000 in financial assistance, but BIA's request only showed the need for $25,784,000 to fund 14,000 students. 46/ Additionally, the Coalition of Indian Controlled School Boards, Inc., reported the following:

> "Now, for fiscal year 1977, the Bureau of Indian Affairs has requested $27,956,000 in Johnson-O'Malley funds. This is $3 million less than for fiscal year 1976. Yet the BIA, by their own admission, states that there are 20,000 more students eligible to receive JOM funds in fiscal year 1977. With $3 million less in funds, may we ask how the BIA intends to accommodate these 20,000 students?" 47/

45 / 7 Stat. 47, 48.
46 / John Rainer, American Indian Scholarships, Inc., AIPRC Hearing, Denver, Colo. Vol. IV, p. 501.
47 / Sylvester Knows Gun, Coalition of Indian Controlled School Boards, Inc., AIPRC Hearing, Denver, Colo., Vol. IV. p. 546.

Coupled with this cutback by BIA, the Office of Management and Budget slashes the Indian Education budget without knowing fully the real need for the increasing educational needs:

> "OMB, out of its ignorance of actual Indian needs, must accept responsibility for inadequate funding of Indian programs. It wields and exercises its authority too liberally when it comes to slashing BIA-recommended Indian budgets." 48/

The Indian people are moving steadily toward local tribal control of the education of Indian children. They recognize the importance of parental involvement in Indian education and of providing an atmosphere which will bring the Indian student on a par with non-Indian students.

> "... I believe that if we get a child and build the child's identity, after the child has accepted himself for what he is, then he can go from here to Timbuctoo and go to school, he can compete with the rest." 49/

The BIA isn't the sole source of financial responsibility for Indian education. As an entitlement established through treaty rights, several federal agencies have a hand in providing educational assistance to tribes:

> "Because of treaties with the Creek Nation and the trust relationship between the Creek Nation and the federal government, the government does have the responsibility of educating or providing funds for the education of Creek people not only through the Bureau of Indian Affairs, HEW and the Office of Indian Education, but they also have a financial responsibility to provide monies directly to the Creek Nation." 50/

48 / Rainer, John C., AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. IV, p. 501.
49 / Sylvester Knows Gun, CICSB, Inc., AIPRC Hearing, Denver, Colo., Vol. IV, p. 565.
50 / Ed Mouss, Creek Nation, AIPRC Joint Task Force Hearing, Muskogee, Okla., Vol. II, p. 80.

Additional aspects of higher educational training revolve around the need of tribal governments to bring their educated people back to the reservation:

> "... when they graduate, even though they have their PhD's, or Masters, they can ill-afford to go into Indian communities or tribal communities because so often so many tribes and communities are so poor they cannot pay the salaries that these highly skilled individuals command." 51/

Unless the federal government provides tribal governments with additional funds to establish competitive salaries, the Indian professional won't return to the tribe.

The need for qualified teachers who are sensitized to the aspects of Indian education has been recognized by the State of Montana as illustrated here:

> "We could surely use some kind of federal assistance in the Native American Studies programs in the University level... three years ago we passed House Bill 343 and House Joint Resolution 60 which did this, it required by 1979, that all teachers teaching on or near an Indian reservation have Indian studies credits, and by 1984, all teachers in Montana have Indian studies credits so that they have the sensitivity to be able to deal with Indians who are in their classes and also to provide information and sensitivity to the non-Indian. One of the great things that the federal government could do is of course link the federal subsidy monies that go to Indians with an Indian studies requirement so that you insure in the future regardless of what the state is that those people have sensitivity if they have Indian populations." 52/

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51 / John Rainer, Vol. IV, p. 514.
52 / Gary Kimble, Montana State Legislature, AIPRC Joint Task Force Hearing, Missoula, Mont., Vol. II, p. 113.

Due to a change in BIA regulations, Indian college students have to exhaust several non-BIA financial sources for loans, grants, and scholarships. This not only places the Indian student in competition with non-Indians, but has created a situation whereby Indian students must depend heavily on the BIA Education Specialist. A young college student related her experiences and difficulties in getting action out of her Education Specialist. 53/ Similar experiences also cause many college students to drop out simply because they can't make ends meet.

In conclusion, BIA's role in Indian education needs to be realigned, responsibility strengthened, and more funds made available.

6. Leasing and Negotiation, Management and Enforcement

The irresponsibility of the BIA to properly oversee and negotiate leases of Indian land was cited in several instances as a major contributor to non-Indian encroachments on Indian reservations.

a. Leases are negotiated at rates substantially lower than the appraised value, so the non-Indian lessee realizes a great profit:

> "We have another lease that was approved by the Bureau of Indian Affairs. The appraised value on the lease is $5,500. The lease was executed for $3,750, for no rhyme or reason why, and the Bureau approved the lease." 54/

53 / Alice Echohawk, APIRC Hearing, Denver, Colo., May 8-9, 1976, Vol III, pp. 441-448.

54 / Newt Lamar, Wichita Tribe, AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. III, p. 456-457.

"There is an instance where a lady got $15,000 for an oil lease. Right adjacent, a non-Indian got $45,000." 55/

b. Subleasing results in profits to the lessee instead of the landowner on grazing lands:

"...We are having a lot of trouble in grazing. These are Indian operators leasing land from individuals and they are sub-leasing to outside big cattle operators and they get all the money while the landowners, we don't get any at all and that is what the conflict is all about in the reservation." 56/

and residential property:

"... the attorney that has taken both the cases (Oliphant and Belgarde) lives on our reservation and he has also 36 acres of our tribal land leased for 50 years. *** We get $7,000 a year lease for the first 25 years without being able to be negotiated, and in return, the gentleman who has the lease, he leases out lots between eight to twelve thousand dollars a lot. This is on 36 acres of waterfront property." 57/

c. Lease violators are not properly reprimanded by the manager and enforcer - BIA:

"The tribe feels that when a non-Inidan farmer violates a lease and is given only a 10-day period to rectify the violation with no further reprimand, the Bureau is being remiss in not protecting the rights of the Indian landowner." 58/

d. The BIA has acted in concert with non-Indians and other government agencies in perpetuating illegal leases:

"we have a case where the BIA has ruled that a lease was invalid at its inception. This concerns farmland owned by the Wichita Tribe. The alleged lessee is

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55 / Ibid. p. 459.
56 / Hazel Blake, Fort Berthold Reservation, AIPRC Joint Task Force Hearing, Aberdeen, S. Dak., Vol. I. p. 217.
57 / Richard Belmont, Suquamish Tribe. AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. III. p. 429-430.
58 / Hilary Skanen, Coeur d'Alene Tribe. Prepared testimony for AIPRC Hearing, Denver, Colo., May 8-9, 1976, p. 1.

is preparing to harvest his second crop, even though he has no lease. He has been able to exercise dominion over the land with the assistance of the Chief Natural Resources Officer, Herman Lewis; the Field Solicitor, Benno Ombrock; and the Commissioner of Indian Affairs, Morris Thompson." 59/

e. The BIA has failed to develop good management techniques for leases on Indian land:

> "A basic principal of management is to make wise decisions. In order to make wise decisions, management must be familiar with the situation which means having knowledge of the facts pertinent to the situation. ***
>
> "The Secretary of the Interior, being the trustee of Indian lands whose statutory responsibility includes deriving maximum economic benefit for Indians from such lands when approving leases, should be aware of when all leases expire, location and size of such leases, effect of such leases on the Indians, rents, royalties per unit, information on comparable current leases on public or private lands, etc. Without such data, it is obvious that he will not be effective in fulfilling his responsibilities. Data collection and record keeping appears to be a problem which continues to plague most units of administration and management in the Department of Interior and particularly, the Bureau of Indian Affairs." 60/

7. Civil Service and Quality Employees

As Civil Service employees, BIA staff have become so imbedded into the system that they are immune to Indian criticisms. BIA employees have been most consistently characterized in the following manner:

> You have a lot of GS people that are, you know, making a whole lot of money, probably don't have the tribe's best interests in mind. They're just biding their

59 / Newt Lamar, Wichita Tribe, AIPRC Hearing, Denver, Colorado, May 8-9, 1976, Vol. III, p. 454.

60 / Robert Chiago, Native American Studies, the University of Unit. Paper submitted to AIPRC on energy resource development and the leasing of Indian lands, p. 5 & 6.

time while waiting for retirement. Them people should go." 61/

With such career-minded people, the best interests of the tribes are only secondarily considered. As stated by one tribal leader:

> "If there is no perception of real Indian needs, then there is little will to deliver." 62/

Because the BIA has been negligent in enforcing the Indian preference provisions set down in the 1934 Indian Reorganization Act, Indian people have had to resort more and more to Equal Employment Opportunity grievance procedures. Even this procedure has not proven to be an effective solution to the employment problems, as cited here:

> "I launched an EEO complaint in 1974 and my complaint was handed around, dallied with and quite often, appeared to be ignored through all the administrative procedures in our federal bureaucracy. ***
>
> "My case is now on appeal to the Tenth Circuit Court in Denver and perhaps that Court will understand that the reason the Indian Health Service and BIA as well are not all Indian is because, since 1934, the Indian Preference Law has been ignored." 63/

To magnify the incompetency demonstrated by most BIA personnel, they wrongfully involve themselves in tribal politics:

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61 / Fred Dakota, Keweenaw Bay, AIPRC Joint Task Force Hearing, Superior, Wisc. Vol. II, p. 36-37.

62 / Al Trimble, AIPRC Hearing, Denver, Colo., May 8-9, 1976, Vol. II, p. 253.

63 / Ruby G. Cozad, IHS Employee, Oklahoma City, Prepared testimony for AIPRC Joint Task Force Hearing, Anadarko, Oklahoma, May 14, 1976, pp 7-8.

> "The leadership of the Village is something for the Village to decide,, not the Bureau of Indian Affairs. It is just convenient for the Bureau of Indian Affairs to recognize someone else who agrees with their policies, which is what they have allowed to happen." 64/

Indian people feel they will fully realize a goal of quality BIA personnel if they are more directly involved in the selection of BIA staff, both locally and nationally. This does not guarantee a total solution to the problem, but it places the responsibility on a level where personnel actions will be more accountable to the people.

> "We do not need Area Directors and managers who are not compatible with the people they are hired to serve. There are qualified people a-plenty all over this great country; every color imaginable, that are filled with empathy and concern for the health needs and equal employment opportunities for Indian people. These are the kind of people we need in places of authority. I think just sitting around waiting for attrition to solve our problems is not an acceptable solution." 65/

C. Review of BIA Structure

Indians have dealt with the Bureau of Indian Affairs and its predecessors since 1775, longer than any other federal agency. They have witnessed the transfer of Indian administration from three Departments of Indian Affairs to the War Department, to the Department of the Interior, and finally, fractionated among various federal agencies, though primary responsibility remains in the Department of the Interior.

64 / Statement of Minsa Lansa, Kikmongwi-Hopi, Subcommittee on Administrative Practices and Procedures, Part 5, p. 1095.

65 / Ruby Cozad, IHS Employee, Oklahoma City, Prepared testimony for AIPRC Joint Task Force Hearing, Anadarko, Oklahoma, May 14, 1976, p. 11.

Since the 1849 transfer of the Bureau of Indian Affairs from the War Department to the Department of the Interior, its structure has been arranged and rearranged numerous times. The Bureau of Indian Affairs' present structure is the result of a "realignment" effort which began in 1973.

The result of realignment has been slight changes in structural arrangement. It remains organized into three levels: National - Central Office; Regional - Area Offices; Local - Agency Offices -- the same structural organization which has operated since the mid-1940's. The policy which stimulated the three level organizational structure in the 40's was aimed at "get the national government out of the Indian business" and "assimilation of the Indian population into the non-Indian population". This structure was established to facilitate what became a formal policy of "withdrawal" and "termination".

1. Area Offices

The introduction of Regional Indian Affairs offices or BIA Area Offices brought about opposition from Indian tribes and Indian organizations. This is reflected by resolutions adopted by the National Congress of American Indians when it urged once in 1952 and again in 1953, that the Area Offices be abolished. In spite of this position, the NCAI persistently urged that the continued operation of the BIA "is consistent to the welfare of our people" and suggested that the BIA ought to "become an instrument to

serve the welfare of Indians and that Indians shall not be an instrument to serve the welfare of BIA officials". (NCAI Resolutions: 1951, No. 4 and 16; 1955, No. 23; 1973, No. 38.)

These policy views and opposition to Area Offices were echoed by witnesses giving testimony before the American Indian Policy Review Commission. Witnesses testified that the Area Offices were considered a means for increasing "red tape" and they were unresponsive to local tribal needs. As a remedy, several witnesses recommended that Area Offices be abolished while others urged that they become technical assistance agencies without line authority. Many witnesses emphasized increased tribal and agency authority and a direct line connection with the Central Indian Affairs Office.

One witness describes opposition to the Area Office this way:

> "One matter of particular objection regarding the Area Office role is that of apportioning funds to agencies, tribes and reservations from that level. Aside from the purely unacceptable political power it places in the hands of the Area Director, it also leads to a magnification of his administrative power and maintenance of staff and overhead. This is extremely burdensome on the Indian programs which are intended for Indians at the reservation level, or where help is needed." 66/

Problems with the Area Office were described by another witness who urged "abolishing" the Area Office:

66 / Al Trimble, President, Pine Ridge Reservation, AIPRC Hearing (U.S. Congress), Structure of the BIA, Vol. II, p. 248.

> "Area Office directive authority is largely inefficient and ineffective in that it... often dilutes and alters important communications between tribal and Central Office information transmission. This results in long-run negative impact on trust functions in the Indian administration. ***
>
> "... Our recommendation for abolishing the Area Office does not mean a reduction in the BIA budget, but does mean that those funds will be transferred to the local agency level. " 67/

Similar testimony was presented by the first Vice President of the Affiliated Tribes of Northwest Indians, 68/ the former Chairman of the Quechan Tribe, 69/ Chairman of the Shoshone-Bannock Tribes, 70/ and the Area Director for the Minneapolis Area Office of the BIA who said:

> "I feel that federal government structure should also be examined... authority should be delegated to be as close to tribal government as possible so that the traditional long delays do not result in attempting to bring about better delivery of service." 71/

Whether witnesses urged abolishment of the Area Offices or restructuring them as technical assistance agencies without line authority, 72/ 73/ emphasis was placed on the need to increase the authority of local agencies, increase agency management capabilities and permit direct line authority between the Central Indian Service Office andlocal agencies.

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67 / Ibid, Testimony of Pat McLaughlin, Chairman, Standing Rock Sioux Tribal Council, p. 37.
68 / Ibid, Lucy Covington, p. 239, Vol. II.
69 / Ibid, Elmer Savilla, p. 21, Vol. I.
70 / Ibid, Kesley Edmo, p. 166, Vol. II.
71 / AIPRC Hearing, Superior, Wisc. March 20, 1976, George Goodwin, Vol. II. pp 126-127.
72 / Warren Means, Ex. Director, UTETC, N. Dakota, AIPRC Hearing, Structure of BIA, Vol. II, p. 232.
73 / Ibid, Marvin Wilbur, Ex. Dir. of Swinomish Tribal Senate, Prepared testimony submitted for the record, p. 2.

2. Agencies

After urging that Area Offices provide technical assistance, the Executive Director of the United Sioux Tribes of South Dakota recommended that:

> "The agency levels should be given more authority and responsibility for decision-making in all program areas. The agency level must have the administrative capability to provide service and response to the needs of tribal governments. ***
>
> "The agency levels must have budgetary responsibility together with program responsibility if the BIA is to respond to the needs of Indian tribes." 74/

Emphasizing the need for local control of Bureau programs, Mayor Wally Leask, Metlakatla Indian Community, Annette Islands Reserve, Alaska, suggested:

> "... that local needs can be defined by local people. We feel that an office there in Metlakatla would benefit us where we would have an open line to the BIA." 75/

The Chairman of the Makah Tribal Council, Gene Parker, described why his tribe recommends that " all management responsibilities" ought to be located on his reservation:

> "We are 75 miles from the nearest town of any population which is 16,200... The procedures that we have to go through in order to get any type of activity out of the Bureau of Indian Affairs is to go from Neah Bay to the Portland satellite office (sic Port Angeles Office), to the Everett Office, or to the Hoquiam Office and then to Portland to the Area Office. ***
>
> "The procedure is time-consuming, it is expensive for the tribe, and 90% of the time we do not have any services delivered or response from the requests that

74 / Ibid, Vol. II, p. 121, Frank Lawrence, United Tribes of South Dakota.
75 / Ibid. Vol. I, p. 11

we have made." 76/

"At times, this has cost the Makah Tribe lost timber revenue from timber sales offerings going without bid." 77/

Clarence Wesley of San Carlos Apache, Arizona, expressed the view that the "Area Offices are duplications of services, red-tape and /a/ buck passing operation" and therefore suggested "that authority and responsibilities be brought back to the reservation level where the problems really are stacking up." 78/

Several tribes, while urging greater authority at the agency level, noted their desire to have an agency located on their reservations. These tribes 79/ are served by multi-tribal agencies and expressed considerable dissatisfaction with this arrangement. The Chairman of the Washoe Tribe spoke for many tribes when he said:

"All the tribes within the Navada Indian Agency compete with each other for federal services. The Washoe's would like to have their own agency. " 80/

This tendency for tribes to compete with each other (or sometimes it is referred as the agency "playing tribes off against one another") is typically described as a

76 / Ibid, Vol. II, p. 264.
77 / Op. Cit. p. 269.
78 / AIPRC Hearing, May 8-9, 1976, Denver, Colo. Vol. IV, p. 482.
79 / All Indian Pueblo Council in prepared testimony urged that "... additional agencies will be required to provide minimal but adequate services", p. 3 Makah Tribal Council. AIPRC Testimony above cited. Washoe Tribe, Task Force #3 field report, Feb. 17-18, 1976.
80 / Op. cit. p. 2.

serious problem by tribes served by a multi-tribal agency. The problem arises particularly when tribes must "prioritize" their needs and funding requirements under the Band Analysis. Those tribes who are located more distant from the multi-tribe agencies are forced to expend large sums to travel to the agency or make numerous long distance telephone calls to conduct business. These tribes have frequently requested that the Bureau of Indian Affairs establish an agency on their reservation.

3. The Bureau of Indian Affairs and Interior

Since the transfer of the Bureau of Indian Affairs from the War Department to the Department of the Interior, the question has been raised: "Where should the Bureau of Indian Affairs be located?" Another question often asked is: "How should it be organized?" Responses have ranged from the 19th century urging to return it to the direction of the War Department, the recommendation that "... Indian affairs be committed to an independent bureau or department" 81/ and the 20th century recommendations that it should be "abolished" or later transferred to the Department of the Interior. As changes in the structure and location of the

81/ Rep. Comm. Indian Affairs, 1868, p. 48. The Peace Commission appointed by Act of July 20, 1867, 15 Stat. 17 made this recommendation to the Commissioner on January 7, 1868, but in a supplementary report (October 9, 1868), it urged transfer to the Department of War.

Bureau of Indian Affairs were considered during the early part of this century, Indian tribes repeatedly asserted their rights to consultation prior to any administrative or legislative modifications.

Apart from the Board of Indian Commissioners, 82/ the first major influence that tribal governments had on Bureau structure came during Congressional hearings on the administration proposed Indian Reorganization Act. 83/ Indian efforts to influence structure continued sporadically through the remainder of the 1940's and continued through the next decade. But, not until 1961 through the American Indian Chicago Conference did Indians establish a comprehensive position on the character and structure of federal Indian administration. The threat of termination had the ironic effect of binding tribes together. Indian resolve was mirrored in the remarkable document produced by that Conference: The Declaration of Indian Purpose. 84/ The Declaration began:

> "We believe in the inherent right of all people to retain spiritual and cultural values, and that the free exercise of these values is necessary to the normal development of any people." 85/

82 / Act of July 15, 1870, Sec. 3, 16 Stat. 355. See: Schmeckebier, pp. 26-27.
83 / Fifty-eight tribes representing 146,194 persons supporting the bill while 13 tribes representing 15,213 persons requesting more time for consideration or opposing it.
84 / American Indian Chicago Conference. Declaration of Indian Purpose, June 13-20, 1961.
85 / Ibid, p. 45.

Wide ranging proposals and recommendations were offered for a major overhaul of federal Indian affairs administration and policy.

While the Conference urged that Area Offices be abolished and that local agencies be given "broader exercise of responsibility and authority to act" as had their precessors, the Declaration of Indian Purpose urged that certain principles guide the structuring of the Bureau of Indian Affairs. The Conference declared:

> "The basic principle involves the desire on the part of Indians to participate in developing their own programs with help and guidance as needed and requested, from a local decentralized technical and administrative staff, preferably located conveniently to the people it serves. *** The Indians as responsible individual citizens, as responsible tribal representatives, and as responsible tribal councils, want to participate, want to contribute to their own personal and tribal improvements and want to cooperate with their government on how best to resolve the many problems in a business-like, efficient and economical manner as rapidly as possible." 86/

In spite of this thorough and concise declaration, administration officials were unmoved. Termination policies remained strongly fixed in the attitudes of national government leaders. But even stronger was the conviction that government experts could solve Indian problems -- Indians were not to be influential in matters affecting their own lives.

For the eight ensuing years, Indians persisted in the assertion that the United States must play a major role

86 / Ibid, p. 46.

in the restoration of Indian natural and human resources. In a speech before a meeting in Albuquerque, New Mexico, on May 6, 1969, the Executive Director of the National Congress of American Indians urged that the Bureau of Indian Affairs be reorganized and established as a separate agency. At its annual convention in 1969, the NCAI opposed the transfer of the Bureau of Indian Affairs to the Department of Health, Education and Welfare (HEW) or to the Executive Office. 87/ Such transfers, it was feared, would give tise to a radical restatement of policy toward Indians as had occurred when the Indian Health functions had been transferred from the BIA to HEW in the 1950's. In 1971, the national convention of NCAI adopted a resolution 88/ urging that the Bureau of Indian Affairs be removed from the Department of the Interior and elevated to a department with cabinet status. As it had urged in 1970, the NCAI supported the formation of an Indian Trust Counsel Authority 89/ separate from the Department of the Interior and the Department of Justice.

As the NCAI had frequently asserted the need for prior consultation with the tribes before structural changes were made in the BIA, so other inter-tribal organizations demanded tribal participation in decisions related to the

87 / NCAI Convention, Albuquerque, New Mexico, 1969, Resolution No. 6.
88 / NCAI Convention, Reno, Nevada, 1971, Resolution No. 19.
89 / Ibid. Resolution No. 21.

Bureau. The Affiliated Tribes of Northwest Indians (ATNWI) proposed in 1970 that the "significant conflict of interest" found among the various elements of government dealing with Indian affairs could be eased if an Assistant Secretary of the Interior for Indian Affairs was appointed. 90/ In 1971, the ATNWI took the position opposing transfer of the BIA out of the Department of Interior until the tribal organizations had a chance to discuss and vote on the issue. 91/ The Indian position was in part a response to steps taken in the Office of Management and Budget which were aimed at establishing an "Agency for Native Affairs" 92/ which included responsibilities for administering other U.S. trust territories.

Major objectives to this and other plans developed in the national government hinged largely on the extent to which Indian tribes and organizations were involved in the planning and development of such proposals.

By 1974, the National Congress of American Indians unanimously endorsed a position paper and "Proposal for Readjustment of Indian Affairs" 93/ which recommended "the establishment of independent federal governmental machinery

90 / Affiliated Tribes of Northwest Indians, Spokane Convention, Sept. 11, 1970, Resolution No. 6.
91 / Affiliated Tribes of Northwest Indians, Portland Convention, October 15, 1971, Resolution No. 21.
92 / Crane Report on an Independent Agency, 1971, Office of Management and Budget Sub-Task Force on Native Self-Determination, March 18, 1971.
93 / NCAI Convention, San Diego, California, Oct. 24, 1974.

to replace the Bureau of Indian Affairs". Contained in the "American Indian Declaration of Sovereignty" which is attached to the NCAI proposal is this urging:

> "Establish a single, independent, federal governmental instrumentality with concurrence of the majority of the recognized aboriginal American Indian tribes and nations, in order to implement and guarantee the treaty responsibilities and trust obligations of the United States of America under Article Six of the Constitution of said nation." 94/

The National Tribal Chairmen's Association took a similar position in support of a separate Indian agency in the summer of 1975. 95/

Since these formal organizational statements were publicly announced, Indian tribes and other organizations have announced their support for various forms of a new structure of the BIA as a separate agency. Common among these various proposals is the separation of Indian affairs from the Department of the Interior. Similarly, support for separation has been conditioned on full participation of Indian nations and tribes in the planning and development of the new agency.

In testimony presented to the American Indian Policy Review Commission on behalf of the Creek Nation, the following was recommended:

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94 / Ibid. "American Indian Declaration of Sovereignty", part C (See appendix for full statement).

95 /

"...Indian affairs are not solely a judicial nor a legislative duty of the government, nor are they an exclusively Executive duty. On the other hand, Indian affairs are constituted by governmental duties which are simultaneously quasi-executive, quasi-legislative, and quasi-judicial. There is only one form of governmental organization of powers which embodies these three types of power simultaneously: independent commissions and agencies. ***

"Therefore, I strongly recommend that Indian affairs be assigned to an independent commission. Only this assignment of federal power will alleviate the present confusion of Indian affairs with the Executive Branch." 96/

This position echoes the "Proposal for Readjustment of Indian Affairs" adopted by the National Congress of American Indians in 1974. 97/ The Affiliated Tribes of Northwest Indians testified to the need for an "Independent Indian Commission" and gave the following description to amplify their remarks:

"... recommendation of the Affiliated Tribes of Northwest Indians is the establishment of an independent agency which would replace the Bureau of Indian Affairs, all other federal agencies involved in Indian affairs, and state involvement with Indian tribes. The purpose of this independent agency is to provide health, education and welfare; preserve, protect and guarantee Indian natural resources and lands, and the exclusive rights of Indians to their water, timber and minerals." 98/

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96 / Glenn Moore and Robert Trepp, Creek Nation, AIPRC Hearing, May 8-9, 1976, Denver, Colorado

97 / See Appendix

98 / Cal Peters, Skip Skanen, Wendell George, ATNWI, AIPRC Hearing, May 8-9, 1976, Denver, Colorado, pp. 64-65 and prepared testimony appended to testimony.

"To insure that the tribal government shall have the widest possible flexibility in desining programs and setting priorities for their tribal members, all program and funding efforts will begin at the tribal level." *** 99/

"This Commission will be guided... by nine Indian Commissioners. These Commissioners... selected by Indians through a series of elections beginning at the tribal level..." 100/

Consistent with the desire to separate Indian affairs from the Department of the Interior, the United Sioux Tribes of South Dakota state:

"BIA services must be molded into an adequate structure with functions relevant to the needs of the Indian tribes. The BIA must be allowed to function as a separate agency with cabinet status so as to eliminate interference of other interest(s)" 101/

This view was expressed by the United Tribes of North Dakota, 102/ Swinomish Tribal Senate, 103/ as well.

While several witnesses for Indian organizations expressed the view that Indian affairs ought to be separated from the Department of the Interior and function as an

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99/ Ibid, Op. Cit. p. 27-28.

100/ Ibid, p. 28.

101/ Ms. Elnita Rank, Chairperson of United Sioux Tribes and Crow Creek Sioux Tribe, testimony presented to AIPRC Hearing, Denver, Colorado, May 8-9, 1976, Vol. II, pp. 119-120.

102/ Ibid, Warren Means and Ralph LePera, Vol. II, p. 231.

103/ Ibid, Marvin Wilbur, Prepared testimony appended, p. 2, para. 1.

independent agency." 104/

The present location of the BIA is widely regarded as harmful to the future of Indian nations and tribes while its present organization is seen as expensive, cumbersome and outdated.

104/ Testimony to this effect was presented by: Elmer M. Savilla, former Chairman of the Quechan Tribe, expressed his endorsement of proposals to: "...completely remove the Bureau of Indian Affairs from under the umbrella of the Department of the Interior.

"The benefits of such a move... (1) The inherent conflict of interest within the Interior Department would be removed; (2) There would be a strong administrative advocacy within the new Indian Department; (3) The obligation of the Commissioner of Indian Affairs and his Area Directors to carry out dictated policy from the Secretary of the Interior would be removed.

"Very importantly, the organized Indian tribes of this country must be given the right to manage and control their own affairs... free from the heavy bureaucratic restrictions that limit their development."

(Statement of Elmer M. Savilla before AIPRC hearing on the Structure of the Bureau of Indian Affairs, May 8, 1976, Denver, Colorado.)

* * * * *

C. David Gardner, Principal Chief, Choctaw Nation presented this recommendation in prepared testimony: "Transfer of the BIA to the Executive Office of the President would give it high visibility and a strong mandate for change and improved performance..." (AIPRC Hearing, Denver, Colo. Vol. III, prepared testimony appended.)

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Bob Cannon, Chairman of the Kiowa Tribe presented testimony before a joint Task Force Hearing in Oklahoma, May 11, 1976, Oklahoma City, Vol. II). He urged: "The BIA should be created by Congress to have department-level powers as an equal to non-Indian Department, DOL, Department of the Interior, HEW, HUD, CSA, etc..... under this structure all funding impacting the tribes to carry out the United States Trust responsibilities to the tribes." (p. 5 of prepared testimony.)

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Rosebud Sioux Tribe submitted prepared testimony before AIPRC Hearing, Denver, Colorado, May 8, 1976, Vol. II which recommended a solution to the problem of conflict of interest within the Department of the Interior: "The Bureau of Indian Affairs should be removed from the Department of the Interior and should be established as an independent agency within the Executive Branch of the Federal government. In this new arrangement the BIA would exercise no authority over Indian tribes but would be a service organization delivering to the Indian tribes appropriate and requested services and relaying to Congressional Interior Committees legislation proposed by Indian tribes." (from prepared testimony, pp. 1-2)

CHAPTER III.

FEDERAL INDIAN ASSISTANCE PROGRAMS: THE DELIVERY OF PROGRAMS

A. Review of Policy

1. Roots of Federal Assistance

The system for delivery of goods and services to Indians found its beginning in early treaties with Indian tribes. Though the methods of delivery have changed and the spectrum of goods and services has broadened, the United States has continued to respond to treaties and agreements by developing general and specific government programs intended to fulfill commitments made long ago.

There are now hundreds of avenues through which goods, services and assistance pass before they reach Indian tribes and people. The inconsistency of treatment of Indian tribal governments by federal domestic assistance agencies and the often arbitrary requirements placed upon tribal participation have given rise to serious concerns that the United States is failing to uphold its treaty commitments. The success or failure of federal assistance to Indians is key to tribal survival and the fulfillment of treaties and American law.

After the first six treaties were concluded between the United States and the Six Nations, 1 / the Continental Congress in 1776 authorized:

> "...the permanent supply of the Indians with goods at the public expense..." 2 /

in accordance with treaty provisions and agreements. Every subsequent treaty concluded with tribes across the continent contained similar provisions. With the creation of the three Departments of Indian Affairs, the Commissioners and later, the superintendents became the instruments for delivering goods and services of civilization 3 / to tribes. Provisions of these goods and the services were provided "for preserving peace and friendship" 4 / with the tribes. Congress demonstrates its commitment to the obligation to supply goods and services to Indians as it reviewed the circumstances which gave rise to violent conflicts involving the Creek and Cherokee Nations against the people of Georgia and North Carolina:

> "Various circumstances show that the Indian in general, with the United States, want only to enjoy their lands without interruption, and to have the necessities regularly supplied by our traders, and could these objects be effected, no

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1 / The Iroquois Confederacy was a league of tribes including the Mohawk, Seneca, Oneida, Cayoga, Onondaga, and Tuscarora. The Iroquois Confederacy is the oldest known democratic federation which came into being around the middle of the 1500's and which survives to this day.

2 / First Journal of Congress, p. 249.

3 / Ibid, p. 255.

4 / Northwest Ordinance, Stat. 50-52 , August 7, 1789.

other measures would, probably, be necessary for securing peace and a profitable trade with those Indians." 5 /

2. Payment for Land Cessions

Until the treaty with the Creek Nations was concluded on August 7, 1790 (7 Stat. L. 35), no earlier treaty had contained a provision for the payment of an annuity in consideration for certain land cessions. 6 / Thus established the first formal links between Indian ownership in the land and provision of goods, services and the payment of annuities in consideration for lands ceded.

It had become the standing practice of the Congress to deal only with the tribes as a whole in trade and in the provision of goods, services and annuities. This practice continued for over one hundred years prior to 1875. 7 / In that year, Congress passed an Act (18 Stat. L. 420) which allowed an Indian "who abandoned his tribal relations to obtain land under the Homestead Law in the same manner as white persons." 8 /

5 / Blunt, Joseph. Report of a Committee...relative to Indian affairs and a motion of the Delegates from Georgia. Aug. 3, 1787 p. 113.

6 / Schmeckebier, Laurence F., The Office of Indian Affairs, 1927, p. 20.

7 / Ibid. p. 76. "Before 1875, practically all general legislation had regarded a tribe as the unit of Indian life, and there was no attempt to interfere between members of the tribe or to make any general legal provisions for Indians who might separate from the tribe. There had been some acts applying to particular tribes, generally small ones, that provided for the allotment of land in severalty and the admission of the Indian to citizenship, but in general, the Indians were regarded as a portion of the population set apart, to which the government owed certain obligations". [Emphasis supplied.]

8 / Ibid. p. 78

3. The General Allotment Act and the Emergence of Services to Individuals

The General Allotment Act passed on February 8, 1887, represented the first drastic departure from patterns in the U.S./Indian relations. For the first time, the United States began to take steps to deliberately intervene in the internal affairs of tribes. And for the first time, the United States sought to deal directly with individual Indians, by way of parceling out Indian collective holdings to allotments. This was a deliberate move to break up the reservations "and destroy the Indian tribe as the institution of Indian life."

To insure that Indians would willingly participate in the allotment program, they assured them of continuing protection of their land holding for a period of twenty-five years after which, the Secretary of the Interior could issue a patent in fee when it might be determined the Indian allottee was competent to manage his or her own affairs. 9 / They were further assured of support by the government and provided education so that they might learn how to be civilized like the white man. Where Indians did not willingly accept allotted lands, they were forced to take allotments and become Indian land owners. 10/

All of this flowed from a conviction of Congressmen and administrative officials alike that Indians ought to be given the chance to live freely, own land, become civilized

9 / Act of May 8, 1906 (34 Stat. L. 182)
10 / Schmeckebier, Laurence F., The Office of Indian Affairs, p. 80.

and assimilated into the white society. Those that did not or could not adopt the ways of the American society, were not worth saving and certainly ought not be allowed to return to the "savage state."

The Bureau of Indian Affairs was geared up to assist the individual Indian in making the transition from tribal life to the life of individualism and "free enterprise".

> "The education program of the Bureau was expanded and secularized, with emphasis upon the use of boarding schools to get young Indian off the reservations. Health and medical services, law enforcement, meager amounts of technical assistance, land reclamation aid, forestry supervision, and sporadic welfare services made up the balance of the program." 11/

That the General Allotment Act served to divest tribes of large tracts of prime land and permitted unscrupulous non-Indians and economic interests to purchase countless allotments through fraud and deception, there is no question. Ironically, however, the resultant high incidence of death, disease and the spreading poverty among Indians caused a substantial public outcry demanding that justice be done. This swell of public criticism impressed by the Executive and the legislative branches of government. Finally, Congress passed the Snyder Act on November 2, 1921 12/ authorizing appropriations and expenditures for the purpose of supplying goods, services and assistance to Indians. The statute read in part:

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11 / Freeman, John L. The Indian New Deal, p. 43.
12 / 42 Stat. L. 208.

"...That the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care and assistance of the Indians throughout the United States..." 13/ [Emphasis supplied.]

The passage of this act might have supplied the impetus for a major overhaul of the Bureau of Indian Affairs, but no changes were made in its duties or activities. 14/ The Act merely made it easier for the Bureau to secure funds from the Congress by preventing "appropriations items from being subject to a point of order in the House of Representatives," 15/ which had been the practice of the House Appropriations Committee when no prior legislative authority existed for a particular item.

4. Federal Assistance to Indians Broadened to Other Agencies

It was not until 1929 that consideration was given to the possibility that agencies other than the Bureau of Indian Affairs should become involved in the provision of services and assistance to Indians. This view was first offered by Commissioner John Collier as a part of the new policies which were to emerge from the Indian Reorganization Act of June, 1934. 16/ Commissioner defined one of his objectives under the new policy as follows:

13 / Ibid.
14 / Schmeckebier, Laurence F., The Office of Indian Affairs, p. 89.
15 / Ibid.
16 / Act of June 18, 1934, 48 Stat. 987.

> "To abandon the tradition of Indian Office monopoly over the Indian Service, by drawing all available federal and state agencies into the Indian Service." 17/

The prime motivation for this policy was due to Collier's conviction that the Indian Service should "shift from that of dispatch management to that of cooperative advice and technical assistance." 18/ While many agencies of the federal and state government had begun modest efforts to serve the social and health needs of Indians after the publication of the Meriam Report in 1928, 19/ there remained considerable reluctance among agency officials to provide services. This state of affairs was largely due to uncertainty about the extent of BIA responsibilities and the tendency of the Bureau to guard its turf and assert its control over Indian affairs.

The Bureau, it was thought, was guilty of providing insufficient and substandard services. The remedy Collier sought was a movement "toward the sharing of responsibilities with other agencies" 20/ in a cooperative inter-governmental effort to solve the economic, social and health problems so starkly revealed in the Meriam Report. As an example of how this system of cooperation could work, Collier asserted:

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17 / Records of the Development of Collier's IRA Policy 75, 56-A-588, 395, 50660-45-120. Federal Archives Records Service. Fort Worth, Texas. Indian Service Policies, Galley 1.

18 / Ibid.

19 / Lewis Meriam and others, The Problem of Indian Administration (Baltimore: The Johns Hopkins Press, 1928).

20 / Records of the Development of Collier's IRA Policies, Fort Worth Texas, Galley 5.

"Within the federal system, the outstanding unifications have been those between the Indian Service and the CCC (Indian Emergency Conservation Work), and the Indian Service and the Department of Agriculture (Soil Conservation Service). Continued or extended cooperation with the United States Public Health Service and with the Bureau of Animal Industry has gone forward. An entirely new collaboration with the Bureau of American Ethnology (Smithsonian Institute) has been achieved. Important help to Indians has been given by the Federal Emergency Relief Administration, the Agricultural Adjustment Administration, and the Land Program through the Resettlement Administration.

"Not merely have these many cooperative and sharing arrangements increased the services given to Indians, they have, in addition, reacted in a stimulating and challenging fashion upon the Indian Office. Not a sequestration of Indians within the one federal bureau, but the largest use of all the agencies' helpfulness is the guiding principle in present Indian affairs." 21/

The motivation for state cooperation was as a result of Congress' passage of the Johnson-O'Malley Act 22/ which provided that the Secretary of the Interior could contract with state and local agencies for the purpose of providing pre-college education to Indian youngsters. States in general were not willing to use state revenues to supply services and assistance to Indians due to the non-taxability of Indian lands - the principle source of social and educational revenues generated by states.

Through the 1950's and 60's, the pace increased to place Indian support programs into other federal agencies. Indian Health was moved out of the Bureau of Indian Affairs in

21 / Ibid.
22 / 48 Stat. 596; April 16, 1934.

the middle 1950's, to the Public Health Service to facilite more "expert" provision of services. The overriding policy was to "get the government out of the Indian business" - a policy which was to be achieved by moving the responsibilities for Indian services into other agencies, state governments and out of the Bureau of Indian Affairs. This policy was accelerated in the 1960's with the policy of assimilation of Indian populations as the goal.

Indian tribes began to see the advantages of multiple agency federal assistance programs as the flow of direct funding and assistance began to boost tribal economies in ways the Bureau of Indian Affairs never could. The Great Society Programs of the Johnson administration became the first major breakthrough for tribal governments. 23/

> "...although Indian tribes were not specifically mentioned in the delivery system provided in the Economic Opportunity Act of 1964, a crucial policy decision was made by OEO to make Community Action Program grants to Indian tribes, frustrating an attempt by the BIA to serve as an administrative conduit for these funds." 24/

The infusion of OEO funds into tribal communities brought about vigorous efforts of tribal governments to serve their people by developing economic and social programs that they administered. Though the quantity of funds was not large, they nevertheless provided Indian tribes with the first real opportunity to plan their own future.

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23 / Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs., University of New Mexico, American Indian Law Center, 1976.

24 / Ibid, p.1.

At the close of the decade of the 1960's and the beginning of the 1970's, the Nixon administration began efforts to establish domestic assistance programs by expanding the Bureau of Budget into the Office of Management and Budget and through an effort to standardize federal service regions, organize federal regional councils, decentralize federal granting authority to the regions and establishment of an integrated grant system for comprehensive development. 25/

For Indians, these administrative changes were couched as methods for insuring tribal self-determination. But inconsistencies in the treatment of tribal governments, poor communications and arbitrary program requirements combined to create distrust of the new system. The policy of self-determination began to be seen as yet a new form of assimilation and termination.

B. Review of Practices and Procedures

The first surge of federal programs outside of the Bureau of Indian Affairs served as a stimulant to tribal governmental activity and the delivery of social services. Tribes became recipients of federal funds through the Office of Economic Opportunity, a program that was organized to minimize bureaucracy and maximize actual service dollars. Indian tribes, both large and small, responded to the new sense of freedom that came with the power to expend funds according to plans developed within the Indian community.

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25 / Ibid. p. 2.

Nine cabinet-level departments have developed major programs concerned with Indians and two have some activities associated with Indian concerns. In a 1974 study conducted by the National Council on Indian Opportunity (NCIO), 26/ they determined that of six hundred programs surveyed in all departments, only 78 domestic assistance programs were being used by a sample of twenty-nine tribes. 27/ These programs, as a practical matter, were not then and are not now solely for Indian services. Cabinet departments often have numerous programs available to all persons, Indian and non-Indian, but which are foreclosed to Indians because of restrictive eligibility criteria, 28/ or because funds are channeled through "state and local governments" which do not, as a matter of practice, include Indians in their population counts.

In addition to the eleven cabinet-level departments, there are at least seven independent agencies with functions that touch on Indian rights and/or benefits, and five temporary commissions whose studies and recommendations will affect Indian interests. Of the twenty agencies, departments and commissions studied, the Government Accounting Office (GAO) concluded in its August 28, 1975, report that: 29/

26 / Office of the Vice President, National Council on Indian Opportunity, A Study of Federal Indian Domestic Assistance Programs, February 1974.

27 / Ibid, p. 2.

28 / Ibid, p. 2. "There are 46 specific instances of statutory or administrative exclusions to, or constraints on, Indian tribes..."

29 / Information on Federal Programs Which Benefit American Indians, Report of the Comptroller General of the United States, B-114868 (Requested by Sen. Paul J. Fannin).

"...obligations which benefited American Indians during this period increased from about $0.71 billion to about $1.5 billion. The Departments of the Interior, Health, Education, and Welfare provided over 66 percent of these funds for fiscal year 1969 through 1974." 30/

The GAO finding seems remarkable when considered on its own. However, it becomes clear that a vast amount of the reported total for Indian programs must be supporting a sizable bureaucracy since only 78 programs were reported to being used by Indian tribes in the NCIO survey.

The explosion of federal domestic assistance programs tended to be a "boomlet" since most federal agencies lacked a summary data basis regarding Indian needs, generally lacked awareness and knowledge of the unique relationship between Indians and the United States, and they developed complex rules and regulations which demanded highly skilled "grantsmen" at the tribal level. 31/

In many agencies there is a lack of clarity in the definition of programs being offered. This often leads to overlap and duplication of programs of different agencies. Yet despite this overlap, it is also true that many of the programs offering grants or contracts are so limited that no one program offers the full support needed by the applicants.

The once hopeful atmosphere in which federal Indian assistance programs emerged has been clouded in recent years. Tribal governments which found greater freedoms through a combination

30 / Ibid, Letter of transmittal, p. 2.
31 / Ibid, p. 3.

of programs from both the Bureau of Indian Affairs and other federal agencies are beginning to reject federal assistance and emphasize Bureau contracting. As Robert Trepp suggested in testimony before the AIPRC: 32/

> "... all programs directed toward American Indians operate within one of the several departments at the cabinet level. ***
> "This creates so much organizational confusion that it is becoming impossible for the tribes to operate within the executive framework. It is not that the tribes, individually and collectively, lack the intelligence, capability and technical expertise necessary to deal with these cabinet departments. To the contrary, it is these cabinet departments, individually and collectively, which lack the capability and technical expertise to deal with the tribes and with each other." 33/

In the Great Lakes region of the United States, twenty-eight tribes in the States of Minnesota, Wisconsin, Michigan and Iowa have experienced very little contact with both the Bureau of Indian Affairs and other federal agencies. As a consequence, these tribes depend mainly on assistance from state governments, services of county governments and nothing else. When funds are received from federal agencies, they are frequently passed through state agencies before tribes receive funding support. This poses several difficulties as Fred Dakota, Chairman of the Keweenaw Bay Indian Community described in testimony before a Joint Task Force Hearing: 34/

32 / AIPRC Hearing, May 8-9, 1976, Denver, Colorado, Vol. III.
33 / Ibid, Prepared testimony of the Creek Nation, p. 2.
34 / AIPRC Joint Task Force Hearing, March 19-20, 1976, Vol. II.

"... we were advised to go through LEAA for funding. LEAA went along with it, but they've got... their own rules and regulations also and we were informed that ... we requested funding and it goes through your channels... Washington, regional office, and in this instance, Michigan." 35/

1. Statutes and Regulations

Over six hundred domestic assistance programs may be useful to Indian tribes, but most of the enabling legislation does not note Indian tribes as eligible recipiants. 36/ (See Appendix C). Because of inconsistent inclusion of Indian tribes in general program legislation, administrative legislative regulations for the conduct of a program reveal similar misconsistencies which place a substantial burden on tribal governments. Without uniformty in the various program delivery systems, tribes are forced to deal with complex systems which do not permit flexibility at the local level.

"The Indian people as a whole have very little knowledge or understanding of the legislation. Programs with stringent requirements that are not understandable for its implementation results only in abuse, waste and inefficiency." 37/

Frustrations that result from these "stringent" regulations have created a general unwillingness to use federal agency assistance.

35 / Ibid. p. 20.
36 / Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, 1976, p. 13.
37 / Chief Overton James, Chickasaw Tribe, AIPRC Joint Task Force Hearings, Muskogee, Oklahoma, Vol. II, p. 9.

2. Service Delivery Mechanisms

Federal assistance to tribes relies on several specific methods of delivery: Indian Desks, federal regional councils and state government. Each system poses problems for tribes because of the nature of tribal government, treaties and agreements. The key issue which gives rise to problems is that of eligibility. Eligibility relates to two alternative systems of delivery: "either the relationship is between the tribe or tribal organization and the federal government, or the statute requires some form of state participation in the delivery of services." 38/ Where services are delivered to "units of local government" in accordance with state law, Indian tribes are excluded from consideration. Such program services that are delivered may have an impact on individual Indians as citizens of a state but tribal governments are excluded. Even as programs are directed specifically at Indian tribes (EDA, HUD, LEAA) the state may exercise the right to review tribal plans. This occurs dispite the fact that there is no policy reason to require states to have an involvement in Indian programs. Though the Office of Management and Budget has made it clear that states need not coordinate tribal programs, many tribes continue to have their programs reviewed by state authorities. 39/

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38 / Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, pp. 24-25.

39 / U.S. Congress Hearing of the American Indian Policy Review Commission, Task Forces #3 & #4, Superior,Wisconsin.

That tribes are not eligible for federal programs unless they permit state review or have a specific place in the legislation causes an irregular initiation of programs and a major block to the use of programs.

Indian Desks are regarded by tribes as important instruments for gaining federal assistance, 40/ but they lack sufficient authority to respond to tribal needs. Similarly, they are seen as having insufficient funds to adequately respond to tribal needs.

Federal Regional Councils are generally regarded as inefficient instruments to coordinate service programs for tribes. Many tribes sense that Regional Councils lack sufficient authority and expertise to deal with tribal governments. 41/ The problem of Regional Councils is characterized in this way by an official of the national government:

> "... we are hindered in the regional council by the split of program authority among the federal agencies. As you all well know, some Indian programs are run out of Washington. Some strictly out of Chicago. And there's a mixed bag in between. It's difficult to get the right people at the regional level to be able to handle all these kinds of problems." 42/

As a reaction to problems such as this, the NCAI urged in 1972 that federal agencies work through the Bureau of Indian Affairs. 43/

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40 / NCAI Historical Priorities and Policies, (paper prepared by AIPRC), Resolutions 27 (1967), 50 (1969), 58 (1970), 12 (1974).
41 / AIPRC Hearing, TF's 1, 3, 4, Yakima, Washington.
42 / Madonna McGrath, Secretary's Special Asst., Region 5, Indian Committee, AIPRC Joint TF Hearings, Superior, Wisc. Vol. II, pp 142-143.
43 / Historical Priorities and Policies, AIPRC paper, NCAI Resolution #46.

Indians have urged with increasing frequency that federal goods, services and assistance be channeled directly to tribes and reservations. 44/

Indians have been determined to be eligible or potentially eligible for numerous programs 45/ (See Appendix C). The recommendations of the American Indian Law Institute make a strong argument for making substantial changes in present program legislation. As they put it:

> In view of the pledge of Congress and the administration to support Indian tribal government... the time is right for all of these programs to be made available to Indian tribes." 46/

44 / Ibid, NCAI Resolutions #19 (1969), #59 (1975), #61 (1975).
45 / Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, 1976.
46 / Ibid, pp. 34, 35, 36.

CHAPTER IV.

FEASIBILITY OF ALTERNATIVE INDIAN ELECTIVE BODIES

A. The Status of Indian Tribes and People

1. Legal Status of Indian Tribes

a. Indian Nations and Tribes as Independent National Entities

Anthropologists and historians have estimated that over one million Indians, making up over 600 societies, lived in what is now the United States before the first landing of Europeans. 1/ A complex trade economy and highly structured governments were found wherever European explorers traveled. Indians exercised all the governmental powers necessary to maintain social, economic and political stability. There can be no doubt that the numerous distinct governments checkerboarding the continent were nations. 2/ These nations were recognized by European nations and the United States in over 800 formal treaties up to 1871. 3/ Such treaties covered the full range of relations between nations including trade, social intercourse, land cessions and the ending of war. By definition and by example of international relations, Indian tribes fully met the qualifications of nationhood. The treaties concluded among themselves and with European nations and the United States carried the full weight of law. This point was explained by Justice Marshall when the Supreme Court held:

1/ John Collier, Indians of the Americas: A Long Hope, p. 101.
2/ The term "nation: comes from the Latin nātiō - ōnis.
3/ Numerous other agreements both written and oral were made to define the relations between nations; these too are considered treaties.

> "The words 'treaty' and 'nation; are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense." 4 /

That treaties were concluded between sovereign Indian nations and the United States is supported by the position taken by U.S. Attorney General William Wirt, who said, in 1828:

> "If it be meant to say that, although capable of treating, their treaties are not to be construed like the treaties of nations absolutely independent, no reason is discerned for this distinction in the circumstance that their independence is of limited character. If they are independent to the purpose of treating, they have all the independence that is necessary to the argument. The point, then, once conceded, that Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation." 5 / [Emphasis supplied.]

Indian nations had the capacity to govern themselves, make war and peace, and form alliances with other nations. Having such capacities and having those capacities recognized by other Indian nations and European nations firmly establishes their sovereign nationhood. The independent national character of each Indian nation was secured among the family of nations.

Even as treaties placing certain Indian nations under the protection of various kings 6 / and potentates were concluded, the nature of Indian sovereignty remained unaltered.

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4 / Worcester v. Georgia, 31 U.S. 515 (1832).
5 / 2 Op. Atty. Gen. 110 (1828).
6 / King George III proclaimed (October 7, 1763) the right of Indians to live "unmolested and undisturbed" under "our protection".

As Justice Marshall concluded in Worcester v. Georgia:

> "...the settled doctrine of law of nations is that a weaker power does not surrender its independence -- its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." 7 /

Though the United States dealt with Indian nations according to protocols similar to those of European nations, its motivations were decidedly different. The Continental Congress concluded its first treaty with the Delawares 8 / for the purposes of defining boundaries between the Colonies and Indian territory and forming a military alliance. In this instance, no land cessions were made. However, after the war with Great Britain, the United States sought treaties with Indian nations for the main purpose of land cession. A major provision typically contained in treaties spoke to a perpetual relationship arising out of compensation for land purchased by the United States. The basic motivation of the United States in its treaty-making emerged -- the taking and securing of land. In spite of this, Indian nations retained their independence and their right to govern.

b. Indian Nations as "Domestic Dependent Nations"

The United States and its citizens had moved rapidly into ceded Indian territories and land purchased. The

7 / Worcester v. Georgia, 31 U.S. 515 (1832)
8 / 7 Stat. L. 13, Signed at Ft. Pitt on September 17, 1778.

forced removal of Indians to lands west of the Mississippi had opened large tracts of land previously occupied by Indian nations. Though the act of forced removal was in violation of treaties with Indian nations and therefore a violation of international law, the United States was not held back. Justice and fairness were not principles to guide the U.S. in its dealings with Indian nations. Destruction and expedience became the means to secure land, wealth and new opportunities for the United States. In its wake, the U.S. left death, destruction, and a disrupted economy among the Indian nations.

Whole Indian tribes and communities were forced out of their original territories or surrounded by white communities. It was the isolated Indian territory that became the subject of a U.S. Supreme Court decision 9 / which rendered a whole new concept by which Indian nations and tribes could be described. The court held that Indian nations could be "denominated domestic dependent nations". 10/

In a recent analysis of this decision, the Institute for the Development of Indian Law noted: 11/

> "...it is important to know that the 'domestic dependent nations' doctrine was a compromise between the political realities of the time and the views of several judges that Indian tribes were indeed independent nations. *** A strong decision supporting the complete independence of Indian nations would have been more in line with the facts." 12/

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9 / Cherokee Nation v. Georgia, 30 U.S. 1. (1831)
10 / Ibid.
11 / Curtis Berkey, Indian Sovereignty, 1975.
12 / Ibid, p. 65.

Chief Justice Marshall's decision had the effect of defining a U.S. responsibility to protect Indian nations and tribes against encroachments by states and recognized the weakened condition - brought on by the destructive militarism of the United States - of the Indian nations requiring U.S. protection. This decision did not in fact reduce the tribes' authority, but it did serve as the means by which the U.S. government justified extension of federal power over Indian governments.

It remains a settled legal doctrine to this day that Indian nations and tribes are "dependent nations" of people; dependent on the greater power of the United States for their protection and survival. This condition of dependence does not reduce the national powers of an Indian tribe or nation, though as a practical reality, tribes have reduced their own powers by entering into treaties and agreements with the United States. Tribal powers have further been reduced by unilateral usurpations without the consent of tribes, by the United States. Nevertheless, to have such reductions in national power does not diminish the national character of an Indian tribe.

The legal status of Indian tribes as "domestic dependent nations" was used to "refer to political dependency in the international sense", 13/ of a lesser power taking

13 / Russel L. Barsh, Henderson Tribal Administration of Natural Development. National Law Review, Vol. 52, No. 2, Winter 1975, p. 314, fn. 37.

the protection of a greater power. U.S. federal authority to regulate Indian affairs ends at tribal borders. 14/ It can be said, therefore, that the United States has the authority to control the external affairs of Indian nations and tribes, but it does not have the authority to supervise, regulate, or control their internal affairs unless consent is given to do so.

2. Political Status of Indian Nations and Tribes

Indian tribes and nations do not have a role as political entities either as members of the family of nations or as political units within the federal Union that makes up the United States. Their political status has been characterized as "unique" though no specific interpretation of uniqueness has been developed, except in terms of the relationship between Indians and the United States -- likened to that of a ward/guardian relationship. But, nowhere else is there a comparable relationship except perhaps the relationship between the Micronesia Islands in the Pacific and the United States. This possible comparison is discussed in Section E.

a. Indian Nations as States in the Union

Early in the history of the United States, attempts were made to include Indian nations as formal members of the federal Union. Such attempts are reflected in the first treaty concluded by the Continental Congress with the Delaware

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14 / United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876).

Nation. 15/ Contained in the treaty was a proposal for the creation of an Indian state "where the Delaware Nation shall be the head, and have a representation in Congress". In the treaty of 1785 with the Cherokee Nation, it was provided that "they shall have the right to send a deputy of their choice, whenever they think fit, to the Congress". Public sentiment in support of Indian nations becoming states within the Union continued for one hundred years, but no direct actions were taken to implement the treaty provisions just mentioned or actions to respond to public opinion.

The United States continued to deal with Indian nations and tribes as separate political entities having no political affiliation with the United States except as expressly stated in treaties and agreements until 1871, when Congress enacted the Appropriation Act of March 3, 1871 containing an amendment for the termination of treaty-making with Indian tribes. 16/ Though this Act did not prevent the process of treating with Indians by agreement, it did serve as a unilateral denial of tribal national character which had been commonly recognized since the Europeans first placed settlements on the continent. The 1870's marked the first decade in the history of U.S./Indian relations in which the growth of federal Indian law was entirely a matter of legislation rather than treaty.

15 / Treaty with the Delaware Nation, 7 Stat. L. 13 (Sept. 17, 1778).
16 / 16 Stat. 544, 566.

b. Indian Nations as Territories

Though no specific agreements were made between Indian tribes and the United States to change the separate status of Indian nations and tribes, the nature of tribal political status took on the character of territories in the minds of legislators and administrators. In a case concerning the authority of an administrator appointed by a probate court of the Cherokee Nation, 17/ the Supreme Court held:

> "...In some respects they bear the same relation to the federal government as a territory did in its second grade of government, under the ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and Acts of Congress. *** It is not foreign, but a domestic territory, -- a territory which originated under our Constitution and laws." 18/

As separate political entities, dependent nations and then Indian territories, the Courts had held to the doctrine passed down by the Supreme Court in Worcester v. Georgia, 19/ that:

> "They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility." 20/

17 / Mackey v. Coxe, 18 How. 100 (1855).
18 / Ibid, p. 103.
19 / 6 Pet. 515 (1832).
20 / Ibid, p. 20.

Such a status was clearly never contemplated by tribes as they entered into treaties with the United States. From the Wampum Belt treaties of the Six Nations in the 1770's to the "Red Paper" of the Second International Indian Treaty Conference, 20/ Indians have asserted the doctrine of "separate paths". 21/ The recent treaty conference strongly reasserted the position that:

> "American Indians belong to separate sovereign nations in North America. Collectively and individually, we have a nationality of our own which is separate from the United States. Our history, culture, customs, traditions, values and interests are totally different from those of the imperialist United States." 22/

c. Indian Nations as Colonies

The present political status of Indian nations and tribes has been characterized as one of colonies under the domination and rule of a "government department" of the United States. The "colonial status" of Indian nations began with the unilateral termination of treating with Indians and the assumption of agreements and legislation. The colonial character of Indian nations and tribes is described as follows:

> "Today, the United States imposes rule over all aspects of Indian life. From birth to death, the Indian individual and nation are subject to totalitarian authority of the United States. The United States imposes its form of education, e.g., boarding schools, which attempt to alienate the Indian child from his/her parents and culture.

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20 / "Red Paper", unpublished. The Second International Indian Treaty Conference, Yankton Lakota (Sioux) Country, S.D. (June 13-20, 1976)

21 / The Wampum Belt and many other treaties defined a separation between U.S. and Indian nations in a spirit of mutual coexistance and non-interference.

22 / Op Cit. p. 1 "Red Paper".

"The United States has imposed a foreign form of government on the Indians and recognizes that government... not a traditional, legitimate government. The United States maintains that no Indian nation's law is effective without United States approval. It imposes its criminal law, foreign trade, currency, postal service, radio, television, and air transport regulations on reservations. *** An Indian nation is not even allowed to sign contracts or to hire a lawyer without the permission of the United States. Any self-government left to Indian nations by the United States is, it is made clear, left only by the grace of the United States Congress. The United States maintains it has a right to, at any time, pass a law and make it applicable to Indians on their reservations whether or not the laws conform to treaties with Indians, to international law, or to the United Nations Charter." 23/

3. Political Status Unresolved

As two hundred years of Indian/U.S. relations have evolved, the question of Indian political status remains unresolved. Indians, as a people, do not fully exercise the right of self-government nor do they have the right to participate as Indian nations and tribes in the decisions which affect their lives and welfare. This state of affairs has given rise to frustration and violence in various parts of Indian Country. Indians have discussed among themselves and publicly stated alternative approaches to settling the question of Indian political status.

Some have urged that all of the Indian nations and tribes ought to be joined politically to form an Indian State, 24/ a fifty-first State of the Union. Others have urged the United States to recognize the sovereignty and

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23 / Ibid, p. 3-4.
24 / Indian Legislative Institutions Workshop. Task Force #3, February 14-15, 1976, Washington, D.C.

independence of Indian nations and tribes. 25/ Such views reflect the wide diversity in the positions of tribal governments regarding Indian political status. It is clear, in spite of this diversity, that any determination of Indian political status must evolve from the Indian people and their respective governments and not as a result of U.S. unilateral action. The latter approach most surely will not settle the question of Indian political status because of the increasing disinclination of Indian nations and tribes to take direction from the United States and their greater inclination to define a status as a result of inter-tribal negotiations. An imposed political status rather than an agreed-upon status which is a product of bilateral negotiations can do nothing more than bind Indian nations and prevent self-governance and diminish the chances of an emergent self-sufficiency.

B. Recognition and the Role of the United States

1. Tribal Existence

In plain terms, the recognized Indian nation and tribe is not substantially different in character than a non-recognized tribe.

A recognized tribe is that Indian nation or tribe which is "acknowledged by the United States to have the status of a tribe". Such acknowledgment of status is conditioned

25 / The Second International Indian Treaty Conference "Red Paper", June 13-20, 1976.

on a political criteria, a legal criteria and an historical criteria. These conditions are:

1. That the group has had treaty relations with the United States.

2. That the group has been denominated a tribe by Act of Congress or Executive Order.

3. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.

4. That the group has been treated as a tribe or band by other Indian tribes.

5. That the group has exercised political authority over its members, through a tribal council or other governmental form. 26/

Crucial to an acknowledgment of the status of Indians as constituting a tribe is a common understanding of the term tribe. To this question, the Supreme Court has supplied a definition:

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." 27/

Said in another way, a tribe may be defined as a body of people marked off by common descent, language, culture or historical tradition. While an Indian tribe may not be characterized by all these criteria (as well one might note this to be true of all nations and states today), it is clear

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26 / Felix S. Cohen, Handbook of Federal Indian Law, p. 271.
27 / Montoya v. United States, 180 U.S. 261 (1901) p. 266.

that the application of one or more of these measurements will assist in the definition of a tribe.

The definition of an Indian tribe must clearly be linked to an existence of a body of people who occupied territory before the settlement of the lands by non-Indians. That the tribe does not today occupy aboriginal territories, but rather occupies territories to which it was forced to move, does not diminish the tribal status of a body of Indian people. That a tribe continues to reside in a territory not specifically denominated a "reservation" does not diminish their status as a tribe. Than an Indian tribe's territory is occupied by others in their midst does not diminish their status as a tribe. A tribe cannot be logically said to cease in its existence unless it ceases to assert its rights to territory and ceases to have a common descent, language, culture or historical tradition founded prior to the intervention of the non-Indian.

It is certain that a settled definition of a tribe must flow from the deliberations of tribes themselves since it is clearly the case that for two hundred years and more, the application of European standards have not permitted a clear understanding of the issue. Until such time as Indian nations and tribes fix a definition among themselves, it is obvious that the United States must rely on the most permissive definition.

The commonly used criteria noted above for recognizing tribes which wish to take the protection of the United States leads to the erroneous assumption that all tribes were known by the government so that the U.S. could deal with them. Alternately, it assumes that all treaties and agreements were successful. Clearly, neither is the case. The United States must extend its protection to those tribes which can demonstrate a right to territories not ceded to the United States and that people who make up the tribe share a common descendency, language, culture or historical tradition, and can furthermore demonstrate a link to the existence of a body of people who occupied territory before the settlement of the lands by non-Indians.

2. Who is an Indian? 28/

Odd as it may seem, there is no more complex problem than to decide who is or is not an Indian. This is largely due to the application of the term "Indian". Since the term is not of aboriginal origin but rather European, it is difficult to apply the term. It is therefore difficult to distinguish an "Indian" from anyone else. However, the problem becomes more manageable if a person's identity is linked to a tribal culture, society and government which combines to make up a tribe. A person's relationship to the language, culture,

28 / "Who is an Indian", unpublished paper by D'Arcy McNickle, and Ray Goetting, 1976.

descendency or historical traditions of a group of human beings denotes an identity.

Since the numerous members of tribes and nations did have names which distinguished one group of people from another, it is not uncommon to describe a descendent of the tribes or nations by their tribal name. Normally, one's identity is also related to whether a loyalty to a distinctive tribe has been agreed to by the members of that tribe. Therefore, a common community acceptance of an individual as a member of the tribe fully served as the means by which that person could be identified by the tribal name. In its simplest form, this method of defining a member of a tribe is no different from the method by which an individual becomes a member of a nation or state. The methods may be different and the custom may be different, but the objective and results are the same. We will not go into the variety of customs and methods by which a person becomes a member of a tribe. It is enough to say that to be identified with a tribe, one must first be recognized by a tribal community as being a member with the right to share in the common culture and traditions. To require less would undermine the very existence of the tribe as a whole.

C. Tribal Nationalism and Self-Government: A Question of Human Loyalties

1. Re-emergence of Tribal Nationalism 29/

As if they were dormant seeds resting in the winter soil preparing to germinate in the warming Spring air, Indian nations and tribes are reasserting their national character through an expanded assertion of tribal sovereignty. A rising sense of individual Indian consciousness places one's tribal membership above other identities. The survival of tribal cultures through tribal language, educational institutions, establishment of tribal economies, the re-emergence of tribal religious institutions and the increasing exercise of governmental powers all contribute evidence that tribal nationalism is increasing.

Ironically, the seeds of the present day emergence of tribal nationalism are based in the example set by the European immigrants to the North American continent when they sought emancipation from the tyranny of their mother countries. The Declaration of Independence and the United States Constitution have become the model for the Indian nations and tribes which had been pushed aside to make way for the new homeland for displaced Europeans. The irony is that:

> "...today, two hundred years later, the federal government established by the Europeans is under ever-increasing pressure to limit its power and authority, while in striking contrast, tribal governments are pressed daily by reservation Indians to increase their exercise of sovereign powers." 30/

29 / Daniel H. Israel, unpublished paper, Native American Rights Fund, Boulder, Colo. April, 1976.
30 / Ibid, p. 10-1

The beginnings of the re-emergence of tribal nationalism came with the enactment of legislation by the 83rd Congress aimed at terminating several Indian tribes, liquidating their land holdings, rights and resources. 31/

Sensing the trend of termination, in 1948 the National Congress of American Indians vehemently opposed all termination and "general competency bills" being considered by the Congress. Indian nations and tribes asserted that individual Indians should be allowed to withdraw without jeopardizing the whole tribe. 32/ For succeeding years thereafter, Indians insisted that termination of services to Indian nations and tribes be predicated on complete consultation and consent of the affected tribe. 33/

In 1954, an emergency conference was called by NCAI to discuss termination legislation and organize protests against it. President Joseph Garry stated:

> "The crisis by introduction of bills in Congress to terminate federal services and supervision over Indian reservations now faces us in clear-cut terms. Though the bills before Congress today affect only a limited number of tribes in certain states, it is almost certain they constitute the first wave of attack.
> "In standing together to oppose (such) injurious legislation, ... we shall not only conserve Indian values, but serve the best interests of the United States by protecting its national honor." 34/

31 / This began with the enactment of H.C. Res. 108 and the subsequent termination of the Menominee Tribe of Wisconsin, and the Klamath Tribe in Oregon.
32 / NCAI Resolution No. 21-1948.
33 / Historical Indian Priorities and Policies, 1900-1975, AIPRC, 1976.
34 / Ibid. Emergency Conference Report of American Indians on Legislation, 1954.

The threat to tribal existence created an atmosphere of insecurity among tribes which in turn established a pattern of tribal inter-dependence. Collective action to prevent wholesale liquidation of Indian nations and tribes by the United States through termination policies strengthened the resolve of individual tribal governments to take initiatives on their own to assert their rights. Several events during the decade of the sixties and early part of the seventies inspired tribes to take more deliberate steps to protect their interests. These included:

1. A significant change in Congress, the Executive and Judiciary toward increased protection of Indian rights;

2. A substantial increase in federal monies provided directly to the tribes;

3. A number of courageous and successful actions taken by tribes on their own initiative. 35/

The deciding factor in the re-emergence of tribal nationalism is the increasing assertiveness of tribal governments to protect their land base, develop economic stability and regulate the internal affairs of the Indian nation and tribe. Combined with legislative enactments and increased financial capabilities, tribes have had greater flexibility to assert their own interests. As a result, the tribal agenda now focuses more and more on the security and prosperity of the

35 / Unpublished paper by Daniel H. Israel, "The Re-emergence of Tribal Nationalism", April 1976, p. 10-10.

individual Indian nation with the consequent focus on the national interests of each tribal community.

2. Increased Exercise of Self-Government

The enactment of the Equal Opportunity Act of 1964 and the subsequent administrative inclusion of tribal governments as eligible recipients of federal funds triggered the expansion of tribal governmental capabilities to exercise governmental powers. The funding program was structured in such a way as to permit tribes to take independent actions without total dependence on the Bureau of Indian Affairs. Direct funding permitted tribal governments to employ their own professional staff, conduct their own research and establish their own governmental institutions which could directly serve members of the community on matters which most directly affected their lives. Though it was impossible to deal with all matters because of limited funding, an initial step had been taken. Subsequent funding programs for which tribes became eligible expanded tribal government capabilities even more. The key to tribal government resurgence became the availability of federal grant moneys which permitted tribal government decision making.

The consequence of direct financial assistance to tribal governments was the development of tribal institutions for education, economic development, social and welfare support and law enforcement. Tribal governments began to plan housing programs, new schools and tribal businesses while assuming the

responsibility for law enforcement, health care and protection of natural resources. Tribal governments have begun to enact laws, regulations and codes to control important elements of life within the tribe. These acts of tribal governments reflect the greater confidence of Indian nations and tribes. Their successes reflect the greater loyalties of tribal members.

3. Regional and National Tribal Government Organizations

As pointed out in an earlier section, tribal governments joined together for collective action beginning in the 1940's to oppose U.S. termination policies. Inter-tribal associations or confederacies have existed for over four hundred years. Indeed, the concept of the confederation of nations or states was borrowed by the founders of the United States from the experiences of the Iroquois Confederacy -- a political alliance which exists today. 36/ Through the 20th century, Indian nations and tribes continued to form associations but to an increasing degree, these inter-tribal instruments

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36 / Felix S. Cohen, "Indian Self-Government", The American Indian (1949). "It was not only Franklin and Jefferson who went to school with Indian teachers like the Iroquois statesman Canasatego, to learn the ways of federal union and democracy. It was no less the great political thinkers of Europe, in the years following the discovery of the new world who undermined ancient dogmas when they saw spread before them on the pantheon of the Western hemisphere new societies in which liberty, equality and fraternity were more perfectly realized then they were realized in contemporary European societies in which government drew its just powers from the consent of the governed." pp 305-306.

were chartered under state laws. As a consequence, the charter of inter-tribal associations took on the image of "voluntary organizations". Though tribal governments regarded such Indian organizations as much more than mere voluntary organizations, legally, these instruments could be considered as nothing more. Because of legal constraints on the handling of moneys by inter-tribal organizations imposed by the U.S. government, the scope and powers of inter-tribal mechanisms are considerably limited. With the emerging nationalism of tribes and the broader exercise of sovereign powers, tribal governments have become increasingly reluctant to empower inter-tribal organizations to act on their behalf. The result has come to be that inter-tribal organizations came into existence to advance the collective causes of Indian nations and tribes, but they do not have the power to decide matters directly related to the internal affairs of tribal governments. Inter-tribal organizations are instruments of advocacy. Actual decision making is reserved to tribal governments and their members.

D. U.S. Indian Policies and Programs: Tribal Influence in the National Government

The question of whether it is feasible to establish a national Indian elective body to provide direct participation in policy and program decisions of the national government is an important question which has concerned Indians for more than two hundred years. As the earlier sections of this chapter show, there are numerous factors which must be considered in answering

this question. To determine the feasibility, we must account for what the present political status of Indian nations and tribes is now, as well as what it ought to be. This issue alone is complicated by virtue of the need for Indians to agree on the crucial nature of their political status. Because there is no common position among Indians on this subject, it could only be a guess as to the feasibility of forming a political confederacy of tribes that has the power to decide tribal laws.

As a general discussion, however, it is possible to review various ways that tribal governments could politically relate to the United States government, though tribal governments have not wholly addressed the issue.

1. Indians as Advisors:

Tribal governments and tribal leaders have been permitted to play a role in the national government's policy and program activities as "advisors without authority". The process of selecting Indian advisors has most often included a method of appointment by tribal officials or national government officials rather than an elective method. To get around the non-elective character of the advisory role, Indians have tended to offer their elected tribal officials for appointment to an advisory board or committee. In the absence of skilled elected officials, a non-elected "expert" in a technical field is offered.

An example of how Indians become "advisors" on matters effecting the lives of Indian people is the National Council on Indian Opportunity (NCIO). 37/ While there are numerous other boards, committees and councils created by the national government to "gain the Indian view", the NCIO is especially instructive because of the level of government it advised and the classic methods of operation which characterize the limited nature of the role of Indians as advisors.

The National Council on Indian Opportunity was created by Executive Order during the Johnson administration to coordinate federal programs authorized to serve federally recognized tribes. The structure of the organization included four parts: the Vice President and his own personal staff; the Indian members; representatives of federal agencies; and the Council's staff. Each organizational unit tended to function as separate parts with the Council staff acting as a sort of liaison between the other three parts. During the Johnson years of NCIO, the Indian members of the Council were selected and appointed on the basis of experience and their representativeness of Indian interests. During the Nixon years the Indian members were selected and appointed on the basis of their loyalty to the Nixon administration's goals and objectives.

37 / From a special records survey and interviews conducted by the Task Force on Federal Administration and Structure of Indian Affairs, December 1975.

Despite the Council's divided structure and its vulnerability to partisan influence, the staff and the Indian members did consider themselves as advocates for Indian people and a clearing house on information regarding federal agencies. At times, the Indian members attempted to secure program or policy changes, though these efforts were not always successful.

The Indian members of the Council under the Johnson administration continued to serve into the Nixon administration until 1970. During their tenure, they conducted hearings and special research that resulted in a policy recommendation which asserted the need for more Indian participation in the federal government's policy formation and program implementation activities. They suggested three means to attain this goal: (1) appointment of special assistants to the Secretary for each department represented in NCIO; (2) establishment of Indian desks; (3) the provision of direct funding to tribal governments.

The forceful statement delivered by Indian members at the January 1970 Council meeting was credited with being the origin of President Nixon's July 8, 1970 message to Congress on Indian affairs. After the appointment of new Indian Council members, there was only one full Council meeting called by Vice President Agnew for the purpose of introducing the Indian members to representatives of a number of large companies. NCIO's records show that after 1971, the

Council's effectiveness seemed to fade as it narrowed its scope to economic development issues and as it limited its dealings with the Indian community to elected tribal council officials from federally recognized tribes.

Outside of the effect on the Presidential message to Congress and the creation of Indian desks, other attempts by the Indian members to effect changes had little impact. Cabinet departments did not respond with alacrity to the Indian members' recommendations or demands. For the most part, top-level people in the departments had no contact with NCIO and the lower-level people who did have contact, lacked authority to respond to NCIO in a meaningful way. Because this was no specific requirement that the Vice President actively advance the positions of the Indian members, the only source of the Indian advisory powers would be sporadically used. The consequence of this was that when the Vice President chose to act, the Indian views would receive attention. When the Vice President chose not to act or simply lost interest, the Indian views would be ignored. The latter case proved to be the rule and not the exception.

The NCIO pattern is consistent with any advisory group experience. An advisory group must depend on the good will and cooperation of those who have control. If the powerful choose not to take advice, then Indian advisors go unheard.

2. Alternative Indian Elective Structures

The notion that there could or should be a national Indian elective body which represents the interests of Indian nations, tribes and their people in relations with the U.S. is not a new one. Thirty-two years ago in Denver, Colorado, representatives of 50 Indian nations met together for just that purpose. The result of those formative efforts was the creation of the National Congress of American Indians which today, includes a membership of over one-hundred Indian nations. Despite its substantial successes since 1944, the NCAI has never had as its membership, all Indian nations and tribes, nor has it functioned with the direct participation of the majority of individual tribal members. Though the Indian Congress has a membership of perhaps 5,000 individual Indians in addition to tribal governments, it can hardly be said to represent each individual. It is, however, clearly the only successful national constituent Indian organization.

The National Congress of American Indians is by no means the only national Indian organization. Many others of a speciality or professional nature have either "spun off" of the Indian Congress or developed on their own in answer to a specialized need. Among these national organizations are the National Indian Youth Council, National Tribal Chairmen's Association, American Indian Movement, National Indian Education Association, National Indian Businessmen's Association and many others.

But, even with these organizations which serve a narrower constituency than the NCAI, there is no example of an organization with delegates selected directly by the Indian population to represent their interests in relations with the United States. The closest one can come to an elective and representative body is of course the tribal councils themselves.

Some would argue that at least since 1924 Indians have had the francise to elect Congressmen and Senators as well as the President. One only need look more carefully at the location of the Indian population to see that Indians can have a slight effect on an election (with the possible exception of the Navajo Tribe) but they are easily forgotten after the election. The plain reality is, as described earlier in this chapter, Indian nations and tribes do not have a clearly defined political status in the United States and their populations are too dispersed to have direct representation in the national government. The result is that the U.S. legislates and administers the affairs of Indians without their official representation.

In a workshop 38/ specifically arranged for the purpose of the Task Force on Federal Administration and Structure of Indian Affairs, 18 Indian scholars and tribal leaders

38/ Workshop on Indian Legislative Institutions, Washington, D.C., February 14-15, 1976.

were asked to examine the question of tribal political status and national Indian elective bodies alternatives. Their conclusions were as follows:

1. It is not politically or financially feasible to create a national Indian elective body in the present, but it may be feasible in the future if the subject is thoroughly discussed throughout Indian Country and the United States provides economic assistance to tribes and nations to facilite the process.

2. There are potentially several feasible alternatives for national Indian elective bodies which may be considered by Indian nations and tribes. Among these are:

Election of an Indian Congressional Delegation: This approach includes two Senators and three or more Representatives elected by Indians to represent Indians in the U.S. Congress. Direct election of an Indian Congressional delegation would require an amendment to the U.S. Constitution and a formal introduction of Indian Country into the Union as a state with a form of government not unlike that of the other states. The trust relationship would have to be substantially modified. This option has been considered in the past by the Delawares, Cherokee of Oklahoma and the Navajo -- as single Indian tribes and not as multiple tribes.

Union of Indian Nations: This approach would establish an Indian legislative body with tribal delegations from each

Indian nation or tribe elected by popular vote among the adult population. The elected delegates would be directly accountable to the Indian constituency. Each tribal government may reserve the right to ratify actions taken by its elected delegation or actions taken by the Union of Indian Nations. The Union of Indian Nations would serve as the elected Indian voice which works directly with the Congress in the development of Indian policy. Individual tribes would naturally have unimpeded access to the Congress. The Union of Indian Nations would require formal ratification by a majority of the tribes before it could be established. Financial support would be provided by the trustee, United States.

Indian Board of Representatives or Commissioners: 39/ Through direct election by the Indian population and appointment by the President, the Indian Board would define U.S. policy toward Indian nations and oversee and coordinate the program activities of federal agencies as they relate to Indian interests.

As a guide to the establishment of any Indian elective body, the following objectives were thought to be controlling:

39/ This concept was first considered in a position paper entitled "Declaration of Sovereignty" in 1974 by the National Congress of American Indians.

I. PROVIDE REAL INDIAN INPUT INTO THE BUDGETARY PROCESS TAKING PLACE IN BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE U.S. GOVERNMENT

This would include program definition, line item control and development of rules and regulations for the administration. This system would have to provide a door to Congress which would insure participation in the initial stages of legislation. It must have an ongoing mechanism which would watchdog and thereby prevent unilateral Executive action which alters legislative intent.

II. PROVIDE A CONSTANT REVIEW OF THE ACTIVITIES OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

The intent is to identify areas where the Executive Branch changes the intent of Congress, to make Congress aware of these inconsistencies and to take follow-up actions to correct them.

III. PROVIDE ACCOUNTABILITY OF THE UNITED STATES TO TRIBES AND TRIBAL REPRESENTATIVES TO THEIR PEOPLE

IV. PROVIDE A METHOD FOR ENHANCING TRIBAL SELF-GOVERNMENT AND STRENGTHENING THE TRUST RESPONSIBILITY OF THE UNITED STATES GOVERNMENT

The workshop on Indian Legislative Institutions concluded its review with the consensus being that such a review can only be considered an academic exercise since the feasibility of any concept of Indian elective bodies can only be determined by tribal governments and the Indian people as a whole. Any other conclusions, it was thought, would violate the rights of Indian people to determine their own form of government through a process that permits full and complete participation.

3. Congressional Organization and the Policy Process

The Congress of the United States, because of the authority it draws from the Constitution, 40/ occupies a most important position in Indian affairs. The functions of Congress are of paramount importance to the future of the Indian people since all legislation presented to and enacted by this branch of the national government vitally affects the lives of each member of every Indian nation or tribe.

From the beginning of the 94th Congress to the middle of 1976, more than 300 pieces of legislation were introduced specifically dealing with Indians in some manner. 41/ In addition to these legislative actions, there are numerous general bills 42/ which would govern all citizens if enacted but may possibly affect Indians in undesired and undesirable ways.

Little actual review of these legislative proposals is made from the tribal perspective, taking into account the unique relationship between Indians and the United States, the form of their tribal structure or their special needs. Sometimes one or two lines including or excluding Indian nations or Alaska villages from a particular measure could avoid months of difficulties with the administering agencies or in the courts. A good example of this is the recent amendment to the Freedom of Information Act. 43/

40 / Primarily from a study conducted by Dick Shipman, ATPRC Research Staff for Task Force #3.
41 / Article III, Section 8, Clause 3.
42 / U.S. Senate Library, Bill status computer system.
43 / P.L. 93-502 (5 U.S.C.A. 552 as amended), 1974.

The Congress felt that if the private citizen was allowed more accessibility to governmental agency records, democracy would be served. Tribal governments and the Bureau of Indian Affairs felt the law, as written, was detrimental to the private rights of Indians. The law permitted confidential records containing descriptions of minerals and water resources on Indian lands to be opened to the inspection of oil, coal and other commercial interests. This gave commercial developers a competitive advantage, so some tribes and BIA officials contended. If exceptions to the Act had included considerations of the special rights of Indian nations and tribes, detrimental effects on the lives and resources of Indian nations could have been avoided. Further, tribal manpower time and financial resources spent trying to resolve the issue through additional legislation or even law suits could have been avoided.

Indian nations do not have the capability either singly or collectively to monitor all Indian-related legislation. The BIA monitors the Bureau's legislative program and legislation which affects particular tribes. 44/ But, even with this, it is impossible to initiate action to influence the content of all legislation.

It is unreasonable to except all existing legislative committees to have a specialist in Indian affairs hired

44 / 13 Bureau of Indian Affairs Manual, 1.1-1.2.

to review legislation referred to that committee. A day-to-day monitoring and analysis of legislation is necessary before legislative proposals become law. This is to insure that the status of tribal governing bodies, programs, and Indian rights are not violated by the passage of laws by Congress.

It is the function of Congress to set Indian affairs policy, not only by developing legislation to solve new (or old) problems, but reviewing ongoing programs and setting their levels of appropriations. Therefore, a similar but second dimensions to the problem of monitoring the volume of Indian legislation is the problem of dispersal of Indian legislation to numerous committees in the Congress. These committees may or may not have specialists who understand Indian communities and Indian law. This has resulted in programs serving Indians being dispersed by statute throughout the federal bureaucracy for implementation. The Bureau of Indian Affairs is no longer the sole federal agency to which Indian people and tribes must look for federal program participation. Therefore, the Congressional committee counterparts to these agencies are similarly dispersed on Capitol Hill, lessening the effectiveness of the oversight function of Congress in Indian affairs and hampering a unified or overall Congressional policy in this area.

The following chart illustrates the array of major Indian programs or Executive Branch offices that exist and which Congressional committees have legislative and

appropriations authority over them. Note that the House Interior Committee has oversight authority for all Indian programs whether under its legislative authority or not, a step the Senate has not taken.

However, Senate committee legislative jurisdictions are very similar.

HOUSE COMMITTEE JURISDICTION (cont'd.)

Program	Legislative Authority	Special Oversight	Appropriations Subcommittee
(DOT) Fed. Hwy. Adm.	Public Works	Interior	Transportation
SBA	Sma.. Bus.	Interior	State, Justice, Commerce & Judiciary

Several problems arise because of this phenomenon. Those bureaus or offices administering Indian programs must deal with a Congressional committee which has no particular expertise or knowledge in Indian affairs with the exception of the respective Interior committees. The Indian public has a similar problem attempting to get its views known on particular programs not only because of lack of understanding of Indian law by committee members and staff, but also because of the competition with other issues within that committee. Therefore the plea for a special provision or the consideration of a particular Indian program may be diluted substantially by the ignorance or lack of consideration by those at the committee level.

It is not surprising that those programs benefiting Native Americans which are only a part of a larger program available to all citizens will receive the attention of the particular committee overseeing that particular agency or program. For example, within the Farmers Home Administration of the Department of Agriculture is the Indian Land

Acquisition Loan Program as well as other programs open to all rural citizens including Indians.

But whether that program meshes with and complements other Indian programs and statutes and whether it is being carried out propertly or has the proper funding, are all questions which will be determined by an agriculture committee whose members and staff may or may not have the expertise in Indian affairs or the time and inclination to make the program operate most effectively for Indians. On the other hand, the expertise and sympathy of committee members and staff concerning their particular legislative authority should not be entirely avoided. But again, some system should be found where one Congressional entity will have input of a Native American nature while retaining the use of professionals in the various legislative subject areas, e.g., housing, agriculture, banking. To depend upon private Indian advocacy groups and the administrative agencies to study the implications and potential ramifications of legislation to all Indian policy is to transfer totally the job of Congress to others.

Congress feels that it has a continuing role in supervising the implementation of legislation enacted into law. The oversight function of Congress carried out by its committees gives both the members of Congress and the administrators a chance to review the effectiveness of various statutes and programs as well as to give the public involved, albiet through their representatives, a method to question the

operation of those programs. We have seen how this function is diluted somewhat by the dispersion of committee jurisdiction over Indian programs. The House of Representatives has taken one step to consolidate the oversight function of the House Interior Committee over Indian Affairs by giving that Committee special oversight authority for "reviewing and studying, on a continuing basis, all laws, programs, and government activities dealing with Indians..." 45/ although that committee does not of course have legislative jurisdiction over all Indian programs. The Senate has no such special rules. Oversight authority there rests as usual with those committees which have legislative authority over particular Native American programs.

Congressional commiteee specialists on Indian affairs 46/ see oversight hearings and review of existing agency programs and operations as an important part of the legislative process and feel they should be expanded not only to shape agency improvements within those operations, but as a signal for the necessity of further legislation to improve the agency operations.

Criticism of the oversight process of Indian programs from one legislative representative of an Indian advocacy group was centered on the feeling that the intentions of the

45 / U.S. Congress, Rules of the House of Representatives, First Sess., 94th Cong., Rule X, Sec. 3(e).
46 / Forest Gerard, Professional Staff Member, Senate Interior & Insular Affairs Comm. Interview by Dick Shipman, June, 1976.

process were good but that thorough and adequate preparation and investigation into the problem did not precede the hearings, therefore making them of limited value. 47/ This function is partially served in some other areas of government by advocacy groups themselves of various bent who provide to the appropriate committees, input from the clientele of the programs themselves.

Some methods for more effective oversight of Indian programs should be developed in the existing committees or become one of the elements of the creation of a new committee structure.

The political and geographical character of the House and Senate Committees where a large majority of specifically "Indian" legislation is referred for consideration and which oversees the BIA, often impedes the formation of a truly just and reformative Congressional policy toward Indians.

The largely Western makeup of the membership of the Interior Committees places those Congressional members with the greatest anti-Indian pressure from their non-Indian constituents in the very committee which has life or death power over much major Indian legislation. Problems arise, for example, when a somewhat controversial or innovative proposal is desired by the Indian tribes of a particular area or state and that state's representative in Congress and as a member

47 / Suzanne Harjo, Legisl. Rep. for NCAI. Interview by Dick Shipman, June 1976.

of the Interior Committee, refuses to introduce or sponsor the legislation. No other member of Congress will usually introduce the measure, even to begin the process of committee consideration or hearings, often because he believes the expertise or interest in such a specific subject should originate from an Interior Committee member or as a "courtesy" to the member from the area affected. 48/

So, in effect, the policy of the U.S. towards its Indian citizens is not formed in its important beginning stages by a balanced group of legislators from around the nation. This conflict of interest problem arises less often in the Appropriations Committee because its membership is more geographically widespread, although notable exceptions have been documented. 49/

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48 / Harjo interview.

49 / During the decade between 1935 and 1945, Congressional Appropriations Committee support was generally favorable and consistent for Indian health, education, law and order and forestry operations. But land purchase and administration appropriations, although authorized, was severely underfunded partly because Congressmen were unwilling to fund a program which meant competition with local white interests and taking land off local tax rolls. ("House Appropriations Subcommittee) Chairman Jed Johnson, Democrat of Oklahoma, led the Subcommittee during the most significant period of restriction of Bureau funds. During this time, he was not only largely responsible for curtailing Indian Bureau appropriations... but he played the role of a general critic of the Department of the Interior." John Leiper Freeman. The New Deal for Indians: A Study in Bureau-Committee Relations In American Government. Princeton University, 1952 (unpublished dissertation). pp. 444-456.

The problems of conflicts of interest of the Western members of Congress on the Interior Committees, when dealing with Indian affairs, will likely become more critical as important questions on Indian water and mineral rights arise and issues dealing with state jurisdiction over various areas of the Indian community or Indian jurisdiction over non-Indians come to the fore! No structural changes in Congress are going to make these and other issues less controversial, but some observers feel that a hearing of these issues by a committee with a more neutral composition would at least allow the merits of the issues equal footage with purely political and regional considerations.

A special committee of the House of Representatives recommended in 1974 that jurisdiction over basic Indian legislation except Indian education be moved to the House Government Operations Committee, among many other suggestions for jurisdictional changes in House committees. 50/ In the compromise that resulted, however, legislative jurisdiction was maintained for Indian legislation in the Interior Committee with the exception of Indian education, including BIA-administered education programs, which now resides in the House Education and Labor Committee.

50 / U.S. House of Rep. Select Comm. on Committees. Committee Reform Amendments of 1974; Report, to accompany H. Res. 988., Washington, U.S. Govt. Printing Office 1974. (93rd Cong., 2nd Session, Report No. 93-916, Part II), p. 39.

A standing committee on Indian affairs existed in the House and Senate before the 1946 Reorganization Act. Some people believe that such a committee with legislative authority apart from the Interior Committees would allow for a consolidation of most Indian program consideration by one unified committee. One problem with this idea is that participation in such a committee could be less than enthusiastic since most members of Congress usually try to obtain committee assignments with major interests of their constituency or one giving them a chance for an influential position.

4. Micronesia's Evolving Political Status: An Example for Indian/U.S. Relations? 51/

The Department of the Interior, charged with administering the trust responsibility for Indians, became the trustee for another special group, the Micronesians in 1951. A comparison of the manner in which these two trust relationships have been approached by the Department provides a revealing commentary on the problems of fulfilling the trust. This comparison is not accidental; it was suggested by the striking number of parallels in the problems of the two peoples and by the attempts of both groups to make the trust work for them rather than against them. But the question may be asked: Assuming that the circumstances are essentially identical, how does a description or proof of this relate specifically to

51 / A special analysis prepared by Dennis Carroll, AIPRC Research Staff for Task Force #3.

a better understanding of the trust relationship toward American Indians? How may it be used to improve that relationship?

For one thing, the demonstration of the demonstration of the similarity will serve to strengthen the criticisms or general remarks about the administration of the trust toward Indians. That is, it will make some of the basic errors such as the substitution of an immense bureaucracy in place of a healthy local economy, stand out more clearly. In this respect, the economically destructive policies pursued in the name of the trust in Micronesia should be of special interest to American Indians in their efforts to improve the indecisive or damaging features of Indian "economic development".

There is another respect in which the comparison will be useful in relation to the Indian trust responsibility: the Micronesians have been involved for six years now in a discussion of their future political status. These negotiations have resembled an international forum where crucial issues such as local versus departmental sovereignty over the land in Micronesia have been debated intensely. The dissention within Micronesia concerning the general struggle for sovereignty, the toughness of the Micronesian stance, and the capitulation or advantage contained in the recent compact between the United States and the Mariana Islands (a district of Micronesia), reflect a sustained attempt to develop a new relationship that benefits the smaller group as much as the sovereign.

The manner in which the Micronesians have pushed for greater local sovereignty while retaining the protection and assistance of the U.S. may well serve as a model for the same trend in Indian affairs. In general, the Micronesians, confronted by many of the same problems of federal administration as the Indians, have searched for a solution in much the same direction as the Indians: the attempt to diminish the power of the Interior Department through the development of local government.

a. Background

The essential reason for the United States' presence in Micronesia has been the military value of the islands. Stemming from the controversial debates on the United Nations charter and the definition of trust territories after World War II, the United States was able to have the islands set aside in a special category as a "strategic" trust. It permitted the U.S. to fortify the islands and this, as it turned out, was the only noticeable development which took place for quite some time.

As for the human side of the trust responsibility which was also included in the U.N. charter, the early policy of the Interior was one of "showcase" neglect". By the end of the 1950's, the budget had climbed to barely six million and the bad habit of spending this limited amount primarily on the bureaucracy was established. No attempt was made to institute local government and there was a minimal involvement with education which nontheless exceeded the attention given

to any other concern. Then, an epidemic of polio in the islands emphasized the neglect and around President Kennedy's anger, which led to a special study and a new sense of commitment to the islands.

b. Establishment and Role of Micronesian Government

During the 1960's, one of the principal (but still limited) accomplishments in Micronesia was the formation of a Micronesian government embodied in a Congress with Senators and Representatives. An effort to polish up government at the local level was also pursued, with traditional chiefs in some cases being converted into "mayors" by elections. The actual authority in all areas, however, resides with the High Commissioner, an American appointee of the Secretary of the Interior.

The High Commissioner retains the power of veto regarding any recommendation of the Micronesian Congress. The judicial branch is likewise imposed -- the highest court under the trust agreement consisting of a panel of three judges appointed by the Secretary. The Micronesians regard them as unrepresentative and have demanded the removal of two of them who proved particularly objectionable. The request was refused by the High Commissioner. Mirroring the problems encountered by American Indian leaders, the Micronesian Congressional members are cast in the role of messengers reporting to their people on the transactions with the federal government while having a minimal influence on the outcome. As a policy-making body during the 1960's, the Micronesian government resembled

a local democracy from the neck down: the head, however, was the High Commissioner.

The limitation of power is especially evident in the areas of revenue and the budget. Although the Micronesian Congress has the power to levy taxes, the income derived from this is a very small percentage of the budget, which means that after 25 years under Interior's trusteeship, the trust territory is still totally dependent on the federal government for any substantial programs or economic progress. With this revenue, the Micronesian Congress is able to support its own governmental activities, but it is far from being able to shoulder the high costs of an intensive economic development program.

Revenue has increased at the rate of ten to twenty percent per year, totalling some $5 million in 1974. It is gained primarily by taxing the leases of public land, imports and exports, and income. The development of local as opposed to territory-wide taxes has been substantially limited both by the subsistence style economics of many Micronesians and by the reluctance of the High Commissioner to allocate more responsibility at the district level. The highest local revenues amount to approximately $200,000 in one district.

Since the federal government must provide the major portion of the funds, it has also fallen into the tradition of administering them through the Interior Department. For a variety of reasons, Interior has been reluctant to surrender

its privileges so that the High Commissioner can dictate the distribution of funding and veto any line item proposal originating in the Micronesian Congress. This situation was criticized in the comprehensive Report of the United Nations Visiting Mission for 1970. Citing the findings of an earlier Visiting Mission, the report observed that the power is "to a much greater extent with the executive which controls the budget and to a much lesser extent with the Congress than seemed healthy for sound political development".

The 1970 Mission concluded: "Until recently, the process of consultation between the Administration and the Congress of Micronesia did not last for a sufficient time or go into sufficient detail to enable members of the Congress of Micronesia to exercise a really important role in planning and framing of the budget." The Micronesian Congress, embarrassed and frustrated by its "figurehead" role in the budget issues, has struggled to obtain more authority. This has resulted in an improvement of the Micronesian position during the preliminary planning for the budget. It has also prompted the request by a Representative from the Congress of Micronesia:

> "We would like to request in fiscal year 1975, a direct appropriation from the Congress of the United States to the Congress of Micronesia which will terminate the intermediary functions of the Department of the Interior and permit and require the functions of the government to be discharged through the Congress of Micronesia and the High Commissioner."

Part of the reason for the request was Micronesian frustration at not being able to get at a $13 million carry-over in unobligated funds. There was a strong suspicion among Micronesians that at least part of the reason for the bottle-neck was Interior's intention to apply pressure on them during the negotiations concering political status. Such a request would not only eliminate both the carrot and stick aspects of the budget process. It would also mean that the Micronesians could allocate the money according to their own plan. This latter result, according to Micronesian views, would diminish some of the damaging influence of the presently unpredictable fluctuations in the budget.

One Representative commented as follows:

> "The uncertainty of budgetary level from year to year for Micronesia and the fluctuation in the level of expenditures available to us, at any given period, have combined to impede and frustrate our efforts to carry forth effective programs and realistically assess our progress and past accomplishments."

Regardless of the chances of approval for this proposal, its passage would be accompanied by certain penalties: for example, a probable retraction of open-ended authorizations. In general, it is difficult to visualize a Micronesia whose budget is essentially controlled by Micronesians in the foreseeable future. A further share of responsibility may be attainable, but it may well be at the expense of strategic concessions in the time after the trusteeship expires.

As a reaction against this concentration of power in the High Commissioner, the issue of decentralization to improve government operations in the six Micronesian districts has become a fundamental concern involving both the federal and Micronesian administrations. Decentralization is a realistic response to the diversity of cultures and languages contained in the islands as well as to the immense distance separating them. The establishment of the Micronesian Congress represents a hopeful attempt at constructing a kind of loose federation of islands, but decentralization of authority is a more immediate and pragmetic way of getting things accomplished. Micronesian Representative Setik brushed aside different excuses from the Interior for the slowness of programs and asserted:

> "The major retardant, not a major retardant, is the absence of authority and responsibility permitting the District Administrators to act."

The extent to which local officials are hamstrung by the centralization of authority is apparent from examples such as the $50,000 limitation on local contracting. Any contract exceeding that sum must be referred back to the Office of Territorial Affairs in the Department of Interior for approval. This latest figure was raised from $25,000 only very recently.

It appears now that the Interior administration is caught between two opposing currents: one which encourages the idea of greater local responsibility and one which reflects

the entrenched resistance to the change. Although the High Commissioner stated that "we, in 1969, started a very intensive program of decentralization of functions in Micronesia from the central territorial government to the district governments", Congressman Setik was complaining angrily three years later that remarks by him which were critical of the failure to decentralize the administration were being censored and omitted from publication by Interior. Setik has been one of the leading spokesmen insisting on the necessity of decentralization for effective responses to the widely differing conditions of the islands.

The influence of the Micronesian Congress has been favorable in that it has contributed greatly to the desire for self-determination. In several areas of government, the Micronesians have acquired at least a limited amount of practical experience and have been aggressive in pursuing their goals. In his book, Micronesia at the Crossroads, Carl Heine, a member of the Micronesian Congress, described the role of the Congress in the following words:

> "The Micronesian colonial experience took a different form six years ago when theCongress of Micronesia came into existence. It is during this six-year period that Micronesians began for the first time to confront the administering authority."

c. Failure of Economic Development in Micronesia

The United States, as of 1970, had not only failed to develop a sound economy in Micronesia, its policies had actually been detrimental to the system which existed with the result that the Micronesians were more dependent than ever on outside support. The essential effect of the U.S. policies was to create an enormous bureaucracy that in turn diverted Micronesians from farm labor to the higher paying and less demanding positions in the government.

In the 1960's, the acreage under cultivation was cut in half and production declined correspondingly. The high wages, combined with reliance on imported goods, produced a high rate of inflation to complete the picture of a seriously weakened economy. The U.N. report observed that the system could easily collapse unless strong measures were taken to reverse the migration toward the urban centers and the bureaucracy in favor of a stay-at-home-and-tend-the-farm approach.

The impact of bureaucracy and the defense establishment have had a serious effect on the nature of the economy in Micronesia. Paralleling the American Indian experience, a very high percentage of the local workers are dependent upon the presence of the federal government for employment. In reviewing the budgets and recommendations for Micronesia in recent hearings, it becomes evident how heavily the bureaucratic and strategic formulas were applied to the islands

without any corresponding stress in more crucial directions, such as economic development. Perhaps the government's major (and dubious) accomplishment during the 1960's overshadowing the creation of the Micronesian Congress, was the installment of a Western-style bureaucracy with some unpleasant side effects: the development of crowded urban areas and the first ghettoes in the islands. Now, in addition to the other types of federal assistance, there is even an urban renewal and slum clearance program for Micronesians who have relocated themselves to areas where the federal government offers employment!

It has dawned slowly that bureaucracy and dependence on the federal government should not be a substitute for a healthy local economy. It is only in the past few years that discussions of basic policy have centered on the advisability of "holding increasing costs of operations to a minimum in order that maximum amounts may be made available for needed capital improvements." In another exchange concerning the same question, a member of the Subcommittee on Territorial and Insular Affairs asked what conclusions might be drawn from a budget in which $46 million was set aside for operations and $8 million was reserved for construction of all kinds. The High Commissioner's reply: "We are building up operations at the expense of capital improvements."

The agricultural development program was the target of specific criticism. The report by the U.N. cited one

instance where samples of soil from the islands were taken for examination by the Department of Agriculture but the results were never made known to the islanders. Inconsistency in planning from year to year has caused havoc and the program has been described as still no further advanced than the experimental phase. In areas with fertile soil, such as the Marianas, only a fraction of the land is being cultivated. Vocational training in preparation for agricultural work has been almost non-existent; furthermore, the Micronesians must depend on expensive outside experts for technical support. The report draws the conclusion that the agricultural program has had "no significant impact" on the islands, while other policies have actually made it more difficult to launch a productive program.

Another area with potentially tremendous wealth has been likewise ignored. This is mariculture -- the exploitation of Micronesia's most obvious resource -- the sea. In Micronesia, nothing seems more remarkable than the almost complete lack of encouragement in this direction by the federal government during the first two decades of the trusteeship. Although recently a handful of fishing boats with modern equipment were loaned to the islanders, fishing is still primarily a subsistance activity. There has been no effort to introduce the refrigerant capacity that would directly stimulate the development of a fishing industry. A mariculture study program has finally been instituted, but the funding, as reflected in the

1974 budget is far from ambitious. In addition, the islanders themselves seem to be unaware of the problem: Of the several hundred Micronesians studying in American, not one was involved with oceanographic or mariculturäl studies. (It may be an indication that the American-style public education of young Micronesians is not reflecting their local situation or needs.)

One of the more revealing examples of Micronesians muddled economy is the story of the foreigners who do profit from fishing in Micronesian waters. The Japanese in particular and the Americans to a lesser extent return home with their holds full, proceed to can the fish, and then export them to Micronesian people who in turn must pay the high prices. It is an absurd situation, but one which does not seem particularly disturbing to the Department of the Interior, charged with the trust of the Micronesian people and their economic development. An economic study has suggested that a fishing boat with modern equipment in Micronesia could accumulate profits of approximately $100,000 per year, yet there are barely a half dozen such boats in Micronesian hands, and those boats are part of a limited economic loan program for small businesses.

In a case like this where there is such an obvious resistance to the fulfillment of the trust, one is compelled to think of the conflicts within the federal administration of the islands which prevent the trustee from acting fairly in behalf of its client. One of the outspoken Senators in

the Micronesian Congress, Senator Amaraich, presented his views of the reasons for the bungling of the local economy:

> "Many of us in Micronesia are beginning to discern a pattern in the administration of the trust territory over the past 26 years. The plan is expressly directed at thwarting the fundamental right of the people of Micronesia to determine their own political future. The rationale of the plan is simple. An economically dependent Micronesia kept economically isolated from the other nations of the world can never be a politically independent Micronesia. A politically dependent Micronesia will be and must remain under the control of the United States. And a Micronesia under the control of the United States means a place in which the United States can be assured that its ultimate objective is attained: the ability to secure unimpeded its military position in the Pacific. The record is plain."

For better or worse, the U.S. has not known how or has not wanted to encourage the transition from a subsistence to a modern economy in Micronesia although it has artificially imposed an inflated, urbanized bureaucracy on the islands that contrasts uncomfortably with the low living standards of the majority of the population. In turn, this division has sapped even the limited security inherent in the subsistence economy. For more than the first twenty years of the so-called trust responsibility, the economic planning has fostered a ridiculously distorted economy, which, judging from the fact that the Micronesians are more dependent than before, seems almost to have been intended to make genuine independence impossible to attain.

With the upswing to $75 million for the Micronesian budget, there has been a recent and favorable response to the

recommendations of the U.S. report in the areas of agriculture and capital improvements. The allowance for agriculture has jumped from 2% of a minimal budget to some 10% of the newest expenditures and there appears to be a determination to reverse the trend toward reliance on imported goods. A similar shift is evident in the attitude toward capital improvements. The U.S. has stated its intention of instituting a major construction program whose goal would be the installation of a complete and self-sustaining "infrastructure" for each district.

Some skeptics maintain that the promises exceed the probable outcome, but at least the budget reflects a new sense of commitment and numerous projects are going forward. There is a realistic appraisal of the difficulties and expenditures involved in duplicating the crucial improvements for each of the districts ("not one airport but six; not one road system, but six..."). Whether this flurry of activity is designed to generate an independent Micronesian economy or whether Senator Amaraich will be proven right once again is open to question.

In the area of economic development, the ironic and striking aspect of Micronesia's trust status is that, as one Micronesian remarked, the islands would probably have been better off without it. With emphasis on its strategic features, the trust was used to seal off Micronesia from other nations, while the machinery of American bureaucracy was put in place.

In much the same way that the U.S. has manipulated its definition of the trust status of Indians in order to obtain what it wanted from them, the U.S. has singled out only one aspect of its trust relationship with Micronesia, the strategic part, and ignored or even hindered the development of the remainder. The result for both the Indians and the Micronesians has been identical: a mushrooming bureaucracy in place of an authentic economy, and haphazard governmental planning and budgeting which in turn threatens the artificial economy with which they are struck.

d. Negotiations Regarding Sovereignty Over The Land

The issue which has caused the most controversy and in which the Micronesian Congress has shown itself the most aggressive has concerned the question of who will control Micronesia's most valuable and limited asset -- the land. In order to protect its strategic investment, the United States government adopted the view that it was necessary for the U.S. to retain the right of eminent domain. Each side at the beginning of the negotiations regarded its claim to the land as non-negotiable. The stress of the discussions, however, split the facade of Micronesian unity, resulting in a request for separate negotiations by the Marianas. The internal dispute between the Marianas and the other two island groups, the Carolines and the Marshalls, has led to the Marianas' surrender of sovereignty over their land while the remainder of Micronesia is still resolutely resisting anything less than

clear sovereignty. Surprised by the firmness of Micronesia's resistance, the U.S. found itself unable to force its viewpoints on the Micronesians and proposed a series of special "refinements". The American Ambassador addressed the Micronesians with the following words:

> "As I understand it, your first and foremost concern regarding land is whether the United States would have the power to acquire, after termination of the trust, Micronesian land for public purposes of the United States without Micronesian concurrent. In May 1970, my government proposed a unique form of eminent domain that would have provided many safeguards and would have been extremely difficult for us to implement over local opposition."

It is remarkable to what lengths the American delegation went in its attempt to get around the essential Micronesian question: Who will have the final word about the land? At one point in the negotiations, the United States even wound up with the paradoxical announcement that it would concede eminent domain to the Micronesians but retain "options" on their land. The negotiator added that he would like to emphasize the word "options". The Defense Department's extensive landholdings and unpredictable needs, plus the High Commissioner's right to dispose of public lands (some 60% of the total land area) as he pleases, made the Micronesian delegation understandably uneasy about the nature of "options".

In a recent case, Micronesians went to court to sue the High Commissioner for granting a lease to an American company without studying the effects on Micronesian interests.

The case was dismissed in the federal district court on two gounds:

> "First, the trust territory government was not a federal agency subject to judicial review... and secondly, the trusteeship agreement did not vest plaintiffs with rights enforceable in a federal court."

This case is part of a pattern of frustrating incidents in which Micronesians see not only their land controlled by foreigners, but even their right to challenge that control denied by the court system. Another example involved several thousand acres of land on one island which the United States wished to convert into a memorial part for Americans killed in World War II. The Micronesians were astounded at the idea that one of the best areas of one of the best islands would be evoted to creating a completely non-Micronesian symbol. They fought the issue intensively during the negotiations on political status and managed to reduce the United States' request to several hundred acres.

The problem of public lands (those areas exclusively controlled by the Japanese prior to World War II) aggravated the Micronesian worries about eventual sovereignty. These are among the choicest areas for strategic or scenic purposes and the United States had stepped quite comfortably into the Japanese shoes. Micronesian negotiators insisted that the public land be returned to the people of Micronesia and that the United States should [1] define its future strategic land-holding needs as clearly as possible and [2] reduce them as

much as possible. In subsequent rounds of negotiations, the United States seemed willing to meet these requests, stating the precise locations and acreages which it felt necessary to lease. In most cases, the United States was able to reduce its requirements and it also worked out a leaseback arrangement ($1 per acre per year) that seems favorable for the Micronesians.

One aspects of the Micronesian relation to the land that is undergoing major change is the result of an ongoing allotment program. Begun by the Janapese and resumed by the United States, the break-up of clan or tribal ownership and the commencement of individual ownership is becoming a more common feature of Micronesian life. Remarkably enough, in a case that exactly mirrors Indian history, there has been a decision about the trust status of this fee patent land confirming that a 25-year restriction on the alienation of the property will be imposed. So far this provision affects only the Marianas and the clause establishing it is found in Sec. 805(a) of the Compact between the Marianas and the United States:

> "...the government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency: (a) will until twenty-five years after the termination of the trusteeship agreement, and may thereafter, regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of

such interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent:.."

Whether this is an adequate safeguard or whether it is only a prelude to the same kind of exploitation that beset the American Indians, a local Micronesian government at least nominally has been assigned the role of acting as trustee.

e. Future Political Status

Besides the struggle for sovereignty over the land, the negotiations foundered on a number of related questions. One of the most important was the extent to which any agreement would be mutually binding and would require mutual assent for cancellation. The Micronesians (with the exception of the Marianas) have not budged from their insistence that an agreement should be subject to unilateral termination if it becomes a hindrance to either party. The United States has felt that its rights in the Carolines and Marshalls would be threatened by guilding into a compact, the unpredictable currents of Micronesian politics and demanded that the assent of both sides be required for any change in the nature of an agreement. The Marianas parted ways with the other islands on this issue, so that their compact with the United States imposes this further restriction on their sovereignty. The other islands still declare it to be a non-negotiable item, the cornerstone in fact of their desire for the political status of "free association".

The Marianas were upset when the other islands voted to reject the original Commonwealth proposal by the United States as a replacement of the trusteeship. They desired a relationship in many ways resembling that of an American state, without the final incorporation as a United States territory. Basically, the islanders of the Marianas were willing to sacrifice the various aspects of sovereignty in favor of a close relationship with the United States, especially when it became apparent, as one expert observed, that the United States would "shell out" for the advantages the Marianas offered. The United States recognized the Marianas' request for separate negotiations the very day it was first announced, and the Compact was drafted and signed with few difficulties.

It is perhaps relevant to note that in a budget hearing held at the same time as the final rounds of negotiations with the Marianas, the following pattern of funding is previewed: a "slight" increase in the Marianas' budget combined with a multi-million dollar cut amounting to some $10 million annually over the next five years for the other five districts.

While a political realist could argue that the United States is well within its rights to reduce the budget if it feels its strategic needs are being obstructed, it is difficult to square this reduction with the humanitarian aspects of the trusteeship or with the promise of a substantial construction program. It is a prime example of the opposing forces within a trust arrangement where coersion or punishment for

the independent behavior of a people is applied in the hope that the needs of the trustee can be more fully satisfied. But in view of the adamant feelings about the right to unilateral withdrawal by the Marshalls and the Carolines, it seems that they will capitulate only under extraordinary pressure of a kind that the United States may not want to use.

It is likely that neither the Marshalls and the Carolines nor the United States will be overly comfortable with the compromise that may result from the current negotiations. The United States has too strong a concern about the islands to let go of them. At the same time, the islands cannot afford the price tag for the kind of freedom they would like. It is to be expected that the Marianas will receive preferential treatment, which ought to increase the dissatisfaction of the other islanders. Under the same pressure that splintered the Marianas from Micronesia, the Marshalls have had thoughts about separate negotiations also, which would leave the poorer Carolines to fend for themselves. There has even been a threat of complete independence if the United States cannot grant favorable terms for "free association". At any rate, the question of future political status has been tied to the question of federal assistance in a way that undercuts the humanitarian and equitable aspects of the trust.

What is the nature and significance of the two main political alternatives, free association and the Mariana Compact which have split the islands into two groups?

The basic feature of "free association" is the sovereignty it would give to the Marshalls and the Carolines through the right of withdrawal. It would not only be a way to protect themselves (or free themselves) from the harmful elements of the trust status, it would also provide them some much-needed leverage in future bargaining with the United States. It would allow them to administer the budget largely through their own decisions. The relationship, according to Micronesians, could be constructed to insure adequate security for United States' strategic needs, though the United States has not accepted this viewpoint. As a test case, the United States' response to free association reveals a remarkable amount of fear and distrust combined with an intense desire to retain a very direct control of the islands. The United States prefers the built-in controls of the present trust arrangement to the risks of the post-trust relationship. It presents a case that may be instructive to Indians in America: the problems encountered in refusing to be a "captive audience" while the trustee satisfies its own ambitions.

The Marianas Compact, on the other hand, involves a series of concessions for which the United States seems willing to pay rather handsomely. In some respects, each side has improved its position. The Marianas, while relinquishing the goal of sovereignty over the land, have acquired safeguards for their lands that they did not have in the trust relationship. Their insistence that the United States specify and

reduce its requirements for land has been successfully negotiated so that the title to public and private land clearly belongs to the government of the Marianas. The control of the local government over the land has been recognized in all cases except those in which emergency needs may compel the United States to exercise the right of eminent domain. In general, the new arrangement and regulations will make it more difficult for the U.S. to impose any but the most urgent strategic projects.

The High Commissioner is eliminated from the scene and replaced by a self-governing commonwealth. Funding is provided directly to the government of the Marianas without the intervention of the Department of the Interior. As noted earlier, the restriction prohibiting alienation of the land to people of non-Marianas descent is controlled by the local government rather than by the U.S. The price for these advantages was the willingness to form a very close political relationship with the United States that could guarantee its strategic requirements. The Marianas appear to have gained both a political and economic relationship that corresponds more closely than the trust relationship with what they have wanted all along. The trusteeship which produced a somewhat strained and ill-defined connection has given way to a more secure and promising relationship for both sides.

The two alternatives offer some suggestions for the future course of American Indian political development. The

first alternative, represented by the Marshalls and the Carolines, points out the financial penalties and bargaining difficulties that have accompanied the effort toward a completely independent stand. The Marianas, after making the critical concession of sovereignty, have at least improved their situation by integrating themselves more smoothly into the American political system. They possess all of the rights and powers of state governments in the United States, and yet they retain certain distinctive features such as the non-alienation of land for protection of Micronesian interests. This combination of political/fiscal integration and cultural protection is an accomplishment that would be more than valuable for Indian development. The issue of land in the case of the Marianas is ambiguous. They have gained more authority than they possessed before, yet they still do not have the final word. The majority of future land disputes, however, are out of Interior's hands. The Marianas will be confronting the federal government and the Department of Defense directly.