

National Congress of American Indians

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Discussion Paper for

National Tribal Leaders' Meetings

1993 Administration Transition Plan and 1993-97 Congressional Initiatives

November 1992

This is a "draft" Discussion Paper and Action Plan to be considered, modified, edited, shaped, and/or used by Tribal leaders of American Indian and Native Alaskan Nations to take the lead in communicating a New Indian Affairs Agenda to the newly elected United States Administration and to the 103rd Congress.

The National Congress of American Indians is the oldest and largest inter-tribal organization in the United States - promoting Indian Rights since 1944. Its mission is to promote and advance the interests of its member Tribes as sovereign nations. N.C.A.I. works to protect and advocate the rights of all sovereign American Indian and Native Alaskan nations in their "government-to-government" relationship with the U.S. government. In its capacity as an advocate, N.C.A.I. proposes to coordinate a series of meetings between Tribal leadership and inter-tribal organizations to establish a new Indian Affairs Agenda, an action plan, to prepare President-Elect Bill Clinton's Transition Team to address Indian Policy and advance a constructive future relationship with Indian tribes. This plan will help Clinton's Administration address Indian Policy and concerns over the next four years. Our proposed plan addresses a new approach for presenting an American Indian and Native Alaskan Administrative and Legislative Agenda. In addition to establishing a coherent Indian Affairs administrative and legislative agenda,

Center for World Indigenous Studies
Washington U.S.A.

setting a cooperative tone with the new U.S. Administration, the primary objective is to allow the leaders of the American Indian and Native Alaskan nations to take responsibility for development of a new plan or approach for addressing Indian and Native Alaskan issues.

This paper contains proposed Indian Affairs policy initiatives suggested by the National Coordinating Committee of Tribal Government Leaders. The goal is to establish a mutually acceptable Indian Affairs Agenda with the new U.S. administration, and get the agenda implemented over the next four years. A first draft of this paper was prepared for the October 21-22, 1992 meeting in Sacramento, California. Further consideration of this revised paper is planned during a follow-up meeting in Albuquerque, New Mexico on November 17, 1992.

These policy proposals are intended for discussion purposes only. Our purpose here is to frame the issues and identify broad policy goals which are reasonable and achievable. Thus, the Indian Affairs Agenda proposed in this paper is designed to "set the stage" for a new, more substantive relationship between a new Administration and the political leadership of Indian Country.

If tribal leaders are able to reach agreement on a set of policy initiatives especially formulated for a new Administration, they will have positioned themselves to take advantage of the opportunity represented by the United States presidential elections. The policy suggestions in this paper are based on familiar ideas and proposals. This presentation is not intended to be exclusive of other ideas. Rather, concentration on a few critical priorities in a focused, constructive manner would most likely ensure the most effective communication of these ideas. If tribal leaders can unite and coordinate their efforts, the probability of discussing more specific issues with the Clinton Administration within this broad policy framework may be enhanced.

The essential issues concerning the interests of American Indian and Native Alaskan Nations are:

Essential Indian Affairs Issues

- Presidential support for an "Indian Affairs Office" or an "Inter-Departmental Council on Indian Affairs."
- Building on earlier efforts, further develop a framework for the federal/Tribal "government-to-government" relationship; defined as bilateral negotiations, i.e., participation vs. consultation
- Independent office for review of trust and treaty right(s) conflicts.
- Presidential support for a Tribal government development initiative.
- Administration support for National Indian Legislative and Policy Agenda, i.e., the NCAI "12 Point Plan" for 103rd Congress and the next Administration.

Indian Affairs

1993 Transition Plan and 1993-97 Legislative Initiatives

A. ESTABLISH A COMPREHENSIVE FEDERAL "AMERICAN INDIAN & NATIVE ALASKAN" POLICY

We seek Presidential support for an *White House Indian Affairs Office* and/or establishment of an *Inter-Departmental Council for Indian Affairs*. The United States government has a special political and a constitutionally based government-to-government relationship with Indian Tribes. This political relationship differentiates Indian Tribes and other indigenous native people, from minority Americans. In exchange for 99% of the land, the United States and Indian tribes entered into treaties and mutual commitments. The Treaties, U.S. Constitution and the Trusteeship responsibilities of the United States are the underlying basis for the treatment of Indian tribes as self-governing, self-determining and sovereign nations.

U.S. Government's Indian Affairs Policy over the next four years

The Clinton Administration should:

- reaffirm that the failed policies of Termination, and Federal paternalism are rejected.
- specifically reaffirm the policy of Indian Self-Determination first initiated by President Lyndon Johnson's administration and endorsed by every succeeding President.
- Establish an overall federal policy by the United States which extends to all Federal Agencies to establish a mutually defined and mutually acceptable framework for a "government-to-government" relationship between the United States government and the governments of Indian Tribes, Alaskan Natives and other native peoples. This policy should address the following key objectives:
 - ✓ Protection of Tribal Treaty Rights and Trust Assets;
 - ✓ Support comprehensive Tribal development and environmental protection in government operations, natural resource and economic development, health-social-education and training, service delivery, law and justice systems, housing and infrastructure;
 - ✓ Promote inclusion of Indian tribes and Alaskan Natives in legislation providing assistance to state and

**The New
Federal Administration
Should . . .**

**Indian
Policy**

local units of government, and the Trust Territories to include appropriate protection and recognition of the unique legal relationship Tribes and other Native people have with the United States

- ✓ **Conduct negotiations between the U.S. government and tribal governments on the basis of mutually recognized sovereignty.**

Over the past twenty years, tribal leaders have repeatedly recommended to successive Presidents that an Indian Affairs Office be established in the White House. Tribal leaders have recognized that Presidential authority in support of an Executive Branch-wide Indian policy program is essential to achieve consistency in the relationship between Tribal governments and the Federal government and in the implementation of: (a) the "government-to-government" relationship; (b) protection and advancement of tribes' Treaty rights and U.S./ Indian Treaty commitments; and (c) the federal/ tribal trust responsibility.

In the absence of such an office, each agency of the federal government has developed its own Indian policy, jealously protecting its own turf. Some agencies haven't yet considered an Indian Affairs policy. This condition has predictably resulted in inconsistencies and serious conflicts in policies between agencies. A heavy burden has been imposed on tribal governments as they struggle to resolve and mediate such conflicts by dealing with many different agencies.

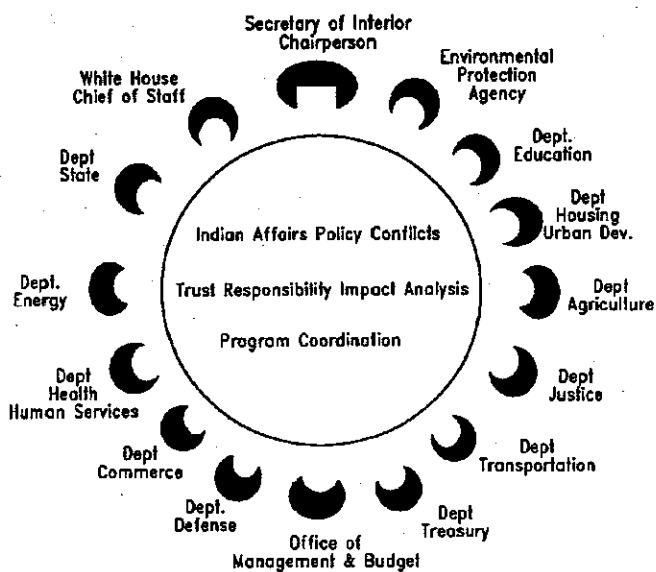
It is well established that the trust responsibility of the United States in relation to Indian tribes and their lands is shared by all federal agencies - the U.S. government as a whole. The policy of a government-to-government relationship between the tribal governments and the federal government applies to all federal agencies, not just to those who, in their own discretion, decide to recognize such a policy. The Secretary of Interior has been acknowledged as the official with lead responsibility for Indian policy in the federal government. Other Cabinet departments have failed

to recognize that they share a government-wide responsibility to deal with Indian tribes in a manner consistent with the government-to-government policy.

President Richard Nixon's staff made a serious attempt at coordinating Indian policy throughout the Executive Branch. The response of Presidents Ford, Carter, Reagan and Bush to the recommendation that an Indian policy office responsible for coordinating Indian Affairs policy be established in the White House has been negative. They have uniformly characterized this proposal as an unnecessary duplication of the Interior Secretary's responsibilities. White House staff, in "off the record" discussions, have responded by claiming that this would create additional management complexities for a White House staff which is traditionally spread thin dealing with a whole range of domestic policy problems. In addition, the potential for conflict with cabinet agencies and the possibility of turf competition between the Interior Secretary and such a White House staffer have discouraged more serious consideration.

On the assumption that a new President and his staff will be open to Tribal leaders' policy initiatives with a fresh perspective, a new strategy might be considered. Instead of renewing the "White House Indian Office" proposal, Tribal leaders should consider proposing an "Inter-Departmental Council on Indian Affairs." The President would expressly delegate authority to the Secretary of Interior to preside over the Council which would include representatives from all cabinet departments and the Office of Management & Budget (See figure 1). Such a delegation of authority should be accompanied by a formal acknowledgment that the trust responsibility and "government-to-government" relationship policies apply to all federal agencies. The Secretary of the Interior's new responsibility would be to coordinate implementation of these policies by all Executive Branch agencies. In effect, the Secretary should be given clear and strong backing by the President to see that these policies are implemented by other agencies and, in the event of problems or conflicts, the head of another agency must work with the Interior Secretary to resolve the conflict. If the Secretary of the Interior is unable to resolve an inter-cabinet conflict, the President would become the final

(Figure 1)
Inter-Departmental Council on Indian Affairs
 United States Executive Branch



1992 R.C. Ryser, Special Counsel

word.

Although the concept of an *Inter-Departmental Council on Indian Affairs* is not new, the idea of clear and expressed backing by the President is unprecedented. If such an initiative were agreed upon and committed to by a new president at the very beginning of his term of office, it could become a dynamic new instrument for streamlining Indian Affairs. It may also be seen as "reasonable and achievable" by the Transition Team as contrasted to the more problematic *White House Indian Policy Office* idea which would require additional staff in the White House and possibly create yet another management problem.

B. ENHANCEMENT OF THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP

President-Elect Clinton should be challenged to recognize that the relationship between tribal governments and the United States has been given a new definition. Instead of the old, outdated policy of "consultation", a new policy of "participation" has been established through 1988 amendments to the Indian Self-

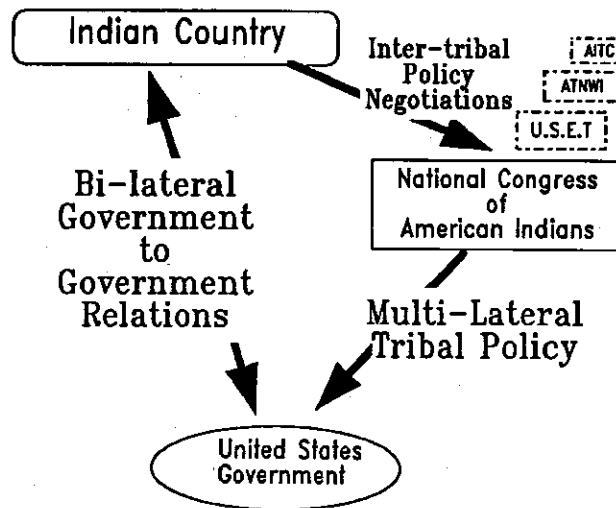
Determination and Education Assistance Act of 1975 (P.L. 83-638). Participation in the development and implementation of federal policies that affect the rights and status of tribal governments means that policy decisions are made on the basis of bi-lateral or multi-lateral negotiation between Indian governments and the United States government.

In the old way of consultation, federal officials made policy decisions "unilaterally" and may or may not seek a consensus among tribal governments. Consultation, when practiced effectively, has meant securing tribal consent and providing an opportunity to make comments and offer recommendations on policy proposals. However, the standard procedure has been for the policy-making official to develop the policy proposal without the direct involvement of Tribal officials and then, after the fact, offer the opportunity to comment.

Implicit in the current consultation process is the assumption that no assurances or commitments are to be given that the tribal comments and/or recommendations will be accepted or have any particular influence in the federal decision. Decision-making is currently unilateral, not bi-lateral, and tribal government officials are not offered a seat at the table for the purpose of reaching mutual agreement among equals. Of course, this consultation approach which ignores the role of tribal consent and tribal participation is inconsistent with the constructive and cooperative government-to-government relationship. When looked at directly, the consultation approach may clearly be seen as a paternalistic practice, perhaps suited for the "guardian-ward" relationship, but certainly not appropriate to today's realities and the prevailing policy of self-determination.

The Congress established an historic precedent when it required, in the 1988 Indian Self-determination Act amendments, that "implementing regulations be developed with the participation of tribal governments." Tribal officials have steadfastly asserted this new responsibility. As a result of resistance from Bureau of Indian Affairs and the Indian Health Service over the last four years regulations have not been formalized. In 1990, Congress again broke new ground when it required the Secretary of Interior to establish a task force of tribal government delegates to

participate in the reorganization of the BIA. In successive Interior Appropriation Acts Congress restricted the BIA from expending any funds for BIA reorganization unless the BIA Reorganization Task



Force, representing all tribes, agreed to such reorganization steps.

These precedents established a new way of "participation" and bilateral negotiation should be explained to the new President and he should be challenged to embrace this definition of the policy of government-to-government relationships. This would enable tribal governments to deal directly with

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the Secretary of Interior in his responsibilities as chair of an *Inter-Departmental Council on Indian Affairs* and implement Indian Affairs policy on an effective, government-wide basis. Implementation of this initiative should include the following:

Principles of Government-to-Government Relations

1. **Meaningful recognition and establishment of a respectful partnership between Tribal Governments and the United States requiring discussion of proposals with Tribal leadership, securing their consent where appropriate and ensuring serious consideration of Tribal recommendations before establishing new federal policy. Consent to policies which directly affect tribal interests .**
2. **Recognition, respect and support for Tribal self-government and the sovereign authority of tribal governments (sovereignty) and each Tribal government's inherent right to determine its relationship with the United States through direct services, Self-Determination contracts, Self-Governance Compacts or otherwise.**
3. **Commitment to implement Congressional policies and programs, and to promote legislative authorizations and appropriations supportive to Indian Tribes and Alaskan Native across all Federal agencies.**
4. **Appoint Tribally-supported and Indian Affairs knowledgeable personnel to ensure implementation of the United States and Tribal partnership in relation to the federal system including:**

- a. **Establishment of a White House Office of Indian Affairs - Inter-Departmental Council on Indian Affairs.**
 - b. **Personnel appointments in the Office of Management and Budget (Office of the Director) and priority Indian program fields in Land and Natural Resources, health and Social Services, Justice, Education and Economic Development.**
5. **Support Intra and Inter-Departmental coordination, improvement and expansion of financial assistance and service delivery to Tribal Governments.**
 6. **Provide special consideration to the small Tribes and Alaskan Native governments administration and service delivery needs.**
 7. **Promote increased management resources for Tribal governments, a tribal judicial conference cooperating with the Justice Department and Federal Judiciary, and improved Tribal law enforcement and justice system operations.**
 8. **Support the establishment of Tribal stable-base-budgets including annual adjustments for COLA/inflation and a consistent Federal Agency policy to support Tribal indirect costs.**
 9. **Sponsor bi-lateral and multi-lateral government-to-government meetings with Tribal leadership concerning unique Indian directives; including the development of O.M.B. circulars specifically for Indian Tribes and Alaskan Natives.**
- C. INDEPENDENT OFFICE FOR REVIEW OF TRUST CONFLICTS**

A new Administration represents an opportunity to enhance the federal government's performance of its Trust obligations to Indian Nations. In the 101st Congress the Senate Select Committee on Indian Affairs considered legislation to create an "independent office of trust review" in the Department of Interior. The bill was based on the Trust Counsel Authority proposal considered during the Nixon Administration. The current draft legislation attempted to avoid the pitfalls of that Nixon proposal.

The Trust Counsel Authority proposal would have created an independent legal authority which would bring lawsuits on behalf of the United States government as trustee. The idea was criticized because it was seen as relieving the Justice Department of its responsibility. The compromise suggested in the draft legislation of the 101st Congress was that the Office would not bring lawsuits, but simply investigate complaints of trust conflicts within the federal government. If the Office determined that a conflict existed, its findings could give the tribe or tribes affected powerful leverage over the agency found to be in violation.

**Commitment
to
Protect
Trust Assets**

In response to this draft bill, the Bush Administration made a public commitment to administratively create such an office. However, the office of trust review idea was changed within the Bureau of Indian Affairs to a single new staffer for the Assistant Secretary for Indian Affairs. This staff position is not independent, nor does it have authority to conduct independent investigations or to review trust conflict complaints.

It is essential to protect Tribal Trust assets, particularly those assets that may be vulnerable to political mischief, or exploitation by states, counties, municipalities and private industry notably:

1. **Protecting Indian water rights from competing uses, including advocacy to overturn the McCarran amendment and increased assistance to tribes from the Environmental Protection Agency and Interior Department's Bureau of Reclamation.**
2. **Develop a Federal initiative to assist Tribes to restore and consolidate their land-base within the reservation boundaries, and to assist small Tribes in establishing adequate reservation land bases.**
3. **Support Tribal Fishing Rights, including the protection of harvesting rights in Treaty-protected areas and assistance to competitively participate commercially; increase resource enhancement and habitat protection through EPA, Fish and Wildlife Service and the Commerce Department's National Oceanographic and Atmospheric Administration (NOAA).**
4. **Protect Indian Forests, including increased investment through the BIA to comparable industry/acreage and increased assistance from the Agriculture Department's U.S. Forest Service and Interior Department's Bureau of Land Management.**
5. **Protect Energy Resources including increased resources to a designated Tribal management program in the Department of Energy.**
6. **Protect Agriculture resources including increased resources to a designated Tribal assistance program in the Department of Agriculture.**

D. PRESIDENTIAL SUPPORT FOR A TRIBAL GOVERNMENT DEVELOPMENT INITIATIVE

Of the 500 federally recognized tribes, including Alaskan Native villages, over 85% are small tribes. Their small populations and small land-base, contribute to shared problems in terms of income and tribal governmental infrastructure. Apart from the few tribes that have successfully established economic enterprises, small tribes are very hard-pressed for independent income and paid, full-time staff necessary to operate governments capable of exercising minimum responsibilities associated with exercising sovereign powers. Their population is often not large enough to make them eligible for funding under federal contract and grant guidelines related to essential governmental services.

Federal recognition of sovereignty is not based on distinctions of size,

income or land-base. In many respects tribes sink or swim together. Legal precedents directed at limiting the scope of tribal sovereignty may be set by small tribes as well as large tribes and the political credibility of tribal sovereignty itself may be at risk.

Core funding for small tribes should be provided at a sufficient level to ensure that all tribes can meet their sovereign responsibilities. Such an initiative would require \$150,000 for each of 400 small tribes for a total of \$60 million. Although new funding proposals are problematic in this era of deficits, a cost-benefit study would probably show that the initial investment would reduce federal obligations in other areas, enable small tribes to begin generating tax revenues and organize other income-generating activities, and pay for itself. If combined with programs to assist small tribes in development of essential tribal codes and other infrastructure, tremendous progress could be achieved in a relatively short time.

E. ADMINISTRATION SUPPORT FOR THE NATIONAL INDIAN LEGISLATIVE AGENDA

During the recently concluded NCAI convention, Tribal delegates adopted a resolution calling for the presentation of a National Indian Legislative Agenda based on the highest priorities to come from each of the 12 NCAI issue committees. The 12 point agenda will also be presented to the 103rd Congress when it convenes in 1993.

The list could include the following initiatives:

1. **Increased Federal assistance in human services delivery capabilities in the fields of health, social services, education and training including opportunities to coordinate/consolidated Programs from multiple Federal agencies to improve service delivery efficiencies and effectiveness.**
2. **Support policies of coordinated, multi-year Federal assistance to Tribes for long-term economic and infrastructure development (including housing and community development) involving the Departments of Housing and Urban Development (HUD), Commerce, Labor and Interior.**
3. **Promote Tribal access to state and local government assistance programs in health, social services, education and veterans affairs.**
4. **Support Tribal access and increases in federal assistance for health promotion and disease prevention for alcoholism and drug abuse (including emphasis on fetal alcohol syndrome/effects and substance abuse prevention), mental health, and specialized National Institute of Health research on illnesses prevalent in American Indian communities.**
5. **Support Indian Gaming enterprises, the most successful economic development in reservations in decades, includ-**

N.C.A.I. 12 Point Agenda

- ing requiring state governments to negotiate in good faith with Tribes interested in Class III gaming operations.
6. Support through Federal assistance and policies the recommendations of the National Commission on American Indian, Native Alaskan, and Native Hawaiian Housing.
 7. Support inclusion of Indian Tribes and Alaskan Natives as being eligible for assistance through the Overseas Private Investment Corporation. Ensure that any comparable "domestic OPIC" which is created affords Tribes equitable treatment along with state and local governments. Guarantee that Indian Tribes are equitably included in any Enterprise Zone or employment investment tax credit legislation. Adopt legislation which gives Indian tribes the tools to attract economic development, allowing them to get past the hurdles which preclude private industry from locating on Indian reservations.
 8. Support an aggressive Federal policy of peaceful conflict resolution, human rights protection, and mutual respect and support between indigenous peoples. [Tribes, States and Nations domestically through State and Tribal relations and internationally through the State Department and United Nations.]
 9. Establish a special emphasis on research, development and improvement of Indian Education through education research in the Education Department, and create special assistance mechanisms for American Indians, Native Alaskans and Native Hawaiians in all Education Department assistance programs.
 10. Support a Federal initiative to assist Tribes, States and local units of government to negotiate resolution of conflict areas including taxation and jurisdiction.
 11. Support Native Hawaiian Claims for compensation for their former lands and the restoration of their right of self-government.
 12. Support the right of Native People to maintain their culture, practice their traditional religions, protect their access to sacred places, and their rights to repatriation of skeletal remains, sacred items and cultural patrimony.

It was also decided that such an historic approach should be applied to negotiations with the new administration. Thus, the new administration should be presented with the legislative package and support should be formally requested. Although a list has not been compiled, the following items would certainly be considered and should give tribal leaders not in attendance at the NCAI convention an idea of the agenda:

Legislative Agenda

- **Governance and Jurisdiction:**
 - ✓ The Tribal Court Enhancement Act
 - ✓ Indian Self-Determination Act Amendments
 - ✓ Reform of Federal Recognition Administrative Procedures
 - ✓ Establishment of National Indian Policy Research Institute
 - ✓ National Commission of Indian Governments
 - ✓ Tribal Law Enforcement Assistance
 - ✓ Permanent Establishment of Self-Governance Initiative
 - ✓ Indian Joint-Funding Simplification Action
 - ✓ Regulation of Military/Commercial Air Traffic over Tribal Lands
 - ✓ Repeal of Public Law 280
 - ✓ Repeal of General Allotment Act
- **Culture and Religion:**
 - ✓ American Indian Religious Freedom Act Amendments
 - ✓ Restoration of Black Hills to Sioux Tribes
- **Economic Development:**
 - ✓ Employment and Investment Tax Credits to Business locating on Reservation Lands (from HR-11 102nd Congress)
 - ✓ Pension and Retirement (from HR-11, 102nd Congress)
 - ✓ Fair Labor Standards Act - Tribal applicability
 - ✓ ITPA/Youth Services to Tribal Governments
 - ✓ Amendments to Buy Indian Act
 - ✓ Amendments to Indian Gaming Regulatory Act
 - ✓ Indian Enterprise Zones
 - ✓ Tribal Government Tax Status Act amendment to qualifying Tribes for IRS 501 (c) (3) tax exemption status
 - ✓ National Indian Trust Funds Management legislation
 - ✓ Native American Infrastructure Jobs Act
- **Natural Resources:**
 - ✓ The Indian Agricultural Development legislation
 - ✓ The National Indian Fish and Wildlife Enhancement
 - ✓ Reauthorization of Resource Conservation Recovery Act - provision for treatment of Tribes as States.
 - ✓ Safety of Dams legislation
 - ✓ Tribal Irrigation legislation
 - ✓ American Indian and Native Alaskan Environmental Consolidation Grants
- **Indian Housing:**
 - ✓ Indian Housing and Community Development Act
 - ✓ Native American Veterans' Home Loan Equity Act
 - ✓ American Indian Housing Self-Governance Demonstration Project Act.
- **Human Resources:**
 - ✓ Reauthorization of Indian Education Act - Title V
 - ✓ Indian Health - National Health Insurance eligibility
 - ✓ Indian Child Welfare Enhancement
 - ✓ Trust Income Exemption
 - ✓ Title 20 Social Service Block Grants to Tribes
 - ✓ Comprehensive Indian Veterans legislation



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