[COMMITTEE PRINT]

REPORT ON RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION

TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION

FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION

Printed for the use of the American Indian Policy Review Commission

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AMERICAN INDIAN POLICY REVIEW COMMISSION,
CONGRESS OF THE UNITED STATES,
Washington, D.C., July 29, 1976

DEAR COMMISSIONERS

Attached is the Report of the Task Force on Reservation Development and Resource Protection.

Because of the budget constraints and reductions imposed on us over the last several months, the report does not accurately reflect the capability, dedication and professionalism of those involved. We feel that the originally approved agenda and budget were adequate for our task and that a higher quality product would have evolved had it been possible to follow our original plan. However, we have recorded the results of extensive research, analysis, conclusions and recommendations.

It is the comprehensiveness of our recommendations which has suffered by the recent budget reduction, but we have recorded the condition of Resource Development and Protection at this point in our history and have given our best efforts, with constraint of time and money, to give you what we believe to be the problem and recommendation to remedy the problem.

We all stand ready to respond to all questions which you may raise as you begin to prepare your report to Congress and to testify as needed.

Very truly yours,

PETER MACDONALD,
Task Force No. 7 Chairman.
KENNETH SMITH,
Task Force Member.
PHILIP MARTIN,
Task Force Member.

American Indian Policy Review Commission,
Congress of the United States,
Washington, D.C., August 3, 1976.

Mr. Ernest L. Stevens,
Director, American Indian Policy Review Commission, Washington, D.C.

Dear Mr. Stevens: Please find enclosed Task Force #7's Final Reports. They include a final report on Reservation and Resource Development and Protection; a final report on Indian Housing; and a final report on the Alaska Native Claims Settlement Act.

The Task Force would like to acknowledge the help of the Central Core Staff in collecting and tabulating data available in Washington. In particular, we are grateful for the contributions of Nancy Evans, John Kough, Dick Shipman, Jenice Bigbee and Kathryn Harris.

The Task Force members submit these Final Reports with the condition that the attached letter accompany the reports to the Commissioners.

Sincerely yours,

Lorraine Turner Ruffing,
Task Force No. 7 Specialist.

AMERICAN INDIAN POLICY REVIEW COMMISSION

TASK FORCE NO. 7

RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION

Final Report

Peter MacDonald, *Chairman*
Kenneth Smith, *Task Force Member*
Philip Martin, *Task Force Member*
Lorraine Ruffing, *Task Force Specialist*
Leo Denetsone, *Consultant*
Bill Douglass, *CORE Staff Member*
Frank Ryan, *Consultant*
Ron Trosper, *Consultant*
Pat Porter, *Research Assistant*
A.T. Anderson, *Special Assistant to Commission*

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CHAPTER I

Introduction

The theme which dominates this report is that the current system of exercising the trust responsibility by the Federal Government perpetuates economic dependence. The three necessary conditions for economic development are control, capital, and management. Under the present system these three conditions are not being met. The trust responsibility must be clarified.

The birth of the trust responsibility lies in the nature of treaties. In exchange for land concessions to the Federal Government, Indians were to receive protection from foreign nations, hostile Indian tribes, and individuals. Since only the Federal Government could extinguish aboriginal title, protecting Indian tribes came to be regarded as a trust; that is, the fiduciary responsibility to protect.

Unfortunately, there was no one to protect the Indians from the Federal Government. The United States, by its own laws, illegally seized Indian lands and forced Indians onto what were then submarginal lands. Because others were prevented from extinguishing aboriginal title, essentially, the trust responsibility meant that the Indians were holding the land in trust for the United States, until it wanted it.

Protection of Indian lands and people meant that the Federal Government should protect them from others. But in reality the Federal Government exercised control over Indian attempts to use what resources were left to them. Control of Indians could mean two things. It could mean that the Federal Government would benignly protect them from outsiders, leaving internal control with the Indians, or it could mean internally controlling Indian action. Title 25 of the United States Code, particularly section two, is the latter interpretation taken by the Executive and Congress. Only the Judiciary has consistently taken the other interpretation. The judiciary has tried to hold the Government to its word.

While the judiciary characterized the Federal-Indian relationship as fiduciary in nature, the Executive through the Department of the Interior interpreted "fiduciary" to mean acting for Indians rather than acting to protect them. Title 25 of the United States Code allows the Federal Government to act according to what it believes is the best interest of the Indians.

Congress has placed primary exercise of the trust responsibility in the Department of Interior. The Executive has interpreted this responsibility to mean control of Indian affairs. Although this is an improvement over the War Department, Indians still lack the internal control over their resources and people, as guaranteed by their treaties.

Management and control of Indian resources by the Bureau of Indian Affairs has meant custodianship of Indian resources for the Federal Government. Failure to protect Indian rights to resources has continued to erode what few resources tribes retained. Perhaps out of guilt or hindsight recent Federal programs have tried to aid

Indians develop their remaining resources. Categorical grant programs, directed at curing the symptoms of depressed Indian economies, intensify the problem of lack of dominion or control. Without control over their own resources and programs, tribal destiny is extinction. For, how can one develop a resource without control over it? Federal paternalism disguised as fiduciary action has deprived Indians of control and has made them dependent upon Federal action. Would Indian tribes be dependent if they could exercise control over their reservations? They would only be dependent to the extent of their capital needs. With freedom of action, management skills could be built. Management cannot be built in a vacuum, where someone else manages for you. It is indeed ironic that the Federal Government claims that Indians mismanage their affairs, when it is the Federal Government who is doing the mismanaging.

The theme which runs throughout this report is that without control over their own affairs, the Federal Government cannot expect total Indian economic development. The report seeks to redefine the trust responsibility and its relationship to economic development. Trust responsibility means protection of tribal assets. It means that Indians control their own destinies.

The report adequately demonstrates the disastrous economic consequences suffered by Indian tribes due to preemptive Federal control. The message is that the Federal Government has caused this state of affairs and is responsible for stultifying Indian action. The current interpretation of the trust responsibility has created barriers to reservation development. The report considers the barriers and recommends a vehicle for their elimination. The new trust responsibility is responsible to and compatible with three important conditions for reservation development, control, capital, and management.

It is impossible to attain economic self-sufficiency and political self-determination in a system which perpetuates economic dependence. This requires a commitment on the part of the Federal Government to return control to Indian tribes. Failure to do so means that Indian resources will continue to be held in trust for the public.

CHAPTER II

A. Federal Trust Responsibility and Economic Development

The United States of America recognized the independent sovereignty of Indian tribes when it honored treaties previously made by Great Britain with Indians, *Holden* v. *Joy*, 17 (Wall) U.S. 211, 242, 243 (1872); *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. No. 14251 (C. C. Mich. 1852). In the early days of the Republic, Indian tribes were recognized as independent sovereigns. As a consequence, the Trade and Intercourse Acts prohibited States and individuals from acquiring title to any Indian lands except by process of public treaty undertaken and secured by authority of the United States. See, (*Passamaquoddy Tribe*) v. *Morton*, 528 F. 2d, 370 (1st Cir. 1975); see also, *Johnson* v. *McIntosh*, 8 (Wheat.) U.S. 543 (1823). The Intercourse Acts respected tribal sovereignty. It has come to be a recognized principle of American Indian law that Indian tribes are still possessed of a limited sovereignty and possess all of those powers of government which have not been proscribed on the Federal Government.

In exchange for giving the United States sole right to extinguish aboriginal title, the United States agreed to protect Indian tribes. The essence of what has come to be known as the "trust responsibility" exists because of the exchange between two sovereigns. The trust responsibility is a legal duty. The distinctive obligation of trust incumbent upon the United States in carrying out its treaty obligations must of necessity be self-imposed. Not only is there a public trust to citizens of the United States that their government keeps its word, but there is a trust obligation to the obligee.

The court in *Seminole* v. *United States*, 316 U.S. 286, 297 (1942) stated that the United States:

> has charged itself with moral obligations of the highest responsibility and trust. Its conduct as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

In reaching its conclusion regarding the United States' fiduciary responsibilities to a people whom the Federal Government had pledged to protect, the Seminole court adopted Mr. Justice Cardozo's fiduciary standard expressed in *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, as the standard applicable to the Federal Government.

> Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciarities. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, *but the punctilio of an honor the most sensitive, is then the standard of behavior* . . . Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd. (Emphasis supplied).

The courts have been mindful of the fiduciary responsibility due to Indian tribes, and when this trust has been breached, courts have found such a breach to be an abuse of discretion. In (*Pyramid Lake* v. *Morton*, 354 F. Supp. 252, 256 (DCDC, 1973) the court stated that

the Secretary of the Interior's action was "defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the tribe. This is also an abuse of discretion and not in accordance with law."

Under the Commerce Clause of the United States Constitution and through various treaties, statutes, and judicial doctrine, the United States has recognized tribal sovereignty and come to recognize its fiduciary responsibility to them. The legal duty to protect Indian tribes is the trust responsibility. It follows therefore that the major responsibility of the Federal Government should be to protect Indian tribes from erosion of tribal sovereignty, to protect resources from outside interests including the Federal Government. Inherent in the protection of Indian assets in accordance with the trust responsibility of the United States is an obligation to fully, vigorously, and without reservation, support tribal efforts to develop their own resources. For, without development of tribal resources, protection is a meaningless gesture.

Proper exercise of the trust responsibility can allow Indian tribes to attain "economic self-sufficiey.nc" Economic self-sufficiency means a strong tribal economy which generates income which can be used to support the tribal government and such services as the tribes wish to provide their members. No tribe can achieve economic self-sufficiency without three important conditions.

(1) Tribal Jurisdictional Control.
(2) Availability of Capital.
(3) Management.

The Ideal: Tribal Economic Independence

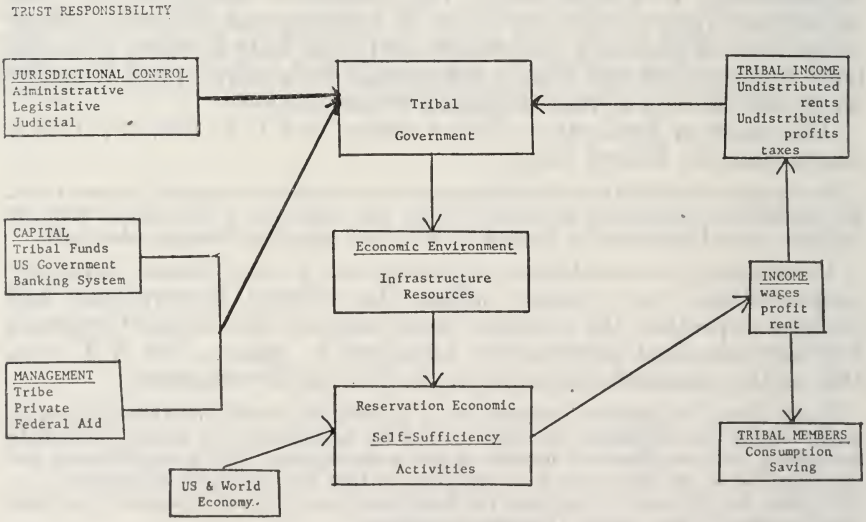


FIGURE 1

Figure 1 shows that tribal government is able to regulate economic processes on the reservation. Prosperity provides the government with

sufficient revenue for internal financing of some activities, while the Federal Government provides capital and management assistance both to strengthen protection and to aid economic development. Figure 1 illustrates a self-sufficient economy within the proper practice of trust responsibility.

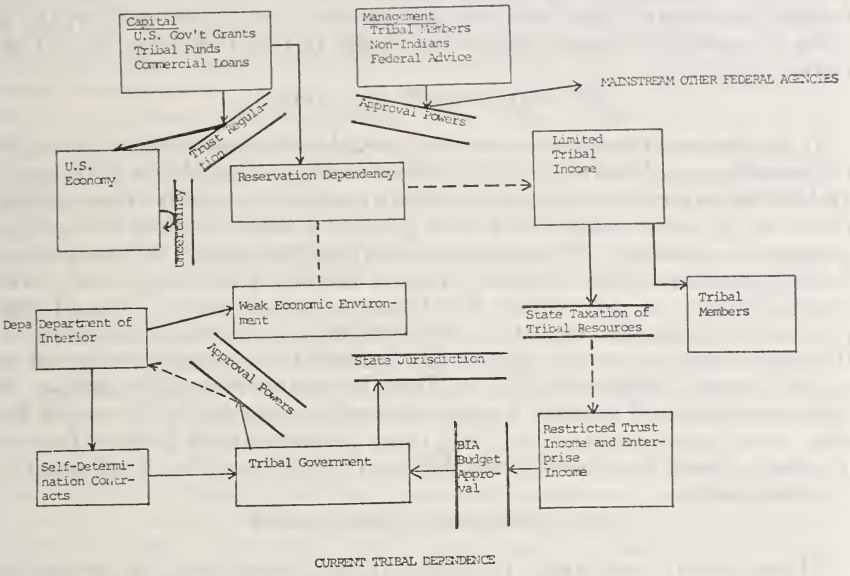


FIGURE 2

Figure 2 shows the improper exercise of federal power under the guise of trust responsibility. Using the rhetoric of protection and development, the government has instead erected barriers between Indians and their economic processes while tearing down barriers between states and tribes. State interference impedes Indian development. Tribal governments are weak because the Federal Government retains powers to veto all budgets and resolutions. Resources remain unused and unprotected. Actual exercise of federal power has blocked Indian attainment of the three conditions for economic self-sufficiency, jurisdictional control, capital and management.

(1) JURISDICTIONAL CONTROL

The Federal Government must assist the tribes to take complete jurisdictional control over factors related to economic development. Greater administrative and legislative control requires less interference by the Federal Government under Title 25 of the United States Code with tribal economic development. Agencies should be required to complete federal-Indian rights impact statements for all actions which may impinge upon Indian rights and jurisdiction. Further, a clearinghouse for all legislation which may affect Indian rights and jurisdiction should be established so that Federal Acts do

not inadvertently affect the totality of tribal jurisdiction. Judicially, tribal courts should be accorded full faith and credit for their judgments. Tribal courts should be assisted to become courts of record. Jurisdictional control in personam and in rem would make it possible for tribes to chart their own courses for economic development and provide independence of thought and action. Tribal laws when enforced consistently and fairly would provide credibility and create a more favorable economic environment for Indian residents as well as for non-Indians.

(2) AVAILABILITY OF CAPITAL

If the Federal Government would provide sufficient capital, it would be possible on all but the smallest reservations to establish individual and tribal enterprises strong enough to produce a profit, after paying the costs of production, and would provide tribal members a share as workers or as owners. Trust responsibility in the context of reservation development requires capital grants, rather than long term low interest loans, or guarantees for business development. Should the Federal Government wish to provide sufficient capital, it must be in the form of equity grants. Should the Federal Government not provide capital grants, tribes can find capital themselves through exercise of their jurisdictional powers. Large reservations, particularly, would be able to use private capital or long term federal capital in the absence of grants. Small reservations would face formidable obstacles if capital is unavailable.

(3) MANAGEMENT ASSISTANCE

Management assistance, technical advice, education and access to specific skills, are different from management. Ultimately, Indians must provide their own management, and attempts by the Federal Government to do so leads to an incorrect understanding of trust responsibility. Executive control of reservation based enterprises is exclusively the domain of tribal government and Indian leadership. These managers could use advice from outside, but would choose what to adopt and what not to adopt.

In the ideal world where the Federal Government lives up to its trust responsibility, control, capital, and management would produce economic self-sufficiency such as depicted in Figure 1. The enterprises would produce income: income for tribal members; tribal income in the form of undistributed rents and taxes from non-tribal enterprises; and profits from tribal enterprises. Such tribal income would be at the disposal of the tribal government, and the circle depicted in Figure 1 completed.

Present barriers to economic self-sufficiency prevent the creation of a favorable economic environment and diminish the amount of capital and management available, as in Figure 2. Failure by the Federal Government to properly fulfill its trust responsibility has retarded reservation development. Because of the interdependence of control, capital, and management, it is clear that development will continue to be blocked or interferred with if all three conditions are not simultaneously met.

B. Procedure of Data Collection

Task Force #7 was specifically charged with the mandate to investigate the development needs of Indian people now and in the future. The Task Force chose to investigate the obstacles ot economic development and to search for solutions to those problems. Surely, development problems differed between large and small reservations, between allotted and non-allotted reservations, between reservations in Public Law 280 states, and reservations in non-Public Law 280 states, and among reservations in the Northwest, Southwest, North Central, Central, Northeast, and Southeast. How then, could the Task Force study the development obstacles which were particular to each type of reservation as well as those obstacles which were common to all? Furthermore, how could it ensure that no group of Indian people living in these different situations was left unrepresented?[1]

The selection of representative reservations was further complicated by the fact that the Task Force had very limited time, personnel, and funds.[2]

The Task Force was left no other choice than to visit a limited number of representative reservations. To ensure that every reservation had a chance to participate in the Task Force investigation, it was decided to select the reservations at random within the various categories of types of reservations.[3]

The Task Force specialist organized 288 federal and state reservations into four groups according to size and existence of allotted land. These characteristics directly affect economic development. Table 1 divides the 288 reservations into four groups: small non-allotted, small allotted, large non-allotted, and large allotted.

TABLE 1.—BREAKDOWN OF RESERVATIONS BY SIZE [1] AND PATTERN OF LAND HOLDING [2]

Pattern of landholding	Small	Large	Total number of reservations
Nonallotted	141	48	189
Allotted	47	52	99
Total number of reservations	188	100	288

[1] Any reservation with more than 25,000 acres was considered "large."
[2] Any reservation with more than 10 percent of its trust land base in individual Indian allottments was considered "allotted."

[1] The scope of the Task Force work has been necessarily limited to reservations, as can be seen from its title:
"Reservation and Resource Development and Protection." To serve Indian people more completely it would have been advisable to include terminated and non-federally recognized Indian communities as well as urban communities. Hopefully, their development problems will be addressed by Task Force Nos. 8 and 10. In the few contacts Task Force #7 had with state (non-federally recognized) reservations in Maine, Virginia, New York, and Louisiana, these people thought the biggest obstacle to their development was lack of federal recognition. However, in Texas, state reservations did not feel federal recognition was essential for development because the state had been particularly generous to them.

[2] The Task Force was composed of three part-time Indian members and one full time specialist as well as those Indian experts that could be hired from time to time. The Task Force was given one year and $105,673 to undertake its investigation.

[3] Some might question selecting reservations at "random." It is a mysterious process for most and they would feel more confident in choosing what they know are "typical" reservations. Selecting typical cases usually introduces some subjective bias on the part of the person making the selection. For example, the person would only pick those typical cases in his geographic area that he knew or only those cases that had gotten national publicity. All the other reservations of which he was unaware would have had no chance to participate and so the selection would not be truly representative.

Indian Population distribution among the groups according to BIA records was as follows:

	Percent of Indian People
Small nonallotted	20. 9
Small allotted	7. 9
Large nonallotted	28. 4
Large allotted	42. 8

The Task Force used population percentages as a basis for allocating its site visits. The Task Force decided that it could visit 32 reservations: 7 small non-allotted, 3 small allotted, 9 large non-allotted, and 13 large allotted. Among those chosen at random from the groups were:

Small nonallotted.—Carson City, Nevada; Havasupai, Arizona; Moapa, Nevada; Nambe, New Mexico; Picuris, New Mexico; Prairie Island, Minnesota; and Reno-Sparks, Nevada.

Small allotted.—Chehalis, Washington; Kickapoo, Oklahoma; and Swinomish, Washington.

Large nonallotted.—Duck Valley, Nevada; Fort Apache, Arizona; Fort McDermitt, Nevada; Hoopa Valley, California; Hualapai, Arizona; Laguna, New Mexico; Makah, Washington; Morongo, California; and San Carlos, Arizona.

Large allotted.—Cheyenne River, South Dakota; Colville, Washington; Crow, Montana; Crow Creek, South Dakota; Fort Hall, Idaho; Lac du Flambeau, Minnesota; Nett Lake (Bois Forte) Minnesota; Omaha, Nebraska; Rosebud, South Dakota; Spokane, Washington; Standing Rock, North Dakota; Umatilla, Oregon; and Warm Springs, Oregon.

Reservations were visited by either a Task Force member, the specialist, or a consultant, depending upon availability and geographic location. The individual usually spent three days interviewing the tribal council, the tribal chairman, and the tribal planner. The objective was to collect pertinent data needed to determine what the obstacles to development were on that reservation. Data was collected by a questionnaire. The questionnaire was used to ensure that data could be uniformly compared. The interviewers succeeded in understanding local economic conditions to the extent that Indian leaders, willingly and patiently, helped them to comprehend it. Often Indian leaders openly disclosed their problems with the local BIA, county, state, and Federal governments and submitted whatever data they had available. At other times Indian leaders would not reveal their problems for fear of reprisal from these institutions. They would not release data which they thought could be used against them. In order to protect the identity of the thirty-two reservations in the study, each one is assigned a code number where sensitive data is involved.

To complement our data collection at the reservation level, the Task Force initiated four other data gathering efforts. In order to ascertain the opinions of all Indian people on economic development, short opinion polls were sent to the 288 reservations. Twenty-eight were returned. Investigations were started on the federal level to determine what role the government agencies were playing in promoting economic development. Among the agencies studied were the Bureau of Indian Affairs (BIA), the Economic Development Administration (EDA), the Department of Labor (DOL), the Department of Agriculture (DOA), the Small Business Administration (SBA), the Office of Minority Business Enterprise (OME), and the Office of Native American Programs (ONAP). Data was collected on past and present

programs, on funding, and an attempt was made to evaluate their impact on development.

The Task Force also commissioned four special papers which treat particular subjects in-depth (Indian mineral development, EDA) or address an issue which had been omitted from the original scope of work (Indian housing, Alaska Native Claims Settlement Act).

This report is based on information gathered from thirty-two reservations, from an opinion poll, from investigation of federal agencies, and from special subject papers.

C. What Indian People Said

The continuing search for understanding of Indian feelings toward "Development" took the form of seven open-ended interview questions to 32 tribes and eleven mailed questions to all Land-based Indian tribes.

SEVEN OPEN-ENDED QUESTIONS

1. What does "development" or progress mean to the tribe?
2. How is the tribe going to achieve this development?
3. What will the tribe need to achieve this development?
4. How is the tribe going to get what they need to develop?
5. What are the obstacles to development on the reservation?
6. Are there any other problems on the reservation that influence development that we should know?
7. What do you think the American Indian Policy Review Commission should be doing about reservation development and resource protection?

These questions were asked and recorded in personal visits with Indian people along with the detailed economics questionnaire.

A supplementary questionnaire (11 questions) was also sent to all tribes not included in the site visit schedule. Twenty-eight questionnaires were returned. The answers were organized under the above seven questions.

MAILED QUESTIONS

1. What is development?
2. Is there a particular kind of "development" which is best for your people?
3. How is the tribal council promoting this development?
4. What government agencies or private institutions are promoting this development?
5. What are the most important obstacles to your development?
6. How can these obstacles be removed?
7. What programs or laws would best promote development or remove the obstacles to your development?
8. What kind of protection do you have for your resources? Please include any codes enforced by the tribal government.
9. Does the BIA provide adequate resource protection? If not, please explain.
10. Who is the principal offender(s) in depleting or damaging your resources (state, private corporations, local non-Indians, others)?
11. What do you think the American Indian Policy Review Com-

mission should be doing about reservation and resource development and protection?

Opinions from sixty-one tribes are included in the following seven topic areas.

(1) UNDERSTANDING

What does "development" or progress mean to the tribe?

The diversity of tribal operations and the complexty of laws, agencies, treaties, quality and quantity of the land base, make a discrete summary of the feelings difficult. To preserve the integrity and feelings about development, quotes are used as follows:

"To strengthen sovereign powers and to become self-sufficient by development of resources to create jobs for everyone."

"Development of tribal enterprises to provide financial security."

"Development means the building of a self-sustaining economy which provides jobs for tribal members without damaging the natural resources or Indian cultural values."

"Stabilizing economic conditions to improve health and welfare of the reservation and its people."

"Develop better management of tribal government so that more individuals can operate their own businesses."

"Development of local communities through education and human resources projects."

"Affording the youth a chance to remain in the tribal community through appropriate job training."

"Development of industry to obtain a guaranteed income for the tribe."

The priority for most tribes appears to be self-sufficiency through tribal government development so that in the near future their people may fully partake of the "American Dream" in their own Indian way. There is a strong feeling that they no longer want to depend on Government grants but on their own human resources for their security and comfort.

Each tribe feels that it is unique and the uniqueness ought to be recognized by all federal agencies in participative development projects.

(2) ACHIEVEMENT

How is the tribe going to achieve this development?

The answers to this question ranged over a wide area in detail but were easily categorized into the responsibility of tribes to develop their own unique physical, psychological and social infrastructure. It is significant to note that no answers indicated that future development was someone else's responsibility other than the tribe's.

Several significant opposing views were expressed—for instance from: "We will protect the land, by war if necessary. We will acquire the skills, learn the language and manage our own tribal business affairs. This does not include joint ventures."

To: "We prefer development through the private sector over Tribal ownership."

This infrastructure to be built through education, community centers, communication systems on an inter- and intra-reservation basis along with easy contact with the outside world such as Government agencies, schools, colleges and the Business and Industrial sector.

The need for strengthening their ownership and sovereignty over land, water and minerals is a priority. Additional land acquisition is a

significant part of their growth. Some tribes also feel that development can be more safely managed through inter-Tribal councils.

There is a pervasive feeling that a major improvement in the relationship between Federal Government agencies and tribes must be accomplished. Some tribes feel that they must develop extensive training programs to give their people a clear understanding of agency operations. Others feel that the "Government" ought to organize itself so that tribes can work through one agency instead of a dozen or more. Most tribes cannot afford the luxury of organizing to deal with many agencies.

There is a universal view that long-range plans for reservations is essential. They are generally not satisfied with planning to date. The HUD–701 plans are an improvement but much more needs doing. A granting process to span five years was viewed as an improvement over the year to year or short-term grants.

(3) NEEDS

What will the tribe need to achieve this development?

One tribal chairman answered as follows: "To achieve this development we will require capital, political and managerial control, technical services, effective protection of tribal sovereignty and trust land, more housing, and the talent, ideas and leadership by our own people."

A substantial response indicates that one of the priority needs is for access to capital markets by tribes and Indian individuals. A mechanism for borrowing money for development must be found until Indian tribes and individuals can earn the respect and trust of those who have capital. The desire is for Indian business people to have the same relationship to banks and product markets as do other Americans.

One tribal chairman answered the question at a council meeting by simply saying: "Education and training."

Others feel there is little hope until they can increase their land base and those who have a large land base feel that soil erosion, poor land management by lessees, and extremely poor leases for agricultural and mining properties which they are locked into are frustrating and infuriating.

Access to capital must be accompanied by appropriate technical assistance; one without the other is impractical.

(4) PROCEDURE

How is the tribe going to get what they need to develop?

This question was answered by only 23 of the 32 respondents, and the answers reflected poorly defined ideas on how attainment of their aspirations may be fulfilled.

The most significant point was that there appear to be many opportunities to obtain help but the tribes were not trained to know how to proceed. The answers also reflect an absence of middle management people in the tribes who can do the work with expeditious good judgment.

Some discrete quotes on the question are:

"Tribe needs to develop business acumen rapidly. Ability to make economic decision on economic rather than on a political basis. Develop management and fiscal controls and enforce them."

"Development of enterprises with emphasis on individual participation so they will become less dependent on sale of allotted land. Large amounts of development capital are needed."

Most of the respondents like the idea of going to a number of agencies for help so they do not feel as dependent on and confined to BIA. The cost of negotiations for assistance through many agencies, however, is a luxury most tribes cannot afford. This inequity results in poorly defined programs which are under-funded and have little prospect of success from the beginning. Even if the Tribe recognizes this shortcoming, it proceeds on the basis that something is better than nothing.

(5) OBSTACLES

What are the obstacles to development on the reservation?

Obstacles mentioned by most respondents were isolation, control, jurisdiction, incompetent leases, heirship, apathy, and lack of control, jurisdiction, and fiscal responsibility by tribal government. While these were the words most often used, analysis of the language and other feelings expressed in context indicate that the cost of negotiating for their unique growth opportunity is very high. This cost in time and dollars results in frustration which is directed toward isolation, jurisdiction, etc.

The tribes who look to Indian industrial enterprise for jobs feel that industrial organizations don't understand the benefits they can share with Indians by building production facilities on reservations.

Some comments are:

"Lack of initiative to enter into business ownership."

"Heirship problems prevent proper use of land and encourage sale of the land."

"Lack of education, risk capital and failure to follow-up long range plans."

"Money—BIA incompetence."

(6) OTHER PROBLEMS

Are there any other problems on the reservation that influence development that we know?

This question was apparently not rigorously pursued by the interviewers because the answers were sketchy and incomplete. No unusual subjects were raised. The emphasis, however, seemed to be on heirship and problems of dealing with Anglos on the periphery of the reservation. The animosity and anatgonism which exist is a challenge for tribes faced with the problem. Perhaps the greater emphasis on cost of negotiation was mentioned in many different ways including the high cost of litigation, lawyers' fees, land consolidation, and negotiating time with agencies, especially the BIA.

(7) REVIEW COMMISSION

What do you think the American Indian Policy Review Commission should be doing about reservation development and resource protection?

This question engendered the greatest interest, if the length of the answers is a measure.

Several subjects received equal support. They are:

Recommend legislation that would continue some kind of Indian group to carry on the work which the Commission has started. Poor continuity or the absence thereof is a general problem throughout all relationships with the Government.

Recommend legislation which would strengthen sovereignty, support land acquisition and accompanying funds to implement the legislation.

Recommend legislation which would resolve the complexities of the heirship problem. This should be accomplished through detailed discussion with tribes having the problem. The "public hearings" process is inadequate.

Most interviewees had a good working knowledge of the Commission and the mandate. These tribes seemed free to discuss the subject openly and to voice their hopes, aspirations and frustrations. It will suffice to list the subjects suggested for serious legislative consideration, which is preferred to Executive Order and Departmental Regulations and Guidelines. Some tribes felt that directives by Congress would be more equitable to Indian people than Agency regulation. The subjects are:

Recommendations to:

Restructure the BIA.

Improve youth programs. Develop appropriate education. Accommodate self-regulation and local control.

Provide for a unification process for all Indians.

Assist tribal government development and long-term funds.

Mandate Congress to have closer psychological and physical contact with Indian people.

Create an Indian Research Center.

Develop a process for co-management with State Government.

Include review of report by Tribes.

A way to have better and easier access to Washington, D.C.—e.g., eliminate the Agency offices.

Leave us alone so we can continue to live in harmony with nature.

Redefine, classify and improve Technical Assistance to be more appropriate to the uniqueness for the Tribe.

Develop a more expeditious communication system with Congress and the executive agencies.

CHAPTER III

Introduction

This chapter examines economic development from the perspective gained by investigating thirty-two reservations. Among the issues examined are the ability of tribal governments to control and promote economic development, the scope and quality of tribal planning, the current control, use and development of reservation resources including land, minerals, timber, water, and, finally, the insufficiency of capital and manpower training.

A. Tribal Governments as Promoters of Economic Development

If one advocates Indian control of economic development, then the logical promoter of such development should be the tribal government. The purpose of this section is to examine tribal governments as independent decisionmaking units. Such independence is necessary for tribal governments, if they are to promote economic development consistent with tribal goals.

Table 1 illustrates the great variation in the complexity of tribal government structure among the thirty-two reservations. Complexity is usually a function of the size of the population to be governed and the economic wealth of the reservation.

TABLE 1.—RESERVATION STATISTICS AND FORCES OF TRIBAL GOVERNMENT

Reservation code No.	Reservation population	Trust land area	Number of tribal government employees (full time)	Structure			
				Council and chairman	Committees	Administrative divisions	Tribal enterprises/ entities
1	194	160	0	X	0	0	0
2	244	2,296	22	X	4	0	0
3	4,538	1,398,934	NA	X	9	71	15
4	4,816	1,076,592	157	X	8	15	7
5	4,144	1,567,827	97	X	14	20	NA
6	1,429	105,557	123	X	4	5	3
7	959	289,819	22	X	1	1	4
8	8,097	1,644,972	149	X	35	17	7
9	2,979	481,673	70	X	NA	NA	2
10	512	35,577	0	X	2	0	1
11	396	188,077	10	X	NA	1	3
12	1,060	86,072	60	X	4	8	3
13	797	993,173	25	X	12	1	4
14	655	5,846	3	X	1	5	0
15	1,016	44,493	4	X	15	1	4
16	3,196	417,295	60	X	5	13	1
17	902	27,052	75	X	5	10	0
18	165	1,174	5	X	7	3	1
19	257	32,242	3	X	1	1	0
20	381	19,075	2	X	7	1	0
21	507	41,778	4	X	12	1	2
22	1,331	27,413	35	X	5	14	2
23	198	14,946	2	X	2	1	2
24	84	534	0	X	2	3	0
25	566	28	2	X	5	1	1
26	8,410	958,473	73	X	NA	NA	NA
27	6,141	1,827,421	127	X	4	NA	0
28	743	136,925	35	X	11	4	0
29	5,133	849,339	188	X	4	17	12
30	430	3,430	33	X	2	7	1
31	700	75,351	70	X	1	5	1
32	2,190	639,655	263	X	3	23	5

Note: The smallest government (1) consists of an elected tribal business committee whose members serve voluntarily; the largest (32) consists of a tribal government with 23 administrative subdivisions employing in excess of 250 people.

The necessary minimum for tribal government is an elected council or business committee whose chief executive is the chairman.

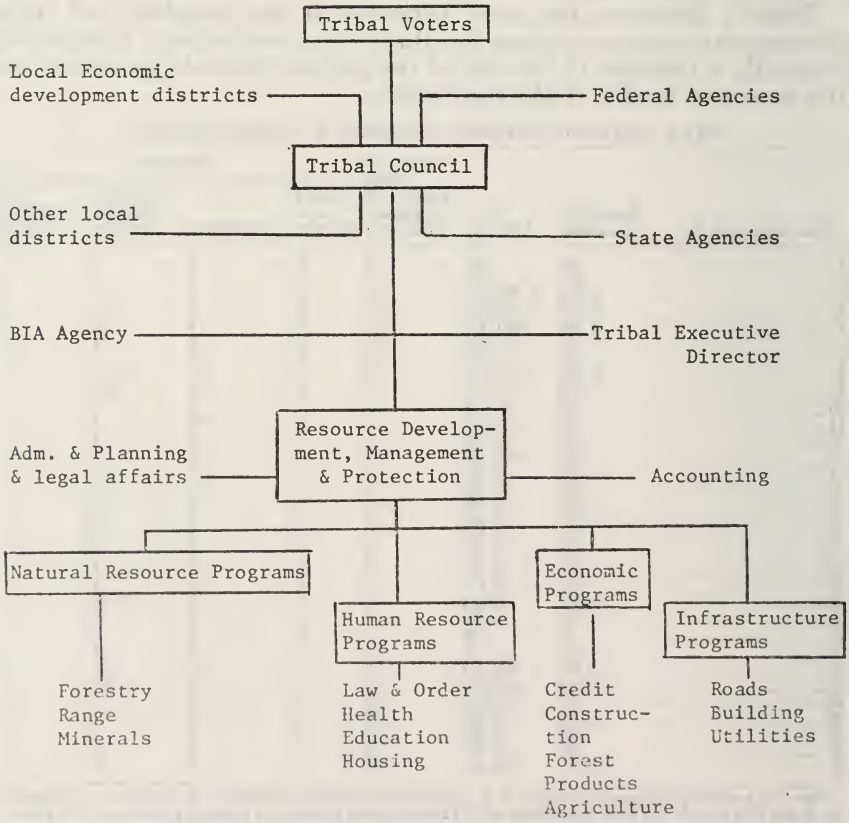
Often the same people serve on the council committees, and in the administrative divisions. Thus, the same people who make policy implement it. Consequently, when the policy-makers are not re-elected, there is a turn-over in administration.

Some tribal governments have realized the instability this constant turnover creates and have designed a structure in which policy-makers (council members) are distinct from administrators and managers.

Some tribes have expanded beyond mere administration and have begun to directly promote economic development by developing their resources through tribal enterprises. Among the examples of resource-based enterprises are tribal ranches and farms, logging companies, sawmills, wood-products factories, fisheries, resorts.

The question arises, what is a tribal government? Is it similar in function to a county government or a state government? One of the thirty-two governments provided an answer, "An Indian tribe is, or can be, a government, a landowner, a business firm and a social organization." Tribal Governments are unique.

One of the thirty-two reservations has proposed the following structure to enable it to govern, to provide services, and to develop its resources:



RESTRICTION OF TRIBAL CONTROL

The successful fulfillment of responsibilities is dependent not only on an adequate structure but also on the absolute amount of control the policy-making body can exert. As explained in Chapter 11, the tribal government's control is severely limited by Secretarial approval powers; 25 U.S.C., Section 2 gives the Secretary ultimate control over the tribe.

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian relations." (25 U.S.C. section 2.) The tribal government's power is also limited by the interference of state and local governments, especially in Public Law 280 states.[1]

In the area of state interference, tribal governments have recently scored a victory and a defeat. The State of Minnesota was prohibited from taxing Indian reservation residents. In *Bryan* v. *Itasca County, Minnesota*, the judge ruled that PL 280 did not give the state taxation powers on Indian reservations. In the case of Indian water rights, the Supreme Court ruled in *Akin* v. *U.S.* they must first be adjudicated in state courts, thus giving the state the first opportunity to decide this controversial issue. In many reservation areas, many non-Indians have organized themselves into citizens' groups in order to make sure that tribal resources and tribal jurisdiction are limited to a minimum. Typical of these groups is the South Dakota Civil Liberties League. Also typical of local interference is the practice of some Congressmen and Senators of inserting restrictions to the yearly Congressional appropriations of Indian funds which prohibit the use of such funds for land purchases. Obviously, their local constituencies want to restrict the size of the Indian land base.

DEPENDENCE OF TRIBAL GOVERNMENTS

Tribal power is not only limited by Secretarial, state, and local interference, but it is also weakened by a financial dependence on the federal government. Tribal government will never be free from federal pressures as long as the federal government finances the cost of the tribal government. This section discusses the tribal government's financial dependency as well as dependent reservation economies.

While tribes are quasi-sovereign entities in the legal sense, they will never be able to successfully exercise their sovereign powers unless, among other things, their tribal governments are financially independent and their reservation economies are self-sustaining as described in Chapter II, Figure 1.

Unfortunately, the Task Force was not able to measure the degree of dependency of each of the thirty-two reservations economies. Any comprehensive study which seeks to address the problem of reservation development, should include a definition and measurement of dependency.

The General Accounting Office (GAO) measured the dependency for the White Mountain Apaches, one of thirty-two reservations.[2]

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[1] The issue of the proper division of federal, state, and tribal jurisdiction or power is the subject of another task force. See their report for a discussion of the problems in PL 280 states.

[2] Comptroller General of the U.S., "Better Overall Planning Needed to Improve the Standard of Living of White Mountain Apaches of Arizona." General Accounting Office, August 12, 1975

They discovered that in 1972, federal funds accounted for 81 percent of all reservation expenditures; state and local funds, 12 percent; and tribal funds, 7 percent. The study found that dependency on the federal government increased from 1968 to 1972.

One step in achieving tribal control of government is financial independence of that tribal government. Task Force No. 7 made an attempt to assess the potential for financial independence by comparing tribal government expenditures for 1975 with tribal disposable income from all tribal sources for 1975.[3]

The following table illustrates how many tribal governments are capable of being financially independent and which are not.

TABLE 2.—TRIBAL INCOME COMPARED TO TRIBAL GOVERNMENT EXPENSES

Tribal government	Tribal income exceeds tribal government expenses	Tribal income equals government expenses	Tribal income is less than government expenses	Resource base inadequate to generate sufficient tribal income	Resource base is adequate but undeveloped
(1)	(2)	(3)	(4)	(4a)	(4b)
Number	11	9	12	4	8
Percent	34.3	28.1	37.5		

Table 2 shows that 34.3 percent of tribal governments studied were not only capable of financing their governments but also would have had some funds left over to invest in their own economic development. They would not, however, have been able to provide all the social services (health, education and welfare) needed by their resident populations. Only 28.1 percent would have been able to cover their annual administrative expenses with nothing left over for development activities or social services.

Not surprisingly, 37.5 percent were not able to pay their normal government operating expenses. Necessarily, they were dependent on the federal government to provide funds for development and for services. Of these governments, four have physical resource bases so inadequate that it is difficult to ever imagine them achieving political or economic self-sufficiency. There is the possibility, of course, that if their residents were adequately educated and were employed, they could support their tribal government through taxation. But this depends on the attainment of three long term goals: (1) adequate education for everyone; (2) full employment; and (3) a system of tribal taxation. None of these goals are likely to be attained in the near future. These four governments were, are, and will be heavily dependent on the federal government, particularly on the Bureau of Indian Affairs (BIA). If AIPRC recommendations include a restructuring of the BIA, they are likely to encounter understandable opposition from these reservations and all reservations in similar circumstances.

Eight of the reservations whose governmental administrative expenses exceeded their tribal income, have physical resource bases which, if developed through tribal enterprise, would generate adequate revenues to cover such expenses. This does not mean to imply that the first group whose income exceeded expenses had developed their

[3] Tribal government expenditures were not always met from tribal income. In many instances, tribal expenses were met by federal program funds such as the tribal government development program CETA, or revenue sharing

resources. In most instances their favorable situation was the result of their unusually large physical resource base and the fact that the revenues from it accrued to them. It does not mean to say that their large resource base was developed to any substantial degree.

In sum, no tribal government exercised the control necessary for development due to Secretarial approval powers. Furthermore, 37 percent of the governments studied did not have the financial resources to support even the administrative operations of their government.

B. Evaluation of Tribal Planning

The Federal Government has encouraged and financially supported planning by American Indian tribes for a number of years. Of the thirty-two Indian reservations considered, all have been, or are covered, by Economic Development Administration Overall Economic Development Program plans.[1] More than half of the reservations studied also have Department of Housing and Urban Development Section 701 Comprehensive Planning Assistance Plans. Most notably, federal efforts have centered on EDA and HUD comprehensive plans, but the Bureau of Indian Affairs, Department of Health, Education and Welfare and Department of Agriculture have also supported Indian planning efforts.

PLANNING PROCESS

The planning process requires that goals be set by the community. These goals may be broad and general in nature. The process then requires that a series of objectives be stated, which if pursued, should lead to achievement of the stated goal. As a consequence, it is necessary that objectives be specific and quantifiable, otherwise it is impossible to know whether progress is being made and at what cost. The next step in the planning process is to choose appropriate projects. Since communities may prefer that certain objectives be pursued sooner than others, or that more resources be expended in attaining a certain set of objectives, these preferences must be embodied in the choice of projects. A methodology must be selected to rank potential projects in terms of objectives. This methodology will also provide for a means of periodic evaluation of progress and costs of projects.

The fundamental development problem which Indian tribes seek to overcome through planning is to increase the limited absorptive capacity of the reservation's economy. Absorptive capacity is the opportunity for profitable economic and social investment. Because Indian planning does not objectively calculate the social profitability of individual projects conceived in response to their goals and objectives, it is not possible to choose consistently the best alternatives in selecting the size or composition of an investment program. Proper planning would require that a cost/benefit analysis of individual projects be made. Return on various projects, once measured, would indicate whether a particular deployment of resources would or would not lead to an increase in available resources. Maximizing returns, for example, would increase income and aid in overcoming limited absorptive capacity. But social welfare considerations may be important also. Including social welfare would give proper weight to projects which maximize welfare for the greatest number of people. What is

[1] Since 1965 EDA and HUD spent $6.78 million on planners and studies on the 32 reservations.

important is that reservation cost/benefit analysis chose projects from among measured alternatives. As an example of cost/benefit analysis in a reservation context, readers are referred to the appendix by Fitch and Trosper.

ANALYSIS OF RESERVATION PLANNING

Considering the above, EDA and HUD plans were analyzed to determine whether or not they could properly be termed as plans which could govern the selection of the best projects consistent with goals.

GOALS AND OBJECTIVES

Generally, most reservation plans stated goals and objectives which could be quantitatively defined and measured. None of the plans attempted to relate objectives to broad goals.

CURRENCY OF DATA

Most plans used current data when they were written, although with passage of time the data has become old and therefore less relevant.

AMOUNT OF DATA

The number of statistical items collected is the amount of data. Some plans presented great quantities of data in many areas. These plans tended to be more comprehensive. Other plans presented less data but still managed to cover many diverse areas. While others presented great quantities of data in just a few areas, many presented very little data at all. In general, HUD plans tend to have more data than EDA plans. HUD plans were also more often the product of consultants than of resident Indian planners. On the whole, very little data was presented irrespective of whether they were EDA or HUD plans. Lack of data is a major flaw in many plans.

ADEQUACY OF DATA

It was necessary to determine whether data provided on a given subject matter basis was sufficient to make judgments about projects. Data in most plans read would be insufficient for making decisions based on usual methods of analysis. HUD plans tended to provide more detailed data than did EDA plans. Generally speaking, the data was so inadequate as to make it difficult to select projects. Yet the plans did so. Indequacy of data is a major flaw in the plans.

DATA RELATION TO PROJECTS

In general, none of the plans really attempted to relate the data collected to the projects listed in the plans. HUD plans tended to have more detailed data collection, and when HUD plans did relate the data to projects, it did so better than EDA plans. EDA plans had less data collection, and therefore failed to relate data collected to projects selected.

ANALYSIS OF COMPETING PROJECTS

The data base in reservation plans is generally so poor as to make analysis impossible. Furthermore, the plans do not employ any form

of cost/benefit analysis to determine project priorities. Occasionally, time-lines are employed to indicate the existence of a planning strategy, but the "plans" never revealed any analysis indicating why certain projects were selected, nor why some projects came first in time.

HUD plans had more data which could have been used to analyze various project possibilities, but these plans were weak on analysis of data as well as upon competing projects. EDA plans had less data but more analysis was attempted.

CITIZEN PARTICIPATION

Citizen Participation is required by EDA and HUD in the formulation of plans. In general, EDA plans appeared to have had greater input by the community than do HUD plans. This may be due to several facts. EDA plans are, for the most part, written by "resident" planners, while many of the HUD plans were written by consulting firms. EDA plans require overall Economic Development Program committees, while HUD plans do not require any citizen committees, per se.

COMPLIANCE WITH STATUTORY REQUIREMENTS

Since all the plans studied were found acceptable by HUD and EDA, it must be assumed that they met agency guidelines. EDA guidelines are vague and topical. They do not appear to require more than that the blanks be filled in. By contrast, HUD guidelines are quite detailed and do require specific information for required planning activity sections: housing and land use. However, most HUD plans present extremely inadequate information on land use and housing. It is the exception to find a plan with more than three pages constituting the housing or land use element. Further, although HUD requires that environmental assessments be made, only two Indian plans appeared to comply. Considering Indian plans in the context of statutory requirements and agency guidelines, and considering the fact that these plans have been found to be acceptable by HUD and EDA, one must conclude that these agencies are more concerned with polished topical formats than they are in content.

CONCLUSION

Indian planning does not objectively calculate the social return on individual projects conceived in response to their data collection. No cost/benefit analysis of projects is made, making it impossible to select the best alternative. Reservation planning amounts to data collection without analysis. The plans are collections of base line data with project lists attached.

The major reason that reservation plans are not plans is the attitude of tribal councils and federal agencies; both view the planning process as a requirement that must be complied with to obtain federal project funding. This attitude is supported by the stress of the Federal Government on format of the plan, rather than on its content or methodology. Further, the fact that government agencies will accept practically any work product submitted by an Indian reservation indicates that the plans really are only documents of qualification. Both views reflect the realistic recognition that Indian plans are grantsmanship.

As a consequence of this recognition, plans are written in a perfunctory manner. Since it is not possible to know at the time the plan is written what projects the Federal Government will fund, it becomes incumbent upon the planners to write plans which are vague or ambiguous. Vagueness produces flexible documents under which practially all current and future projects will qualify. Grantsmanship-planning demonstrates that reservations and federal agencies have, as yet, failed to grasp the significance between planning as merely a preparation for applications to a government agency, and planning as a method to maximize social welfare.

C. Current Methods of Using Indian Resources

From the point of view of Indian income, current methods of resource use on Indian reservations are subject to two general objections. First, Indians are mere rent-receivers with diminished bargaining power. Second, Indians are not able to expand their share of the return from their resources by investing it in resource processing. This pattern results from the lack of control which Indians have over their economy. In the field of resource use, the interference of the Bureau of Indian Affairs between Indians and the management of their land is the basic problem. This section will document the forms of interference and the results.

Failure to move into processing has resulted from lack of capital as well as lack of tribal control over resources. And, even when the government has provided capital, Indian control has still been minimzed. Consequently, most resources are exploited by non-Indians through leasing. While in principle leases can be written to protect the lessor's interest, in practice the lessor receives diminished protection. Because Bureau leases do not adequately protect Indian interests and because Indians generally may not execute leases on their own behalf without Bureau approval, leasing is de facto submission to the dominant society.

C.1. LAND CONSOLIDATION

There is probably no more dismal chapter in Indian economic history than the erosion of their land base. At the zenith of the treaty period (1875), the tribal land base consisted of 165,929,710 acres.[1] Between 1875 and 1887, 29,000,000 acres of this original treaty area was ceded by the Indians as settlers continued to exert strong pressures for more land (See Table 1). The ultimate blow to a self-sufficient and contiguous tribal land base came in 1887 with the passage of the General Allotment Act.[2] The Act broke up tribally held land into individual Indian allotments. When all Indian recipients had received their allotments, the remaining reservation land area was declared surplus and opened to homesteaders. Fortunately, the allotment policy was not applied uniformly to all reservations and some reservations' tribal land base remained intact (See Table 2). The Allotment Act policy and subsequent sales of individual allotments reduced the tribal land base to 29,481,685 acres in 1933.[3]

[1] The Development of Federal Indian Relations 1775–1952, Department of the Interior, no author, no date.
[2] For those unfamilar with the Act, read D.S. Otis; "History of the Allotment Policy."
[3] J. P. Kinney, "A Continent Lost—A Civilization Won: Indian Land Tenure in America" (Baltimore, 1937) p. 351.

TABLE 1.—INDIAN LAND BASE

Federal policy period	Reservation period		Allotment					Depression,	IRA		Termination,	Self-determination	
	1871 [1]	1875 [1]	1887 [2]	1890 [2]	1900 [2]	1911 [2]	1929 [2]	1933 [2]	1934 [2]	1950 [3]	1957 [3]	1965 [4]	1975 [5]
Total Acres in trust	155,000,000	165,929,710	136,394,985	104,314,349	77,865,373	72,535,862	71,144,213	47,311,099	NA	56,315,133	53,330,835	NA	51,845,282
Tribal acres	155,000,000	165,929,710	119,375,930	86,540,624	52,455,027	40,263,442	32,014,945	29,481,685	34,287,336	37,066,556	39,549,366	39,097,020	40,822,456
Alotted acres	0	0	17,018,965	17,773,525	25,409,546	32,272,420	39,129,268	17,829,414	17,622,700	17,414,129	13,223,498	11,286,652	10,127,204
Government-owned acres	0	0	0	----------	NA	NA	NA	NA	NA	1,834,448	558,031	NA	895,621

[1] The Development of Federal-Indian Relations 1775-1952, Department of Interior.
[2] J. P. Kinney, "A Continent Lost—A Civilization Won: Indian Land Tenure in America" (Baltimore, 1937) p. 351.
[3] P. P. Dorner, "The Economic Position of the American Indians" (Boston: Harvard University, 1959) p. 25.
[4] Theodore W. Taylor, "Report on Purchase on Indian Land and Acres on Indian Land in Trust" 1934–75, BIA (Washington, May 1976) p. 96.
[5] Annual Report on Indian Land and Income from Surface and Subsurface Leases as of June 30, 1975, p. 1.

TABLE 2.—LAND STATUS OF 32 RESERVATIONS

Reservations	Original treaty area [1]	Allotted by 1934 [1]	Area opened to settlement or ceded [1]	Alienated by 1934 [1]	Present total area in reservation boundary [2]	Tribal trust land [3]	Percent	Allotted trust land [3]	Government land [3]	Fee land
	(1)	(2)	(3)	(4)	(5)	(6)	(6e)	(7)	(8)	(9)
Allotted:										
Cheyenne River	2,804,090.0	1,261,926	(S) 1,122,993	344,627	2,804,090.0	929,167.0	[4] 33	470,766	0	[5] 1,404,157
Crow	38,531,174.0	2,054,055	(S/C) 36,132,241	218,136	2,291,368.0	361,901.0	16	1,205,926	1,401.0	[5] 722,140
Crow Creek	285,609.0	284,732	----------	126,086	304,793.0	58,984.0	19	65,693	0	[5] 180,116
Fort Hall	[6] 1,800,000.0	175,445	----------	96,296	565,111.0	253,364.0	45	237,018	33,009.0	[5] 41,720
Lac du Flambeau	69,832.0	42,532	----------	15,346	81,346.0	29,503.0	36	14,990	40.0	[3] 36,853
Nett Lake	103,863.0	56,471	46,957	6,583	105,278.0	30,034.0	28	11,744	5.0	[3] 63,500
Omaha	300,000.0	----------	----------	----------	300,061.0	10,097.0	3.3	17,316	0	[5] 272,648
Rosebud	3,228,161.0	1,869,463	1,270,897	868,853	3,329,501.0	482,153.0	14.4	476,320	0	[3] 2,371,028
Spokane	154,888.0	65,063	5,880	14,852	154,602.0	105,960.0	68.5	30,965	3,122.0	[3] 14,555
Standing Rock	2,332,976.0	1,336,731	866,022	497,121	2,332,482.0	373,325.0	16	476,014	0	[3] 1,483,143
Umatilla	292,112.0	156,252	----------	63,751	157,982.0	2,131.0	1.3	69,061	0	[3] 86,790
Warm Springs	581,740.0	162,948	----------	15,365	662,032.0	578,488.0	87.3	61,168	376.0	[3] 22,000
Chehalis	4,215.0	4,195	----------	2,858	4,237.0	36.0	.8	2,260	0	[3] 1,941
Kickapoo	300,000.0	----------	----------	----------	3,000,000.0	17.5	.01	5,829	0	[3] 294,154
Swinomish	7,260.0	7,170	----------	1,685	7,169.0	313.0	4.3	3,117	0	[3] 3,739
Colville	2,885,086.0	414,974	(S/C) 1,674,058	102,076	1,414,140.0	989,640.0	66	136,932	7	[5] 337,541
Nonallotted:										
Duck Valley	289,667.0	----------	----------	----------	293,522.0	289,667.0	----------	0	3,855.0	0
Fort Apache	1,668,597.0	----------	----------	----------	1,664,972.0	1,664,972.0	----------	0	0	0
Fort McDermitt	4,287.0	----------	----------	----------	35,577.0	35,432.0	----------	145	0	0
Hoopa Valley	116,512.0	32,886	----------	15,131	86,990.0	84,778.0	----------	1,294	0	[3] 918
Hualapai	972,949.0	----------	----------	----------	998,845.0	992,463.0	----------	0	6,382.0	0
Laguna	17,360.0	----------	----------	----------	417,298.0	412,211.0	----------	4,066	1,016.0	0
Makah	26,133.0	3,723	----------	----------	27,075.0	24,415.0	----------	2,637	23.0	0
Morongo	11,059.0	----------	----------	----------	32,292.0	30,957.0	----------	1,250	0	[3] 85
San Carlos	1,610,240.0	----------	----------	----------	1,849,836.0	1,826,541.0	----------	880	22,415.0	0
Carson Colony	160.0	----------	----------	----------	160.0	160.0	----------	0	0	0
Havasupai	518.0	----------	----------	----------	188,077.0	188,077.0	----------	0	0	0
Moapa	1,065.0	----------	----------	----------	1,174.0	1,174.0	----------	0	0	0
Nambe	12,487.0	----------	----------	----------	19,075.0	19,072.0	----------	0	2.3	0
Picuris	17,467.0	----------	----------	----------	14,946.0	14,946.0	----------	0	0	0
Prairie Island	120.0	----------	----------	----------	534.0	534.0	----------	0	0	0
Reno-Sparks	28.8	----------	----------	----------	28.8	28.8	----------	0	0	0

[1] National Resource Board, "Report on Land Planning, Part X," "Indian Land Tenure, Economic Status, and Population Trends," Washington, D.C., GPO, 1935, pp. 28–34.
[2] Obtained by summing cols. 6–9.
[3] Obtained from TF No. 7 reservation questionnaire.
[4] Percent are tribal trust land divided by present total area in reservation boundary (col. 5).
[5] Memo from Pamela M. Sayad, to Associate Solicitor, Indian Affairs, subject: Indian and non-Indian owned land on specific reservations, no date (col. 6).
[6] Jack Peterson, "Futures: A Comprehensive Plan for the Shoshone-Bannock Tribes," Fort Hall Indian Reservation, June 1974, pp. 3–5.

The Depression was a factor in restoring some of the Indian land base. As farmers went under, the U.S. Government bought their land and later transferred it to the Bureau of Indian Affairs. More important, however, was the Indian Reorganization Act which put an end to the Allotment Policy on reservations in 1934. Reservations thus, according to the books, regained an estimated 7.6 million acres between 1933 and 1950.[4]

Table 2 separates the 32 reservations into those whose land was allotted, and those whose lands were not. Among the first group, tribal land as a percentage of total reservation land area, ranges from a low of .01 percent to a high of 87.3 percent. In the second group, every tribe possesses more than 90 percent of the reservation land base.

Problems caused by allotment

The economic and legal problems that allotment and sale of individual Indian allotments have caused have been adequately documented by the Meriam Report, 1928; by Congressional testimony during the Collier administration; and by independent scholars such as Peter Paul Dorner and Stephen Langone.[5]

Among the most serious problems caused by allotment is the breaking up of the reservation into small uneconomical units. These units are held by individual Indian allottees or they have been sold to non-Indians. The problem is further complicated by the fact that ownership becomes fragmented among divided-interest heirs, which further reduces the amount of land any one such heir can use. A "checkerboard" pattern of land holding among Indian allottees, non-Indians and their tribe is the result. Economic use of the land becomes impossible. Indian farmers and ranchers who are divided-interest heirs cannot earn sufficient income from small land tracts. Consequently, the land is used by non-Indians who can afford to consolidate, by leasing a number of Indian tracts.

Dorner observed in 1957 that:

> Indian allotments are useless except as a parcel to be combined with other land for a sufficient sized livestock operation; for whereas 2500–3000 acres are required in much of the Dakota country for an efficient ranch, the allotments range in size from 160–640 acres. Hence, individuals continue to sell their allotments, lease them to non-Indians, or permit them to lie idle.[6]

Checkerboarding also impedes the exercise of effective jurisdiction by the tribe. There have been few instances where tribes have been able to enforce law and order, zoning and building codes, environmental codes, and water codes where Indian lands are interspersed with non-Indian lands. In most cases, non-Indians vigorously reject any type of regulation by the tribe. Clear jurisdiction over reservation lands is necessary for a tribe to plan and control development. Land consolidation is a prerequisite to a successful development program and perhaps it is the most crucial prerequisite.

The existence of allotted land not only allows for inefficient land use, leasing, and jurisdictional conflicts but also it contributes to the gradual erosion of the Indian land base. There has been a shift in

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[4] J. P. Kinney, p. 351.

[5] Peter Paul Dorner, "The Economic Position of the American Indian" (Cambridge, Harvard University, 1959). Stephen Langone, "The Heirship Problem and its Effect on the Indian, The Tribe and Effectual Utilization" in "Toward Economic Development for Native American Communities," U.S. Government Printing Office, Washington, 1969.

[6] Dorner, p. 108.

ownership since 1934 from allotted land to fee patent and tribal land as allottees sell out to non-Indians or the tribe. From the secondary statistics available, it appears fee lands increased on ten of the fifteen allotted reservations, (see Table 2, compare columns 4 and 9) and only in three cases declined.

Land consolidation as a solution to checkerboarding: past attempts

"Land consolidation" means consolidation of already existing trust land and previously owned trust land to form contiguous-economic size units within the exterior boundary of the reservation. It does not mean increasing trust land outside reservation boundaries.

Land consolidation was considered in depth by the Meriam Report in 1928; it was the chief goal of the Collier administration; and it was one purpose of the Indian Reorganization Act (1934).

If land consolidation has been recognized as a necessity for more than 58 years, why has nothing been accomplished? To answer this we must review the history of the Indian Reorganization Act.

Section 4 of the Act stopped the allotment procedure and the issuance of fee patents to Indian allottees as well as sales by allottees.

Section 5 of the Act allowed the Secretary of the Interior to purchase lands, water rights or surface rights to lands, within or without existing reservations. For acquisition of such lands, Congress authorized the appropriation of $2,000,000 annually, but no part was to be spent for the Navajo. Any land acquired under this Act was to be placed in trust.

From 1934 to 1974, only 595,154 acres were purchased under the Act at a cost of $5,988,077.[7] If one considers the fact that while the BIA was buying 595,154 acres, the Bureau of Reclamation was taking 1,811,010 acres, then land consolidation efforts were more than offset by other federal takings. Not only was little land purchased under the IRA, but also Section 4 was amended in 1948 so that the Secretary could issue fee patents or approve sales upon the application of the Indian owners. The Commissioner himself noted that such pressures and the resulting alienation of land endangered the advance made in the previous fifteen years.[8]

Appropriations under Section 5 of the IRA had virtually ceased by 1951, and the balance of the unexpended funds was transferred to the Construction account.[9] Given that some $84 million could have been appropriated, what explains the Secretary of Interior's or the BIA's reluctance to purchase land? According to Theodore Taylor, the BIA was reluctant to seek the funds because of the termination mood of Congress. The BIA decided that the atmosphere of the time did not make appropriations of funds for land purchase a realistic option.[10]

If the BIA is an advocate of Indian rights, why was it unwilling to pressure Congress to appropriate what it had already authorized? The BIA is not and was not interested in land consolidation. An example of the Bureau's past lack of interest is found in the following:

The Northern Cheyenne had sold cattle, and planned to invest proceeds in the land so they could hold together at least part of the reservation. But the Bureau, busy for months auditing the proceeds from the cattle sale, refused to delay the sale until this money was available to the tribe. Secondly, the Bureau sold at least

[7] Taylor, pp. 4-5.
[8] Ibid, p. 15.
[9] Ibid, p. 40.
[10] Ibid, p. 27.

one key tract, the loss of which jeopardizes the grazing economy of the entire tribe. And as a final blow, the Indian Bureau refused to permit the tribe the opportunity it requested to meet the price of the highest bidder.[11]

As a result of the reluctance of the BIA to request Congressional appropriations, most tribes interested in land consolidation have been forced to rely on loans. Indian tribes have obtained loans from the Bureau's revolving loan fund and the Department of Agriculture.

The Farmer's Home Administration has been the largest source of loans for land repurchase by tribes even though its land acquisition program has only been in existence six years. To date the tribes have borrowed $40 million. Usually tribes offer the land purchased, or a guaranteed income, such as interest from trust funds, as collateral. However, in order to repay these loans, the tribe must put the land into production. This usually takes another capital expenditure and there is virtually no capital available for land improvements or machinery. Thus, if the land cannot be put into production rapidly enough, the tribe might default.

Upon default, USDA can liquidate the loan through a foreclosure sale. If the land purchased by the tribe was alloted trust land, the land goes from trust status to fee patent, when foreclosed by USDA. Therefore, securing loans with trust land is a risky method for attempting land consolidation.

There is yet another cause of the failure of land consolidation efforts. Under the BIA, there is a standard provision in each Fiscal Year Appropriations Bill to authorize expenditures of tribal trust funds. Some Congressmen have placed restrictions on using these tribal trust funds as well as on U.S. funds granted under the IRA or Construction account for the purpose of land purchase. Currently in the States of Arizona, California, Colorado, New Mexico, South Dakota, Utah and Wyoming, Congress has restricted the use of government appropriations under IRA or the construction account to acquire land outside the reservation. Similar restrictions in Oregon, Nevada and Washington also restrict the use of government appropriations from purchasing land inside or outside the reservation. In Nevada and Oregon tribal trust funds are restricted for buying land inside or outside the reservations.

Tribal trust funds often originate from timber, mineral and leasing revenues. They are the proceeds earned from Indian trust land. Restricting the free use of these monies perpetuates federal paternalism and makes Congressional support of self-determination appear hollow indeed. The purpose of these restrictions is clearly political, in that, they protect the economic interests of non-Indians at the expense of Indians.

Experience of the allotted reservations

Eleven of the sixteen allotted reservations said that allotment was their major obstacle to development. Thirteen of the allotted reservations are actively engaged in land consolidation. The Rosebud Sioux have had a Tribal Land Enterprise since 1943. Membership is restricted to members of the tribe who place their lands under the operation and management of the enterprise. In return they receive certificates of interest equal to the appraised value of their land which

[11] U.S. Congress, Senate Indian Land Transactions Memorandum of the Chairman to the Committee on Interior and Insular Affairs, December 1, 1958; Washington, D.C., GPO; 2.

allows them to vote. The purposes of the TLE are to remedy fractionation of ownership, consolidate land, develop a management plan for the members, preserve land values, facilitate land exchanges and to develop tribal enterprises on tribal lands. The Rosebud Sioux have been able to obtain loans from RLF and from FmHA, but the latter allows the tribe to buy land only in Todd County. The tribe is contesting this restriction.

The General Accounting Office conducted an investigation of BIA land sales practices on two allotted reservations (Rosebud and Cheyenne River) where land has been consistently passing from trust to fee patent in spite of the tribal land purchase programs.[12] According to the Code of Federal Regulations, the BIA is supposed to follow these procedures whenever land sales occur:

1. BIA is to insure that the sale is in the *best long-range interest* of the owner.
2. Fair-market value is to be obtained.
3. The seller is to be advised he may retain his mineral rights.
4. The tribe is to be notified of pending sales of land owned by individual Indians so it may have an opportunity to purchase it.

GAO found that the BIA had not prepared statements that the sales were in the long-range best interest. BIA officials admitted that they had not prepared these statements and said it was because they had no definition of long-range best interest.

In the land sales reviewed by GAO, 62% received the appraised value, 33% received more than the appraised value, and 6% received less than the appraised value. More serious still was the fact that the sellers were not advised of their mineral rights in 52% of the cases! Probably, the individuals would have elected to reserve them since 60% of the sellers who were informed of their rights elected to retain them. Likewise, the BIA failed to notify the tribe of the sale in 27% of the cases. Tribal officials at Rosebud and Cheyenne River said that the BIA had not provided proper notification. In at least one case at Rosebud, the tribe would have been interested in buying the land.

The BIA's handling of land sales is another convincing proof that the BIA has no interest in land consolidation. Furthermore, even though land consolidation is a priority item for Rosebud and Cheyenne River, their attempts are being thwarted by BIA procedures.

Other tribes such as Crow, Crow Creek, Ft. Hall, Standing Rock, Warm Springs, Swinomish, and Umatilla have tribal land purchase programs.

The Crows are in a particularly vulnerable position which is described by Mr. Ray Bear Don't Walk:

> There are over 100 applications for patent-in-fee land sales on file in the Billings Area Office. There is a certain bill either to be introduced or pending in U.S. Congress promoted by powerful white landowners and stockmen to get the mineral rights for themselves on their lands in the Crow Indian Reservation. The Crow Tribe or individual members must be given an opportunity to purchase the lands when the individual allottees sell them. In order to perserve the dwindling Indian holdings the Federal Government must adopt an augmented loan program to the tribes for this purpose.[13]

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[12] Comptroller General of the United States, "Land Management Activities on Three Indian Reservations in South Dakota Can be Improved," General Accounting Office, June 4, 1975.

[13] Personal Communication from Ray Bear Don't Walk, Sr., March 29, 1976.

The Crows have asked for the Secretary to declare a moratorium on all land sales and would like to introduce a bill into Congress allowing them to mortgage or hypothecate land income which they could offer as collateral for loans for land purchase.

At Lac du Flambeau, 79 allotments have been offered to the tribe for purchase. However, their annual income is small and does not permit them to pay $1,070,400, the appraised value of the 5,574 acres.

Swinomish, by a special act of Congress in 1968, is permitted to purchase and transfer to trust status lands on the reservation, lands adjacent to the reservation, or lands in close proximity to the boundaries of the reservation. However, they have practically no funds and have been able to secure only a small loan of $36,000 from FmHA. The Umatilla is one of those reservations where the state has pursuaded Congress to restrict the Umatilla from using appropriated monies, including their own tribal trust funds, from buying land inside or outside the reservation. The Umatilla have introduced a bill into Congress to waive this restriction.

In spite of these restrictions the Umatilla are pursuing a land purchase program. They are using their profits (which are not restricted since they are not "appropriated funds") from their tribal farm to purchase land. Few tribes have been as successful in regaining former tribal lands as the Colville Confederated Tribes. However, even they have been restricted by outside non-Indian interests. Public Law 84–772 restored 818,000 acres to tribal ownership. It also authorized land purchases for the purpose of land consolidation. However, if non-Indians are involved, the Board of County Commissioners in which the land is located must consent before such non-Indian land may be acquired by the tribes. The tribes and individual tribal members own 20,000 acres of fee patent land because the counties will not approve the transfer of this acreage to trust status.

It is possible to estimate the funds needed in 1975 by each allotted reservation in our survey, to buy allotted lands (See Table 3). If these figures are compared with the loan money available to them (Table 4), it was clearly inadequate.

Consolidation estimates can be developed for the cost of acquiring all allotted land on all Indian reservations. That figure is $1,497,927,-999, approximately $1.5 billion. As an order of magnitude, it is not an unreasonable sum when it is compared to other uses of federal money.

Outlook for future land consolidation

The outlook for land acquisition is dim, largely due to the current procedures and the attitude of the BIA. Recently OMB and Congress requested that the BIA prepare a "land study" which would describe existing Indian lands, forecast needs, and set limits upon future acquisition. The BIA took the position that such a study would not be useful because it could not anticipate tribal needs accurately! In any case the BIA is in no position to anticipate tribal needs because it has neither an adequate data base nor a qualified planning staff. Moreover, in the absence of knowing what the tribal need is and will be, the BIA independently decided to formulate a land acquisition policy. This land acquisition policy is not to guide the use of any new appropriations from Congress but merely to set guidelines for Secrerarial approval of tribal land purchases financed by their own tribal funds or outside loans. In other words, even when

TABLE 3.—ESTIMATED CURRENT VALUE OF ALLOTTED LAND ON SOME RESERVATIONS

Reservations	(1) Grazing		(2) Dry farm		(3) Irrigated		(4) Commercial timber		(5) Noncommercial timber		(6) Total		Year
	Acres[1]	Value	Acres	Value	Acres	Value	Acres	Value	Acres	Value	Acres	Value	
Cheyenne River	456,048	$31,850,392	19,085	$772,560					3,319	$547,560	484,299	$33,170,512	
	[2] ($69.84)		[2] ($40.48)						[3] ($60)				
Crow Creek	59,133	4,129,848	5,582	225,959	310	$130,026			518	31,000	65,543	4,516,913	1975
	($69.84)		($40.48)		($419.44)				($60)				
Rosebud	414,907	28,977,104	57,130	2,312,622	400	167,776			988	59,280	473,425	31,516,782	
	($69.84)		($40.48)		($419.44)				($60)				
Standing Rock	435,716	30,430,405	44,216	1,789,863					9,947	596,820	489,879	32,817,088	
	($69.84)		($40.48)						($60)				
Crow	946,211	41,491,352	193,523	21,351,292	28,883	3,739,482	23,124	$16,186,800	14,371	2,874,200	1,206,112	85,643,126	
	($43.85)		($110.33)		($129.47)		($700)		($200)				
Lac du Flambeau							12,793	1,023,440	600	30,000	13,393	1,053,440	1975
							($86)		($50)				
Nett Lake							10,912	872,960	933	46,650	11,845	919,610	
							($86)		($50)				
Fort Hall	139,709	14,746,284	27,234	8,420,752	61,383	26,241,223	890	623,000			229,216	50,031,259	1975
	($105.55)		($309.20)		($427.50)		($700)						
Spokane	11,052	340,401	1,977	427,961			20,482	20,482,000	927	185,400	16,024	21,435,762	1975
	($30.80)		($216.47)				($1,000)		($200)				
Umatilla	34,476	1,061,860	27,408	5,933,009	360	129,016	5,144	5,144,000	285	57,000	67,673	12,324,885	
	($30.80)		($216.47)		($358.38)		($1,000)		($200)				
Warm Springs	58,246	1,793,976	5,740	1,242,537	967	346,553	10,504	10,504,000	3,031	606,200	78,488	14,493,266	
	($30.80)		($216.47)		($358.38)		($1,000)		($200)				
Chehalis			73	15,802			1,469	1,469,000			1,542	1,484,802	
			($216.47)				($1,000)						
Swinomish							2,929	2,929,500			2,929	2,929,000	
							($1,000)						
Colville	34,875	1,074,150	62,164	13,456,641	2,667	13,341,053	37,226	22,335,600			136,932	50,207,444	
	((30.80)		($216.47)		($358.38)		($600)						

[1] The acreages were obtained from the (1974) 50–1 land use form for each reservation, unless 1975 is noted.

[2] The prices per acre were developed by adjusting Stephen Langone's 1960 area prices to 1975 levels by using a farm real estate price index for grazing, dry farm and irrigated land. (See Langone, pp. 532, 533, 534).

[3] The timber prices were obtained from the area offices.

Note: There is a discrepancy between acres in col. 6 and allotted acres in col. 7, table 2, because the former is based on BIA data and the latter on more recent task force questionnaire data.

A more complete study would collect current 1975 real estate values instead of adjusting Langone's figures to reflect price changes between 1960 and 1975.

TABLE 4.—FUNDS SPENT ON LAND PURCHASE 1934–75, COMPARED TO CURRENT COST OF LAND CONSOLIDATION ON 13 RESERVATIONS

IRA Appropriations [1]	Tribal funds [2]	BIA loans [3]	FmHA [4]	Total cost
$412, 842	$3, 739, 955	$4, 185, 000	$10, 826, 000	$330, 543, 889

[1] Taylor, appendix, pp. 59–83.
[2] Task force No. 7 questionnaire.
[3] BIA Division of Credit and Finance, December 1975.
[4] Farmers Home Administration, June 1976.

TABLE 5.—COST OF CONSOLIDATING ALL ALLOTTED LAND

Type of land	Acres [1]	Price in 1975	Total values
Grazing	7, 220, 040	[2] $71. 14	$512, 622, 840
Dry farm	1, 416, 361	[2] 309. 20	437, 655, 549
Irrigated	377, 156	[2] 419. 44	158, 028, 364
Forest:			
Commercial	516, 075	[3] 560. 00	289, 002, 000
Noncommercial	522, 853	[3] 182. 00	100, 619, 246
Other	140, 621		
Total	10, 223, 106		1, 497, 927, 999

[1] Acreage was obtained from 1974 50–1 form.
[2] Prices were obtained by adjusting Stephen Langone's 1960 prices for different types of Indian land to reflect 1975 values. (See Longone, p. 532.)
[3] Prices were obtained from the area offices and averages were calculated for commercial timber and noncommercial timber.

the BIA has no active purchase program, it is setting policy to control the tribal land purchase programs.

The policy identifies four classes of land and proposes that acquisitions in each category be analyzed separately. The categories are (1) unintentionally alienated lands, (2) submarginal lands, (3) lands set aside for permanent retention and management for public purposes, and (4) all other federal and privately owned lands.

This last category includes lands within, adjacent or near reservations which tribes might wish to acquire, including allotted, unreserved public domain, surplus, or privately owned lands. The most controversial guidelines for acquisition pertain to this category. Basically, the Department of Interior will support transfer of lands to Indian tribes when these conditions are met:

1. The transfer will contribute to a tribe's economic development objectives as these are expressed in an economic development plan.
2. The expected beneficial contribution of transfer substantially outweighs the social and economic costs of acquisition.[14]

With regard to this first condition we have already discussed the fact that Indian tribes design inadequate plans and that the BIA has no staff to evaluate transfers in the light of tribal plans. As for the second condition, who is going to do the cost/benefit analysis of the transfer? Again, the Bureau has no expertise.

The memo continues with a detailed outline of what the benefits might be:

1. Creation of employment; reduction of unemployment.
2. Nature and amount of capital investment anticipated, its multiplier effect.
3. Impact on individual income, tribal income, rental or lease revenue expected.
4. Whether planned use will expand an existing economic venture which has been successful.

[14] Memorandum from Acting Assistant Secretary, Program of Development and Budget of Interior, Stanley Doremus to the Commission, Bureau of Indian Affairs, February 19, 1976.

5. Whether the planned use will enable a greater economic return to the tribe than is realized currently.

It will be extremely difficult to project the effect of the acquisition or employment since there are no adequate statistics on employment to measure marginal changes. Further, how can a multiplier even be calculated given the absence of a data base? To calculate a regional multiplier for a reservation one needs to know much detailed information about personnel expenditures and about supply sources. The Bureau does not have this data.

Under costs the Department cites:

1. Displacement of non-Indians.
2. Creation of unemployment (among non-Indians?).
3. Creation of a land ownership pattern which results in parcels that are difficult to use (difficult for whom?).
4. Whether the planned use would result in loss of a scarce natural resource, destruction, or non-development.
5. Whether planned use would be incompatible with use of adjacent lands in non-Indian ownership.
6. Whether planned use would have detrimental environmental effects.
7. Whether the transfer would block access to public land.
8. Revenues forgone by federal government, state government, local government.
9. Whether existing public use would be eliminated.

It is very clear that the Department is comparing Indian benefits to non-Indian costs, rather than total benefits (Indian and non-Indian) to total costs. However, in a free market economy, the only comparison that is relevant is the cost of the land to the purchaser versus the benefit to the purchaser. One assumes that the sale price adequately compensated the seller; after all, the sale was voluntary. Therefore, to list "displacement and unemployment of non-Indians" as costs is ridiculous since the sales price should have compensated them.

However, there are certain external costs which might be imposed on others, but in a free market economy, bystanders usually have no recourse. The external costs are the loss of tax revenues and loss of access to public lands. Tax loss occurs, of course, only when fee patent land is purchased. The fact that the Department is concerned with federal and state revenues demonstrates a conflict of interest on their part and an inability to always promote Indian economic development.

As for other "cost" considerations, who is to judge what is destruction of a scarce natural resource? Does the Department have the right to dictate the type of development that is to occur on Indian lands when they have no concept of development? As long as the tribe can meet its loan payments this should be sufficient.

Summary and conclusion

This section has discussed the need for land consolidation and the past and present obstacles to such consolidation. It has also given reasonable cost estimates of such a program. Given the past and present reluctance and inability of the Bureau to pursue such a program, the Task Force recommends a new appropriation of at least $2 billion for land purchase which would be administered by the Indian Development Authority.

C.2 INDIAN AGRICULTURE

This section seeks to examine the importance of Indian agriculture; the present method of using Indian agricultural lands; the return to such uses; abuses under the present system; and obstacles to Indian participation in agriculture.

Importance of Indian agriculture

According to 1974 BIA statistics, 2,440,172 acres, or 4.7% of all Indian trust land, was classified as agricultural. Of the almost 2-½ million acres, 29% were irrigated and 71% were dry farm. While the size of Indian agricultural lands seems small, the value of products grown was considerable: $339,919,780.

However, 73% of this value was produced by non-Indian operators. Part I of the 50–1 forms shows that non-Indian operators usually cultivate 63% of all Indian agricultural lands, while Indian operators cultivate 29% and 8% remains idle.[1] Table 1 shows the gross value of products grown and the actual number of acres used to grow such products.

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[1] Calculations based on 1974 BIA 50–1 form, Part I, for total Indian land in agriculture and use by Indian or non-Indian. Part VII for value of products grown.

TABLE 1.—INDIAN AGRICULTURAL LANDS USED BY INDIAN AND NONINDIAN OPERATORS AND GROSS VALUE PRODUCT, 1974

Operator	Type of land					
	Dry farm			Irrigated		
	Acres	Gross, value, product	Gross return per acre	Acres	Gross value, product	Gross return per acre
Indian	564, 630	$38, 643, 144	$68	70, 998	$24, 433, 041	$344
Non-Indian	936, 649	111, 617, 105	119	247, 047	134, 891, 467	460

Source: 1974, 50–1 form pt. Vii. Indian dry farm acreage—col. 2 and 4, rows A, B, D; non-Idnian—col. 12, rows A, B, D. Indian dry farm gross value—col. 3 and 5, rows A, B, D; non-Indian—col. 13, rows A, B, D. Indian irrigated acreage—col. 6 and 8, rows A, B, D; non-Indian—col. 14, rows A, B, D. Indian irrigated gross avlue—col. 7 and 9, rows A, B, D; non-Indian—col. 15, rows A, B, D.

One is immediately struck by the fact that the non-Indian operator not only cultivates the bulk of Indian lands, but that his gross return per acre is higher. This is probably due to the fact that Indians have never had the capital or technology to properly farm their land. Their undercapitalization has forced them to lease their lands to non-Indians. The situation is virtually the same for the ten reservations having the most agricultural land out of our sample of thirty-two. Table 2 illustrates who operated the land, both dry farm and irrigated. According to a 1974 GAO study at Fort Hall, the chief reason for not participating in high-dollar yield farming (irrigated) was that Indians (1) could not obtain credit, and (2) lacked a knowledge of farming technology.[2]

TABLE 2.—TYPE OF AGRICULTURAL LAND AND OPERATOR

Reservation	Reservations								
	Agricultural land (acres)			Irrigated land			Dry farm land		
	Irrigated	Dry farm	Agricultural land as percent of total trust land	Indian operator	Non-Indian operator	Idle	Indian operator	Non-Indian operator	Idle
Crow Creek	271	10, 291	10	150	121	----------	3, 973	6, 318	----------
Percent				55	45	----------	39	61	----------
Crow	30, 287	200, 761	15	2, 754	27, 533	----------	29, 130	171, 631	----------
Percent				9	91	----------	15	85	----------
Standing Rock	300	58, 287	7	300	0	----------	13, 721	44, 566	----------
Percent				100	0	----------	24	76	----------
Omaha	0	17, 275	63	0	0	----------	1, 699	15, 361	215
Percent							10	89	1
Rosebud	900	81, 464	9	0	100	800	18, 518	62, 431	515
Percent				0	11	89	22	77	1
Fort Hall	81, 474	31, 769	22	10, 780	56, 033	14, 663	1, 855	29, 914	----------
Percent				13	69	18	6	94	----------
Umatilla	360	28, 661	34	0	360	0	1, 507	26, 914	----------
Percent				0	100	0	5	94	1
Duck Valley	8, 000	0	6	6, 455	78	1, 467	----------	----------	----------
Percent				81	1	18	----------	----------	----------
Fort McDermitt	3, 500	0	9	2, 853	0	647	----------	----------	----------
Percent				81	----------	19	----------	----------	----------
Moapa	550	0	47	500	0	0	----------	----------	----------
Percent				100	----------	----------	----------	----------	----------

The Indian farmer has three sources of credit: commercial banks, Farmers Home Administration and the BIA Revolving Loan Fund.

[2] Report to the Subcommittee on Indian Affairs Committee on Interior and Insular Affairs, U.S. Senate, "Land Leases on the Fort Hall Indian Reservation in Idaho," General Accounting Office; May 31, 1974; pp. 16–17.

Both commercial banks and the FmHA require acceptable collateral, and GAO reported that they were reluctant to accept Indian land because of its trust status. In reviewing new BIA revolving loans made during FY 1975, it appears that the bulk of the individual loans were made for other purposes—housing in particular. (See Table 3).

The technical assistance available to Indian farmers is supplied through a cooperative BIA–USDA effort. Under a Memorandum of Understanding between the Extension Service and the BIA, the Extension Service provides "leadership and direct assistance to State Extension Services in planning, conducting, and evaluating extension programs in those states where the BIA has contracts with state extension services." Funds for this work are transferred directly from the BIA to the State Extension Services.

TABLE 3.—*Distribution by type of new BIA revolving loans to individuals, fiscal year 1975*

Type of loan:	*Percent*
Agriculture	15. 9
Farming	8. 4
Livestock	7. 6
Business enterprise	22. 7
Consumer credit	11. 3
Education	0. 4
Fisheries	1. 3
Land	5. 8
Housing	34. 6
Refinancing	7. 9
Total percent	99. 9
Total	$15, 315, 532

However, USDA officials have complained that the actual amount of technical assistance provided has declined in recent years because the BIA is reluctant to seek increased appropriations. The extension budget has remained small and virtually constant since 1971.

Extension Service BIA Funds Directed to State Extension Services

1971	$1, 748, 331
1972	1, 877, 232
1973	1, 732, 737
1974	1, 695, 020
1975	1, 709, 633

Source: USDA.

The nature of fiscal funding makes job security uncertain for extension agents. This affects the quality of personnel that work in the program. For most, it is a temporary job. USDA would prefer direct appropriations. This would increase the level of funding and promote job security. Ultimately, the funds should be given directly to the tribe so that they may contract with those who will supply the best technical assistance.

Leasing

Uneconomic size plots, lack of capital and technical assistance force Indians to lease their land to others. The BIA has long favored this situation, believing that allotment, heirship, lack of capital and technology, and the supposed Indian dislike of agriculture compared to ranching were insoluble problems. Dorner found that BIA officials

readily admitted that "a large share of the Indians' land is leased because land is better used by non-Indians, or the land realized its full potential under non-Indian operation but not under Indian operation." [3]

The BIA's preference for leasing keeps it from designing an agricultural development program. As a result, lack of capital and technology continue to plague Indian farmers and the BIA continues its leasing activities. In 1958 Dorner found:

> There are no plans to speed up the development of irrigable land. There is no program to get Indians established on sufficient-sized units. There is no program to solve the problems of land, management, and inadequate credit for undertaking development. Nor are such programs being planned.[4]

Leasing has not only caused the postponement of agricultural development, but also has resulted in three additional problems: (1) Some Indians are losing permanent control of their land (2) Rent per acre is substantially less than comparable non-Indian land, and (3) Soil is depleted by non-Indian farmers who do not observe proper conservation practices. To illustrate the full force of these problems two case studies are offered: Crow Competent Leasing and Leases on the Fort Hall Reservation.

Crow competent leasing

A competent lease is a five or ten year lease of allotted agricultural land in which the rent is prepaid for the entire term of the lease. For a given piece of land, the first five year period was paid in a lump sum when the land first went into competent lease status. Subsequently, once a year the current lease is cancelled and a new one written, with payment of rent for the last year of the new lease discounted to the present. December is the most usual time to cancel and rewrite the leases.

The Crow allotment act defined "competent," but its concept was not clear until 44 Stat. 658, which allowed the leasing of the lands of competent Indians and their minor children, was passed.

The BIA's role is recording of leases. As long as the allotment is owned by five or fewer people, a competent lease is valid. If an allottee or a group of owners wishes to regain control of its land, he must wait five or ten years. For poor people, this can be a long wait. Further, for many of the leases, and particularly for range land, even after the five year period there would be only one potential lessor. Many of the lessors are large operators who lease land from many Indians. Many own fee patented land interspersed among Indian allotments which they lease.

The five or ten year limitation arose from the Act defining the term "competent." A competent Indian can lease his land without interference or assistance from the BIA.

It appears that the national policy stopping "forced patents" limited the ability of ranchers on the Crow reservation from obtaining Indian land. Thus, the system of obtaining fee patents was modified, but continued to use the same terminology regarding "competence." Astute Indian lessors did not apply for competence, since they would become vulnerable to non-Bureau controlled leases. While they would ostensibly be "free" to supervise their own leases, they would have no

[3] Dorner, p. 218.
[4] Dorner, p. 179.

resources with which to do so, and no courts or administrative agencies to enforce the leases they wrote. In 1949, a law making all children of competent Indians competent, also included adults who did not want the status! Thus, the "forced" aspect of this system did not occur until 1948–1949. Both the 1926 and 1948 laws used a competency commission.

In June, 1975, 868,281 acres of 1,205,926 acres of allotted land were under competent lease. This is 72% of the allotted land. Recent development use of the land is illustrated in Table 4. This table shows the following:

(1) Between 1952 and 1962, 22.5% of all allotted land acreage was transferred to fee status. Twenty-three and one-half percent competent leases were so transferred. After 1962, the rates of transfer changed; mostly allotted land not under competent lease was alienated. The rate slowed to 7.9% for all allotted land, and 0.3% for land under competent lease. Thus competent leases slowed the alienation of allotted land.

(2) The range unit system of managing grazing land was replaced by competent leases. This is undoubtedly the key to understanding the way in which allottees were forced to start the annual cycle of cancellation and renewal. If lands were transferred from range units to competent status in the middle of a permit period, ranchers with permits could negotiate with individual allottees without competition from other ranchers.

TABLE 4.—LEASES OF ALLOTTED LAND, CROW RESERVATION

	December 1952	March 1962	June 1975
Trust allotted land (acres)	1,690,411	1,309,313	1,206,111
Office leases	135,663	265,415	(7)
Office permits (range)	240,792	[1] (18,996)	
Competent leases:			
Total, competent leases	1,140,362	871,865	868,865
Grazing land:			
Total	1,054,411	737,106	NA
In range units	(802,230)	(13,157)	NA
Dry cropland	62,125	102,694	NA
Irrigated cropland	23,827	32,065	NA

[1] Figures in parentheses are for 1961 rather than 1962.

Sources: Missouri River basin investigations project, "Leasing of Indian Trust Lands on Crow Reservation, Mont, with particular reference to Competent Leases," Billings, Mont., September 1963. (Report No. 170). Bureau of Indian Affairs, Crow Agency, "Annual Report of Caseloads, Acreages under BIA and Surface Leasing," June 30, 1975. (Form 5–152).

(3) There was an increase in dry cropland under competent leases. Once this system is in place and operating, Indians have no way out. The keys to the system's stability lies in the relationship between the large scale of the lessee's operation and the poverty of his lessors. Further, the fact that lessors have no real alternatives contributes to the cancellation—renewal cycle.

Such leasing constitutes a partial alienation of allotted land. Competent leases can be used as collateral for loans, while trust land can not. This feature depends upon the existence of an assignment clause in the lease. Since Indians use competent leases as collateral for loans, such leases provide a method of financing, without which, Indians might otherwise feel forced to sell their lands.

What is the impact on Indian income? Assuming that the alternative to competent leasing would be office leasing (the normal BIA

practice), the competent lease rates would be adjusted upward using rental data. This is a major assumption. An alternative might be sale at a discounted price, due to the fact that only the lessee is willing to purchase land under a competent lease.

Based on this assumption, it is estimated that income, using office lease rates rather than competent lease rates, would be $899,849. The estimate would be higher if competent lease rates of $0.76 were compared to the rental rates of fee land, rather than office leases for which the average rate is $1.65.

What is the significance of the competent lease situation for our recommendations?

(1) If the original intent of the Competent Lease Act is to assist the Crows, then it is a good example that helping is difficult. The ability to collateralize because of the assignment factor in competent leases reduces impoverished Indian lessors to debt peonage. As the law was interpreted, the BIA left Indian lessors vulnerable to the unequal bargaining power exerted by powerful lessees, without concern for the strategic position of the Indians.

(2) Economic and political power are important. The lessees cooperate among themselves and have professional legal assistance. Indians are the weaker group in a competitive bidding situation. The fact that lessees are rich means that they can exert greater bargaining power in any market battle with the lessor Indians.

(3) The Crow Tribe wants some help with the situation. But such aid must be cautiously given. The Crow are very interested in protecting their sovereignty. Land under competent leases remains "trust" land, although it is heavily encumbered. Actions which cause sales of allotted land would be dangerous.

Land leases on the Fort Hall Indian Reservation

Since 1973, a controversy has raged at Fort Hall over a finding by the Economic Research Associates of Los Angeles, consultants for the tribe's overall economic development plan, required by EDA. They found that Fort Hall Indians failed to get equitable income for all agricultural land leased to non-Indian tenants. Typical non-reservation leases in the Fort Hall area averaged 35 percent of gross crop value, while Fort Hall leases were equivalent to about 2.3 percent of gross crop value.

This funding caused the tribal council to request the Secretary of Interior to investigate the BIA Land Operations Office at Fort Hall for inequitable lease rates. In response, GAO conducted an investigation and found that ERA was guilty of sloppy research procedures, but they had arrived at the right conclusion: there was a large disparity in lease rates. The GAO calculated a $60 per acre disparity between the net income (rental) earned by irrigated reservation land as compared to the net income (rental) earned by nearby irrigated non-reservation land.[5] The actual differences were as follows:

TABLE 5.—NET INCOME

Type	Reservation land	Nonresreva-tion land
Irrigated (per acre)	$15.36	$75.41
Dry farm (per acre)	9.84	9.73
Pasture (per animal unit)	1.74	1–4.50

[5] Land Leases at Fort Hall, pp. 11–12.

However, GAO went on to justify the $60 disparity by the fact that non-Indian operators incurred certain tangible and intangible costs when using Indian land. These costs make the non-Indian operators less willing to pay the same rent as for non-Indian land. They calculated the tangible costs at $20. However, GAO was not able to quantify the "intangible costs" and so did not account for the remaining $40 disparity.[6]

In 1975, another firm, Farm Management Company, did another evaluation of leasing at Fort Hall. They calculated the value of cash leases for both high quality and average quality non-reservation land, thus taking into consideration the tangible costs raised by GAO, and compared them to the value of cash leases for the same quality land on the Reservation.

TABLE 6.—VALUE OF CASH LEASES

	Nonreservation land				Reservation land			
	High quality		Average quality		High quality		Average quality	
	Potatoes	Grain	Potatoes	Grain	Potatoes	Grain	Potatoes	Grain
Value of cash lease	$64–$80	$40–$60	$26–$39	$9–$19	$35	$35	$35	$35
Average	56– 70	----------	17– 24	----------	35	----------	35	----------

Source: Western Farm Management Co. pp. 52–53.

Since potatoes are normally rotated every other year with a grain crop, the average cash rent is $56–70 on the better soils and $17–24 on the sandier soils. After the first reports of ERA and GAO, the tribal council increased the standard rent per acre from an average of $15 to $35 an acre. However, this fixed fee allows the better lands to stay in farming at a bargain price while the poorer or marginal lands were abandoned because of lower yields, greater fertilizer expense and difficulty in irrigating this type of soil. Using standard lease rates for the entire reservation has caused the tribe to receive less rent than it should for better farmland and the poorer land is left idle.[7]

Western Farm's criticism of a fixed rate rent raises another weakness of BIA's leasing agreements. Whether leases are for agriculture, minerals, or stumpage, payments have traditionally been fixed rate agreements, rather than a percentage of the sales volume. Because the BIA is not profit-oriented, and is a risk averter, Indian lessors continue to receive low fixed rents or royalties while the market value of their agricultural produce and minerals has increased.

Possibly, agricultural leasing should be based on crop share rents (a rent which is an agreed percentage of the crops grown by the tenant) instead of fixed cash rents. Only two reservations out of the thirty-two had crop share rents. Of course, the crop share rents system involves more monitoring and risk. Some one will have to determine the exact yield of the tenant, and the lessor would share gains or losses with the tenant depending on yields and market prices. However, if Indian lessors want to realize the maximum return to their land, they will have to be willing to assume risks. Probably, Indian lessors have been reluctant to assume such risks in the past

[6] Land Leases at Fort Hall, pp. 12–15.

[7] Western Farm Management Company, "Analysis of Present Leasing Practices" and the Effect on Rental Rates of Tribal Agricultural Land, funded by EDA, Technical Assistance Grant No. 07–6–01534, pp. 52–53.

because of their already low level of income. Therefore, they might prefer low safe returns to higher but uncertain ones. However, the Task Force has no proof to substantiate Indian preferences for risk-taking.

Other standard leasing difficulties are inordinately long lease periods, and no controls for soil conservation.

Western Farm noted that a five to ten year lease is of no benefit to the Tribe because the type of improvements made by the lessee are fully depreciated. They recommended a three year leasing agreement.[8]

If there are any violations of the lease, the only effective recourse the Indian lessor has is not to renew the lease. This means that he will have to wait out the entire lease period. Not one of the thirty-two reservations surveyed reported effective and timely action by the BIA against lease violations.

Western Farms also discovered that the lack of proper rotation and cultural practices was leading to much erosion of the Tribe's land resources. The standard rotation policies written into the leases were not accomplishing the proper rotations and erosion controls. In most of the leases there is a requirement for alfalfa to be seeded before the land is turned back to the Indian owner. If not planted to alfalfa a penalty of $25–50 per acre is assessed the lessee. Currently, the cost of establishing a stand of alfalfa is $60–100 per acre. Therefore, it is cheaper to pay the penalty.[9]

Jack Peterson noted in his study of Fort Hall:

> While there is little disparity in lease income from dry land farming, there is a disparity in land use and conservation practices between Indian and non-Indian lands. Sheet and gully erosion wash thousands of tons of this valuable topsoil into Fort Hall's once glimmering streams.[10]

Peterson went on to state that 16,000 acres of Ross Fork watershed had been virtually destroyed by dry landing.

Leasing practices have provided Indian landowners with very substandard returns for the following reasons:

Fixed rate rentals on Indian land are substantially less than on non-Indian land.

Indian fixed rate rentals are preferred over crop share rental.

Indian lessors have no recourse when leases are violated.

Leases are for lengthy periods of time.

Lease regulations for proper conservation practices are unenforceable.

What is the alternative to leasing? On several of the sample reservations, particularly Umatilla and Crow Creek, tribes have consolidated tracts of trust land and are farming it. This would solve a multitude of problems. First, efficient-size units could be created. Second, the tribe has better access to capital and technical assistance than do individuals. Third, returns are usually higher than leasing and are directly received by the tribe.

Crow Creek tribal farm

At Crow Creek, the tribe has brought 1500 acres under dry farm cultivation, principally alfalfa and winter wheat. It obtained funds

[8] Western Farm, p. 48.
[9] Western Farm, pp. 41, 44.
[10] Jack Peterson, Futures, A Comprehensive Plan for the Shoshone-Bannock Tribe, funded by a 701 Planning Grant, HUD, 1974, p. 14.

for land consolidation through FmHA and enterprise funds from EDA. The tribe reported that these funds were still insufficient for complete development of the farm. Eventually, the tribe hopes to have three units of 2,000 acres each under cultivation. Fifteen hundred acres would be irrigated. It is estimated that eight would be employed full-time on the 60,000 acres, and many more through indirect supportive industries. In 1975 the farm enterprise had a net profit of $48,000 or $35 an acre. If this is compared to the gross cash rent per acre ($16.89) usually received in South Dakota, probable return would be more than doubled.[11]

Umatilla tribal farm enterprise

The Umatilla farm enterprise manages the Umatilla tribal farm lands. The Umatilla obtained a loan from the Revolving Loan Fund to purchase land to start the farm. Income derived from the land is used to pay for land purchase loans, spraying, fertilizer, and related expenses. Through 1976, the tribe had 1360 acres of land under cultivation which they hope to expand to 6000 acres. The farm enterprise has generated a net income which exceeds the average net income received by Umatilla lessors.

TABLE 7.—TRIBAL ENTERPRISE INCOME VERSUS LEASING INCOME

Year	Total net income from tribal farm enterprise	Net income per acre	Average income received by Umatilla lessor
1973	77, 357	$53. 60	$23. 13
1974	61, 431	46. 53	37. 12
1975	71, 910	52. 87	34. 08

Source: Superintendent, Umatilla Agency, Pendleton, Oreg., 1976.

Other examples

There are other examples of tribal agricultural development which did not fall within our survey. Among the most exciting developments is the Quechan hypodroponic farm. It demonstrates how the tribe marshalled the necessary grants and loans to buy land and put it into production using the latest techniques available.

C.3. INDIAN LIVESTOCK ACTIVITIES

Approximately 64 percent of all Indian land is classified as open grazing. Of the 33,282,203 acres so classified, 86 percent are used by Indians; 13 percent by non-Indians; and 2 percent are idle. Unlike agriculture, the bulk of land is used by Indian operators instead of non-Indian operators. Nevertheless, non-Indian operators were still more productive (see Table I).

TABLE 1.—GRAZING ACTIVITIES: ACREAGE AND GROSS VALUE PRODUCT, 1974

Operator	Acres used in 1974	Percent	Gross value product	Gross value, product per acre
Indian	39, 569, 133	89	$53, 565, 224	$1. 35
Non-Indian	5, 099, 413	11	35, 188, 583	6. 90

Source: 1974, form 50–1, pt. VII.

[11] Farm Real Estate Market Developments Economic Research Service, USDA, July 1975, p. 34.

TABLE II.—GRAZING ACTIVITIES ON SELECTED RESERVATIONS

	Percent grazing acres used by—			Carrying capacity in AUM's	Actual AUM's on range	Number of Indian operators	Number of families on reservation	Percent families with livestock	Range techs.	Indian operators per tech.
	Indians	Non-Indians	Idle							
		(1)		(2)	(3)	(4)	(5)	(6)	(7)	(8)
Cheyenne River	92	8	0	584, 232	584, 232	256	907	28.0	3	85
Crow	83	7	0	39, 516	41, 366	38	805	5.0	1	38
Crow Creek	70	30	0	90, 516	87, 864	17	286	6.0	0	----
Fort Hall	31	69	0	68, 179	60, 979	52	596	8.7	3	17
Rosebud	52	48	0	376, 468	376, 110	105	1, 682	6.2	3	35
Standing Rock	56	44	0	440, 848	440, 848	104	1, 026	10.0	3	35
Hualapai	100	0	0	50, 496	60, 564	85	159	53.0	1	85
Fort Apache	100	0	0	219, 532	203, 401	447	1, 619	27.6	2	223
San Carlos	83	2	15	321, 552	170, 040	729	1, 163	63.7	2	364
Duck Valley	94	6	0	63, 000	54, 420	73	192	38.0	0	----
Fort McDermitt	88	12	0	14, 200	14, 400	25	81	31.0	0	----
Colville	72	28	0	92, 715	93, 701	124	963	12.9	1	125
Warm Springs	89	10	1	37, 416	36, 569	132	412	32.0	1	132
Spokane	86	10	4	13, 530	13, 530	45	315	14.3	1	45
Nambe				1, 536	1, 169	17	73	23.0	0	----
Havasupai					504	25	79	32.0	0	----

Source: Col. 1 BIA 50-1 form pt. I, 1974; col. 2-3-4,7 Range Management Report, 1974; col. 5 BIA Labor Force Resident Population Figure for 1974 divided by 5; col. 6 is col. 4 divided by col. 5.

This general situation also held true on those reservations in our survey where livestock activities were important in terms of employment and land use. (See Table 11).

Again, the explanation for the differential in productivity could be accounted for by different amounts of capital and technical assistance which are available to Indian ranchers as compared to non-Indian ranchers.

In fiscal year 1975 only 7.6 percent of the total value of revolving loans to individuals were for livestock activities (see Agriculture section). The revolving loan fund was really the only source of credit for Indian ranchers because they were considered poor risks by local banks and agricultural credit co-ops.

Our discussion of technical assistance in agriculture holds equally for livestock activities. Column 8 of Table II shows how many Indian operators each BIA range technician was supposed to be advising.

Lack of technical assistance results in poor management practices by Indian operators. For example, Indian calf crops are generally lower than non-Indian calf crops because non-Indians provide better management during this crucial time.

Productivity is also a function of the size of operation. Table III illustrates the fact that on 16 reservations, 79 percent of the operators have less than 101 cows, 67 percent have less than 51 cows. These operations are so small that they will not generate enough income to support a family of five. It is generally agreed that any rancher needs at least 200 cows minimum, in which case only 9 percent of the Indian operators were potentially capable of earning an adequate income.

Operation size depends on the amount of capital and land to which the Indian operator has access. The capital constraint has already been discussed. If the carrying capacity of the sample reservations is compared with the actual number of livestock, the range is grazed to capacity. Thus there is also a constraint on land.

TABLE III.—SIZE OF OPERATIONS ON SELECTED RESERVATIONS

Reservation	Cattle operators	Total cows					
		0 to 50	51 to 100	101 to 150	151 to 200	201 to 300	301 plus
Cheyenne River	256	16	57	59	37	69	19
Crow	38	5	10	9	7	5	2
Crow Creek	17	4	2	3	0	6	2
Fort Hall	52	28	6	5	1	9	3
Rosebud	105	6	25	28	15	16	15
Standing Rock	104	13	23	25	16	14	13
Warm Springs	132	121	3	4	4	0	0
Spokane	35	35	9	1	0	0	0
Hualapai	85	74	5	3	1	1	1
Fort Apache	447	368	52	10	3	11	3
San Carlos	729	688	30	2	5	3	1
Duck Valley	73	42	15	5	6	4	0
Fort McDermitt	25	18	4	2	0	1	----
Colville	124	61	38	11	6	7	1
Nambe	17	17	----	----	----	----	----
Havasupai	25	25	----	----	----	----	----
Total	2,274	1,521	279	167	100	146	60
Percent	----	67	12	7	4	6	3

Source: BIA Range Mangement Report 1974.

The only way to increase land available to Indians is to not lease land to non-Indians. However, this is easier said than done. In many cases, Indian tracts are surrounded by non-Indian ones and so they

are difficult to use. The only solution to increasing the size of Indian operation is through land consolidation where such captive tracts can be traded for others.

Probably the best solution is to manage a number of individual operations jointly so that best use can be made of the scarce land, capital and technical assistance.

Inequities in livestock activities

Besides low productivity, there are several problems which plague livestock activities. They are inequitable grazing fees and illegal subleasing.

Code 25 CFR 151 requires that the BIA administer grazing privileges on Indian lands in a manner which will yield the highest returns for the landowners consistent with sustained yield land management principles. Usually, the BIA establishes the reservation minimum rate for grazing on individually owned lands. This rate is supposed to reflect the market value of grazing permits on comparable non-Indian land. Individual owners may stipulate a rate above the BIA minimum. The tribal governments may set rates on tribally-owned land for Indian operators. Once all Indian operators have been taken care of, BIA advertises the remaining grazing land which is leased out according to competitive bidding. Table IV contains the grazing rates per animal unit month on the reservations in our sample.

The first observation is that the BIA reservation minimum was considerably below the high bid price and the average monthly rate per head for private lands in the surrounding area. One wonders why the BIA minimum rate was so abnormally low if they were supposedly basing the rate on fair market value.

The second observation is that in seven cases, Indians were charged lower fees for tribal land. In four cases, no fee was charged for the use of tribal land. The effect of having a lower grazing fee or no fee for tribal lands is to diminish the tribal income and the service the tribal government can provide its people. Those Indian operators who use tribal lands are in effect being subsidized by the rest of the tribe. Table II gives ranching families as a percentage of total families on the reservation; they range from a minority of 5 percent to a majority of 63.7 percent. The question is: should all livestock operators be subsidized at the expense of the rest of the population?

In one of the seven cases, the tribal council passed a resolution charging $2.08 per AUM on tribal and allotted lands for non-Indians. The same resolution gives a rebate to Indian operators so they pay, in effect, $1.56 per AUM. This resolution is unpopular with allottees who prefer not to lease their land to Indian operators. It has caused some of them to sell their land or take it out of trust.

The tribal grazing fee is the subject of a GAO report,[1] on another of the sample reservations. In 1968, the BIA set the reservation minimum at $2.75 per AUM while the tribal council recommended $0.54 per AUM for tribal lands and $1.72 per AUM for allotted lands for Indian operators. The council said that Indian land was not fully competitive due to its limited water, inadequate fencing, lack of consolidated land and limited guarantee of continuing grazing privileges.

[1] Comptroller General of the U.S., Land Management Activities on Three Indian Reservations in South Dakota Can Be Improved, General Accounting Office, June 4, 1975.

TABLE IV. GRAZING RATES PER ANIMAL UNIT MONTH

Reservation code No.	Tribal land [1]		Allotted land [1]	Set by advertisement [1]						AUM rate [2] on private land (non-reservation)
				Tribal land			Allotted land			
	Set by tribe Indian operator	Set by BIA non-Indian operator	Minimum set by BIA all operators	Minimum	Medium	High	Minimum	Medium	High	
3	$1.21	$2.33	$2.33	$1.21	$1.21	$4.98	$1.92	$1.92	$5.21	$5.99
5	1.25	3.50	3.50	3.25	4.06	4.37	3.50	4.06	4.37	5.99
6	2.50	2.50	2.50	2.50	2.50		2.50	2.50		5.43
9	.80	1.60	1.60	1.60	2.50	3.14	1.60	2.50	3.14	5.99
26	2.80	2.80	2.80	2.80	3.04	6.55	2.80	3.04	6.44	5.99
29	2.08	2.08	2.08	2.08	2.11	4.71	2.08	2.11	4.71	5.99
13	.29	2.00								5.99
8		2.00								4.41
27	.33	1.25		[3] .17						4.41
7	[5]			[4] .25						4.41
10	[5]									5.41
4	[5]	1.75	1.75	1.75	1.75	1.75	1.75	1.75	1.75	5.41
28	[5]	1.40	1.40	1.40	1.40	1.40	1.40	1.40	1.40	5.36
31	1.75	1.75	1.75	1.75	1.75	1.75	1.75	1.75	1.75	5.36
32		1.50	1.50							5.29

[1] Range Management Report for Reservations, 1974.
[2] Farm Real Estate Market Developments, Economic Research Service, USDA, July 1975, p. 34.
[3] Indian association.
[4] Tribal herd.
[5] Free.

They also said that the 132 small operators (52 percent of all operators) who had less than 150 cows would be forced out of business by a fee of $2.75 per AUM. Unfortunately, GAO did not verify any of these reasons. It only calculated that the tribe lost $4 million in charging the lower fee over a five-year period. In checking over the data, it appears that the reservation was always grazed up to and in excess of its carrying capacity. Indian land was in demand. This indicates that it was competitive with the surrounding land. GAO found, in fact, that it was in better physical condition than the surrounding land. The second reason is probably the most vaid reason for the subsidy: small Indian operators could not compete.

On the reservation which offered the rebate to Indian operators, we were able to determine what would have been the impact on small operators first if they hadn't been given the rebate, and second, if they had been asked to meet the high bid on their reservation which was roughly equivalent to the local market value.

The average gross income for operators with less than 100 cows was $6,705. They paid on the average of $1,026 to graze their animals. If they paid the reservation minimum, it would have cost $1,350; if they paid the high bid, it would have cost $3.052.

TABLE VI.—NET INCOME AFTER 3 DIFFERENT GRAZING FEE RATES

	Rebate	BIA reservation minimum	High bid
Average gross income	$6,705	$6,705	$6,705
Grazing fee	1,026	1,350	3,052
Net income	5,879	5,355	3,653

It is clear that an operator with an average family of five did not earn an adequate income even under the rebate system. If the tribal governments on the two reservations in question want to keep small operators in business, they are correct in offering them rebates or lowering grazing fees.

However, does the entire tribe have to subsidize the large Indian operator or non-Indian operators? Why not give the subsidy only to operators with less than 150 cows? There is not enough data to determine if large Indian operators could pay the reservation minimum. Before large Indian operators are excluded from the subsidy, the impact on their income should be evaluated.

There is no reason why non-Indian operators should benefit from the differing grazing fees. It seems that low tribal rates have depressed the BIA reservation minimum rate since they bear little relation to the animal unit month rate on comparable land. On the reservation with the rebate system, there were 148 non-Indian operators, many of whom were paying $2.08 AUM instead of $4.71 AUM, the high bid, which is almost equal to the local off-reservation fee for AUMs. If all 148 were paying $4.71 AUM, this would have resulted in a gain of $640,005 in 1974.

On the reservation studied by GAO, there were only ten non-Indian operators and so the loss from a depressed BIA minimum rate was not as large.

Subleasing

Where there are no controls over who is actually using the range, a number of different rates encourages illegal subleasing. On at least three reservations in our survey, it was common for Indian operators to pay the subsidized rate and then to sublease to non-Indians for the BIA minimum reservation rate and pocket the difference at the expense of the tribe.

If the tribe decides it is necessary to keep small Indian operators in business it would be much more advisable to guarantee them a certain minimum income from their livestock activities. Everyone, small Indian operators, large Indian operators, and non-Indians, would pay the same grazing fee. This would discourage subleasing. At the end of the year, the tribe could give a direct subsidy to small marginal Indian operators out of their increased tribal grazing revenues. The direct subsidy payment would bring the net income of the livestock operator up to an acceptable level.

On large, non-allotted reservations, Indian operators were also subsidized. They usually used tribal land for free. There were usually no non-Indian operators. On one such reservation, we collected complete information on the number of operators, their herd size, and current sales prices. The largest Indian operator owned 238 cows which grossed him $17,377. If he had been required to pay fair market value in the state for use of the range, his gross income would have been reduced by $15,450. Similarly, a small operator with 50 head grossed $3,650. If he had paid the fair market value, his gross income would have been reduced by $3,246.

Conclusions for Indian livestock activities

The chief handicap for Indian livestock operators is the small size of their operations. More animals could be grazed on Indian range by consolidating tracts, eliminating non-Indian operators and by running the animals in large cooperative herds over the entire range. We were not able to determine if this re-organization would guarantee every Indian operator an economically viable herd. Indian livestock activities present a challenge to tribal governments in terms of assuring the best allocation of resources to serve the greatest number of tribal members. To date tribal governments have done little to improve the inequitable resource distribution among tribal members for fear of political retribution. Indian livestock income could be increased through land consolidation, and increased capital and technical assistance. However, before such changes can benefit all tribal members, tribal governments must solve the inequities among tribal members.

C.4. MINERAL LEASING

As described in the paper, "American Indian Mineral Agreements," in the appendix, Indians are now burdened with inequitable agreements resulting from their weak bargaining positions. Revision of current leases and the provisions in new leases will be disadvantageous to Indians unless the situation is changed. This part of the report will summarize the results of the paper and relate those results to the experiences of the sample reservations with minerals.

Five of the reservations has mineral production in significant quantities. The minerals are coal, oil, gas, phosphate, uranium, and

iron. One reservation had just signed a uranium lease. Others may have some copper. It was not possible to determine how thoroughly exploration for minerals had progressed among all the sample reservations. Further, it was not expected that tribes would readily reveal knowledge of possible discoveries.

Before reviewing the problems with current agreements, a brief review of the relative importance of Indian minerals in the United States should be instructive. The data comes from the Geological Survey. For coal, in 1974 production on Indian lands was 1.9 percent of all U.S. production and 35.8 percent of all federal and Indian production. For phosphate, production on Indian lands was 4.9 percent of all U.S. production and 35.4 percent of production on federal and Indian lands. It is not possible to compare Indian production to total U.S. production for other minerals. Comparing the value of all mining on federal and Indian lands in 1974, we find that the value of mining on Indian lands was 15.6 percent of the total.

For oil and gas, the value of Indian production was 4.4 percent of the total; if returns from off-shore leases are excluded, the value of production on Indian lands is 13.6 percent of the value of all production on federal and Indian land in the continental United States. In 1974, all uranium produced on federal and Indian land was produced on Indian land. In all three of these comparisons, it was not possible to compare the amount produced on federal and Indian land to the total U.S. production because the Geological Survey did not report total U.S. production.[1]

The four major problems with current agreements are that (1) royalty or rental rates are too low; (2) the duration of the leases is too long; (3) environmental controls are too weak; and (4) labor and population controls are too weak. Each of these problems will be discussed.

(*1*) *Royalty or rental rates are too low.*—One cause is that for some minerals the royalty is fixed in dollars per unit of the mineral, rather than being a percentage of value. In our sample, phosphate and iron ore are leased at fixed rates. Uranium, coal, oil, and gas are leased at percentage rates. Unfortunately, the Bureau of Indian Affairs and the U.S. Geological Survey fail adequately to audit companies' statements about the volume of production. A tribe cannot be reasonably certain that the true value of the minerals is as the company reports it.[2]

Indians do not tax and receive royalties. Usually they just receive royalties. The difference between the two is important from a company's point of view.

Depending upon how federal tax laws treat tribal taxation, it might be possible for a company to deduct a tax from its federal tax rather than from its before-tax income.

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[1] Department of the Interior, Geological Survey, Conservation Division, Federal and Indian Lands: Coal, Phosphate, Potash, Sodium, and other Mineral Production, Royalty Income, and Related Statistics, March 1976, pp. 31, 37, 50, 66, 77, 80, 290, 291.

[2] In Jicarilla Apach Tribe v. Southern Union Gas Company, et al., U.S. D.C. for the District of New Mexico, 1976, the tribe has by discovery obtained data showing that the USGS does not critically examine sales between a parent and its subsidiary. Nor are by-products adequately accounted for in royalty collection. An internal audit by the Department of Interior revealed delays in the processing of royalty payments. The "Report to the Federal Trade Commission on Mineral Leasing on Indian Lands," Bureau of Competition, FTC, (October 1975) discusses other apparent underpayments, particularly for oil and gas, on pp. 183–193.

Consider a $500,000 annual royalty charge. A company deducts it and pays taxes on the remaining profits, for example at a 40% rate. Converting the royalty to a tax means that before tax, income would rise by the $500,000; the company would pay 40% of this, or $200,000, in increased taxes. But the company can now deduct the tribal tax of $500,000 from its now higher federal tax. The result is that the company's total after tax income rises by $300,000. The company would prefer paying a tax rather than a royalty, and a tribe could bargain for a higher cash return from taxation than from rental. The federal government, of course, would then bear part of the tribal tax, as it has chosen to do for taxes of other countries.

The taxes earned by a state government on minerals produced from a lease by one of our tribes at present amounts to three times as much as the royalties received by the Indians.

(*2*) *The duration of leases is too long.*—Nearly all can be indefinitely extended if production is occurring. The provisions for redetermining the rental rate are usually weak. The extension provision results from the Omnibus Mineral Leasing Act of May 11, 1938 (25 U.S.C. 396 a–f), which states that minerals may be leased ". . . for a term not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The limit of ten years is contradicted by the possible indefinite extension of time. Long-lived leases accentuate the low price problem. In a time of general inflation, a fixed per ton payment can become a very small share of the total income from a particular mineral production activity. For percentage royalties, should the usual landowner's share drift upward over time, a tribe with a long lease would lose relative to those with short term leases.

Long term leasing problems can be avoided if terms could be renegotiated periodically. Some leases contain provisions enabling the Secretary of Interior to redetermine royalty rates and other provisions of a lease every ten years. But such leases rarely contain a method by which a tribe can force such Secretarial action by not defining the reasons which require redetermination of lease terms. The relevant provision of a lease on one of our sample reservations stated the following, which gives no standards to define "reasonable adjustment:"

Adjustment of terms or conditions

The terms and conditions of this lease shall be subject to reasonable adjustment, with the approval of the Secretary of the Interior or his authorized representative at the end of each 10-year period. Should either party to this lease desire to effect a reasonable adjustment in any of the terms or conditions of this lease, then the party desiring such reasonable adjustment must give written notice of not less than 120 days to the other party prior to the expiration of each 10-year period of the term of this lease. Such written notice shall specify in particular the section of the lease which is desired to be adjusted. If such notice to make reasonable adjustment is not given as herein required, then the terms and conditions of this lease shall continue in full force and effect during the next successive 10-year period. In the event the parties have not reached an agreement by six (6) months after the commencement of each successive 10-year period of the terms of this lease, then the matter shall be submitted to the Secretary of the Interior who will make a determination, giving due

consideration to the facts as presented by both parties, and his determination shall be final.

Related to the problem of long term leasing is the fact that Indians have no way to control the pace of development. The only language which controls such development is that there be "paying quantities" of mineral production. Some leases contain clauses prohibiting holding a lease for "speculative purposes." Without tighter control over the timing of development, two disadvantageous possibilities may occur. A tribe may wish immediate development, while a firm may wait. Conversely, a tribe may wish to delay development, while a firm proceeds unimpeded.

(3) *Environmental controls are too weak.*—Indians are unable to prevent environmental degradation resulting from development except through the very cumbersome mechanism of the National Environmental Protection Act. NEPA's main contribution is to cause delay. A tribe may wish to control the form of development rather than to delay it; yet without the opportunity to bargain effectively, the tribe cannot impose the controls it wants or extract a higher royalty in return for not imposing the controls. It may be too early to know how much strength tribes can put in codes controlling development, particularly on leases which already have been signed.

(4) *Labor and population controls are too weak.*—Mineral development invariably increases the population of non-Indians on or near a reservation, creating political difficulties for the tribal government and cultural problems for the Indians. Tribes wish to be able to reach a reasonable accommodation with the non-Indians who move in, but are unable to do so if they cannot set some controls which are widely known from the very arrival of the new residents. An alternative in some cases is for Indians to provide the labor for developing the minerals. Although training may entail some costs, the tribe could exchange rental receipts for training opportunities if it could bargain effectively. Current clauses requiring employment of Indians are vaguely worded and raise questions of enforceability. This situation has been reported for several reservations, and it can be documented on at least one of the sample reservations.[3]

All of these four problems are examples of Indians receiving too small a share of the returns from mineral development. If they could choose, some tribes might wish to impose environmental controls and workplace controls which lower the monetary return, while other tribes may prefer to maximize the monetary return. Unfortunately, tribes now receive low monetary return without any of the other controls either.

The difficulties in mineral leases are caused by the weak bargaining position of tribes in relation to potential resource developers. This weak position is created by five conditions. Our appendix on mineral agreements explains the following five points at greater length and suggests ways to strengthen the tribal position.

1. Tribes make decisions in a virtual vacuum of information, particularly about the financial and production aspects of mineral agreements. The BIA makes decisions in a similar vacuum, thus failing to discharge the federal government's trust responsibility. Since the

[3] For the general situation, see "Report to the Federal Trade Commission on Mineral Leasing on Indian land," pp. 194-196.

Bureau has failed to develop information to guide its decisions, a demand that the Bureau provide information to the tribes will leave tribes knowing little about the true value and dangers of mineral development.

2. Exercise of Secretarial approval powers creates uncertainty about tribal powers to draw up, negotiate, and enforce contracts on its own initiative. Even if a contract is approved as desired by a tribe—presuming the contract is good because the other problems listed here have been circumvented—the approval process itself has an unpredictable duration. No one can plan during the approval process. Since the Bureau's information is inadequate, judgments about contracts must be viewed skeptically.

3. Tribes are third in line behind the federal government and states in power to tax and to regulate development, although they do not have to be if their sovereign powers can be enforced. The current legal situation causes considerable uncertainty, and tribes are bearing the expense of litigation to defend their powers while states collect taxes. In July, 1975, the State of Montana began to collect a tax on coal. In January 1975, the Crow, one of the tribes surveyed, enacted a severance tax of their own. As of July, 1976, the Secretary of the Interior still had not acted on the tax code. After he acts, a court fight will ensue.

4. Failure by the Department of the Interior to audit royalty payments adequately illustrates the fact that tribes find it difficult to force companies to comply with even current weak contracts. Federal regulations make it difficult for tribes to enforce contracts. Currently proposed changes in the regulations will not improve tribal powers.

5. Finally, tribal difficulties in obtaining capital and credit forces them to accept inequitable lease agreements. The need for cash creates pressure on a tribe to settle early during a bargaining process. Perhaps tribes accept proposals presented by the BIA because prices seem so attractive. Alternative sources of income and credit would decrease the importance of immediate cash and allow tribes to bargain more effectively.

C.5. FOREST MANAGEMENT

In a different form, Indian control over forest resources suffers from some of the five problems which affect Indian control of mineral developments. Non-Indian control of forest inventories and other data gathering weakens Indian control. The approval powers of the Secretary interfere with adoption of contracts and the proper interpretation of policy in forest management. The state taxation problem does not appear to be significant. Tribes cannot be reasonably certain that the Bureau is enforcing timber contracts, and is practically unable to force contracting officers to make sure that the provisions are reasonably carried out. Finally, federal control of timber production is one of the major capital market difficulties for Indian tribes with substantial timber holdings. Timber is capital and from the economic point of view should be treated as such.

This survey of forest management first considers the importance of timber on the sample reservations and compares that data to previously published averages for all Indian reservations. Next, a review of some of the principles of good forest management follows.

This review provides a basis for assessing current BIA management procedures in terms of the five issues raised above. Finally, the relation of BIA procedures to those recommended by the General Accounting Office will be considered.

Timber use on the sample reservations

Table 1 gives the division between Indian and non-Indian cutting on the sample reservations, according to BIA data for calendar year 1974. Significant timber harvests occurred only on large reservations, and sales constituted a major source of income for seven reservations. One can compare the percentages either by using relative volumes or relative sales. First, based on volume, Indians cut 51 percent of the timber, while non-Indians cut 49 percent. The ratios differ when the large reservations are divided into allotted and non-allotted groups. Second, based on sales, Indians cut 36 percent of the timber value and non-Indians cut 64 percent of the value. The ratios again differ when the division between allotted and non-allotted reservations is made.

TABLE 1.—COMPARISON OF INDIAN AND NON-INDIAN HARVESTS OF TIMBER FROM SAMPLE RESERVATIONS, 1974

	Volume (thousands of board feet)			Sales		
	Indians	Non-Indians	Total	Indians	Non-Indians	Total
Large	94,992	37,299	132,291	$6,574,000	$3,411,000	$9,985,000
Allotted (percent)	.72	.28	1.00	.66	.34	1.00
Large	121,960	172,995	294,955	5,794,000	18,770,000	24,564,000
Nonallotted (percent)	.41	.59	1.00	.24	.76	1.00
Total	216,952	210,924	427,246	12,368,000	22,181,000	34,549,000
Percent	.51	.49	1.00	.36	.64	1.00

Earlier figures based upon national averages reveal that in 1968 approximately 80 percent of the volume of timber was cut or milled by non-Indians.[1] The major reason for the discrepancy is that the sample contains two reservations on which Indians have constructed their own lumber mills. The cut on these reservations is large and heavily influences the percentages in Table 1. Also, the BIA data discusses only timber cut, without reference to the identity of the owner of the mill to which the lumber is taken after cutting. The 80% figure just cited refers to milling as well as cutting. Another possible reason for the discrepancy is that there may have been a shift into processing by Indians between 1968 and 1974. Presently, there is insufficient data to verify the truth of this possibility.

Summary of forest management principles

Forest management raises complicated questions. This review relies heavily upon a recent conference at the University of Washington, and particularly upon papers by Paul Samuelson and Leon Moses.[2]

Samuelson suggests that the owner of land which is used exclusively for timber (and which has no side-effects on other land) should choose

[1] Rich Nafziger, "A Violation of Trust? Federal Management of Indian Forest Lands," Americans for Indian Opportunity, June 1976, p. 1, quoting "A Study of the Indian Forestry Program," Cornell, Howland, Hayes and Merrifield, Cornwallis, Oregon, Appendix 2, p. 23.

[2] Paul A. Samuelson, "Economics of Forestry in an Evolving Society," and Leon Moses, "Economics of Timber Harvest Regulation," papers presented at symposium, "The Economics of Sustained Yield Forestry," College of Forest Resources, University of Washington, Seattle, November 23, 1974. A set of the papers will be published by the College of Forest Resources.

the age at which he cuts his trees primarily by examining the real rate of interest available to him in capital markets. Such an owner chooses tree age which is less than that chosen for the purpose of maximizing the size of the annual cut; although a steady flow of timber arises from cutting timber in this manner, the alternative of investing timber receipts in the capital market makes it uneconomic to let trees grow large enough to maximize the physical amount of annual harvests.

This view of economists is fairly well known, and supports the idea that old virgin forests should be cut and replaced by younger growing trees.

But the analysis of the simple forest situation presented in Samuelson's paper is only the start of the analysis for a large forest in which many possible ways to cut the virgin forest exist. One cannot ignore transportation costs, planting costs, or environmental externalities. Further, one must have a reasonably accurate idea about the determinants of tree growth in order to decide in what manner to transform the virgin forest into a cutover forest growing new trees.

As a virgin forest is cut and a "managed" forest created, landowners must identify the land which is most productive for timber production and land which is better suited for other uses. The costs of transportation to mills will affect that decision, as will the importance of competing land uses for recreation and water supply.

On land used in forest production, the most important decision for future use is the manner of the cut and the form of regeneration which occurs. Also significant is the choice of which lands to cut when. Few landowners, and certainly not Indian tribes, wish to cut all their old growth timber on commercial timberland at once. Such action dramatically produces an uneven flow of future timber. New trees on cutover land would all mature at the same time in the future. Somewhat lower priority might be placed on timber thinning decisions, for once the replacement forest is started, many years elapse before thinning is required. During those years, market conditions change and knowledge about the growth characteristics of trees increases. Both of these factors should change timber thinning decisions.

Although the transformation of a virgin forest into a managed forest is supposed to give a forest of balanced age types, few forest managers succeed in creating such a situation. Budget priorities, fires, insects, and accidents of other sorts mean that a forest is never a simple collection of equal numbers of trees of every age within each species and each degree of accessibility.

To manage a complicated forest well, one needs a computer model. Such models are now available and will become more sophisticated and productive in the years ahead. A clear and simple proof of the usefulness of such models is provided by Ernest M. Gould and William G. O'Regan.[3]

The Forest Service has developed a package called Timber RAM; although economists—Leon Moses, for instance—find defects from their point of view in Timber RAM, it is a flexible tool which could be used to plan where and when to cut in a complicated forest.

The preceding remarks about the proper age to harvest trees, the problem of timing the cuts, and the usefulness of computer models all

[3] Ernest M. Gould, Jr., and William B. O'Regan, "Simulation: A Step Toward Better Forest Planning," Harvard Forest Papers, No. 13, 1965.

refer to long-term planning of forest development. Such plans would give the proper amount of timber to cut in a particular decade, but would not give annual amounts. The proper time to cut timber within a decade depends upon the housing cycle and other determinants of the price of lumber. To plan and cut equal amounts of timber each and every year would give less revenue than uneven harvests within a decade. One should harvest the timber when its price is highest and also obtain that price through advantageous timber harvest contracts. Present Bureau policy favors equal annual harvests irrespective of market price. Harvesting during a period of low prices is somewhat mitigated because most timber contracts allow some under and over-cutting during a particular year, provided that the total amount harvested does not vary from the estimated amount.

Evaluation of BIA management practices

Based upon the literature briefly summarized in the preceding section, one can assess the quality of management of Indian timber lands. The categories for this evaluation are:

(1) Information.
(2) Approval Power.
(3) Taxation.
(4) Contract Enforcement.
(5) Capital.

(1) Information

Evaluating Indian forest management requires examination of the BIA's concept of "annual allowable cut." The Bureau applies two old and simple formulas to determine what cut is "allowable" on uneven age and even aged stands of timber. Having determined the allowable cut, the choice of actual acres to cut is made in the field according to the judgment of the foresters in charge. Serious objections can be raised about the use of these two formulas.

Failure adequately to model the forests for the purpose of determining the cutting schedule is another problem separate from the calculation of the allowable cut.

After discussing the formulas for the allowable cut, the formula to adjust stumpage values in response to changes in the market price of lumber will be discussed. As with the formulas used to compute allowable cuts, the stumpage adjustment formula is seriously out of date. It fails to adjust for changes in the efficiency of mills which make lumber scale and log scale measurement different. The difference is recognized by the BIA only in the appraisal process, not in the stumpage adjustment process. The result is that tribes earn much less than they might when markets are good. If the BIA allows timber contractors to revise stumpage prices downward during bad markets, Tribes fail to benefit from the stumpage formula when prices are low. Since prices have been rising in recent years, the benefits derived from the formula in slumps have not been available, while tribes have lost during good years. The reason is that the formula used to adjust stumpage prices causes those prices to rise moderately when lumber prices rise, and to fall moderately when lumber prices fall. The formula also causes profits to rise faster then stumpage prices when lumber prices fall.

Allowable cut calculations use the Austrian and Hanzlik formulas. These formulas are described below. They make no use of economic

concepts such as the rate of interest, transportation costs, the price of timber relative to other goods, or the value of land in alternative uses.

Adjustment for those factors must be done outside of the application of the formulas, by decisions such as those determining which forest land is "commercial." Indians have no assurance such decisions are well made. "Allowable" does not mean "optimal."

Some may not accept the above economic objections to these two formulas. There are other types of objections. Both of these formulas use a predicted future growth rate of the forest. The BIA's predicted rates for cutover land are invariably higher than current rates of growth on cutover land. Use of the high rates assumes that the Bureau will achieve those rates through improved management. Yet by its own admission, the Bureau is not completing the management tasks it has set for itself. In the Program Strategy Paper for Fiscal Year 1978, the Bureau of Indian Affairs directed the following comments to superiors in the Department of Interior:

Forestry.—The Bureau is proposing a double-bitted program of forest development and timber harvest. The total program includes: 1) increasing annual timber harvest from the current 850 million board feet to the allowable 1,050 million board feet; 2) to carry our reforestation and timber stand improvement work on 39,500 acres of new work each year; and 3) eliminating, over a ten-year period the 912,000 acres of accumulated reforestation and timber stand improvement work. Full realization of the program is possibly only at the unconstrained funding level (Priority D). At the Priority A and B levels, we are proposing a $5 million increase to initiate the ten-year program to elimiuate the accumulation of reforestation and TSI work.

The 912,000 acres of accumulated backlog consists of 7.2 percent of the 12,619,000 acres of total forest land and 17 percent of the commercial forest land on Indian reservations in 1974.[4]

Bureau representatives received some questioning on the subject of the reforestation and timber stand improvement at the 1977 House Appropriation hearings. They reported that in fiscal year 1975, a total of 26,408 acres of timber stand improvement and reforestation had been completed. The total backlog consisted of 173,365 acres needing reforestation and 738,593 acres needing timber stand improvement. The Bureau estimated that a total of 39,500 acres are added to the backlog each year, 9,500 in the reforestation category and 30,000 in timber stand improvement category. The difference between 39,000 and 26,000 represents an increase of 7,000 acres to the backlog each year.[4a]

In spite of the fact that the Bureau has not been completing past work in regenerating and improving the forest, the budget narrative proposed to achieve the allowable cut levels calculated by the two formulas. The allowable cut calculations assume that the regeneration is occurring, and that in the future Indian forests will grow faster. Yet there is a backlog requiring ten years to eliminate.

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[4] The GAO reported that the Bureau's estimates of land needing thinning and reforestation may be too low because the Bureau does not add new acres to backlog estimates as harvests proceed. "Indian Natural Resources—Opportunities for Improved management and Increased Productivity, Part I, Forestland, Rangeland, and Cropland," August 18, 1975, p. 16.

[4a] U.S. Congress House, "Department of the Interior and Related Agencies Appropriations for 1977," Hearings before a subcommittee, Committee on Appropriations, Part 6, March 3, 1976, p. 150 (94th Cong., 2nd sess.)

To prove this statement requires careful examination of the two formulas. Although technical, such an examination is very important to reveal the dangerous simplicity of the concepts the Bureau uses.

The Austrian formula is the following:

$$AC = I + (Vo - Vn)/n$$

where the symbols mean the following:

AC=Annual allowable cut per acre

I=Average annual increment during period of developing desirable levels of growing stock (this entity is further defined below).

Vo=Volume in year "0", namely, the year in which the allowable cut is computed.

Vn=Desired volume at the end of "n" years.

n=The number of years accepted as a desirable period in which to develop the "Target" level of growing stock.

Before discussing these components of the formula, we must define "I", the average Annual increment during the adjustment period.

I=½ Current gross growth—mortality=anticipated optimum growth.

In other words, I, the average annual increment is the "simple" average of the current net increment and the increment that will occur at the end of the planning period for adjusting to the desired level of growing stock.[4b]

We must question each of the terms in the above equation, beginning with the concept of "anticipated optimum growth." The following is a quotation from a timber management plan on one of the reservations:

The allowable cut calculations are based in part on the assumption that the forest will be brought to an intensively managed status during an eighty year adjustment period.

As the earlier quotation from the BIA budget document says, the assumption is false. The BIA estimates it will take ten years just to get caught up with the national backlog of regenerations and timber stand improvement.[5]

Further, when the BIA uses the "anticipated optimum growth" in the Austrian formula, it does not report to tribes any estimate of the accuracy of their figure. Usually, the growth rates are based upon five or ten year measurements of a forest. Since the anticipated rates are to be achieved over a much longer period, a small error in the sampling procedures or in other assumptions could potentially make the annual allowable cut calculation contain a very great error.

On the Spokane Reservation, which was 96% cutover at the time of inventory, the inventory analysis revealed current net growth of 149 board feet per acre in 1970, predicted net growth of 172 board feet per acre for the next five year period, and predicted 275 board feet per acre for 2010. The 275 figure was based on an assumption that unsalvaged mortality (20 board feet per year in 1970) would be zero in 2010. The study offered no assessment of the statistical properties of the 275 board feet estimate, beyond stating, "Since the pro-

[4b] Bureau of Indian Affairs, "Indian Forestry Center, Handbook for Continuous Forest Inventory," 3rd edition (Sept. 1974), Part III, p. 41.

[5] The statement in the text may be overly generous to the Bureau. Some foresters appear to believe that a portion of the forest has been brought under intensive management merely if it has been logged once and has roads. The removal of a portion of the old growth will automatically cause an increase in the rate of growth of the remaining timber, which can be called "intensive management" even though the Bureau is doing nothing active to promote that growth.

jection procedures contain a number of conservatisms it is reasonable to assume that the above indicated averages per acre are substantially less than will be achieved under future management." The projection also contained a certain number of optimistic assumptions.[6]

The problems with the formula also extend to other components. What determines the "desired volume" at the end of the adjustment period? There is considerable uncertainty about the relationship between forest growth rate and the average volume of timber per acre in the forest. The Weyerhauser Company, for instance, plans a dense stocking and high volume per acre simply because with present levels of knowledge the optimum is not known. Weyerhauser feels that overstocking can be removed more cheaply than new trees can be grown. Such removal will be required if it turns out that high volume does restrict growth. Weyerhauser may be right or it may be wrong. Experience with its forest will tell the answer. The Bureau, however, has preferred low volume to a high volume of residual growing stock. Whether the Bureau is right or wrong in this assumption is simply not known.

The number of years used to adjust the forest, "n" is determined by looking at the desired rotation age for the species dominant on the land, and then comparing that to the number of years for which harvesting has occurred on the reservation. The desired rotation age is that age chosen to maximize physical yield. Examination of the formulas show, however, that more than the rotation age is involved in computing the annual allowable cut.

Further examination of the concept of "adjustment period" shows that the allowable cut is not necessarily the sustainable cut after the period of adjustment has been completed. The forest is gradually cut so that new growth will have a variety of ages and sizes. But the standing volume took many years to grow. After all the old growth has been cut once, the new annual allowable cut will be the average annual increment per acre of the managed forest times the total number of acres. The second term of the formula given above will be zero, for Vn and Vo will be equal. It is possible for the annual allowable cut to fall or to rise at the end of the "n" years. How many tribes realize that the formula works in that manner? GAO missed this point in a recent study.[7] The language clearly says "allowable," not "sustainable," and that is what it means.

The forestry profession's use of the words "sustained yield management" is a misnomer. The principle is to bring the forest under management, in order to obtain an even flow. The cut during the period of bringing a forest under management may not be a sustainable cut. The subsequent cut will be sustainable.

Finally, the formula is computed as an average per acre for the forest lands defined as "commercial." A Bureau handbook defines commercial acreage as follows:

Commercial Forest Lands.—This is defined as forest lands producing or capable of producing crops of industrial wood and not withdrawn

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[6] Bureau of Indian Affairs, "Spokane Indian Reservation, A Forest Inventory Analysis," June 1972, pp. 1, 7–8, 44–46. The projection depended heavily upon measured ingrowth during 1964–1969. No estimate of the quality of that figure was given in the report; therefore, no assessment of the quality of projections based on the figure is possible, irrespective of the optimism or conservatism of other assumptions.

[7] U.S. General Accounting Office, "Indian Natural Resources: Opportunities for Improved Management and Increased Productivity," August 18, 1975, p. 10.

from timber utilization. Areas qualifying as commercial forest land must have the capability of producing 20 cubic feet or more per acre per year of industrial wood under management. Currently inaccessible and inoperable acres are included, except when the areas involved are small and unlikely to become suitable for production of industrial wood in the foreseeable future.[8]

No provision is made here for the cost of making presently inaccessible land accessible. Further, no attempt is mentioned to predict which lands in the future might be withdrawn from timber production because competing uses are more important.

Should a timber manager choose to manipulate the Austrian formula in order to obtain a rate of cut which is actually determined by other considerations, how might he do so? The three items which are determined by appeal to professional competence are the anticipated optimum growth per acre, the desired volume per acre at the end of the adjustment period, and the number of acres that are commercial. High allowable cuts can be computed by having a high anticipated growth per acres, a low anticipated volume per acre of growing stock, and a high number of acres of commercial timber land. Low cuts can be computed by going in the other direction on each three items.

Without a thorough examination of the actual use of the Austrian formula by the Bureau, and without separate computation of what the cut would be under an alternative management scheme, one cannot determine whether the current cut from Indian forest lands is too high or too low.

In a recent commentary, the Government Accounting Office criticized the Bureau for not harvesting the full allowable cut both nationwide and on the three reservations which they chose to study.[9] If it is true that the Bureau is not managing forest intensively—as the GAO study states—then the proper thing to do based on the Austrian formula is to lower the annual allowable cut to correct for the lower predicted growth of the forest. The GAO failed to understand this point, and supported the Bureau's argument that they need more forestry personnel for harvest supervision.

The Austrian formula just discussed applies to uneven-aged timber lands, such as pine and Douglas Fir. For spruce and other species, for which clearcutting is the usual harvest practice, the Bureau applies the Hanzlik formula, which dates from 1922.

The Formula:

$$AC=(Vm/R)+1.$$

Where

AC=Annual allowable cut.

Vm=Volume of mature merchantable timber above rotation age.

R=Rotation period adopted.

I=Average increment that is predicted will occur between time of computation and the time that regulation has been achieved.

The formula contains two concepts which are in the Austrian formula: the average annual increment (with its assumption about

[8] Bureau of Indian Affairs, Handbook for Continuous Forest Inventory, 3rd ed., 1974, "Definitions," p. 4.

[9] U.S. General Accounting Office, "Indian Natural Resources—Opportunities for Improved Management and Increased Productivity, Part I, Forest land, Rangeland, and Cropland," August 18, 1975, pp. 1, 10, 27.

future growth) and the cutting of old growth timber. Thus, once regulation is achieved, the first term, Vm/R, will be zero and the rate of cut will be determined only by the average rate of growth of the forest. There are some difficulties actually applying this formula to achieve an even flow.

Some other computations are required. One Bureau manual suggests, however, that such checks are not necessary:

> Historically, each such complex adjustment has proved unwarranted when cast in the later light of 1) changing utilization standard, and 2) changing views of the increased productivity that will be achieved during the remainder of the first rotation. Accordingly, if adequate inventory data are available for use of the Hanzlik formula to compute allowable cuts, the detailed area-volume checks should not be made unless all data in the formula are based on the most intensive "utilization-growth prediction" standards available[10]

One reasonably concludes from this statement that Bureau application of the Hanzlik formula often includes quite generous allowances for future growth and realization of harvests. The criticism that the BIA is not actually intensively managing Indian forests thus applies to BIA use of this formula.

The Hanzlik formula does not use the concept of an optimum volume per acre but bases the computation of the quantity of old growth volume directly upon the accepted rotation age for that type of timber. Many economists may feel that the rotation age is too high, thus lowering the allowable cut and lengthening the period which it takes to bring the entire forest "under regulation"—i.e., to harvest all commercial acres at least once.

Since the BIA uses these two formulas for its management decisions, it collects only that information which is required to apply those formulas. Forest inventories do not classify the standing timber according to accessibility or other factors which are important economically. Rather, averages are given for all lands which are determined to be commercial forest land. Thus, a tribe wishing to take over management of its own forest and to use other procedures would have to spend a period collecting additional data to make existing inventories useful for other methods of managing the forest.

This completes the discussion of one of the two types of formulas which are important in the management of Indian timber. Another very important formula governs the price of timber on the stump when sold in timber sales which last many years.

Most timber sales contracts contain adjustment clauses for stumpage, the price paid per thousand board feet measured log scale as the timber is cut. At the time the winning bid is made and accepted, there is a level for the lumber price index of each species sold. In the West, the Western Wood Products Lumber Price Index is often used for the lumber index. This index is provided for lumber measured in lumber scale. During the timber sale period, changes in lumber prices should cause stumpage to change. The usual adjustment clause takes the difference between the index price at the time the timber is cut and the index price at the time the contract was signed, multiplies that difference by a factor (.5 or .75 are common), and adds the results to the base bid price. Thus, stumpage goes up when lumber prices rise, and falls when lumber prices fall.

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[10] BIA, Handbook for Continuous Forest Inventory, 3rd. ed., 1974, Chapter III, p. 43.

The error in this procedure is that lumber scale and log scale are not the same any more. Technical progress and changing utilization standards have enabled mills to obtain more lumber per log than formerly. Currently, lumber scale is 1.3 to 1.5 times larger than log scale. An increase of $10 per thousand board feet log scale equals an increase of $13 to $15 per thousand board feet lumber scale.

If the lumber price index rises by $10, there is an increase in revenue of $13 per thousand log scale to the mill if we take the small value. If the stumpage adjustment formula uses a factor of .5, an apparent 50–50 split between purchaser and tribe, then stumpage would go up by .5 (10), or $5. The firm receives an additional $8, the tribe an additional $5. The split is not 50–50 because log scale and lumber scale are different.

When lumber prices are generally moving upward, as they have been in recent years, this arrangement favors firms with long-term timber sales contracts.[11]

(*2*) *Approval Powers*

At present, all significant timber sale contracts must be approved by the tribe and by the Secretary of the Interior or his representative on approved contract forms (25–CFR–141.12). Should a tribe wish to make changes in these contracts, it must persuade the BIA to agree. A tribe can refuse to approve a contract, if it wishes to forego income until a better one can be written or if it wishes to wait until prices improve.

On some reservations, including one in our sample, the Bureau has approved long term sales. One reservation in our sample has a ten year sale with no adjustment clause for stumpage. Federal regulations require that the Secretary authorize contracts which have longer terms than five years (25–CFR–141.17); otherwise, the contracting officer in area offices can approve the contracts.

From our sample of reservations, it appears that the Secretary has allowed several tribes to build lumber mills. The Bureau helped one tribe finance the construction with a loan. There was interference in the use of the profits of that enterprise when the tribe wanted to lend money to another tribal enterprise.

(*3*) *Taxation and regulation by States*

Our sample reservations reported few difficulties with either of these issues in regard to timber. Lumber mills are more profitable when trust land location and Indian ownership makes them able to avoid state and federal taxes. One mill owned by a non-Indian but located on leased trust land was paying local property taxes. A tribal lumber mill was not. Non-Indian mills located outside of reservations which use Indian timber must, of course, pay property and all other taxes.

(*4*) *Contract enforcement*

Although few of the tribes surveyed complained about timber contract enforcement, the Bureau's backlog of regeneration needs suggests that too much attention is paid to timber sales and too little to the impact of harvest method upon timber regeneration. The

[11] Tribal lumber mills are often good investments simply because of this feature of adjustment clauses now in use by the Bureau. Any mill purchasing Indian timber benefits; by building a mill, the tribe obtains this benefit in the profits of the mill. One must ask if there is not a cheaper way to get this particular benefit, by writing different contracts. Tribal mills, of course, also have a tax advantage.

Quinault Reservation has experienced severe difficulties with regeneration on logged allotted lands. Bureau enforcement of timber sales were not investigated sufficiently to support firm conclusions here.

(5) *Capital*

Trees are capital. For those tribes with substantial forest holdings, the restraint of sustained yield as interpreted by annual allowable cuts would conceivably prevent use of the forest as a source of direct financing for tribal investments. It would appear that tribes have not used timber in this manner out of their own desires for an even flow of income.

By ignoring the real rate of interest and other economic considerations such as the relative price of timber, transportation costs, and the cycle in lumber prices, the BIA's formulas cause tribes to receive less income than would otherwise be the case. Since roads to timber sales are paid for by lower stumpage receipts, construction of these roads must be considered as an investment whose cost must be balanced against the increase in the present value of future timber growth on the lands which have been made accessible. The Bureau makes no such calculations at present.

Analysis of the Austrian and Hanzlik formulas should make clear, however, that tribes cannot determine if presently calculated annual allowable cuts are above or below that which a different and more advanced forest management approach would offer.

Another capital issue is the construction of lumber mills. Two tribes of the thirty-two visited had large mills and two had small mills. Tribes are beginning to move into the processing stage in this field, and other tribes with adequate timber bases should also consider this the possibility.

Conclusion

This assessment of BIA forestry practices differs from other assessments, particularly the recent study by the Government Accounting Office. That report recommended that the BIA be enabled to hire additional staff in order to carry out more intensive timber management and to increase the actual cut of timber on Indian lands. The BIA agreed with this recommendation.[12]

Much more fundamental change is required. Merely adding staff to administer a management program based upon rudimentary and out-of-date formulas will not assure tribes of higher returns. Further, to recommend that the cut be increased before the regeneration and timberstand improvement has been carried out is inconsistent with the formulas which now guide the calculations of annual allowable cuts. According to the BIA, the numbers used in those formulas assume that the forests are being intensively managed. Both the GAO and the BIA agree that the forests are not being intensively managed. Therefore it is not objectionable that allowable cut levels are not being achieved!

This conclusion suggests a different interpretation of the fact that the Bureau now allows tribes to retain administrative fees assessed against timber sales receipts if they spend that money on timber management. In fiscal year 1973, tribes contributed $3.7 million to

[12] GAO, "Indian Natural Resources" (August 18, 1975, pp. 27–29).

forest management under the administrative fee program. The federal government contributed $5.9 million.[13] Since tribes now pay for 38% of their forest management, they should demand that at least a portion of these funds be spent on improving the quality of data and management models of their forests.

One suggestion for improving that quality is that timber tribes insist upon and hire a team of people who know modern forest management techniques to suggest changes. These people would come from private industry and universities. Since one must expect such a study team to recommend sweeping changes, it would be essential that tribes rather than the Bureau hire the team. The study could review all Bureau timber management, the management of particular reservation forests, or a combination of these. Tribes could then adopt the proposals as they wished for their forests.

C.6. FISHING

The fisheries problem is both legal and economic. For years states have not recognized Indian rights reserved by treaty. The states through their police power have prevented Indians from fishing at their usual and accustomed places. Consequently, development of fishing industries was retarded by lack of control over their fishing resources and the failure of the Federal Government to protect these invaluable resources.

In *U.S.* v. *Winans*, 198 U.S. 371 (1904), the Supreme Court noted that rights and interests not specifically granted by Indian tribes in their treaties, were reserved by the tribes. What had not been specifically granted was reserved. Those tribes in Washington State which had not specifically granted their fishing rights to the U.S., for example, had retained those rights. *U.S.* v. *Washington*, 384 F. Supp 312 (WD Wash. 1974). The court recognized that the Indians were entitled to one-half of all fish caught in the "usual and accustomed" fishing areas.

Although *Washington* supra (Boldt's decision) recognized that treaty tribes had vested rights in fishing, continuing controversy exists with respect to conservation and quality of claim.

Conservation

In *Arnett* v. *5 Gill Nets*, California Ct. app 1st Dist. Div 3, (5/27/75) Cert denied, the court stated: Passage of Public Law 83–280, 67 Stat. 588, transferring jurisdiction over Indian reservations from the Federal Government to the State of California did not result in the state's acquiring jurisdiction to regulate fishing rights of Indians on the Klamath Indian reservation. The State has no right under its police power to restrict Indians' subsistence fishing on their own reservation by prohibiting gill netting in interest of conservation.

But, in *Department of Game* v. *Payallup Tribe*, 548 P. 2nd 1058 (Wash. Supreme Ct. 1976; on remand from U.S. Supreme Ct.) The court stated:

> We conclude therefore that a proper interpretation of the treaty of Medicine Creek permits the state to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non-Indian, equally.

[13] GAO, "Indian Natural Resources," p. 8.

The police power of the state to regulate "all" fishing may "restrain the fishing rights of all state citizens, e.g., regulations as to time and manner of fishing, size of catch, etc.;" *Puyallup* supra. While the State may not necessarily regulate the manner of catching fish, fish traps, gill netting, etc. by Indians, the power to regulate size of catch because of conservation seriously limits the scope of Indian rights.

Quality of Claim

There is also some controversy over whether or not Indians have a right to fish which are raised in hatcheries but spawn in their streams. In *Puyallup* the court reasoned that since fish programs funded by the State are supported by user fees, it was unfair to non-Indians to allow Indians to take one-half of the catch and to use gill nets. The *Puyallup* court stated that the Puyallup tribe had no interest in hatchery run fish other than those enjoyed by all citizens. Effectively, there is total state regulation where hatchery run fish are involved. The Puyallup were only entitled to one-half of the "natural" run fish. The quality of the Puyallup claim to fish spawning in their waters has been seriously diminished.

Although fish are spawned in hatcheries they do use the water which Indians hold under private right. Water rights are rights to the use of water. They are not rights to any particular corpus of water. Therefore, State Fisheries use Indian water. There should be no legal distinction between a sale of water for use in irrigation and a sale of water for use in spawning. Because State fish use Indian water, Indians should not be limited to State regulations, as have the Puyallup.

It is ironic that State dams which have destroyed natural spawning should work to deny Indians hatchery spawned fish. Not only have States themselves, and through the Federal Government, taken Indian water, but they also deny Indians the fish which they would otherwise be entitled to, if their waters had not been interfered with by Dams.

In addition, the Puyallup Court raised issues of equal protection under the United States Constitution. Equal protection means that for hatchery run fish, the "manner of fishing by any regulations for the conservation of fishery must apply the same to Indians as to non-Indians." Therefore, the manner of fishing may also be regulated by the state. Equal protection, as applied to hatchery runs means that in the name of conservation, a state may not only regulate the size of the catch, but also the manner in which the fish are caught.

Of the thirty-two Indian reservations studied, many expressed interest in fishery development, but also discussed the legal impediments involved. Those tribes which have previously adjudicated their treaty fishing rights have undertaken more fishery development than those who have not. Chehalis for example, is an Executive Order tribe, and as such was not a party to *Washington* supra, involving treaty tribes. Tribes such as Swinomish and Makah were parties to *Washington*. Now, however, they find that although their claim to one-half of the fish catch will be honored, they still lack the financial capital to fully exercise their rights. Other reservations have not found it necessary to sue states over fishing rights. Lac du Flambeau's fish hatchery is used to stock lakes within the exterior boundaries

of the reservations. For commercial and tourist related purposes, expansion of rearing ponds and the hatchery is necessary.

Conclusion

In the past most tribes were prevented from developing their fishery potential because states refused to respect Indian treaties and frequently used their police power to prevent Indian fishing. Fishery development was retarded. Because of continuing and recent litigation, Indian fishing rights have gained greater recognition, but sufficient capital has not been available to assist tribes in meeting their potential.

Today, the attack upon Indian fishery development is based upon conservation, equality of treatment, and hatchery versus natural fish runs. These attacks are aided by the reluctance of the Federal Government to provide sufficient capital to exploit recognized fishery resources. In addition to general harassment of Indians by state police, the non-Indian commercial fisheries industry wants Congress to either buy up native fishing rights or to change the treaties.

D. Resource Protection

The survey of reservations directed considerable attention to protection and control of Indian-owned resources. The reservations reported continuing difficulty in controlling resources such as oil, gas, coal, uranium, sand and gravel, forests, rangeland, phosphates, iron, and water. The Federal Government and the Secretary of the Interior and Bureau of Indian Affairs in particular have acted as a hurdle between Indians and their resources.

Although the Bureau of Indian Affairs is supposed to aid Indians, very few examples of such assistance were reported. Some tribes claimed that the Bureau was acting on the behalf on non-Indian neighbors rather than on their behalf. Actual protection of Indian property occurs mostly as a result of tribal action or tribally induced Bureau of Indian Affairs action. The following discussion considers four categories: (1) Infringements such as trespassing; (2) state taxation; (3) Codes controlling land use; (4) Tribal opinion of the usefulness of litigation as a method of protection.

All respondents were requested to fill out a table listing "the major infringements against tribal resources and their cost to the tribe," and the major ones mentioned were against land. Unfortunately, only 14 of the 32 reservations visited provided the list. One reason for this low rate of response may well be the amount of detail involved. In addition to asking for the type of infringement and the resource damaged, other information requested concerned the duration of the infringement, the guilty party, the responsible party for protection, the action taken, the outcome, the legal costs, and damages collected, if any.

Trespassing

Eight reservations reported trespassing problems; two said that the problem was "not major." Six reservations with major trespassing problems represent 43 percent of those who responded to the question. Of these, one had no data to describe the problem. One reported problems with snowmobiles, another with hikers, another with

grazing. One reservation had extensive data on illegal rights of way. This tribe estimated that approximately $9,000,000 had been lost to the tribe because of illegal rights of way. The tribe owns land which must be used by roads, pipelines, and railroads due to geographic conditions.

Poaching

Nine reservations, or 64% of those responding to the question, reported poaching. In none of the cases did the BIA act to prevent the poaching. Tribal action was taken in two of the cases; other tribes reported no funds were available to prevent poaching.

Federal Projects

Seven of the fourteen tribes reported that some type of federal project had infringed upon their lands. Four of these were dams. One was a Corps of Engineers jetty which diverted fish runs from tribally controlled waterways and tidelands. Three reservations, including one which had a dam, had recreational land taken for federal use. Compensation was reported for one of the dam cases.

Since tribes need to control development on their land, a natural move is to adopt codes. We asked tribes during our site visits to fill out a chart describing the situation with codes on their reservation. Task Force No. 2 (Tribal Government) asked the same question. Table 1 shows the response among the tribes we visited. In this table only six (6) tribes are omitted for non-response to the question as a whole. Some did not respond to particular parts of the question.

Of the twenty-six tribes responding, twenty-one had at least one code. Of the five with no codes, two had at least one under consideration. Four of the five without codes were small reservations. One of the small reservations reported it was considering one code to control all matters we asked about. Most codes enacted regulate fish and wildlife; seventeen of the twenty-six tribes regulate fish and wildlife on their reservations. Zoning and land use planning regulations were the second most numerous type of codes, with eight tribes having full zoning ordinance.

Since our sample had five tribes with important minerals, it is interesting to note that only one of them had a code to control such development. Only one of those five were considering enacting a code. The other two tribes considering such codes did not report known reserves.

The Task Force did not attempt to assess the quality of the codes reported. Nor did it attempt to determine if the tribes with codes were successfully enforcing them. Four of the tribes with fish and wildlife codes reported poaching problems which had not been solved, while three of the tribes with fish and wildlife regulations reported minor poaching problems. Unfortunately, six of the tribes with fish and wildlife codes did not respond to our question about infringements; such non-response inhibits reaching firm conclusions in either direction about the success tribes have had enforcing their wildlife regulations. Four of the seventeen tribes with such codes had problems enforcing them, but there may be more than four having such problems.

We asked tribal representatives, "Do you think that litigation is the most effective way to secure or protect your resource rights?" Of the eighteen who were asked this question, nine said yes and nine said

no. Of the nine who said no, all suggested legislation as an alternative method. They indicated cost and uncertainty as problems with litigation. Most of them indicated national legislation, but some suggested tribal and state legislation as well. In response to a question to identify the outside interests which influence the choice of protection used, most answering the question indicated non-Indian local people, state governments, or corporations. A few indicated the federal government was a problem also.

Miscellaneous

One tribe reported a salmon run had been cut off by a dam. A California tribe was in the midst of a dispute over annexation of trust land by a neighboring city; in this case the Solicitor's office was taking action in a similar case in California and postponing enforcing the case in our sample until the other was settled. Minerals protection has been discussed in another section. We do not know the situation for timber.

Water Rights

Six of the reservations reported problems with water rights. Two cases were under litigation, one of which had been settled for monetary damages. There was some evidence of BIA support, particularly in the area of research.

Conclusion

Although fewer than half of the site visits produced responses to the question about infringement on resources, the rate of infringement among the respondents was great. Only two of the fourteen said they had no major problems. Trespassing and poaching were important, as were federal projects. It is well known that water rights are a problem, and so it is among the respondents. The Interior Department took very little action to prevent any of the infringements reported by the tribes responding to the question.

TABLE 1

Type of code	Large reservations			Small reservations			Total		
	Yes	No	If no—under consideration	Yes	No	If no—under consideration	Yes	No	If no—under consideration
1. Control of development	1	17	2	0	7	1	1	24	3
2. Control of water	3	14	4	0	7	2	3	21	6
3. Control of fish and wildlife	15	3	0	2	5	1	17	8	1
4. Residential zoning	9	11	7	1	4	2	9	15	9
5l Industrial zoning	8	9	5	0	7	2	8	16	7
6. General resource zoning	8	12	7	2	5	2	8	18	9
7. Building	5	14	3	1	6	2	6	20	5
8. Environmental regulations	4	15	2	1	6	2	5	21	4
At least 1 code	18	1	1	3	4	1	21	5	2

D.1. STATE TAXATION

Tribal governments and state governments are in direct conflict over taxation. It is useful to distinguish two different types of tax, 1) a tax on the product of land, and 2) a general business, income, or sales tax. These two categories present different issues. A tax on mineral

production will, in the long run, fall upon the owner of the resource rather than upon the developer. A tax on profits or income may fall partially upon developers. Therefore, a state tax upon the products of land, such as minerals, can be regarded as a tax upon Indian-owned resources no matter who in fact pays the tax. The competition is between the state as government and the tribe as landowner. A tax upon business on a reservation is only partially a tax upon Indians if the business is partly non-Indian owned. The conflict between a tribe and a state in this case is not between landowner and state but between competing governments looking for good revenue sources. This will be elaborated.

Economic theory suggests that Indians as landowners, in the long run, end up paying a large share of any tax assessed against the products of land. The reason is that other factors of production can be switched among alternative uses with more ease than can land. This enables the owners of labor and capital to force the owner of land to bear the taxes by threatening to depart, or by actually departing, from the development process.[1] From this point of view, the person who actually pays the tax, in the sense of writing out the check and sending it to the government, is not always the same as the person who bears the tax, in the sense of whose income is lowered when the tax takes effect.

Courts have recognized the relevance of this analysis, in terms of who bears tax burdens, but they determine the validity of the tax by who actually sends in the check, not whose income is reduced by the tax. Generally, on reservations where a non-Indian sends in the check, a state can tax: and where an Indian would send in the check, the State cannot tax.

The Supreme Court drew this distinction in the recent *Moe* v. *Confederated Salish and Kootenai Tribes*, decided April 27, 1976. With regard to a sales tax, the court ruled that the tax was actually paid by cigarette purchasers; although the retailer—an Indian—sent the money in, he was not the one responsible for paying the tax. The Montana statute provides that the cigarette tax "shall be conclusively presumed to be (a) direct (tax) on the retail consumer precollected for the purpose of convenience and facility only."

In our terminology, the "check for the tax" was written by the retail purchaser, and merely conveyed to the State of Montana by the Indian cigarette dealer. Had the tax been a direct tax on the dealer, presumably the Court would have ruled it invalid. The Court said:

> Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violation of the law by the latter class will go virtually unchecked. *Moe* v. *Salish and Kootenai Tribes*, No. 74–1656, 1976.

It appears that the way that Indians can avoid state taxation on enterprises on Indian land is to be certain that courts rule that the check is written out by Indians rather than by non-Indians. In *Moe*, Montana's law did not make wholesalers or retailers liable for the tax.

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[1] Shoup, Carl S., Public Finance (Chicago: Aldine, 1969), pp. 273–274.

Such language prevents tribes from asserting that the tax is assessed against an Indian. Perhaps a tribal strategy against this would be to tax the purchaser also. Substantial uncertainty about the true jurisdictional boundary between reservations and states will exist while the two parties engage in legal maneuvers to determine who can tax. Meanwhile, the tribe as landowner bears the tax, whether it can collect it as a government or not. In addition, uncertainty of tax jurisdiction creates costs which act as a tax, and which are therefore born by the landowner.

As one might expect from this interpretation of the law, companies, exploiting tribally-owned mineral resources, pay state taxes, particularly severance taxes. The most striking example comes from a large Montana reservation, which is selling coal located on ceded land for which the tribe retained mineral rights.

Between July, 1975, when the state tax went into effect and March, 1976, Montana collected $3,988,242. The tribe's royalties during the same period was $1,270,530. The state's revenue amounted to more than three times the tribe's revenue. The federal government took no action to protect tribal taxation powers against the state.[2]

Should the tribe fail to displace the state tax, it would be unable in future negotiation to obtain as favorable a change in royalty payments as in the presence of the state tax.

The situation was not as bad at this same reservation in regard to taxation of oil and gas. For crude oil, Montana charges 2.1 percent of the wellhead price for the first 450 barrels, and 2.65 percent for all subsequent barrels. The tax on natural gas is 2.65 percent for all production. Both also are charged a resources indemnity tax of 0.5 percent per year. The total tax for natural gas is, therefore, 3.15 percent for crude oil, the total tax lies between 2.6 percent and 3.15 percent. Indian landowners receive in the range of 12.5 percent to 16.6 percent depending upon the lease.[3]

Indian income on reservations is less because states are able to collect severance, wellhead, leasehold, license, possessory interest, and other taxes charged against lessees of Indian land. Although non-Indians may pay the tax, the burden of that tax is borne by Indians as landowners. Should tribal governments attempt to tax as well, they will succeed only in reducing their own royalties. (In some cases, however, if the tribal taxes can be deducted directly from a company's federal tax, the royalty will fall by less than the tax.) Continued successful taxation by states in this manner will be a serious obstacle to the development of Indian economic self-sufficiency.[4] The income of tribal governments in their role as landowners will be less, as will be the income of individual Indians, as owners of allotments and as beneficiaries of per capita payments and governmental services.

The question of general taxation of income and business raises related but somewhat different issues. A fundamental power of a government is the power to tax. Governments use this power both to finance their own activities and to regulate the economy within their jurisdiction. In a world of competing governments, the choice not to tax is often a useful incentive in economic development strategy.

It is well known that different municipalities and states in the United States compete with one another for the location of business

enterprise. If tribal governments are not able to clearly exercise taxing authority within their jurisdictions, tribes will be hampered in their competition with other governments.

State governments regard the possibility that tribes could create "tax havens" within their borders as a serious threat to their own revenue raising powers. To an extent, this is true; it is also true that each state and the District of Columbia is a threat to the revenue-raising powers of its neighbors. Businesses examine state laws in the process of choosing where to incorporate and to locate. States with high tax rates lose revenue when businesses choose to locate in a neighboring state; the same would occur with Indian tribes. One must ask, however, how many states would be seriously threatened by competition with Indian tribes within their borders. Many businesses are forced to choose their location by other factors. Tribal land is limited, as are sites which are suitable for development. The impact on tribal revenue and income is probably much more important than is the impact on state income. This would be especially true if one considers the impact on per capita income, since Indians are not numerous.

In conclusion, state taxation within Indian reservations is a threat to tribal sovereignty and to tribal income. If states successfully impose their taxes, Indians will suffer income losses and economic development efforts will be frustrated. Tribes should attempt to preempt state taxation by levying their own taxes. They should also create agreements with developers which keep the ownership of the minerals and processing in Indian hands, so that state taxation will be frustrated by the identity of the taxed enterprise; this would require contract-for-work or other such types of contracts. These are described in the appendix on mineral agreements. It remains to be seen whether the legal battles can be won by tribes. There is a danger that the cost of those battles will be very great.

D.2. AN EVALUATION OF INDIAN WATER RIGHTS

Of the thirty-two Indian reservations covered in Task Force Seven's economic survey, most indicated what their current water use is, and the available capacity from existing sources, although they failed to indicate what future water requirements will be. A number of responses to the questionnaire stated that water was definitely necessary for future economic development, although this relationship was not documented. Some responses indicated that litigation is contemplated, while others stated that they were actively engaged in litigation over water rights.

There appears to be great diversity of thought on what constitutes Indian water rights and on the need to inventory current water needs and project future requirements. Apparently, some Indian tribes

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[2] As of July 7, 1976, the Secretary of the Interior had not acted on a proposed tribal taxation code, which the tribe adopted in January 1976.

[3] Information obtained from the Division of Miscellaneous Taxes, Montana State Department of Revenue, and the tribe in question. No other tribes in our sample had significant production of oil and gas.

[4] Another example of the monetary issue involved comes from testimony regarding a proposed leasehold tax in Arizona. "Speaking in favor of the bill was the Pima County Assessor, who argued that the state would receive $9.5 million a year and Pima County, $5 million, from the leasehold tax. He said that the tax would substantially reduce area property taxes." The Navajo Times, April 22, 1976. If the tax were enacted and the county taxes are lowered, non-Indians in Pima County would benefit from a tax on the income from the Papago Reservation.

believe that the water will always be there when they want it. The Winters doctrine and other cases somewhat support this belief. Other tribes may not be using very much water and fail to see why any controversy exists. Still other tribes are locked into legal combat to quiet title to their water rights.

This paper attempts to structure the water rights controversy and to determine whether or not these rights are immune from state or Federal interference or seizure. It is believed that all water rights controversies come within the following structure.

The first question concerns the nature of the right to the use of water. Water rights are usually referred to as Winters Doctrine Rights. The following proceeds to clarify the doctrine of Indian water rights. In *United States* v. *Winans*, 198 U.S. 371 (1904) the Supreme Court noted that rights and interests not specifically granted by Indian tribes in their treaties, were reserved. The Court recognized that a treaty was not a grant of rights to the Indians by the United States, but rather a grant of rights by the Indians to the United States. Later, in *Winters* v. *United States*, 207 U.S. 564 (1907) the Supreme Court declared that rights to the use of water were reserved by Indians when they ceded large tracts of land to the United States, even though no mention of a reservation of water rights was made in the treaty. In terms of *Winans* supra, the fact that water rights were not mentioned means that they were not granted to the United States. This is exactly the interpretation taken by the *Winters* court. The *Winters* court also clarified that a state's entrance into the Union does not divest tribes of their rights. Consequently, Winters doctrine rights to the use of water have been recognized as interests in real property. And, as interests in real property, they are entitled to the same protection from abridgment and loss by the Federal government as those obligations respecting the land itself.

May non-treaty tribes invoke the Winters doctrine? Many tribes with water rights problems are not treaty tribes. In *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (CA9, 1939) the court recognized that Executive Order reservations could have Winters Doctrine rights. But there is a substantial difference between the rights, title to which resided in the Indians and which they retained by treaty or agreement, from those, title to which was in the United States, but passed to the Indians when their reservations were created by Congress or Executive Order. Indian rights to the use of water under treaties are immemorial and unimpaired in character since they have always resided in the Indians. But when Congress or the Executive granted title to the Indians those titles are from the United States subject to any interests outstanding when title was conveyed to the Indians. See also *Arizona* v. *California*, 373 U.S. 546 which recognized that Congressional Act reservations were entitled to Winters Doctrine rights.

As a general rule Winters doctrine rights to the use of water apply even if the tribe received title to the land from the United States; therefore, treaty, congressional act, and executive order reservations may invoke the Winters Doctrine.

Current controversy now focuses on whether non-Indians may claim water under the Winters Doctrine. If non-Indian successors in interest to Indian allottees may invoke Winters Doctrine rights to

the use of water, then tribal water is in jeopardy. Essentially, this issue involves the controversy over whether Winters doctrine rights are appurtenant to allotted land or whether the rights are held in common by the tribe, separate from the land. The controversy stems from a muddled opinion written by the Supreme Court in *United States* v. *Powers*, 305 U.S. 527 (1939). The decision arose from an attempt to enjoin the use of water by a non-Indian, who had succeeded to the title to land from an Indian allottee. The court held that the non-Indian succeeded to "some portion of tribal waters." But then the court continued, "We do not consider the extent or precise nature of respondents' (non-Indians) rights in the water. The present proceeding (being an action to enjoin and not to quiet title) is not properly framed to that end," at p. 533. The decision is unclear because it says that a non-Indian successor in interest is entitled to some portion of tribal waters. This implies that Winters doctrine rights are appurtenant to Indian land, irrespective of ownership. But then the court says that it is not deciding whether or not a non-Indian successor in interest has any Winters doctrine rights.

Currently, *United States* v. *Walton*, involving the Crow and Colville reservations, is in litigation. The central issue is whether or not Walton owns any individual right to the use of waters reserved under the Winters doctrine, because he is a successor in interest to Indian allotted land. The tribe claims that Walton does not, because it owns all Winters doctrine rights to the use of water. If Walton wins on the merits, the result could be massive claims on the waters of streams traversing the reservations by non-Indians, claims of equal dignity to those of the Indians. If this were to occur, then the trust asset of probably the greatest value, Indian water rights, would be catastrophically depreciated.

If the tribe wins, it would mean that Winters doctrine rights are separate from, rather than appurtenant to land, and that the right is held in common by the tribe. If this is the case, then non-Indian successors in interest would not be entitled to any portion of tribal waters, but would come under state water law. This would be of positive benefit to the tribe, but of questionable benefit to Indian allottees should they desire to sell their land to non-Indians. Since the land would carry no water right, the non-Indian successor would have to apply to the state for an allocation of water. But since the application is so late in time, that is, prior claims having been appropriated, it is doubtful whether an allocation could be given. The result is that Indian allotted land would carry two values. A lower value if sold to a non-Indian because of no water rights, and a higher value to an Indian or tribal purchaser because if retained in trust it has water rights; therefore, greater value obtains.

Currently, the Solicitor's office in the Department of the Interior and the Lands Division in the U.S. Department of Justice are taking the tribe's position in the *Walton* case. They argue that *Powers* is not dispositive of the above issue. The *Powers* decision's internal inconsistency does not compel the conclusion that the non-Indian successors to Indian allottees own any individual rights to reserved waters.

There are also questions of when and under what circumstances the doctrine may be invoked. Whenever tribes possessing Winters doctrine rights have an increased need for water, they may assert their rights.

In the application of Winters doctrine rights the courts have recognized that the Indians would of necessity need additional quantities of water to meet their future needs.

> What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water . . . may be reasonably necessary not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case. *Conrad Investment Company* v. *United States, 161 Fed. 829 (CA9, 1928).*

The court in Conrad went on to state that other claims to water were subject to modification by the tribes when conditions on the reservation "at any time require such modification," at p. 835. The *Conrad* decision encompasses any "useful purpose."

The same principle was declared by the Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1962). There the court, relying upon the Winters decision, stated that the quantities of water reserved for the Indians were sufficient "to make those reservations livable." Although *Arizona* discusses reserved water in terms of irrigible acreage, it is unlikely that irrigable acreage is the maximum amount of water which can be claimed under *Winters*, because of the tribes' paramount title. In other words, "useful purpose" and "livable" indicate that water demands which exceed irrigable acreage requirements must be satisfied. Irrigable acreage may be employed as a measure, but not as a limitation. *United States* v. *Ahtanum Irrigation District*, 330 F. 2d 897 (CA9, 1964) supports the position that Indian Winters doctrine rights, like the lands to which they are a part, may be used for any "beneficial purpose."

Indian tribes possessing Winters doctrine rights may assert those rights whenever a need exists. Case law indicates that water usage is not limited to farming or agricultural uses exclusively, although irrigable acreage is employed as a measure. Practically any useful, or beneficial purpose which makes a reservation more "livable" would qualify for modification. The power to modify and divert water from non-Indian uses is inherent in the private right ot the water. Indian tribes may assert their rights at any time.

Most importantly, it is necessary that tribes know against whom the Winters doctrine is effective. Immunity of Winters doctrine rights from state and Federal interference or seizure has not been guaranteed, although the *Winters* case would indicate to the contrary:

> When the Indians made the treaty granting rights to the United States, they reserved the right to use the waters, at lease to the extent reasonably necessary to irrigate their lands. *The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees. Winters,* at p. 749. (Emphasis supplied).

Indian Winters doctrine rights are immune from state interference and seizure, but not immune from seizure by the Federal government, even though the case so holds.

Winters holds that treaty reservations are immune from state seizure. Since treaties are supported by the Supremacy Clause of the United States Constitution, treaties are paramount to state law. States are bound by all treaties made by Congress. In addition, many State Enabling Acts respect Indian rights. "Rights reserved by treaties such as this are not subject to appropriation under state law,

nor has the state power to dispose of them, "*Ahtanum*, supra at p. 328. Further, Federal Acts opening surplus rights to the use of water to appropriation, are not applicable to Indian lands. See *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955).

As a general rule, whenever Indian tribes have asserted their Winters doctrine rights to the use of water against states, they have prevailed. In *New Mexico* v. *Aamodt*, Civ. Nos. 75–1069, 75–1106 (10th Cir. 6/19/76) the court upheld Pueblo de Nambe, among other Winters doctrine claims. The court rejected the contention of New Mexico that water uses by Pueblo Indians are controlled by state water law based on the doctrine of prior appropriation.

General principles of state water law have limited application to Winters doctrine reserved rights, *Walker River, Arizona* v. *California*. Doctrines such as prior appropriation and abandoment by non-use do not pertain to Winters doctrine rights, *Aamodt*, supra. Winters doctrine rights are not riparian in character, because the concept of a reserved right to Indian tribes is at variance with limitation inherent in a tenancy in common. Furthermore, because Winters rights may be increased in the future, *Arizona* v. *California*, *Conrad*, *Anthanum*, they are not measured correlatively as are appropriative rights. Indian Winters doctrine rights therefore are paramount in title, private in right, and are superior to State claims on water.

But, are Winters doctrine rights effective against the United States? Winters states that it is effective against "the United States and its grantees," at p. 749. But, because the power of Congress is plenary in nature it may appropriate property. Consequently, although the Federal government may respect the fact that Winters doctrine rights are reserved to Indian tribes, it is not prevented from appropriating those rights by such recognition. The only constraint on the Federal government is the Fifth Amendment to the Constitution, which prohibits it from taking property without due process of law and compensation. Effectively, the Federal government may appropriate Indian Property if it provides just compensation.

The taking itself cannot be prevented because of Congress' plenary power. Federal Acts provide the "due process of law" which allows for taking. Indians get damages in the form of compensation, but they do not get their water back. So although on the surface, Winters doctrine rights appear to operate against the United States, in reality they do not. Every Bureau of Reclamation project which has appropriated Indian water is an example of Federal taking.

Conclusion

It has been recommended that protection of Indian rights be removed from the Department of the Interior because of the presence of other agencies which compete for Indian resources. Apparently, so the theory goes, if the conflict within Interior and Justice were eliminated, then Indian rights would be more diligently protected. While greater diligence is necessary, removal of conflicting interests does not solve the problem of the Federal governments "taking" power. Even If the Bureau of Indian Affairs and Indian legal representation were independently consolidated into a new agency, that would not diminish the power of the Federal government to appropriate Indian water through the Bureau of Reclamation, etc. Elimi-

nating conflicting interests from within Federal agencies is a worthy and important goal, but the absence of such conflict does not mean that competing agencies will conduct themselves any differently from before. Competing agencies will appropriate more Indian water and Indians through greater diligence and conflict-free legal representation will sue to prevent such appropriations. The outcome remains the same, however; Indians get damages and lose their water.

It appears that the only solution to this problem is an Act which applies to all Federal Acts which allow Indian water to be taken. The Act would effectively prohibit all governmental agencies from taking any Indian water. Since it appears that this solution may be politically impracticable, an Act which makes taking subject to future water requirements of Indians, might be a second best alternative. This would require Indian tribes to plan and to document their future water needs. Federal agencies could appropriate Indian water only to the extent that it did not interfere with their potential needs.

Presently, Indian tribes rely on their Winters doctrine rights to the use of water as a shield and a spear. They reason that whenever they want water they can use this weapon against the states. But the real danger is not from the states; it is from the Federal government. Every judicial victory under the winters doctrine means that the state loses. The result is a political victory, somewhat delayed, for the states when the Federal government appropriates Indian water for the States. Conceivably, Indians can use the winters doctrine as a spear to deny states all water. But politically it is not a shield. Politically, the Federal government does what it cannot do judicially under *Winters;* it balances competing needs and then appropriates water for the states. *New Mexico* v. *Aamodt*, supra, rejected the argument which called for "a balancing of competing interests," because Winters doctrine rights are paramount and prior to state claims. But politically, the Federal government may still take Indian water provided it makes just compensation. Compensation however, is not compensatory if Indian lands may never be economically developed as a result.

The real danger lies in the present and in the future; that danger is pragmatic. Whenever Indians push out the states, the Federal Government can retaliate with a reclamation project for the states. Much time and energy should be devoted to amending Federal acts which currently allow for appropriation of Indian water.

E. Indian Capital and Manpower

In the preceding sections, the use of Indian physical resources—land, minerals, timber, fisheries—by non-Indians was discussed. There are reasons why these resources are used by others. Indians lack capital, management skills, and manpower training to develop and use their own resources. In this section, we will examine the adequacy and the impact of capital, management, and manpower training that has been available to the 32 reservations in the survey.

E. 1. Internal Indian Capital

The chief source of internal Indian capital is in trust funds. Indian trust funds are divided into four classifications.

(1) Tribal Trust Funds

These originate from claim awards, sale or lease of tribal land, minerals, timber, water, and interest from investments and funds in the U.S. Treasury. According to 25 U.S.C. § 161b, they are deposited in the U.S. Treasury where they earn 4 percent *simple interest* unless otherwise stipulated by treaty or a court. (25 U.S.C. § 162a) authorizes the Secretary to invest tribal funds. Given the extremely low interest rates at Treasury, the Bureau of Indian Affairs Branch of Investment has been investing these funds since 1968 in Treasury bills, notes, bonds, and time certificates of deposit which earn higher interest. During fiscal year 1975, the bulk of these funds $387.4 million) were invested at 9.19 percent and earned $35.6 million, which is considerably more than they could have earned if invested at 4 percent simple interest.

(2) Indian Service Special Disbursing Agent

ISSDA Funds consist of individual Indian money (IIM) from claims awards; money of mental incompetents; income from trust land of individuals; income from operating funds; and income from special deposit for advance payments from such things as timber stumpage. These funds do not earn interest when deposited at Treasury, but only if invested by the Bureau of Indian Affairs Branch of Investments. In fiscal year 1975, $123.6 million was invested at 8.6 percent and earned $10.6 million. ISSDA funds also consist of Buy-Indian Contract Advances. These are not invested by the Branch of Investments.

(3) Indian Money Proceeds of Labor

IMPL is a small account containing a residue of pre-1928 money which cannot be identified as belonging to any one tribe. It also contains miscellaneous money from schools and agencies. This account is controlled and used by the Bureau of Indian Affairs. These funds do not earn interest when at Treasury, but only if invested by the Branch of Investments. In fiscal year 1975, $9.4 million was invested at 8.6 percent and earned $812,293. The interest from special deposits in ISSDA is deposited in IMPL account and some tribes would like this money disbursed directly to them instead of forfeiting it to the Bureau of Indian Affairs.

(4) Alaskan Native Escrow

This contains income from the 100 million acres from which Alaskan natives are making their selection of 40 million acres. Interest is paid according to a floating interest rate pegged to short-term Treasury rate at the time of payment, or funds may be invested by the Branch of Investments.

For the purpose of our analysis we are interested in only the first category of funds, tribal trust funds. These are the largest and the ones available for tribal investment, whereas the other funds are small and used for current expenses.

Control over tribal trust funds

The only effective control tribes exercise over their trust funds is the decision to leave their funds in trust or to take them out of trust.

They exercise little or no control over collection and deposit, but have some control over investment decisions. The particular way the Secretary has chosen to fulfill his trust responsibility has limited the amount of control tribes are able to exercise.

Funds originating from sale or lease of tribal land, minerals, timber, and water are collected at the BIA agency level and sent to the area office on a daily basis. The area office has 24 hours to deposit these in a federal depository which transfers them to Treasury. At the depository they start earning interest immediately and are available for advance to the tribe or for investment. Theoretically, then, tribal trust funds are available to the tribe 48 hours after collected if the area director approves the tribal budget for their use. However, they are not always collected promptly, accurately, nor deposited according to the Bureau's regulations. From the time claims award money is appropriated, it is invested and not available for disbursement until the Bureau of Indian Affairs approves a tribal plan for disbursement.[1]

For the past three years, as soon as tribal trust funds are deposited at Treasury, they are automatically invested by the Branch of Investments unless it is otherwise instructed. Only five tribes out of 195 with accounts have given the Branch specific authorizations on what to do with their money. However, the Branch prudently contacts the others through their area office investment coordinator when an unusually large deposit is made and no word has been received by the Branch. There is a great need for investment analysts to work with the tribes in order to determine cash flow needs with respect to their investment program. If unforeseen needs occur and a tribe pulls its funds out of investment, it forefits interest. Because no one in the office of Trust Responsibility is capable of evaluating tribal investment plans, investment counseling should be done by the Albuquerque office.

Presently, the Branch can invest tribal trust money only in financial investments which are fully guaranteed, such as time certificates of deposits, Treasury bills, notes, and bonds. Tribal trust funds may not be invested in other government securities (FmHA, FHA, FHLB, FLB, GNMA). This needless restriction by OMB is the subject of a GAO report [2] and two tribes have suits against the Bureau of Indian Affairs for failing to invest in these other government securities. The Branch cannot go into the stock or bond market because the funds must be fully guaranteed. The rate of return on investments obtained by the Branch of Investments over the last ten years has on the average exceeded that obtained on the stock market or on certificates of deposit quoted in the Wall Street Journal.

The 100 percent security has not interfered with the return on tribal trust funds, but it has interfered with where the money can be placed. Many tribes would like the money invested locally, that is, they would like time certificates of deposits from local banks. However, small banks are not always able to accept tribal trust money because the bank does not have the resources to guarantee it. Therefore, the bulk of tribal trust funds are deposited in large financial centers.

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[1] Legal expenses may be paid from claims money as soon as it is appropriated.

[2] Comptroller General of the United States, "Increased Income Could be Earned on Indian Trust Monies Administered by the Bureau of Indian Affairs," General Accounting Office, April 28, 1972.

The Branch usually invests tribal trust funds according to the following criteria:

1. With the highest bidder.
2. With a bank selected by the tribe with approval of the area director.
3. With a bank which has been allowed to match the highest bid upon special request of the tribe.

If options (2) and (3) are not requested, the Branch invests the funds according to the highest bid. If there is a tie for high bid, it goes to the bidder located nearest the tribe.

During the course of our survey we have discovered two instances where the area director denied tribes option (2), that is, to deposit in a bank of their choice. In one case it is clear that the bank, American Indian National Bank, could have offered proper collateral. In the second instance, we could not determine the reason the area director did not approve their request.

Thus, it appears that the only option that exists is to invest at the high bid unless the tribe decides to pull their funds completely out of trust and invest them independently. However, the tribe must have the approval of the Office of Trust Responsibility. Once the funds are taken out of trust, it is not clear if they may be put back. The Branch of Investments has waited nine months (as of March 1976) for a clarification of this point from the Solicitor's Office. This is another indication that the Bureau of Indian Affairs has no clear idea of what constitutes their trust responsibility. If the tribe invests its own funds, it will not receive a 100% guarantee, but only a normal federal insurance guarantee of $40,000. Only two of the reservations interviewed had taken their money out of trust and were investing it themselves. Most of the tribal chairmen said that they lacked the expertise and that their people wanted their money 100% guaranteed.

When one examines the thirty-two tribal trust fund balances as of December 1975 it is apparent why some tribes are unwilling to invest them without a 100% guarantee (see Table 1). Some funds are small in relation to the population, originated from a non-renewable source such as a judgment claim, and the interest is the only reliable source of tribal income. This is especially true for tribes whose physical resources were taken from them and their only compensation was a meager financial one. Others have accumulated large trust fund balances from the annual returns from their natural resources. However, they, with two exceptions, are no more willing than those with small balances to invest it themselves.

There are some recommendations which are readily apparent from our brief discussion of the handling of trust funds. They are procedural and statutory changes which in themselves will not solve the problem of insufficient capital. Nevertheless, they should be mentioned:

1. ISSDA and IMPL accounts should earn the same interest as tribal trust funds when deposited in the U.S. Treasury.
2. The ISSDA "special deposits" interest should go to tribal trust funds accounts or directly to the tribe, not to IMPL accounts.
3. Interest should be paid on accumulated interest in treasury accounts. This can be done by changing the words "simple interest" to "compound interest."

4. The current 4 percent simple interest rate should be increased, possibly to 6 percent compound interest.[3]

TABLE 1.—TRIBAL TRUST FUND BALANCES AS OF DECEMBER 1975

	Reservations, ordered but not coded [1]	Balance	Trust funds per capita	Chief origin
SA	1	$380,788	$1,046	Claims.
	2	428,309	653	Do.
	3	32,413	68	Do.
SNA	4	0		
	5	0		
	6	156,706	609	Resource.
	7	47,022	128	Do.
	8	679,147	4,116	Claims.
	9	215,177	837	Resource.
	10	1,142,799	2,885	Claims.
	11	3,913	35	Resource.
LA	12	867,474	191	Do.
	13	623,091	150	Claims.
	14	1,066,907	746	Resource.
	15	2,033,653	682	Claims.
	16	140,216	138	Resource.
	17	0		
	18	96,979	72	Do.
	19	8,550	1	Do.
	20	2,906,649	1,845	Do.
	21	1,947,089	379	Do.
	22	499,266	500	Claims.
	23	19,076,419	9,251	Resource.
LNA	24	6,953,243	1,443	Claims.
	25			
	26	1,307,400	161	Resource.
	27	0		
	28	10,907,879	10,290	Do.
	29	799,818	1,003	Claims.
	30	[2] 44,885	10	Resource.
	31	[2] 0		Do.
	32	1,495,012	257	Do.

[1] Given that the information in this section is extremely sensitive, the reservations have not been assigned their usual code number and have instead been listed indiscriminately.

[2] Trust funds were withdrawn during year and are being invested by the tribe.

Source: Tribal trust fund balance statement for December 1975.

Other sources of internal capital formation

The other source of capital, outside of accumulated trust funds, is annual revenue from tribal resources. In the first section of this chapter these revenues were compared with the expenses of tribal government administration.

Only eleven reservations had income sufficient to administer their governments and invest in their own development. Was total internal capital sufficient to promote the development of these eleven reservations? Only land consolidation costs have been estimated. Five of the

[3] There is some uncertainty on whether to peg the new rate at 6 percent compound interest or to suggest a floating rate which would be based on the current rate of interest. Trust funds of other government agencies sometimes earn interest according to the following formula: ". . . a rate which is the higher of the rate of 4 present per annum or a rate which is 0.25 percentage points less than a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with comparable maturities."

The formula establishes a floor of 4 percent. If the current market yield is 7.25 percent, the deposit would earn 7 percent, the .25 percent is a penalty for the establishment of the 5 percent floor. The current average market yield would be based on those intruments with maturities comparable to the trust fund deposits. Therefore, short-term trust funds would receive an interest rate based on short-term current average market yields. Long-term trust funds such as minor's judgment funds would receive an interest rate based on long-term current average market rates.

Current average market yields could be determined semi-annually, quarterly, or monthly. It might be better to have funds invested than a deposit at the Treasury at a fluctuating interest rate. For example, if the funds are invested at 6 percent compound interest, they earn 6 percent the entire period. If these fund were on deposit at Treasury, they would earn the current market yield which could change semi-annually or quarterly, so that one could start out at 6 percent and end up at the floor, 4 percent.

Very few government agencies have their money on deposit at the Treasury. Most of their money is invested through Treasury in government securities. Indian trust funds have an apparent advantage in that they can be invested in time certificates of deposit as well as government securities.

eleven reservations with significant amounts of internal capital were allotted reservations. Only one of these can, and is, financing land consolidation out of its internal funds. During the course of this study, estimates of the capital necessary to fully develop Indian land, timber, minerals and water could not be done. Until such studies are undertaken, Indian capital needs cannot be adequately assessed.

Tribal control of other sources of internal capital

The fact that eleven reservations have large annual incomes does not necessarily mean that they can or will invest it in their own development. Two of the eleven make large annual per capita payments. Tribal governments justify per capita payments by pointing to members' low per capita income. But such payments reduce the pool of investment funds, and perpetuate the low per capita income status. If reinvested in productive enterprises each member could receive a greater return through permanent employment.

The tribe is not free to invest its annual timber, mineral, or leasing revenues as it chooses. A tribe must submit a budget to the BIA before its money can be made available to it. This procedure was probably designed to protect Indian people from the unscrupulous. However, tribal governments should have their own internal safeguards to protect against abuse. Tribes do have control over profits derived from tribal businesses, recreational licensing, taxes, and when stipulated by lease, income from agriculture and grazing. But, because of the Bureau's pervasive control, tribes have even lost control over the use of these revenues.

At Ft. Apache, for example, the Tribe consolidated its credit and financing operations under the BIA—Tribal Revolving Credit Program. But the BIA holds ultimate approval power through 25 CFR § 91. The tribal council voted to invest timber enterprise profits in a shopping center. It was clear that the transfer would not have impaired the timber enterprise. The BIA would not approve the transfer because the timber enterprise had an outstanding loan with the RCP. Since the enterprise was making repayments on schedule, one questions BIA's judgment. The reasonable borrower sees that paying off a low interest loan during a period of inflation is foolish. The reasonable borrower will make payments according to his fixed schedule. Why should a tribe act unreasonably? Similarly, during periods of high interest rates, a reasonable borrower would first try to finance his needs internally. Why shouldn't tribes also act reasonably? If the economic environment is such that there is high inflation and high interest rates, the tribe should pay its loans on schedule and finance its needs internally, if possible. The Bureau, however, while criticizing the lack of tribal business acumen, prevents it from acting as any reasonable borrower-investor would.

E.2. EXTERNAL CAPITAL AND MANPOWER DEVELOPMENT

While the majority of the sample reservations had little internal capital to invest, external capital was available in limited amounts through various government programs. One problem with this external capital is that it could not be shifted to the most productive sectors where it would have had the greatest return. Instead, it was tied to various government programs, which Indians could take or leave. Major investments in infrastructure and economic activities on thrity-two reservations were documented for a period of ten years, 1965–1975.

In this section the distribution of such investment capital and its impact in terms of income and employment will be examined.

Table 2 illustrates the distribution of capital among the various sectors. It is striking to note that capital is very unevenly distributed over the sectors. This is due to a combination of poor planning and no control over outside capital flows. In every case, more than 50% of investment capital has been spent for infrastructure. Examination of infrastructural components, water, sewers, roads, telephones, electricity, housing, and community buildings, indicated that housing was the most important.

Table 3 indicates how many houses have been built by HUD and BIA over the past ten years and gives their approximate value. Housing infrastructure is necessary to support a healthy labor force. The increase in available housing has probably been the single most important factor in attracting people back to the reservation. While reservation-urban migration is beyond the scope of this study, the relationship between housing and rates of return should be examined. In the short run, construction of housing can have an impact on the local reservation economy, if Indian contractors and laborers are used.

TABLE 2.—DISTRIBUTION OF EXTERNAL INVESTMENT CAPITAL AMONG SECTORS (1965–75) [1]

[In percent]

Reservation code No.	Infrastructure (1)	Planning (2)	Agriculture and land consolidation (3)	Resources development (4)	Manufacturing (5)	Commerce (6)	Manpower development (7)
3	78.9	0.8	10.6	Agriculture [2]	0	0.5	9.0
5	61.9	1.5	19.4	0 percent	7.1	7.0	2.9
6	78.6	1.6	9.2	Agriculture [2]	.1	6.7	3.6
9	50.9	6.0	33.4	0 percent	0	1.0	8.2
15	83.6	.7	0	3 percent	1.4	14.5	.3
21	62.7	1.9	8.3	18.3 percent	0	0	8.6
22	79.9	.1	0	Agriculture [2]	4.1	11.5	4.2
26	77.0	1.3	12.6	do [2]	2.3	.2	7.0
28	88.9	1.1	1.4	0 percent	0	2.0	6.3
29	71.7	1.5	10.9	Agriculture [2]	([3])	5.6	10.1
31	72.0	10.0	4.0	0 percent	0	11.0	3.0
32	54.5	2.2	.9	15 percent	([4])	25.8	1.7
4	71.4	4.8	0	0 percent	0	1.6	22.0
7	66.4	1.6	24.1	Agriculture [2]	0	6.5	1.2
8	57.0	1.0	0	12 percent	0	23.0	8.0
10	80.5	0	6.2	Agriculture [2]	4.2	0	12.9
12	60.5	2.9	.2	0 percent	0	30.7	4.5
13	95.2	.1	0	0.5 percent	1.1	1.7	1.2
16	93.5	1.8	.7	0 percent	0	3.2	.5
17	94.5	1.4	1.0	2.5 percent	0	0	.4
19	92.7	5.1	1.9	0 percent	0	0	.2
27	77.1	([5])	2.9	0.7 percent	1.2	6.5	10.9
2	72.7	5.0	0	17.9 percent	0	0	4.3
14	99.7	0	0	0 percent	0	0	.3
30	38.1	5.4	.8	23.2 percent	17.4	2.7	12.4
1	100.0	0	0	0 percent	0	0	0
11	81.2	2.4	8.2	do	0	7.1	.8
18	83.0	0	17.0	do	0	0	0
20	92.7	1.4				5.5	
23	74.2	2.4				23.4	
24	100.0						
25	92.0	.6	0	0 percent	0	6.4	0

[1] Investment capital includes all grants for physical projects and long-term loans.

[2] No other natural resource but land, and so, col. 3 and 4 should be combined. Col. 1—Infrastructure—water, and sewers, roads, telephones, electricity, housing, and community building. Col. 2—Planning—planners and studies. Col. 3—Agriculture—land purchase, improvement (not maintenance), building and equipment. Col. 4—Resource—mining, forestry, fisheries, primary and secondary activities. Col. 5—Manufacturing—industrial parks, buildings and machinery. Col. 6—Commercial—shopping centers, restaurants, motels, marinas, ski lifts, campgrounds. Col. 7—Manpower—OJT, AVT IAT, CETA, skill centers.

[3] SRHCO.

[4] Electronics.

[5] Not available.

Source: From TF No. 7 reservation questionnaires.

TABLE III.—HOUSING CONSTRUCTION AND DEMAND ON 32 RESERVATIONS

Reservation	Number of new HUD homes 1965–75	Value of new HUD homes	Number of new BIA homes 1965–75	Value of new BIA homes	Existing houses 1975, total	Houses in standard condition		Substandard houses: Repair		Substandard houses: Replacement		New housing demand	
						Number	Percent	Number	Percent	Number	Percent	New families	Replacement
	(1)	(2)	(3)	(4)	(5)	(6)		(7)		(8)		(9)	
Cheyenne River	588	$15, 964, 200	0		957	536	56	95	10	326	34	97	326
Crow	235	6, 456, 625	1	20, 000	597	323	54	87	14	187	31	123	187
Crow Creek	225	6, 159, 375	11	77, 500	336	240	71	41	12	55	16	86	55
Fort Hall	15	368, 250	60	343, 898	556	215	38	220	39	121	22	54	121
Lac du Flambeau	20	1, 534, 325	7	77, 000	161	112	69	41	25	8	5	15	8
Nett Lake	44	1, 513, 500	7	89, 437	93	60	64	9	9	29	31	10	29
Omaha	135	3, 327, 750	11	58, 900	235	178	75	0	0	57	24	34	57
Rosebud	142	4, 025, 700	5	75, 500	1, 512	1, 084	72	74	4	354	23	249	354
Spokane	0	0	8	68, 400	240	168	70	15	6	57	24	10	57
Standing Rock	507	13, 765, 050	4	20, 000	933	668	71	227	24	38	4	64	38
Umatilla	70	1, 620, 500	2	32, 500	222	167	75	39	17	16	7	44	16
Warm Springs	50	1, 155, 000	9	25, 500	390	263	67	10	2	117	30	100	117
Colville	0		7	59, 950	712	398	56	114	16	200	28	90	200
Duck Valley	70	1, 674, 750	18	360, 000	368	218	59	75	20	75	20	25	75
Fort Apache	450	9, 945, 000	0		620	371	60	13	2	236	38	10	236
Fort McDermitt	45	774, 500	0		76	45	59	10	13	21	28	20	21
Hoopa Valley	30	735, 000	13	184, 371	(1)								
Hualapai	80	2, 050, 000	10	(1)	135	104	77	0	0	31	23	19	31
Laguna	197	4, 801, 875	6	43, 200	775	497	64	119	15	159	20	117	159
Makah	35	917, 000	0		192	122	63	23	11	47	24	30	47
Morongo	21	527, 100	0		(1)								
San Carlos	171	3, 779, 000	0		1, 122	270	24	3	.26	849	76	25	849
Chehalis	0		5	50, 700	40	33	82	3	7	4	10	28	4
Kickapoo	68	1, 545, 300	0		101	70	69	5	4	26	26	8	26
Swinomish	26	657, 200	2	37, 000	78	68	87	4	5	6	8	30	6
Carson Colony	24	581, 400	3	12, 400	41	26	63	5	12	10	24	6	10
Havasupai	0		37	1, 200, 000	65	38	58	0	0	27	41	0	27
Moapa	32	791, 200	0		34	32	94	2	5	0	0	20	0
Nambe	30	705, 750	0		54	47	87	7	12	0	0	15	0
Picuris	18	423, 450	0		20	20	100	0	0	0	0	25	0
Prairie Island	0		10	150, 000	21	14	67	3	14	4	40	0	4
Reno-Sparks	85	1, 391, 000	0		141	126	89	5	3	10	7	10	10

[1] Not available.

Source: Col. (1), from HUD housing authorities; col. (2) from prototype costs for area—average (1970–75) cost of 3-bedroom house; col. (3) and (4), from area BIA offices; col. (5) through (9), BIA Housing Inventory for 1974.

Housing construction has had little impact because non-Indian contractors were given the jobs. This situation has changed somewhat during the last three years because of the increase of Indian contractors and the creation of Indian action teams. Table 3 demonstrates that the demand for Indian housing is still great. Indian contractors and Indian action teams are still necessary. The problem of how to meet existing housing demand is the subject of a special task force paper.

The remaining capital is spread among agriculture, resource development [1] (minerals, timber, fisheries) manufacturing, commerce, and manpower training. Most of the investment in agriculture is accounted for by land consolidation which is examined above. Very little has been invested in enterprises which process and refine raw materials such as minerals, timber, or fish. There has been some development of Indian commerce—restaurants, gas stations, shopping centers, recreational facilities. The majority of the commercial capital has been invested in motels, marinas, ski lifts, etc., which employ few people and serve non-Indians. Due to their isolated locations and poor management, they have been unprofitable.

Table 2 indicates that a considerable portion of external capital has been directed to manpower programs such as On-The-Job Training (OJT), Adult Vocational Training (AVT), Comprehensive Training and Employment (CETA), and Indian Action Teams (IAT). The latter two programs account for most of the funds.

There was a dramatic increase in FY 1976 in both programs which is not recorded in the table. CETA funds are currently being used to create temporary jobs rather than for training. In contrast, Indian action teams are trained, usually in construction skills, as they improve and repair existing infrastructure. In the future, probably no less than 10 percent of external capital will go to "manpower employment." On one reservation 22 percent of the outside capital has been invested in manpower programs but little has been invested in agriculture, resource development or manufacturing. Training without creating permanent jobs will not solve low per capita income.

E.3 IMPACT OF INTERNAL AND EXTERNAL CAPITAL ON EMPLOYMENT AND INCOME PER CAPITA

The impact of increased investment can be measured by examining changes in income per capita and employment. Both should increase with the increase in investment. The task force looked at income and employment figures for the 32 reservations for the time period 1967–1975. Table 4 compares US Census 1970 per capita income with BIA 1975 per capita figures (See Col. 1 and 2). In fifteen cases out of the twenty for which comparative data exists, there appears to have been an increase in income. The figures should be examined closely. U.S. Census figures are obtained from surveys of individuals. It is an accepted fact that the U.S. Census inadequately surveyed Indian people.

The total number of Indians recorded was 792,930, which is probably an under-estimate. For example, Navajo population was reported as 96,743, while Navajo tribal estimates indicate 150,000. Whatever the defects of Census figures, they are surpassed by the defects of the

[1] Resource development here means investment in the processing of raw materials.

Bureau of Indian Affairs' statistics. The Bureau calculates per capita income by summing all known sources of income, including government programs, and divides this by the number of residents. BIA estimates include income which was never received by individual Indians, because it was either earned by non-Indians, or used, invested, or saved, by the tribal government.

TABLE 4.—INCOME PER CAPITA AND UNEMPLOYMENT

Reservations	1970 U.S. census per capita income	1975 BIA per capita income	Percent				
			1967 BIA Unemployment	1970 BIA unemployment	1975 BIA unemployment	1970 U.S. census unemployment	1970 BIA unemployment
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Cheyenne River	$918	$1,480	25	32	27.8	18	32
Crow	970	4,140	28	34	38.6	11	34
Crow Creek	768	2,140	66	65	45.6	30	65
Fort Hall	1,373	1,420	45	42	50.0	16	42
Lac du Flambeau	1,242	990	17	37	36.1	9	37
Nett Lake	1,292	1,170	53	60	60.8	17	60
Omaha	792	1,980	50	44	55.2	0	44
Rosebud	846	1,510	56	37	37.9	48	37
Spokane	1,282	2,130	27	74	29.5	47	74
Standing Rock	1,002	1,470	47	42	40.0	29	42
Umatilla	1,161	1,560	30	20	43.3	17	20
Warm Springs	1,625	5,450	41	28	8.3	10	28
Colville	1,947	3,340	(1)	49	44.2	30	49
Duck Valley	1,204	1,050	42	42	36.9	29	42
Fort Apache	876	(1)	38	56	42.0	13	56
Fort McDermitt	(1)	1,220	43	78	52.0	(1)	78
Hoopa Valley	2,225	5,560	22	61	7.3	21	61
Hualapai	1,218	1,840	82	46	16.2	14	46
Laguna	1,345	1,870	47	35	18.8	6	35
Makah	2,341	1,750	36	45	34.9	38	45
Morongo	(1)	(1)	17	8	24.5	(1)	(1)
San Carlos	687	1,300	34	39	50.7	13	39
Chehalis	(1)	800	40	27	45.7	(1)	27
Kickapoo	(1)	(1)	(1)	(1)	20.5	(1)	(1)
Swinomish	1,122	1,010	39	43	43.9	10	43
Carson Colony	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Havasupai	(1)	(1)	90	40	77.9	(1)	40
Moapa	(1)	(1)	15	45	50.0	(1)	45
Nambe	(1)	2,480	67	33	27.7	0	33
Pitures	(1)	1,060	57	44	68.7	0	44
Prairie Island	(1)	(1)	32	53	43.4	(1)	53
Reno-Sparks	(1)	(1)	(1)	(1)	62.9	(1)	(1)

[1] Not available.

Source: U.S. Census 1970, unpublished data. BIA Labor Force Reports—1967, 1970, 1975.

The apparent uselessness of per capita income data is not overly disturbing because per capita income as a measure of economic development is far from satisfactory. It is not a good measure of actual welfare because it indicates only what each person's income would be if all income were equally distributed. In actuality, on reservations as in the rest of the world, there are substantial discrepancies between the wealthiest and the poorest individuals. A more meaningful indicator of the economic position of a group is its rate of unemployment. It was the intention of the Task Force to measure changes in unemployment on the various reservations from 1967 to 1975 to determine whether increased investment had any impact on lowering unemployment.

The period 1967–1975 was chosen because it appeared to be a high point in terms of the availability of external capital. Examination of BIA unemployment data for 1967–1975 (Col. 3–4–5) did not reveal any consistent pattern. Of the twenty-eight reservations with com-

parative data, unemployment rates for seventeen were actually lower in 1967 than in 1975. In the remaining eleven cases, unemployment had declined in 1975. The pattern of increase and decrease is so erratic that no attempt was made to correlate them with successive increases in investment. A further deterrent to correlation was due to unreliability of the data base. The BIA Labor Force statistics are compiled on an annual basis by the agency or area office. The agency does not take a household survey to establish these figures but merely adjusts the previous year's figures to reflect any changes it thinks may have occurred. The Bureau's justification for lack of accurate statistics is twofold. One, it claims lack of personnel. Two, its response through its representative is sufficient, "What good are accurate statistics?"

It is disheartening that there is no determination on the part of BIA officials to accurately document the situation. If accurate unemployment figures are not collected from year to year, how can one judge the effect of government programs, particularly manpower programs? Good statistics are not ends in themselves but invaluable to evaluation of federal programs and policy. Indian income and employment statistics are used by the Department of Labor to determine Indian fund allocation under the Comprehensive Trainі ng and Employment Assistance Act. The officials administering this program know the US Census figures and BIA figures are unreliable. Nevertheless, they are unable to collect their own data and so rely on Census and BIA. There is no excuse for basing federal program planning and funding on an unreliable data base.

A second intent was to compare the Indian rates of unemployment with US Census rates for the nation. While this comparison is often made by respected scholars, it is a falacious comparison. The BIA uses a different definition of employment from the US Census.

The Census defines an unemployed person as one who has been seeking work within the four week period previous to the interview. The BIA definition includes those seeking work as well as those not seeking work but who are employable. This gives the BIA a larger labor force figure and inflated rates of unemployment. For example, the BIA Labor Force Report, April 1975, reported the labor force of Standing Rock as 1229 of which 737 were employed, and 492 were not employed. Of the 492 unemployed, 320 were seeking work. The BIA rate of unemployment was (429/1229) 40 percent. If we use the US Census definition and subtract out those not seeking work (172) from the labor force and from those unemployed, we obtain a lower rate of unemployment (320/1055) 30 percent.

The BIA is aware that it defines unemployment differently but it justifies the difference by saying that the nature of job search is different on the reservation and so the U.S. Census definition has little relevance. On the reservation there is almost perfect job information. Everyone knows when there is a job opening and therefore does not have to search continuously. Therefore, if a Census taker asked an Indian, "Have you looked for a job in the past four weeks?" he might reply no because there had been no job openings and being rational he wouldn't seek what didn't exist. If BIA is correct, then the U.S. Census figures for American Indians are underestimates, while BIA figures are overestimates (see Columns 6 and 7, Table 1). The truth is somewhere in between. Possibly for the 1980 U.S. Census,

the question should be modified for American Indians. They should be asked, "When job opportunities occur, do you seek them?" In this way the U.S. Census might be able to more accurately determine who is to be included among the unemployed.

As for the BIA, its data base will remain inaccurate and useless for any comparative purpose of determination in the allocation of federal grant money and for program evaluation until it is actually based on household surveys, and uses the same definition as the U.S. Census.

There is an urgent need to develop a uniform, consistent and accurate data base now, so that the effects of government programs and all expenditures on development can be measured.

E.4. STRUCTURAL CHANGES NECESSARY TO INCREASE IMPACT OF EXTERNAL CAPITAL [2]

In the absence of reliable data on income and employment, it was impossible to analyze the impact of the inflow of federal funds in the form of grants and loans.

Given the fact that unemployment rates remain high, one would assume that the impact has been minimal. This suspicion is confirmed by the GAO study of the White Mountain Apache where it was able to adequately trace the inflow and distribution of federal expenditures.

The GAO study developed a measure of the value of the total output of goods and services produced by the reservation economy which it called gross reservation product (GRP).

However, GRP does not show what determines changes from one year to the next. To understand the reason for changes in GRP, it is necessary to calculate a multiplier. A multiplier is a factor which shows how much GRP changes as a result of a change in governmental expenditure. To illustrate, if the government spends an additional $1,000 in the local economy and the multiplier is 1.5, one can expect that GRP will increase to a level of $1,500 ($1,000×1.5) as a result of the government's expenditure.

This increase in GRP is a multiple of the original expenditure because of the following events. Increased governmental expenditures provide increased incomes for both governmental employees and the producers of governmental goods and services. Most of this increased income is likely to be spent on the reservation for additional goods and services. However, part of the increased income is likely to be either saved or spent off the Reservation—thus, no longer contributing to GRP. For the part of increased income spent on the Reservation, those who receive it will spend it again (but again part will "leak-out" through savings or external spending). This process continues until the initial expenditure reduces to zero. The end result is a multiple increase in GRP as the result of new governmental expenditure. GAO calculated a multiplier of 1.3 for Ft. Apache using the accepted formula developed by economists. This multiplier is lower than that which has been calculated for other communities in the United States by other studies. Generally, the more isolated and the smaller the

[2] This section was written by Jim Hedricks and Barry Anderson, General Accounting Office.

for this is that smaller communities depend much more heavily on imports from outside so that much of the increase in external governmental expenditure in the community "leaks out" of that community through payments for imported goods and services. GAO found that per capita money income to Tribal members was only $1,418 in 1972 compared to $4,478 for the nation in that year. The money income "gap" between the Reservation and the nation of $3,000 measured how far the Reservation fell below the nation in terms of economic well-being. The magnitude of the economic problem from an overall Reservation standpoint is illustrated by the following analysis showing the approximate scale of governmental expenditures needed to increase Reservation per capita incomes to the national level.

The total personal income received by Reservation Apaches averaged only 22.6 percent of GRP for the five years of the GAO study. Another large proportion of GRP (about 25 percent) went into the incomes on non-Apaches working on the Reservation. Exact data were not available on the recipients of the remaining one-half of Reservation GRP, but it apparently went to business and government purchase of goods and services off the Reservation, capital investments and inventories, and other expenditures not directly resulting in increases in Apache incomes. Thus, there is far from being a one-to-one correspondence between increases in GRP and increases in Apache money incomes; in fact, GAO estimated that only $.226 out of every $1.00 in GRP goes directly into Apache incomes.

An increase in total personal income to Apaches of about $20 million was necessary to lift all 6,520 Apaches to the National level of per capita income. Since the personal income to Apaches averaged only 22.6 cents of every dollar in GRP it would take an $89 million increase in GRP (1.0/.226×$20 million) to bring Apache incomes to National levels. However, as has been shown in the preceding section, when the Government attempted to increase GRP through increases in expenditures, there is a multiplier effect on GRP. That is, an increase in expenditure results in a greater than proportionate increase in GRP. The Fort Apache multiplier has been calculated to be 1.3. Applying this multiplier to the needed increase in GRP (1.0/1.3×$89 million) results in an estimate that Government expenditures must be increased by about $69 million to close the income gap on the Reservation. This amount would represent a very substantial increase in Governmental expenditures over the 1972 expenditure level of $22.2 million by Federal, State, and local governments.

GAO's findings have obvious implications. Federal expenditures have had a lesser effect than what might otherwise be expected, because of certain structural weaknesses which are common to all reservation economies. The fact that non-Indians control reservation economies means that Indians receive only ¼ to ½ of federal expenditures.

The effect of these expenditures is further diminished by a low multiplier or the fact that Indians spend their income in non-Indian establishments on or off the Reservation. Thus, the federal expenditures accrue to others or "leak out." The federal expenditure impact on Indian income and employment is reduced. This situation can be

community, the smaller its multiplier becomes. The principal reason changed only by returning control to Indians over their own economies. Dumping capital or federal funds into reservation economies will have little effect unless the capital is directed in such a way as to help Indians gain control of their economies.

For example, when capital is invested in infrastructure, Indian contractors and laborers should be hired. Capital should be invested in the commercial sector so that Indians can buy on the reservation from other Indians and thus keep the federal dollars circulating. Capital should also be invested in job producing enterprises.

CHAPTER IV

A. Federal Government Policies and Programs

The development by Indians of their reservations requires not only financing and assistance from the Federal Government, but an active effort on the part of the Government to demonstrate that it has changed its ways. The long history of Government control and manipulation of Indian lives and resources has created a structure which promotes survival rather than developmental goals. Congressional plenary power is awesome, and its fulfillment of the trust responsibility requires support of development far beyond what is being done.

Development is not an easily defined term. This is so because each society must define what direction its own development is to take and toward what goals it seeks to develop. The essence of development as used here is not a quantifiable, monetized level, but a sustained and eventually self-sustaining exercise of control over their own lives by Indians. The Federal Government must heavily support Indian Development, but it cannot do Indian Development.

As detailed elsewhere in this report the Government must provide capital, support for the training of human resources and adequate physical infra-structure. These are essential factors of development. At the same time it must ensure that these factors can be freely combined by Indians, utilizing their own resources without interference and with the assurance that success in the endeavor will not diminish their rights.

Examination of Government programs and their policies relating to development has identified a number of basic policy issues which must be resolved. Some issues are more difficult to resolve than others. Government commitment is what is necessary.

POLICY ISSUES

1. Trust responsibility and development

Debates over whether the trust responsibility encompasses a duty to develop are ultimately less important than the implicit conflict which now exists between poorly articulated policies of trust responsibility and development. As enacted into laws over past decades, trust responsibility has been expressed as a mechanistic and overly paternal responsibility to protect Indians and their resources from Indians. While this has been elaborately developed into a maze of laws and codes, the core of the responsibility—the protection of Indian sovereignty and property—has been left open to erosion, theft, and abuse by individuals, states, and the Government itself. The pitiably weak policy of allowing Indians to develop over the past 15 years cannot be reformed without correcting the Government's policy on trust responsibility. To do this the Government must enact clear and unambiguous laws which affirm the basis of its trust responsibility—the

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protection and preservation of Indian sovereignty and property—and the essential relation of the Federal Government to tribes. This should also reaffirm the Government's responsibility for providing services to reservations based on treaties, laws, and the fundamental necessity of upholding tribal sovereignty.

The massive accumulation of laws, codes, and directives based on over 100 years of paternalism must be carefully but resolutely reduced to conform to the needs of Indian peoples for protection and assistance. With these conditions the Government's policies supporting development could fully mature.

2. Termination and development

The concept that termination of Federal recognition of tribes is somehow related to the level of tribal development stems from the misunderstanding of trust responsibility, as discussed above. Termination as a reward for development is muted in current legislation, but remains as a very real threat. In the minds of those who support termination, development has become a modern substitute for the last century's goal of civilizing Indians. The fundamental difference between development and "civilization" or assimilation is that development is the expression of the aspirations of the people who are developing, not necessarily their achievement of the standards and lifestyle of the wider society around them. Unless all threat of termination and reduction of rights and services is removed, the Government's support of development will remain a futile exercise for both Indians and the Government.

3. Needs versus rights

The rapid increase in Governmental expenditures for minority, poverty, and disadvantaged groups in the United States has led to another policy confusion. Indians are clearly a minority, poor, and disadvantaged. As such they are clearly eligible for programs and attention directed at these characteristics. As a source of assistance and support for individual Indians, and a supplementary source of services for tribes, this presents problems only in terms of the administration of many of these programs by states.

Indians are, however, unique as a group within the United States. As the original inhabitants and possessors of the continent, their treaties and the long process of attrition and their forced sale of most of their lands has left the Federal Government with exceptional responsibilities to them. These are not contingent upon their numbers, poverty, or present status, but upon their being Indians. The Government's responsibility to tribal authorities is only properly carried out through enactments which respect tribes' standing and sovereignty; not through programs incorporating criteria of needs as qualifications.

This policy confusion repeats the same pattern as termination. It operates, however, in a more insidious way in terminating services and subsidies at a point most likely to frustrate both the individual or tribal recipient and the Government. Both parties end up being convinced, for the wrong reasons, that their preconceptions of the other were correct.

Implementation and administration

The focus of the Task Force's efforts have been far more on policy implementation than policy formation. The conflicts and confusions

summarized above are painfully evident in the workings of the agencies within the Executive Branch. Different departments and agencies suffer more noticeably than others from particular conflicts. The most obvious theatre of conflict is the Bureau of Indian Affairs within the Department of the Interior.

Bureaucracies can only be expected to exert limited initiative when they operate under basic conflicts of policies and responsibilities. The primary mission of the Department of the Interior is the protection and management of the nation's natural resources and public lands. If the delegation of responsibility for Indian Affairs to this Department ever made sense, it certainly does not make sense currently. As a large, but weak, component of Interior, the Bureau is responsible for protecting and advocating the rights of Indians within an agency whose other responsibilities most frequently and directly conflict with the rights and needs of Indians. The development of Indian resources need not and will not always be consonant with the nation's interests. The Bureau is in a position in which neither its needs, nor those of Indians, can be adequately presented or fairly argued. The entire structure of policies also works against the Bureau's advocacy of Indian needs. The clearest examples of conflicts within the Bureau and between the Bureau and other divisions are in the areas of resource protection and development. The Bureau's stance on land consolidation provides a painful example of its attempts to serve both national and Indian interests simultaneously, to the detriment of both.

The Bureau is also confronted with the conflict of attempting to carry out the Government's trust responsibility and the development of reservations. Both the structure and the historical role of the Bureau on reservations weakens its ability to effectively adovcate development. The Bureau's internal regulations, developed over its long history as the administrator of reservations, seriously conflict with the types of programs and the approach needed to support development on reservations under Indian control. This is illustrated by the problems within the Bureau in promoting innovative employment and training programs and its attempts in implementing self-determination.

Coordination, Consolidation and Funding Simplification

Coordination among programs serving or funding Indian development have generally been poor. This has been true with categorically related programs in different departments and between programs within a single department or agency. Given the generally inadequate levels of funding and uncertain future of some programs, this lack of coordination offers some positive aspects for Indians. Multiple and overlapping sources of funding offer a higher overall success rate in grantsmanship and the chance that some sources of funding will continue if one is cut off.

While greater coordination among programs is clearly necessary, coordination cannot substitute for programs which provide adequate funding within categorical limits which realistically conform to Indian needs. Many Indians feel that coordination is frequently not in their interests, because it perpetuates overly-narrow, under-funded programs.

For the reasons mentioned above, the consolidation of related programs into larger programs is viewed in part as a threat to funding

levels. Consolidation is sensible and acceptable only if proportional or significantly increased funding levels are assured. Unless the consolidation of programs is related to structural changes which establish Indian control and/or input into programs, it frequently further divorces programs from Indian needs. The same criticism has been made of coordinating committees and councils, which coordinate Federal inputs but insulate against Indian inputs.

The Joint Funding Simplification Act (PL 93–510) has established a mechanism for packaging grants from a number of Federal sources into one unified grant. Although the procedures for utilizing this mechanism are not yet finished, the Act appears to present several problems for tribes. The most serious of these is the decentralized nature of the Act's procedures which require the participation of the Federal Regional Councils.

This is viewed by some tribes as an undesirable weakening of their direct links with Washington, D.C. The other major problem of the Joint Funding process is that it has not, thus far, adequately reduced paper work and reporting procedures. This is in part due to the lack of enthusiasm with which many departments have complied with the procedures of the Act. The publication of Regulations for the Act may help in this respect.

Development and Needs

Few Federal agencies outside of the Department of the Interior had significant programs relating to reservation development prior to the 1960's. During the last 15 years the increased activity of HUD, HEW, ARA/EDA, SBA, VISTA, and OEO/ONAP and DOL on reservations has been accompanied by major increases in the funding of development related activities. Most of the programs initiated for or extended to Indians by the agencies have not closely followed the lead of the BIA in formulating their programs.

While the inherently conservative administration of trust responsibilities within the Department of Interior has conflicted with the Bureau's adequate promotion of development, the Federal trust responsibility apparently remains a considerable mystery to departments and agencies outside of Interior. The rapid proliferation of Federal programs providing services and funding to poverty and minority groups in recent years has created many new sources of assistance for Indians. Many of these programs must, however, depend on the BIA, for an interpretation of the status of Indians. The response of the Bureau to this responsibility has not been adequate to dispel the understandable tendency to treat Indians as simply another minority.

> First, the Bureau does not have any special programs which are specifically designed to benefit Indians as a group. We treat American Indians as one of the many minority groups to whom we give special consideration because they are socially and/or economically disadvantaged.[1]

This interpretation of the status of Indians is certainly accurate in that they clearly qualify as a disadvantaged group by almost all indices, but it raises serious problems for programs seeking to effectively provide funding and services to reservation populations. The Federal responsibility to Indians originates from reasons quite distinct

[1] Cited from a Departmental response to a Commission request for information.

from their current need. The long negative experience of Indians with the Federal Government generally and with programs to "help" them in specific has left them with little trust for even the well intended. The rhetoric of new programs based on determination of needs and "gap closing" is too similar to the rhetoric of termination oriented programs for Indians to be able to afford the risk of distinguishing motivations.

From the perspective of those administering such programs it is frequently difficult to understand the ready suspicion of Indians toward their well intended programs. Indians should not be disqualified from programs based on needs common to many groups and individuals in the United States, but the Federal Government must assure that the unique status of Indians is made clear to those administering such programs.

The government's responsibility to Indians can be made compatible with programs based on need. While yet imperfect, the Comprehensive Employment and Training Act moves toward this by its specific inclusion of an Indian program which is not statutorily tied entirely to needs. Under CETA, Indians do benefit from increased funding during periods of large scale unemployment, but they are also provided with a base level of funding as Indians.

The policy and administrative conflicts discussed here require firm and consistent Federal Government action. The present situation of implicitly conflicting polices directly affects the program of most Government agencies. The same conflicts make it impossible for the massive Federal bureaucracy to properly understand and serve Indians and Native Americans even if the agencies are well intended.

B. Introduction to Analysis of Federal Government Programs

The task force has attempted to examine and analyze the contributions of Federal government programs to reservation development In the widest analysis, all government programs affecting Indians play some role in reservation development. The task force, however, has taken a far narrower view, and restricted its data collection, interviews and analysis to primarily programs which claim to be involved in development. Some programs which are not strictly developmental but which were considered crucial to promoting or retarding development were also analyzed.

The format used in this examination requires some introduction. A program-by-program evaluation was carefully considered, but the number of programs, and the time and resources of the task force presented strong arguments against this approach. The most compelling argument against this has been the lesson learned from research carried out on 32 reservations. At the level of the reservation, relatively short-lived and rapidly reorganized and renamed programs generated from Washington, blend into a more continuous Federal presence. The task force was far more interested in continuing and basic problems experienced by reservations with Federal programs than it was in evaluating programmatic idiosynacracies.

The Federal government inputs to reservation development are analyzed on the basis of classical economic production factors: land, capital, and labor. In our analysis we found it helpful to divide capital into two parts, financial capital and physical capital, or infrastructure.

As our analysis proceeded, it became clear that programs dealing with land as a factor would be adequately covered in Chapter III of this report. In addition to capital and manpower, we have briefly examined the nature and impact of Federal programs promoting development per se, particularly industrial development. Fitting federal programs into this scheme has not been a wholly successful effort, but it has presented an evaluative format which displaces arbitrariness.

B.1. CAPITAL

The passage of the Indian Financing Act on April 12, 1974, PL 93–262 (88 Stat. 77), indicated federal interest in improving Indian access to capital. The Act's declaration of policy indicated that Congress wished: "to develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."

It appears that the Act is intended to be the major instrument for this goal.

Will the act assist the goal? If it does, how important will its contribution be? These are ambitious questions. This section of the report will address them in a limited way. The first important task in doing so is to obtain a picture of the current magnitudes of loan balances on Indian reservations. This can be partially done by using data from the Bureau of Indian Affairs' Revolving Loan Fund Reports. A second important task is to assess the contributions of other federal agencies and the Indian tribes themselves in the absence of the Indian Financing Act. With these two components as a background, the Act and early implementing steps can be examined.

This section addresses only capital used for business purposes. Reservations also use capital to finance the construction of infrastructure,—roads, industrial parks, sewage facilities—and in financing consumer credit for housing and consumer durables. Such purposes are not within the scope of this section of the report. Other chapters and other studies are concerned with those issues.

This section concludes that the Indian Financing Act will have little positive impact on reservation enterprise. First, the funds involved are minor. Second, control of those funds by the Bureau of Indian Affairs, combined with Bureau control of tribal funds, constitute a significant obstacle to utilization of the funds. This last point is especially demonstrated by BIA Indian Business Development Program regulations. These regulations explicitly advocate criteria which are in conflict with profitability. For all-Indian enterprises, the criteria will reward enterprises with high labor-capital and output-capital ratios. (25 CFR § 80.8)

There is no provision that grantees be able to cover costs with revenues or to even make a profit.[1] Encouraging extensive use of labor conflicts with profitability. It would be better to adopt criteria which encourage viable Indian enterprise. Under Bureau policy, the same

[1] The regulations may have been meant to maximize Indian employment; quoted below, the regulation encourages maximizing the ratio of Indian employment to capital invested. If this was the intent, a rule which would not necessarily have conflicted with profitability would be to maximize the proportion of the labor force, which is Indian.

branch will be applying the criteria to both the loan programs and the grant programs under the Indian Financing Act.

(1) Current loan balances

This section presents questions which cannot be fully answered with the available data: What business capital has the Federal Government provided for Indians in recent years? What have Indians provided as business capital on reservations? Looking at the situtation from the other side, what has been the contribution of Indians to the capital supply of the general American economy?

In answering these questions, outstanding loan balances are examined to see what the sources and uses of financial capital are. This shows indebtedness of individuals, enterprises, and relending programs, at a particular time. Although such comparisons should be comprehensive, absence of data makes it impossible to know the dimensions of Indian participation in private capital markets. The Bureau provides some estimates of loans to Indians from non-Indian sources but the quality of the data is unknown. No one provides an estimate of the loans from individual Indians to the general economy through the private banking system.

The only easily observable investment by Indians in the American economy is the use of tribal and individual trust funds invested on behalf of Indians by the Bureau of Indian Affairs. The Branch of Investments in Albuquerque reported that on June 30, 1975, Indian trust monies invested in government securities and in certificates of deposit totalled $542.3 million.[2] These consisted of both tribal and individual funds. It is important to note the size of the outstanding loan balance of Indians to the government and the banking sector. The reason is that Indians appear reluctant to use all of their funds on their own reservations. Individual Indians find the return on trust monies (9 percent, risk and tax free) very attractive. Tribes seem reluctant to commit funds to Bureau control on reservations, but do prefer Bureau control in the Branch of Investments.

The Division of Credit and Finance of the Bureau of Indian Affairs administers the Revolving Loan Fund and keeps records on all Bureau and tribal money invested on reservations. Bureau money is federal money but additional federal money is available from other federal agencies. The tribal money is divided between the loan fund and investments in Indian enterprises.

On June 30, 1975, the Bureau of Indian Affairs, through its contribution to the Revolving Loan Fund, had an outstanding balance of $36.5 million in United States funds. Of this amount, $1.5 million was in outstanding loans to assist tribes with preparation of expert testimony before the Indian Claims Commission. The remaining, $35 million, was in the outstanding loan balance to Indian individuals and tribal relending programs.

On June 30, 1975, tribes had $169.75 million invested in reservations. This total consisted of $40,174,000 in relending programs, $64,937,000 as equity in tribal enterprises, $57,830,000 as retained earnings in tribal enterprises, and $6,810,000 as retained earnings in relending programs.

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[2] Bureau of Indian Affairs, Branch of Investments, "Trust Responsibility for Indian Trust Funds," Report, Albuquerque, New Mex., June 30, 1975.

The relationship of tribal and federal funds is demonstrated in Figure 1. Figure 2 gives the same information for July 30, 1974; and Figure 3 for June 30, 1973. All information in these figures is from the Division of Credit and Financing, Bureau of Indian Affairs.

In each figure, the arrows between boxes are labeled with a quantity which represents the debt of the receiving box to the sending box. Quantities in boxes mean the total assets or liabilities of the entity represented by the box. There are some minor discrepancies because the original Bureau figures are not quite consistent.

Although we cannot accurately determine the amount of private debt of Indians on reservations in 1975, the BIA's estimate of this figure in 1970 was $228.94. This figure includes consumer credit. It is unclear whether the figure refers to outstanding balances or to new loans exclusively; inspection of the source table suggests that the two are combined.[3]

For all of these outstanding loan balances, it is difficult to know what portion is for business purposes and what portion finance houses, consumer durables, and consumer credit. The Bureau reports a classification of all new loans to individuals under the Revolving Loan Fund which shows that in 1973, housing plus consumer credit comprised 55.9 percent of loans made. This data is reported in Table 1.

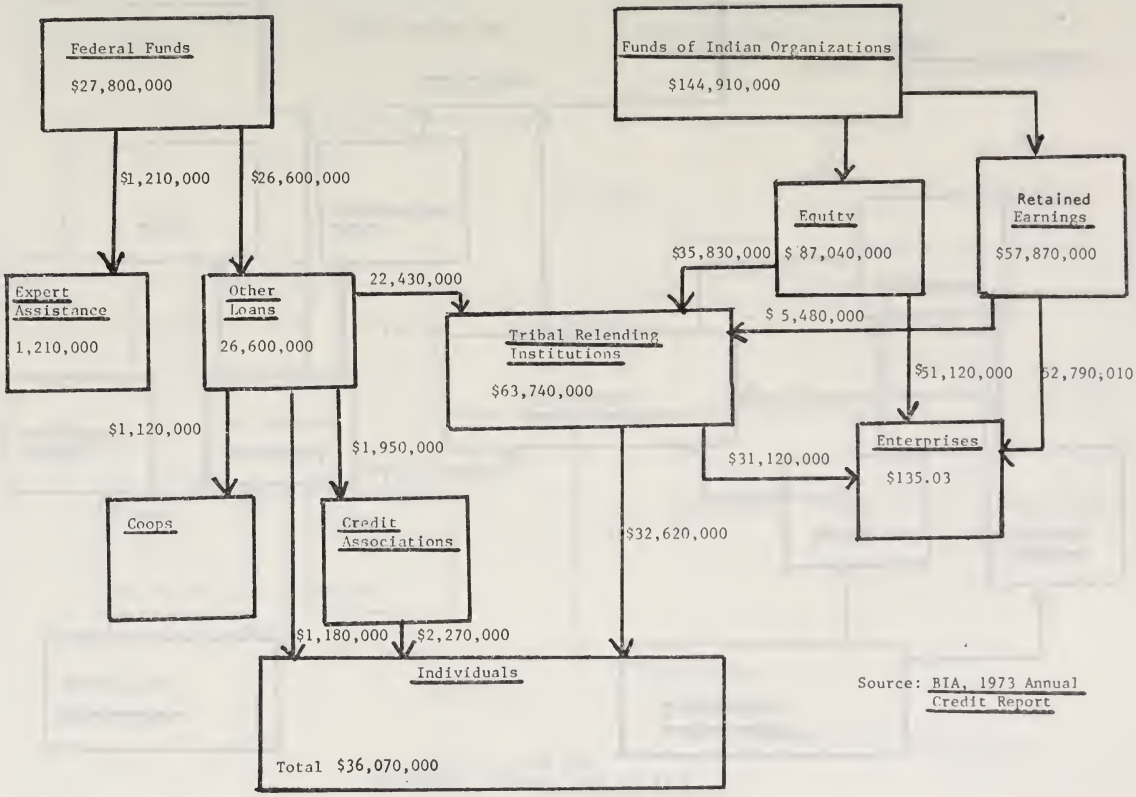
TABLE 1

Purpose	1973	Percent of total
Agriculture	1,689,949	16.0
Farming	(514,625)	(4.9)
Livestock	(1,175,324)	(11.1)
Business enterprise	667,029	6.3
Consumer credit	1,393,623	13.2
Education	66,764	.6
Fisheries	217,038	2.0
Land (purchase)	881,256	8.3
Housing	4,520,941	42.7
New construction/purchase	(2,900,604)	(27.4)
Repairs/modernization	(529,644)	(5.0)
Mobile home and trailer purchase	(1,090,693)	(10.3)
Refinancing	1,151,976	10.9
Total	10,588,576	100.0

Source: Bureau of Indian Affairs, Division of Credit and Financing, "Annual Credit Report," 1973, p. 32.

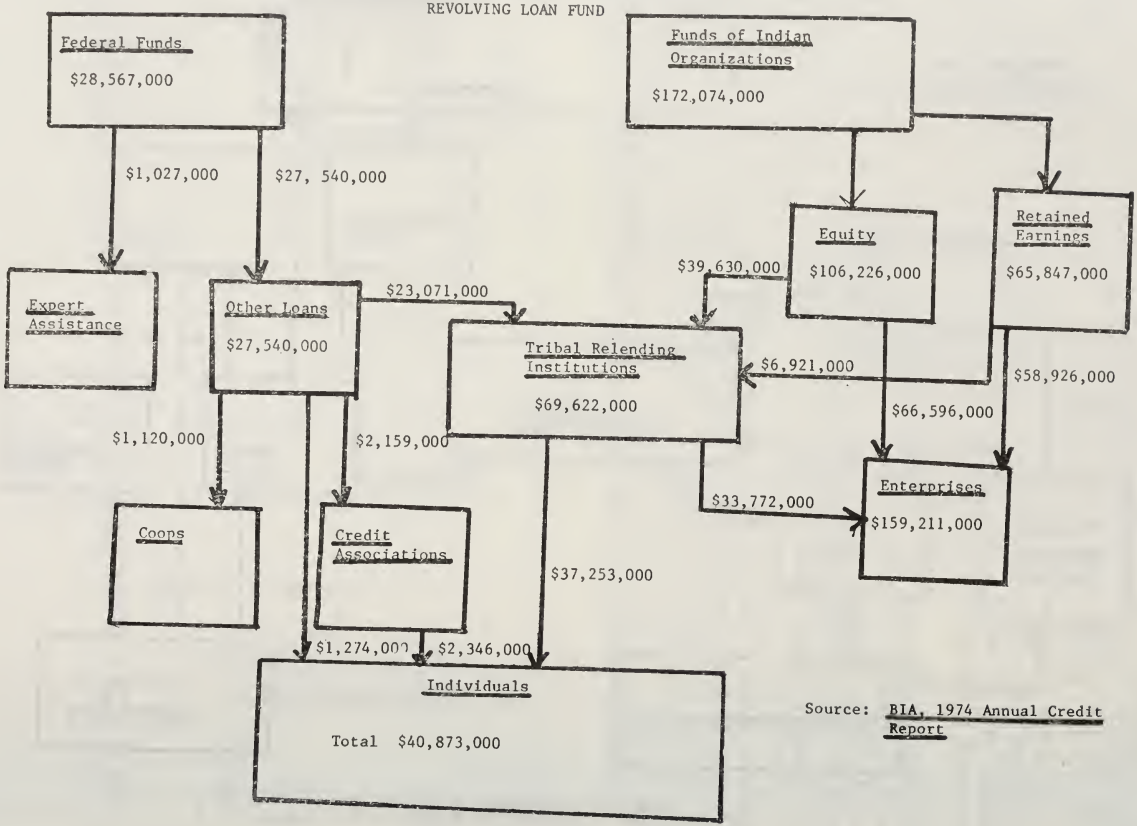
[3] Bureau of Indian Affairs, Division of Credit and Financing, Annual Credit Report, 1971, p. 26. Entries representing federal contributions when checked against the originating agency's figures, are approximately the size of the loan flow, not balances.

OUTSTANDING BALANCES: JUNE 30, 1973
REVOLVING LOAN FUND



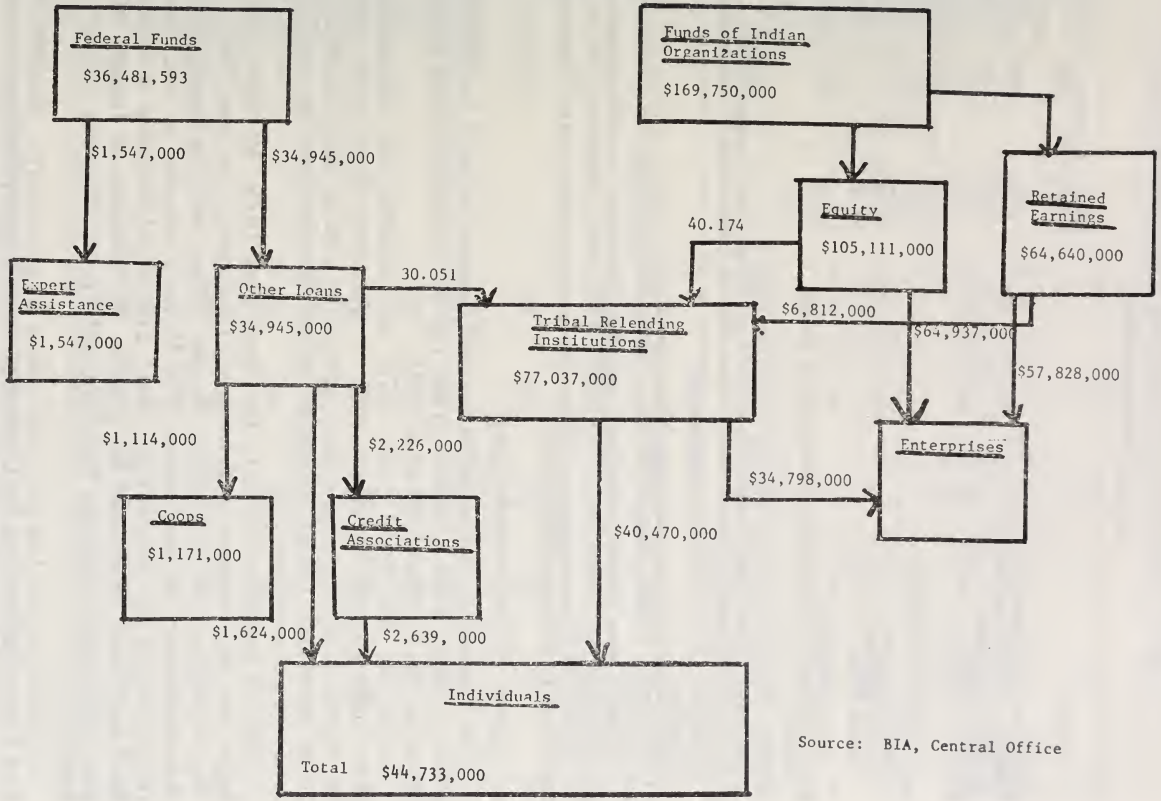
Source: BIA, 1973 Annual Credit Report

OUTSTANDING BALANCES: JUNE 30, 1974
REVOLVING LOAN FUND



Source: BIA, 1974 Annual Credit Report

OUTSTANDING BALANCES: JUNE 30, 1975
REVOLVING LOAN FUND



Source: BIA, Central Office

TABLE 2.— NEW LOAN OR CAPITAL OBLIGATIONS BY SOURCE, FISCAL YEAR 1973

[In thousands of dollars]

Source	Direct loans	Guaranteed loans	Capital grants
Small Business Administration [1]	6, 324	7, 011	0
Economic Development Administration [2]	1, 869	----------	11, 046
Department of Agriculture [3]	15, 750	(4)	(4)
Department of HEW [5]	(4)	(4)	(4)
Bureau of Indian Affairs [6 7]	−39	0	3, 400
Subtotal Federal programs	23, 904	7, 011	14, 446
Indian tribes [8]	12, 891	----------	----------
Relending programs	(4, 079)	----------	----------
Equity in enterprises	−(2, 337)	----------	----------
Retained earnings	(11, 149)	----------	----------
Total, new obligations	36, 795	7, 011	14, 446
Revolving fund for loans: New loans to individual Indians, for business purposes [8]	3, 455	----------	----------

[1] Department of Commerce, Small Business Administration "Loan Approvals" (memo to AIPRC) May 1976.
[2] Department of Commerce, economic development program. The grant figure is all loans for industry and tourism. Grants for infrastructure are omitted.
[3] Department of Agriculture, Farmers Home Administration.
[4] Not available.
[5] No data identified for the Department of Health, Education, and Welfare.
[6] U.S. Department of Interior, Bureau of Indian Affairs, Division of Credit and Financing, annual credit report, 1972, 1973, tables 11, 27.
[7] U.S. Congress, Senate, Committee on Interior and Insular Affairs, "Financing the Economic Development of Indians and Indian Organizations," Hearings, Subcommittee on Indian Affairs 93d Congress, 1st session on S. 1341 and related bills, USGPO 1973, p. 73.
[8] Ibid., 1973, table 25, Business purposes are agriculture, business enterprises, fisheries, and land. Total new loans to individuals was $10,587 thousands in fiscal year 1973.

(2) Recent Federal contributions

The Bureau of Indian Affairs is only one of several federal credit sources. Since other agencies do not report outstanding loan balances, no total can be presented as of 1975.

Loans for one fiscal year, 1973, are reported for all programs. New loans granted by agencies for several recent fiscal years can also be reported. These comparisions give some idea of the relative magnitudes involved. Grant programs which are designed to aid Indian business are also included.

Table 2 provides the data for fiscal year 1973. As shown in that table, the major sources of loan capital during that year were from the Department of Agriculture, Indian Tribes, and the Small Business Administration, in that order. The Bureau recorded a small loss on its portion of the Revolving Fund.[4] The Small Business Administration was most important for grants. The Bureau of Indian Affairs had the Indian Business Development Grant Program during fiscal year 1973.

In order to put the one year's data in perspective, Tables 3, 4, 5 and 6 give similar data by fiscal year for the Small Business Administration, the Department of Agriculture, the Economic Development Administration, and the Revolving Loan Fund.

[4] The allocation of losses between the Federal Government and tribes is somewhat puzzling in the Annual Reports of the Revolving Loan Fund. Most of the losses are charged against tribal rather than Federal funds.

TABLE 3.—SMALL BUSINESS ADMINISTRATION LOANS TO INDIANS, 1970–75 (FISCAL YEAR)

Programs	Fiscal year— 1970	1971	1972	1973	1974	1975
Business 7(a):						
Direct	1,152,000	1,586,500	1,300,300	1,185,700	526,800	1,148,400
Guarantee	879,950	3,947,700	2,139,750	6,041,361	3,398,400	5,035,110
Economic opportunity:						
Direct	1,964,225	3,109,540	2,330,000	2,175,614	1,247,580	1,500,550
Guarantee	450,900	461,600	369,200	902,100	371,600	364,240
Displaced business:						
Direct			44,000		226,200	
Guarantee						
Development comparison:						
Direct	1,485,000	2,618,903	1,005,639	1,530,565	911,500	420,750
Guarantee	16,200			68,000	49,500	
Disaster:						
Direct	6,600	24,100	76,950	1,432,345	114,850	232,300
Guarantee						
Total:						
Direct	4,607,825	7,339,043	4,759,889	6,324,224	3,026,930	3,302,000
Guarantee	1,347,050	4,409,300	2,508,950	7,011,461	3,819,500	5,399,350

Source: Small Business Administration, Reports Management Division, May 1976.

TABLE 4.—DEPARTMENT OF AGRICULTURE, FARMERS HOME ADMINISTRATION LOANS, FISCAL YEAR 1970–75 IDENTIFIED BY THE FMHA AS MADE TO AMERICAN INDIANS[1]

[Dollar amounts in thousands]

Loan programs	Fiscal year— 1970	1971	1972	1973	1974	1975
Operating loans:						
Amount	$1,453	$2,164	$2,681	$3,801	$4,848	$5,493
Number	277	314	350	362	462	510
Emergency loans:						
Amount	$129	$95	$97	$263	$284	$1,304
Number	38	42	21	79	75	132
Farm ownership loans:						
Amount	$402	$662	$886	$1,509	$1,092	$1,760
Number	18	33	39	59	56	65
Recreation loans:						
Amount		$18				
Number		2				
Soil and water loans:						
Amount	$14	$26	$10	$30	$5	
Number	2	4	2	2	1	
Rural housing loans:						
Amount	$2,418	$5,718	$5,825	$6,898	$6,778	$6,980
Number	276	460	417	485	441	427
Tribal land acquisition:						
Amount	(2)	$5,000	$1,990	$3,250	$9,850	$9,666
Number	(2)	5	4	4	9	11
Total amount	$4,416	$13,683	$11,488	$15,750	$22,857	$25,202

[1] It is not known how many of the loans listed, with the exception of the land acquisition program, were made to Indians on reservations.
[2] Not available.

Source: Farmers Home Administration, Department of Agriculture.

TABLE 5.—ECONOMIC DEVELOPMENT ADMINISTRATION PROJECT FUNDING BY TYPE[1]

[In thousands of dollars]

Type	Fiscal years									
	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975
Industry:										
Total	1,233	7,208	2,285	3,920	5,401	1,142	4,609	5,045	6,108	2,608
Grants	(203)	(2,556)	(1,547)	(3,574)	(2,885)	(668)	(4,609)	(3,176)	(6,108)	(2,605)
Loans	(1,030)	(4,652)	(678)	(345)	(2,516)	(475)	(0)	(1,869)	(0)	(3)
Tourism	74	6,418	3,483	9,486	7,260	10,270	3,296	7,859	10,029	3,849
Commercial services		171	1,041	549	61	909	314	55	665	250
Shopping centers					82		8	2,234		22
Industrial parks	626	3,623	937	2,100	340	3,051	2,699	7,893	1,766	
Community facilities	1,263	1,817	4,882	3,333	8,083	7,054	5,834	5,913	12,741	12,309
Planning		98	535	1,008	843	823	1,015	2,812	4,276	3,082
Total[2]	3,196	19,330	13,163	20,376	22,070	23,259	17,775	31,821	35,585	22,120

[1] Tabulated from Department of Commerce, "Results of a Partnership Between the American Indian and the Economic Development Administration," June 30, 1975. This report gives a brief description of each project by reservation by fiscal year.

[2] These totals differ slightly from those of other reports of the Economic Development Administration for reasons we could not determine.

These tables show that relative magnitudes for other years were roughly similar. Loans from the Small Business Administration fell off in 1974 and 1975. Loans and grants from EDA rose during 1966–1975, as did loans from the Farmers Home Administration.

The last two columns in Table 6 present a puzzle. It is difficult to believe that a pattern of steady investment by Indian tribes suddenly more than doubled in fiscal year 1974 and then became negative in fiscal year 1975. Bureau data indicates such was the case. The average increase during 1974 and 1975 is approximately equal to the average increase during 1972 and 1973. Perhaps contributions actually made in 1975 had been credited by accident to 1974.

(3) The Indian Financing Act

The brief description of the size of balances in mid-1973 allows us to assess the potential impact of the Indian Financing Act. The Bureau and some members of Congress believed that the measure would have a substantial effect. Title I authorized the addition of $50 million to the Revolving Loan Fund. Title II could insure and/or guarantee a total of $200 million. Title III provided $60 million, $20 million a year for three years. Title III covered administrative expenses, interest subsidies in reguaranteed individual loans and the cost of guarantees and insurance beyond those covered by premiums. Finally, Title IV authorized $30 million, $10 million per fiscal year, for Indian Business Grants.

New money consists of $50 million for the Revolving Loan Fund and $30 million for Business Grants, totalling $80 million to be distributed over three years. The $200 million of guaranteed loans would be realized if there is no substitution from loans which would have been acquired anyway. The regulations attempt to prohibit substitution by requiring letters from two customary lenders showing that they will not make the loan. This is a condition for granting a guarantee (25 CFR§ 93.16).

According to the Bureau's estimates, debt to private sources was $228.9 million in 1970. The new $80 million would thus be 35 percent of actual indebtedness in 1971. Although this percentage might sug-

gest that a well-run program could have some impact, the comparison is between a three year figure in 1975–1977 to dollars in 1971. Inflation means the 1975–1977 dollars are less valuable per dollar than those in 1971.

Why don't tribes provide their own capital needs? This may be a matter of rich tribes having substantial balances in trust accounts while small or poor tribes do not. In 1967, five tribes held 58 percent of the trust funds and 25 tribes held 88 percent of the funds.[5] Perhaps a large portion of trust monies are held in the name of individual Indians. But one must ask if some other conditions prevent tribes from using more of their trust moneis to finance their own development. On June 30, 1975, Indians has placed $170 million out of a total $712 million of trust funds into direct reservation investments in enterprises or relending programs.

Part of the answer may lie in regulations which implement Title I of the Indian Finance Act. The Commissioner of Indian Affairs retains the option to control all trust monies relended on reservations through 25 CFR section 91.20. Sections (a) and (d) of this regulation read as follows:

(a) Tribal trust funds may be advanced to tribes when authorized by Congress, requested by the governing body, and approved by the Commissioner for the establishment, operation, or expansion of economic enterprises and for relending in accordance with paragraphs (b) and (c) of this section and section 91.21 herein. No interest shall be paid to the United States on such funds. The Commissioner may require the tribe to prepare a plan of operation for the enterprise and a plan establishing the policies and procedures for making loans to members from tribal funds.

(d) Failure of a tribe to use tribal funds advanced under paragraph (a) of this section in accordance with the regulations and purposes for which requested shall be grounds for any or all of the following steps to be taken by the Commissioner: (1) Discontinue further advance of funds requested. (2) Require that the entire amount advanced be returned to the treasury. (3) Prevent further disbursement of tribal funds in the account of an economic enterprise or tribal relending program under the control of the tribe. (4) Withdraw any unobligated funds from the tribe and deposit the same in the Treasury. (5) Require that all payments on loans made by the tribe be used to replace funds advanced to the tribe from the Treasury. (6) In the case of tribal economic enterprises operated with tribal funds, liquidate, operate or arrange for the operation of the enterprise until all tribal trust funds advanced to the tribe have been replaced in the tribe's United States Treasury account, or until the Commissioner has received acceptable assurance that the funds will be replaced or that the enterprise will be operated in a manner satisfactory to him.

With this regulation, the Commissioner, or his authorized representative, can threaten to immediately take over a tribal enterprise or relending program if the plan of operation of that enterprise or relending program be violated. There is no provision that trust funds may be, say, at least 25 percent of the equity of an enterprise before this regulation applies. Any small share of trust funds makes it apply.

All plans of operations for relending programs need Bureau approval to operate (25 CFR section 91.24). Tribes may well be unwilling to commit substantial funds to their own economies under such conditions. This provision of the regulations appears to contradict the stated purpose of the Indian Finance Act, which is to help Indians reach a

[5] Alan Sorkin, "Indian Trust Funds," Toward Economic Development for Native American Communities, Committee Print, Joint Economic Committee, Congress, Vol. 2, p. 451 (91st Cong. 1st Sess.).

point "where the Indians will fully exercise responsibility for the . . . management of their own resources."

Prior to the Indian Finance Act, interest rates on Revolving Fund Loans were low, around 5 percent. Tribes appeared to make little profit on their equity in such programs, although they did provide inexpensive funds to tribal members. The Indian Finance Act raised the floor on interest payments for loans in the Revolving Fund. In the regulations, the combination of 25 CFR section 91.11 (a) and (d) means that any tribal relending organization using US funds must charge at least the rate determined by the Secretary of the Treasury, according to section 104 of the IFA. This rate was approximately 8 percent in 1975.[6] Since tribes can earn 9 percent through the Branch of Trust Investments, raising the rates in relending organizations may make extending tribal money to these organizations more attractive than it was when such relending organizations were charging 5 to 6 percent on loans.

The net effect of the higher interest rates versus the BIA threat of control over trust moneys is hard to predict. If believable, the data in table 6 show that tribes have placed funds in relending programs at a high rate during fiscal year 1974 and withdrew funds in fiscal year 1976 after the IFA took effect.

Implementation Problems

The Bureau of Indian Affairs was able to commit the money appropriated for the Revolving Loan Fund with some apparent trouble. Setting up the loan guarantee and insurance fund, together with the interest rate subsidy program, proved more difficult.

A total of $38 million was appropriated for fiscal year 1975 for the Revolving Loan Fund. Although the Bureau requested $12 million for fiscal year 1976, only $3 million was appropriated. The Bureau had some short-term difficulty committing all the loan money made available to the Revolving Loan Fund in fiscal year 1975. The cash balance on October 31, 1974, for instance, was $41,014,000. By January 1, 1976, these funds had all been scheduled and the Bureau reported a cash shortage. The Bureau made no request for the Revolving Loan Fund for fiscal year 1977, although the total $50 million authorization had not been fully appropriated, because the authorization was about to end for other parts of the Act.[7]

Although there had been ample advance signs that Congress was amendable to the Indian Financing Act,[8] the Bureau was not prepared to immediately implement Titles II and III. The law was enacted on April 12, 1974. The loan guarantee and insurance fund began operation in August, 1975, a year and four months later. By March, 1976, Commissioner Thompson reported that $7.6 million had been loaned with guarantees or insurance to four tribes and eighteen individuals and businesses.[9]

In fiscal year 1975, no loans were guaranteed or insured, meaning that the $20 million appropriated for that year was not used. only

[6] U.S. Congress, House. Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1977, Hearings before a subcommittee, March 3, 1976, p. 59.
[7] *Ibid*, p. 211.
[8] U.S. Congress, Senate, Financing the Economic Development of Indians and Indian Organizations, Hearing before the subcommittee on Indian Affairs May 31, 1973, p. 45. (93rd Cong., 1st Sess.). The House passed the bill in the 92d Cong. and had passed it again in the 93d.
[9] U.S. Congress, House ,Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1977, Hearings before a subcommittee, March 3, 1976, pp. 59–60.

$10 million was appropriated for fiscal year 1976. The Bureau requested the full authorization, $20 million, for fiscal year 1977, while also planning to add 72 additional positions.[10]

The Indian Business Development Program operated at the fully authorized and appropriated level of $10 million in fiscal year 1975. These funds supported 615 grants which averaged $16,260 per grant. A similar level was reached in 1976. The full appropriation was requested for fiscal year 1977.[11] There had been a pilot program for this title early in the 1970's. Part of the pilot operation is reported in Table 2.

(4) Inappropriate criteria

In the appropriation hearings for fiscal 1977, the Commissioner said, "We try to tie grants to either a revolving loan or an interest subsidy and loan guarantee." [12] The criteria which govern the awarding of grants also govern loans and interest subsidies. These criteria are not consistent with sound business management because they conflict with profit maximization.

(25 CFR § 80.8) "Priority Criteria" states:

> The following priority will be used in selecting economic enterprises for grant funding:
>
> (a) *First Priority.* First priority will be given to economic enterprises located on a reservation that will:
>
> (1) Utilize Indian resources, both natural and human.
>
> (2) Create the highest ratio of Indian jobs to the total amount of dollars to be invested, including market value of materials and equipment contributed to the project.
>
> (3) Create the highest ratio of income to a tribe or its members in relation to the total amount of dollars to be invested, including market value of materials or equipment contributed to the project.
>
> (4) Generate the most non-Bureau financing.

The second part of the regulation applies the same four criteria to enterprises located in the immediate vicinity of a reservation. Following these criteria, the Bureau reported the results of its grant program giving data approximately in the categories offered in points (2) through (4) of the regulations. In the appropriation request for 1977, the program description of the Business Development Program gave the measures of success reproduced in Table 7.

TABLE 6.—INCREASE IN CAPITAL CONTRIBUTION TO FUNDS BY SOURCE UNDER THE REVOLVING LOAN FUND [1]

	Fiscal year—					
	1970	1971	1972	1973	1974	1975
Funds of Indian organizations:						
Total annual change	$12,607	−$18	$14,334	$12,891	$27,164	−$2,324
Investments in enterprises	[2] NA	[2] NA	3,871	−2,337	25,476	−1,659
Retained earnings	NA	NA	5,116	11,149	7,977	−1,207
Tribal enterprises	NA	NA	(5,292)	(12,612)	7,806	−1,098
Relending programs	NA	NA	(−176)	(−1,463)	1,441	−109
Contributions to relending			5,348	4,079	3,800	544
Federal contribution	459	1,924	181	−39	767	7,915

[1] U.S. Department of the Interior, Bureau of Indian Affairs, Division of Credit and Financing, "Annual Credit Report," fiscal years 1969–74; fiscal year 1975 from central office records, in July 1976.

[2] Until fiscal year 1971, "Funds of Indian Organizations" was reported in 3 categories: "treasury," "local," "other;" the correspondence between this and the subsequent categories used in the table is not clear.

[10] *Ibid.*, p. 212.

[11] U.S. Congress. House. Department of the Interior and Related Agencies Appropriations for 1977, Hearings before a subcommittee, Part 2, p. 38; part 6, p. 161. (94th Cong., 2d Sess.).

[12] U.S. Congress, House, Department of the Interior and Related Agencies Appropriation for 1977, part 6, p. 143. (94th Congress, 2d Sess.).

TABLE 7.—*Selected fiscal year 1975 data for the Indian business development program (IBDP)*

	Amount
Appropriation (thousands)	$10, 000. 0
Applications received (number)	982
Amount of IBDP requested (thousands)	$17, 934. 0
Amount of IBDP expended (thousands)	$10, 000. 0
Impacts:	
Additional capital generated (thousands)	$31, 690. 1
Job created (number)	3, 184
Estimated annual payroll generated (thousands)	$16, 740. 1
Average IBDP grants per job created	$3, 140
Average additional capital generated per job created	$9, 950
Amount of IBDP granted per approved application	$16, 260
Amount additional capital generated per approved project	$51, 530
Ratio IBDP funds to capital generated	1. 3. 2
Ratio of IBDP funds to annual payroll generated	1. 1. 7

Source: U.S. Congress, House, "Department of the Interior and Related Agencies Appropriations for 1977," hearings before a subcommittee of the Committee on Appropriations, (94th Cong., 2d sess.) pt. 2, justification material, p. 38.

The ratios in these tables are close to the ones which are used in the regulations. There is no data giving a measure of the utilization of Indian resources. For point (2), there is data on the number of jobs created, and the additional capital generated, from which the ratio of jobs created to total capital employed, (3,184)/($41,690,000) equals 7.64×10^{-5}, can be obtained. Point (2) of the criteria states that the higher that number, the better the program. Point (3) cannot be estimated precisely unless one makes the additional assumption that all the payroll generated by the grants went to Indians. If it did, and if "income" in the regulations means employment income, then the third criterion gives the ratio of total payroll added to total capital added, or ($16,740,100)/($41,690,000) equals .40.

The fourth criterion is given in the table namely, the ratio of IBDP funds to capital generated, 1:3.2.

What should one say about these criteria? The first point is that the Bureau only computed one of the three for which it reported data. It did not report data for the first. And it did not fully report data on either Indian jobs created or Indian income created.

But merely pointing out inconsistency is not enough. The criteria themselves are wrong. There is nothing in them which requires that grants be given to enterprises with the best chance of financial success. A program to place Indians in business should focus attention upon normal measures of business success. The most popular such measure is the rate of return on capital, which depends upon annual profits.

Rates of return can be calculated with or without social goals included. A private firm would use only cash flow. A tribe interested in the income of all its members would add to cash flow a portion of wage income and then compute a rate of return. This procedure would recognize the Indian employment goal without conflicting with the profitability principle.

In the process of planning, one computes either or both of these rates of return using expected profits and wages. In the process of assessing the success of a program, one looks at the results to see if they are above or below that which was expected. For the early years of a new enterprise, one might expect the annual rates of return to be different, probably lower, than the projected returns. But as

a program such as the Indian Business Development Fund grows older, the ratio of new to old firms assisted should change. One can develop a track record to see how successful the program was in terms of the success of its clients. The program which insures loans should be even more interested in the success of its clients than one which gives grants.

But enterprises trying to satisfy the Bureau's stated criteria will not be encouraged to maximize their rate of profit. Rather, they are encouraged to maximize the ratio of workers to capital and wages to capital. A profit making firm finds its best labor to capital ratio. This ratio can be raised only by lowering profits. The Bureau's criteria encourages grantees to raise their labor to capital ratios, thereby lowering their rates of profit. Perhaps this has contributed to the lack of interest by private lenders as reported by the Commissioner of Indian Affairs in the Appropriations Hearings.[13]

That the present regulations fail to encourage profitability is particularly disturbing, because earlier regulations did so. It appears that the effort to make regulations specific made them wrong: could there be better evidence that the Bureau is a pool source of business advice? In 1970, the first version of Part 80 of 25 CFR read as follows in section 41, "eligibility requirements": [14]

> The project must satisfy all the following requirements to be eligible for consideration:
>
> (a) It is a profit-making enterprise which generates jobs for Indians.
>
> (b) It is owned or controlled by an Indian group or an individual Indian.
>
> (c) It is located on a reservation or in the immediate vicinity, except in Alaska. . . .
>
> (d) It must have the potential to become a profitable operation within the total cost of establishing the business.
>
> The following section, §80.42, gives the order of preference for projects:
>
> (a) Profit in the shortest length of time.
>
> (b) Indian employment.
>
> (c) Indian payroll.
>
> (d) Other Indian income.

There is a desire in the early regulations to support Indian wage income as well as to create profitable enterprises. In the later regulations, emphasis on profit is removed.

B.2. INVESTMENT IN PHYSICAL CAPITAL: INFRASTRUCTURE

In addition to the three factors which were earlier stressed as essential to Reservation development—jurisdiction, capital and management—adequate transportation and communications systems are necessary. Whether termed infrastructure, or physical overhead capital, efficient transportation and communication systems must be at least minimally in place for successful development.

Until recent years these systems have been the responsibility of the BIA. Transportation in the form of roads has received the most attention by the Bureau. Most of the basic infrastructure has been, at least initially, necessary for the support of government administrators. If one were to draw parallels to the experience of other colonial

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[13] Department of Interior, House Appropriations Hearings for 1977, p. 211.
[14] Federal Register, Vol. 35, no. 199, (Oct. 13, 1970).

territories, the relative underdevelopment of reservation infrastructure systems can be viewed positively. In colonial territories these systems have generally been developed in proportion to the level of economic exploitation and alien settlement carried out.

Infrastructure

A full discussion of infrastructure needs for development would include systems not dealt with here. The most significant of those excluded are sanitation related culinary water systems and waste disposal. These needs are discussed in detail by Health Task Force, No. 6.

Without detailing the economic costs, it is clear that new and existing reservation enterprises face tremendous problems without adequate transportation, power, and water systems. At the same time, however, providing all systems necessary for planned reservation development would be prohibitively expensive in most cases.

Even if all the Federal funds could be made immediately available for expansion or provision of required infrastructure, few reservations could afford the maintenance costs. Furthermore, the government has generally provided inadequate funding for maintenance for less than required infrastructure. The Federal Government should provide adequate funding for maintenance of infrastructure, in the interim to financial stability.

Significant increases in the provision of capital for infrastructure are required. Tribal governments must, however, rely heavily on sound and comprehensive planning in expending available capital. In addition to directing funds, maintaining and upgrading crucial elements of existing systems, new construction should be approved by the tribe in accordance with its plans. Each tribe must carefully weigh more quantifiable economic justifications for infrastructure against socially and culturally justified needs.

With the exception of a few reservations which have taken steps to manage their own communications systems,[1] most reservations are generally served at low levels by telephone and other communications systems from surrounding non-Indian areas. Federal funding in these areas is primarily from categorical grant and loan programs aimed at rural areas generally.

With the exception of those reservations which have combined power and irrigation works and those remote enough to require their own generating facilities, the power needs of most reservations are served with varying adequacy by systems from nearby areas. In recent years some reservations have begun to develop or take over either their own distribution systems or entire power systems based on hydroelectric plants on or near the reservation.[2]

The most important component of reservation transportation systems is roads. Rail connections are minimal and exist only as unintended spinoffs of non-Indian railway system needs. Air transportation is economically most important in Alaska, where most of the funds available from the Federal Aviation Administration have gone.[3]

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[1] The Rural Electrification Administration, Department of Agriculture made a loan of $3,200,000 to the Cheyenne River Sioux in 1976 to improve and expand their telephone system. See DOA News Release, March 19, 1976.

[2] Both EDA, Commerce and REA provide infrastructure loans. BIA's Credit and Finance Office has reported assisting several utility systems in Alaska under Enterprise loans and grants.

[3] News releases and other communications submitted to the Commission by the Rural Electrification Administration, DOA.

Local and limited air facilities on other reservations are of potential economic importance primarily for tourism. Some use has been made of air transport for carrying low weight industrial materials and products, but this remains minimal.

TABLE 1.—EXISTING MILES OF ROADS ON INDIAN LANDS AS OF APR. 28, 1975, BY ORGANIZATIONAL RESPONSIBILITY

Construction responsibility	Miles of surface type			
	Pavement	Gravel	Grade and drain	Total
BIA (Federal aid Indian road)	3,839.9	2,891.5	18,081.2	24,812.6
County and township	954.5	8,093.5	4,427.3	13,475.3
State	6,719.6	919.0	184.5	7,832.1
(Federal aid interstate)	(423.5)	(2.0)	(0)	(425.5)
Federal aid primary)	(3,690.0)	(151.8)	(9.0)	(3,850.8)
(Federal aid secondary)	(2,326.7)	(721.2)	(175.0)	(3,222.9)
(Other)	(279.4)	(44.0)	(.5)	(323.9)
Tribal	8.5	0	1,137.4	1,145.9
Other government agencies	28.9	2.4	309.8	341.1
Other	6.9	7.0	61.6	75.5
Total	11,558.3	11,917.2	24,201.8	47,677.3

Source: BIA Office of Tribal Resouce Development, Division of Transportation.

Existing airport facilities on reservations used for personnel movement and emergency transport have been maintained to some extent by the BIA's Division of Transportation (paving of runways) and with some funding from the FAA.

Roads.—Roads systems have been and remain the major mode of transportation within reservations, and between reservations and surrounding areas. The development of road construction on reservations has created a situation where primary, long distance roads are generally more adequate than local and connecting roads. This has resulted from building and maintaining routes required for long distance non-Indian transportation needs.

The Federal Government began providing funds for building roads on reservations in 1935 through the BIA Road Program.[4] In addition to reservation roads under the BIA's jurisdiction, there are currently roads under the jurisdiction of counties, states and the Federal-Aid Highway system on reservations. The table below shows the mileage of roads on reservations by jurisdictions based on a study done by the Federal Highway Administration for the BIA.

This survey apparently did not include approximately 13,000 miles of tribally controlled "Special Purpose" roads, that is, logging trails, utility transmission trails, etc., which would bring the total road network on Indian lands to about 61,000 miles. In addition to state maintained Federal-Aid roads, approximately 3,000 miles of county roads are also on the Federal-Aid system.

Roads under the BIA's responsibility are funded through Federal Highway Acts (currently P.L. 93–643) with Contract Obligation Authority under 23 USC 203 and Liquidating Cash appropriated under the Department of Interior's annual Appropriations Acts. For somewhat complex, and apparently unnecessary reasons, the Bureau requested a portion of its appropriations for road construction

[4] Information provided to the Commission by the Federal Aviation Administration.

in FY 1977 under authority of 25 USC 318a, which has not been used since the 1950's.[5]

The Bureau's road construction program is carried out by Bureau and Federal Highway Administration personnel. They operate under a Memorandum of Agreement between the BIA and the FHWA. The Bureau indicates that tribes, through their governments or road committees, may determine road priorities and needs.

In addition to tribal input in the selection and approval of road projects, tribal governments have been able to influence the construction and maintenance portions of local BIA budgets through Band Analysis. The Transportation Division, however, requested and received approval for removing road construction from "Banding" in Fiscal 1977.

It is believed that roads under the BIA will also receive funding through the "Off-System Roads" provision of Public Law 93–643. Funding under this provision has been clarified in a Memorandum from the FHWA, but it is currently unclear how significant this source may become.

Roads constructed by states and counties receive funds from the Highway Trust Fund if they are on the designated Federal-Aid system. Of the over 21,000 miles of state and county roads, approximately 11,000 miles are reported to be on the Federal-Aid system. Funds for these roads are allocated by formula to states and tribes who must request and compete for funding for qualifying roads for their reservations. It is felt that tribes receive less than a proportionate share of Trust Fund monies through the states. This has generated a series of proposals within the BIA to create an Indian Highway System, encompassing all roads on Indian lands in the BIA Federal-Aid system, which would qualify for Trust Funds more directly.[6]

The inequitable share of Highway Trust Funds received by reservations through states has been recognized. Recent legislation stresses the need for BIA road funding to be in addition to, not in lieu of, other Federal-Aid funding. Selected information on funds expended for road construction and maintenance by the BIA, and partial estimates for Highway Trust Funds expended by states on roads, are presented in the following table.

Road Maintenance.—Maintenance on the roads under BIA's jurisdiction has been estimated by its Division of Transportation to be about 40 percent adequate.[7]

In the Hearings for 1976 Appropriations it was estimated that the BIA's road system was deteriorating at the rate of about $40 million a year. For the same period BIA was obligating about $9 million a year for maintenance.[8] A considerable portion of the road construction budget is admitted to go for the reconstruction and upgrading of prematurely deteriorated roads.

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[5] "A Proposal for Financing the Construction of Federal Aid Highways on Indian Reservations," p. 4. Division of Transportation, Office of Engineering, BIA, February 9, 1973. mimeo.

[6] Fiscal year 1977 Interior Appropriations Hearings, House of Representatives, dPt. 6, p. 208. The 1977 Federal Budget was reported to have recommended that BIA, BLM and National Park Service Roads not be included in the Highway Act. It was evidently intended that they submit independent requests for direct appropriations. This evidently did not happen.

[7] "A Proposal for Financing the Construction of Federal Aid Highways on Indian Reservations," p. 4. Division of Transportation, Office of Engineering, BIA, February 9, 1973. mimeo.

[8] Fiscal year 1976 Interior Appropriations hearing, House of Representatives, Pt. 3, p. 88.

Maintenance operations are carried out by the BIA or contracting tribes. In 1976 the BIA indicated that five percent of tribes were contracting for their own road maintenance.[9]

Needs and Adequacy of Roads.—Assessments of overall road needs on reservations until recently have been based on several types of comparisons. Comparisons of road mileage per area and population for reservations and non-Indian areas were made. Comparisons made of reservations with surrounding non-reservation counties have been the most reasonable. They have consistently shown Indian road networks to be about one-half the density of non-Indian networks.

The study carried out by the Federal Highway Administration for the BIA projected road needs and construction costs on a reservation-by-reservation basis.[10] It is not known what basis was used in this study for projecting the extent or alignment of the road networks for individual reservations.

The overall projections arrived at by the study are, however, in contrast with earlier comparative assessments. The study projected a net increase in the BIA's road system of only 2,000 miles. Replacement of existing roads by 1990, and construction of new roads, were estimated to cost $2.72 billion; presumably the estimate is in current dollars. No provision for maintenance was made. The same study projected the cost of upgrading existing roads, plus constructing new mileage, to arrive at the same overall system as above, at $1.45 billion.

The following table shows the changes by road type between the existing system in 1975 and the projected 1990 system.

TABLE 2.—MILES OF ROADS PROJECTED TO 1990 ON INDIAN LANDS, BY TYPE OF PAVEMENT

	Pavement	Gravel	Gr. and Dr.	Total	Number of bridges	Linear feets
Existing BIA system, 1975	3,839.9	2,891.5	18,081.2	24,812.6	839	63,465
Percent of total	15.5	11.7	72.9	100.0		
Projected system, 1990	12,389.2	12,760.3	1,859.3	27,008.8	889	71,169
Percent of total	45.8	47.2	6.9	100.0		
Percent change in mileage by pavement type	+222.6	+341.3	−89.7	+8.9	(+6.0)	(+12.1)

Source: Data supplied by the Division of Transportation, BIA.

It is clear that the Highway Administration's study does not stress a significant overall expansion of the existing reservation road system, but does strongly stress its upgrading to a more usable and safer standard. Testimony on this point during recent appropriations hearings was somewhat misleading.

The existing provision of road construction and maintenance by the BIA combined with the roads provided by surrounding states and counties is clearly inadequate. The BIA's estimates suggest that one-half of the $80 million requested for construction and maintenance in 1977 is required to simply maintain the status quo. The remaining $40 million for upgrading and expanding the system is clearly inadequate compared to the FHWA Study.

[9] Ibid., p.

[10] "A Proposal for Financing the Construction of Federal Aid Highways on Indian Reservations," Information made available by the Division of Transportation, BIA. The full study is available in the Division Offices in Washington.

The BIA attempts to divide up a wholly inadequate budget in such a way that everyone is partially satisfied. It is evident from the available cost projections for the construction of an adequate reservation road system that more funds must be made available. These projections do not even include maintenance costs.

Overall, reservation road systems are likely to remain at a relatively low level for some time. Inadequate transportation systems are a hinderance to development. Reservation transportation networks should be related to tribal development plans as well as to social and educational needs. In the long run, however, the level, type, and distribution of economic activities will significantly determine the extent to which roads remain usable and safe.

There is clearly a need, legal basis and strong precedent for greater Federal support in road construction. Tribes should, however, take the unpredictableness of Federal funding into account in accepting major projects. The availability of federal monies is simply too unpredictable to allow anything other than the cautious expansion and improvement of systems which may become a severe drain on local resources if they are to be maintained in a useful state.

B.3. HUMAN RESOURCES DEVELOPMENT

This report has repeatedly emphasized the importance of developing the human resources necessary to govern, manage, and participate in reservation development. The Commission has recognized the critical importance of human resources by appointing separate Task Forces to deal with Education and Health. We can only stress the importance of efforts to radically improve the availability of education and health services to Indians. The provision of education for Indians under Indian control, allowing them to govern and support themselves, and health services and facilities which allow them to lead long and productive lives are essential to reservation development.

Professionals and managers

The full scope of manpower skills which will be required to achieve and to manage fully Indian controlled reservations includes large numbers of highly skilled professionals, technicians, and managers. Some of these fields are supported under manpower training programs, but most fall within the responsibility of education and professional programs of the BIA and the Department of Health, Education and Welfare. The Task Force has not examined these programs. The Task Force comments here only on those specific skills which these programs must provide for successful development.

Educational programs must focus on skills required by the development process. The programs must meet the needs of tribal governments as well as individuals. The record of past education program efforts bears out the experience which lesser developed countries have had. Education and training which cannot be utilized locally is human capital lost. Better educated Indians leave the reservations. Indians educated in skills not related to the development process must remain unemployed or leave the reservation. The commitment of reservation leaders and citizen groups to higher education and

professional training in areas of critical need on reservations must be matched by Federal Government and local support for these trained individuals to practice their skills on the reservations.

The training of adequate numbers of skilled Indian professionals and technicians presents fewer problems in some ways than the training of skilled managers for tribal and private enterprises. Managers can be trained, but must learn most of their skills from experience. Most reservations currently present only limited opportunities for positions of apprenticeship under skilled and experienced managers, Indian or non-Indian.

Individuals and tribes must carefully weigh the advantages and disadvantages of management experience gained on and off the reservation. The need for Indian managers of projects and enterprises on reservations is great, but this should not be allowed to outweigh the more basic need for competent management. The management of Indian enterprises may require additional skills and approaches, but the need for basic management skills remains.

Qualified and experienced Indian managers should be used to replace non-Indians in positions of control. When tribal jurisidiction is relatively secure, the transitional retention or employment of competent non-Indian managers may be to the reservation's benefit. In the present rush to replace non-Indians as quickly as possible, competency is not always adequately considered. Hiring someone who is Indian and unqualified may assuage Indian preference, but his mistakes while gaining experience could mean a loss of valuable resources and opportunity for all members of the tribe. Such avoidable failures also perpetuate the expectations of failure which cloud many development efforts at present.

Training and employment assistance

More federal money goes to programs for education, vocational skills training, employment assistance and subsidization than for any other program area. There are now more Indians receiving education and training than ever before but the results of this are difficult to assess because of unreliable statistics. Average unemployment rates for all reservations are still high. Estimates range from 14 percent to 40 percent, but this data is unreliable. High underemployment figures are also cited by the BIA. This category concerns individuals who are working part-time, seasonally, or are in jobs which are not considered adequately productive. These figures are both statistically unreliable and questionable as to their meaning.

Labor Force participation rates, indicating the number of individuals working and those unemployed seeking work, continue to be low on reservations. Many Indians have simply dropped out of the definitional labor force, because they know there are no jobs available, or because they have become accustomed to a lifestyle to which employment is only marginal. The need for reliable statistics is felt not only by those concerned with studying the economic situation of Indians; but should be of concern to tribal leaders and government officials who are responsible for expending large amounts of money based on inaccurate statistics.

From the beginning, the BIA employment programs placed stress on the need to usefully employ Indians. Sometimes this was carried to an extreme where all other factors were ignored. One extreme is represented by the Direct Relocation Program undertaken in 1950, during the government's Termination Policy period. This program contributed to moving large numbers of skilled or employable Indians off reservations to urban centers. Skills, training programs, and on-the-job training began in the mid 1950's and received increasing stress as opposition to relocation increased. Only after Congress reacted to the mistakes of the relocation program, did funding for local training and placement increase. Congressional support for improving skills and employment possibilities on reservations reached its fullest expression in the 1973 Comprehensive Employment and Training Act.

Despite the last twenty-five years of efforts, the greatest barrier to increased employment on reservations is quite simply the lack of jobs. In the period from 1966 to 1975 the BIA reported a figure for total new entries into its Direct Employment and Adult Vocational Training programs equal to 60 percent of its own estimate for the total Indian Labor force in 1973.[1] If all other training and employment programs were considered, it is not unreasonable to assume that a total figure for entries into programs would be larger than the total Indian Labor force at any point in time. This does not take into account the adequacy of the programs involved or the reasonableness of the comparison involved. It does point out the fact that training alone even if coupled with various types of job experience and subsidized employment will not solve employment problems on reservations, if there are simply too few unsubsidized jobs available. The creation of jobs is ultimately the outcome of overall reservation development.

A 1975 report by the General Accounting Office[2] on expenditures by the Federal Government benefiting Indians showed approximately 19 programs outside of the BIA relating directly to the training and employment needs of Indians. These programs spent an estimated total of $52.8 million dollars in FY 1974. Together with the BIA's programs in the same areas, a total estimated $94. 1 million was spent in fiscal year 1974.[3]

In contrast, the estimated expenditures under BIA programs in training and employment assistance and the various titles of CETA total $125 million for fiscal year 1976 (See Tables 1 and 2).

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[1] Based on BIA data supplied by the Division of Training and Job Placement. 1966–1975 (fiscal years) total for new entries into DE and AVT programs equals 103,925. March 1973 data for the total reservation labor force equals 167,312. April 1975 BIA data gives a labor force of 205,300 Indians and Alaskan Natives. Bureau of Census figures for the reservations labor force are considerably lower in 1970, but based on a different definition.

[2] GAO, Report in Expenditures benefitting American Indians, 1975, popularly known as the "Fannin Report." GPO.

[3] Data on BIA programs from Division of Job Training and Employment.

TABLE 1.—FUNDING FOR BUREAU OF INDIAN AFFAIRS EMPLOYMENT ASSISTANCE, FISCAL YEAR 1966–75

	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975
Adult vocational training	$11,421	$13,259	$13,830	$15,700	$25,000	$24,273	$24,716	$22,408.5	$19,035.4	$19,684
Direct employment (relocation and O/N placements)	3,007	3,864	7,267	8,477	12,761	14,935	15,133	15,700.05	13,336.8	14,107
On-the-job training (under AVT until 1974)								(3,400.0)	(2,600.0)	(2,400)
Indian action								5,283.1	8,916.2	10,604
Total	14,428	17,123	21,097	24,177	37,761	39,208	39,849	43,392.1	41,288.4	44,251

Source: Data provided by the Division of Job Placement and Training, BIA.

TABLE 2.—FUNDING UNDER CETA TO INDIAN ORGANIZATIONS OR FOR THE BENEFIT OF INDIANS

	Title I	Title II	Title III		Title VI	Total
			Sec. 302	Sec. 304		
Fiscal year 1975	Estimated Indian participation in title I.	[1] $7,063,094	$49,279,000	[2] $7,400,000	$5,987,590	$69,729,684
Fiscal year 1976 (estimate).	Programs not calculated.	1,800,235	[3] 51,841,000	[2] 8,884,940	8,139,597	70,665,772
Transistion quarter		450,055	12,640,000	[3] NA	[4] 6,018,915	19,108,970
Fiscal year 1977 (estimate).		2,000,000	50,560,000	NA	([5])	52,560,000
Total		11,313 384	164,320,000	16,284,940	20,146,102	

[1] This figure includes "carryover" funds from fiscal year 1974.
[2] These figures are for the summers at the end of the respective fiscal years.
[3] Includes $17,000 of unobligated 1975 carryover and $1,264,000 compensating adjustment for a like sum utilized in financing Job Corps contracts in fiscal year 1975.
[4] This represents part of a supplemental appropriation under title II to support title VI programs through December 1976, and their phase out by the end of fiscal year 1977.
[5] Program phased out.

Source: CETA information submitted to the Commission, 1976 CETA budget justification, various numbers of the Federal Register.

Of this amount, a total of $85 million is estimated to go to programs, which are at least under local Indian control.[4] This increase does not indicate that present expenditures are adequate, but does increase Indian control over how these moneys are spent.

The two major programs in which Indian Control is significant are Indian Action Teams and programs under the Comprehensive Employment and Training Act of 1973.

Both of these programs are only partially oriented towards training, and include emphasis on local management and program direction, on-the-job training, transitional and temporary employment, and in the case of Indian Action, community service.

CETA Title III programs have been in operation now for only two years and little is known about the effectiveness and organization of individual prime sponsor's programs. The major problems raised about the program on a national level have related to its overall administration, funding allocation and prohibitions relating to allowable training and public service employment expenditures.

The Indian Manpower Program was brought into existence at the end of 1973. An understandable period of time elapsed before funds were allocated, proposals received and processed from prime sponsors. Concern has been expressed about the lack of early and clear guidelines for program operations and allowable expenditures.

Responding to allegations concerning CETA program management, the Department of Labor has made efforts to solicit Indian input. DOL feels that it has invited and received considerable Indian input from both Indian organizations and prime sponsors.

Regulations for Title III, Section 302—Indian Manpower Programs—were first published in June 1974, 39 FR 23158. A large number of comments were received on these regulations. This led the Department of Labor to eventually publish revised Regulations in October, 1975, 40 FR 47722. Some of the objectionable aspects of the regulations were revised, but several points of controversy remain.

[4] $125 million is based on $70 million under all CETA Titles going to primarily Indian Prime Sponsors and approximately $55 million under BIA's DE, AVT and Indian Action Programs. The $85 million figure is based on $60 million of CETA funds, Indian Action and reservations contracting for DE and AVT programs.

One of these is the restriction placed upon expenditures in training and public employment programs, under section 97.161, allowable Federal Costs, 29 CFR 97.161. Additional changes were made in these restrictions by proposed amended regulations published in October 1975, 40 FR 47744. These place restrictions on expenditures for facilities and equipment. Many prime sponsors feel that these restrictions have unreasonably hampered their effectiveness. It is not known whether this situation has improved since prime sponsors have had more time to obtain other sources of funding for expenses disallowed under CETA.

Allocations for Title III programs have raised several problems. The overall funding for Indian Manpower Programs under Title III, Section 302 is set by statute at a minimum of four percent of the base funding of Title I (80 percent of Title I funding). Allocation of this amount among prime sponsors of programs for Indians and Alaskan natives is by formula. The formula is based partially on relative numbers of unemployed and partially on relative numbers of low income families within prime sponsors' areas of responsibility, 29 CFR 197.104 (c). The allocation formula requires the use of a number of statistics for Native Americans which are known to be inaccurate. Present allocations are based on an adjusted mixture of Bureau of Census, Bureau of Indian Affairs, and Revenue Sharing statistics.

CETA officials are attempting to further adjust their data, using reports submitted by prime sponsors and the BIA. But the past history of BIA "statistics," and the obvious self-interest of both parties submitting these figures, raise serious doubts as to their accuracy. Given Congressional awareness of the importance of good manpower statistics to the equitable operations of CETA programs, it is hoped that the Department of Labor will take stronger action to rectify this situation.

Training under CETA has, according to many prime sponsors, been hampered by the lack of technical assistance provided by the Department of Labor and by limitations on the consulting services which may be contracted for by prime sponsors. Part of the overall concept of CETA is the decentralization of training and employment activities. This assumes that there will be experienced local personnel to run these programs. This is not yet true for many reservations. As a result many prime sponsors have required more technical assistance than that available from the Department of Labor.

Public Service Employment under Titles II and III has been supplemented in the past two years by funds under Title VI of CETA, Emergency Public Service Employment. Title VI was added to CETA by Title I of the Emergency Jobs and Unemployment Act of 1974 (PL 93–567, 88 Stat. 1845) and provided funding to areas of substantial unemployment. The Emergency Jobs Act was designed to assist areas hurt by the economic problems of the past few years and funding under the Act will end in 1977.

In view of what has been said earlier about the critical lack of jobs on reservations, CETA funds which do provide additional jobs should improve the employment situation, but only as long as Federal funds are available for these subsidies. Data presented by the Department of Labor for Title III, Indian Manpower Programs in fiscal year 1975 shows the following breakdown for participant activities:

Activity	Participants	Percent of total
Classroom training	7,300	14.6
OJT	3,600	7.2
Public service employment	2,500	5.0
Work experience	25,000	50.0
Other activities	12,200	24.4
Total	50,600	

In 1975, there were 133 prime sponsors for Title III Indian programs receiving an average of $985.58 per program participant, including administrative costs. This average expenditure is not accurate since 20,800 participants left the programs during the year, with 6,100 of these reported to have entered employment. What is important is the stress shown by these figures on employment experience and subsidization rather than formal training. Since these figures include both reservation and urban programs, it is not known whether this emphasis is uniform for both types of programs.

Indian action team

Indian Action Teams were begun under the Division of Job Placement and Training in the BIA in 1972. The program supporting these contracted teams is viewed by the Bureau as broadly oriented effort:

> Indian action team program is a reservation-based program benefiting Indian people with skills training; strengthening of tribal government; projects completed as a result of the on-the-job training; development of management capability leading to increased capability to contract for Bureau of Indian Affairs services in accordance with the Indian self-determination concept; attracting additional funds from other agencies; development of tribal enterprises, whether they be commercial or limited to revenue producing activities on reservations. This type of program directly benefits individuals and the tribe in general.[5]

Indian Action Teams are organized on reservations by residents and operate under contracts from the Indian Technical Assistance Center in Colorado. They are supposed to provide training in a skill while carrying out activities useful to the reservation. The program has concentrated on construction skill, but has begun to train in other skill and vocational areas. With a budget of $800,000 in fiscal year 1972 the program consisted of three action teams. In 1976 it has a budget of 23.5 million dollars and consists of 86 action teams under contract.[6] For fiscal year 1977 the BIA requested 14 million dollars for the program, a reduction of $1 million from the fiscal year 1976 funding.

The Indian Technical Assistance Center has argued strongly for a $38 million budget for 1977. This level of funding is based on the total of 200 tribes ITAC claims wish to contract for Action Teams and the strong support the program has received. This has been eloquently shown by the support the programs have received in appropriations hearings from national Indian organizations and many tribal governments.[7] The fiscal year 1977 appropriation level is unknown at this time.

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[5] Commissioner Thompson, BIA, Senate Interior Appropriations Hearings fiscal year 1976, Pt. 3, p. 902.

[6] Funding came from two sources, $14.8 million from appropriations to BIA and $8.5 million from Title X funds under the Public Works and Economic Development Act of 1965, as amended by the Emergency Jobs and Unemployment Act of 1974.

[7] Letters and documents received by the Task Force.

The present status of Indian Action illustrates a number of problems which must be confronted by the Bureau and by Indians who take self-determination seriously. The following exchange from this year's appropriation hearings illustrates the status of Indian Action at BIA:

Mr. YATES. You are requesting an increase of $1.1 million for direct employment. Last year you wanted a decrease of this activity due to the expansion of Indian action teams which you expressed as being a better alternative in terms of reducing the unemployment level. This year you are basically requesting the same level of funding for Indian action teams and an increase for direct employment. Does this mean you have changed your priorities?

Mr. THOMPSON. I think in light of the economic situation that we have in Indian communities we feel this direct employment money will aid Indian action teams as well as be funds directly to the Indian people who are seeking employment in the expanded job market.

Subsequent questioning established that this expanding job market was thought to exist primarily in urban areas. The additional $1.1 million is said to provide for an additional 600 individuals desiring direct employment services, with emphasis in this case on relocation. It is difficult to see how this money will benefit Indian Action. [9]

An audit done on the program by the Department of Interior's Audits and Investigation Office found a number of problems and irregularities with the overall program and with the programs of specific contractors. [10] The auditors report that the program currently has no specific goals, no regulations and inadequate administrative procedures, particularly for reviewing and monitoring contracts. The programs visited by the auditors showed similar administrative weaknesses, some blatant irregularities, and generally poor success when judged as training programs. Some of these problems are being corrected by the ITAC, but many are inherent in the approach being taken by Indian Action. If the recommendations of the auditors were carried out, Indian Action would quite likely become an overly rigid program having little to do with its original goals.

Poor administrative procedures and irregularities should be avoided in programs such as Indian action if only because they will be inevitably present quite enough points for criticism even if well run. So long as Indian action, or similar programs can mobilize local support and generate some level of constructive activities they offer more long-run benefits for the reservation than conventional, well-administered programs. They must, however, avoid becoming elaborate welfare programs for a select few.

The Division of Job Placement and Training is presently involved in several internal struggles within the Bureau. In the case of Indian Action it can defer to the group responsible for the program, the Indian Technical Assistance Center. At the same time it is involved in trying to maintain an embryonic integrated Career Development Program. [11] This program basically combines the elements of employment assistance from the Division of Job Placement and Training with higher education programs currently under the Education in the Bureau. The Bureau apparently accepted the concept, but had

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[9] Additional money is apparently needed for direct employment services. A. Sorkin noted for fiscal year 1968 and 1969 that the Direct Employment and Adult Vocational Training programs were running out of funds half way through the year. Program officials indicate that they now run out only after 9 months.

[10] "Review of Indian Action Team Program. Bureau of Indian Affairs" Office of Audits and Investigation. USDI. November 1975.

[11] This and the following information on Career Development are based on interviews with BIA officials in the Division of Job Placement and Employment and on the Annual Report to the Bureau by the Navajo Area Office on its Career Development Program for fiscal year 1975.

difficulty in deciding whether to place the new program under employment or education. The existing pilot program in Career Development at several agencies in the Navajo Area is under the Division of Job Placement and Training. The basic idea of Career Development has strong appeal in creating a single service point offering an entire range of educational, training and employment placement alternatives already available in the BIA. At the same time it is proposing that additional, and much needed elements be added. These primarily consist of a Jobs Bank centrally accessing available opportunities and a Skills Bank similarly accessing available skills on and near reservations. While centralizing a group of logically related services, the concept should also offer administrative efficiencies while allowing better specialization among counselors.

It is too early to assess the future of Career Development within the Bureau. On the basis of its apparent success at Navajo, it should be successful at the local level if it is not consumed by struggle and disagreement in Washington.

Another recent audit report by the Department of Interior deals with the BIA's Direct Employment and Adult Vocational Training Programs.[12] This report is also highly critical of these two programs and indicates that significant changes have occurred in their administration since the thorough study of them done by Sorkin in 1969.[13] The auditors basically concluded that neither of these programs was being run according to the regulations which applied to them. This had apparently been true for some years. It observes that the Direct Employment programs frequently provided income subsidies for individuals already holding jobs rather than assisting persons to find jobs. The auditors found that the performance figures for this and the AVT programs were very innaccurate and misleading since both programs were being utilized in ways quite different from intended. The AVT program was found to be improperly screening applicants, or not screening them at all, but providing benefits without assessing needs to all applicants until program funds ran out. It was also found that AVT money was going in many cases to students enrolled in college studies which were not primarily vocationally oriented. The program administrators were also found to not properly monitor the progress and status of participants.

Local program officials generally admitted that rules were not being followed and that the auditors findings were indeed correct. Perhaps it was this openness which prompted the auditors to arrive at some quite basic insights.

> The principal issue is—are these programs available to all Indians as a basic right, or are they available only to those Indians who are considered likely to succeed, i.e., meet specified admission requirements. This is a basic policy question on which we are taking no position. However, we do urge that the BIA make the decision and clearly reflect it in the program directives and procedures.[14]

This same question must be asked with regard to most of the programs examined in this discussion, but not by the Bureau, by the

[12] "Review of Adult Vocational Training and Direct Employment Assistance Programs, Bureau of Indian Affairs." Office of Audit and Investigation, U.S. Department of the Interior, May 1976.

[13] Alan Sorkin, "American Indians and Federal Aid," The Brookings Institution, 1971. pp. 104, 135, 207-213. Sorkin found that the employment assistance and training programs being run by the BIA were, if adequately administered, quite effective. He did note a number of problems which lessened their actua effectiveness.

[14] Ibid., Transmittal letter to the Commissioner, Bureau of Indian Affairs.

tribes themselves. As reservations gain increasing control over manpower programs, these questions may become more difficult to discuss, but easier to answer. They will be more difficult because it will be Indians who are aware of and allocating the inevitably limited financing for the programs involved. The answers may be easier because the tribes will know their own priorities and the manpower skills necessary to achieve them.

C. 1. ENTERPRISE CREATION BY BIA AND EDA

A number of Federal Government programs have been created to promote enterprise development on reservations. These have ranged in scope from the potentially broad activities of the Economic Development Administration's Indian programs to the narrow responsibilities of the Office of Minority Business Enterprise. Together they have provided planning, technical and management assistance, capital, infra-structure and promotional efforts. These programs have undoubtedly made some progress toward economic development on reservations, but have fallen far short of the effort required.

The programs promoting enterprise development are not examined in detail because several recent reports adequately cover the problems which exist in this area.[1] Many of the problems encountered directly or indirectly by these programs have also been dealt with elsewhere in this report. These relate to the reservation economic environment and Indian control, the inadequacy and constraints on capital provided, and categorical nature of some of the programs themselves. Many of these programs have attempted to promote a particular type of development on reservations. The failures encountered reflect less on the potentials for reservation development than on the approaches attempted.

An attempt to industrialize the reservations began in 1955 when BIA initiated a program to attract industry to locate on or near Indian reservations. The objective was to provide Indians with employment opportunities. In setting up the industries, the non-Indians usually supplied the management and working capital, and the reservvation supplied the labor and sometimes the physical capital, and the BIA gave on-the-job training (OJT) subsidies. In 1968 Sorkin evaluated this program and found that 137 enterprises had been attracted, 27 had closed down and 110 were still operating. The labor force was equally divided between Indian (4112) and non-Indian (4375). Most of the plants were established during 1964–1968 when the Vietnam War had accelerated the demand for electronics parts. Sorkin found that one out of five failed because of inexperienced management and insufficient capital, inputs which non-Indians were supposed to provide: With the data available from the BIA we have not been able to adequately trace the results of the program from 1968 to 1975. However, in interviews with the directors of the Business Development program, the response was that plants were still folding and for the same reasons: inexperienced management and undercapitalization.

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[1] a. GAO Report, "Improving Federally Assisted Business Development on Indian Reservations," June 27, 1975.
b. "Minority Enterprise and Allied Problems of Small Business," hearings before the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, July 8, 9, 10, 1975, GPO, 1974.

The BIA's recently established Indian Business Grant Program, established under the Indian Finance Act, has been discussed earlier under Capital. The capital grants available under this program may alleviate some of the problems discussed earlier for the establishment of small Indian enterprises. Generally, however, the program must be viewed as inadequate in scope and subject to the same constraints as other BIA development programs.

In 1966 the Economic Development Administration replaced the Area Redevelopment Administration and continued the attempt to bolster local depressed economies. Since that time EDA has spent $231 million or $23 million annually on Indian programs. EDA's program is much more flexible than BIA's program of business development. EDA has invested in public works such as water, sewers, and industrial parks. Business loans, planning grants, and technical assistance are also available. The distribution of funding was as follows:

Industrial parks,(7 percent)	$17, 126, 113
Other public works, (75 percent)	173, 926, 993
Business loans, (7 percent)	16, 509, 204
Planning grants, (6 percent)	14, 359, 463
Technical assistance (4 percent)	9, 447, 965

How EDA decides to distribute its funds is the subject of a special Task Force report which is contained in the appendix.

Some EDA projects have more of an impact in terms of creating income and employment than others. If we consider the industrial park program, only 45 plants have located in the 42 parks which have a total acreage of 3487. These 45 firms employ 1200 Indians. The cost of creating these jobs was $14,000 per job not including business loans or wage subsidies. This is not excessive if one considers the average industry cost of $35,000 per job. Of the 32 reservations in the sample, five had industrial parks, but no occupants. One difficulty in attracting non-Indian industry is built into the enabling legislation itself. EDA is not able to pay relocation costs of plants, as only new or expanding industries qualify for EDA assistance. A relocating industry may locate on an Indian industrial park but it cannot receive any federal assistance. This creates a high failure rate among park occupants as branches and new businesses have a higher failure rate during recessions.

It has long been recommended that industries which use the natural resources be promoted. EDA has recently begun to examine the characteristics of the plants that fail and they found that they had the lowest failure rate among tribally owned resource based industries. Hopefully, it will continue to collect statistics so that this pattern can be verified.

When the composition of reservation enterprises was analyzed, we found that most of the enterprises were commercial, again with an emphasis (See Table 5) on tourism and recreation. Among the 32 reservations, there was a total of 81 tribally-owned enterprises; 36 percent were based on the natural resources, 58 percent were commercial or construction establishments, and only 5 percent manufacturing a non-resource based product. Sixty-three percent of all tribal enterprises were established with the help of EDA and BIA loans and grants. At the same time there were twenty-one major

non-Indian enterprises; 47.6 percent were based on a natural resource; 14.3 percent were commercial; and 38.1 percent manufactured a product not based on reservation resources.

When the sample reservations were asked to write a case study on a development project they had attempted, thirteen said they had nothing to report. Eight reported on resource-based enterprises, eight on a commercial enterprise and three on a non-resource based enterprise.

TABLE V.—OWNERSHIP AND TYPE OF MAJOR ENTERPRISES ON SAMPLE RESERVATIONS

Reservation	Tribally owned enterprises						Non-Indian enterprises			
	Resource based	Commercial	Manufactured	Other	Employment total/Indian	Number receiving EDA/BIA assistance	Resource based	Commercial	Manufactured	Employment—total/Indian
Cheyenne River	0	2	0		(1)	0			1	
Crow	2	4	0	Industrial park	(1)	6			1	71/63
Crow Creek	1	1	0	Museum	16/16	2				
Fort Hall	2	1	0		59/48	1				
Lac du Flambeau	2	1	0		12/12	2			1	162/81
Nett Lake	1	0	0		18/18	1				
Omaha	0	0	0						2	125/15
Rosebud	3	1	3	Industrial park	852/842	6			2	
Spokane	2	2	0	Museum	67/67	2	2			
Standing Rock	0	2	1		(1)	2			1	5/0
Umatilla	1	3	0		(1)	1				
Warm Springs	1	2	1			2				
Chehalis	1	0	0			1				
Kickapoo	0	0	0							
Swinomish	1	0	0	Industrial park	50/25	1	2	1		
Colville	3	4	0		83/83	0				
Duck Valley	0	3	0		4/4	1				
Fort Apache	2	4	0		560/409	4	2	2		
Fort McDermitt	0	0	0						1	4/4
Hoopa Valley	0	4	0		(1)	2				
Hualapai	1	2	1		48/43	4				
Laguna	2	0	0		(1)	0	3			
Makah	0	2	0	Museum	12/12	0	1			
Morongo	0	0	0	do	(1)	1				
San Carlos	3	4	0	Industrial park	52/52	7				
Carson Colony	0	0	0							
Havasupai	0	3			9/8	3				
Moapa	0	0	0		5	1				
Nambe	0	1	0		(1)	1				
Picuris	1	1	0		(1)	2				
Prairie Island	0	0	0							
Reno Sparks	0	0	0							

[1] Not available.

C.2. THE CASE OF INDIAN TOURISM

One of the most popular types of development projects among federal officials has been Indian tourism. EDA has been the largest promoter of Indian tourism complexes. It has funded 65 projects, spending $60,467,609 or 23.9 percent of its total expenditures on all Indian development projects. Some tribes have also contributed large sums to these projects. Because EDA sometimes approved tourism projects without requiring feasibility studies, provided almost no on-site technical assistance, and failed to monitor the projects themselves, nearly all projects have failed to achieve their goals of income and employment. Most are running large deficits and have had these deficits since the projects began operating. As a consequence some are now behind in their loan payments. Employees have been laid off and facilities are deteriorating. Some facilities have closed or are being rented out as apartments or offices. On one reservation 30 out of 60 motel rooms are now used as offices. Only a few projects are making profits and are doing well enough to expand.

Harry Clement, former EDA-funded Indian tourism consultant commented:

> Nobody can protect himself from the way money works and from the way economics works, or from the way tourists work. All you can do is the best you can with the system. And the system is grinding Indian tourism to bits.

Clement also commented that it is difficult to make profits in tourism anywhere, much less on Indian reservations which are often located in remote areas.

Faltering tourism projects impose burdens on tribes that they can ill afford since they are liable for loans upon default. But even if the projects were in the black, they provide relatively little employment. It is not surprising that tribes have sometimes over-hired in an effort to provide more employment. One facility initially employed 100 people. Today it employs only 20. Overemployment in projects which cannot pay their labor overhead produces losses. The employment problem is compounded by tourism's seasonal nature. Under-built projects which are not destination point and which do not provide year-round recreational activity must of necessity be seasonal. On 10 reservations studied by Centaur Management Consultants, employment due to tourism rose from 2.8 man months to 7 man months. During the seasonal period the proportion of Indian families below the poverty level diminished from 56 percent to 23 percent.

In the Centaur Management Consultant's study, it was reported that there had been some improvement of job skills. In the 10 Indian tourism projects studied, 10 percent of the people employed received some type of formal training and 43 percent obtained on-the-job training. But Task Force calculations indicate the EDA-funded Indian tourism projects are subsidizing non-Indian employment nearly as much as Indian employment. In the 12 motel tourist facilities examined on which EDA spent $34,998,309, there are presently (as of July 1976) 684 full-time employees, of which 401 are Indian, or 58.6 percent. The total cost to EDA per job created appears to be $51,167. The total cost per job created would rise considerably if tribal funds were also considered.

JOBS GENERATED ON MOTEL TOURIST FACILITIES ON INDIAN RESERVATIONS—1976

	Total jobs	Numbers of Indians
Fort Apache	45	29
Hopi	28	28
S. Ute	40	32
Grand Portage	60	55
Crow	20	16
Jicarilla	10	9
Mescalero	180	90
Fort Berthold	15	11
Standing Rock	25	4
Warm Springs	157	56
Crow Creek	24	23
Uintah and Ouray	80	48
Total	684	401

401 or 58.6 percent Indian.

These are full-time jobs only. Some figures are averages of differing summer and winter employment.

EDA has spent $34,998,309 on the above 12 projects. Dividing 684 jobs into this amount cost per job is $51,167. Cost per job would be higher if tribal amount spent on the projects were included.

An example of deficits incurred at one tourism facility follows:

Period	Hotel	Ski area	Total
Aug. 4, 1970, to Apr. 30, 1971		($76,626)	($76,626)
May 1, 1971, to Apr. 30, 1972	($28,556)	(98,741)	(127,297)
May 1, 1972, to Apr. 30, 1973	(307,663)	36,258	(271,405)
May 1, 1973, to Apr. 30, 1974	(254,235)	10,585	(243,650)
Total	(590,454)	(128,524)	(718,978)

Why do Indian tourism projects fail? If the EDA Development Directive No. 10–75 had been followed, most if not all of the problems in the projects could have been overcome. It is also true that some projects would not have been built at all if the directive had been followed. The directive specifies: "all proposals for tribal business projects must include a demonstration of feasibility, the identification and commitment of working capital, and a management plan."

The problem of feasibility is a crucial one. EDA relied on inadequate feasibility studies, or approved projects even when no feasibility studies were done at all. Many studies were contracted to firms with no experience in tourism. In more than a few cases the question of objectivity arises because some architectural-engineering firms such as Harrison G. Fagg and Associates; Leo A. Daly; and Dana, Larsen and Ruble did studies gratis, "on spec" in the hope of getting follow-up architectural work on the proposed projects. In many cases they did obtain the desired contracts.

It is unclear whether architectural, engineering, or management consultant firms just do poor feasibility studies, or have an interest in making studies look better than they really are because they want to do the construction. The studies showed glaring deficiences in market analysis, capital requirements, estimated income, and operating expenses. Because cost estimates were incorrect, inflation unconsidered, and estimates not updated, it is not surprising that once

EDA approved them, there arose cost overruns. In one Harrison Fagg study, motel costs were placed at $687,834 for 60 rooms; the actual cost turned out to be $1,002,000 or 32 percent higher.

Attempts to solve the overrun problem produced more problems. Sometimes tribes borrowed money or used other funds. Sometimes projects were scaled down, making profitability questionable. At other times EDA paid for the cost overruns. In any case tribes were left with unprofitable operations. Without feasibility studies and without working capital, tribes were left with white elephants.

Another problem in Indian tourism is lack of tribal organization necessary to deal with tourism. Few feasibility studies considered who would supervise the design, construction, management and promotion. of the projects. Nor did they consider who would maintain financial supervision and controls. Tribal councils or tourism committees having little if any expertise in tourism have been running most tourism projects. Some reservations have had managers who did not work out and there has been difficulty in finding qualified replacements. Training funds to train Indians for management are also lacking. In some projects, there has been a manager for only one or two facilities and none for others. In others, there have been managers overseeing various facilities but no overall manager. A hopeful note is that now some tribes have formed or are in the process of forming independent tourism development corporations with boards of directors consisting of both tribal members and non-Indian technicians who have skills in tourism. These corporations will do overall planning and see to it that adequate management is provided with good financial records.

Despite a plethora of problems, at least some of the Indian tourism projects could probably be saved. A 1975 General Accounting Office report recommended that EDA evaluate projects more closely and provide closer monitoring after funding. The earlier Centaur evaluation recommended that EDA hire its own tourism specialists to assist tribes. In response, EDA funded the American Indian Travel Commission, a Denver-based agency consisting of five tourism technicians (mostly non-Indian) who now provide technical assistance. Feasibility studies, evaluation, recommendations and promotion are provided.

Another GAO recommendation was that EDA cooperate more with other federal agencies involved in Indian development. Indian tourism has suffered because of lack of roads and housing in areas where tourist facilities were built. On one reservation, Indian employees have to travel 40 miles from the nearest town to the tourism facility because there is no housing at the facility. Coordination with the BIA, DOL (CETA) could provide training funds. Agencies such as the US Forest Service, US Park Service, Corps of Engineers, Bureau of Land Management and various State agencies dealing with tourism/recreation could possibly be utilized by EDA and the tribes.

It is also necessary that EDA fund entire projects during one fiscal year rather than continue funding projects in phases over a period of several fiscal years as in the past. This process has delayed opening of projects and caused financial losses. On one reservation, because of a light snowfall, much money was lost in ski operations because a

snow-making machine was not scheduled until the next phase. On another reservation, a project could not open because furniture was not funded until the next phase.

EDA should not abandon Indian tourism projects, and it should re-evaluate them to determine which elements contain the greatest potential for profitability, then assist them to make existing projects profitable.

CHAPTER V

Findings and Recommendations on Reservation and Resource Development and Protection

The Navajo Nation,
Window Rock, Ariz., September 1, 1976.

Mr. Ernest Stevens,
Director, American Indian Policy Review Commission, House Office Building, Annex No. 2, Washington, D.C.

Dear Mr. Stevens: Enclosed herewith is our final report concerning Reservation and Resource Development and Protection. As Chairman of Task Force #7, I would like to acknowledge and express my appreciation for the aid and assistance of the Central Core Staff in collecting and tabulating data from Washington sources. In particular, we commend Lorraine Ruffing, Nancy Evans, John Kough, Dick Shipman and Kathryn Harris. Needless to say, by not enumerating all those who have provided assistance on this project, we do not intend to demean the efforts of those unnamed.

Very truly yours,

Peter MacDonald.

I. Introduction

In 1775 the Continental Congress named the first Committee on Indian Affairs, and men such as Benjamin Franklin and Patrick Henry were appointed to that Committee. Two hundred years later, the American Indian Policy Review Commission was created by Congress because it found that "the policy implementing this relationship [the special legal relationship between the Federal Government and the American Indian] has shifted and changed with changing administrations and the passing years, without apparent rational design and without a consistent goal to achieve Indian self-sufficiency."

Two hundred years of effort has yet to make an appreciable advance in producing economic progress for the Indian American; thus, this Task Force is burdened with the responsibility of breathing life into the Northwest Ordinance of 1787, which provided that:

> The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property rights and liberty, they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs done to them, and for preserving peace and friendship with them.

This Task Force is charged with making findings and recommendations concerning both "resource protection" and "reservation development," and is of the belief that its primary function is to make sure that the promises and good will first expressed in the Northwest Ordinance will become fact, as opposed to mere rhetorical fancy. It is beyond cavil that Indian land and property have been taken from Indians without their consent. It is our intention to recommend

procedures not only to prevent such takings from occurring in the future, but also to enhance and enlarge the economic independence of both those Indian tribes that still possess a sufficient resource base to become economically self-sufficient and those tribes which must reach self-sufficiency without an adequate land base.

In 1972 BIA Commissioner, Louis R. Bruce, in initiating plans for a reduction of BIA programs, stated:

> Developing Indian economies does not mean really locating non-Indian industry close to or on the Reservations so that these corporations can enjoy a cheap labor supply. It means the development of truly Indian economic systems so that a dollar once earned by an Indian citizen can be spent and kept moving throughout an Indian economy, thus developing that economy and making a maximum impact upon that community. . . . I want to see Indian economies where dollars move from Indian hand to Indian hand and are not drained out by those non-Indian cities that develop and grow and feed upon Indian reservations.

The fact of the matter is that, despite all of the good intentions and statements of high-sounding purpose, resources of Indian reservations have been regularly exploited, and such exploitation is the principal factor leading to the drastic diminution of the Indian land and resource base. This necessitates stringent resource protection. In fact, it is the very exploitation of reservation resources and the present inadequate land and resource base which makes reservation development and, in particular, economic development so difficult and yet so critical. Indian reservations are not mere relics of the past nor museums dedicated to the former glory of America's native people. They are instead the home of some 750,000 Americans with the same types of hopes and dreams, fears and concerns as the rest of the American people. While the language of America's Indian people may differ from the Anglo population, while the history and culture may have both a different perspective and embrace different values, there is a common bond in those things which make all men brothers and all mankind human.

This Task Force believes that American Indian people must seek a way to develop within the American system and yet, in many ways, apart from it. As has been said, "We know that we cannot go back, nor can we merely sit beside the trail." What this Task Force proposes—the Kah-Nee-Ta Plan—is simple to express, but obviously, in view of the almost uniform failures of past efforts, will be hard to implement.

The Plan is divided into two parts, the first of which is a bill which provides for a Constitutional Amendment, which embodies the sentiments and feelings first expressed in the Northwest Ordinance. This Amendment simply provides that no governmental authority within the United States shall take the land and property of Indians without their consent. The bill establishes an American Indian Trust Protection Commission to provide protection of Indian lands and resources.

The second part of this Plan merely re-channels, through the establishment of an American Indian Development Authority, the monies presently expended for the benefit of the Indian communities through HEW, HUD, DOL, IHS, BIA and other existing governmental agencies for capital outlays into one administrative agency designed for the sole purpose of providing a viable and permanent economic base for Indian reservations. It also calls upon the Federal

Government to augment these funds with more substantial sums in a relatively short period of time so that the Indian reservations will have a reasonable opportunity to become at least partially self-supporting before the end of this century.

II. Reservation and Resource Protection

The problems associated with the protection of the resources of Indian America are as varied as the resources themselves. Historically, America progressed from a land that had almost two billion acres under Indian ownership or use in 1492 to a land with 150,000,000 acres in Indian ownership and use in 1887 and 60,000,000 acres in 1934 (with about that amount today). While the Indian land base is only about 1/30th of what it was at the time of the first European exploration and settlement, the Indian population is considerably greater today than it was at that time. Thus more people must be sustained by much less land. This problem is complicated by the fact that in many areas the land which is still Indian has limited resources and is, in fact, the least desirable from a surface resource standpoint. (This particular problem will be addressed in Section III, Reservation and Resource Development.)

While it is interesting to review the various ways in which Indian land was taken, it is useful to do so only if the exercise provides some guidance towards a future course of conduct. From the Indian standpoint it makes little difference whether the land was taken out of military necessity, the demands of an expanding non-Indian population, in an attempt to "civilize" the Indian and end so-called "Indian paganism and nomadism," or simply because of the resources the Indian land possessed (whether it was in the form of the land itself, or water, or minerals).

What emerges from any historical review is the conclusion that existing law and policy have failed to adequately protect Indian lands. It is certainly true that much Indian land was signed away by the Indian owners, albeit under economic or physical duress. It is not appropriate for the United States to now be asked to protect the Indian people from their own mistakes. It is appropriate to ask the United States to assist in protecting the lands which remain Indian (and any lands which may be added to this base) from further outside encroachment, whether such encroachment comes in the form of actual physical taking of lands, which in most cases could only be done by the Federal Government, or from indirect taking of Indian resources by taxation or regulation.

The ultimate goal is a Constitutional Amendment, since federal law has long established that one act of Congress can repeal another and that even treaties may be overridden by Congressional action.

In the interim legislation is sought in two basic areas:

First, the establishment of an American Indian Trust Protection Commission charged with the responsibility of protecting Indian resources and reviewing proposed federal actions which may affect those resources (much like the existing Environmental Protection Agency). Since poverty often renders the poor unable to protect what is rightfully theirs—even if they have the stronger case on the merits—the Commission would have the responsibility and the

financial capacity to provide either direct legal and technical assistance or grants so that Indian Tribes might obtain such assistance (much like the existing Legal Services Corporation).

Secondly, to prevent the ongoing encroachment by some states and local governments which both takes Indian resources and hinders reservation development, legislation is sought which would specifically prohibit any state or local regulatory or tax activities within Indian Country without the consent of the governing body of the Indian Tribe. Some Tribes may welcome benign state and local assistance. Other Tribes may resist it, but, consistent with the National policy of Indian self-determination (expressed in such legislation as Public Law 93–638), it must be the Indian Tribe which decides the level of cooperation and involvement with state and local governments. (Needless to say, this legislation would not affect the duties of state and local governments to provide equal access to state services and programs to all its citizens whether or not the citizens are Indians.)

Resource protection, however important, is not an end in itself. Since Indian Nations are living dynamic bodies, the ultimate question, as yet unanswered, is whether and how they may be made viable homelands for America's Indian people. Resource protection is designed to hold the line against future encroachment and to provide the legal setting in which Reservation Development, discussed in the next section can take place.

A draft bill to provide protection of resources in Indian Country is attached as Exhibit "A".

III. Reservation and Resource Development

History indicates to us that the American Indian lands which have been taken in the past have been those which offered the greatest economic potential. Thus, the problem of reservation development stems from the fact that the lands remaining in Indian hands are in large part sub-marginal in terms of their resource base, and are, therefore, unable to support the ever increasing Indian population. In addition, the relocation of Indians to isolated reservations has resulted in their being far removed from the major regional economic centers of the United States and thus placed at a locational disadvantage in terms of industrial development. The result is that Indians have been forced into a poor economic environment where poverty has been the inevitable consequence. The United States government, in recognizing its obligations to Indians as citizens, and to Indian Tribes by virtue of past treaties, has attempted to rectify this situation through efforts to provide Indians with equal economic opportunity.

Since 1950 the Federal Government has, through a variety of agencies and programs, spent a great deal of money and effort in an attempt to improve the material conditions of Indians. The lack of significant improvement in the material condition of Indians is a matter of record and a source of widespread concern among Indian leaders and members of the United States Congress.

Out of several attempts to understand and alleviate the persistence of American Indian poverty has come a general agreement that the economic development of Indian reservations is the most promising

means of overcoming American Indian poverty. Nevertheless, the most recent evidence indicates that Indians continue to suffer rom extremely widespread poverty, despite the efforts of the Federal Government to promote economic development on Indian reservations.

The problem is not that federal efforts have failed to produce any economic development on Indian reservations, but rather that the rate of economic development has not kept pace with the rising level of need associated with both the rising American Indian population and the rising cost of the average level of living of all American people. For example, while some increases in American Indian employment have occurred as a result of economic development efforts on Indian reservations, the rate of increase in employment has not kept pace with the rate of increase in the American Indian labor force, with the result being increasingly higher rates of unemployment among American Indians. Similarly, there have been some increases in American Indian per capita income, but the rate of increase in these per capita incomes has not kept pace with either the rate of inflation or the rate of increase in the average American per capita income, with the result that the disparity between non-Indian and Indian per capita incomes has been increasing in both real and relative terms. Indeed, the rate of increase in the poverty level of income has been faster than the rate of increase in American Indian incomes, with the result that more, rather than fewer, American Indians are living below the poverty level.

The explanation for the slow rate of economic development on Indian reservations lies in part in the level and use of Federal funds for economic development. Out of the $1,733,000,000 spent by the Federal Government for Indians in 1976, far too much was spent on the symptoms of poverty and under-development, and far too little spent on the causes of poverty. The Federal Government has, in effect, been applying its resources to mitigating problems rather than developing solutions.

The problem with Federal Government programs to date may be summarized as too little money available for reservation development of the scale necessary to solve the problem of under-development. Because the under-development of Indian reservations is so all-encompassing and pervasive, the piecemeal project-by-project categorical grant approach can never provide a workable solution.

What is needed is a new program for Federal support of American Indian reservation development. The new orientation needed involves a significant increase in the amount of Federal funds available, administered in such a way that those increased funds are spent in the right places at the right time and on the causes of under-development, rather than on the symptoms. Rather than spending funds for providing housing for those who cannot afford it, and training for jobs which do not exist, these funds should be spent for reservation resource and industrial development and the necessary infrastructure to sustain this. With an increased understanding of how real development has taken place in the past, these funds should be applied comprehensively for implementation of plans rather than for projects. Such plans would enable tribes to program development to be consistent with their ability to absorb the massive infusions of Federal capital. Such comprehensive plans would also enable tribes to realize the full external benefits of each project, in that each project would make every other

project more feasible. The basis for the success of this program lies in the fact that, notwithstanding the relative isolation and resource poverty of many Indian reservations, recent mineral discoveries and the increased prices of energy resources have made many reservations viable locations for real economic development.

The goal of this approach is to create for American Indians the means for the efficient development of viable reservation economies, which will afford Indian people the maximum opportunity for choice of both their style and standard of living, and which will move them towards self-sufficiency as individuals and as tribes.

The mechanism proposed to administer this new program is an American Indian Development Authority (AIDA) created by Congress as an independent Federal agency. It shall be the function of AIDA to provide Indian reservations with technical assistance funding and development capital to prepare and implement comprehensive development plans. Initially it shall coordinate, and eventually consolidate, all development-related federal funding for Indians from current categorical grant programs. In addition, AIDA would administer an accelerating amount of financing for Indian reservation capital formation obtained from increased annual appropriations as set forth in the Act creating its statutory authority.

Each tribe would apply to AIDA for planning grants to establish a Tribal Development Authority, which would prepare a multi-year comprehensive development plan in the context of long-range tribal development goals. AIDA would then review each tribe's plan in light of the specific needs and developmental problems facing that tribe and the overall feasibility of the plan. Once AIDA has accepted multi-year tribal plan, it would make a commitment for the duration of the plan, and provide grants for development capital and make loans for operating expenses.

This approach to reservation development will make economics work for Indians rather than against them. This is the American Indian version of a model applied with some success in other underdeveloped economies. By pursuing development in a manner which emulates the way in which successful development has taken place elsewhere, reservations should be able to reach the necessary threshold levels of economic activity which will make possible a self-generating, self-sustaining economy. Indian people will thus be assured of equal economic opportunity on lands which the Federal Government, by Treaty and Executive Order, has assigned them.

Indian people wish to view this approach as a way of joining with the rest of the nation, to participate in the nation's economic prosperity, while contributing to the nation's economic growth.

A draft bill to provide for reservation development and for the establishment of the American Indian Development Authority is attached as Exhibit "B".

EXHIBIT "A"

A BILL To provide for the protection of the resources of Indian Nations by Constitutional amendment; to establish the American Indian Trust Protection Commission and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—CONGRESSIONAL DECLARATION OF PURPOSE

SEC. 101. The purposes of this Act are to protect by Constitutional amendment the lands and resources of Indian Nations from taking or regulation by any federal, state, local or regional body without the consent of the governing body of the relevant Indian Nation.

TITLE II—CONGRESSIONAL FINDINGS AND GOALS

SEC. 201. The Congress, recognizing that the land base of the Indian Nations of the United States has decreased from 150 million acres in 1887 to 60 million acres in 1934 and further recognizing that the lands which remained Indian were largely the least attractive and possessing the least resources, and further recognizing that agreements for utilization of Indian resources have historically been on less than fair and equitable terms and that the efforts of federal, state and local governments to tax and regulate Indian lands and activities thereon are in derogation of the trust responsibility of the United States and against the interests of the Indian people, declares that it is the policy of the Federal Government to use all practical means and measures in a manner calculated to carry out the trust responsibility of the United States.

SEC. 202. In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all means to improve and coordinate federal plans, functions, programs and resources to the end that the Nation may:

(a) Fulfill the responsibilities of the United States as Trustee for Indian lands and resources;

(b) Prevent the regulation or other interference with Tribal resources by Government at any level without tribal consent;

(c) Prevent the diminishing of the land base of the Indian Nations.

TITLE III—PROPOSED CONSTITUTIONAL AMENDMENT

SEC. 301. Short Title.

INDIAN RIGHTS AMENDMENT

SEC. 302. Neither the United States nor any state or local government shall have the authority to take land, minerals, water or other resources in Indian Country or which are located thereon, thereunder, or appurtenant thereto or regulate activities, whether by taxation or otherwise, without the consent of the governing body of the Indian Nation given after the date this amendment becomes law.

SEC. 303. "Indian Country" as used in this amendment means:

(a) All land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent and, including rights-of-way running through the Reservation; and

(b) All dependent Indian communities within the borders of the United States; and

(c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

SEC. 304. The Congress shall have the power to enforce this article by appropriate legislation.

SEC. 305. This article shall be valid to all intents and purposes as part of the Constitution of the United States when ratified by the Legislatures of three-fourths of the several States within 15 years from the date of its submission by the Congress.

TITLE IV—AMERICAN INDIAN TRUST PROTECTION COMMISSION

SEC. 401. There is hereby established an American Indian Trust Protection Commission (hereinafter referred to as the "Commission") to be composed of 9 Commissioners to be appointed by the President by and with the advice and consent of the Senate. Not less than 6 of such Commissioners shall be residents of Indian Country at the time of their appointment and enrolled members of an Indian Tribe duly recognized as such by the Secretary of the Interior. No Commissioner shall engage in any other business, vocation or employment other than that of serving as a Commissioner. Each Commissioner shall hold office for a term of 5 years and until his successor is appointed and has qualified, except:

(a) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and

(b) The terms of office of the Commissioners first taking office after this Bill becomes law shall expire as designated by the President at the time of nomination: two at the end of one year, two at the end of two years, two at the end of three years, two at the end of four years, and one at the end of five years.

SEC. 402. The Commission is authorized to appoint such officers, attorneys and other experts as may be necessary for carrying out its functions under this Act and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries.

SEC. 403. It shall be the duty and function of the Commission:

(a) To assist all Indian Nations (the term "Indian Nations" and the term "Indian Tribe with a governing body duly recognized by the Secretary of the Interior" being synonymous) in the protection of their land and other resources;

(b) Upon the request of any Indian Nation to represent said Indian Nation in any legislative, administrative or judicial proceeding for the purpose of protecting and enhancing the land resources of said Indian Nation or to provide grants to Indian Nations for such representation;

(c) To provide technical assistance to any Indian Nation in the protection, utilization or management of its resources;

(d) To report at least once each year to the President, the Congress, and the governing body of each Indian Nation on the status of resource protection within Indian Country;

(e) To review all proposed federal action which may affect Indian Country and Indian resources and prepare a report on the likely affect of such activity upon Indian Country and Indian resources;

(f) To adopt such rules and regulations as it deems just and appropriate in carrying out the functions delegated to it.

SEC. 404. There are authorized to be appropriated to carry out the provisions of this Title not to exceed $3,000,000 for fiscal year 1978 and $4,500,000 for each fiscal year thereafter.

TITLE V—REPEAL OF EXISTING LAWS

SEC. 501. Notwithstanding any other provision of law, no state or political subdivision thereof is authorized to tax, regulate or exercise jurisdiction in any manner within Indian Country without the consent of the governing body of the affected Indian Nation given after the date this Bill becomes law.

EXHIBIT "B"

A BILL To provide for the development of Indian County consistent with the goal of providing for Indian self-sufficiency; to establish the American Indian Development Authority and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I—CONGRESSIONAL DECLARATION OF PURPOSE; SHORT TITLE.

SEC. 101. The purposes of this Act are to provide for the development of Indian Country in a manner consistent with the comprehensive plan adopted by each Indian Nation (the term "Indian Nation" and "Indian Tribe with a governing body duly recognized by the Secretary of the Interior" being synonomous) with the assistance, as requested, of the American Indian Development Authority so as to achieve self-sufficiency within Indian Country for all Indian Nations as the Indian Nations may each choose to define the term "self-sufficiency."

SEC. 102. This Act may be cited as the "Indian Development Act."

TITLE II—CONGRESSIONAL FINDINGS AND GOALS

SEC. 201. The Congress declares that the establishment of viable economies on Indian Reservations is vital to the best interests of the United States, but finds that many Indian Reservations are underdeveloped and suffering substantial and persistent unemployment and underemployment; that such unemployment and underemployment cause hardship to many Indians and their families, and waste invaluable human resources; that existing Federal Indian programs have not been effective in combating the chronic unemployment and underdevelopment of Indian Reservations; that to overcome the problem the Federal Government should help Indian Reservations to take effective steps in planning and financing reservation development; that Federal financial assistance, including grants to Indian Tribes for resource, industrial and infrastructure development should enable such tribes to help themselves achieve lasting economic improvement by the establishment of stable and diversified Reservation economies and improved living conditions for their residents.

TITLE III—AMERICAN INDIAN DEVELOPMENT AUTHORITY.

SEC. 301. There is hereby established an American Indian Development Authority (hereinafter referred to as the "Authority") to be composed of 9 members to be appointed by the President by and with the advice and consent of the Senate. Not less than 6 of such members shall be residents of Indian Country at the time of their appointment and enrolled members of an Indian Tribe duly recognized as such by the Secretary of the Interior. No member shall engage in any other business, vocation or employment other than that of serving as a member. Each member shall hold office for a term of 5 years and until his successor is appointed and has qualified, except:

(a) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and

(b) The terms of office of the members first taking office after this Bill becomes law shall expire as designated by the President at the time of nomination: two at the end of one year, two at the end of two years, two at the end of three years, two at the end of four years, and one at the end of five years.

SEC. 302. The Authority is authorized to appoint such officers, attorneys and other experts as may be necessary for carrying out its functions under this Act and the Authority may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries.

SEC. 303. It shall be the duty and function of the Authority:

(a) To assist Indian Nations by grants or other assistance in the preparation and presentation of comprehensive development plans consistent with the long-term goals and needs of each individual Indian Nation;

(b) To review and approve the comprehensive development plan of any Indian Nation;

(c) To provide financial, technical and other assistance as requested to any Indian Nation to assist in carrying out the provisions of any approved comprehensive development plan;

(d) To adopt such rules and regulations and create such subordinate bodies and departments as it deems just and appropriate in carrying out the functions delegated to it.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS

There are authorized to be appropriated to carry out the provisions of this Title not to exceed $15,000,000,000 as "no-year" funds.

APPENDIX I

American Indian Mineral Agreements: Literature Search and Reform Proposals: by Ronald L. Trosper

SUMMARY

This paper summarizes critiques of Indian mineral agreements and reform proposals which have been, or perhaps should be, written. The paper is not a treatise; there are too many possible complications. Mineral extraction, even for one type of mineral, is a complicated business. For this reason, the paper does not deal with specifics.

It reviews tribal and corporate goals in mineral development, and describes the objections to the current situation. It also summarizes some new agreements in developing countries and discusses the determinants of bargaining strengths. Finally, it draws some conclusions and suggests changes for tribes and for Congress.

Section I

GOALS

A. Tribes

Although few tribes have published their goals for mineral development, it appears one can summarize them as follows:

(1) Preservation and enhancement of tribal sovereignty
(2) Revenue maximization
(3) Minimization of negative impacts on environmental, cultural, or other objectives.

Each of these three is itself a complex of sub-issues. Further, each is a classification of important means to a more general end: the welfare of the members of the tribe. A tribe with secure sovereignty, a high revenue, and with few imposed environmental or cultural costs can go about welfare maximization with few constraints, whatever the particular meaning of welfare to its members. Tribes differ in the weights which they give to each goal, depending upon the specific relationship between the goals and the ultimate values of the tribe. For instance, a tribe which values religious ends may place a far greater weight upon sovereignty than would other tribes. A tribe concerned about environmental preservation may accept lower revenue prospects in return for the power to prevent pollution. Sovereignty and revenue maximization do not necessarily conflict, since the power to tax, an attribute of sovereignty, can increase revenue.

Although the economist is accustomed to analyzing revenue maximization, there is no barrier to including the other goals in an analysis. The difficulty with Indian mineral agreements is that none of these goals have been important to the Bureau of Indian Affairs although federal regulations appear to stress revenue maximization. Further, much non-Indian criticism of the agreements stresses only environmental issues, while questions of sovereignty and revenue improvement are ignored.

B. Corporations

The failure to examine revenue maximization is important because companies interested in minerals are exclusively concerned with net revenue maximization. They are little concerned with costs which they do not pay. Indians bargaining with the firms should at a minimum understand the revenue-maximization view of the world, even if they themselves prefer to moderate the concern for revenue with other considerations.

The term "net revenue maximization" requires closer definition. "Net Revenue" means "net of all costs"; one could use the term "profit" were it not for the fact that the use of "profit" for taxation and other purposes can create confusion.

"Cash flow" is best. It emphasizes the cash and timing aspects. All firms are concerned with when the revenues occur, and use "rate of return" or "present value" formulas to adjust for timing. These leave out the issue of risk. A firm fears negative cash flow; after a sufficient period of such losses, it will be unable to meet its commitments and become bankrupt. Thus, in planning an investment, a firm will compare the possible cash flow under a number of possible occurrences. It will attempt to design an investment to achieve a balance between maximum cash flow and the risk of disaster. Contingent contracts, which make costs fall if revenues fall, have appeal from the point of view of minimizing risk.

C. The Matter of Risk

All observers agree that uncertainty and the sharing of risk is a central issue in mineral development. Risk originates in the exploration, development, and marketing of minerals. Is there a rich deposit? How big is it, and how accessibile? Will the price of the mineral rise or fall? The possibilities in the energy field are staggering, Adelman estimates that the real cost of Persian Gulf oil is about ten cents a barrel and could rise to twenty cents by 1985 (Adelman, 1962: 6). Should the OPEC cartel dissolve, now-valuable coal would have to compete with very cheap oil. Few cartels have seemed so strong and united, but most cartels have dissolved eventually.

The risk issue becomes ideological because oil companies use "the bearing of risk" as a justification for their profits. In order to commit capital, they need some return. But how much do they deserve? How much chance do companies actually take on Indian lands? Is it true that the landowners, the tribes, have not been bearing risk under current arrangements? Company spokesmen—such as some at the recent Indian Land Development Conference (Rocky Mountain Mineral Law Foundation, 1976)—do not recognize the risks a tribe takes when it commits a portion of its land to development. It is natural for such spokesmen also to overstate the risks their companies bear.

For information, one turns to studies by economists, who usually ask their traditional question, "what is the socially optimal approach?" (Hughart, 1975; Leland, 1975). Others attempt to show what changes public policy has caused (Cox and Wright, 1976; Adelman, 1972) by discovering how markets work. Our question is different: "What are the best strategies to maximize the benefits to Indian tribes as landlords and sovereigns?"

Unfortunately, analysis such as that from recent studies of oil in the United States provide little help and they are contradictory. Economists making these studies are concerned that the companies' fear of disaster leads them to undertake far too little exploration and development. This view is evident in recent research (Hughart, 1975; Leland, 1975). Unfortunately researchers on risk have not yet tested their ideas with data. Adelman argues that uncertainty is so great in exploration that "discovery cost" cannot be calculated (Adelman, 1972: 13).

Economists studying the impact of taxation, production controls, and import quotas do not discuss risk but do have data. They conclude that tax laws have increased expenditures on exploration and development, as have policies which raise the price of oil (Cox and Wright, 1976: 164–166). These authors are circumspect and do not state whether there has been "too little" or "too much" investment by the oil industry in the United States.

One cannot answer the questions of fairness raised in the second paragraph of this section without some examples and some estimates of the risks companies and tribes bear. The literature search for this paper uncovered no data on this issue, although it may exist. The advice offered by Lipton seems wise: no one, not tribes, not the government, not outside observers, can tell what is fair without realistic estimates of the prospective returns and the prospective costs to Indian sovereignty, environment, and culture (Lipton, AIO 1975a).

It is sometimes asserted that Indian tribes wish to avoid risk more than companies do. If such is truly the case, then one argument would be that tribes should expect a smaller share of returns in exchange for a small chance of financial loss. But another argument is that tribes deserve a large share of financial return in exchange for the risks to sovereignty, environment, and culture which development brings. Can we determine tribes' attitudes toward financial risk? Elected tribal officials (and BIA bureaucrats) fear the embarrassment of observed losses, which indicates risk aversion. Another way to determine the attitude toward risk is to examine the consequences of financial loss. Tribes have survived such losses much better than private corporations can: the history of tribal survival in spite of property confiscation demonstrates this fact. The ability to survive

such losses suggests tribes can bear financial risk even if the current political structure of tribal governments threatens individual tribal leaders when losses occur.

This line of reasoning suggests tribes should agree to bear risk and would find companies willing to let them do so.

Section II

MINERAL DEVELOPMENT PRACTICE

Many publications have criticized leasing practices on Indian reservations (Americans for Indian Opportunity, 1974, 1975a, 1975b; Barsh, 1975; Bennett, 1970; Council on Economic Priorities, 1974; Federal Trade Commission, National Congress of American Indians, 1974; Price, 1973: 601–610, 635; Stands Over Bull, 1975; U.S. Department of the Interior, Office of the Audit and Investigation, 1975, plus many magazine and newspaper stories). Most of these publications agree that the cause of the problem lies with federal management of Indian resources. The government has not carried out its trust responsibility. As Barsh has pointed out, the trustee in fact is the Indian: "Historically, Indians have always been forced into the position of caretakers of non-Indian interests . . . whether . . . for the federal government, or . . . for private recreation" (Barsh, 1975: 46). Examples of such caretaking are the Black Hills (gold) and the Great Plains (farmland). It does not suffice to identify the source of the problem, however; one must analyze how the Federal Government has served non-Indian interests. Several authors have suggested the excellent point that a weak bargaining position is the most important cause of unfavorable leases (Erb and Lipton in AIO 1974, 1975a, 1975b; Barsh, 1975; Price, 1973: 628, 719–20).

It is useful at this point to distinguish causes of a poor bargaining position from the results of a poor bargaining position. The following lists of causes and results stems from examination of energy-related minerals; one might assume that similar problems exist also in the arrangements for other minerals (and also for surface resources).

CAUSES

A. Access to information

Lack of information on the extent of deposits, on the costs of exploration, on market conditions, and about the true intentions of energy producing companies all cause tribes to negotiate from an uninformed and therefore weak position. The Bureau of Indian Affairs, ostensibly the source of data about development opportunities, does not provide adequate information. Tribes who wish good information must circumvent the Bureau; Bureau control of Tribal budgets, plus other problems Indians have with obtaining loans, make it difficult or even prohibit Indians from acquiring information. Indians have the same problems developing countries faced under colonial rule, and only recently have been able to overcome them (Smith and Wells, 1975a, 1975b). Information is power in mineral development, and multinational corporations have lower cost access to it than do others. Thus, the Indian problem with information access cannot be totally due to the BIA.

Tribes are making important long-term decisions with little information about the consequences of the decisions. Strip mining shows the lack of information about environmental impacts. But this is only part of the problem; tribes have also had little or no information about financial and production aspects of mineral development. The Bureau of Indian Affairs utilizes the Geological Survey to judge lease terms and provide data. The Geological Survey provides little help prior to the signing of permits and leases. Although it appears exploration permits have clauses stating the information is to be provided to the Bureau and the Tribe, the Bureau does not obtain the information, and neither do the tribes. Consequently, it is impossible for a tribe to know or to guess the value of what it owns. It could be taking serious losses unknowingly either because the contract price is far too low or because revenue is not being collected. Neither the tribe nor the BIA will ever learn of these losses unless they obtain knowledge of the net return from mineral development.

B. Secretarial approval powers

Because of the approval powers of the Secretary of the Interior, a tribe faces considerable uncertainty about its own scope to draw up, negotiate, and enforce contracts with outside companies. The possibility that a tribal decision will be vetoed by the Secretary weakens the tribe's bargaining position.

Unfortunately, approval of contract, permit, or lease by the Department of the Interior is no guarantee that the contract is a good one from the Indian point of view. Neither does disapproval by the Secretary mean that a contract is bad. Dissatisfied with leases of its uranium deposits negotiated by the Department of Interior, the Navajo Tribe negotiated simultaneously with five interested companies and chose the one the tribe preferred. The lease contained a clause which the Department did not require, allowing the tribe an option to become a 49 percent partner with the leasing company. Since the regulations required competitive bidding, and in spite of the fact that 41 percent of past competitive auctions had received only one bid, the Bureau's area office refused to approve the lease, causing at least a three-year delay. Not only is the tribe foregoing the return on the lease, it is losing interest on the 6 million dollar bonus payment. (Federal Trade Commission 1975: 42–43, 88, 132).

C. Taxation and regulatory powers

Tribes appear to be third in line after the federal government and state for both taxation and regulation of mineral development, although they do not have to be. The multiplicity of contradictory decisions makes summary difficult (Price, 1973: 251–277; Will, 1976). The Federal Government now applies its National Environmental Policy Act to reservations (a two-edged sword, since it allows only delay, of possible benefit to tribes), an unpleasant precedent. Perhaps tribes can enact their own regulations, excluding states, but federal limits may still be imposed (Will, 1976: 5, 21). The State of Montana has imposed severance, license, and net proceeds taxes on Crow coal which is greater than the rent and royalties earned by the Crow Tribe (NCAI, 1974: 47; Stands Over Bull, 1975). The same is true of the tax revenue of Arizona compared to that of the Navajo Nation (Robbins, 1975: 12). Oklahoma has been able to tax oil and gas (Price, 1973: 353). In a non-mineral area, the city of Palm Springs successfully taxed leaseholds on Agua Caliente land (Price, 1973: 249). New Mexico and Arizona are applying leasehold taxes to mineral development (Reno, 1975: 362). The current law and statutes give tribal lawyers difficulty discovering ways for tribes to successfully impose their own taxes and exclude state taxation. An exception may be inherent tribal sovereignty if courts will recognize it. Similar problems may apply to regulation of firm behavior (Price, 1973: 629–649). The great variety of taxes makes the uncertainty even greater: courts must resolve the limits of state, federal, and tribal power for each tax. This uncertainty must lower the plausibility of tribal claims to taxation powers. It is strange that companies are unwilling to fight state taxation and ally with tribes in this matter; perhaps they fear tribes would tax more heavily, or perhaps they do not believe in tribal sovereignty or understand the possibility of tribal taxation.

D. Enforcement of contracts

The Federal Government does not enforce current Indian mineral leases. The failure to require full compliance with information provisions of exploration permits is one example. Another is failure adequately to audit royalty payment—an error which applies to federal leases on its land as well (U.S. Department of the Interior, 1975). The lack of enforcement of the weak employment clauses is yet another (Federal Trade Commission, 1975: 194–196). With such trouble with current clauses, corporations would have little reason to expect clauses which Indians wish written into contracts to be enforced. Thus, the threat to include such clauses is not credible, a weakness in bargaining strength.

E. Access to capital

Indian tribes and Indian individuals as tribal members continue to have difficulty obtaining credit. Access to credit would improve the threat by Indians to perform development themselves rather than in conjunction with outside developers. With the very large capital requirements of some mineral development methods, this constraint may not be relevant: even if tribes were as able as anyone to get credit, they could not finance a large coal development. Even the energy corporations enter consortiums and use government guarantees to assemble the required financial backing. Access to credit would enable a tribe to hold out during a negotiation by decreasing its need for cash from a lease. Access to capital could improve access to information.

RESULTS

A. Fixed royalties

Some tribes have attempted to negotiate royalty rates in spite of the government-written leases; the Crows forced the rate up to 17.5 cents a ton for coal from the offered 11 cents (Barsh, 1975: 11). Other leases have been renegotiated.

The rates now in force have been rendered extraordinarily low by the rise in the price of oil. Early oil company interest in coal indicates they foresaw the development; examination of the adjustment clauses in their contracts to sell coal after processing, compared to those of pure coal companies, would indicate further the extent of their foresight. Such a test was not possible for this paper. As a general principle, however, in a time of anticipated inflation, a fixed-price contract for a commodity is, on its face, a poor contract. Even if the relative price of a commodity does not rise in relation to all other goods over time, the general rise in the price level will hurt tribes with fixed rates per ton rather than percentages of value. Observers familiar with leases in the Third World suggest that much more favorable leases are now available from the same companies which are leasing Indian land (Lipton, 1975; Smith and Wells, 1975a, b). These leases tie revenue to sales value or to profit, often by use of taxes. Since the corporations are facing the same world market, the difference must be due to the greater bargaining strength of independent Third World countries.

B. Long terms

The Omnibus Mineral Leasing Act of May 11, 1938, 25 U.S.C. 396a–f contains the following enigmatic phrase: ". . . for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The limit of ten years appears to be contradicted by a possibly indefinite extension of time. The more valuable the mineral deposit, the more likely the second part of the phrase will apply. Such long lived leases increase the losses due to poor revenue clauses. How long, on average, have past leases lasted? By what standard should one determine that a lease has too long a term? The Third World comparison again applies. Tribal ability to bargain down a term is considerably weakened by federal law, and tribes have been burdened with long term leases.

C. Lack of protection

Two noted costs to Indians of mineral development are pollution (or environmental degradation generally) and the political dangers of resident whites on reservations. The troubles Indians have with neighboring whites are a difficult issue which may not have a strong parallel in the Third World and has been little studied (although noted by Price, 1973: 603). Efficient methods to control pollution have been proposed. However, unfortunately, the Federal Government has not adopted sensible laws when it has attempted to regulate pollution (Kneese and Schultz, 1975: 112–120). Current federal law is not a good model to follow, and future federal action may not be, either. Tribes now bear the costs of the current vacuum, and could perhaps do a better job if they had the opportunity to regulate environmental costs themselves. Although the Federal Government might acknowledge tribal codes rather than state ones (Will, 1976: 21), there remains the question of inappropriate federal standards and inefficient regulatory methods.

CONCLUSION

The themes of the AIO conferences, "Indian Control of Indian Resource Development" and "Indian Tribes as Developing Nations," indicate the reason and the method for understanding the sources of low benefits to Indians of mineral development on their reservations. Poor control means low bargaining strength. The developing nations once had little bargaining strength and are slowly creating it, to the consternation of the developed world. The increasing strength of the Third World will improve the bargaining position of Indians with the Federal Government as well as with the corporations wishing to develop the minerals. What is needed is some specificity about the methods to use to change the bargaining position.

SECTION III

ALTERNATIVES

Possible improvements can be divided into two categories:

(1) Changes which will enhance a tribe's bargaining position;

(2) Favorable clauses and components of development agreements which tribes would want if they could obtain them at the bargaining table.

Restated as questions:

(1) What changes will allow tribes to obtain improved mineral development?

(2) What types of development agreements should tribes obtain?

The second question will be answered first, by examining the agreements Third World countries are not obtaining.

(1) Third World mineral agreements

Recent work by David Smith and Louis Wells (1975a, 1975b) and presentations at AIO regional conferences by Charles Lipton (AIO 1974, 1975a, 1975b) suggest the range of possibilities tribes should consider. The Blackfeet Tribe and Damson Oil Corporation signed an agreement in 1975 which is an example of the "latest" type of agreement. Ziontz describes the terms of this lease, which makes the Corporation a service contractor rather than a partner or a lessee (Ziontz, 1976: 16–22).

Mineral agreements are complex and varied. For classification and clarity, Smith and Wells divide them into three categories: (a) the traditional concession, (b) the modern concession, and (c) production-sharing, service, and work contracts. Each differs in the manner of distributing cash flow and control between the host country and the contracting company. In the traditional concession, the producing enterprise is owned by the foreign company. In a modern concession, the host country and the company share ownership. In the third category, the host country owns the producing enterprise. Although the authors rank the three types in order of historical development, they make it clear that a good concession in the traditional framework might bring more benefits to a host country than a bad service contract. The distinctions among the three types follow. Smith and Wells (1975b) provide a wealth of examples.

The traditional concession, in its modern form, has the host country receiving royalties on production—either a fee per physical unit of production or a percentage of value—and taxing the firm's profits. Such concessions also contain employment provisions and controls on pollution, although for the latter the standards are ". . . frequently in vague language and with little provisions for enforcement." (Smith and Wells, 1975a: 572). The financial aspects of such concessions are relatively easy to enforce, although income taxes require sophisticated machinery.

The modern concession has equity sharing between the company and the host country. These are often called joint ventures. Because the country owns part of the extracting operation, it receives a share of the distributed profits in proportion to its equity in the company. It may purchase the equity out of revenue it might otherwise have received; it may receive the equity in a non-voting form; or it may successfully insist on a large share. Some countries have exchanged the right to tax for a share of ownership, occasionally with a decrease in the cash flow to the country (Smith and Wells, 1975a: 574–5)! A particular danger is excessive interest charges on debt to a foreign parent company. Such charges may disguise profit and reduce a country's return. When a host country becomes a part-owner, the question of management control must be settled. Since both sides retain a share of the profits, both wish to have control over key decisions which affect the level and timing of these profits. Therefore, modern concessions contain extensive provisions defining the powers of the board of directors in terms of which decisions must be made at the top level and which decisions are subject to veto powers by either contracting party.

Production-sharing, service, and work contracts occur in situations where the foreign company obtains no ownership interest in the producing enterprise. In structural terms, such arrangements are at the opposite pole from the traditional concessions, in which the producing enterprise is entirely owned by the foreign company. The foreign company obtains a share in the proceeds from the mining venture, or a fixed fee in return for its expertise and its capital (Smith and Wells, 1975a: 583). In Indonesia, for instance, the government's oil company, Pertamina, negotiated many "production-sharing" agreements with foreign companies. One of these, with the Phillips Petroleum Company, guaranteed Phillips repayment of the expenses for "operating" the development, including exploration, as long as those costs did not exceed 40 percent of the oil generated per calendar year, and 35 percent of the remaining oil produced. The shares are expressed in terms of oil, rather than revenue or sales. The state oil company retains rights to market its share of the oil itself, to prevent the company from selling oil to an affiliate at an artficially low price. Abuses in such "transfer" could be used to export profits otherwise due Indonesia. Althouth Phillips does not own the operation, it does have control of day to day activities and can claim a share of the revenue. Government auditors must watch to assure the state company that costs are not being exaggerated and the oil production is correctly reported. Conceivably, althouth Phillips is merely a contractor, not an owner, it could do as well or better than under a traditional or modern concession. A share of production gives Indonesia more mechanisms to use to assure itself of a fair share of the return from oil development (Smith and Wells, 1975a: 586–588).

Current tribal agreements are unfavorable versions of the traditional concession (Lipton, AIO 1975a). In addition, tribes have not been able to date to modify the traditional form by adding taxes to their royalty returns. Joint ventures have appeared uninviting at least to the Navajo, because the capital costs are high. The list of problems in the previous section shows that tribes have had all the difficulties under-developed countries have faced in the past obtaining a high cash flow and in controlling the adverse impacts of mineral development. Improvements will come when tribes win more equitable agreements. The use of production-sharing and service contracts shows that tribes can circumvent the equity issue by basing their own enterprise upon the substantial mineral assets which they own. The Blackfeet-Damson Oil arrangement is this type of mineral agreement (Ziontz, 1976: 16–22).

What differences between tribes and underdeveloped countries stand out to one examining the comparison between them? One is struck by two aspects: the taxing situation and contract approval by the Secretary of the Interior. Tribes are simply not taxing corporations in the manner in which all other governmental forms do. The opportunity to do so surely exists; the United States government has complicated arrangements under which large corporations are able to deduct tax payments in other countries from their taxes due in this country. States have joint arrangements to divide the tax revenue from corporations. Tribes should join this process and obtain their fair share of tax revenue. Contract contents must also be improved; to an extent current legislation and federal regulations impede these developments. Both of these differences between underdeveloped countries and tribes are examples of elements which affect the relative bargaining positions of either. Let us turn to this topic directly.

(2) Relative bargaining positions

Since it is unlikely that the Federal Government will voluntarily advocate mineral agreements which benefit tribes (in spite of its trust responsibilities), tribes must obtain agreements for themselves. It is useful, therefore, to investigate the circumstances which will help a tribe obtain a favorable agreement and those which will inhibit a tribe's actions. If a tribe is in a strong bargaining position, it can obtain a good agreement.

What are the elements of a strong tribal bargaining position? Initial investigation would suggest the following (see also Lipton, 1973a; Smith and Wells, 1975b: 153–180):

(a) The tribal negotiator should know the potential profitability of the mineral deposit in question and should be able to calculate the return to the company under different market or natural conditions. In this way, he can figure out the consequences for the company of all proposals offered either by himself on behalf of the tribe or by the company's representatives. In other words, he should have equal or better quality information than the company.

(b) The tribe should be able to exclude all forms of control and taxation which might potentially come from other governments. It should be able to offer a company security about the potentially costly matters of taxation and environmental controls. In return for reducing the risk of unexpected taxes or control, a tribe can then extract revenue (whether in the form of royalties, taxes, a share of production, or a share of profits) and impose the controls which it wishes.

(c) The negotiator should have solid backing from the tribal government. Should the company attempt to circumvent the negotiator, claiming that he is not serving the tribe's real interests, such a ploy should serve to strengthen rather than weaken the support given the tribal representatives.

(d) Corresponding to his own strong position, a tribal negotiator would like to know a great deal about the position and goals of the firm with which he is bargaining. He would like to be able to say that he had to obtain final approval of all compromises with the tribal council, while negotiating with a firm representative whose concessions are not subject to modification by higher officials or a board of directors.

(e) The tribe should be able plausibly to threaten not to come to agreement and to negotiate a better agreement with another company. If there are many companies competing for the same mineral deposit, the tribe would like to find that company which can pay the highest price. Thus, the ability to hold out and to choose the best time to reach agreement would strengthen a tribe's position.

(f) A tribe would like to have a mix of outside "principles of fair agreements" which favor it. Bargaining processes are influenced by appeals to what is "fair and reasonable." A tribe would like to be able to claim that provisions which are costly to the company are "fair," while not finding that provisions it does not

want have a similar favored status. In this, the agreements offered by the Federal Government on federal land may be highly undesirable standards, and a tribe would like to appeal to worldwide market conditions. The discovery of industry standards has been one of the benefits of producer organizations in the Third World (Lipton, AIO, 1975b; Smith and Wells, 1975a, b).

These six points should serve at least to indicate the sort of position a tribe would like to have. The process of bargaining between a single seller and a single buyer is difficult to describe and has not been fully studied by any means.

The other perspective is that of a firm. What are the elements of a strong bargaining position for a company wishing a mineral agreement with a tribe?

(a) The company would like the tribe to be ignorant of the true value of the resource for sale. Such ignorance would make the firm's representative able to convince the tribe that a relatively low price is actually an excellent one.

(b) The company would like the tribe to be able to offer certain enforcement of the provisions of the agreement, as long as the other conditions of the negotiation meant the company could obtain an agreement favorable to its interests. If, however, the tribe's negotiators are knowledgeable and able to force clauses which aid the tribe, the company would like to have an outside forum which would overrule the tribal representative. The BIA currently plays this role (Price, 1973: 717–730; Barsh, 1975). In other words, the sovereignty of the tribe is either a good or a bad thing from the point of view of the company, depending upon the other conditions of the negotiations.

(c) The firm's negotiator would like to be able to divide the tribe and set it squabbling over what form of agreement would be a good one, as long as the company could control the dissension enough to assure itself of an agreement reached on its own time schedule. If the firm has control of the information about the project, it can control the internal political discussion of the tribe with timely release of information and judicious concealment of other information. Since so many tribes have experienced their leaders being bought off, appearing to reach special deals might be a sophisticated way to remove a knowledgeable negotiator and substitute one who will agree to a better arrangement. (The actions of Shell on the Crow reservation are an example of such tactics—Shell is offering an immediate per capita payment in return for a resource whose value is unknown to the Crow people generally.)

(d) The ability to cause division within the Indian group would be enhanced if the company had a thorough understanding of the true goals and interests of the tribal members. In this way, the company's negotiator could offer a lot in a dimension which is actually unimportant to the company while not offering as much as he would be willing to give up if forced to do so. Knowing the true concerns of the tribal members, he would be better able to release information which would imply that the tribe's negotiator was not representing its true interest.

(e) The company would like to be the only potential purchaser of the mineral deposit in question. It would also like the tribe to be dependent only upon that mineral for income, so that the tribe would be anxious to come to a quick agreement, while threats to delay would mean a loss of immediate income to the tribe.

(f) The company would like to have a set of standards which favor its position and which strengthen its ability to obtain favorable clauses. These standards could be either "industry norms" or legal codes provided by the federal government. It would like to hide the existence of any better agreements signed by either itself or its competitors for similar deposits.

(g) If the prospective returns from the resource are very uncertain, the company would like to be able to avoid demands upon its cash flow should revenues not occur. It would like to be able to get out of leases easily should they become unprofitable, without also having to share the returns should the deposit or the market prove to be favorable. This is more than saying it would like to pay a low price, which is clear. For each price it would have to pay, the firm would like to be able to insure itself against the risk of unsustainable losses.

Section IV

RECOMMENDATIONS

The preceding consideration of the determinants of relative bargaining strength in negotiations serves as a basis for focusing the recommendations which many observers have offered. The interests of tribes are served by actions which they and others take to improve their bargaining position and to improve the agreements which they obtain. This paper addresses the recommendations to two audiences: the Tribes and Congress.

A. Tribes

(1) Tribes should not negotiate agreements from a position of ignorance. They should insist upon data, and examine it for internal consistency, reliability, and consistency with generally known facts about extraction of the mineral in question. Hiring consultants may be required in place of reliance upon the BIA. Should the federal government prove to be unhelpful in finding and negotiating with consultants, advice from sources such as the United Nations might be considered. (See United Nations Industrial Development Organization, 1968, for an example of the type of advice available from that source.) A joint organization such as CERTS could assist in the exchange of information.

(2) Tribes should assert their taxation and regulation powers to the fullest extent possible under current law, in order to exclude state taxation and to impress upon corporations the potential usefulness of allying with tribes rather than with states.

(3) Tribes should attempt to achieve internal consensus about mineral development prior to entering negotiations. If the BIA or general circumstances have pushed it into negotiation prematurely, a tribe should refuse to sign and should delay until internal divisions have been mended. Failing such, they should attempt to limit the commitment as best as possible, either by cutting back the acreage to be leased or by shortening the time period for which the lease applies.

(4) The clause "as long thereafter as minerals are produced in paying quantities" and all other such unlimited clauses should be stricken from all leases or agreements, particularly when a tribe is under pressure to sign. If the sale price is low, companies will sign for the benefit of a handsome profit for the ten-year period required by law even if they cannot obtain the indefinite extension. Tribes should not accept an indefinite commitment of their resource. Other vague clauses relating to employment and environment should be stricken and replaced by precise and adequate ones.

(5) For all contracts, whether of the current traditional form or new ones, tribes should assure themselves that auditing of actual production and sales value occurs. Whether they can rely on the Bureau or the Geological Survey by vigilantly watching their behavior is unknown. Tribes with substantial resources may wish to perform audits at their own expense.

(6) Most important, tribes must negotiate contracts favorable to them and insist that the federal government agrees to those contracts. Some tribes now burdened with bad leases are tying to get out of them; should the efforts succeed, they will face the problem of defining and negotiating the type of agreement which they want.

B. Congress

One suggests congressional action with fear, for once begun a legislative process can have dangerous consequences. Thus, this list is an attempt to describe good legislation and not a recommendation to seek congressional assistance.

(1) Separate the management of Indian resources from the management of federally owned resources. Since the federal conflict-of-interest permeates all branches of the government, one finds it hard to imagine reforms which will completely eliminate the difficulty. Placing Indians in effective control of the resources while keeping title under the Federal Government rather than under state governments may be the best general form for the solution.

(2) Increased Indian control over the negotiating process could be unfavorable if Indians are unable to acquire sufficient information to negotiate in their own best interest. A good method of subsidizing information acquisition could improve Indians' position. The formal structure of such a subsidy process must be scrutinized carefully before it is implemented, to avoid recreating the dilemma represented by the current position of the BIA. A consulting institution, which would finance the information-gathering contracts of a tribe in return for a small share in profits or a low rate of interest, could pay the expenses of information acquisition without itself becoming the ostensible "expert" who is "protecting" Indian tribes.

(3) In terms of improving the general standards of agreements, a shift in policy by the Federal Government to obtain a better return on its land would improve the bargaining position of tribes by making the alternatives open to companies less attractive. Tribes now wishing good agreements are competing with easy terms on federal land.

(4) Should tribes be unable to impose taxes based upon their own sovereignty, one might ask Congress to recognize the right of tribes to tax mineral development involving Indian-owned resources. Good legislation would exclude the power of

states to tax such development and would be considered only after courts had not excluded such powers. It would also clearly delimit the scope of federal taxation powers over minerals and the profit from mineral development.

(5) Corresponding to recognizing inherent Indian taxation powers is the strengthening of other powers of Indian governments to control the environmental and other impacts of resource development, using their own standards rather than those of the federal government. Again, tribal sovereignty allows these actions now and Congressional intervention is required only if the courts restrict tribal laws.

Section V

CONCLUSION

Current trends in federal policy contain contradictory elements for American Indians. On one hand, pro-Indian sentiment is strong on the Indian affairs subcommittees in Congress and pro-Indian policy formulations seem possible. On the other hand, changes in the price of oil have highlighted the fact that Indians own valuable energy resources. Indians were unable to retain ownership of gold and farmland in the nineteenth century; similar pressures have appeared again. True Indian allies must fear that another General Allotment Act will emerge—an act which skillfully placates the sentimentalist while also providing Indian resources for non-Indian use. This paper suggests that new legislation be examined to see its impact upon tribes' negotiating position to determine if the changes strengthen or weaken the tribal side of the bargaining table. It suggests also that tribes owning minerals develop a staff specially trained in mineral agreement procedure and in the negotiating process. The excellent book by Smith and Wells (1975b) could aid such a staff.

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APPENDIX II

A Case Study: Economic Development Administration

INTRODUCTION

At a time when the American Indian Policy Review Commission undertakes the task of determining the nature of the Federal-Indian relationship, it is important to clearly define the role the Economic Development Administration plays in assisting tribes to achieve economic Self-Determination. The central theme of this paper, therefore, concerns the response of the Economic Development Administration to Indian reservations in terms of its legislative mandate. The Economic Development Administration cannot be criticized for not doing something which its act forbids. But it can be criticized for not fulfilling the role Congress intended for it. Consequently, the paper focuses on inconsistentency between the legislative history and act, and agency action. Inconsistency may be the hob-goblin of small minds, but it may also be the source of arbitrary and capricious exercise of discretion.

The paper provides an administrative, legal, and economic analysis of the Economic Development Administration.

Respectfully Submitted.

Frank Anthony Ryan.

SECTION I. LEGISLATIVE HISTORY

Purpose

The Economic Development Act was considered at a time when national unemployment was only six percent. Although emphasis was placed on alleviating unemployment, there was general concern that the benefits of economic growth experienced in the early to mid 1960's was not being shared by all areas of the country. The concern was not just to decrease unemployment, but to increase employment in distressed areas. Senator McNamara stated that:

"The principle purposes of S. 1648, as amended, are to: First, provide a means by which certain areas which are lagging behind the general economic growth of the Nation can be helped to improve their physical and social structure and thereby stimulate economic growth. Congressional Record, Vol. III, page 11787."

It is important to note that the legislative history has a geographical preference. Probably because there was a fear that two Americans might be emerging, a modern highly technological society on the one hand and a backward economically depressed America on the other, that emphasis was placed on alleviating unemployment in "distressed areas." The major emphasis of the act is probably first aimed at distressed backward areas, then at alleviation of unemployment. It was recognized that employment would not necessarily be the measure against which agency success would depend. Senator McNamara, in explaining the Bill to the Senate, noted that the purpose was to assist these areas, so that in the long run economic development potential might be achieved. Short run jobs were a beneficial externality:

"This type of investment cannot adequately be measured in terms of jobs created or new factories constructed. But the purpose here is not the immediate employment gain that such facilities will produce. The primary purpose is to create developmental facilities that will contribute to the economic underpinning of the community that can make it more capable of supporting additional population and of making the most of its natural advantages. Congressional Record, Vol. III, p. 11788"

It is important to note two aspects concerning the purpose of the act. First, the act emphasizes development of backward areas. Section 2, Statement of Purpose states:

"The Congress declares that the maintenance of the national economy at a high level is vital to the best interests of the United States, but that some of our regions, counties, and communities are suffering substantial and persistent unemployment and underemployment; * * * that Federal financial assistance, * * * in areas needing development should enable such areas to help themselves achieve lasting employment and enhance the domestic prosperity by the establishment of stable and diversified local economics and improved local conditions."

Second, the number of jobs created per dollar of investment in these areas is not a criterion in the legislative history nor in the act. The emphasis of the legislative history is not placed on achieving an acceptable level of national employment and then maintaining that level. The act is not a national employment maintenance act. The legislative history indicates that its thrust is to ameliorate the disparity in economic growth among regions and areas.

Since the late 1960's there has been increased unemployment and inflation. With increased national unemployment many areas hitherto unqualified for economic development assistance become areas designated for economic developments grants/loans under Part A of Title IV. Consequently, the Economic Development Administration began to provide economic assistance to these areas. Technically speaking, while alleviation of enemployment is a purpose of the act, that purpose is qualified by a preference for regional or area development. When E.D.A. soley relies on the duration and rate of enemployment for designation it does so at the expense of lesser developed areas. Assuming arguendo, that the purpose of the act is to alleviate unemployment in backward areas which are distressed; it can be argued that higher unemployment in previously unqualified urban areas should not receive equal preference under the purpose of the act.

The act however does not define what "areas needing development" are. As a consequence it is within the discretion of the agency to define what constitutes an area requiring financial assistance. The criteria appear to be duration and rate of unemployment. Other factors are also considered, see section 401(a)(1). "The Secretary of Labor shall find the facts and provide the data to be used by the Secretary in making the determinations required by this subsection; . . ." While the distinction between what constitutes a backward distressed area under the legislative history and what constitutes an area of substantial unemployment under the 1970's recession may appear unimportant in terms of alleviating unemployment; such a distinction however, is very important to American Indian tribes.

If every country in the United States becomes qualified for EDA assistance, then areas which are more economically developed but which momentarily have high unemployment rates, benefit at the expense of lesser developed areas. More developed areas have a better chance of recovering than do areas which have never been developed at all. Therefore American Indian tribes are particularly concerned that the original purpose of the act prevail.

With respect to the economic development of Indian tribes the Economic Development Administration has been mindful of the purpose set out in the act's legislative history. Qualified Indian area population constitutes approximately one-quarter of one percent of the United States population, yet these Indian areas receive approximately 10 to 15 percent of the total EDA fiscal budget. With backward areas as a major target of the legislative history and act, this emphasis appears to be well served and deserved, under the purpose of the act.

Economic development planning

A major criterion for economic development assistance is the Overall Economic Development Program, OEDP. In discussing the Area Redevelopment Act which preceded the EDA, the need for economic development planning was stressed. Senator Douglas stated:

Another substantial though largely unheralded achievement of the Area Redevelopment Act is the effect of the program upon local planning. Before a community is eligible for funds, it must develop an overall economic development program. For many areas, and particularly the smaller communities, this represents the first time community leaders have gotten together to examine their common problems, and settle upon a course of action. One Tennessee paper commented:

"Even if our country never received one penny of loans or grant money from ARA, I am convinced by starting our overall economic development program, we have benefited—benefited in a concentration of interest that has led to a great deal of local initiative that might otherwise have taken years to get started.

Similarly, in the House deliberations, economic development planning was stressed as the sine quo non of financial assistance.

OVERALL ECONOMIC DEVELOPMENT PROGRAMS

"Before a project can be approved under title I, the area must have an OEDP approved by the Secretary, and the project for which assistance is sought must be consistent with that program. There is a similar requirement for the approval of projects under sections 201 and 202. House Report No. 539 (Committee on Public Works) p. 19."

Title IV, part A provides that no area may be designated until it has an approved overall economic development program. In addition, under title III assistance can be provided to help in the formulation of overall economic development programs. The importance of economic development planning is preeminent under both the legislative history and act.

Further, the projects which make up the overall economic development plan must be consistent with that plan.

"The committee wished to underscore this emphasis on economic development programs. Projects assisted under this bill should not be submitted and approved in a perfunctory manner, but should insofar as practical be planned and carried out in accordance with logical, consistent, realistic, and agreed upon programs for economic development. . . . House Report No. 539, p. 19."

The act specifically provides for periodic revisions of previously approved overall economic development programs, and termination of areas which do not maintain overall economic development programs. Current agency policy allows for "midcycle adjustments".

Designation of Indian areas

Area eligibility for economic development assistance to Indian tribes depends upon the Secretary's assessment of unemployment, income statistics "and other appropriate evidence of economic underdevelopment". Title IV, part A, Section 401(a)(3). Based upon this calculus and the production of an overall economic development assistance. Senator Montoya stressed the importance of assistance to Indian tribes, consistent with economic development planning.

"Federal financial assistance including grants for the development of reservation and community facilities, establishing of industries and enterprises, particularly where there are self-help features, should do much to alleviate poverty and to help the people become self sufficient. . . .We wholeheartedly support the view that such assistance should be preceded by and be consistent with sound, long range economic planning and that under the provisions of this act new employment opportunities would be created by developing and expanding new and existing public works and other facilities and resources rather than by merely transferring jobs from one area of the United States to another." Congressional Record, Vol. III, page 12154.

Once an Indian tribe becomes eligible for assistance, it receives preferential treatment under the act with respect to per centum grant assistance, equity requirements, planning assistance, community size, etc. A number of Senators expressed particular concern about the economic plight of Indian tribes. Such preferential treatment as is accorded under the act is fully consistent with the concern expressed in the legislative history. Senator Mondale stated that "I am most happy that the bill specifically provides for relief and assistance to those living in substandard and poverty conditions on Indian reservations in the United States. The bill recognizes that the great majority of these areas are among the most critical in the United States in terms of labor surplus, economic distress, and poverty." Congressional Record, Vol. III, page 12168.

Thus far we have considered purpose, economic development planning, and the basis for Indian preference in the act's legislative history. It is clear from the legislative history that Congress intended to provide preferential treatment for Indian tribes under the act. First, although the act is national in scope, the legislative history places great emphasis on the development of backward areas. Indian areas are the most backward economically in the United States today. Under practically any form of economic analysis, it can be demonstrated that Indian reservations constitute the most technologically and economically distressed areas. It follows logically that these areas should receive preferential treatment based upon duration and rate of unemployment. Second, the act itself specifically provides for preferential treatment of Indian reservations in its various titles of assistance.

SECTION II. PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT OF 1965, AS AMENDED

Does the act reflect the concern expressed by Congress in the legislative history that Indian tribes receive preferential treatment? While the legislative history does not use the term "preference" with respect to Indian tribes, the concept of preference was recognized. See Senator Mondale's comment supra; that the "bill *specifically provides* for relief and assistance to * * * Indian reservations;" and that the "*bill recognizes* that the great majority of these [Indian] areas are among the most critical in the United States. * * *" (emphasis supplied).

The act does reflect the concern expressed by Congress that Indian areas receive special assistance. While there is no separate title for "Indians," preferential treatment exists under many of the titles. Indian tribes are eligible for title I-Grants for Public Works and Development Facilities. The Secretary is authorized to make direct grants under this title, subject to certain criteria, sec. authorized to make direct grants under this title, subject to certain criteria, 101(a)(1) (A), (B), (C), (D); with the maximum amount of any direct grant not to exceed 50 percentum of the cost of such project. But in the special case of Indian tribes, the Secretary is able to provide supplemental grants in excess of that available to non-Indian entities. Section 101(c) "except that in the case of a grant to an Indian tribe, the Secretary may reduce the non-Federal share below such per centum or may waive the non-Federal share," or, the Secretary may increase the amount of the direct grant. Supplementary grants shall be made by the Secretary, in accordance with such regulations as he shall prescribe, by increasing the amounts of direct grants authorized under this section * * *."

Under title II—Other Financial Assistance, Public Works and Development Facility Loans, Indian tribes receive some special consideration. Subject to sec. (a)(1)(A)(B)(C); 201 (a)(2)(3)(4)(5), (loan criteria), an Indian tribe may be an applicant for a public works loan, which may extend for a period of 40 years.

While Indian tribes receive no greater preference under public works loans than do other entities, they do receive special consideration under business loans. Subject to section 202(b)(6) (reasonable assurance of repayment), the Secretary may make a loan without participation by another source, sec. 202(b)(5). Normally, 15% of the aggregate cost of the project must be supplied as equity capital; or as a loan repayable in no shorter period of time and at no faster an amortization rate than the Federal loan. But in the case of Indian tribes, sec. 202(b)(9)(B) provides:

". . . *except in projects involving financial participation by Indian tribes, not less than 5 per centum of such aggregate cost shall be supplied* by the state or any agency, instrumentality, or political subdivision thereof, or by a community or area organization which is nongovernmental in character, *unless the Secretary* shall determine in accordance with objective standards promulgated by regulation that all or part of such funds are not reasonably available to the project *because of the economic distress of the area or for other good cause,* in which case *he may waive the requirement of this provision to the extent of such unavailability,* and allow the funds required by this subsection to be supplied by the applicant or by such other non-Federal source as may reasonably be available to the project. (emphasis supplied)

Although Indian loans may not receive preferential treatment in acceptance of their application, they do receive special consideration with respect to the local equity contribution. This provision recognizes the difficulty which Indian tribes have in amassing financial capital; and lowers the requirement to facilitate financial packaging.

Under title III—Technical Assistance, Research, and Information, Indian tribes also receive special consideration. Under sec. 301(6):

"The Secretary is authorized to make grants to defray not to exceed 75 per centum of the administrative expenses of organizations which he determines to be qualified to receive grants-in-aid under subsection (a) hereof, *except that in the case of a grant under this subsection to an Indian tribe the Secretary is authorized to defray up to 100 per centum of such expenses.*" (emphasis supplied)

Further, the Secretary may provide 100 percent grants for Demonstration Projects in Indian areas. Section 301(f) provides "The Secretary is authorized to make grants, enter into contracts or otherwise provide funds for any demonstration project within a redevelopment area or areas which he determines is designed to foster regional productivity and growth, prevent outmigration, and otherwide carry out the purposes of this Act."

Consequently, Indian tribes may qualify for 100 percent grants for economic development planning and technical assistance programs, while non-Indian entities receive less.

Generally the import of titles I, II, and III relate to Federal or State Indian reservations; and trust or restricted Indian-owned land areas. But, assistance is also available to Indian organizations which exist outside these areas. While Indian reservations qualify for special treatment under the act, however, urban Indians qualify for the same consideration as other entity-applicants. For example, an urban Indian organization which has a project listed on an Economic Development District's Overall Economic Development Program, may qualify for assistance.

Section 403(a)

In order that economic development projects of broader geographical significance may be planned and carried out, the Secretary is authorized—

(1) To designate appropriate "economic development districts" within the United States with the concurrence of the States in which such districts will be wholly or partially located, if—

* * * * *

(D) the proposed district has a district overall economic development program which includes adequate land use and transportation planning and contains a specific program for district cooperation, self-help, and public investment and is approved by the State of States affected and by the Secretary;

Section 403 (a)(2)(B)

The project is consistent with an approved district overall economic development program.

The United Indians of All Tribes Foundation, UIATF, in Seattle, Washington placed its project on the local economic development district's overall economic development plan and had its project approved. In addition, UIATF received assistance under title V-Regional Action Planning Commissions; see section 505 (a)(1)(2). Consequently, UIATF was able to qualify its project by using the economic development district as a vehicle for obtaining grant assistance, as well as receiving technical assistance from a Regional Commission.

Clearly, the act favors assistance to Indian reservations, but the act is neutral in so far as it does not discriminate against urban Indians. It merely treats urban Indians in the same manner as it would other entities. Special consideration under the act is reserved for Indian tribes in titles I, II, and III.

But it is theoretically possible for an Indian tribe or other designated entity to make an application for grant assistance, the recipient of which may not be eligible for designation. In this manner qualified Indian umbrella organizations could assist urban Indians.

"Furthermore, the bill only specifies who may make an application for a grant or loan. It does not say who may be recipients of grants or loans. It can be assumed that designated applicants may receive grants or loans, but there is nothing in the bill to prevent an applicant from applying for a grant or loan to be given to a person or organization that cannot qualify as an applicant" House Report No. 539, Minority View on S.1648, p. 35.

As a result, it is also possible for urban Indian organizations to receive grant/loan assistance, either through economic development districts or through qualified Indian organizations.

While the first three titles of the act provide most of the economic assistance to Indian tribes, Indian tribes also qualify under other titles. Under title V, sec. 414 (a)(3):

"Any Indian tribe, band, group, pueblo, or Alaskan village or Regional Corporation (as defined by the Alaska Native Land Claims Settlement Act of 1971) recognized by the Federal Government or any State, and any business owned by any tribe, band, group, pueblo, village, or Regional Corporation;" qualifies for the Regional Excess Property Program. Indian tribes also qualify for title IX-Special Economic Development and Adjustment Assistance, under sec. 902; and for title X-Job Opportunities Program, under Sec. 1002 (c). In addition, under title III section 301 (d):

"The Secretary may furnish the procurement divisions of the various departments, agencies, and other instrumentalities of the Federal Government with a list containing the names and addresses of business firms which are located in redevelopment areas and which are desirous of obtaining government contracts for the furnishing of supplies or services, and designating the supplies and services such firms are engaged in providing."

The Public Works and Economic Development Act of 1965, as amended, does provide Indian tribes with preferential treatment under titles I, II, III. With respect to assistance provided under the other titles, Indian tribes receive no special consideration. Urban Indians in general receive no consideration at all unless they come under the umbrella of a qualified applicant. To the extent that Indian tribes receive special consideration under titles I, II, and III, the act is fully consistent with its legislative intent.

With respect to titles VIII, IX, and X, these titles represent authorizations from other acts, such as: Disaster Relief Act of 1974 (Public Law 93–288); Emergency Jobs and Unemployment Assistance Act of 1974 (Public Law 93–567) etc. As a consequence, the legislative history of those acts as well as the acts themselves may not have expressed and preference for Indian tribes.

Basically, titles I–IV form the core of the Public Works and Economic Development Act of 1965. Indian tribes do receive special consideration under these titles, as well as recognition under some of the other titles. The act is consistent with its legislative history in this respect. Under title VII-Miscellaneous, Powers of the Secretary, the Secretary of the U.S. Department of Commerce is authorized to:

Section 701(12)

Establish such rules, regulations, and procedures as he may deem appropriate in carrying out the provisions of this act.

The question which arises is whether or not the Economic Development Administration's policies, rules, regulation, and procedures are consistent with the act and its legislative history, with respect to Indian tribes.

SECTION III. ECONOMIC DEVELOPMENT ADMINISTRATION

Title 13 Code of Federal Regulation, Section 301.1 purpose. The purpose of the Economic Development Administration is to provide assistance in economically distressed areas and regions in order to alleviate conditions of substantial and persistent unemployment and underemployment and to establish stable and diversified economics.

In 1967 EDA established an Indian Desk as an administrative department within the Agency. The responsibility of the Indian Desk can be summarized by the agency authority for its Special Assistant for Indian Affairs: 13 *CFR* Sec. 301. 33(d): *provide advice and direction for development and implementation of a viable program* providing assistance to American Indians; *recommends approval or denial of all Indian project proposals;* operates the selected Indian Reservation Program in order to develop strong and permanent economic activity on Indian reservations, resulting in increased employment opportunities and a rise in the per capita income of the Indian people; *provides assistance* and advise *to economic development planners* employed by Indian tribes or groups funded through the Agency's planning grant program; initiates and develops seminars, conferences, and other programs which *disseminates information to assist Indian tribes* in economic development programs; *coordinates Federal, State and private agencies* which work with Indian tribes *in formulating and implementing beneficial programs.* (emphasis supplied)

The Special Assistant for Indian Affairs works with the Agency's various departments to develop an overall agency policy for economic development of Indian areas.

There is, however, no indication in the legislative history nor statutory mandate in the act which requires the establishment of an "Indian Desk" department. This innovation is purely an administrative creation, and occurred largely in response to the fact that Indians had difficulty in working through administrative bureaucracies.

The agency had established a system of Directives which constitute agency policy in given areas; for example, Indian Development, Indian planning grants, OEDP's Public Works, etc.. The question which arises is whether or not these policy directives are consistent with the legislative history and the Public Works and Economic Development Act of 1965, as amended, or whether they represent the exercise of arbitrary discretion.

(A) *Formulation of Indian Policy.*—Economic Development Administration Directive No. 17.02–3, "Indian Development Program," states the objectives, policy, and methodology for its Indian Program. It's general objective is: "The general objective of the EDA Indian development program is to assist Indians

in taking effective steps, compatible with the Indian cultural heritage, to achieve stable local economics and economic growth, new long-term employment opportunities and improved local conditions."

Directive Section 3.03 (c) states that "planning and project goals for the Indian development effort shall be determined by the elected representatives of the Indian reservation. Directive Section 3.04(b)(1) states that "The special Assistant (for Indian Affairs) will prepare or assist in the preparation of special Indian program policy statements, . . .;" and Directive Section 3.04(b)(2) states that "Regional directors will prepare an annual regional Indian program, which is consistent with overall Agency Indian development program policy." Directive No. 17.02–3 raises the issue of "who" formulates Indian policy, as well as the "basis" upon which the policy is made.

The directive indicates that the policy is formulated in two ways. First, reservation planning sets local policy which is indicated in the OEDP planning document. All projects are required by the legislative history, the act, and the Agency policy to be consistent with the overall economic development plan.

Directive Section 3.03(a): "Accordingly, EDA project decisions require that project proposals clearly delineate development objectives over both short and long term planning periods and contain an objective evaluation of the resources and capabilities of the Indian reservation."

Second, under Directive Section 3.04(b)(1)(2) the agency charges itself with the responsibility for developing an Indian policy. The first policy is qualified by the second policy. Indian projects which are consistent with the local OEDP must also come within the Agency's broad Indian Development Program directive.

"*Project projection in the OEDP document do not constitute formal approval of such projects by EDA.* Final approval can be made only following satisfactory completion of all of the Agency's requirements relating to project applications and as conditioned by the availability of funds." *Guide for Indian Overall Economic Development Program. p. 10.*

As a result, local reservation policy is not binding on the EDA. Local policy is subject to agency policy.

(1) Who formulates Agency policy? The Special Assistant for Indian Affairs occupies the central coordinating role, in preparing Indian development program policy. The Special Assistant works with various agency department heads to achieve an overall Agency policy. The Special Assistant then works to assure that Agency policies and actions prescribed by the policy directive are implemented. This objective is achieved primarily through a process of coordination with Regional Directors with respect to the policy, and monitoring of projects by the Indian Desk. The Special Assistant monitors, evaluates, and reports the results of each regional office's Indian Program to the Assistant Secretary. Prior to the completion of Action Memorandum (ED–506) (on Indian Projects) the Regional Directors are required to seek the Special Assistant's comments. After the final Action Memorandum is received, the Special Assistant makes a project review recommending or rejecting the project to the Assistant Secretary. In this manner, the Special Assistant for Indian Affairs plays a key role in developing, implementing, monitoring, and evaluating Agency Indian policy. When the Special Assistant believes that a certain project is not consistent with Agency policy he is in a position to recommend the project's rejection.

(2) What is the basis upon which Agency policy is formulated? Directive No. 17.02–3 states:

"*The degree to which a reservation demonstrates growth potential will largely determine the amount of return from a concerted investment of government resources. Therefore,* although overall quality of the local economic and social environment must be a principal consideration in project selection, *EDA investments should normally lead to new private investment in Indian land* which should in turn produce a higher rate of economic expansion, increases in jobs and increased levels of median family income.

"The agency characterizes projects, which are or may be consistent with OEDP's, in terms of high and low growth potential. (Emphasis supplied.)

"*Directive No. 17.02–3.03(b) Policy*

"For Indian reservations with *high economic growth potential,* EDA resources should be invested in programs which develop permanent activities that assist in the creation of employment opportunities and/or raise per capital income on Indian reservations. . . .

"For Indian reservations with *limited economic growth potential,* EDA's assistance will be directed toward integrating the economic activity on the reservation with

that of the surrounding area. This will be accomplished in part by stimulating employment opportunities for the reservation Indians in economic activities which are, or potentially could be, a part of the extent local economy." (Emphasis supplied.)

Although the language used in the policy directive is vague, its general import seems to favor high economic growth potential.

The Agency's Indian first requires that Indian tribes do their own economic development planning, and that projects be consistent with their overall economic development plans. Secondly the policy states that it will look to the degree of economic growth potential which the project manifests.

(3) Is the Method of Policy Formulation Consistent? The Agency policy seeks to meet the needs of the Indian tribes and the Federal Government. It recognizes that successful economic development requires involvement by the community. It also recognizes the responsibility EDA has in attempting to achieve the Congressional Mandate. Accordingly, Indian projects may have a high local priority, such as housing, community centers, head start programs, etc., but these projects may not be considered as projects of high economic development potential by the EDA. Where reservation planning produces a set of project priorities which conflict with Agency Indian policy, the overall Indian policy begins to breakdown. This situation can develop in a number of ways.

First, the local OEDP committee and Tribal Council may not know what Agency policy is. Consequently, a planning document may be developed containing projects which the tribe believes will meet its needs; but the projects are not consistent with agency policy. This case represents a total breakdown of Indian program development. Agency policy should be made clear to all Indian tribes.

Second, although the legislative history and the act do not measure government investment in terms of jobs created, it is well within the Agency's discretionary power to prefer projects of high economic potential. It is in the implementation of this policy that problems are encountered. Under Directive No. 17.02–3.03(b) Policy, supra, the Agency attempts to charactierize its policy in terms of "high" and "limited" economic growth potential "reservations." The policy focuses on the reservation, not on the project per se. The policy indicates that reservations with high potential should be granted projects which "develop permanent activities". If a particular reservation is characterized as having high growth potential, then Agency policy indicates that only projects which will permanently produce jobs should be accepted. A problem arises when the top priority projects are those in infrastructure rather than job-producing in nature. This puts the Agency in the position of denying a community building for example, because the Agency believes the reservation has high growth potential and should therefore be developing projects of more permanent significance. To Indian tribes this appears somewhat schizophrenic. First tribes are told that they should plan for their own needs, but when they do, they discover that Agency policy precludes acceptance of their projects.

Still another problem arises when a tribe which is characterized as a limited growth potential reservation, has its project for a community building accepted. Because of its characterization, the project will probably be considered for acceptance since building infrastructure is more important in these areas. But to the "high" potential reservation this appears to be inconsistent. The high potential reservation reasons that "we are all Indian Tribes," so why does X reservation get a community building and Y reservation does not? Particularly, when such project was its OEDP's top priority, and for X reservation it was its third priority.

When reservation planning and Agency policy work toward the same goals, the overall Indian policy works better. It is when Indian tribes do not know or understand what constitutes Agency policy that problems develop. To the Indian tribes, ostensible inconsistencies appear to be yet another example of bureaucratic paternalism at best and gross abuse of discretionary power at worst. What rankles the Indian tribes is to have the Agency approve their overall Economic Development programs but to reject projects listed thereon. These problems raise the question as to whether Agency policy relating to substantive projects is consistent or inconsistent with the legislative history act, and Indian Development Program Directive No. 17.02–3.

SECTION IV. PUBLIC WORKS INDIAN DEVELOPMENT PROGRAM

What Public Works projects meet the criteria set out in the legislative history and the act?

Senator Muskie stated that:

"The principal test to be applied in this new bill is the contribution the project will make to the long-term well-being of an area; not as it was under Accelerated Public Works, the temporary relief of unemployment. Congressional Record, Vol. II, p. 11915".

In the House Report No. 539, page eight, the House admitted that it did not know what kinds of projects would qualify for assistance, but did say, "the committee understands the following types of facilities ordinarily would not be appropriate, since their relationship to economic development is much more tenous: courthouses and townhalls; swimming pools not related to tourism; playgrounds."

Between the Senate and House reports it is clear that neither one knew nor stated what projects per se would qualify for acceptance. Conceivably, the project could be anything so long as it met two tests: 1) long-term economic contribution to an area, and 2) not too tenously related to economic development. Beyond these two tests, the House appeared to grant the Secretary of the U.S. Department of Commerce discretionary authority in the selection of projects. ". . . the Secretary has the flexibility to make the best possible decision regarding individual projects which will most advantageously carry out the purposes of the Act." House Report No. 539, p. 9.

The Economic Development Administration first developed its Indian Development Program, Directive No. 17.02–3, supra, which set overall Agency Indian policy. Next, the Agency promulgated an overall Public Works Indian Development Program policy through Directive N. 10–75 (effective date 7/14/75; destroy date 6/30/76).

"The purpose of this Bulletin is to provide general policy and direction for EDA Public Works response to the problems, needs, and the priorities established by the Indian communities. Such policy and direction recognizes the continuing need on Indian reservations for the basic infrastructure that is a prerequisite to economic growth, as well as for projects with direct job impact."

The directive sets out what it terms "selection criteria" for "Community Development Projects" and "Projects assisting development of Tribally-owned Business, and other economic impact projects."

(A) Community development projects

The policy directive states that it will continue to place a high priority on projects "providing the infrastructure necessary for community development and growth." The policy appears to be consistent with overall Agency policy stated in Directive No. 17.02–3.03(b) supra. Community development projects appear to apply to all reservations irrespective of their "high" or "limited" economic growth potential classification. The criteria for selection are apparently "based on consideration of the relative need of the area, the nature and economic impact of the project, and the revenue to be generated by the project." The primary criterion for the project appears to be "relative need," and not economic growth potential characterization. Because of this inconsistency, it is both possible for the Agency to reject a community development project on a "high" potential reservation under Directive No. 17.02–3.03(b); and possible to accept the same project under Directive No. 10–75. Again, the problem arises when the Agency rejects X reservation under Directive No. 71.02–3.03(b); and accepts Y reservation under Directive No. 10–75.

Further, if Directive No. 17.02–3.03(b) controls Directive No. 10–75, but the classification according to growth potential is not stated in advance, it is very easy for the Agency to juggle the classification to fit the project. Accordingly, X and Y reservations which are economically and demographically similarly situated, may suffer or benefit by an *ad hoc* Agency classification. X reservation may be told that it has high potential and face rejection, while Y is not told anything, but receives its project.

Clearly, the legislative history and the Act do not make such a classification. But the power to classify is an inherent power granted to the Secretary. Such a grant of discretionary power may in itself be overbroad (see House Report N. 539, "Minority View on S1648"), or it may not. But whether or not the power to classify is reasonably related to the act's objectives, it remains that inconsistent application of classifications can be an abuse of discretion. It appears from the policy directions that the Agency should be able to tell X reservation why its project was rejected and why Y's was accepted. The agency should say that X is classified as a high economic growth potential reservation, therefore only projects which will produce permanent jobs will be accepted. And, that Y reservation

is of "limited growth potential"; therefore the project is more appropriate. Or the Agency should say that while X and Y are in the same characterization, Y has a greater need for such a project. It is important that Agency policies be clear and consistent; otherwise the area of policy inconsistency will present opportunities for abusive exercise of discretionary power. In this case, it is the power to classify and reject, or the power to determine needs and reject. Accordingly, the various "criteria" stated in Directive No. 10–75 can be rendered meaningless when read in the context of Directive No. 17.02–3.03(b).

The criteria may also be meaningless from another perspective. Essentially, the criterion of "need" is broad enough to allow the proverbial camel to walk through the eye of a needle. Practically any type of community development project could qualify. But what the Directive does not state is the basis for criteria used to constrict the eye of the needle. The Agency does not say how it determines "relative need." What is the basis upon which the Agency determines that Y reservation's need is greater than X reservation's need? Or, how does it determine that a community building project is not as good on X reservation as a skill center would be, if the community building has top priority?

The EDA Indian policy appears to be based on a system of classification. Under Title VII—Miscellaneous, powers of Secretary Sec. 701(12) the Secretary is authorized to "establish such rules, regulations, and procedures as he may deem appropriate in carrying out the provisions of this Act." Sec. 701(12) grants the Secretary power to make classification, if such classifications will carry out the provisions of the Act. Directive No. 17.02–3.03(b) (economic growth potential classification) and Directive No. 10–75 (relative need classification) are the result of the exercise of the Secretary's power. The power of the Secretary to classify is not in doubt, but the basis for the classification and reasonableness of the classification may not be rationally related to achieving the purpose of the Act. This raises economic and legal questions; see Section VI, Administrative Law Analysis.

(B) Projects Assisting Development of Tribally-owned Business, and Other Economic Impact Projects

This section does set out "selection Criteria" somewhat clearer than "Community Development Projects," supra. General requirements are that, "all proposals for tribal business projects must include a demonstration of feasibility, the identification and commitment of working capital, and a management plan." If these criteria are met, the tribe may qualify for 50% grant 50% loan assistance. However, under "unusual conditions requiring special consideration, a waiver of up to 30% of the 50% local share (for a total 80% grant funding) may be recommended for projects establishing new business." The selection criteria appear to be:

(1) Feasibility.
(2) Working Capital.
(3) Management.

It is not clear whether or not these three criteria are essential in an "unusual condition" situation. What constitutes unusual conditions, and the effect unusual conditions have on the selection criteria is not clear. The Agency need not particularize the elements of all unusual conditions, but it should state what the nature of the relationship between such conditions and the selection criteria is. It would appear that if these three criteria are present, no unusual condition could exist. An unusual condition is the basis for additional grant assistance. If feasibility is present on a 50/50 grant/loan basis, then why would there be a need for an additional 30%? To improve feasibility? Similarly if working capital and management are available, what unusual condition could justify increasing the grant rate? It would seem that "unusual conditions" can only exist where one or more of the selection criteria have not been met. The Directive does not say this, however. Further, whatever the unusual condition may be, it would appear that its nature must be one which could be remedied by an infusion of 30% more grant. In addition to "unusual conditions," projects providing "infrastructure" qualify as an exemption to the 50/50 grant/loan policy. Projects which provide infrastructure for business of any kind are eligible for 100% grants.

The Public Works Indian Development Program then sets out its criteria for "types of projects." For example, under Commercial Development, the EDA's "priority consideration" will be given to small scale convenience shopping centers, trading posts, and general stores where "a small investment will result in significant impact." It becomes clear that if a tribe wants funding for a commercial project it should plan for a small scale shopping center. Although the Agency says it will give priority consideration to such projects, it does not say why it will.

By stating Agency priorities the EDA must know that it prejudices the type of project applications it will receive. Why shouldn't feasibility, working capital, and management be the tests? Or, does the Agency like shopping centers, trading posts and general stores? Certainly the legislative history and Act make no such preference. Further, if reservations are to be allowed to do their own planning, why should such planning be influenced by what the EDA's preferences are, particularly if there is no basis for such preference in the Act itself?

Similiarly, "Industrial Development" and "Tourism/recreation Development" set out preferences. Although feasibility, working capital and management seem to be the criteria for new Motel/Lodge facilities, these criteria do not appear to be controlling with respect to other types of projects. For example, expansion of an already existing tourist-related business may be justified on the basis of "new jobs" created and receive 100% grant assistance.

The Public Works Indian Development Program purports to establish project selection criteria. In fact it establishes no criteria at all. It attempts to establish criteria such as feasibility working capital and management. In realiy, however, the directive is vague and ambiguous. In certain places it lists types of projects which are to receive agency priority. But, the Agency does not indicate why a different type project which has feasibility working capital and management should receive a lower priority. What the Directive does in fact is to set up types of projects the Agency likes and dislikes. For example, small scale shopping centers are "in" and new industrial parks are "out," for all practical purposes.

The Senate and House could not say what types of projects would qualify for assistance. The Act leaves the power to decide among projects to the Secretary of Commerce. But clearly the legislative history and the Act do not require the Secretary to decide on "types" of projects. The Act would not require more than feasibility, working capital, and management. The Act leaves decisions of project type to the applicants, as developed in their OEDP's. Although the Agency does not exclude other "types" of projects from consideration, it does bias local planning. For example, if the Agency had a policy of giving priority consideration to industrial park type projects, it could expect either that many applicants would be influenced by such preference, or that by accepting many industrial park projects it would encourage such applications. For the Agency to later say that it was what the tribes wanted is for EDA to blow hot and cold. When House Report No. 539, page nine states ". . . the Secretary has the flexibility to make the best possible decision regarding individual projects which will most advantageously carry out the purposes of the Act," it does not mean that the Secretary is to create types of project priorities. The two tests which should be used to determine consistency with the Act are (1) long-term economic contribution and (2) more than a tenuous relation to Economic development; see House Report No. 539 page eight. In the context of business development, feasibility, working capital, and management appear to be relevant criteria in terms of the above tests. But, Agency preference for particular types of projects is totally irrelevant. Consistent with the above two tests and subject to other statutory limitations, it should not make any difference to the Agency what "type" of project the applicant prefers. There certainly is not any basis for this action in the legislative history and the Act.

When the Economic Development Administration develops policies which favor particular types of projects, it goes beyond what the Act requires. If from year to year the Agency favors industrial parks, then skill centers, then tourism development, the industrial site location, etc. it effectively places itself in the role of a grocer whose heavy thumb tips the scales in its own favor. Of what real benefit is overall economic development planning, if project selection is subject to written and unwritten Agency policies, preferences, and bias? Subject to the Act's statutory requirements and limitations and consistent with the above two tests, project planning should be left to the applicants. The EDA has no business in setting priorities for any particular type of project.

The proper role for the Agency should be to evaluate the economic feasibility of projects in the short and long run. Because the Agency has set project types priorities, it continually finds itself moving from one unsuccessful type of project to the next unsuccessful type of project priority. The proper role of the EDA should have been to economically evaluate projects and determine consistency with the local OEDP.

"In our opinion, EDA and SBA have not adequately evaluated the feasibility of proposed business ventures on reservations before providing financing assistance. In some cases these agencies did not require the development of all necessary information to permit a good evaluation of the business ventures' prospects.

In other cases the agencies provided financing without requiring the resolution of known problems. Report to Congress by the Comptroller General of the United States, June 27, 1975, page 25."

This report indicates that the EDA has been deficient in performing the task assigned to it by Congress. It appears that the EDA has been more concerned with solving Indian Development problems according to its own policies, than it has been responsive to its act. The General Accounting Office Report supra recommends that the EDA 1) conduct a better evaluation of projects before they are selected, 2) provide closer monitoring after selection, and 3) cooperate more with other agencies involved in Indian Development. If the EDA were project—neutral as it should be, and more carefully evaluated the economic feasibility of its projects it would probably have had fewer failures. As a recommendation, the Agency should discontinue its current Indian policy and adopt a policy of project-neutrality. All projects regardless of type would be subject to close scrutiny of their long term economic impact. If the project has economic feasibility it should be approved.

SECTION V. PROCEDURAL NEUTRALITY AND DISCRETIONARY ABUSE

Above we considered the effect of substantive project bias in terms of the legislative history and the act. The fact that agency project priorities exist is inconsistent with the act. There are also procedural problems in the application-processing-grant system which create opportunities for abuse of discretionary power.

(*A*) *First-In-First-Out . . . FIFO*

As a condition precedent, the applicant must be designated under the act. The applicant must have an Overall Economic Development Program on which the proposed project is priortized. Next, subject to agency policy, and funds permitting, the project should be processed on a first come first served basis.

Due to a number of factors, however, projects are not always processed on a FIFO basis. Because of the fiscal nature of government spending the EDA may not always have the funds to accept a project which would otherwise meet all of its requirements. This may occur for a number of reasons. First, the project application may have been made at a time when the agency did not have enough funds. Second, the application may have been timely, but funding it would mean not funding several other projects which require less. Another reason why FIFO may not obtain involves projects which later developed problems and could not be processed until their deficiencies were remedied. These factors contribute to the creation of a project pool of hold over projects.

If the agency model for processing projects is procedurally neutral, all of the projects in the pool should be funded on a FIFO basis beginning with the next fiscal year. The FIFO neutrality principle is not always at work however.

Frequently projects in the pool are considered along with new projects. It is at this point that procedural neutrality breaks down. Of course, the hold over projects have not been formally accepted and in this respect they are similar to the new proposed projects. At this time the agency reviews all of its Indian projects. The review, analysis, evaluation, and assessment are not exhaustive Projects tend to be characterized as "weak," "good," "bad," "solid," etc. These economic evaluations are made and act as a screening device for project selection. On a regional basis each office knows what its allocation of Indian entity funds will be. It also knows that the total pool of projects constitutes a sum greater than its allocation. Consequently, rather than process projects on a FIFO basis, subject to clearly defined economic criteria, the agency proceeds to weed out projects. A project which may have no "problems" and meets all of the agency's requirements may not be accepted, for subjective reasons. Since many projects will meet all pertinent requirements the project screening is based on agency policies, economic feasibility, need, and discretionary factors. No one factor controls or is preeminent. Sometimes the agency will look for problems where none exist in order to avoid taking an application.

The lack of procedural neutrality stems from the lack of substantive neutrality. Because the agency can set project type priorities, it can refuse acceptance of a project which is otherwise economically feasible. Further, because of the inconsistency between Directives Nos. 17.02–3.03(b) and 10–75 above, a project can be accepted or refused for the same reason. That is, class of economic growth potential can be used as a reason to accept or refuse; similarly, relative need can be used to accept or refuse. Consequently, a project may not be accepted because it is 1) not on the agency's priority, 2) the reservation is of high growth potential

but the project is of low potential, although economically feasible in the long run, 3) the reservation is low potential and the project, because it is high potential, is is unreasonable, 4) the reservation is high potential so its "relative need" is not as great, 5) the reservation is low potential and its need is great but it should be planning "better" projects, and 6) the reservation has a low public relations profile with the agency.

If agency policy were project-neutral and if projects which met long-term economic feasibility were processed on a FIFO basis, a great deal of agency discretion would be minimized. The present system of project selection and processing is the embodiment of casuistry. The agency sees the weeding out process as one in which economic analysis and statutory requirements work to exclude "bad" projects and include "good" projects. To a certain extent this may be true, but to tribal governments it appears otherwise. On a literary plane it gives tribes reason to ponder Sergius' statement in "Arms and the Man," "Why is everything I say contradicted by everything I do?"

Because there is substantive and procedural unneutrality the purposes of the act are frustrated. As mentioned earlier, the fact that EDA sets project priorities encourages applicants to apply for that particular type of project, because the probability of acceptance is higher. This produces a plethora of industrial parks with a dearth of tenants. In this case Indian tribes are not ignorant of agency policy. For projects which are not on the agency's priority, however, procedural unneutrality and inconsistencies in general agency policy allow EDA to refuse projects for reasons of which the applicant is ignorant. The lack of substantive and procedural neutrality allows the agency to exercise wide discretionary power in the selection of projects. When agency discretion is too great, the spectre of abuse arises.

As an example of what may appear to be arbitrary and capricious, community building projects are appropriate. Although an economic justification for such projects can be found in the legislative history and act as projects which contribute to long term economic development, the agency has refused acceptance of many projects believing that they more properly belonged under HUD. This judgment is properly within agency discretion since EDA is not HUD. But, when the agency accepts some applications and refuses others an inconsistency arises. If the agency refused our project because HUD is supposed to accept it, the tribe reasons, then why did it accept a project from another reservation? The Indian tribes can only view this action as schizophrenic. Certainly, the real reason for rejection should be disclosed.

EDA's failure to clearly define its policies and its lack of substantive and procedural neutrality contrbute to the exercise of discretionary power which is often arbitrary, capricious, and abusive. At best the agency's action is benign paternalism and at worst irresponsible. Sometimes agency discretion may even become punitive. Where a reservation fails to promote its industrial park it may find that its other projects are not accepted. The proper role of the agency should embody substantive and procedural neutrality. The potential for discretionary abuse was recognized in the House Report.

The Minority View on S. 1648, House Report No. 539, page 26 stated, "Congress would be abdicating its responsibilities if it enacted a bill of such sweeping scope with so few congressional guidelines and controls for proper administration." The Minority Report added that, "Good intentions are no substitute for good legislation." One of the primary criticisms of the act was that its language was vague and ambiguous, such as to give rise to arbitrary discretion:

"Among the most disturbing aspects of this bill is its vagueness. Many of its provisions are vague and ambiguous. It is replete with meaningless and undefined terms and phrases, which *no one, including the spokesman for the administration, has been able to clearly explain and say with any certainty just what can or cannot be done under the bill.*" p. 33. . . . example of the loose and ambiguous language that is found throughout the bill, which may have been purposely drafted in this fashion *so as to make it susceptible of any interpretations* that the administration wishes to place upon it." p. 35 (emphasis supplied).

The vague and ambiguous language in the act, and the lack of substantive and procedural neutrality contribute to the exercise of wide discretion by the agency. The exercise of such discretion raises a number of administrative and legal problems.

SECTION VI. ADMINISTRATIVE LAW SUMMARY

This section considers the availability of administrative and judicial review of EDA actions.

(*A*) *Administrative Review*

Under Title VII S. 701(2) the Secretary is authorized to "hold such hearings, sit and act at such times and places, and take such testimony, as he may deem advisable; . . . " As a result, an Indian reservation may petition the Secretary for a hearing to consider agency action. Further, under 13 *C.F.R.* Section 309.24, requests to reopen declined applications, the tribe may request reconsideration of the project. These are the only provisions in the act and Code of Federal Regulations which specifically provide some sort of administrative review. If the Security declines to review agency action, does the tribe have recourse to the courts for judicial review?

(*B*) *Judicial Review*

Under the Administrative Procedure Act, 5 *U.S.C.* sec. 701, a presumption of reviewability exists subject ot two exceptions. First, if "statutes preclude review," the APA does not apply. A classic example of a statute which explicitly precludes judicial review is the provision of the Veterans' Benefit Act, 38 U.S.C. sec 211(a): "the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

Most cases have construed this first exception narrowly. In *Ortego* v. *Weinberger*, 516 F. 2d 1005 (5th Cir. 1975), Ortego required "clear and convincing evidence" that the statute was intended to preclude judicial review.

The second exception to the APA's presumption of reviewability occurs "when agency action is committed to agency discretion by law." This exception has also been given limited scope under case law. See *Associated Electric Co-op* v. *Morton*, 507 F. 2d 1167 (D.C. Cir. 1974).

The EDA act does not explicitly preclude judicial review; however, review may be possible under the Administrative Procedure Act.

Section 10(a) Right of review.—Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Even where an exception to the APA can be found, however, review may still be had under the common law or through constitutional claims.

American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94, 108 (1902) set out the common law presumption of reviewability. In discussing an order made by the Post Office excluding petitioner's letters, the court stated:

"That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief."

Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. But, where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant, in determining whether judicial review may be nonetheless supplied. See *United States* v. *Griffin*, 303 U.S. 226, 232–237. Judicial review of EDA actions can probably be obtained under the APA or upon the common law. For constitutional questions review may always be had.

(*C*) *Fifth amendment due process clause*

Generally, before the Fifth Amendment due process clause will apply, a common law property right, statutory entitlement, or deprivation of liberty must be demonstrated. If an Indian tribe can show that it has a statutory entitlement under the EDA act, it can sue the EDA for violating its substantive right to due process, or for violating the equal protection component of the due process clause. The issue which arises is whether or not an Indian tribe has a statutory entitlement under the EDA act.

1. *Statutory entitlement.*—Under the common law there was no private right of action to enforce the payment of gratuities. Enforcement of gratuitous promises or donative intent was not possible for want of legal consideration. In *Decatur* v. *Paulding*, 14 Pet. 497 (U.S. 1840), Mrs. Stephen Decatur, widow of the naval hero, brought a mandamus to comple the Secretary of the Navy to pay her two

pensions, one under a general pension act, the other under a statute granting a pension to her by name. The Secretary ruled that she might have either but not both. The additional pension was considered gratuitous and therefore no statutory entitlement vested. Mandamus was denied.

The Economic Development Administration might contend that its grants, loans, and other special consideration for Indian tribes constitute a privilege or gratuity and therefore the EDA has absolute (non-reviewable) discretion in agency action. In *Work* v. *United States ex. rel Rives*, 267 U.S. 175 (1925) the court held that the Secretary of the Interior had absolute discretion concerning benefits under the Dent act.

"Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. *It was a gratuity based on equitable and moral considerations* [citations omitted]. Congress did not wish to create a legal claim. *It was not dealing with vested rights.*" (Emphasis supplied.)

In an effort to defeat reviewability of its action, EDA would argue that its grant/loan program is closer to being a gratuity than a right. If an Indian tribe were to argue that the Federal government has a fiduciary duty to assist Indian tribes, and therefore an entitlement exists, the EDA might counter that trust responsibility lies in the Department of the Interior. In *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972) the court held that, "* * * to have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it."

Because of EDA's statutory mandate to alleviate unemployment in distressed economic areas and because of the special preference Indians receive under the act, it can be argued that these areas have more than a unilateral expectation of benefits; there is a claim of entitlement established under the act. The statute itself, which gives preferential treatment to Indians, shapes the entitlement, *Arnett* v. *Kennedy*, 416 U.S. 134 (1975). It is very probable that Indian tribes would be able to establish the existence of a statutory entitlement under the EDA act, because of the legislative intent and special preference which the act sets out. The existence of an entitlement provides the basis upon which the tribe may assert that agency action interferred with the exercise of that entitlement. Interference may also be based on other violations. Agency action may set out procedures which violate applicant's right to due process. The action may create classes which violate applicants' right to equal protection of the law. Finally, agency action may be an abuse of discretion.

2. *Due process.*—The inconsistency of agency policies and procedures in the selection of projects may constitute a ground for violation of the due process under the Fifth Amendment. This analysis focuses on the type of process due to applicants rather than the existence of a property right or entitlement. In *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968) the court upheld a claim for relief under the due process clause in light of alleged procedures employed by the Housing Authority in the admission of tenants to low rent public housing projects. The similarity between this case and EDA action is amazing. The case is quoted at some length:

"Each year the Authority receives approximately 90,000 applications out of which it is able to select an average of only 10,000 families for admission to its housing projects. In doing so the Authority gives preference to certain specified classes of candidates, e.g. 'site residents,' families in 'emergency need of housing,' 'split families,' 'doubled up and overcrowded families * * *'"

These classes are similar to EDA's classification system in two respects. One is level of income which correlates analogously to level of economic growth potential. The other is need, which is more analogous to the above classes.

"The complaint cites numerous claimed deficiencies in the admissions policies and practices of the Authority. Regulations on admissions (other than those pertaining to income level and residence) are not made available to prospective tenants either by publication or by posting in a conspicuous public place."

EDA does make its policies available for copying, but does not publish them in the Federal Register. Regulations, 13 C.F.R. section 301.52(4) states, "A current index, EDA Directive Systems, Index, providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and required to be made available [under the APA] or published by 5 U.S.C. section 552(a)(2)." EDA policies should be furnished to all Indian planners who are responsible for the OEDP's.

"Applications received by the Authority are not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable or systematic manner. . . .

"There is no waiting list or other device by which an applicant can guage the progress of his case and the Authority refuses to divulge a candidate's status on request."

Although EDA does process applications which it accepts, chronologically, it does not maintain a system for holdover projects for which insufficient funds caused rejection.

"Many applications are never considered by the Authority. If and when a determination of eligibility is made however, the candidate is not informed of the Authority's decision, or the reasons therefor."

When EDA refuses to accept a project it never gives formal reasons for rejection. Because the New York City Housing Authority lacked ascertainable standards in determining which applicant should be accepted, and lacked a neutral method for processing projects (such as FIFO) the court held:

"* * * due process requires that selection among applicants be made in accordance with 'ascertainable standards.' [citations omitted], and in cases where many candidates are equally qualified under these standards, that further *selection be made in some reasonable manner such as 'by lot or on the basis of chronological order of application.'* " (Emphasis supplied.)

The court in *Holmes* would prefer a procedurally neutral method for processing applications. The New York City Authority was similar to EDA in that it did chronologically process applications "which it accepted." The problem that existed occurred before acceptance of an application. That problem involved a screening process much like EDA's, that is, one which lacked ascertainable and fair standards, *Holmes* would seem to militate in favor of FIFO processing.

In *Holmes* the court added:

"Due process is a flexible concept which would certainly also leave room for the employment of a scheme such as the 'objective scoring system' suggested in the resolution adopted by the Authority for federal-aided projects."

The objective scoring system in *Holmes* is analogous to EDA objective selection criteria: feasibility, working capital and management. These criteria are objectively neutral. But EDA's policy of setting project type priorities would probably be a violation of due process under a *Holmes* standard.

3. *Equal protection.*—Under EDA Directive No. 17.02-3.03(b), the EDA purports to establish classifications for Indian reservations. High and limited economic growth potential are the classes. The Directive policy indicates project selection will be different according to the class. That is, that high growth potential reservations will be considered for projects which have job producing character and low potential reservations will receive greater favor for infrasturctural projects.

Based on this classification it is possible for a high potential reservation to be denied an infrastructural project. On this basis the reservation may claim that EDA's classification violates the equal protection component of the Fifth Amendment's due process clause. The tribe could contend that it had no notice that it had been classified as an high economic growth potential reservation. It could also contend that the classification is not rationally related to achieving the objectives of the act. In *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746, (1973) the court stated:

"The construction put on a statute by an agency charged with administering it is entitled to great deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law'. . . . *But the courts are the final authorities on issues of statutory construction* [citations omitted] *and 'are not obliged to stand aside and rubber-stamp' their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate congressional policy underlying a statute.*" (Emphasis supplied.)

4. *Disclosure of unpublished policies.*—The use of unpublished policies by EDA to determine the selection of projects is analogous to that in *Morton* v. *Ruiz*, 451 U.S. 199 (1975). The court determined that the Bureau of Indian Affairs could not use unpublished criteria in deciding which Indians would be eligible for welfare benefits. The court took the opportunity to lecture the BIA on the need to comply with the publication rules of the APA whenever it is formulating policy and making rules "that affect substantial individual rights and obligations."

"*The power of an administrative agency to administer a congressionally created funding program necessarily requires the formulation of policy and the making of rules* to fill any gap left, implicitly or explicitly by Congress. * * *

This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with governing federal legislation, [citations ommitted], *but also to employ procedures which conform to the law.*" (Emphasis supplied).

The Administrative Procedure Act was adopted to provide, *inter alia,* that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. The *Ruiz* case is particularly appropriate to EDA since they both involve Indians, and a "congressionally created funding program."

(*E*) *Summary*

The basic issue posed by this section has been whether or not a qualified Indian tribe would have standing to bring judicial review of EDA action. An Indian tribe would probably be able to seek judicial review in the Federal District Courts if its project were rejected on the basis of 1) agency priority for certain "types" of projects, 2) inconsistent policies regarding economic growth potential and relative need, and possible on grounds of processing defects. Under the EDA act Indian tribes do have a statutory entitlement and presently the agency does lack "ascertainable standards" which are objectively neutral. The purpose of this section has not been to "brief-up" a case against the agency but rather to explore the limits of agency policy in an administrative law context.

SECTION VII. ECONOMIC DEVELOPMENT SUMMARY

There are a great number of theories for economic development. It is generally accepted that most theories, given time, will produce a state of development. Although the economic theories themselves are neutral, each theory tends to wear a political garb to which people relate. Different theories have different effects on the allocation of resources as well as upon distribution. Some theories emphasize allocation more while other theories concentrate upon the manner in which resources are distributed among society. The type of theory selected with its allocative and distributive effects is a matter of choice.

The Public Works and Economic Development Act of 1965, as amended, interjects some indicative planning into an essentially capitalist economy. In a capitalist system which is theoretically perfectly competitive, profit maximization is the goal. Business seeks to maximize its profits and minimize its costs. By the 1960's certain geographic areas in the United States were more competitive than others. The EDA act sought to influence the profit-cost calculus of business by providing grants and loans to geographic areas which lagged behind more developed areas in the country. In this manner it was hoped that private capital could be attracted to economically and technologically distressed areas. Externalities would be positive. The rush of rural unemployed to major urban centers could be stemmed and more people could share in the benefits of market capitalism.

There is a basic conflict between what the act attempts to do and what would happen if there were no act. The conflict is between what would happen 'laissez faire' or by indicative planning. Many Senators were against the act because they feared that its effect would be to pirate industries from developed areas at their expense. They feared loss of jobs and taxes. Opposition focused on the loan provision for machinery, which could serve as an incentive for industrial location.

Senator Javits. We had a colloquy the other day and have the implementation in the Record enjoining the Secretary to condemn and beware of pirating practices, and the section of the bill referred to was implemented, . . . I think it is a rather dangerous point and requires great scrupulousness in its administration. Congressional Record, Vol. III, page 12165

Senator Cooper added however, "It was argued by the Secretary that, unless the loan section included provision for machinery, certain projects might never come into operation." The Senate and House voted for equipment and machinery loans however. Generally the "laissez faire" sentiment of Senator Javits became embodied in an agency policy against "relocation" of industries. Industrial "expansions" however were fair game.

The basic problem in the act is that it respects "laissez faire" capitalism more than it attempts to influence development in backward areas. The grants and loans available under the act are insufficient as "incentives" to attract the fewer than 2000 yearly industrial expansions beyond 100 miles. Further, grants and loans are unavailable for relocating industries. The act ignores the fact that there are more relocations annually, and the fact that relocation is done in order to improve profit maximization.

Generally, the thrust of the act is to provide infrastructure in distressed areas in the hope and expectation that an industrial expansion will somehow result. Next, the act seeks to provide grants, loans, and guarantees to industry if it does decide to locate in a distressed "redevelopment area." In addition, the act seeks to provide financial and grant assistance to distressed areas to develop local natural resources, or businesses based on an import substitution-cottage industry concept.

Economic Problems

1. *Spending Pattern.*—The legislative history of the act focuses on economic development assistance to backward distressed areas. Under section 401(a) of the act, however, it is possible for more developed areas to become designated as redevelopment areas on the basis of Department of Labor unemployment statistics. Because both backward and developed areas are eligible for assistance, the spending pattern of the agency tends to favor developed areas more in non-full employment situations. Although the level of funding for Indian areas is not affected by agency spending in developed areas, economic development potential in Indian areas is indirectly affected. If the agency did not designate developed areas for assistance during periods of cyclic decline, EDA grants and loans in backward areas would become an incentive for these areas.

Unemployment rate and duration should not be the criteria for designation. A coefficient of rate/duration of unemployment over an index of development would be a better method of determining eligibility. This would put more emphasis on backward areas where it belongs.

2. *Incentives.*—There are nearly 27,000 agencies, chambers of commerce, nonprofit and profit associations, government agencies, local development corporations and real estate groups which promote economic development in the United States. Most of them offer 100% plant and equipment financing. Because Indian tribes with the assistance of EDA grants and loans are also able to offer 100% financing does not in itself make them competitive. Probably, the best financing and most effective incentive would be 100% grants for most Indian business development, providing that it meets economic feasibility and has proper management. See the EDA Full Employment Program Proposal. This proposal should be seriously considered.

3. *Non-Relocation.*—In the past there have been some relocating industries which were interested in locating on an Indian reservation, and a few wanted to locate but for the fact that EDA would not provide assistance. There are two general policies against relocation. One policy is directed against pirating of industry, which only relocates jobs rather than creating new jobs. The other policy is directed against uncompetitive industry. The belief is that relocating industry is not as competitive as industrial expansions. But many industries which relocate are competitive. Rather than having a policy against relocations per se, the policy should be directed at competitive locations. This would allow EDA assistance in situations where relocating industry is competitive.

4. *Inadequate Funding.*—Because fiscal spending is on an annual basis, some projects are not fully funded. Sometimes components of an integrated project will be funded, but the applicant must reapply the next fiscal year for the remaining components. In doing so the applicant's project comes into competition with other newer projects. Projects should not be funded on a staggered basis. Either the agency should fund the entire project, or it should be allowed to commit itself to fund it in the next fiscal year. Since such a commitment is not possible under a fiscal system, the entire project should be funded.

Present spending is inadequate in terms of the number and amount of projects which seek acceptance yearly. Increasing the availability of funds would help immensely.

Further, a special processing system should be developed for funding of projects which face cost overruns. If a project is submitted in September and funds are not received until the following June, the probability of a cost overrun increases. Processing an overrun project requires as much paper work as a new project. Consequently, there is a reluctance by the agency to accept the overrun project. The increase in cost can be easily blamed on the Indians as a demonstration of their poor planning, rather than on inflation which is usually the case. If the overruns are not funded and the tribes cannot raise the amount, the tribes lose their projects. The agency should make a commitment to stand behind projects which they accept and a more efficient processing system would expedite such projects.

These are only a few of the economic problems which exist under the Public Works and Economic Development of 1965, but these are major problems.

CONCLUSION

The House Minority Report said that the Public Works and Economic Development Act of 1965 was a case of good intentions but bad legislation. Because of the act's vague and ambiguous language it leaves much discretion to agency action. The conflict which exists is between the purpose of the act and discretion. The act and legislative history indicate that practically any project which makes a long-term contribution to economic development is satisfactory. Such projects, however, must not be too tenuously related to economic development. On the one hand, the act would seem to allow practically any project. So long as money is involved some economic justification can always be made even if it is just spending it. The act does not establish any ascertainable standards for determining what constitutes economic justification. Jobs created per dollar of investment, return to capital, etc. were specifically rejected as measures or standards.

Leaving the Economic Development Administration without standards to determine "economic justification," the task of developing standards fell upon the agency. If the agency developed very strict standards of economic feasibility, working capital, and management, then the agency would be creating standards which would limit its ability to fulfill the purpose of the act. Certainly, these standards if operable would have prevented acceptance of the public works infrastructure projects. This result would have impaired the "long-term contribution" purpose of the act. In order to avoid this situation, the EDA developed a policy based on relative need of an application. Projects could be funded by circumventing economic feasibility standards by looking to local need.

Essentially, objective standards of feasibility and subjective standards of need are in conflict. The conflict, although created inadvertently as a way to fulfill the legislative mandate, has in reality stultified that purpose. The conflict or inconsistency of policies, has produced an opportunity for abuse of agency discretion. Indian projects may be rejected because they lack economic feasibility or because their need is not great enough, although the agency does not attempt to explain how it determines need. The inadequacy of neutral selection standards allows the agency to make *ad hoc* judgments about what it thinks is best for Indian tribes. In the end the agency makes the final determination, and it does so at the sacrifice of local planning.

The Economic Development Administration should develop objective standards for project selection, which are neutral. This would minimize discretion. The agency should discontinue its policy of setting project type priorities, and/or refrain from influencing or attempting to influence local planning efforts which would produce *ad hominem* applications for *ad hoc* agency priorities. At present, the Economic Development Administration is rapidly approaching that plateau of benign paternalism which has for so long been occupied only by the Bureau of Indian Affairs. Self-Determination is a self-explanatory term.

APPENDIX III

The Indian Housing Effort in the United States

American Indian Policy Review Commission,
Congress of the United States,
Washington, D.C., August 2, 1976.

Ernest L. Stevens,
Director, American Indian Policy Review Commission,
Washington, D.C.

Dear Mr. Stevens: We are submitting the special Housing Report, written by Bob Leatherman, for your perusal as well as the Task Force #6 and #7 recommendation on how to better meet Indian housing needs.

Through consultation with Mr. Leatherman and other persons familiar with present Indian housing program deficiencies, Task Force #6 and #7 have considered several possible recommendations. In the end, Task Force #6 and #7 decided the best short-run solution to the present administrative problems of Indian housing must involve reorganization within HUD. We recommend creation within the Office of the Secretary of HUD a new Office of Indian Housing Programs which would be held accountable for all components of Indian housing provided by HUD, BIA and IHS. Creation of this new HUD office would be more effective if done legislatively. This would firmly institutionalize an Indian program which could not be reorganized out of existence as a result of changing administrations. This new office would:

(1) be headed by a director appointed by the Secretary;

(2) be responsible for administration of all HUD programs affecting Indians and for coordinating HUD's programs with other individual operations;

(3) require the Secretary to appoint a fifteen-member National Indian Housing Council to advise the director on policy and planning issues and conduct an annual Indian Housing Conference.

Sincerely yours,

Lorraine Turner Ruffing,
Task Force No. 7, Specialist.

INTRODUCTION

From the outset, this report was conceived as being a comprehensive review of the total Indian housing effort to date, rather than an esoteric analysis of some obscure issue. Where relevant, however, such previous reviews have been drawn on in developing a particular topic, and are credited where used. But it was agreed upon by author and the Task Force Specialist, Lorraine Ruffing, that another agonizing appraisal of the Indian Housing effort was neither needed nor should be done. Further condemnations, or yet another paper documenting defects and deficiencies, is unnecessary—rather, what is needed are some answers and some direction, which this report seeks to provide. This approach will hopefully enable the reader to sort out the significant issues involved in Indian housing and pursue feasible remedies.

Anyone desiring further material on any points covered on this report has been referred to other publications cited in various footnotes in the text. The Committee Print, Indian Housing in the United States, cited profusely throughout this report, contains several articles printed in their entirety. The May 1975 Hearing Report, also cited in this report, contains numerous papers and articles discussing in some detail particular aspects of Indian housing.

It should be mentioned that the author of this report was also involved in the development of the content for both these publications. As a Congressional Fellow with the Senate Interior and Insular Affairs Committee in 1974–1975, he and Tom Williams, still on the staff of the Committee, were encouraged by Forrest Gerard, Professional Staff Member on the Senate Subcommittee on Indian Affairs, to cooperate in these efforts. The result was the Committee Print, which provided the basis for hearings, held both in Washington, D.C. and in Oklahoma on the status

of Indian housing. The May 1975 Washington, D.C. hearings, chaired by Senator James Abourezk, were printed in report form, and are a compilation of testimony and papers presented at that time.

The report divides the Indian housing effort into three segments for ease of analysis: (1) an identification of the Indian housing need in terms of quantity and program design; (2) why the need continues to remain substantially unfilled and probably will remain so unless changes occur; and (3) what can be done about it, and by whom! The report essentially reflects an optimistic tone, provided certain events occur. Where unfootnoted citations are encountered in the text, these are references to specific sections of the new Indian Housing Regulations, published in the March 9, 1975 issue of the Federal Register.

The author regrets that it is impossible to go into the special set of housing circumstances surrounding each tribe, band, pueblo, rancheria and community. There simply is not the space nor the time to do so. Representative situations and descriptions were included that take into account the bulk of the Indian housing need. Additional facts can be developed at further hearings that should be held on this subject, or in further reporting that might be done. Each Indian community is unique and incorporates a different set of controlling circumstances. Literally, no two are alike, and few are even similar. Thus, the need for a highly flexible Indian housing program cannot too strongly be impressed upon the reader.

Such a flexible program should provide for housing designed according to the various cultural traditions of the Indian communities rather than continuing the policy of building homes for non-Indian, suburban, middle-class Americans. One of the few graphic statements available to the author is found in the book "Black Elk Speaks," by John G. Neihardt (available now only in paperback, published by Pocket Books, at pages 165–166) where the famous Oglala Holy Man, Black Elk, comments on the design of Indian housing:

". . . the life of a man is a circle from childhood to childhood, and so it is in everything where power moves. Our tepees were round like the nests of birds, and these were always set in a circle, the nation's hoop, a nest of many nests, where the Great Spirit meant for us to hatch our children.

"But the Wasichus (White Men) have put us in these square boxes. Our power is gone and we are dying, for the power is not in us anymore . . ."

At least one prominent Indian architect, Dennis Sun Rhodes, is presently involved in developing a better and more relevantly designed home around the true Indian life-style. More should be encouraged!

To bring this lengthening introduction to a conclusion, the author would like to identify and thank those that have contributed in some significant why to this report. Special note is made of the efforts of both Robert Rosenheim, Regional Administrator of the Denver HUD Regional Office, and William Hallett, Assistant Regional Administrator for the Office of Indian Programs in the Denver HUD Regional Office. In addition to their cooperation in providing the author the opportunity of undertaking this assignment, both have been vigorous advocates for some years now of a more effective Indian housing effort.

Other contributors were George Rucker, of the Senate Budget Committee, who has been a reliable analyst of Indian housing statistics, and whose charts and figures are used in this report. Tony Strong, on Senator Abourezk's Staff, and Grade Thorpe, on the staff of the American Indian Policy Review Commission, have both been involved with portions of this report. Lorraine Ruffing, coordinating the housing study for Task Force No. 7 of the American Indian Policy Review Commission, has also been extremely helpful in giving the report some direction.

David King, in the Regional Counsel's Office of the Seattle HUD Regional Office, contributed much of the information on Alaskan housing used in Part I. Ron Peake, BIA Housing Assistance Chief, and Robert Selvey, in BIA headquarters, have been valuable resources of material and information.

Mary Gaston, formerly in charge of the financing of Tribal Project Notes and Bonds in the Denver HUD Regional Office, contributed much effort to Part II. Dennis Spencer, Housing Management Specialist in the Office of Indian Programs of the Denver HUD Regional Office, provided much assistance. James Wagenlander, formerly with the Regional Counsel's Office in the Denver HUD Regional Office, worked on portions of Part I. Judy Hanson, in the Hud-West Training Center, prepared the transcript of this report from the author's often garbled, handwritten draft.

Gordon Cavanaugh, Executive Director of the Housing Assistance Council, has contributed both material and comments on the report's content. Loie Brooks,

Executive Director of the National Indian Housing Council, was helpful, along with Tim Foster and Ron Froman, Chairman and Treasurer, respectively, of that organization.

Various members of the HUD Central Office and the San Francisco HUD Office of Indian Programs were helpful with aspects of this report, but are too numerous to mention here individually.

The author requests one further indulgence: permitting the dedication of this report, such as it is, to one person whose life had profoundly affected Indian housing, particularly in the Great Plains area, and who untimely passed away this past fall: Arnold Nelson. In a very real sense, those in the Denver HUD Office of Indian Programs remain his disciples. His influence on Indian housing programming in that area was so pervasive that not a day appears to pass without someone voicing the question: "How would Arnie handle this situation?" Others the author desires to mention in this dedication are the Indian Housing Authority executive directors . . . All of them! Laws, regulations, agencies and policies will flow and subside like the tide, but the executive director will have the most bearing of all on whether or not any Indian housing program will finally succeed. Standing somewhere among the tenants, the tribal government, the IHA board of commissioners, IHS, BIA and HUD, the executive director is expected to possess the patience of Job, the wisdom of Solomon, and the courage of David, all on a wage that more often than not qualifies him or her for one of the authority's own low-income units. He is, without a doubt, the most crucial link in the entire operational chain.

There is one thought with which this portion of the report will be concluded. Originally expressed by W.G.T. Shedd, and graphically embodied now in a poster hanging in the author's office, is the idea: "A ship in a harbor is safe, but that is not what ships are built for."

This pretty well sums up Indian housing efforts until now. All the theory and dialogue over Indian housing is really of no value whatsoever, if in the final analysis it never results in meeting Indian housing needs.

It is time we got our Indian housing vessel underway, so that it can accomplish the purpose it was created for.

Glossary and Notes on Terms, References and Materials Used in This Report

AGENCY ABBREVIATIONS

Census: Bureau of the Census, part of the Department of Commerce.

Commission: The American Indian Policy Review Commission.

EDA: Economic Development Administration, also part of the Department of Commerce.

GAO: Government Accounting Office, an independent agency with responsibility for monitoring various agency programs.

HAC: Housing Assistance Council, a non-profit organization organized to further housing programs for low or moderate income persons in rual area.

HEW: Department of Health, Education, and Welfare.

HUD: Department of Housing and Urban Development.

IHA: Indian Housing Authority.

PHA: Public Housing Authority (non-Indian).

IHS: Indian Health Service, organized under Public Health Service in HEW.

OIP: Office of Indian Programs, organized in HUD's Denver and San Francisco Regional Office, only.

ONAP: Office of Native American Programs organized under HEW.

OMB: Office of Management and Budget, the Executive Agency responsible for financial and program control.

ACC: Annual Contributions Contract, agreement between HUD, IHA and PHA.

HUD agrees to make such annual contributions sufficient to amortize the development and financing costs of a housing project in an Annual Contributions Contract, entered into with the housing authority for each project. Normally, the amortization period for a rental project is 40 years, and for a home-ownership project (whether Mutual-Help or Turnkey III) either 25 or 30 years. While the entire development of a housing project with HUD funds is too complicated a process to be described here in detail, a short summary of its financing may be helpful.

HUD makes a short-term loan to the authority to enable it to hire the necessary personnel to get the housing project underway. Under HUD supervision the housing authority then issues temporary Project Notes of up to 12 months maturity to private investors. The money thus generated is used by the authorities to repay these initial loans to HUD. Ultimately, the notes may be incorporated into what is referred to by HUD as a more "permanent" means of financing in the form of bonds with up to 40 years maturity. Bonds of shorter maturities for home-ownership projects are presently not sold. Whether notes or bonds, after the units are occupied HUD then pays directly to the paying agent named by the purchaser an amount sufficient, but not above that stipulated in the ACC, to take care of the annual debt service on the securities until they are retired. When the projects continue to be financed by the sale of the project notes, old notes are refinanced by a sale of new notes, in effect capitalizing interest costs. The entire process involves both a loan and an annual contribution arrangement. Leased units are also provided for in an ACC. However, since under the leasing programs the housing authorities are not building or purchasing the units, this elaborate financing scheme is unnecessary.

CDDBG: Community Development Discretionary Block Grant. A HUD program that can be used for a wide variety of activities, replacing the old categorical grant programs providing for use of funds for specific types of projects such as Urban Renewal.

FY: Fiscal Year, which can be defined as covering any 12 month period for bookkeeping purposes. It traditionally ran between July 1st and June 30th with federal agencies. In 1976 Congress changed the fiscal year to run from October 1st to September 30th to correspond more closely with the Congressional Calendar. The three month extension in 1976 is termed the "transitional quarter."

MPS: Minimum Property Standards; minimum level of quality, space, etc., required in a moderately priced, decent, safe and sanitary dwelling.

Committee Print: Indian Housing in the United States, See Footnote 1, Part I.

Davis-Bacon Wages: By federal law, most federally funded projects, including those for public housing and construction, must pay wages determined by the Department of Labor as prevailing in the surrounding area.

Federally Recognized: A general term for any tribe, band, pueblo, rancheria, community, etc., that has signed a treaty with the U.S. Government or by some other means has become eligible for Federally-originated Indian Service Programs.

New Indian Housing Regulations: The regulations controlling HUD Indian housing programs. See Footnote 5, Part I.

Office of Indian Programs and Policy: Newly orgainzed in the HUD Central Office; its primary mission is one of coordination and development of Indian policy within HUD.

OMB A–90 Circular Clearance: Non-Indian entities must clear all applications for most government programs through a state clearing office. In a letter to Wendell Chino, Chairman of the National Tribal Chairmen's Association, an OMB official specifically exempted tribes from this procedure.

Public Law 280: The federal law ceding to the States involved court jurisdiction over certain tribal civil and criminal matters (both parties agreeing); highly controversial and often confusing, the whole issue is the subject of another Commission task force report.

Prototype Costs: The figure HUD determines a moderately priced home of a certain type and design should cost in a specific area. It serves as a ceiling for cost-analyzing out the price per dwelling in a new project, in order to insure public housing units are not overly designed.

Very Low Income: Defined in Footnote 2, Part I.

I. THE INDIAN HOUSING NEED

A. Measuring the Need

The accuracy of housing statistics are vital because they act as a basis for all production activities. The most widely accepted measurement of Indian housing needs are those statistics compiled yearly by the Bureau of Indian Affairs. Yet, they are only computed for those areas serviced by the BIA. The special needs of those Indians living on state reservations, in non-federally recognized Indian communities, and in urban areas are not being measured. Compounding the problem, the past inability of the Bureau of Census to detect the needs of these specific groups has hampered efforts by many American Indians throughout the country to correct these conditions. In addition to the inherent limitations of the Census survey, the BIA reviews in the past have been incomplete and sometimes

misleading. These deficiencies, along with BIA determinations of service areas, have come under attack several times. Encouragingly, BIA surveys have steadily been improving. This, coupled with future improvements in the Census gathering, both on and off the reservations, and improved tribal planning activities, should provide a clearer picture of present conditions and future needs.

1. Census information, last collected in 1970, is now much out of date; indicating appalling conditions even then, it is very probable that an update would show a deterioration in the housing situation, rather than an improved or even *status quo* situation.

TABLE 1.—SELECTED CHARACTERISTICS OF INDIAN HOUSING, 1970, INSIDE AND OUTSIDE STANDARD METROPOLITAN AREAS (SMSA'S)

Selected characteristics	In central cities	Outside central cities	Total metropolitan area	Outside SMSA's	Total metropolitan and nonmetropolitan
All occupied units	44,257	36,071	80,328	99,938	180,266
Age of units:					
Percent 30 yr or older	51.3	29.7	41.6	40.4	40.9
National average—Percent 30 yr	(48.0)	(27.8)	(37.7)	(46.7)	(40.5)
Quality:					
Percent lacking plumbing	6.4	12.9	9.3	40.0	26.3
National average—Percent without plumbing	(2.9)	(2.9)	(2.9)	(11.4)	(5.5)
Percent with plumbing, but crowded [1]	15.7	14.9	15.3	17.3	16.4
National average—Percent crowded [1]	(7.9)	(7.3)	(7.1)	(6.4)	(6.9)
Percent with plumbing, severely crowded [2]	4.4	4.3	4.4	7.2	5.9
National Average—Percent severely crowded [2]	(2.0)	(1.1)	(1.6)	(1.3)	(1.5)
Household income:					
Indian median	$6,000	$7,100	$6,500	$4,200	$5,100
National median	($7,900)	($10,300)	($9,100)	($6,800)	($8,400)
Household size:					
Indian median	2.7	3.2	2.9	3.8	3.4
National median	(2.4)	(3.0)	(2.7)	(2.7)	(2.7)
Percent of 7 or more persons	7.4	10.3	8 7	21.2	1.57
National average—Percent 7 or more persons	(4.6)	(5.1)	(4.8)	(5.7)	(5.1)

[1] Crowded means more than 1 person per room.
[2] Severely crowded means more than 1.50 persons per room.

Source: 1970 Census of Housing, HC(7)-9, "Housing of Selected Racial Groups," HC(7)-1, "Housing Characteristics by Household Composition," and HC(2)-1, "Metropolitan Housing Characteristics."

Reproduced from page 2 of the Committee Print [1] and shown in Table One are selected characteristics of Indian housing taken from 1970 Census reports. A summarization of this information indicates that the preponderance of Indian dwelling units are located outside SMSA's (normally, this means communities outside metropolitan areas, with less than 50,000 population). The housing occupied by Indian families are older dwellings, most of which are in need of extensive repairs. Further demographical analysis indicates these families are, for the most part, low to very low income,[2] with large families to each house. Note the particularly alarming statistics of Indian housing compared with the national average under the headings "Quality" and "Household Size."

Another difficulty in using Census data is that there is no uniformly accepted identification of American Indians for purposes of eligibility for federal programs. One method is to use a blood quantum (Usually one-fourth) while another merely includes anyone identifying himself or herself as such. Others use this latter method, with the additional qualification that the person must be generally recognized as such in the community in which he or she resides. One of the interesting features of succeeding Census surveys is that the nation's Indian population is growing faster now than can be accounted for with a birthrate above the national average and a reduced death rate. The only plausible reason for this is that more persons in each survey are willing to identify themselves as American Indians, which is an indication of resurging healthy pride in one's heritage.

[1] Indian Housing in the United States. A staff report on the Indian housing effort in the United States with selected Appendixes, Committee on Interior and Insular Affairs, United States Senate (February 1975) cited hereafter as Committee Print.

[2] Very low income as defined by the Secretary of HUD is a family whose total family income does not exceed 50 percent of the median total family income for the area, with adjustments for smaller and larger families (notice No. HM 75-39 (LHA), Sec. 860.403 (Q), dated October 22, 1975.

2. Besides Census, the other major agency assembling data in Indian housing is the BIA. For purposes of this report the BIA-developed data offers the most pertinent housing figures for better understanding of the state of Indian housing. Even, then however, there have been some problems in the manner in which the BIA has collected its data, which have been commented on by the General Accounting Office (GAO).[3] The curious result of a more conscientious effort on the part of the BIA in identifying housing needs is that, although Indian housing construction and repairs accelerated between 1971 and 1973 (in particular HUD-financed public housing) successive inventories by the BIA indicates things are, in fact, getting worse, presumably because the more complete and reliable data now available indicates that the situation has really been worse than believed all along. George Rucker, a statician and analyst who has been reviewing and commenting on BIA housing data for several years now, has prepared several charts using most recent information from the BIA.

George Rucker, a statistician and analyst who has been reviewing and commenting on BIA housing data for several years now, has prepared several charts using the most recent information from the BIA.

Table Two is an inventory of housing by BIA area offices. Of the 109,255 dwelling units shown in all BIA service areas, less than half (49,560) are considered standard. A third of the total need outright replacement; slightly over one-fourth need renovating; and another 18,000 families who may be living with other families, are in need of some kind of shelter of their own.

Table Three shows the BIA inventory changes between fiscal year 1974 and fiscal year 1975. Because of movement back to reservations, more reliable data collection procedures, expanded BIA Service districts, and deteriorating existing stock, it is estimated that present efforts will just barely keep pace with the demand and will not result in reducing the total need. Restated, present efforts will have to be doubled in order to meet housing goals within a reasonable period of time.

TABLE 2.—BUREAU OF INDIAN AFFAIRS CONSOLIDATED HOUSING INVENTORY, FISCAL YEAR 1975[1]

Area/agency	Total number existing housing units	Housing units in standard condition	Subtotal sub-standard condition	Housing units needing replace-ment	Housing units needing renova-tion	Total new housing units required	Housing units needing replace-ment	Families needing housing
Aberdeen	9,714	6,445	3,269	2,382	887	3,646	2,382	1,264
Albuquerque	7,063	4,443	2,620	972	1,648	3,048	972	2,076
Anadarko	4,395	2,064	2,331	984	1,347	2,198	984	1,214
Billings	5,938	3,882	2,056	1,385	671	1,905	1,385	520
Eastern	2,989	1,474	1,515	916	599	1,478	916	562
Juneau	11,336	3,972	7,414	6,453	961	8,400	6,453	1,947
Minnneapolis	3,958	2,561	1,397	745	652	1,312	745	567
Muskogee	14,546	9,318	5,228	3,382	1,846	7,249	3,382	3,867
Navajo	23,314	4,753	18,561	5,659	12,902	3,321	5,659	2,662
Phoenix	9,334	4,502	4,882	4,301	581	5,628	4,301	1,327
Portland	5,781	3,990	1,791	938	853	1,937	938	999
Sacramento	10,787	2,156	3,631	5,005	3,626	5,943	5,005	938
Total	109,255	49,560	59,695	33,122	26,573	51,065	33,122	17,943

[1] This inventory reflects increased service population due to new HIP rules.

[3] Slow Progress in Eliminating Substandard Indian Housing. General Accounting Office Report No. B-114868, October 12, 1971, p. 4 (p. 34 of Committee Print).

TABLE 3.—CHARGES BETWEEN FISCAL YEAR 1974 AND FISCAL YEAR 1975 REFLECTED IN THE HOUSING INVENTORY OF THE BUREAU OF INDIAN AFFAIRS

Office or agency	Number of families in service populations		Total number of housing units		Number of substandard housing units		Total housing need [1]	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Aberdeen	+38	+0.8	+272	+2.9	−593	−15.4	−777	−14.6
Albuquerque	+256	+2.9	+438	+6.6	−133	−4.8	−315	−6.3
Anadarko	+258	+4.8	+337	+8.3	−53	−2.2	−132	−3.6
Billings	+160	+2.5	+255	+4.5	−122	−5.6	−217	−7.8
Juneau	+255	+1.9	+84	+.7	−75	−1.0	+96	+1.0
Minneapolis	+816	+220.0	+545	+16.0	+13	+.9	+284	+16.9
Muskogee	+544	+3.0	+709	+5.1	−164	−3.0	−329	−3.5
Navajo	+1,171	+4.7	+549	+2.4	−248	−1.3	+374	+1.8
Phoenix	+271	+2.6	+278	+3.1	−100	−2.0	−107	−1.7
Portland	+204	+3.1	+226	+4.1	−31	−1.7	−53	−1.9
Sacramento	+9,521	+432.0	+9,176	+569.6	+7,740	+863.7	+8,085	+544.8
Eastern	+383	+12.1	+232	+8.4	+176	+13.1	+327	+18.7
Total	+13,927	+12.3	+13,101	+13.6	+6,410	+12.0	+7,236	+10.3

[1] Including doubled up families.

Substandard housing conditions cause serious health problems for Indian people. As pointed out by Dr. Emery A. Johnson, Director of the Indian Health Service (IHS), during the 1975 Senate Hearings on Indian housing, "a major element in the health status of the people is based on the environment in which they live, and a fundamental part of that environment is their housing." Dr. Johnson went on to say that "crowded living conditions, insufficient amounts of safe water, and lack of sanitation facilities are factors contributing to the poor environments in which most Indian and Alaska natives live . . . (and) . . . one of the essentials if the Indian and Alaskian native people are to achieve the desired level of health, is a descent home located in a well planned community." [4] Such a quality environment will not only contribute to the health of the Indians, but also will surely aid in the educational, social, and economic development on the reservations.

In 1949 the United States established a goal to provide decent housing for all its citizens. More than twenty-five years later that goal falls short for many of its people, including the nation's Indians. Despite Federal assistance, the deplorable housing conditions that have endured in the past remain an everyday reality.

[4] Indian Housing. A report of the Hearing before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, May 1, 1975, p. 12, cited hereafter as Hearing Report.

TABLE 4.—NEW HOMES CONSTRUCTED, FISCAL YEAR 1975

Area/agency tribe	Total new homes	Low rent	Mutual help	Turnkey III	Housing improvement, new homes	Flood rehabilitation	Built with judgment funds	Built with credit loans	Other	Housing improvement repairs, nonadd
Aberdeen	663	372	98	74	88	0	0	0	31	524
Albuquerque	592	10	234	0	12	0	0	0	336	371
Anadarko	258	50	204	0	2	0	0	2	0	234
Billings	315	54	153	5	27	44	0	32	0	270
Eastern	138	61	10	0	24	0	0	4	39	133
Juneau	129	0	0	14	43	30	0	0	42	142
Minneapolis	139	40	0	0	98	0	0	1	0	250
Muskogee	740	238	492	0	10	0	0	0	0	226
Navajo	547	60	250	0	186	0	0	28	23	891
Phoenix	349	44	147	0	80	0	0	12	66	215
Portland	197	45	60	0	23	0	0	32	37	227
Sacramento	79	0	30	0	48	0	0	1	0	177
Total	4,146	974	1,678	93	641	74	0	112	574	3,660

3. Shown in Table Four is the total of new houses built within BIA Service areas during fiscal year 1975. Of the 4,146 homes built, 2,745 were provided for under a HUD public housing program; approximately two-thirds of all the new homes constructed in fiscal year 1975 were either HUDs Mutual-Help Program (1,678 units), Low Rent (974 units), or Turnkey III (93 units). The BIA Housing Improvement Program (HIP) provided 641 new homes, or slightly more than 15% of the total. A complete description of these programs can be found on pages 3 through 8 of the Committee Print.

The overall performance of the public housing program is shown on page 6 of the Committee Print. Since its availability to tribes in 1962, 24,476 housing units were authorized under executed ACCs, and 17,457 has been completed for occupancy at the end of fiscal year 1974. Between 1968 and 1975, as shown on page 8 of the Committee Print, HIP provided $59,587,000 for a total of 29,443 home repairs and 4,113 new home construction units. According to page 9 of the Committee Print, between 1970–1974, the Farmer's Home Administration (FmHA) made 1,635 loans to Indians, totaling $20,832,840. Although FmHA records do not show how many of these loans were made on dwellings located on trust land, they are believed to be only a very small percentage of the total. Between 1972–1974, as shown on page 639 of the Committee Print, the Veteran's Administration (VA) closed a total of 909 loans to Indian veterans. Again, there is no way of identifying how many loans involved trust land, but they were probably few of the total loans given.

TABLE 5.—BUREAU OF INDIAN AFFAIRS ESTIMATES OF INDIAN HOUSING NEED, MID-1971 THROUGH MID-1974

	Mid-1971	Mid-1972	Mid-1973	Mid-1974
Number of new housing units needed	49,840	48,313	47,071	46,556
Change from prior year	(+3,269)	(−1,527)	(−1,242	(−515)
Number of units needing rehabilitation	20,739	24,853	23,776	23,846
Change from prior year	(+6,872)	(+4,114)	(−1,077)	(+70)
Total housing need of BIA Indians	70,579	73,166	70,847	70,402
Change from prior year	(+10,168)	(+2,587)	(−2,319)	(−445)
Total number of families under BIA jurisdiction	100,463	103,310	106,882	113,271
Incidence of housing need (percent)	70.3	70.8	66.3	62.2

Source: Bureau of Indian Affairs, "Consolidated Area Housing Inventory," fiscal year 1971 through fiscal year 1974.

In order to give the reader some reference in which to compare these numbers, included in the report in Table Five are the BIA estimates of housing need, mid-fiscal year 1971 through mid-fiscal year 1974.

4. Before leaving the subject of needs measurement, one final problem should be mentioned: the lack of adequate or trained personnel at the tribal government level to assist in collections of data, such as housing needs. It is now evident that one of the necessary assets tribes must have is personnel who can capably develop housing codes, formulate land use plans, assist in housing surveys, as well as participate in economic planning for the tribe. The Economic Development Administration (EDA) provides planning grants to do the latter, while HUD hitherto on a limited basis has provided planning grants through its Sec. 701 categorical planning program to do the former.

The problem now is that HUD is phasing outs its Sec. 701 program and tribes must now apply for planning funds through the Community Development Discretionary Block Grant (CDDBG) funds, which can be used for planning as well as other activities. The disadvantage to tribes is that CDDBG funds are limited and must be competed for, and in fiscal year 1976 HUD did not give a high priority for use of these funds for planning. Consequently few, if any, tribes would have received these funds based on an application showing planning need. A "Catch 22" aspect of this competition is that applications are usually prepared by planning staffs at the local level, so that shrinking Sec. 701 funds lead to shrinking tribal planning staffs, which places tribes, with limited resources to begin with at a disadvantage with rural non-tribal governments competing for the same CDDBG funds. When tribes are funded through the CDDBG process, it is primarily as a result of their hig incidence of poverty, and high unemployment figures, being sufficient to overcome their lack of expertise in participating in these kinds of competitions.

Squarely addressed, the policy issue can be framed: is comprehensive planning a valuable activity for tribes which should be funded by the Federal government? Are only paper plans being written, which are not being put to any practical use—or do they make a difference? It is the opinion of many tribal leaders that Section 701 planning activities play an important function on reservations, and they argue that this program for a tribal government is more vital than for a rural town. Consequently, it is the opinion of these leaders that Section 701 comprehensive planning funds should be continued as a special program for tribal governments.

B. *Where is the Need.*—This part of the report seeks to identify the extreme variety of situations in which the Indian's housing need is found, in a regional, cultural, as well as a political context.

1. *Regional and Cultural Variations.*—Indian housing specialists agree that conditions existing in Alaska dictate that Alaskan Indians and Natives can only be adequately housed with a program, or programs, developed explicitly for that area.

(a) *Alaskan Housing.*—Seeking to meet the special housing needs of Alaskan Indians and Natives, in 1974 HUD and the BIA came up with the "special 500" program. As its name implies, it was designed to provide 500 homes to remote villages in Alaska. By special agreement, certain HUD standards, such as its Minimum Property Standards (MPS), were waived. Also, the BIA was delegated full authority by HUD and the IHS to oversee local erection of the units. It has been a "noble" experiment, in the classic use of the term.

The features of the "special 500" were:

(1) Because of the extremely short construction season, the homes were pre-cut and packaged to reduce on-site time needed to erect them.

(2) Severe weather conditions dictated that heavy insulation and 2 x 6's in lieu of 2 x 4's be used in construction.

(3) To minimize both construction and operating costs, the homes were reduced in size to 700 square feet, very small by most standard standards. Even at this size, however, the homes were often much larger than other homes in the community.

(4) Because of the remoteness of the areas where the homes were to be placed, little or no local skills, tools or replacement materials were available. Consequently, all these had to be shipped in at additional cost.

The program is now far enough along that some conclusions can be drawn about its effect. Among these are:

(1) Costs are running higher than anticipated—closer to $50,000 per unit than the $30,000 specified in the Agreement.

(2) The remoteness of the location has resulted in increased costs, and the units have been virtually impossible to manage according to HUD's conventional guidelines. With sites containing only a few units and the cost of visiting them running into hundreds of dollars per visit, it is not practical to conduct regular visitations to enforce rent collections or make minor repairs.

(3) Even with increased materials used in their construction, operating and maintaining the units are beyond the incomes of some of their occupants. Even heating requires a sizeable monthly outlay.

Many of the problems inherent in the "special 500" are not limited to conditions only in Alaska, but to building in general, in remote areas. It has been recommended that if HUD is to continue to provide housing in remote areas, the bulk of which will be for the Alaskan tribes, traditional programs must be reconsidered and developed accordingly. One suggestion would be to provide only project construction and initial tenant selection. This would establish housing as a community resource, cancelling any further involvement by any State or Federal agency. A review of housing programs for remote Alaskan villages is now underway at HUD.

(b) *Eastern Tribes.*—Many Eastern tribes or bands never actually signed treaties with the Federal government and are not "federally-recognized" as being eligible for special Federal services in exchange for loss of land. Yet, the Indian population East of the Mississippi has been estimated to be in excess of 250,000 persons, or approximately one-third of the Nation's total.[5] Except for 14 federally-recognized Eastern tribes, Indians in this part of the nation live in or near small communities along the Eastern seaboard rather than reservations and are not eligible for any direct HUD assistance out of its Indian set-aside.

[5] Hearing Report paper submitted by Ms. Pat Porter for Coalition of Eastern Native Americans (CENA) p. 217.

Therefore, they must compete with other needy Americans for often scarce housing funds controlled by local, city or county housing authorities. Where these do not exist, there usually is no rescourse.

Several things can be done to address the situation, some of which are listed later in this report in Sec. III. In addition to these, it may also be possible for some of these off-reservation needs to be satisfied through adjustment of HUD's new Sec. 8 leased-housing program. Because there is no present Indian set-aside in this program, and because of its design and reliance on the private sector, it will require a great deal of work to make the necessary adjustments.

Another possibility is encouraging States to enact enabling statutes recognizing Indian housing authorities, as in the cases of Oklahoma and Utah, among others. Other recommendations have been advanced, most notably by the Coalition of Eastern Native Americans (CENA). In a paper submitted to the Senate Subcommittee on Indian Affairs, chaired by Senator James Abourezk of South Dakota, several recommendations were made, including:

(1) That HUD establish a permanent advisory committee to represent *all* Indians.

(2) That research and planning funds be made available to assist in improving housing conditions for Eastern Indians.

(3) That an inter-agency mechanism be formed to link all housing programs together to benefit Eastern Indians.

(4) That a set-aside be established to be used for off-reservation Indians. (Although the 1921 Snyder Act provides for Federal aid to all Indians, the government has chosen not to do so.)

(5) That there be Indian desks established by HUD in its Boston, New York, Philadelphia and Atlanta regional offices.[6]

A much more complete analysis of the housing plight of Eastern Indians, along with the recommendations set out in detail, can be found on page 217 of the Indian Housing Hearings Report held May 1, 1975, by the Senate Subcommittee on Ibdian Affiars.

(c) *Oklahoma Tribes.*—With one of the largest Indian populations in the nation, Oklahoma Indians have continually asserted their rights to Federal housing programs. Recognized under State law, but served by BIA and IHS, Indian housing in that state has many unique features that distinguish their needs from other tribes. The Oklahoma Indian Housing Association has been very active, and has prepared a paper setting forth their recommendations, also submitted to Senator Abourezk, and included in page 220 of the previously mentioned Hearing Report. It was no accident that the organizational meeting of the National American Indian Housing Council was held in Oklahoma, and that the Oklahoma delegation was prominent in the passage of the first Indian housing set-aside in the 1974 Housing and Community Development Act, inserted by Senator Montoya of New Mexico.

(d) *Rancherias, Smaller Bands and Unorganized Communities.*—The other general classifications include the diversely organized tribes, bands, smaller communities and rancherias which are paricularly disadvantaged in attempting to obtain either HUD of BIA housing. Plague by lack of trust land, sparse settlements and remote locations, they have participated only sparingly in any available program althouth many have the "Federal-recognition" not accorded Eastern tribes.

(e) *Southwest Tribes and Pueblos.*—The Southwestern tribes are equally diverse in their make-up and organization and range from the Navajo—the largest single tribal entity in the nation, with over 100,000 members and reaching into three states—to small communities of only a few hundred persons. Because many bands and pueblos have living traditions that go back 800 years or further, modern housing programs often simply do not fit their needs. Their location in remote areas presents difficult construction and management problems which require special solutions.

(f) *The Great Plains.*—The Plains tribes, while experiencing problems, have probably managed to make HUD and BIA housing programs fit as well there as anywhere. However, much of the usable space on most reservations is gradually being taken up, and many tribes are now looking for new sites in adjacently located off-reservation communities. Most agency or Congressional personnel fail to understand that few reservations are completely enclosed reserves. Most are checkerboards of privately-held land intermixed with tribally-held trust lands. Another major variation is privately allotted land held in trust for an

[6] Hearing Report. Ibid., p. 220.

individual. The heirship or multiple-owner problem also creates difficulties in land use. As shown here, these tribes have their special problems in acquiring sites, as well as adapting HUD and BIA housing programs to fit their individual circumstances.

2. Concluding this part, the theme running throughout this report is the fact that American Indians are the most disadvantaged group in the nation. Their housing needs are critical, and will probably require special programs to meet those needs. Most housing assistance is Federally funded, with HUD providing the bulk of the financial assistance. Eligibility for these programs usually depends on "Federal-recognition," which exempts a great many Indians from receiving any assistance at all.

II. SLOW PROGRESS IN MEETING THE HOUSING NEED

Housing construction is by its very nature a complicated process. Public housing construction is even more complicated, primarily because of the myriad Federal laws and regulations that impose heavy responsibilities on the local housing authority, as well as stringent guidelines on the Federal officials charged with monitoring these programs. The attitudes of these officials play a major role in the program's success or failure. Since the public housing program provides the bulk of new housing on tribal lands, it is appropriate to begin this section by analyzing it.

As long as the present legislation remains in effect, (primarily, The Housing Act of 1937, Public Law 75–412), the processing of public housing units through HUD's maze of reviews is subject to two major constraints: Minimum Property Standards [1] (Sec. 805.212), and Prototype Costs [2] (Sec. 805.213). The former is supposed to assure that the tenant or home-buyer occupies a dwelling meeting at least minimal health and safety standards; the latter is to assure that the taxpayer isn't subsidizing an over-designed or inappropriately expensive home. To comply with these two constraints, much work goes into drawings, plans and specifications that must then be revised and often revised again. However, before this takes place, two other prerequisites must have been satisfactorily completed—site selection and tenant selection. Both can be major obstacles in pursuit of an abbreviated processing period, as described below.

A. *Lengthy Development Period.*—Former HUD Secretary, James T. Lynn, estimated that it takes 18 months to process a housing application to the point where an Annual Contributions Contract (ACC) can be executed between the Indian Housing Authority (IHA) and HUD.[3] There are too many examples of applications being in process from two to three years before ACC execution, if such execution ever does occur. Only then can construction start.

In Northern zones, with short construction periods, a moderately sized project of 50–75 homes may be several years in construction. When the bulk of the project is constructed on individual sites, an even longer construction time may be required.

On individual sites, the usual provision of water and disposal of sewage is through the drilling of a well and location of septic tanks. Percolation tests must be conducted to determine a feasible place for a septic tank. While some tests can be run to determine whether water is available, there is no dependable test to insure that a well will reach a water acquifer. In the Plains areas, it is not uncommon to reach hundreds of feet (at $8.00 to $12.00 per foot) without encountering water sufficient to supply the needs of even a small sized family. Not only can the process be expensive, but if adequate water is never reached, the entire drilling operation must be resumed elsewhere, causing a consequent delay. Perhaps the entire site may have to be rejected and a substitute found. It is evident that commencing construction on a home site before water is assured can be a risky venture. Hence, it is advisable to have the well or an alternative system located first before the foundation is started. When homes are built in close proximity there is less delay in providing water and sewage disposal because IHS can put in lagoon systems or other similar alternatives, both at a reduced cost per unit and usually without problem.

With public housing, especially the Mutual Help projects, HUD's prominent time delays revolve around tenant selection and site selection; with low rent projects, these items are less of a problem. In Mutual-Help, site selection occurs generally after identification of the tenant, who nearly always wants his or her

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[1] Federal Register, Vol. 41, No. 47—March 9, 1976, p. 10162.
[2] Federal Register, *ibid.*, p. 10162.
[3] Remarks by Former HUD Secretary, James T. Lynn, HUD National Indian Housing Conference, November 14, 1974.

home built on land previously assigned, allotted or leased from the tribe. Only at this point can HUD run an accurate cost analysis on site work unit construction, access roads, etc., to determine that unit's cost. As with the location of the wells, unless the site is actually decided upon, any cost analysis can only be a rough estimation, which can lead to large project cost over-runs if the estimates are made blindly. It is much better, therefore, to know the actual location of the home so that its eventual cost can be more accurately computed.

In areas where homes are to be located in a community arrangement, other factors have to be considered. If the site is within an off-reservation community (whether trust land is involved or not) a cooperation agreement must be negotiated with the community government to insure the provision of water and sewer facilities to the houses and to take the property off the tax roles if it is nontrust land. In many instances fire and police protection for the homes must also be specifically negotiated. All of this can take time in areas where reluctant local government is involved, such as some Oklahoma, California and Eastern seaboard Indian communities.

To expedite the processing, many HUD field offices obtain site leases or assignment in advance of ACC execution. The new housing regulations, in Sec. 805.217(b), expressly provide, however, "no site may be acquired or leased and no commitment shall be made for acquisition or leasing until after execution of the ACC." [4] The paradox of this is that an accurate ACC amount cannot be determined until site costs are known; entire site costs cannot be determined until water is located; and water can only be guaranteed through drilling, which is expensive, and can only be paid for out of ACC funds—which brings us back to square one.

B. *Multi-Agency Involvement.*—In the present system of providing Indian housing, close coordination among HUD, IHS and the BIA is essential. Certain decisions by any one of the three are not always possible until one or the other has done its job, e.g., IHS must wait for site identification to be worked out by the BIA before it can project costs for sewer and water services, and only then can HUD confidently review construction plans.

The various responsibilities of the primary agencies involved in the delivery of housing in Indian country are described at length beginning on page 10 of the Committee Print and need not be repeated here. While new regulations have attempted to clarify the roles of the agencies involved, no single agency has been placed in charge of the entire operation, which may continue to prevent the delivery of homes on schedule and at the promised annual level described in this report.

It should be noted here that the new Interdepartmental Agreement entered into between HUD, BIA and IHS seeks to ameliorate the problems flowing from this lack of coordination in the past. Basically, it provides that a meeting shall be held preliminary to issuance of a Program Reservation by HUD, at which time all plans and specifications are jointly reviewed and a time schedule for completing each aspect of the construction is decided. Departure from this schedule must be justified in writing [5] to all other parties involved as well as to the HUD field office director (Sec. 805.223). There is no recourse outlined to remedy delay in the delivery of Indian housing or provide that IHAs can do anything about it. The best remedy, in the opinion of many specialists, that funds be transmitted among the agencies involved to the one in the best position at the moment to complete the particular job delaying the project, is not provided for in the regulations.

The new Interdepartmental Agreement on Indian Housing was officially entered into between the secretaries of the Interior, HEW and HUD on Februay 7, 1976.[6] It is the second such agreement concluded. The first tri-agency Memoranda of Understanding of 1968 was actually composed of two documents. The earlier of these two documents attempted to establish a level of effort in terms of unit construction for the years 1970–1974. HUD promised 6,000 units a year; BIA committed itself to providing 1,000 of new or improved units; and tribal groups were supposed to sponsor another 1,000 units for these years. IHS contributions to service these units were mentioned in terms of dollars to be asked for in its 1970 budget request. The second document composing the Memoranda of Understanding was designed to spell out the specific responsibilities of BIA, HUD and IHS in providing the housing promised in the earlier document.[7]

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[4] Federal Register, March 9, 1976, p. 10164.
[5] Federal Register, *ibid.*, p. 10165.
[6] A complete copy of the agreement is set forth in the Federal Register, March 9, 1976, at p. 10165.
[7] Complete reproductions of these documents are reprinted in the Committee Print, at pp. 285–297.

The 1976 agreement, based on experiences over the past six years, spells out the respective functions of each agency in greater detail. The responsibilities of each agency remain basically unchanged. BIA handles the preliminary work on site selection such as working out the necessary leases, and providing the road work up to the project site. IHS is in charge of providing all the sanitary requirements up to the project site. HUD provides the building, and is responsible for the site work, including whatever intra-project roads and service lines will be needed to connect the homes with the roads and sanitary lines delivered to the project by BIA and IHS. It should be mentioned that the negotiations involved in arriving at satisfactory language for the new Agreement took over two years to formulate.

In addition to the problem of no one agency being accountable for the coordination of the entire operation, a second major issue involved in the tri-agency operation providing Indian housing is budgets. IHS attempts to budget its funds as far ahead as possible. This means that projects to be developed are sometimes decided upon for three year cycles. HUD and BIA, on the other hand, are subject to the annual Congressional allocation process. The new agreement attempts to smooth out the wrinkles in this procedure by stating that "if" and "when" the funds are made available by Congress, what projects shall be given priority. In the past, IHS, in particular, has been disadvantaged by not knowing until very late in the operation where HUD and the IHAs intended to place units—not only the exact site on a reservation where they would be, but also which reservation they would be on—so that funds for the necessary sanitary facilities could be made available in the needed amount to the appropriate IHS director. IHS has been unpleasantly surprised too many times, as has BIA, about where and in what quantities particular IHAs were to receive HUD units. Hopefully Sec. 3 of the new Interdepartment Agreement coordination will alleviate some of the guess work in this respect.

It is evident, as shown, that one of the major reasons for a lengthy development period, and a consequent delay in meeting the Indian housing need, is this multi-agency approach.

C. *Need of Committement.*—It is historical fact that commitments made in the first tri-agency Memoranda of Understanding have not been carried out. The present Inter-Departmental Agreement will require continuing attention to see that its commitments are in fact put into action.

Although public housing was first provided for needy Americans in 1937, none was constructed for tribes. It was, an administrative breakthrough for HUD to decide in 1962 that it was legally possible for it to provide housing directly to tribal government. Congress played only a small role in the process. In fact, only after HUD forged ahead, at the urging of BIA, did Congress subsequently amend the 1937 Housing Act to statutorily recognize tribal government as eligible applicants for public housing.[8] The first mention of a set-aside for Indian housing did not occur until passage of the 1974 Housing and Development Act. The act provided for contracts for annual contributions "on or after July 1, 1974, aggregating at least $15,000,000 per annum, which amount shall be increased by not less than $15,000,000 per annum, on July 1, 1975 . . . " for Indian housing. These annual contributions were to assist in the financing of housing for members of "any Indian tribe, band, pueblo, group, or community of Indians or Alaskan Native which is recognized by the Federal Government (or any State Government)." [9] The figure, $15,000,000, is now viewed by at least some officials at HUD as its maximum goal over the last two years. The Department has not attempted to go over this goal; Congress however, established this figure as a minimum goal.[10] It should be mentioned, however, that in FY 1977, the figure of seventeen million may have been agreed upon by the time this report is printed.

In analyzing HUD's historical role in the Indian Housing effort, it is apparent that the commitment to move ahead in the area, with or without Congressional approval, was assumed in a pioneering spirit of adventure. The special needs of Indian people were at first totally alien to HUD. There are still only a handful of officials in HUD who can be considered experts in Indian housing. In the field there are two HUD Regional Offices of Indian Programs (San Francisco and Denver), and several other regional administrators have special assistants who deal with these matters.

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[8] Complete reproductions of these documents are reprinted in the Committee Print, at pp. 213-282:
[9] 1974 Housing and Community Development Act, Public Law 93-383.
[10] Congressional Record, April 24, 1975, pp. S. 6672-S: 6775.

It is now also apparent that there is a lack of unity among HUD central office officials as to how Indian housing programs should be administered. Addressing this issue, HUD Secretary, Carla Hills, in March, 1976, announced the formation of an Office of Indian Policy and Programs, under the newly established Assistant Secretary for Consumer Affairs and Regulations. Formerly, the assigned coordinator for Indian Programs was located in the Office of Equal Opportunity. While it can be questioned how Indian Programs can be organizationally identified with programs of consumer protection, an Indian Office separate and distinct from other minority programs is a step in the right direction. Most Indian leaders view services such as housing, as a legal responsibility, provided for in the Constitution of the United States and the various Indian treaties. HUD, on the other hand, treats Indian housing as simply another responsibility to a minority group, not requiring a separate specialized organization within its Central Office, although they do exist in the Regions.

The HUD Office of Indian Policy and Programs is still too new to have significant effect on Indian Programs. Its function will be essentially one of coordination. Since Indian program funding still comes from the office of the Assistant Secretary for Housing, and not from that of the Assistant Secretary of Consumer Affairs and Regulatory Functions, the same misunderstandings and funding shortcomings can be expected to persist.

Besides the issue of how HUD should be organized to more effectively implement its Indian programs, there are two other major areas of concern for its staff. HUD Officials have on several occasions committed the agency to a housing production goal in terms of both units and dollars. The earliest such goal was set forth in the 1968 Memoranda of Understanding of 6,000 for each year of the 1970–1974 period, or 30,000 total units. This goal was not reached for a variety of reasons explained in different areas of this report.

At the November 1974 Indian Housing Conference in Scottsdale, Arizona, former HUD Secretary James T. Lynn, reaffirmed this goal. However, there is a problem now in interpreting what these goals have been translated into by the $15,000,000 set-aside in the 1974 Housing and Redevelopment Act. The legislative history of this act clearly indicates that Congress intended that this set-aside should provide for new units for FY 1975 and 1976,[11] and was not intended to complete units already in the pipeline. In December of 1974, a letter containing the signatures of 10 prominent Senators—including Mansfield, Abourezk, Metcalf, Haskell, Montoya, Moss, Jackson, Stevens, Hathaway and Domenici—confirmed this intent.[12] In response, former HUD Secretary, James T. Lynn, said HUD was complying with the statutory intent of the 1974 Act by using the set-side, in effect, to complete units already in the pipeline previously committed by the Tri-Agency Agreement. Many followers of this dialogue were dismayed by his response. Simultaneously with the announcement of the organization of the new Office of Indian Programs and Policy in her March 10, 1976 meeting with several prominent tribal leaders, Secretary Hills also restated HUD's commitment to a level of housing production that will provide 9,723 units for FY 1976.

Thus far, evidence indicates this commitment has been elevated to a priority status within the Department and issuances by the Secretary have stated that this production goal will be taken seriously by all members of the staff. Since all other housing efforts are directed toward making the Sec. 8 leasing program work, leaving Indian housing as the only direct-funded construction program currently in operation, there is no reason why this production goal should not be realized.

To supplement housing production, HUD's Housing Management Division is making available an amount nationally of over two and one-half million dollars on a one-shot basis to train IHA staff to better cope with their Housing management problems. The program has been called "Management Initiatives for Indian Housing." The amount is substantial and if properly administered, may make a difference in assisting IHAs to meet their responsibilities.

A possible use of these funds is to train IHA personnel, to confer on them certifications of competence for those qualified, to elevate their responsibility to a higher level of professionalism and perhaps even to minimize the political aspects of their positions by requiring that only certified managers can be engaged as executive directors by IHA commissioners or the tribal government. Coupled with this might be the development of some form of performance incentives (i.e., priorities for future housing funds, long term commitments for planning

[11] Congressional Record, *Ibid.*, p. S. 6673.

[12] This correspondence is reprinted in its entirety in the Committee Print, pp. 643–646; and in the Congressional Record, *Ibid.*, pps. S. 6674–S. 6676.

funds, and more local control) to reward those tribes who process housing efficiently. The problem to be worked out is that the inefficient operation often needs the most help and a penalty in the form of reduced funds is counter-productive. There should be some merging of these interests, however, to achieve the desired results.

As was previously mentioned, Sec. 701 of the 1937 Housing Act, as amended, once provided planning grants to all local governments, including most tribal governments. However, HUD has been gradually phasing out its planning programs. In the spring of 1976 HUD went to the Senate with a proposed planning budget of $25 million nationally. The Senate subcommittee on housing, however, replied by including in HUD's planning budget the amount of $125 million, representing a $100 million increase over what HUD had asked for. As of the writing of this report, the final amount agreed to by the Senate and the House had not yet been settled.

The only other significant Indian housing program, the BIA Housing Improvement Program (HIP), is considered a truly successful program. While the administration of the program has been well received, its relatively low budget, $11,000,000 currently, does not permit it to make a very large impact nationally. When queried about this low housing budget, BIA Commissioner, Morris Thompson, in a Hearing on Indian Housing before the Senate Subcommittee on Indian Affairs in May of 1975, replied that housing was not a priority item with the BIA. Commissioner Thompson estimated that it would require $392 million minimally in the HIP program to even begin to address the Indian housing need. Overall, Commissioner Thompson estimated that a figure of $1.2 billion would be needed as of FY 1975 by all agencies involved in order to satisfy the tremendous housing need. Further, if the BIA, according to Commissioner Thompson, were to address totally this one segment of the overall Indian Need, it would represent well over half of the BIA's total budget.[13] Consequently, the inference was left that it was not desirable for the BIA to increase the HIP budget at the expense of other programs administered by the BIA, unless the Administration and Congress were willing to increase the BIA's overall budget—something they have been reluctant to do. Some housing has been provided under the Indian Financing Act (P.L. 93–262) but not to any significant extent.

D. *Legal Problems.*—The slow progress in meeting the Indian housing need is also related to unique legal problems arising from the special status of trust land, and the often ill-defined Federal/State/Tribal relationship. Some of the more prominent impediments in obtaining housing from both the public and private sectors, will be summarized here. Most are the subjects of major reviews by a task force of the Commission. They are included in the report because they impact housing in the manner described in each section.

1. *Trust Land.*—Simply stated, private investors have shown no willingness to loan money for housing development on trust land, where a mortgage is of no collateral value because the property cannot be foreclosed upon in the event of a default. The method of providing interest to private investors is through the Federal Government fully guaranteeing the mortgage or notes to finance such construction. Public housing notes issued by IHAs to finance their projects are marketable because of this guarantee contained in Sec. 22(c) of the 1937 Housing Act, as amended.

These notes not only are fully guaranteed, but they are also exempt from Federal taxation by virtue of the language contained in Sec. 5(d) of the 1937 Housing Act, as amended. In some states, such as California, notes issued by IHAs are "double tax exempt"—that is, not only are they free from Federal taxes but state taxes, as well. To an investor in a high tax bracket, IHA notes issued even at 3% to 4%, the current market rate, are quite attractive and easily marketed because of these features.

However, for an individual attempting to arrange a house purchase loan through a private lending company, this guarantee is not available and there usually is no recourse. Testimony of Mr. Paul Reilly on behalf of the National Savings and Loan League before the May 1975 Hearing on Indian Housing conducted by Senator Abourezk fully developed this area; his testimony can be found beginning on page 128 of the Hearing Report. It is not likely that there will occur any significant change in this respect, unless Administration and/or Congress takes action.

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[13] Hearing Report, pp. 3-12.

Of considerable interest to many persons involved in Indian housing on trust land is the impact, if any, the relatively recent establishment of the American Indian National Bank will have on Indian housing. Headquartered in Washington, D.C., the bank is owned and operated, for the most part, by officers familiar with tribal needs. As with most new, minority-owned banks, its funds are limited. Consequently, it may be some time before the bank's resources are sufficient to permit it to participate in some of the housing programs.

Another very recent development has been the organization of a private lending institution on the Navajo Reservation, called the Navajo Saving and Loan Association. The operation is being run under the watchful eye of the First Federal Saving and Loan Association of Phoenix. The Navajo operation will make loans on trust land without any Federal or State guarantees. The establishment of the Navajo operation involved much time and energy on the part of the BIA. It is much too early yet to have any reports as to its success or its problems.

The only other mortgage guarantees or insurance are provided by the Veteran's Administration, FmHA, or Farmer's Home Administration, and have been of negligible value to the American Indian particularly where trust land is involved. Some activity is identifiable, nonetheless, and is fully set forth on pages 637 and 589 of the Committee Print.

2. *Tribal Sovereignty, State Jurisdiction, Public Law 280 and A–95 Clearance.*—These four issues can be discussed together for purposes of this report. Each is a current issue of immense importance to tribal governments, and will be addressed more fully in separate task force reports. They are inextricably bound together with the subject of Indian housing, and a serious omission would result by not at least referencing them in this context.

Tribal sovereignty, of course, forms the very legal foundation for an Indian housing program. The historical basis for developing a separate Federal Indian housing program was the evident need that could not otherwise be provided for except in those jurisdictions where IHAs are organized under State law. In a judicial context, however, there has occurred in several jurisdictions some concession of authority to State courts. This entire question is currently in a state of flux. The complexities of this issue nearly rival those of housing.

Even in states where there is a close political relationship between the State and a tribe, a strong aggressive tribal government is still very much a legitimate goal, especially in the area of housing. Only a tribal government can establish an IHA to develop tribal housing. Without a IHA, a tribe must depend on a nearby municipal or county authority which may or may not be concerned with Indian housing needs. Other benefits to tribes with IHAs include eligibility for allocations out of the Indian set-asides, as well as participation in various other housing subsidy and planning programs.

There should be no question that the Office of Management and Budget (OMB) was quite correct in clarifying its A–95 circular to exclude tribes, in most circumstances, from its coverage, thereby exempting tribal application from being subject to State review, except on a voluntary basis.

3. *Tribal Court Systems.*—There is an increasingly stronger role for the tribal courts to play in Indian housing that neither it nor the tribal governments can ignore. This is not always an easy task, economic and political realities on the reservation being what they are. Without a competent, supportive tribal court system, IHAs are handicapped, perhaps fatally, in coping with their responsibilities.

Tribal courts could aid IHAs in the enforcement or interpretation of construction contracts as well as tenant agreements. Tribal courts could also assume the burden and responsibility of assisting the Indian Housing Authority to become financially stable, while simultaneously protecting the rights of the IHA tenants.

E. *Lack of Direction on National Level.*—One of the major reasons for the sad state of affairs in Indian housing is the lack of clear direction existing at the national level as to how various crucial matters should be handled.

1. *Housing vs. Economic Development.*—Not only within the various agencies involved, but among tribal organizations as well, there is a definite lack of agreement as to whether or not tribal housing construction should be viewed in the broader picture of economic development or seen merely as providing shelter. The economic consequences of such construction in terms of employment, business for contractors and material suppliers, and other related activities cannot be overlooked. There are precious few job opportunities existing on most reservations and it is not uncommon for unemployment to run over 50%, particularly over the winter months.

Realizing the potential of housing construction in alleviating this problem by providing employment and skill development, tribal governments are increasingly involving themselves in housing construction decisions, until now left to the discretion of the IHA for resolution. Several alternatives have been taken: at the Blackfeet and Navajo reservations and others, tribal enterprises were formed to do the construction. On other reservations such as Cheyenne River, Rosebud and Pine Ridge, local contractors with some affiliation with the tribe were given portions of the construction contract, depending on their capabilities and previous experience.

In order to assure that these contractors shared in the construction contract, they were permitted to negotiate directly with the IHA for the job. This negotiation usually took place at the request of the tribal government, HUD concurring when appropriate. HUD permitted a waiver of its usual advertising for bid requirements in order to obtain certain conditions or benefits, as set forth in its circular HPMC–FHA 7580.1, dated November 2, 1970.[14] The waiver approval was permissible where (1) no higher development cost would ensue; (2) local contractors on or near the reservation would share in the economic benefits of the construction contract; (3) there was potential to train residents of the reservation in various construction skills; (4) the project was to be located on a reservation or where trust land was to be used; (5) the contractor selected was to negotiate the construction contract, and was, in fact, Indian; and (6) the IHA, tribal government and HUD all concurred in the arrangement.

Additionally, HEW has organized an Office of Native American Programs (ONAP) to assist tribal construction enterprises in their efforts. HUD housing provided the bulk of the business for most of these companies. ONAP has established an office in the Southwest in order to be geographically located near most tribal construction activity.

The preliminary Indian Housing Regulations published for comment by HUD on September 19, 1975,[15] contained provisions for negotiated contracts, with some minor modifications. However, the final regulations published on March 9, 1976 completely deleted any mention of negotiated contracts. Instead, the regulations contain a reference to Sec. 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 e(b)). The HUD Section restating the 7(b) clause is titled "Indian Preference in Contracting" (Sec. 805.204).[16] In fact, however, there is no such effective preference yet provided for. Since the provisions require advertising for prospective construction bids, and the low responsive bidder must be awarded the contract, where is the Indian preference?

Spurred by large numbers of letters of protest, HUD considered several alternatives to implementing some form of preference, short of re-inserting a provision again endorsing negotiated contract. The most seriously discussed was the permitting of a qualified bidding arrangement—qualified to the extent that only Indian-owned contractors would be eligible to bid on an IHA project, if so desired by the IHA. By the time this report is in final form, this issue should be resolved.

The point to be made here is that those IHAs and tribal governments who believe it in their best interest to do so, requested the authority to negotiate these contracts. HUD was flexible enough in its policies to permit negotiations, based on the facts of the situation. However, without discussing any of the possibilities with the contractors, IHAs, or tribal government involved, the pre-existing preference was deleted. This action clearly showed interest more in housing alone than in economic development.

2. *Need of Coordination.*—Little or no interchange among the major tribal organization and Congressional and other governmental officials has hampered Indian housing efforts. One problem is that when various Tribal representatives give conflicting testimony, or advise individual members of Congress or agencies in contradictory terms, it becomes easy to beg off acting on matters of Indian interest under the guise that it cannot be determined what the Indian really wants. It is essential that there be a frank exchange among all officials involved in Indian housing and a consensus reached on how to meet housing needs.

3. *Federal-Tribal Relationships.*—Still another difficulty is lack of recognition of tribal sovereignty on the part of government officials. Often officials insist on dealing with tribal governments differently than they do other local governments.

[14] A reprint of this circular is contained in the Committee Print, pp. 330–335.
[15] Federal Register, volume 40, No. 183—September 19, 1975.
[16] Federal Register, March 9, 1976, p. 10161.

Well meaning or not, too many agency officials refuse to let decisions be made by the tribal government, or where delegated, to the IHA.

The result from such action is to further confuse the true legal relationship of these tribal governments to States and the Federal government. Such lack of sensitivity to local government has been officially commented on by the Secretary of Housing and Urban Development. All agencies should recognize that the supreme body on the reservation is the tribal government, and should take pains to preserve the relationship of the IHA to this government, rather than create a gulf between them, that in the end leads to more, rather than fewer problems.

At variance with this attitude are occasional Congressional inquiries and hearings which insist on placing the fault for some tribal misadventure on the lack of intervention or proper guidance by a federal agency. While the agency is responsible for informing tribal officials of all of the consequences involved in some course of conduct, absent a patently illegal act, the decision must be the tribe's, in the final analysis. The concomitant circumstance is, of course, that the decision's success or failure must be likewise fully borne by the tribal government.

4. *Indian Set-Asides.*—Indian set-asides, particularly in HUD, remain a controversial issue. There are presently set-asides for both housing and planning funds. There is no set-aisde in the Community Planning Development Discretionary Block Grant Program. One was considered, but expressly rejected by Secretary Hills in the fall of 1975.

The question is whether Indian set-asides are advantageous to the tribes. Officials should not permit themselves to be beguiled with the notion that set-asides are always their best bet. The lawyer-like reply to whether they should be encouraged or discouraged is: sometimes yes and sometimes no!

One should look behind the program to determine on what basis or criteria the specific set-asides are computed or allocated. Where the criteria involves unemployment, incidence of poverty, prevalence of substandard housing, or a percentage of the total appropriation the tribe are normally better off competing with their non-Indian government counterparts. Such a situation exists with HUD's CDDBG Program. It can be demonstrated that a set-aside here would probably result in reduced funds going to the tribes, unless an agreeable formula, such as a percentage of the total appropriation, is used. It is interesting to note that the pressure to create a set-aside in this program often arises from the non-Indian governments and local political officials.

When the set-aside is based on population percentage tribes will again be disadvantaged, but no more so than any other rurally located community. Most tribal communities, located as they are in the less populated regions of the nation, must constantly demonstrate that their need is as great or greater than urban areas. This is primarily true because there are fewer revenue alternatives in terms of taxes and bond sales which are available to rural areas. Again, which formula used to determine the set-aside is all important.

F. *Problems at the Local Level.*—The slow pace in meeting the need of Indian housing is not entirely attributable to forces on the national level . . . the local scene contributes to the delays as well. At the center of these troubles is the relationship between the tribal council and the IHA.

1. *Tribal Politics.*—It has been said that of all the evils afflicted on the Indian by the white man, the two worst have been small pox and politics. Tribal politics has inexorably "thrust itself" into tribal housing programs, which theoretically should have been immunized from this encroachment by establishment of the IHA, separate and nominally autonomous from the tribal council.

Reversals in elections has witnessed wholesale purges of IHA commissioners and staff. The losers in these situations are the tenants, both actual and prospective. Because knowledgeable, trained IHA commissioners and staff cannot easily be replaced, public housing programs have often been brought to a standstill when these wholesale removals have taken place.

In a tribal context, more so than with a town or city, elections seem to have a much more disruptive effect on delivery of on-going services to the people. This is true because of the uniqueness of the tribal government—it is so much more involved with the daily lives of its people than is a non-Indian government. Almost all patronage flows from the faction in power and reaches even into the selection of tenants for new homes being built, as well as who will be employed to do the building. This is not to say these things do not also exist in non-Indian communities; they do, of course! However, such nepotism should not be condoned on that account and measures should be taken to discourage this practice. With this view in mind, new language has been inserted in sub-part 1(d) of Article IV

of the Model Tribal Ordinance, (Sec. 805.110) Appendix I,[17] which should provide some protection against this arbitrary removal of commissioners.

Originally, IHAs were recommended as a way of providing some insulation from politics, not only in terms of protecting the commissioners and staff from dismissal for frivilous cause, but also to insure that selection of tenants and personnel for IHA jobs, among other items, would follow impartial guidelines. Non-Indian housing authorities were organized for similar reasons. Although this was the theory, in fact, such insulation has not always occurred.

There is also a valid legal basis for the IHA as a separate entity. It does tend to protect the tribal government from financial risks which may arise out of the construction of the project, and also serves to insulate the tribe from liability for any claims made by persons injured on the project site, both of which are of some significance.

The tribal council has wide latitude in how it may organize its IHA, as described in footnote 2 to Article IV of the Model Ordinance creating the IHA, published in the new Indian Housing Regulations (Sec. 805.110, Appendix I).[18] For example, at Ute Mountain five members of its tribal council also serve as the five IHA commissioners, with the tribal chairman acting *ex officio* as IHA chairman. This is not always an advisable practice, but indicates how close the relationship can be if desired by the tribal council.

Several ways exist to close the gulf between the two bodies. Assuming that a separate IHA is desired, one effective way is to commit the construction funds directly to the tribal council rather than to the IHA, and have the council outline for the IHA what policies it wants followed in terms of type of program, how the construction contracts should be administered, among other items. The IHA, then, would be responsible for getting the project underway and making the day to day decisions on housing matters. Rent collections might become a matter of tribal council concern under this procedure.

Another alternative would be to require tribal council concurrence on all major agreements such as the ACC, and to leave the day to day business to the IHA to administer. In this manner there might occur a closer communicating relationship between the two bodies than there has previously been. Frivolous removal of an executive director might be inhibited by following the suggestion made earlier in this report, requiring that only certified managers be employed.

Still another alternative is to make the IHA a department of the local government with the executive director an agent of the tribe. The government then, would handle all housing directly.

2. *Rent Delinquencies.*—There is an ominous cloud forming on the horizon of Indian housing in the form of spiraling rental delinquencies. HUD-administered housing is basically not a grant program and the legislation creating this housing program has always required that some rents be paid by the tenants. A rental program in a tribal context poses several problems. One of these problems is that the payment of rent, however small, requires some income. It is believed that the bulk of tenants delinquent to any significant extent are comprised of the very low income people, those that are most in need of housing and with the least ability to obtain it elsewhere. IHAs in undertaking the housing of very low income persons in rental units, run the real risk of imperiling the operation of its entire housing program.

However, an equally serious problem is the number of tribal officials, including councilmen and judges, who are seriously in arrears in their rents. These are the persons expected to be supportive of the IHA, rather than contribute to the problem. Also, some councilmen have campaigned on the platform that there would be free rent if elected, which is completely irresponsible.

Because of delinquent rent payments and particularly because of inadequate subsidies from HUD, to meet their management and maintenance obligations,[19] IHAs, to make ends meet, will sometimes borrow unlawfully from a development account in an emergency such as paying for utilities (which can be extremely expensive over the winter months). This, of course, gets them into trouble with HUD.

A new feature of HUD's Indian Housing Regulations is expected to play a prominent role in future housing allocations. Included in Sec. 805.207(a) the of

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[17] Federal Register, *Ibid.*, p. 10158.

[18] Federal Register, *Ibid.*, p. 10160.

[19] The new Indian Housing Regulations (Federal Register, March 9, 1967, Sec. 805.302(b)(2)(iv), p. 10167) require that at least 20 percent of the dwelling units in a Mutual-Help project placed under ACC after September 26, 1975, be occupied by very low income families.

new regulations is the provision entitled "Determination of Administrative Capability." It states "an application shall not be approved unless HUD determines that the IHA has, or will achieve within a reasonable time prescribed by HUD, the capability to provide adequate administration in compliance with all applicable HUD requirements of the proposed project and other IHA projects without an unreasonable need for continuing HUD assistance.[20] There is no need of a prophet to interpret this handwriting on the wall—it means collect rents, or the IHA may not be eligible for more units.

Contemporaneously with the implementation of the new regulations, HUD also is revising its approach as to how management subsidies will be distributed to all housing authorities, including IHAs. The basis for computing these subsidies in the future will be the use of a complicated formula, involving the establishment of a base year. All future subsidy entitlements will flow from this base year. Because of insufficient subsidies available in the past, many IHAs are going into the new program with severely depressed base years, which will never permit them to become solvent. While the new program is a laudable attempt at systemizing subsidy entitlements, implementation of it concurrently with enforcement of the "administrative capability" requirements portends some difficult times ahead for many IHAs.

The reason for establishment of these new requirements is HUD's general dissatisfaction with IHA efforts to reduce rent delinquencies to a tolerable level. Frustrated at getting the IHAs and tribal governments to recognize and deal with the problem, these were two avenues chosen to deal with the issue. It is too early to determine how narrowly the administrative capacity requirement will be construed, but there is no question that if literally taken, a great many IHAs will receive no more homes until their rental delinquencies are reduced.

3. *Technical Assistance.*—Tribal housing programs suffer severely because of lack of technical assistance in the community. Tribal authorities, faced with major decisions on various aspects of complicated programs have need of trained, knowledgeable, construction specialists, economists, attorneys, accountants, and program technicians to render advice so that these decisions can be made on a sound basis. There have been too many self-styled "consultants" who in the past have offered these services for extravagant fees, but more often than not have created greater problems than they helped resolve.

Tribal authorities, more than any other form of local government, depend on Federal programs for assistance in achieving tribal goals. Well qualified grantsmen could be of inestimable value in assisting these authorities in locating and obtaining needed Federal funds. While there are fewer State programs available to tribes, possibilities do occur and should be used to advantage.

The problems in attracting these talents to the reservation are not dissimilar from those of any other rural community: inability to pay what these persons could command in an urban environment; lack of opportunity to earn sustained income because of the heavy dependence in short-term Federally-funded programs; and the general unavailability of social and cultural inducements.

The Intergovernment Personnel Act (IPA) was amended in 1974 to permit tribes to participate in the program, but to date there has not been any significant number of arrangements made. The program permits a Federal agency to loan one of its officials for up to a year to assist a local government in developing a particular program. Payment of the person's salary is shared with the Federal agency, making if financially possible for a local government to hire a person it might otherwise have been unable to hire because of lack of necessary funds.

More programs similar to the IPA are needed and there should be greater emphasis placed on these programs by the Administration so that Federal agencies would be less reluctant to participate in them.

III. HOW THE NEED CAN BE MET

Any possible recommendation to solving the problems of Indian housing must be politically realistic. It is well-known that the attainable in practical terms may vary somewhat from the most desirable. One reality which should not be forgotten is that a considerable amount of money will be involved—$1.2 billion according to one estimate.[1] Consideration of such a large amount of money will not be an easy pill for Congress to swallow. Further essential characteristics of any successful housing program are discussed below.

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[20] Federal Register, *ibid.*
[1] *Hearing Report*, p. 10.

A. Essential Characteristic of an Indian Housing Program

At least six objectives should be incorporated into any housing program. They are not necessarily exclusively identifiable with Indian housing alone, but should be present in all housing programs.

1. *Simplicity of Implementation and Operation.*—Building housing is by its very nature a complicated process. When further governmental constraints and hurdles are imposed on the process, it becomes a more burdensome program to implement and operate. HUD's Mutual-Help program compared with the BIA's HIP Program offers a significant contrast.

The HIP Program is a grant program, needing minimal administration in implementing it. However, if funded at the level deemed adequate to meet the need, requiring at least a twenty-fold increase on an annual basis, it could be expected that a somewhat escalated administrative burden would result.

Basically, the program combines the elements of individual choice, simplicity, and self-help. There is minimal interference from BIA officials and maximum stress on avoiding unduly incumbering the funding and construction process. However, with so little funds available, it is of necessity used primarily as a housing rehabilitation program rather than a new construction program.

HUD's Mutual-Help program, involving hundreds of millions of dollars on an annual basis, is correspondingly more complicated. Whether such complication is necessary remains a question. Involved are lengthy development periods, complicated financing arrangements, the incorporation of mass production techniques with the usual scheduling problems inherent in these techniques, and ample opportunities for disagreements to occur between the tribal government, the IHA, and HUD.

In the past there has been no way of stating with any certainty what the total cost of the house would be to the purchaser after it had been finished, something mystifying to any Mutual-Help home buyer.[2] The program afforded only marginal input from the individual who would ultimately be paying for homes constructed. Many questions could not be answered such as: when a dry well is sunk, who pays for it—everyone in the project, or only the person who wanted his or her house located on site where water was not easily located?

A HUD program to construct 100 homes, for instance, with a development budget of several million dollars, cannot be precisely comparable to an essentially rehabilitation program usually involving a project of ten homes and a corresponding budget of $50,000. There are however, features in the HIP program such as emphasis on local decision-making and greater program adaptability, which might be incorporated into the Mutual-Help program.

2. *Minimal Cross-Agency Involvement.*—Various proposals have been made as to how to reduce or eliminate altogether the bureaucracy in the present multi-agency Indian housing effort involving HUD, BIA and IHS. Consolidation of all responsibilities into one agency is an obvious alternate—but where? Tribal governments are generally loath to a transfer of more functions to the BIA because that agency is considered too heavily involved already in the daily lives of the Indian. On the other hand a transfer of all components of Indian housing to HUD would meet with a great deal of skepticism on the part of many tribal leaders. In general, HUD has shown no great enthusiasm for undertaking any more responsibility for tribal housing than it now has. The IHS, on the other hand, has neither the staff nor the interest to increase its responsibilities for Indian housing. These are the three obvious candidates for the consolidation, with no clear choice readily available. This report will later discuss some changes that may aid in the goal of reducing the problems inherent in a multi-agency approach to Indian housing.

3. *Variety of Programs.*—There presently exist only three Indian housing programs of any significance: HUD's Mutual-Help and Low Rent programs and BIA's HIP program. Of the three Mutual-Help is the only one providing home ownership to Indian families to any extent. The Low Rent program is designed for low-income persons, but not those with very low-income.[3] As pointed out previously, HIP will remain essentially a rehabilitation program unless funding for it can be increased substantially. There are two major voids in new construction; the consequence is that the *very* low-income and the high or moderate-income persons

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[2] The new Indian Housing Regulations, Sec. 805.422(b)(2) states that the IHA shall furnish to the homebuyer, as promptly as possible after execution of the construction contract, a statement of the initial purchase price of the home, and a purchase price schedule. These new regulations are applicable to any project reaching ACC after March 9, 1976, the date of publication in the Federal Register.

[3] For the official definition of very low income, see FN 2, of Part I.

are not being adequately served. For residents on trust land, even those with enough income to normally qualify for a home construction loan, loans are seldom eligible, because trust land cannot be foreclosed in case of default.

4. *Flexibility for Regional Variations.*—Distinguishable from the earlier point of the need for variety of housing alternatives within each program, there must also be greater flexibility for regional variations. Patterns of tribal governmental organization and housing needs vary greatly according to the region in which Indian groups are located and community size. Climate, culture, and land use patterns also necessitate greater flexibility of design. Unfortunately, the new Indian Housing Regulations tend to sharply curtail regional flexibility.

5. *Promotion of Tribal Control.*—There is little question that the thrust of legislation passed in recent years dealing with Indian programs has been toward locating the actual decision-making in the hands of the tribal authorities.[4] One example of this is the Indian Self-Determination and Education Assistance Act.[5] It would be unwise, therefore, for any Federal agency to ignore this trend. Moreover, transferring increasingly greater decision-making power to the local level should be aided and abetted. Federal housing programs should be no exception to this.

Many tribal governments are not altogether prepared to assume this responsibility immediately, however, and will require some assistance both in terms of individual training as well as hiring other trained specialists to manage these programs. New housing legislation should provide for this.

6. *Combination Grant and Loan Approach.*—The final issue of concern involves the differences between a grant and a loan approach that new housing legislation should address. The casual observer may feel that a grant program such as HIP is preferred. However, upon analysis this may not necessarily be true.

The easiest detectible liability in a full grant program is that it raises to a high level of visibility the enormous amounts of funds being made available to a particular sector of the national community. In other words, when the entire funding is made available on the "front end," so to speak, Congress is very likely to get cold feet and cut back the amount of the allocation by a considerable amount.

One of the reasons HUD has been able to make large allocations of units available at certain periods (although not continuously) is because it has been done on an annual basis. Thus, few persons have sat down and computed out the enormous amortization costs involved. In other words, the HUD-financed programs are a combination loan and grant approach. It is not difficult to perceive that if Congress is asked to produce $1.2 billion housing grant program, there will, understandably, be some hesitation. However, it is a different story if only several hundred million are requested immediately, with a commitment to not only produce more next year, but to finance these funds over 40 years.[6] With this two hundred million in hand, HUD has gone to the private market and used it as "leverage."

Simply stated, when you leverage funds you obtain a great deal more for your money over the length of the amortization period than if you spent it all outright—however, there is an interest factor that has to be taken into account.

To illustrate leveraging in the sense used here, the following example is offered. Assume a tribe has a $500,000 grant to spend on new housing construction. Assume, also, that 3 bedroom houses which is what the tribe wants to build, can be provided for $30,000 each. This means tribal officials have basically two options: (1) They can make a grant of $30,000 outright to each of sixteen families (with a little change left over) to build only sixteen homes. The other option is that they can (2) leverage this $500,000 by using it to sell, say, $25,000,000 in bonds. They do this by pledging the $500,000 as collateral and as a reserve to pay off the early maturing coupons on the bonds (similar to a down payment). The purchaser could be a large bank who regularly deals in municipal bonds, which these are (assuming again, that the bonds are marketable).

Now tribal officials have $25,000,000 which translates into the construction of a little over 833 homes. The difference between 16 voters and 833 voters, especially during an election year, is significant. The problem, however, is that now they

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[4] The possibility was first advanced in 1969 when regionalization in conformance with Executive directive was executed. Subsequently, a paper titled: Justification of a HUD Nationwide Indian Delivery System was developed by members of the Denver HUD Region VIII staff (William Hallett, John Hempel, Robert Leatherman, Arnold Nelson, Dwight Moore, Joseph Weyer, and Martin Seneca, then a White House Fellow and Special Assistant to the Secretary of HUD), dated September 9, 1972.

[5] Public Law 93–262 (1974).

[6] By the terms of the ACC, HUD guarantees annual contributions for 40 years for a rental project, and either 25 or 30 years for a home-ownership project. See "Annual Contributions Contract" in the glossary for further details.

have a rather sizable debt to pay off. If the bonds were sold for 20 years at 5%, this would amount to an additional cost of $500,000, or a total amount of one million dollars in both principal and interest which would have to be repaid.[7]

Except that it is a direct loan and not a bond sale, any home purchaser with only a downpayment available goes through a similar arrangement. He or she may pay back well over double the amount of his original loan, depending on the interest rate and length of time of the loan.

Returning to the example, the only practical way the tribe could repay this debt is to charge the individuals receiving a home some payment. The risks to the tribe include the possibility that someone may miss a payment. If this happens, the tribe must make up this payment out of its own funds and give it to the bond holders.

There is, of course, the possibility of mixing the two options, and perhaps selling only enough bonds to build 300 or 400 homes—the tribe would satisfy fewer tribal members, but would also reduce the risk, accordingly.

This example rather closely parallels the arrangement HUD uses to finance public housing projects, in contrast to BIA which uses a grant approach resembling the first option.

Whether to use the grant or loan method of financing Indian housing is clearly a choice that someone has to make. If funds are limited, as they usually are, which option should be used . . . building only a very few homes at no risk, or building a significantly greater number of homes at considerable financial liability?

These two options clearly contrast the BIA's HIP program and HUD's public housing program. It is unlikely that Congress will make the funds available to build the greater number of homes on a grant basis. Accordingly, some compromise financing arrangement or greater flexibility in financial arrangements, seems to hold the best promise for new Indian housing legislation. The danger of relying on a grant-only, approach, however desirable, is that construction funds may be cut back to a level even below that currently being provided.

Current HUD home-purchase programs combine the two approaches. By law, the IHA must collect a rental payment from each home-purchaser that corresponds to a percentage of the purchaser's income. However, HUD has set up the financing of the dwelling, through the ACC, so that the dwelling will be completely paid for over the life of the ACC, usually in twenty-five years. The effect of the purchaser's payment, therefore, is to accelerate the payoff schedule, and the dwelling is acquired sooner, thus avoiding further rent payment. The question to be answered is: should the purchaser be required to make any contributions at all?

B. Practical Considerations for New Indian Housing Legislation

Most experts in the area of Indian housing programs agree that a major overhaul of Indian housing legislation is long overdue. Beyond this consensus, there is no further agreement possible at the moment on specific aspects of the legislation.

Some want to get HUD out of the picture altogether, others want to get BIA out of the picture altogether. Most are willing to compromise, on the premise that Congress will be reluctant to (1) create an entirely new bureaucracy over and above that already in existence, and (2) to go on the line for a grant program of the magnitude needed. Consequently, these are the two major issues to be thrashed out by the major national tribal organizations.

Whatever the result in terms of the best legislation desired, the following four points must be kept in mind:

(a) National tribal organizations must ultimately come to a consensus on one piece of legislation, and press for its passage in order to realize any success.

(b) Knowing that large amounts of money are involved, strategies should be carefully planned and coordinated. Housing must be elevated to a number one priority before Congress will take notice.

(c) With the departure from Congress of a great many influential Congressmen who, in the past, have helped in tribal legislation, new sponsors will have to be enlisted to help in getting housing legislation passed.

(d) Tribal governments must be willing and able to assume any additional responsibility that new legislation is likely to impose.

Any legislation proposals will have to address that basic political question of whether the Indian housing need is essentially a trust responsibility, or a housing

[7] Interest computations provided by Mary Gaston, Private Market Financing Assistant, Office of the Regional Counsel, Denver HUD Regional Office (Region VIII).

responsibility. The ultimate decision to this question has wide ramifications. If the belief is that it is basically a housing matter, it ordains that HUD is to be the lead agency in the Indian housing effort. Moreover, any major legislation, then would be referred to the Banking, Housing and Urban Affairs Committees in either the Senate or the House. If it is basically a trust responsibility, BIA would be the lead agency and legislation would be referred to the Indian Affairs Subcommittee of the Interior Committee of both bodies. Avoiding a jurisdictional dispute between these two committees could be crucial to the success of any new legislation in this area.

Before detailing the recommendation of Task Force No. 6 and No. 7, one important item should be mentioned. Outstanding project notes and bonds issued by HUD to finance Indian Housing construction since 1962 now total over hundreds of millions of dollars, turned over or refinanced on an annual basis. If these securities were unequivocally "double tax exempt," i.e., free from both Federal and State income taxation, their marketability would be enhanced, according to several estimates, so that the interest rate would drop between one-tenth to one-quarter of a percent. As previously pointed out, Sec. 22 (c) of the 1937 Housing Act, as amended, renders them now Federal tax exempt securities. Legislative changes could clarify their exemption from State taxes, as well. Presently, some States tax them and some do not, so that they cannot be listed everywhere as "double tax exempt," thereby confusing the market.

One other issue should be addressed. What should be the coverage of new legislation in terms of providing some form of housing assistance to Indians living off the reservation, possibly even in urban areas? It is the belief of a great many persons that enrolled Indians enjoy, in effect, a form of "dual citizenship," so that not only are they eligible for any Federal program available generally to any other taxpayer—but they do not lose their eligibility, as well, for any specific program developed through their tribe, irrespective of their residence. One possibility is that a tribe might develop a housing program that could aid a tribal member living hundreds of miles away, through a guaranteed or insured construction loan.

Chapter IV—Task Force Recommended Solution to Indian Housing Dilemma

During the course of their work, Task Forces No. 6, Indian Health, and Task Force No. 7, Reservation and Resource Development and Protection, conferred with the author on a number of possible solutions to the problem of fulfilling Indian housing needs more effectively. The Task Forces also consulted with other officials involved in the area of Indian housing and discussed other possible solutions. Consequently the Task Forces have decided to offer the following recommendation. Part of this recommendation can be implemented immediately, part will require special legislation.

It is apparent that HUD will likely continue to be the Federal agency primarily responsible for providing new home construction for some time to come. With this in mind, the effort most likely to produce immediate, significant results in terms of achievement of housing production goals as well as improved housing is a reorganization with HUD. This reorganization should:

(1) Establish an Indian Housing Office within the Office of the Secretary, headed by a director appointed by the Secretary.

(2) Delegate to the director responsibility for administering all HUD programs effecting all Indians, and the responsibility for coordinating HUD's programs with other involved agencies.

(3) Prohibit the Secretary from making any further delegation to any HUD official anywhere who is not directly responsible to the director.

(4) Require the Secretary to appoint a 15 member National Indian Housing Council, which is to meet at least twice per year, and which has the responsibility of advising the director on matters of policy and planning and conducting an annual Indian Housing Conference.

It can be demonstrated that such a reorganization will undoubtedly address many of the factors mentioned in Part II that have resulted in slow progress in meeting the Indian housing need:

(1) By consolidating all responsibilities for Indian programs in one office, program policy and construction decision-making would be expedited, cutting down on the development time of a project.

(2) The one office within HUD would deal with the IHS and BIA, thereby streamlining to a considerable extent the multiple agency delivery system.

Mutual agreements could be worked out much more quickly. Again, decision-making would be greatly assisted by only one office dealing with the other Federal agencies involved.

(3) An Office of Indian Programs within HUD would be held accountable for Indian services. Consequently, a more coherent philosophy towards funding levels and program content should evolve. There should be less confusion all the way around.

Creation of a HUD Office of Indian Programs seems like a natural choice. It would combine all responsibilities, whether policy or funding, under one division, which should be at the Assistant Secretary level. This office would not only be responsible for spending the funds appropriated by Congress in the various programs, but would also be involved in a needs assessment based on a continuing research and development program. Also, combined within this office would be not only the development responsibility, but operating and maintenance responsibility as well, whether for housing, roads or a water-sewer system.

This office should administer programs providing HUD services for all Indian people, and not merely to persons enrolled in Federally or State recognized tribes. Other agencies would be involved in the development phase, but at some point HUD would become the agency chiefly responsible for the maintenance and operation of all service-provided facilities connected with the provision of housing to Indian people.

To assist HUD in this mission, and to insure adequate Indian control of the programs, some form of joint council or commission should be created. Such a council could be composed of individuals selected by formula from various IHA's and tribes from around the nation.

Lastly, HUD will have to decide how to provide housing both on the reservation and off the reservation, wherever Indian people are organized in distinct groups, whether they are federally recognized or not.

Also, the creation of an Assistant Secretary for the Office of Indian Programs within HUD would be more effective if done legislatively. This would firmly institutionalize an Indian program which would not be reorganized out of existence with changing political tides.

Once an Indian program is set up within HUD which can effectively meet the housing need, this does not mean that the program has to reside there permanently. If and when a new Department of Indian Affairs is created, the HUD Office of Indian Programs could be converted into a national Indian Housing Authority and placed within the new Department. The essential features that should be maintained are control by Indian people and a consolidation of all housing efforts.

We have recommended reorganization of HUD because we feel that it is the most practical and expedient way to solve the Indian housing dilemma in the short run. Lastly we feel that it can best fulfill the six essential characteristics of any successful housing program:

What power they would exercise over the office of Indian Programs must be specifically delineated in the future, further legislation being unnecessary. Much of this consolidation can be done administratively. However, there are some issues, such as flexibility in dealing with minimum property standards, prototype costs, income levels, non-federally recognized tribes and collection of rent, that can only be finally resolved by new legislation.

It is obvious that the new HUD Office of Indian Programs will have to modify the minimum property standards, presently geared toward needs of middle-class, suburban non-Indians, so that they meet Indian needs. These Indian needs are shaped by geographic location, occupation and cultural preferences. Likewise, if the minimum property standards and designs are changed, the prototype costs must be modified in keeping with them and with the real costs of construction in the local area. HUD will have to offer not only a greater variety of designs but a greater variety of financial arrangements to suit the various income levels of Indian people. For the very poor, housing will have to be free except for cooperative maintenance agreements through which the occupant could donate his labor. This means that grant funds will have to be provided. For the poor, the present low-income housing rental arrangement is satisfactory. For middle income persons, HUD will have to design a variety of home buyer programs.

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1. Simplicity of Implementation and Operation
2. Minimal Cross-Agency Involvement
3. Variety of Programs with Various Financial Arrangements Geared to Meeting the Needs of Different Income Groups
4. Flexibility of Design for Regional Variation in Climate, Culture, and Land-Use Patterns
5. Tribal Control
6. Combination Grant and Loan Approach

APPENDIX IV

A Case Study of Project Evaluation for an Indian Reservation

(By James B. Fitch & Ronald L. Trosper)

The material for this case is an excerpt from a larger study of possible projects on a large western reservation. To conceal the identity of the reservation, it was necessary to leave out some references and exact descriptions. This document includes some of the projects under study. In the conclusion, it contains a table showing comparisons of all the projects, including those not described. The purpose of that table is to show how different criteria for choosing projects give different results.

This case concerns use of cost-benefit analysis. Rather than making a cost-benefit study, students are asked to evaluate the results of such a study. What policies does the author recommend? Do you wish to modify his results? Did he make the right assumptions? Does he leave out some important considerations? There are probably other important questions you may wish to ask and answer, both in your proposals for action and during class discussion. We are concerned with understanding *both* cost-benefit analysis and the ways in which it can or cannot be useful for decisionmaking in Indian reservations.

Because we are not concerned with some of the technical issues, the appendix with supporting data has been omitted. In an actual decisionmaking situation, such an appendix would have to be read carefully as well.

LIVESTOCK AND FORAGE PRODUCTION ON IDLE IRRIGATED LANDS

Most of the Indian lands which tend to lie idle are those which require some kind of improvement—leveling, drainage, etc.—in order to bring them up to current standard and raise their productivity. The Tribe appears to have become reluctant in recent years to undertake such investments on its own, particularly when the result has been to make more land available to lease to non-Indian farm operators. As was also indicated earlier, however, the tribal range has little remaining capacity, as it stands, for expanding Indian cattle herds. The Indian Agency personnel state that irrigated lands could be profitably used to produce pasture and hay for herd expansion without such extensive reliance on the range. If so, tribal members themselves would appear to have a sufficient knowledge and ability to apply the farming technology involved, and many lands which now lie idle could be improved to be used by Indian cattlemen. To date, no thorough economic analysis of this type of land use has been made by the Tribe or the Agency. Here we examine a number of possible ways to use idle (and/or low rental value) lands for forage and livestock production by individual tribesmen.

The alternatives to be considered are described in Figure 1. They vary according to a number of assumptions about the type of cattle production, crop yields, the amount of range available for summer grazing, and the extent to which range is supplemented by irrigated pasture grazing. The basic technical assumptions which underlie these configurations are given in the appendix. In each case, it is assumed that the farm size will be 160 acres, with 150 acres cultivated. As shown in the figure, there are five basic alternatives, the first four of which involve cattle production, with the fifth entailing only the production of alfalfa.

FIGURE 1—ALTERNATIVES FOR INCREASING LIVESTOCK AND FODDER CROP PRODUCTION WITH USE OF IRRIGATED LAND

	Basic production scheme	Crop mixture: Acres of— Alfalfa	Crop mixture: Acres of— Irrigation pasture	Crop productivity level	Type of range permit	Total number of brood cows (AU equivalent)	Average tons hay sold annually	Comments
Alternative 1:								
Subalternative (a)	Cow-calf herd on range with 160-acre irrigated farm.	150	0	Average with ditch irrigation.	250-head, full summer.	200(276)	195	Herd limited to range permit size.
Subalternative (b)		110	40			226(312)	0	Increase herd by use of irrigation pasture.
Subalternative (c)		150	0		225-head, full summer.	180(248)	238	Reduced range permit and herd size.
Alternative 2:								
Subalternative (a)	Same as alternative 1.	150	0	High, with sprinkler irrigation.	250-head, full summer.	200(276)	600	Herd limited to range permit size.
Subalternative (b)		80	70			297(410)	0	Increase herd by use of irrigation pasture.
Subalternative (c)		150	0		225-head, full summer.	180(248)	643	Reduced range permit and herd size.
Subalternative (d)		45	105		285-head, 3 months only.	228(315)	0	Time length of range permit reduced. Replace with irrigation pasture.
Alternative 3:								
Subalternative (a)	Cow-yearling herd on range with 160-acre irrigated farm.	150	0	Average, with ditch irrigation.	250-head, full summer.	162(276)	195	Herd limited to range permit size.
Subalternative (b)		60	90			200(340)	−177	Cow-calf on range, yearlings on irrigation pasture.
Subalternative (c)		150	0		225-head, full summer.	146(248)	238	Reduced range permit and herd size.
Alternative 4:								
Subalternative (a)	Same as alternative 3.	150	0	High, with sprinkler irrigation.	250-head, full summer.	162(276)	600	Herd limited to range permit size.
Subalternative (b)		80	70			241(410)	0	Both range and irrigation pasture used to max. herd size.
Subalternative (c)		150	0		225-head, full summer.	146(248)	643	Reduced range permit and herd size.
Subalternative (d)		45	105		285-head, 3 months only.	185(315)	0	Time length of range permit reduced, replaced with irrigation pasture.
Alternative 5:								
Subalternative (a)	Alfalfa produced on 160-acre farm.	150	0	Average, with ditch.	NA	NA	645	Individually owned alfalfa farm, no cattle.
Subalternative (b)		150	0	High, with sprinkler.	NA	NA	1,050	Do.

[1] Negative figure indicates that at the assumed productivity level, a 160-acre farm will not entirely support the feed requirements of a 200-cow (340 AU) herd, given a 250-head (276 AU equivalent) range permit.

Two types of cattle production are considered, the traditional cow-calf operation (alternatives 1 and 2), and cow-yearling production (3 and 4). Changes in crop technology are simulated by allowing yields to vary. Alternatives 1 and 3 assume "average" crop yields, based on moderate fertilizer applications and standard ditch irrigation technology. Alternatives 2 and 4 assume that considerably higher yield levels can be obtained through a combination of improved management practices, increased fertilizer applications, and additional investment in a rectilinear wheel-moved sprinkler system. By ascertaining the additional benefits to be derived from the more productive alternatives, we can exact information about the value of increased extension services and other tribal efforts designed to increase productivity.

Under the cattle production alternatives described above, various sub-alternatives are set up to simulate changes in herd size, depending upon the extent to which irrigated pasture is used to provide supplemental summer grazing capacity. Each of the "a" sub-alternatives assumes that the operator has a 250-head grazing permit which lasts for the entire 7-month summer grazing season; in this case, he does not increase his herd size through the use of irrigated pasture. The "b" sub-alternatives assume that the operator uses irrigated pasture in order to provide grazing for a herd which he has increased to maximum size for his 160-acre unit; he still uses the 250-head range permit. Under the "c" sub-alternatives the herd size and range permit are reduced to 225 head. The "d" sub-alternatives (under alternatives 2 and 4 only) assume that only a 3-month grazing permit is available, but that the number of head is not limited; thus, operators again use maximum herd sizes, obtained through extensive use of irrigated pasture.

The two-sub-options under alternative 5 (alfalfa production) apply to the average and high crop yield levels.

THE INDIVIDUAL OPERATOR'S PROFITABILITY ANALYSIS

As a first step toward calculating tribal benefits and costs, a profitability analysis was made, taking the individual operator's point of view. Initially, a number of basic assumptions about the prices received, taxes and rental paid, and the type of credit available are made. These are described below. Then, in a subsequent section, we change certain of these key assumptions in order to see how operators would fare under varied conditions. In calculating the present values (PV's) derived in the analysis, an eight percent rate of discount was used. This rate may be low by one or two points if current interest levels prevail, and if the operator must resort to commercial banks for credit. On the other hand, the figure may be high by a similar amount if tribal or certain government financing programs are used.

Basic Assumptions

The analysis resulting from the basic assumptions is given in Table 1. Essentially, these assumptions are as follows. In each case, the operator leases land which the Tribe has brought up to adequate standards of levelness and drainage for good ditch irrigation, and for which he pays $15 per acre annual rent. He pays no property or income taxes. It is considered that only tribesmen with some experience in ranching and with generally higher than average employment potential would be able to successfully organize a new cattle enterprise, and thus that the opportunity cost of the operator's labor (i.e., the wage which he must pay himself) is $7,200 per year. In view of recent U.S. cattle prices, the price levels assumed here may seem somewhat conservative—the November feeder calf price (steers) used in the basic calculations is $32.00 per cwt., for example.

The relatively low performance of alternatives 1 and 3, both in terms of PV and IRR, indicates that supporting a range cattle operation with a farm achieving only average crop (alfalfa and pasture) yields is not highly profitable, at least from the point of view of the new investor. The fact that alternatives 2 and 4 are relatively more attractive, even though additional investments of more than $150 per acre in sprinkler systems are assumed to be necessary, is indicative of the rewards to be earned by farmers who learn to achieve the higher yields—and who can, of course, invest when that is called for. This is seen even more clearly in alternative 5, which involves alfalfa production alone. Under average yields (5a), investment in alfalfa production is not profitable at any positive rate of discount, whereas the IRR is almost 10 percent under 5b, the high yield assumption.

A second point to be drawn from the analysis is that, as was suggested earlier, yearling production appears to be considerably more attractive than range calf production. However, two notes of caution should be sounded here. First of all, yearling production is somewhat different than calf production from a management point of view. Marketing can be expected to occur at a different time of year, for example, and this and other factors may make it necessary to keep yearlings separated from the rest of the herd.

A university study on range cattle operations indicates that ranchers will probably find it most profitable to market yearlings in late August or early September, whereas calves are usually marketed when the herd is taken off the range, typically in November.

TABLE 1.—PROFITABILITY ANALYSIS OF INDIVIDUAL INVESTMENTS IN LIVESTOCK AND FORAGE CROP INVESTMENTS UTILIZING IDLE IRRIGATED LAND

[Dollars in thousands]

Alternatives	Farmer's initial investment [1]	Basic assumptions	
		PV [2]	IRR (percent)
Cow-calf production with average crop yields:			
1a	$106.6	−$48.5	4.0
1b	116.1	−70.9	2.5
1c	102.1	−51.1	3.4
2a	131.8	+1.2	8.1
2b	162.8	−50.7	5.4
2c	127.3	−2.1	7.8
2d	140.0	−95.9	1.7
3a	97.1	−22.3	6.4
3b	108.6	−59.2	4.0
3c	90.6	−30.5	5.6
4a	122.3	+27.9	9.7
4b	146.8	−16.5	7.2
4c	117.6	+18.5	9.2
4d	128.0	−69.9	3.6
Alfalfa production with average yields: 5a	34.2	−39.4	(3)
Alfalfa production with high yields: 5b	59.4	+10.6	9.8

[1] Figures in thousands of 1972 dollars. Investment based on the assumption that the operator must buy new equipment, buildings, and fences. In practice, some used equipment would probably be purchased, and serviceable buildings and fences may be available on the properties involved. These factors would serve to reduce initial investment costs. The figure given also includes operating capital, which is estimated to be 50 percent of average annual cash expenditure.

[2] PV given in thousands of 1972 dollars. 8 percent discount rate assumed.

[3] Rate of return is not positive.

Source: Basic data in the appendix. Also see text and figure 1 for a more detailed description of alternatives.

A separate yearling herd may be necessary from the point of view of marketing alone, but, if available, summer range does not allow yearlings to attain the assumed weight gain by the end of August (700 pounds for heifers and 750 for steers) then the Tribe would either have to organize a separate set of better quality yearling ranges, which would also facilitate marketing, or individual operators would find it necessary to keep their yearlings on permanent lowland pastures for adequate weight gain. If permanent irrigated pastures are used for yearlings, this would lower the profitability indicated for yearlings under options 3a and 4a. The amount of pasture envisioned in alternative 3b would be adequate for these purposes, for example, and this option entails a drop in PV of some $37,000 vis-a-vis 3a. Similar calculations under alternative 4 (not shown in Table 2) indicate that converting to an adequate amount of irrigated pasture to carry the yearling herd there would involve a drop of some $22,000 in PV from the level indicated for 4a.

Since most tribal members have not run predominantly yearling operations in the past, doing so would undoubtedly necessitate the generation of some new managerial knowhow within the Tribe. Secondly,the higher rates of profitability attributed to yearlings by our analysis depend ultimately upon the prices of yearlings being favorable relative to those of calves. Should the relative price structure assumed in the analysis (see the Appendix) change, the favored position determined here for yearlings may cease to exist.

The main purpose of including the "c" sub-alternatives in the analysis was to permit the derivation of the implicit value of the range use privilege to Indian cattlemen. As is indicated in Figure 1, the "c" option assumes that the range use permit has been reduced from the "a" level of 250 head to 225 head (i.e., from

275 AU equivalent to 248 AU.) [1] In order to determine the value of the permit, we then ask the question: How much can the value of the range permit be increased before the operator would be indifferent as to whether or not he is granted the larger range privilege? The answer to this question varies from alternative to alternative, depending upon whether it entails calf or yearling production and upon the alfalfa yields assumed. Assuming that the predominant type of operation on the Reservation today resembles sub-alternative 1a (a 250-head range herd supported by alfalfa production which attains "average yields"), then the implicit value (shadow price) of the range permit to the Indian operator is $16.26 per head, or more than double the seven dollar fee which the Tribe now charges on the average. From the point of view of his own evaluation, then, this means that the Indian cattleman receives a subsidy of $9.26 from the tribal government for each head which he is allowed to keep on the range for a full seven month summer grazing period.[2] Similar calculations for all four alternatives are given in Table 2, which also lists the shadow value per animal use month (AUM) equivalent of grazing.

The higher shadow values of the range permit derived for the other production alternatives, as shown in Table 2, are illustrative of an important point; by obtaining a more profitable animal product and/or a higher crop yield, the marginal product of the range permit is raised in the process. This much is to be expected. However, the magnitude of the differences in the shadow prices shown below means that a much greater payoff for obtaining increased summer range—or for finding an acceptable substitute for increased range—is to be had by increasing crop and livestock productivity at the same time.

TABLE 2.—IMPLICIT VALUE OF THE TRIBAL RANGE PERMIT

Calculation based on alternative	Total shadow value per head range permit [1]	Effective subsidy per head range permit [1]	Shadow value per AUM equivalent of range [2]
1	$16.26	$9.26	$2.10
2	18.91	11.91	2.45
3	36.28	29.28	4.69
4	41.08	34.08	4.32

[1] Col. (2) equals col. (1) less the approximately $7 per head which the Tribe charges its members for a full summer's (7 mo) grazing.

[2] Col. (3) equals col. (1) divided by 7.73. This conversion factor derives from the fact that what the Tribe considers to be a 250-head herd for range use charges actually is a 276 animal unit (AU) equivalent herd (see the appendix); i.e., 1 head equals 1.104 AU equivalent. 7 mo multiplied by 1.104 AU equals 7.73 AUM.

Source: Based on figures given in table 1. See footnote 2 for the method of calculation.

What about the possibility of substituting irrigated pasture for summer range, as is being suggested by personnel at the Indian Agency? Each of the "b" sub-alternatives is representative of this type of strategy; land which is devoted to producing alfalfa for sale under "a" is converted to irrigated pasture under "b." The results are uniformly adverse, however, as is shown in Table 2. Both the present values and the internal rates of returns drop significantly. In making these calculations, we have been somewhat pessimistic, perhaps, in estimating the carrying capacities to be attained on irrigated pastures.[3] Even if the capacities

[1] Since a simple linear substitution of activities is involved in this range, this is considered to be a marginal change in the economist's sense. Sub-alternatives "c" devote the extra capacity introduced by having the range permit reduced to the production of additional alfalfa hay for sale. Table 2 indicates that this is the next most profitable alternative.

[2] These figures are derived as follows: the exact difference in the PV's of 1a and 1c is $2,567; this is divided by 25, the number of heads decrease in the range permit; the resultant present value figure is converted to an annual value (allowing for some slight additional finance and administrative costs to the operator which would result from being charged a higher price for range use). The annual value computed in this manner, $9.26, is thus the maximum amount which the Tribe could increase the price of a range permit for one head on a seven-month basis before the cattleman would no longer prefer to purchase more permits. This is considered to be the value of the subsidy, and this amount plus the seven dollars actually paid ($16.26) is thus calculated to be the true value (shadow price) to the cattleman. This amount corresponds roughly to the reports of Range Management personnel at the Indian Agency who claim that the true market value of the range permit would be roughly double what the Tribe currently charges its members.

[3] As shown in the Appendix, lands obtaining "average" alfalfa yields of 4.3 tons per acre are assumed to produce only 9 AUM's of grazing when converted to irrigated pasture, while lands obtaining "high" yields of 7 tons per acre of alfalfa are assumed to produce 18 AUM's under pasture. (Under management capable of producing higher alfalfa yields, it is assumed that a somewhat more efficient pasture conversion would be obtained.) Both pasture conversions are admittedly conservative, but this is considered justified in light of Indian cattlemen's general lack of experience with intensive irrigated pasture operations.

we have assumed are increased by 50 percent, however, using land to produce alfalfa hay for sale is still calculated to be more profitable than using it to produce irrigated pastures for carrying additional cattle.[4]

Would partial (3 month) range permits be of much value to prospective new Indian cattlemen if full (7 month) range permits cannot be provided due to the limited tribal range? Under sub-alternatives 2d and 4d, we have assumed a three-month range permit, without limitation on the individual herd size. A comparison to 5b indicates that operators would, nevertheless, be far better off to just produce alfalfa hay for sale. Given sufficient changes in cattle prices relative to the price of alfalfa, however, this relationship might be expected to change. This possibility will be investigated below.

One final question seems worth taking up at this point. If returns to what might be called the standard type of Indian cattle operation (alternative 1) are as low as we have indicated, what keeps people in this business? This is a perplexing question which does not apply to Indian cattlemen alone. A recent study indicated that many (non-Indian) cow-calf ranchers were experiencing negative returns to their investment when a 6 percent rate of interest was used for discounting. Cattle ranching appears to be a preferred way of life for which many people are willing to settle for lower returns. Furthermore, it seems likely that many cattle ranchers who have long been established in the business and who lack both education and experience which would qualify them to perform other types of work may well have little choice but to continue in ranching, even though the returns are low. Another way of stating this is to say that the opportunity cost of their labor is lower than what we have envisioned for the analysis presented in Table 2. If, for example, we assume that the opportunity cost of the operator's labor is $3,600 per year, rather than the $7,200 assumed previously, the IRR of the investment shown for sub-alternative 1a increases to 7.4 percent from the 4.0 percent shown in the table. This may help to explain what keeps older, less mobile cattlemen in business.

As for new cattlemen, the figures shown under sub-alternative 5b indicate that alfalfa hay production alone may be as attractive as operations which involve cattle production, even when range permits for as much as 250 head of cattle are available on a full seven month basis. Given a scarcity of investment capital on the part of Indians wishing to enter into farming, alfalfa production would seem to be all the more attractive in view of the high additional investment required for cattle. However, it cannot be overemphasized that this finding is contingent on the assumption that new Indian farmers attain higher than average alfalfa yields. Investment in modern sprinkler irrigation systems alone would not guarantee the higher yields; improvement in crop management practices would also be required.

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[4] If we assume that the number of cattle which can be added to herds by converting some alfalfa land to irrigated pasture is increased by 50 percent, the PV's for the "b" options under alternatives 1 through 4 are still well under the PV's for the "a" options. (See Table 2.)

TABLE 3.—PROFITABILITY ANALYSIS OF INDIVIDUAL INVESTMENTS—ASSUMPTIONS VARIED

Alternative	Assumptions											
	Increased cattle prices			Reduced rent			Property taxes paid			Higher grazing fee		
	ΔPV [1]	PV	IRR	ΔPV	PV	IRR	Δ	PV	IRR	ΔPV	PV	IRR
1a	+15.8	−33.1	5.3	+17.7	−31.2	5.4	−5.9	−54.8	3.7	−44.9	−93.8	0
2a	+15.8	+17.0	9.2	+17.7	+18.9	9.4	−9.8	−8.6	7.5	−44.9	−43.7	4.9
3a	−16.4	−5.9	7.6	+17.7	−4.6	7.7	−5.9	−28.2	5.9	−44.9	−67.2	3.0
4a	+16.4	44.3	10.8	+17.7	+45.6	11.1	−9.8	+18.1	9.2	−44.9	−17.0	6.9
5a	0	−39.4	([2])	+17.7	[2] −21.7	([2])	−4.3	−43.7	([2])	0	−39.4	([2])
5b	0	+10.6	9.8	+17.7	+28.3	14.0	−8.1	+2.5	8.7	0	+10.6	9.8

[1] ΔPV represents the change in PV (present value) from that derived for the basic note [1] assumptions (table 1). PV figures are in thousands of 1972 dollars.
[2] Rate of return is not positive.

Source: See the appendix. See figure 1 for a description of the alternatives. See test for explanation of changed assumptions.

Variations in Key Assumptions

Certain information of interest may be gained by varying some of the key assumptions which underlie the analysis presented above. We have chosen to vary prices, rent, the payment of taxes, and the tribal grazing fee. Results are shown in Table 3.

As noted earlier, the prices assumed in the basic analysis may seem overly pessimistic in light of recent feeder cattle sales performance. The prices used were averages of those received during the past five years in the reservation area, with some slight modifications, and since cattle prices have risen primarily during the past year, this is not reflected a great deal in the averages. To check the sensitivity of the price assumption, a second set of calculations was made using $34.00 per cwt. for November steer calves and signifying an overall 5.75 percent increase in the assumed cattle price level.[5] The results are shown under "increased cattle prices" in Table 3.

The results of the price change indicate that the IRR's of the investments which include cattle production increase by 1.0 to 1.5 percent as a result of the price change. In making the calculations, the price of alfalfa was not changed;[6] thus, we would expect the various cattle production activities to become more attractive relative to the production of alfalfa for market. While this does occur, the relative gain in advantage for cattle production is not sufficient to make the use of irrigated pasture for summer grazing more attractive than using the same land to produce hay for sale. That is, the "a" options under alternatives 1 through 4 are still clearly superior to either the "c" or "d" options.[7] And, even with the relative increase in cattle prices, alfalfa production alone still looks attractive compared to most cattle options, if the high yield levels can be obtained (see 5b).

In a later section we will assume that the Tribe must incur an average cost of $50 per acre in improvements such as leveling and drainage, if it is to facilitate the use of idle irrigated lands by new Indian farmers and ranchers. In view of the fact that the Tribe must now make $10 per acre per year in water payments for most of these lands, as long as they lie idle, it may well feel justified in charging new Indian land users less than $15 per acre rent that we have assumed in the basic analysis. Table 3 presents an analysis which assumed $5 per acre rents. For the alternatives which include cattle production, this reduction is roughly equivalent to the 5.75 percent increase in cattle prices in its effect on returns: the IRR's are increased by one to one-and-one-half percent. Its effect on alfalfa production is much more significant, however. It causes a four percent increase in the IRR of alternative 5b, which is alfalfa production attaining 7 tons per acre (high) yields. Thus, rent reduction is one tool which the Tribe has at its disposal for increasing the profitability of individual Indian farming operations, and its effect on straight alfalfa production is especially significant.

One incentive which Indians have in operating their own businesses derives from the fact that they are exempt from paying most taxes. In particular, they are not required to pay property or income taxes. But how much of an incentive do such tax exemptions usually provide for would-be Indian farmers relative to non-Indians who do have to pay such taxes? In the case of property taxes, at least, the answer to this question is relatively simple to derive. Table 3 shows what would happen to the individual Indian's profitability picture if he were to have to pay property taxes. The calculations do not include taxes on the value of the land, since the operator is assumed to rent from the Tribe. By comparison to the "basic assumptions" analysis, it is seen that the tax exemption yields an increase in IRR of from about 0.2 to slightly more than one percent, depending upon the alternative in question. In terms of annual payments, the property tax exemption means an advantage of between $300 and $900 per year for Indian operators in the alternatives under consideration. If the Indian operator owns the land which he is working, there would be an estimated additional saving of some $600 per year, or more, in land tax. Thus, in dollar terms, the tax advantage can be quite significant.

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[5] See the Appendix for a complete list of the higher pricer. Heifer calf and cull cow prices are assured to rise less than steer calf prices, but the overall weighted average price rise is as indicated in the text for both the cow-calf and the cow-yearling operations.

[6] A change of $1 per ton (3.77 percent) in alfalfa prices, for example, would change IRR's by two to two-and-one-half percent in alternative 5.

[7] For the sake of brevity, separate results for the evaluations of sub-alternatives "b" through "d" were not listed in Table 3. In no case, however, did the relative attractiveness of any of these sub-alternatives with respect to "a" option change from that shown in Table 2.

Can the individual operator bear the burden of higher range fees if the Tribe finds it necessary to raise its fees in the process of seeking to make more range grazing available? Under the heading "higher grazing fee" in Table 3, we have assumed that a charge of three dollars per animal use month (AUM) of grazing is levied.[8] (This corresponds roughly with minimum costs of establishing additional grazing, as will be described in the following section.) At this rate, the results presented in Table 3 indicate that only those operators who are able to achieve higher than average crop yields (alternatives 2 and 4) would seem to be capable of conducting viable operations.

None of the variations considered here would materially change the conclusions derived from the basic analysis. They have not altered the conclusion that irrigated pasture is not an acceptable substitute to the individual operator for range grazing; if tribal grazing continues to be in short supply, then the Tribe may do well to encourage new farmers to undertake the production of alfalfa or a comparable crop for sale rather than attempting to use irrigated lands more intensively in cattle production. Forthermore, the importance of achieving higher crop yields has once again been underscored.

The Effects of a Tribal Credit Program

Given the size of investment required per individual farm operator shown in Table 1—especially for those options which include cattle production—it is not likely that many individual tribal members would be able to obtain sufficient funds to start new operations such as the ones envisioned here. Personnel at the Indian Agency frequently talk of the necessity for having what might best be termed a "soft loan program" in order to induce significant numbers of tribesmen to take up farming and ranching. As a means of investigating the implications of soft credit, we have analyzed the effects of such a program on the individual operator, much in the same manner as variations in basic assumptions were analyzed above. The results are shown in Table 4.

The soft credit program proposed here would result in loaning new operators up to 90 percent of the purchase price of cattle, 80 percent of the cost of fixed installations and sprinkler irrigation facilities, and 40 percent of the new cost of required farming and cattle handling equipment—the latter figure is lower because it is considered that used equipment worth some 40 to 50 percent of the value of new equipment would usually suffice for initial purchases. Interest (at a rate of 6 percent) would be charged. beginning only after the third year of operations, and payments would be made in fifteen equal installments in the fourth through eighteenth years.

As Table 4 indicates, such a program would constitute a considerable incentive to the new operator. As was the case previously, however, those operators able to achieve higher than average yields would stand to benefit most, judging by the internal rates of return estimated in the analysis. Even with the additional advantage of the soft loans, the present value of investment would still be negative in all of the cases involving average yields (alternatives 1a, 3a, 5a).

TABLE 4.—PROFITABILITY ANALYSIS OF INDIVIDUAL INVESTMENTS—ASSUMING SOFT LOAN AVAILABLE

[Dollars in thousands of 1972 dollars]

Alternative	Amount of loan	ΔPV[1]	PV	IRR (percent)
1a	$78.7	+$18.8	−$30.1	3.6
2a	99.1	+23.6	+24.8	12.3
3a	68.2	+16.3	−6.0	7.5
4a	88.5	+21.1	+49.0	15.5
5a	17.2	+4.1	−35.3	(2)
5b	37.6	+9.0	+19.6	16.0

[1] ΔPV represents the change in PV from that shown for the basic assumptions in table 1.
[2] Rate of return is not positive.

Source: Appendix. See figure 1 for the alternatives. Soft credit forms are explained in the text.

It may well be argued that the program described above is too lenient. The terms are certainly more favorable than those now available under the Tribal Credit Program. The current program would charge an interest rate of at least seven

[8] Under the basic analysis, a charge of $7 per "head" was assumed for the 7 month summer grazing period. In tribal usage, a herd of 200 *cows* (with calves and bulls) is counted as roughly 250 head for grazing purposes. Under the system used in the Appendix, a 200-cow herd contains 276 animal units. Thus, a grazing fee of $3 per AUM would correspond to $23.10 for the full summer period.

percent, would offer no initial moratorium on interest charges, and would require a shorter repayment period. However, while the program now in force has apparently been instrumental in supporting many existing farmers and ranchers, it has not resulted in getting any significant number of new operators started, as would be required in the future if Indians themselves are to use an appreciable amount of the lands now idle or returning very low rents. Nevertheless, the final advisability of such a program should rest on two factors: (1) an overall anzlysis of net tribal benefit, which will be investigated below, and (2) the judgment of tribal leaders as to whether a soft credit program would actually constitute a suitable incentive to get new operators started.

Alternatives for Further Consideration

Based on the information generated in the preceding analysis, we can, at this point, eliminate a number of alternatives from further consideration because they simply do not appear to offer sufficient incentive to induce new operators to enter farming or ranching. It does not seem realistic to expect appreciable numbers of new starts if returns are no higher than those which we have calculated for the options which assume only average crop yields. Even when we have postulated especially advantageous conditions, such as increased cattle prices, more favorable rents, or the availability of soft credit, the returns produced under average crop yields are just not high enough from the point of view of the private operator. Hereafter, then, we shall consider only those alternatives which assume higher than average yields—specifically, 2a, 4a, and 5b.

Of course, higher than average yields will not be attained automatically. Rather, it will be necessary for the tribe and the operators involved to take special steps to achieve them. Such provisions will be made in the sections which discuss the tribe's appraisal of the project.

If the tribe is to plan on inducing significant numbers of its members to take up this type of production, then it cannot count on being able to supply summer range at the lower rates which were assumed in the basic analysis. We have also suggested that the provision of soft loans will be required to insure broad participation. Thus, as a final appraisal of the three alternatives we have selected, we assume that the tribe offers the private operator soft credit arrangements while charging a higher grazing fee. This analysis is presented in Table 5. Soft credit has the effect of enhancing all three alternatives, whereas the higher grazing fee affects negatively only the two alternatives which involve cattle production (2a and 4a). Thus, given the assumptions we have made here, alfalfa production appears to be far more attractive than either of the two cattle production alternatives. Even with the higher cattle prices discussed earlier (see Table 3), the IRR's of the two cattle production alternatives would be at least five percent less than that shown in Table 5 for straight alfalfa production. In the following sections, we shall analyze these same three alternatives from the point of view of the Tribe.

TABLE 5.—PROFITABILITY ANALYSIS OF SELECTED INDIVIDUAL FARMING INVESTMENTS: A FINAL APPRAISAL

Alternative	NPV (thousands)	IRR (percent)
2a	−$20.1	4.9
4a	+4.1	8.3
5b	+19.6	16.0

N.B. Analysis departs from the basic assumptions of table 1 in that both (a) soft credit is assumed to be available (see description in text), and (b) the range use fee is assumed to be $3 per AUM. See also tables 3 and 4.

THE TRIBE'S CASH FLOW ANALYSIS

In the foregoing analysis, we viewed various alternatives for the use of idle lands from the point of view of the individual tribal businessman. The next step is to determine the attractiveness of this type of land use from the point of view of the Tribe (or the individual Indian landowner), but still considered as a regular business venture. Assuming that all lands to be used for the types of production we are considering would be administered by the Tribal Enterprise, then we are, in effect, interested in the Enterprise's cash flow analysis. For the most part, this is quite straightforward.

First, take the case of the investment in land alone. Essentially the Tribe has two classes of low return, or problem lands. On the one hand, there are those plots which are lying idle and for which it must even pay an annual charge of about

$10 per acre in order to maintain water rights; in effect, these lands have a negative opportunity cost of $10. On the other hand, there are lands which are either idle, or are returning negligible rent, but which do not require the payment of the water charge; these are lands of approximately zero opportunity cost. Hereafter, we refer to the zero cost lands as "Type A" and the negative cost lands as "Type B".

The investment required to bring these lands up to adequate standard of workability would undoubtedly vary from plot to plot. Since all have been farmed previously the investment required to put them back into use would be considerably less than the $150 to $200 per acre typically required to prepare new lands for irrigation. We initially assume a figure of $50 per acre to be the average requirement. If these initial land improvement investments are the only tribal expenditures needed to return problem lands to production, then the cash flow analysis is as shown under the lines marked "LI" in Table 6. (The figures are the same, in this case, for each of the three alternatives.) The table shows present values and internal rates of return for the $50 per acre investment for two rent levels ($5 and $15 per acre) on each of the two types of problem lands described above. These constitute three separate cases corresponding to three distinct increased cash flows, as is explained in the table. The investment in land improvement is assumed to be 50 percent recoverable at the end of the 25-year project life; a tribal discount rate of six percent is used in calculating the present values. The table shows that even a $5 per acre increase in cash flow (Case I) is sufficient to generate ample returns for the Tribe's investment in this instance, whereas a $15 increase constitutes an IRR of more than 50 percent.

Perhaps the $50 per acre we have assumed to be required for land improvement is too optimistic. Breakeven investments have also been listed in Table 5. Depending upon the case involved, these show that the Tribal Enterprise could invest from $36 to $72 per acre on land improvements, provided that these were the only costs incurred, and still earn a six percent return.

TABLE 6.—ANALYSIS OF THE TRIBAL ENTERPRISE'S CASH FLOW ASSOCIATED WITH INDIVIDUAL FARMING UNITS

Land-use alternative [1]	Assumed tribal costs [2]	Case I: [3] $5 per acre increase in cash flow			Case II: [3] $15 per acre increase in cash flow			Case III: [3] $25 per acre increase in cash flow		
		NPV (thousands)	IRR (percent)	Break-even land improvement investments (per acre) [4]	NPV (thousands)	IRR (percent)	Break-even land improvement investments (per acre) [4]	NPV (thousands)	IRR (percent)	Break-even land improvement investments (per acre) [4]
2a	LI	$3.2	10.4	$72	$23.6	30.4	$217	$44.1	50+	$362
Cow-calf	LI + SL	−7.4	5.4	−4	13.0	7.4	141	33.5	9.4	286
Production	LI +SL+TA	−17.0	4.0	−70	3.4	6.3	74	23.9	8.3	219
4a	LI	3.2	10.4	72	23.6	30.4	217	44.1	50+	362
Yearling	LI+SL	−6.3	5.4	44	14.1	7.7	149	34.6	9.9	294
Production	LI+SL+TA	−15.8	3.9	−62	4.5	6.5	82	25.0	8.9	227
5b	LI	3.2	10.4	72	23.6	30.4	217	44.1	50+	362
Alfalfa	LI+SL	−.8	5.9	42	19.6	15.0	187	40.1	14.9	332
Production	LI+SL+TA	−10.4	2.9	−23	10.0	8.2	121	30.4	12.3	265

[1] These alternatives assume above-average crop yields. See fig. 1.

[2] LI=Land improvement investment (assumed $50 per acre); SL=Soft loan costs (see table 4 for loan amounts); TA=Technical assistance costs (assumed to be $750 per 160-acre unit per year).

[3] Case I corresponds to charging $5 per acre rent on type A lands, case II to $15 rent on type A or $5 rent on type B, and case III to $15 rent on type A lands or $25 rent on type B.

[4] Calculated to answer the question: How much could the per acre investment in improvements be and still permit the Enterprise to break even at the given rate of cash flow?

Next, we assume that it would be necessary for the Tribe to provide "soft loans" as discussed previously, in order to induce sufficient numbers of Indian farmers to use the problem acreages. Loan costs have been added to the $50 per acre cost of land improvement under the lines "LI+SL" in Table 6; now the results of the analysis vary among land use alternatives because the loan costs of each type of production are different. (The differences in loan requirements and the terms of the loans were described previously in Table 4.) The negative present values shown for Case I in Table 6 mean that the increased cash flow resulting from leasing this type of land ($5 per acre on Type A land) is not sufficient to offset both the land improvement and soft loan costs which would be incurred by the Land Enterprise. On the other hand the returns under Cases II and III are sufficient to more than offset both costs, yielding returns in the 7 to 15 percent range. The potential returns represented by alternative 5b (alfalfa production only) are now much higher than the other two (cattle production) alternatives due to the much higher loan requirements of the latter.

At the end of the section on private profitability analysis of the individual alternatives it was noted that unless higher than average yields could be attained (which is the assumption under all of the alternatives now being considered) it would be unrealistic to expect tribesmen to enter farming and ranching in sufficient numbers. One provision to help insure attaining higher yields would be for the Tribe to provide special technical assistance to new operators, over and above that which is currently provided by the Tribal Indian Agency. If we assume that the Tribal Enterprise is to underwrite the costs of such assistance, then these costs should be included in the cash flow analysis. This has been done in the lines designated "LI+SC+TA" in Table 6, where it is assumed that high quality technical assistance can be provided for a cost of $750 per year per 160 acre operating unit.[9] The analysis shows that the Enterprise can realize positive returns even when costs are increased by this rather significant amount under Cases II and III. Once again, the five dollar rent on Type A lands (Case I) is insufficient to cover costs. Breakeven calculations given in the tables indicate that the Enterprise could invest from $74 to $121 under the various alternatives which do show positive returns and still even a six percent rate of return, assuming that other costs are unchanged.

In summary, the cash flow analysis outlined in Table 6 yields two important results. First, from the point of view of the Enterprise, it is not profitable to rent zero opportunity cost land at a rate of $5 per acre unless the expenses incurred in doing so are equivalent to less than an initial investment of $72 per acre, which seems unlikely. On the other hand, those cases which would offer increases of $15 to $25 per acre in annual cash flow appear to have sufficient potential for underwriting even the highest levels of costs which were envisioned. Secondly, if it is necessary to make soft loans to operators in order to enable significant numbers to participate—and we have argued that this would seem to be the case—then alternative 5b, which is limited to alfalfa production alone, is much more attractive than the cattle production alternatives from the point of view of the Enterprise. This is a direct reflection of the fact that cattle production has much heavier loan requirements.

TWO APPROACHES TO INCREASING SUMMER GRAZING CAPACITY

Thus far our analysis has been concerned with evaluating various uses of idle lands, viewed both in terms of profitability to individual operators and to the Tribal Enterprise. The alternatives we have chosen for final consideration have been evaluated assuming that adequate summer grazing capacity would be available for 7 months of summer grazing for 250 head of cattle (276 animal units) per 160-acre operating unit. In fact, evaluations of various sub-alternatives shown in Table 1 show that it would not be profitable for individuals to produce cattle in the absence of tribally-provided summer grazing. However, the Tribe is now at the point where they use virtually all available range. Thus, in order to accommodate more than one or two new cattle production units like the ones we have considered, it would be necessary for the Tribe to take measures to increase available summer grazing capacity.

There are essentially two ways in which the Tribe might hope to increase capacity. On the one hand, it would undertake the range improvement program

[9] We have purposely choosen an apparently high figure for the cost of technical assistance. It is derived from the notion that it would cost about $30,000 per year to fund a well-trained technical advisor who would necessarily be backed up by a tribal assistant plus clerical and material support. It is conservatively estimated that such a unit could service at least forty farming units on a rather intensive basis. If less than 40 new units were in existence, the costs of such a service might be extended to existing farmers, with other tribal provisions for finance.

advocated by BIA employees who work in the Range Management Division of the Tribal Agency. On the other hand, it might undertake to provide increased grazing through the use of large irrigated pastures; there is a possibility that a larger scale tribal operation could be profitable for pasture production even though we have shown that small-scale pasture production seems to be unprofitable for individual operators.

Range Improvement

This is a program which the Indian Agency has been trying to fund for a number of years now, but without success. In the event that the government continues to fail to fund this project in the future, tribal leaders may even wish to consider it as a tribally-funded undertaking. As described by Agency range management personnel, range improvement would involve improved stock watering facilities, new fencing, brush control, and reseeding in various areas of the tribal range. This investment program, which would be spread out over a five-year period, would cost some $770,000 (present value) and at its peak, to be reached some seven or eight years after inception, it would provide additional grazing for about 5300 head of cattle. In addition to the initial investment costs, annual maintenance expenses of $20,000 for the water facilities would be incurred starting in the second year of the project and would last throughout its estimated 30 year life.

The cash flow evaluation for this project, taken from the viewpoint of profitability to the Tribal Enterprise, is given in Table 7. First, the analysis assumes that the federal government does fund the initial investments and that the enterprise incurs only the annual maintenance expenses. Then it is assumed that the Enterprise pays all of the costs of the project. In each case, three alternative grazing fees are considered. Initially, it is assumed that the Tribe continues the present grazing fee of $7 per head per summer, and finally, as an outer limit, a much higher fee of some $23 per head (corresponding to $3 per AUM) is used in order to more closely approach the shadow values for grazing which were estimated from our previous analysis (see Table 2).

As would be expected, profitability to the Enterprise is very high when non-reimbursable government funding is assumed. Even at the lowest grazing rate, returns to the Enterprise's relatively small annual maintenance expenses amount to over 50%. If the Enterprise rather than the federal government has to foot the entire initial investment in range improvement, however, the rate of return drops sharply. In fact, the Enterprise will profit only under the highest assumed grazing fee of $23 per summer. A charge of $18.62 per head ($2.41 per AUM) would be required in order to break even: this is more than two and one half times the current seven dollar fee. The final profitability analysis presented in Table 5 for individual operator alternatives did show that some new production units could be marginally profitable to their operators even with a charge of $3 per AUM of grazing—equivalent to $23 per head figure used in Table 7. Thus, perhaps it is not unreasonable to consider undertaking a range improvement program that would necessitate the higher usage fees. The overall tribal benefit-cost analysis, to be conducted in later sections, will help to shed further light on this matter.

Tribal Pasture Operations

If it is not particularly attractive for individual tribesmen to establish permanent pastures on irrigated lands, it is still possible that such an activity might prove economically attractive as a tribal enterprise. This might be expected to be the case for larger-sized tracts, especially, where the Tribe could afford to undertake larger investments and where economies of size or scale might be expected to obtain. In this context, a 640 acre block (600 acres in production) of tribal pasture would seem to achieve most of the economies of a larger-scale operation. The chief economies come from a more efficient use of farm machinery. For example, it is still possible at this size to do all of the work with a single 45 hp. tractor and one set of haying equipment (assuming that one cutting of hay will be required each spring), both of which would also be required on smaller, individually owned tracts.

TABLE 7.—ANALYSIS OF INVESTMENT, IN RANGE IMPROVEMENT—RETURNS TO TRIBAL ENTERPRISE

	Equivalent charge per AUM	Federal funding of initial investment		All funding by land enterprise	
		NPV (thousands)[1]	IRR (percent)[2]	NPV (thousands)[1]	IRR (percent)
Summer grazing fee:					
$7	$0.90	$166	55+	−$703	[3]
$15	1.94	650	65+	−219	3.6
$23	2.98	1,133	70+	264	8.9

[1] 6 percent rate of discount is assumed, 30-year investment life.
[2] IRR's shown are lower limits on true value. Graphic techniques employed did not permit more exact calculation in cases where IRR exceeded 50 percent.
[3] Rate of return is not positive.

In spite of any economic advantages over individual pasture operations, the large irrigated pasture alternatives do not appear highly profitable for the Tribe, as judged from a private business analysis presented in Table 8. The present values of investment shown are based on assuming that grazing will be sold to tribal members for $3 per animal unit month (AUM). Even at this seemingly high rate, however, the returns are insufficient to cover even the annual operating costs in each of the cases examined: under both the average and high yield assumptions the PV's are negative, as are the IRR's.

Table 8 also presents a "breakeven" analysis of the two alternatives which indicates the prices that would have to be charged per AUM on the yields that would have to be attained in order to make the pasture investments generate the minimum acceptable returns—i.e., PV=0 at the assumed 6% discount rate. If we compare the break-even charges with the shadow values per AUM of grazing shown in Table 2 we can see that only the more highly successful types of Indian cattlemen could conceivably afford to pay the prices for pasture which the Tribe would have to collect. And at these rates the subsidy which tribal cattlemen now, in effect, receive for range grazing would disappear entirely. In fact, the prices necessary to make the average yield alternative viable would almost certainly eliminate this alternative from serious consideration by the Tribe.

On the other hand, the pasture yields which we have assumed may be somewhat pessimistic. Table 8 also indicates the number of AUM's of grazing which must be attained in order to break even at the price of $3 per AUM. While these rates may not be technically impossible, it would require extremely skillful pasture management to attain them, however, and Tribal leaders should be hesitant to assume that they could be attained without applying the most skillful management of which they are capable.

TABLE 8.—ANALYSIS OF LARGE-SCALE PASTURE PRODUCTION—RETURNS TO TRIBAL ENTERPRISE

Production assumptions	Initial investment per 640-acre unit (thousands)	Land type used[1]	NPV (thousands)[2]	IRR (percent)	Break-even rates[3]	
					Charge per AUM	AUM's per acre
Average yields with ditch irrigation[4]	$89.6	A	−$168	[5]	$6.65	13.3
		B	−82	[5]	4.78	9.6
High yields with sprinkler irrigation[4]	186.3	A	−107	[5]	3.93	19.6
		B	−23	[5]	3.20	16.0

[1] Type A land has an annual opportunity cost of $0 per acre. Type B a cost of −$10 per acre. See text.
[2] 6 percent rate of discount is used; 1972 dollars.
[3] 2 types of break-even rates are calculated. The "charge per AUM" determines what charge would be required to break even (i.e., make PV=0), assuming yields do not change. "AUM's per acre" is a determination of the total number of AUM's grazing capacity per acre (in addition to the cutting of hay assumed) in order to break even, assuming the $3 per AUM charge is unchanged.
[4] Average yields are assumed to be 6 AUM's of grazing per acre, to a 1 ton (.9 ton alfalfa equivalent) spring cutting of hay. High yields are 15 AUM's of grazing plus the 1 ton hay cut.
[5] Rates of return are not positive.

The picture which we have painted for the pasture enterprise shows that at best it is one of only marginal profitability. Even with close attention to management, the Tribe would probably have to charge at least $3 per AUM to break even, and at this rate, as we have seen, investment in pasture improvement can realize a

modest profit. The final criterion which the Tribe should use for evaluation is the Net Tribal Benefit calculation rather than any single measure of enterprise profitability. In the following section, we shall attempt to evaluate both pasture production and range improvement from the NTB perspective.

At this point it would seem appropriate to bring up a point of contention which would probably arise within the Tribe as a result of either of the foregoing methods of increasing grazing capacity. In order to break even financially, which current tribal policy would seem to dictate, the tribe would have to charge a considerably higher grazing fee than that which is currently charged members for the use of the tribal range. (The current rate is about 90¢ per AUM.) Users of the newly-created grazing capacity would no doubt object to paying a higher fee than established users. Thus, the Tribal Council would find itself in the inevitably troublesome position of having to either allocate new and old grazing among new and old users on some equitable basis or—what is more likely—establish a common grazing rate which is higher than the current fee.

TRIBAL BENEFIT-COST ANALYSIS OF PROJECTS INVOLVING INCREASED GRAZING CAPACITY, CATTLE AND FORAGE PRODUCTION

Thus far we have considered various land use alternatives from two points of view, individual operator cash flow (profitability) and tribal enterprise cash flow. However, it is essential to understand how the alternatives look from the point of view of Net Tribal Income (NTI), meaning the net income generated to all elements of the Tribe, including individual businessmen and workers as well as operating units of the tribal government.

In order to obtain a good estimate of the total tribal benefits that might accrue from the alternatives considered so far, it is necessary to consider the total amount of land which may be devoted to this use. Assuming that initially the Tribe will not wish to discontinue renting land which is currently earning a positive return from outsiders, the land which can be viewed as being eligible for use is limited to those problem lands which we have previously identified as generating zero or negative returns (types A and B). The Indian Agency land use statistics for 1971 indicate that there are at least 3200 acres of each type of land. In the following paragraphs we describe the ways in which various of our alternatives may be combined to put all of this land to use as projects.

Figure 2 describes five basic projects which the Tribe might undertake. These projects represent coordinated combinations of the individual farming alternatives and the programs for increasing grazing capacity which were described earlier. Project I assumes that one or both of the groups of problem land is devoted entirely to alfalfa production units. If the Tribe opts to increase its summer range capacity, of if the federal government funds the range improvement project, one or the other of the groups of problem lands (but not both) could be used to support additional cow-calf production units (Project II) or cow-yearling production (Project III). Similarly, the Tribe could increase grazing capacity by converting of the problem lands into the large irrigated pasture units described earlier, and then the balance of available land could be used in support of cow-calf production (Project IV) or cow-yearling production (Project V).

Evaluations of the five projects are shown in Table 9. The figures were derived directly from the earlier evaluations of individual project components as follows: (1) First, the cash flow data for the various components were revised to reflect a $1.20 per hour shadow price for hired labor. This means that the Net Tribal Income figure finally derived accounts for additional incomes earned by previously underemployed or unemployed tribal workers.[10] (2) Then, the cash flows (modified for shadow priced labor) accruing to individual farmers (summarized in Table 5) were added to those accruing to the Tribal Enterprise as a result of the individual farming operations (Table 6, lines "LI + SL + TA"); the latter figures value land at its opportunity cost and, thus, the need to place a shadow value on land is satisfied. (3) Finally, the (modified) cash flows associated with the applicable tribal grazing capacity expansion program (Tables 7 and 8) were added to those resulting from the farming operations. In the case of Projects II and III, two possibilities presented themselves, corresponding to whether the Tribe or the federal government pays the bill for range improvement; figures for the latter case are shown in parentheses in Table 9.

[10] The $1.20 per hour figure represents a derived hourly rate for governmental public assistance payments, which are assumed to be the best overall reflection of the opportunity cast for unemployed and underemployed tribal labor.

FIGURE 2.—OVERALL PROJECT DESCRIPTIONS FOR USE OF PROBLEM LANDS

Project type:

I—20 to 160-acre alfalfa production units (type 5b).

II—20 to 160-acre cow-calf production unit (Type 2a) in conjunction with the Range Improvement Program.

III—20 to 160-acre cow-yearling production unit (Type 4a) in conjunction with the Range Improvement Program.

IV—2 to 640-acre irrigated pasture unit to support; 9 to 160-acre cow-calf production units (Type 2a), with 3 to 160-acre alfalfa production units (Type 5b) to employ the remaining 480 acres.

V—2 to 640-acre irrigated pasture units to support 9 to 160-acre cow-yearling production units (Type 4a), with 3 to 160-acre alfalfa production units to employ the remaining 480 acres.

NOTE.—The figures for NTI shown in the table were derived simply by summing the positive and negative cash flows described above. Internal rates of return were estimated by allowing the discount rate to vary, as in our previous analyses, and finding that point at which NTI=0. Benefit-cost ratios are also shown in Table 9.

TABLE 9.—TRIBAL BENEFIT-COST ANALYSIS FOR PROJECTS INVOLVING USE OF IDLE LANDS, FORAGE AND CATTLE PRODUCTION

Project type	Type of land	K^t (thousands)	O^t (thousands)	NTI (thousands)	IRR (percent)	B/C	B/K
I	A	$894	$192	$720	11.8	1.66	1.81
	B	894	−217	1,180	14.8	2.74	2.32
II[a]	A	2,644 (1,876)	428 (428)	733 (1,502)	7.6 (10.7)	1.24 (1.65)	1.28 (1.80)
	B	2,644 (1,876)	62 (62)	1,145 (1,914)	8.5 (11.4)	1.42 (1.99)	1.43 (2.02)
III[a]	A	2,458 (1,690)	428 (428)	1,216 (1,984)	9.1 (12.2)	1.42 (1.94)	1.49 (2.17)
	B	2,458 (1,690)	62 (62)	1,627 (2,395)	10.0 (13.0)	1.65 (2.37)	1.66 (2.42)
IV	A	1,451	911	102	6.5	1.04	1.07
	B	1,451	499	544	8.5	1.28	1.37
V	A	1,358	911	345	7.8	1.15	1.25
	B	1,358	499	787	9.9	1.42	1.58

[1] Figures in parentheses are based on the assumption that the Federal Government pays the costs of range improvement.

Explanation of symbols:

K^t=Present value of investment costs borne by the tribal government.

O^t=Present value of annual operating costs received by the tribal government.

NTI=Net tribal income. The aggregated net incomes earned by all individual members and governmental elements of the Tribe.

IRR=Internal rate of return.

B/C=$[NTI+(K^t+O^t)]$ (K^t+O^t)=Tribal benefit-cost ratio.

B/K=$[NTI+K^t]\div K^t$=Modified tribal benefit-cost ratio.

The costs used in forming these ratios were either the present value of the initial investment costs (K^t) or the present value of the total costs ($O^t=K^t+O^t$) incurred by the tribal government as a result of undertaking the project. Thus, the resultant benefit-cost ratios are intended to be measures of returns per dollar of scarce tribal government resources.

The evaluations shown in Table 9 are not unexpected in light of some of our earlier findings. In general, straight alfalfa production (Project I) would seem to be more attractive than the alternatives which involve cattle production. This is true in spite of the fact that alfalfa production, as we have evaluated it in this study, would not require the use of any hired labor—labor requirements are such that the farm operator himself could supply virtually all of the labor required to produce alfalfa on a 160-acre-sized operation—and thus the alfalfa production project evaluation does not receive the "added boost" from the shadow pricing of labor which the other projects do receive. Of course, Project I does not have such high NTI estimates as the other projects, but neither does it have such high capital requirements—it can be undertaken by the tribe for less than $900,000 per 3,200 acre lot of land, whereas the cost of the next cheapest project (V) would be in the neighborhood of $1.4 million. Where the attractiveness of Project I shows up most clearly is in terms of returns per dollar invested, as reflected both in the internal rates of return and the benefit-cost ratios. Measured by these latter terms, it appears to perform far better than the other projects, unless the federal government should decide to fund the initial investments associated with range improvement.

If the government does undertake the range investment, then understandably the Tribe as a whole would stand to benefit far more from undertaking the associated investments required to get new individual cattle operations started. This is shown by the figures in parentheses for Projects II and III in the table. Nevertheless, it is still not entirely clear that either of these projects out-perform Project I because the evaluative criteria are relatively close. Judging by the estimates in the table, however, it would appear that the Tribe might wish to first undertake a project of Type I on Type B land and then, if the federal government does fund range improvement, it could undertake to stimulate cow-yearling production (Project III) on the remaining group of problem lands (Type A). In no case does it appear that the Tribe should wish to stimulate cattle production via large-scale irrigated pasture production.

TABLE 10.—A GENERAL COMPARISON OF ALTERNATIVE PROJECTS

	Cattle and forage production on idle (type A) lands					Water projects		Fruit production and processing (type A lands)				
									Fruit-vegetable			
	I	II	III	IV	V	Project A	Project B	Fruit-160-acre orchard	Orchard and processing plant	160-acre farm	Vegetable farm and processing plant	Tribal lumber mill
Initial tribal investment, Kt (thousands)	$894	$2,644 ($1,876)	$2,458 ($1,690)	$1,451	$1,358	(2)	(2)	$221	$2,906	$391	$1,909	$10,482
Return on investment, IRR (percent)	11.8	7.6 (10.7)	9.1 (12.2)	6.5	7.8 (9)	(2)	(2)	15.5	29.0	12.0	12.0	19.0
Benefit-cost ratios:												
B/C	1.66	1.24 (1.68)	1.42 (1.99)	1.04	1.15	1.59	3.68	1.35	1.59	1.25	1.25	1.14
B'/K	1.81	1.28 (1.80)	1.49 (2.02)	1.07	1.25	(2)	(2)	2.49	4.99	1.76	1.74	2.25
Employment generated for Indians (annual man-year equivalents):												
Lower-skilled jobs	0	18	18	14	14	12	34	4.5	53	7.5	10	56
Higher-skilled jobs	20	20	20	13	13	3	8	0.5	7	0	2	50
Managerial	1	1	1	1	1	3	2	0	2	0	2	10
Total	21	39	39	28	28	18	44	5	62	7.5	14	116
Tribal jobs per million dollars of investment	23.5	14.8 (20.8)	15.9 (23.1)	19.3	20.6	(2)	(2)	22.6	21.3	19.2	7.3	11.1
Index of seasonality in employment [1]	16	8	8	8	8	6	6	47	53	62	51	0
Jobs created for outsiders	0	0	0	0	0	44	77	1	8	1	3	25

[1] See Table 9.
[2] Initial tribal investment would be negligible under USDI funding proposals. Thus, it is not meaningful to calculate Kt, B'/K, and related figures.