

BROKEN PROMISES:

Continuing Federal Funding Shortfall for Native Americans

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
REPORT



DECEMBER 2018

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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*42 U.S.C. §1975a.

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Broken Promises: Continuing Federal Funding Shortfall for Native Americans

**Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC**

Briefing Report

December 2018

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

December 20, 2018

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Paul Ryan

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*. The report is also available in full on the Commission’s website at www.usccr.gov.

Since our nation’s founding, the United States and Native Americans have committed to and sustained a special trust relationship, which obligates the federal government to promote tribal self-government, support the general wellbeing of Native American tribes and villages, and to protect their lands and resources. In exchange for the surrender and reduction of tribal lands and removal and resettlement of approximately one-fifth of Native American tribes from their original lands, the United States signed 375 treaties, passed laws, and instituted policies that shape and define the special government-to-government relationship between federal and tribal governments. Yet the U.S. government forced many Native Americans to give up their culture and, throughout the history of this relationship, has not provided adequate assistance to support Native American interconnected infrastructure, self-governance, housing, education, health, and economic development needs.

In this report, the Commission updates its 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, which evaluated budgets and spending of federal agencies that sponsor Native American programs, including the Departments of Health and Human Services, Interior, Housing and Urban Development, Justice, and Education. Despite some progress, the crisis the Commission found in 2003 remains, and the federal government continues to fail to support adequately the social and economic wellbeing of Native Americans. Due at least in part to the failure of the federal government adequately to address the wellbeing of Native Americans over the last two centuries, Native Americans continue to rank near the bottom of all Americans in health, education, and employment outcomes.

The Commission majority approved key findings including the following: Federal programs designed to support the social and economic wellbeing of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the

Native American community unmet and contributes to the inequities observed in Native American communities. The federal government has also failed to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, making monitoring of federal spending to meet its trust responsibility difficult. Tribal nations are distinctive sovereigns that have a special government-to-government relationship with the United States. Unequal treatment of tribal governments and lack of full recognition of the sovereign status of tribal governments by state and federal governments, laws, and policies diminish tribal self-determination and negatively impact criminal justice, health, education, housing and economic outcomes for Native Americans.

The Commission majority voted for key recommendations, including the following: The United States expects all nations to live up to their treaty obligations; it should live up to its own. Congress should honor the federal government's trust obligations and pass a spending package to fully address unmet needs, targeting the most critical needs for immediate investment. This spending package should also address the funding necessary for the buildout of unmet essential utilities and core infrastructure needs in Indian Country such as electricity, water, telecommunications, and roads. Congress should ensure that these funds are available and accessible to all tribal governments on an equitable need basis.

The federal government should provide steady, equitable, and non-discretionary funding directly to tribal nations to support the public safety, health care, education, housing, and economic development of Native tribes and people. Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon
Chair

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EXECUTIVE SUMMARY

Since our nation's founding, the United States and Native Americans have committed to and sustained a special trust relationship, which obligates the federal government to promote tribal self-government, support the general wellbeing of Native American tribes and villages, and to protect their lands and resources. In exchange for the surrender and reduction of tribal lands and removal and resettlement of approximately one-fifth of Native American tribes from their original lands,¹ the United States signed 375 treaties,² passed laws, and instituted policies that shape and define the special government-to-government relationship between federal and tribal governments. Yet the U.S. government forced many Native Americans to give up their culture and did not provide adequate assistance to support their interconnected infrastructure, self-governance, housing, education, health, and economic development needs.

Due at least in part to the failure of the federal government to adequately address the wellbeing of Native Americans over the last two centuries, Native Americans continue to rank near the bottom of all Americans in terms of health, education, and employment. Many Native Americans face unique challenges and harsh living conditions resulting from the United States having removed their tribes to locations without access to adequate resources and basic infrastructure upon which their tribal governments can foster thriving communities. As reflected in the report text that follows, Native Americans are more likely to live in poverty, be unemployed, experience rape or abuse, and be killed by police than any other ethnic or racial group. Native Americans have 1.6 times the infant mortality rate of non-Hispanic whites, and the life expectancy for Native peoples is 5.5 years less than the national average. Native American students have the lowest high school graduation rates in the nation. The broken treaties have left many reservations without adequate access to clean water, plumbing, electricity, internet, cellular service, roads, public transportation, housing, hospitals, and schools. The often-isolated locations, lack of accurate and full inclusion in the media and in textbooks, and persistent discrimination have rendered their reality often invisible to other Americans.

In a 2003 report titled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, the U.S. Commission on Civil Rights (Commission) took on the task of “evaluat[ing] budgets and expenditures of the [six] major federal agencies sponsoring Native American programs.”³ Herein,

¹ See U.S. Indian Claims Commission, *Final Report: August 13, 1946–September 30, 1978, 1979*, at 1, https://www.narf.org/nill/documents/icc_final_report.pdf (“The period of greatest westward expansion, 1815 to 1860, saw 260 treaties signed. Two hundred and thirty of all the treaties between 1789 and 1868 involved Indian lands, 76 called for removal and resettlement, and nearly 100 dealt with boundaries between Indian and white lands primarily. These treaties and other Government agreements embodied 720 land cessions from 1784 to 1894.”).

² See Harvard Law School Library, “American Indian Law: Treaties,” <https://guides.library.harvard.edu/c.php?g=309883&p=2070028> (last accessed October 1, 2018) (describing *Indian Affairs: Laws and Treaties Volume 2*, edited by Charles J. Kappler, also known as the “Kappler Report,” which compiles 366 of the 375 treaties recognized by the State Department).

³ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (2003), 6, <https://www.usccr.gov/pubs/na0703/na0204.pdf> [hereinafter USCCR, *A Quiet Crisis*]. These six key agencies sponsoring Native American programs are the U.S. Department of Health and Human Services, the U.S. Department of Interior, the U.S. Department of Housing and Urban Development, the U.S. Department of Justice, the U.S. Department of Education, and the U.S. Department of Agriculture.

the Commission updates that 2003 report and examines Congress' continued failure to fully fund treaty and statutory obligations.

In *A Quiet Crisis*, a majority of the Commission found that “funding for services critical to Native Americans—including health care, law enforcement, and education—is disproportionately lower than funding for services to other populations.”⁴

The 2003 report also found that this disproportionately low funding was despite the historical and ongoing promises made to Native Americans based on the federal “trust” relationship.⁵ The trust relationship is based upon a number of treaties made between the U.S. and Native American tribes that “recognized and established unique sets of rights, benefits, and conditions for the treaty-making tribes who agreed to cede [] millions of acres of their homelands to the United States and accept its protection.”⁶

In the 2003 report, as in this one, “[s]pecific focus was given to the adequacy of funding and whether it has kept pace with inflation.”⁷ The 2003 report focused on “unmet needs,” defined as:

the portion of *basic needs* among Native Americans that the government is supposed to supply but does not. Basic needs encompass such critical items as health (e.g., medical facilities, clean drinking water); education (e.g., books, structurally sound school buildings); law enforcement (e.g., a sufficient number of law enforcement personnel); and housing (e.g., indoor plumbing, a sufficient number of houses).⁸

A Quiet Crisis summarized the funding shortfall to which Native Americans were subjected as follows:

At least in policy, the nation has clearly stated its promise to Native Americans. But laws and policies are meaningless without resources to enforce them. Resources are an important demonstration of the U.S. government's commitment to its responsibilities, including the obligation to preserve civil and other rights. . . .

Under-funding violates the basic tenets of the trust relationship between the [federal] government and Native peoples and perpetuates a civil rights crisis in Indian Country.⁹

⁴ Ibid., 5.

⁵ Ibid., 5–6; *see also infra* notes 26–61.

⁶ U.S. Dep't of the Interior, Bureau of Indian Affairs, “Frequently Asked Questions: What are Indian treaty rights?” <https://www.bia.gov/frequently-asked-questions> (last accessed Aug. 23, 2018); *see also* American Indian Treaties, National Archives, <https://www.archives.gov/research/native-americans/treaties>. The latter website includes links to a number of resources that catalogue laws and treaties pertaining to Native Americans in the U.S.

⁷ USCCR, *A Quiet Crisis*, *supra* note 3, at 6.

⁸ Ibid., 9.

⁹ Ibid., 5–6.

In *A Quiet Crisis*, the majority of the Commission found that due to the failure of the federal government's efforts to carry out its promises,¹⁰ "Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator."¹¹ The report explained that, despite significantly increased federal spending between 1994 and 2003, the sums failed to "compensate for a decline in spending power" or "overcome a long and sad history of neglect and discrimination,"¹² and concluded that "Native Americans living on tribal lands do not have access to the same services and programs available to other Americans, even though the government has a binding trust obligation to provide them."¹³

On May 14, 2015, twenty Members of the United States House of Representatives sent a bipartisan letter to the Commission, requesting an update to *A Quiet Crisis*.¹⁴ These Members of Congress stated their concern that the "lack of basic infrastructure" in Indian Country had "only grown over the past decade."¹⁵ The Congressional letter highlighted some of the concerning developments since *A Quiet Crisis*, including "significant budget cuts due to sequestration, increasing threats from natural disasters, and a continued lack of quality housing, educational support, and economic development opportunity."¹⁶ The letter asked the Commission to update the 2003 report "to help ensure that the federal government is making progress in fulfilling its trust and treaty responsibilities."¹⁷

Congress requested that the updated report include an "assessment of whether the federal government is now better meeting its responsibilities to tribal members; what efforts the federal government has taken to implement the Commission's 2003 recommendations—specifically with regard to infrastructure development; and what actions, if any, are needed to best address the unmet needs in Indian Country to uphold the federal trust responsibility and achieve self-governance for Indian nations."¹⁸

Unfortunately, the Commission's current study reflects that the efforts undertaken by the federal government in the past 15 years have resulted in only minor improvements, at best, for the Native population as a whole. And, in some respects, the U.S. Government has backslid in its treatment

¹⁰ See The Federal Trust Relationship, *infra* notes 26–61 (discussing the federal trust relationship).

¹¹ USCCR, *A Quiet Crisis*, *supra* note 3, at ix.

¹² *Ibid.*

¹³ *Ibid.*, 113.

¹⁴ Letter from Rep. Derek Kilmer to then-Chair Castro, Vice Chair Timmons-Goodson, and Commissioners on May 14, 2015 [hereinafter Kilmer letter]. See *infra* Appendix A. The Commission voted to provide an update to *A Quiet Crisis* in June 2015. See U.S. Commission on Civil Rights, Commission Business Meeting, June 29, 2015, transcript, at 24–37.

¹⁵ Kilmer letter, *supra* note 14.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

of Native Americans, and there is more that must be done compared to when the Commission issued *A Quiet Crisis*.¹⁹

Federal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide. Native American program budgets generally remain a barely perceptible and decreasing percentage of agency budgets. Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power.

To be sure, many Native Americans are succeeding as teachers, doctors, lawyers, artists, writers, scientists, and entrepreneurs, among other professions, and some tribes are experiencing greater economic prosperity. Also, some efforts have been made to recognize tribal sovereignty and promote self-determination. For example, the U.S. Department of the Interior (DOI) is reorganizing the Bureau of Indian Education (BIE) to support the direct operation of schools by tribal education authorities. But significant work remains. While support costs for tribal nations who choose to manage their own healthcare programs under the Indian Self-Determination and Education Assistance Act now have a separate indefinite annual appropriation, the overall Indian Health Service (IHS) budget meets just over half of the health care needs of Native Americans who suffer striking health deficiencies and disparities. And under the Tribal Law and Order Act of 2010, tribal courts now have enhanced sentencing authority. Yet, the lack of funding for tribal courts remains a significant barrier for tribes wishing to implement the Act.

In 2016, the Commission held a briefing entitled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country, 2016 Update*, during which it received testimony from a number of expert witnesses, including advocates, researchers, legal scholars, and representatives of federal agencies. The Commission draws this report from the above-referenced sources and independent research. Further, the Commission has considered and been informed by recent reports and briefings from its State Advisory Committees (SACs).²⁰ Commissioners and staff visited Indian Country including the Eastern Shoshone and the Northern Arapaho Tribes at the Wind River Reservation in Wyoming, the Quinault Reservation in Washington State, the Standing Rock Indian Reservation and Camp Site in North Dakota, and the Pine Ridge Reservation in South Dakota. Commissioners and staff also engaged with and received comments from tribes, tribal leaders, and stakeholders through multiple meetings and briefings. This report examines the role, obligations, and jurisdiction of the federal government under the trust relationship with respect to Native American communities, and details Commission findings about whether current levels of funding are sufficient to meet Native American community needs.

This report commences with background about the government-to-government relationship between the United States and tribes, and federal obligations for Native Americans. The introduction also identifies the Native American population and provides an overview of the relevant federal budget programs and the scope, methodology, and organization of this report. As

¹⁹ See *infra* Discussion and Sources cited in Chapters 1–5.

²⁰ A brief list of the Commission's past and current research and reports on Native American and Native Hawaiian issues is listed in Appendix J.

this report uses many acronyms, in addition to defining them in the text, a Glossary of Acronyms is provided for the reader in Appendix I.

Chapter 1 examines the Commission's research on criminal justice and public safety issues for Native American communities. Chapter 2 examines health care issues and related disparities that impact Native Americans. Chapter 3 examines the issues and challenges in Native American access to education. Chapter 4 examines the issues and challenges in Native American access to housing. Chapter 5 examines federal budget disparities impacting Native Americans in economic development issues, including infrastructure, natural resources and the role of the federal government in Native American enterprises. Finally, after this broad review, the Commission sets forth its findings and recommendations.²¹

The Commission's findings and recommendations primarily focus on the special trust relationship between the United States and Native Americans, improved data collection, and the inadequate funding of federal programs serving the social and economic needs of Native Americans. Unequal treatment of tribal governments and lack of full recognition of their sovereign status by state and federal governments also diminish tribal self-determination and negatively impact criminal justice, health, education, housing and economic outcomes for Native Americans.

One of the Commission's most significant recommendations is for Congress to honor the federal government's trust obligations and pass a spending package to fully address unmet needs, targeting the most critical needs for immediate investment. This spending package should also address the funding necessary for the buildout of unmet essential utilities and core infrastructure needs in Indian Country such as electricity, water, telecommunications, and roads.

The Commission majority approved key findings including the following:

I. The Trust Relationship

- The special government-to-government relationship between the federal government and Indian tribes is based on Article I, Section 8 of the Constitution, and has been shaped and defined by 375 treaties between the federal government and Indian tribes, Supreme Court decisions, laws, regulations, Executive Orders, and the customary practices of foreign relations. Congress has also passed over 150 laws that promote the welfare of Native Hawaiians and establish a special political and legal relationship similar to the trust relationship with other Native Americans.
- Since our nation's founding, the United States and Native Americans have committed to and sustained this special trust relationship, which obligates the federal government to promote tribal self-government, support the general welfare of Native American tribes and villages, and to protect their lands and resources. Courts have acknowledged the legal status of Native Americans as both a sovereign political entity and as a racial group with constitutionally guaranteed rights to equal protection. Federal laws dealing with Native

²¹ See *infra* Findings and Recommendations.

Americans are not based upon impermissible racial classifications and are expressly provided for in the Constitution.

- In the Commission's 2003 *A Quiet Crisis* report, the Commission documented the federal government's historic failure to carry out its promises and trust obligations. These failures included longstanding and continuing disregard for tribes' infrastructure, self-governance, housing, education, health, and economic development. The Commission found these failures created a civil rights crisis in our nation. Despite some progress, the crisis remains and the federal government continues to fail to adequately support the social and economic welfare of Native Americans.

II. Data

- Data on Native American and Native Hawaiians and Other Pacific Islander racial groups are often incomplete, inaccurate, old, or not tracked by the federal government. The best available data suggest sometimes extreme social and economic disparities between these communities and national averages. There is a critical need for more accurate and current data collection for these communities, including disaggregated data on American Indian, Alaska Native, and Native Hawaiian and Other Pacific Islander subpopulations, to improve the ability of federal, state, local, and tribal governments to monitor conditions and make more informed policy and spending decisions.

III. Federal Expenditures

- Health, education, public safety, environmental quality, and business development are interconnected, and investment in these areas in Indian Country promotes a cycle of social and economic prosperity.
- Federal programs designed to support the social and economic well-being of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.
- More than 20 federal agencies provide targeted services to Native Americans. Major programs that are underfunded include:
 - U.S. Department of Justice (DOJ) and Bureau of Indian Affairs (BIA) public safety and justice programs;
 - IHS health care, behavioral health, urban Indian health, and water sanitation programs;
 - DOI programs such as BIE programs and BIA real estate services and forest, wildlife, and road maintenance programs; and
 - U.S. Department of Housing and Urban Development (HUD) programs that help meet the housing needs of Native Americans and Native Hawaiians.

IV. Tribal Sovereignty

- Tribal nations are distinctive sovereigns that have a special government-to-government relationship with the United States. Unequal treatment of tribal governments and lack of full recognition of the sovereign status of tribal governments by state and federal governments, laws, and policies diminish tribal self-determination and negatively impact criminal justice, health, education, housing and economic outcomes for Native Americans.

V. Criminal Justice

- Native Americans collectively suffer from one of the nation's highest rates of crime and victimization. The federal government has a trust responsibility to provide for public safety in Indian Country. Although overall funding for public safety in Indian Country has increased, it does not come close to meeting the public safety needs in Indian Country or the needs to police and protect natural resources.

VI. Health Care

- The federal trust relationship establishes a responsibility to provide health care to Native Americans. Resulting in part from the failure of the federal government to honor its trust responsibilities, vast health disparities exist between Native Americans and other populations.
- Funding for the IHS and Native American health care is inequitable and unequal. IHS expenditures per capita remain well below other federal health care programs, and overall IHS funding covers only a fraction of Native American health care needs, including behavioral health needs to address the suicide epidemic in Indian Country.

VII. Education

- The most recent available data reflect that Native American students comprise 1.1 percent (0.5 million) of the total 50.6 million public school students in the U.S., but Native American students experience discernable disparities in access to educational opportunity, compared to their non-Native peers. These disparities in educational opportunities have a profound impact on the social and economic opportunities and well-being of Native students and of Native communities. Educational disparities in access to educational opportunity also exist between Native Hawaiian and non-Hawaiian students.
- The federal government has failed in its trust obligation to provide educational services that address the unique situation of Native American students.

VIII. Housing

- Since the Commission's 2003 report, the housing crisis in Indian Country has worsened. In addition to the continuing lack of affordable housing in Indian Country, since 2003, the number of Native Americans living in overcrowded households or households without adequate kitchens or plumbing has grown. Native Hawaiians experience similar housing

issues such as lower home ownership rates, housing with inadequate plumbing, kitchens, and electric/heating systems, and overcrowded housing.

- The federal government's ongoing failure to increase funding for the Indian Housing Block Grant (Block Grant) program has (1) been a major obstacle to maintaining aging housing stock and increasing total housing in Indian Country and (2) steadily eroded the number of new affordable housing units developed in Indian Country each year.

IX. Economic Development

- While many Native Americans are succeeding as teachers, doctors, lawyers, artists, writers, scientists, and entrepreneurs, the poverty rate of Native Americans is approximately twice the national average. They experience higher rates of unemployment than any other racial group. The unemployment rate for Native Americans approaches 80 percent or higher on some reservations. Individuals on tribal land are more likely to lack access to broadband internet compared to other individuals living in rural areas.
- The federal government has failed to honor its trust responsibility to promote Native American self-determination via its support of economic development in Indian country. The federal government has failed to assist the tribes with the individualized economic development necessary for tribes to exercise self-determination and make a knowledgeable decision as to how to best develop and manage their nation's resources for the tribe's benefit.

The Commission majority approved key recommendations including the following:

I. Keeping Promises

- The federal government should invest in Native American communities because such investment strengthens America. Recognizing the federal government's ongoing and historic failure to honor its trust obligations to protect and support Native Americans, the federal government should do the following:
 - Congress should study and determine the funding necessary for the buildout of unmet essential utilities and core infrastructure needs in Indian Country such as electricity, water, telecommunications, and roads.
 - Congress should honor the federal government's trust obligations and pass a spending package dedicated to address fully these unmet needs, targeting the most critical needs for immediate investment.
 - Congress should ensure funds are available and accessible on an equitable need basis to all tribal governments.
 - Congress should require an annual report from appropriate federal agencies on unmet essential utility and core infrastructure needs, and the reach of funds appropriated to meet them.

- The federal government should provide steady, equitable, and non-discretionary funding directly to tribal nations to support the public safety, health care, education, housing, and economic development of Native tribes and people. These commitments should include:
 - Increased funding for DOJ public safety initiatives and BIA public safety and justice programs in Indian Country, including funding to implement fully the due process mandates of the Tribal Law and Order Act of 2010 and Violence Against Women Act of 2013, including but not limited to funding for indigent defense, sufficiently trained and credentialed judges, mandated jury trials, recordkeeping, and compliance with criminal law and procedural notice requirements.
 - Increased, non-discretionary, and advance appropriations for IHS to bring it to parity with other federal health programs, such as the Veterans Health Administration, including for facilities and urban Indian health. Congress should also provide funding to implement the Indian Health Care Improvement Act, including job training programs to address chronic shortages of health professionals in Indian Country and a mental health technician training program to address the suicide crisis in Indian Country.
 - Full funding for the operation of BIE schools, increased funding for Native American English Language Learner programs and Native Hawaiian education programs, and grant funding to develop curricula and lesson guides that state and local school districts may then choose to adopt to maximize instruction that includes non-derogatory, culturally inclusive discussion of Native American history and student experience. Congress should appropriate sufficient funding for BIE schools to allow the BIE to bring all BIE schools up to minimum standards of habitability for their students and to attract, recruit, and retain teachers to come to and continue teaching in BIE schools. Congress should also provide funding for professional development programs to enhance the skills of current BIE teachers.
 - Reauthorization of the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA), increased appropriations to the Block Grant program and Indian Housing Loan Guarantee Fund to meet fully the housing needs of Indian Country, and increased funding for similar Native Hawaiian housing programs.
 - Increased funding for BIA programs such as real estate trust services, forestry and wildlife programs, tribal resilience, and road maintenance programs. DOI should also increase availability of the Land Buy-Back Program to more tribes.
 - Increased funding for the Federal Communications Commission, Office of Native Affairs and Policy to help increase broadband and telecommunications penetration in Indian Country.
 - Increased funding for the U.S. Department of Energy, Office of Indian Energy Policy and Programs and Tribal Energy Loan Guarantee Program.

II. Tribal Sovereignty

- The federal government should adopt policies for Native American programs and programs that affect Native Americans that promote equal treatment of tribal governments as compared to other governments. The federal government should provide sufficient

funding, training, tools, and resources to tribal nations to provide their citizens the opportunity to exercise self-government and self-determination.

- Congress should provide sufficient funds to tribal law enforcement agencies, tribal courts, and tribal detention facilities to allow those criminal justice components to fulfill their responsibilities to their citizens. Congress should also ensure funds from the Crime Victims Fund are set aside annually to meet sufficiently the needs of Native American victims of crime.
 - Congress should appropriate sufficient funding for BIE schools to allow the BIE to bring all BIE schools up to minimum standards of habitability for their students and to attract, recruit, and retain teachers to come to and continue teaching in BIE schools. Congress should condition ongoing funding on BIE development of policies and programs accountable for provision of equitable and culturally responsive educational opportunity as well as for student performance results.
 - Congress should appropriate sufficient funding to BIA, U.S. Department of Agriculture (USDA), and U.S. Department of Energy programs to provide tribes with sufficient funding and technical assistance to allow tribes to exercise self-reliance and self-determination in the protection, management, and development of their natural, agricultural, and energy resources.
 - Congress should provide consistent, non-discretionary funding to tribal governments to create parity between tribal governments and other governments by allowing tribal governments to leverage federal funding. Congress should make available to tribes programs such as the New Market Tax Credit program, the Community Development Financial Institutions Fund (CDFI) Bond Guarantee Program, and the Low-Income Tax Credit Program, which are designed for the purpose of leveraging and attracting capital to public projects and represent billions in potential investment.
 - The federal government should provide more consistent, transparent, and deferential consultation with tribal governments and strive to reach mutually agreed solutions when working with tribes on infrastructure planning and the use and development of natural resource that occurs on or affects tribal lands and communities. For example, during the development of the Dakota Access Pipeline the federal government should take in the health, spiritual, and cultural concerns of Native Americans and issue a decision that is consistent with those concerns.
 - Congress should provide direct, long-term funding to tribes, analogous to the mandatory funding Congress provides to support Medicare, Social Security, and Medicaid, avoiding pass-through of funds via states. Competitive grant programs such as for DOJ criminal justice initiatives should be available in addition to sufficient baseline funding.
- Congress can acknowledge a government-to-government relationship with Native Hawaiians to confirm its intent to provide Native Hawaiians at least all the same federal benefits that Native Americans have. Congress should pass legislation to provide a process for the reorganization of a Native Hawaiian governing entity and to confirm the special political and legal relationship between the United States and such Native Hawaiian governing entity.

III. Data Collection

- Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.

* * *

Our nation has broken its promises to Native Americans for too long. The United States government must rededicate itself to working with tribal governments to tackle the crisis in Indian Country, including through living up to treaty obligations just as the United States expects all nations to live up to their own. The federal government should provide steady, equitable, and non-discretionary funding directly to tribal nations to support the public safety, health care, education, housing, and economic development of Native tribes and people.

Introduction to Federal Funding for Native American Programs

As a preliminary matter, throughout this report, the term “Native American” is used in lieu of “American Indian” or other terminology when not specifically citing or paraphrasing other work. The term should be understood to include Alaska Natives unless otherwise noted. Unless otherwise indicated, Native Hawaiians are not included in the Native American category because the Native Hawaiian community does not currently have the same government-to-government relationship with the U.S. federal government identical to the one that Native American tribes have.²² Thus, issues concerning Native Hawaiians will be discussed with explicit references to that population throughout this report, similar to the Commission’s 2003 report. Congress has determined the federal government has a special political and trust relationship with Native Hawaiians in part because it bears responsibility for the overthrow of the Kingdom of Hawaii and the annexation of

²² See *Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community*, 81 FED. REG. 71,278–323 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50) [hereinafter *Native Hawaiian Final Rule*]. In 2016, the U.S. Department of the Interior issued a final rule specifying procedures to allow a unified Native Hawaiian government, if one is established in the future, to enter into a formal government-to-government relationship with the U.S. As background to the rule, the Department of the Interior noted that Congress had “federally acknowledged or recognized” the Native Hawaiian community as reflected in more than 150 enacted U.S. statutes that already appear to establish a unique political trust relationship. See 81 FED. REG. 71,278 (Oct. 14, 2016); see also Frances Kai-Hwa Wang, *Dept. of Interior Finalizes Rule to Recognize Native Hawaiian Government*, NBC NEWS, Sept. 23, 2016, <https://www.nbcnews.com/news/asian-america/department-interior-finalizes-rule-recognize-native-hawaiian-government-n653631>; Office of Hawaiian Affairs, *OHA applauds Obama administration* (May 27, 2014), <https://www.oha.org/news/oha-applauds-obama-administrations-consideration-of-administrative-path-to-federal-recognition/>. While some Native Hawaiians have applauded this action by the U.S. Department of the Interior, others do not agree. See generally Brieanah Ka’ohinani Wylde Gouveia, *Paradise Lost: the Controversy Behind US Federal Recognition of Native Hawaiians*, Henry Fowler Policy Paper Competition, <https://www.roanoke.edu/Documents/pa/Brieanah%20Gouveia%20Fowler%20Paper%202017.pdf>; see also Frances Kai-Hwa Wang, *Some Protest [U.S.] Rule for Recognition of Native Hawaiian Government*, NBC NEWS, Sept. 26, 2016, <https://www.nbcnews.com/news/asian-america/some-protest-us-rule-recognition-native-hawaiian-government-n654501>.

Hawaii, which suppressed Native Hawaiians' sovereignty over their land.²³ This trust obligation is represented by over 150 statutes authorizing programs and services similar to, but separate from, those provided to Native Americans.²⁴

The term "Indian Country" is used throughout this report, and is defined as:

[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, . . . and [] all Indian allotments[.]²⁵

The Federal Trust Relationship

There are currently 573 federally recognized tribes across the U.S.²⁶ Native American or Alaska Native tribal sovereign entities have a government-to-government relationship with the U.S. and are entitled to certain federal benefits, services, and civil rights protections.²⁷ The government-to-government relationship between the federal government and Native American tribes has been given form and substance by numerous treaties, laws, Supreme Court decisions, and Executive Orders.²⁸

Treaties between the United States and various tribal nations initially established the federal government's commitment to provide for Native Americans.²⁹ As part of entering into treaties, the

²³ Native Hawaiian Final Rule, at 71,278–282.

²⁴ *Id.*; See also *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005) (exclusion of Native Hawaiians from Department of Interior regulations acknowledging the federally recognized status of Indian tribes did not violate Equal Protection component to the Fifth Amendment's Due Process Clause under rational basis scrutiny). The Ninth Circuit in *Kahawaiolaa* stated:

[It] would have more confidence in the outcome if the Department of Interior had applied its expertise to parse through history and determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis. It would have been equally rational, if perhaps not more so, for the Department to have decided to undertake that inquiry in the first instance Thus, in the end, we must commit this question to Congress to apply its wisdom in deciding whether or not native Hawaiians should be included among those eligible to apply for federal tribal recognition.

386 F.3d at 1283.

²⁵ 18 U.S.C. § 1151.

²⁶ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Frequently Asked Questions: What is a federally recognized tribe?" <https://www.bia.gov/frequently-asked-questions>.

²⁷ *Ibid.*

²⁸ See American Law Institute, Restatement of Law: the Law of American Indians, Tentative Draft No. 1 (April 22, 2015) at §4(b); See also Indian Health Service, "About Us," <https://www.ihs.gov/aboutihs/> (last accessed September 19, 2018) (collecting statutes that apply to the provision of health care services for Native Americans); U.S. Dep't of the Interior, Bureau of Indian Affairs, "Frequently Asked Questions: What is the federal trust responsibility?" <https://www.bia.gov/frequently-asked-questions> (last accessed Aug. 24, 2018).

²⁹ USCCR, *A Quiet Crisis*, *supra* note 3, at 3.

federal government acquired Native American lands and agreed to provide Native Americans with certain services such as the preservation of law and order, education, housing, and health care. Stacy Bohlen, Executive Director of the National Indian Board of Health, described her view of the promises made in treaties at the 2016 briefing: “[W]e exchanged 400 million plus acres of land, and our way of life, and our very lives, for peace, and for the provisions that are provided for in the treaties, and a basic human dignity of having basic services for American Indian and Alaska Native people.”³⁰

“Congress’s trust obligation to provide services deriving from its original trust obligations now takes the form in the multitude of statutes detailing federal services provisions to Indians and tribes.”³¹ Congress has also enacted statutes that define the United States’ trust responsibilities with regard to management of property and other trust assets. “While Congress has certainly established a national policy favoring tribal self-government, and has chosen to comply with its obligations to preserve tribal self-government, it is unlikely that Indian tribes can sue to force Congress to comply with its trust duty.”³² Enforcing a particular trust duty owed by the United States to Native Americans requires identifying a substantive source of law that contains the specific duty.³³ In the absence of a specific duty, the government’s general trust duty only requires its compliance with applicable statutes and regulations.³⁴ This state of affairs—that Congress can limit the United States’ liability for breach of the trust—has led scholars to criticize Congress’s lack of setting out specific trust duties, and allege that this “allows Indian interests to be marginalized when they could and should be better protected.”³⁵

The primary delegation of Congressional authority to the Executive Branch can be found in the Snyder Act of 1921. In this Act, Congress delegated broad authority to the Executive Branch for carrying out the federal trust relationship for the welfare of American Indians by authorizing the expenditure of such funds as Congress may appropriate for the benefit, care, and assistance to Native Americans throughout the United States.³⁶ The Restatement of the Law of American Indians further explains that “[t]he general trust relationship extends to the federal officers who

³⁰ Stacy Bohlen, Executive Director of the National Indian Board of Health, Testimony, Briefing before the U.S. Commission on Civil Rights, Washington D.C., Feb. 19, 2016, p. 22, <https://www.usccr.gov/calendar/2016/02-19-Unedited-Transcript.pdf> [hereinafter *Briefing Transcript*].

³¹ American Law Institute, Restatement of Law: the Law of American Indians, Tentative Draft No. 1 (April 22, 2015) at §4, comment e.

³² *Id.*

³³ See *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750 (2016).

³⁴ See *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810–12 (9th Cir. 2006).

³⁵ See, e.g., Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “We Need Protection from our Protectors:” The Nature, Issues, and Future of the Federal Trust Responsibilities to Indians, 6 Mich. J. Envtl. & Admin. L. 397, 400 (Spring 2017); see also *id.* at 450 (“[a]bsent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court’s misadventures.”) (quoting David Getches, Remarks at Federal Bar Association Indian Law Conference, 84 U. Colo. L. Rev. 201, 202 (2013)).

³⁶ Snyder Act, Pub. L. No. 67–85 42 Stat. 208, (1921) (codified at 25 U.S.C. § 13).

have been delegated authority by Congress to administer Indian-affairs policies.”³⁷ In 2014, the Secretary of the Interior reiterated the executive branch’s role in the federal trust relationship by stating that “[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive” and contains “a paramount commitment to protect their unique rights and ensure their wellbeing, while respecting tribal sovereignty.”³⁸

Congress has also enacted numerous statutes promising services and funding aimed to promote “Indian self-determination.”³⁹ For example, in 2016, Congress reaffirmed a duty to promote tribal self-determination regarding governmental authority and economic development as follows:

Congress finds that:

- 1) there exists a unique relationship between the Government of the United States and the governments of Indian tribes;
- 2) there exists a unique Federal responsibility to Indians;
- 3) through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians;
- 4) the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and
- 5) the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed.⁴⁰

Other statutes include the right to self-government as well as important corresponding civil rights.⁴¹ According to Professors Cornell and Kalt, who co-direct the Harvard Project on American

³⁷ American Law Institute, *Restatement of Law: The Law of American Indians*, Tentative Draft No. 1 (April 22, 2015) at §4(b); see also U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Frequently Asked Questions: What is the federal trust responsibility?” <https://www.bia.gov/frequently-asked-questions> (last accessed Aug. 24, 2018).

³⁸ Secretary of the Interior, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, at 4 (August 20, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf>; see also Solicitor Thompkins to Secretary Jewell, M-37045, Reaffirmation of the United States’ Unique Trust Relationship with Indian Tribes and Related Indian Law Principles (Jan. 18, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf>.

³⁹ Some such laws on Indian self-determination are the Indian Reorganization Act of 1934, 25 U.S.C. § 5101 *et seq.* (1934); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*; Indian Education Act of 1972, Pub. L. No. 92-318 (codified as amended in scattered subsections of §§ 7, 12, 16, and 20 of the U.S. Code); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638 (1975) (codified at 25 U.S.C. § 5301 *et seq.*); and the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341 (1978) (codified at 42 U.S.C. § 1996).

⁴⁰ Indian Trust Asset Reform Act, Pub. L. No. 114-178, 130 Stat. 432 (Jun. 22, 2016) (codified at 25 U.S.C. § 5601).

⁴¹ See generally *supra* note 39.

Indian Economic Development, tribal self-determination includes the control of cultural and religious affairs; the use of natural resources; business permitting and regulation; the provision of social services such as education, health care, housing, and family services; infrastructure development; law making and legislation; citizenship criteria; and more.⁴² Moreover:

[T]ribes are subject to federal law, but operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes. . . . [T]ribes in the current era of self-determination expect and demand government-to-government relations, rather than assuming the earlier role of a dependent subject to paternalistic management by non-Indian governments.⁴³

“The United States’ trust relationship with Indians and tribes authorizes the federal government to promote tribal self-government.”⁴⁴ At the same time, Native Americans have also been “subject to enduring efforts to strip them of their land, their possessions, and even their identities.”⁴⁵ Jacqueline Pata, Executive Director of the National Congress of American Indians (NCAI), noted in her testimony before the Commission in 2016:

In the course of American history, Indian tribes lost millions of acres of land through treaties and agreements, causing devastating losses through displacement and disruption of culture and religion. . . . After federal policies, such as removal, relocation, forced assimilation, allotment, and termination, the continuing viability of tribal cultures and governments reflects the determination of Indian tribes to endure as distinct peoples. Indeed, understanding the role of tribes as governing entities is central to understanding the resilience of Indian Country and Native people today. Efforts to disband and assimilate tribes have drawn on the view of American Indians/Alaska Natives as ethnic or racial groups, as opposed to self-governing entities.⁴⁶

The Commission notes that the locations of some reservations come from historic discrimination, and the trauma of forced relocation and other injustices continues.⁴⁷ The Native American people

⁴² Stephen Cornell and Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy*, Harvard Kennedy School Faculty Research Working Paper Series, (Nov. 2010), 3, http://nmi.arizona.edu/pubs/jopna-wp1_cornell&kalt.pdf [hereinafter Cornell et. al., *American Indian Self Determination*].

⁴³ Ibid.

⁴⁴ American Law Institute, *Restatement of the Law: The Law of American Indians*, Tentative Draft No. 1 (April 22, 2015) at §4, commented.

⁴⁵ USCCR, *A Quiet Crisis*, *supra* note 3, at 2.

⁴⁶ Jacqueline Pata, Executive Director of the National Congress of American Indians [hereinafter NCAI], Written Statement for the U.S. Commission on Civil Rights, Feb. 19, 2016, at 1–2 [hereinafter NCAI Statement].

⁴⁷ See, e.g., Laurence J. Kirmayer, Joseph P. Gone, and Joshua Moses, *Rethinking Historical Trauma*, 51 *TRANS-CULTURAL PSYCHIATRY* 3d 3, 304, 311 (2014), <http://journals.sagepub.com/doi/pdf/10.1177/1363461514536358>. See also Emma Brown, *U.S. government has ‘dismally failed’ to educate Native American children, lawsuit alleges*, WASH. POST, Jan. 12, 2017, https://www.washingtonpost.com/news/education/wp/2017/01/12/u-s-government-has-dismally-failed-to-educate-native-american-children-lawsuit-alleges/?utm_term=.9c5033a6bad4. Brown’s article quotes Don E. Watahomigie, chairman of the Havasupai tribal council, who asserts, “The United States government has confined us to this remote

continue to face everyday challenges due to disproportionately high rates of violence and crime victimization;⁴⁸ poor physical, mental, and behavioral health conditions;⁴⁹ high rates of suicide;⁵⁰

location. . . . The United States government promised quality education to our people. The United States government failed on this promise, and as a result our people suffer.” See also Chapter 3 *infra* notes 544–561 (on education, including discussion of forced separation of children and prohibition of language and other traditions) and Chapter 4 *infra* notes 807–808 (on housing, including discussion of forced relocation and repossession of land).

⁴⁸ U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Victimization, 2012* (October 2013), 7, <http://www.bjs.gov/content/pub/pdf/cv12.pdf>. See also Lynn Rosenthal, THE WHITE HOUSE, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women* (July 29, 2010), <https://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>; Dominique Daye Hunter, INDIGENOUS WOMXN IN SOLIDARITY EMPOWERED AND RISING (IWISER), *What is the Tribal Law and Order Act? And Why Does it Matter?* (Oct. 4, 2017), <https://iwiser4.com/2017/10/04/violence-against-american-indian-women-the-tribal-law-and-order-act-implementation-and-effects/>; U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: Disparities* (Apr. 2018), 2, https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/Disparities.pdf [hereinafter HHS, IHS, *Fact Sheet: Disparities*].

⁴⁹ HHS, IHS, *Fact Sheet: Disparities*, *supra* note 48, at 2; Melissa L. Walls, et al., *Mental Health and Substance Abuse Services Preferences among American Indian People of the Northern Midwest*, 42 CMTY. MENTAL HEALTH J. 6, 522 (2006), <https://link.springer.com/content/pdf/10.1007%2Fs10597-006-9054-7.pdf>; NCAI, *Fiscal Year 2017 Indian Country Budget Request: Upholding the Promises, Respecting Tribal Governance—For the Good of the People* (2016), 56, <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf> [hereinafter NCAI, *FY 2017 Indian Country Budget Request*]; Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, THE PROF. COUNS., <http://tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans/> (last accessed Sept. 24, 2018); U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Office of Applied Studies, *The National Survey on Drug Use and Health Report: Substance Use Among American Indian or Alaska Native Adults* (2010), 1, <http://www.iaia.edu/wp-content/uploads/2011/04/Substance-Use-Among-AI-Adults.pdf>. Native Americans also experience higher rates of binge alcohol episodes and illicit drug use compared to the general population. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE, *Trends in Indian Health* (2014), 192, https://www.ihs.gov/dps/includes/themes/newihstheme/display_objects/documents/Trends2014Book508.pdf [hereinafter IHS, *Trends in Indian Health*]. See also U.S. Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings* (2014), 88, <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>. In 2013, the rate of substance dependence or abuse among Native Americans aged 12 or older was 14.9 percent—the highest rate among all population groups nationwide. See also *infra* notes 384–451 (discussing behavioral health).

⁵⁰ See U.S. Dep’t of Health and Human Services, Indian Health Service, *Fact Sheet: Behavioral Health* (January 2015), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/BehavioralHealth.pdf; National Tribal Budget Formulation Workgroup, *Recommendations on the Indian Health Service Fiscal Year 2017 Budget: Turning the Corner in Indian Health Treaty and Trust Obligations: Writing a New Future for American Indians and Alaska Natives*, May 2015, 24, <https://www.nihb.org/docs/06242015/Final%20FY%202017%20IHS%20budget%20full%20report.pdf> [hereinafter Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*].

low educational achievement and attainment;⁵¹ poor housing conditions;⁵² high rates of poverty⁵³ and unemployment;⁵⁴ and other challenges, which are exacerbated by the shortfall of federal assistance.

Fulfillment of the trust relationship is also crucial for protecting the civil rights of Native Americans.⁵⁵ Therefore, the Commission reported in 2003 that the “federal government’s failure to avail Native Americans of services and programs available to other Americans violates their civil rights.”⁵⁶ A *Quiet Crisis* demonstrated in 2003 that funding for Native American programs and services were disproportionately lower than funding for programs and services to other

⁵¹ See DONNA MARTINEZ, *School Culture and American Indian Educational Outcomes*, *PROCEDIA—SOC. AND BEHAV. SCI.*, Vol. 116 (2014), 165, 199 (2014), https://ac.els-cdn.com/S1877042814001955/1-s2.0-S1877042814001955-main.pdf?_tid=9cfb0a4b-076a-4afc-9204-d72e2eb4859b&acdnat=1526399366_b385d9da205b9ad6e8ea1702542a2bb8 [hereinafter Martinez, *School Culture and American Indian Educational Outcomes*]; U.S. Dep’t of Education, National Center for Education Statistics, Institute of Education Sciences, *Trends in High School Dropout and Completion Rates in the United States: 2014* (March 2018), 24, <https://nces.ed.gov/pubs2018/2018117.pdf>.

⁵² See Secretary Shaun Donovan, U.S. Dep’t of Housing and Urban Development (HUD), testimony before the Senate Committee on Banking, Housing, and Urban Affairs and Committee on Indian Affairs, Aug. 25, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg62798/html/CHRG-111shrg62798.htm>; U.S. Dep’t of Housing and Urban Development, *Continuity and Change: Demographic, Socioeconomic, and Housing Conditions of American Indians and Alaska Natives* (2014), xv, https://www.huduser.gov/portal/publications/pdf/housing_conditions.pdf [hereinafter HUD, *Housing Conditions of American Indians and Alaska Natives*]. An overcrowded household is considered one that contains more than one person per room. U.S. Dep’t of Housing and Urban Development, Office of Policy Development and Research, Urban Institute, *Housing Needs of American Indians and Alaska Natives in Tribal Areas* (January 2017), 67, <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf> [hereinafter HUD *Housing Needs*]; U.S. Government and Accountability Office, *Native American Housing: Additional Actions Needed* (March 2014), introductory summary, <http://www.gao.gov/assets/670/662063.pdf> [hereinafter GAO, *Additional Actions Needed*].

⁵³ U.S. Census Bureau, *Poverty Status in the Past 12 Months, American Community Survey 5-Year Estimates* (2016), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/S1701. See also Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, Pew Research Center, FACT TANK (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/> (stating that the poverty rate among the Standing Rock Sioux Tribe in North Dakota is 43.2 percent, which is almost triple the national average).

⁵⁴ See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://data.bls.gov/timeseries/LNS14000000> (last accessed Sept. 24, 2018); Dedrick Asante-Muhammad, *Beyond Standing Rock: The Native American Economic Experience*, HUFFINGTON POST (Mar. 1, 2017), https://www.huffingtonpost.com/entry/beyond-standing-rock-the-native-american-economic_us_58b6e21de4b0e5fdf619792b; U.S. Senate Committee on Indian Affairs, *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country*, hearing transcript (Jan. 28, 2010), at 3, <https://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf>; Vincent Schilling, *Getting Jobbed: 15 Tribes With Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), https://newsmaven.io/indiancountrytoday/archive/getting-jobbed-15-tribes-with-unemployment-rates-over-80-percent-iAV-3u_770-C6fEcCc3fA/; Shelly Hagan, *Where U.S. Unemployment Is Still Sky-High: Indian Reservations*, BLOOMBERG, Apr. 5, 2018, <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations> (reporting that tribal water systems experienced approximately 60 percent more water-quality violations in the past decade than non-tribal water systems).

⁵⁵ USCCR, *A Quiet Crisis*, *supra* note 3, at 5.

⁵⁶ *Ibid.*

populations.⁵⁷ As this report will document, Native American programs and services continue to be underfunded at the federal level.

For the Commission's 2016 *A Quiet Crisis Update* briefing, NCAI submitted written testimony stating that the federal trust obligation is critical to the wellbeing of Indian Country.⁵⁸ Similarly, the American Indian Policy Review Commission, established in 1975 to conduct a comprehensive review of Indian affairs, noted in a 1977 report:

The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social wellbeing of the Indian people to a level comparable to the non-Indian society.⁵⁹

NCAI noted in its written statement to the Commission that tribes face the continued challenge of being able to govern effectively for the revitalization of Indian Country, as many tribes face “tremendous” economic need that is specifically due to adverse federal policies, and accordingly face challenges to finance their government services.⁶⁰ “While tribal leaders pursue solutions for tribal authority to provide government revenue,” NCAI wrote, “the fulfillment of trust and treaty obligations remains of utmost importance to the wellbeing of American Indian and Alaska Native people.”⁶¹

Population, Location, and Socioeconomic Status of Native Americans

Native Americans are often referred to as the “invisible minority,” because of their small population numbers that are not always tracked by the federal government.⁶² Advocates report a critical need for more accurate data collection for the Native American population, which includes the need for disaggregation of data about Native American populations.⁶³ According to them,

⁵⁷ Ibid.

⁵⁸ NCAI Statement, *supra* note 46, at 2.

⁵⁹ American Indian Policy Review Commission, *Final Report to Congress*, (May 17, 1977), 130, <https://files.eric.ed.gov/fulltext/ED164229.pdf>.

⁶⁰ NCAI Statement, *supra* note 46 at 2.

⁶¹ Ibid.

⁶² USCCR, *A Quiet Crisis*, *supra* note 3, at 7.

⁶³ See, e.g., NCAI, “Data Disaggregation: The Asterisk Nation,” <http://www.ncai.org/policy-research-center/research-data/data> (last accessed July 17, 2018); NCAI Policy Research Center, *Federal Data Collection in American Indian/Alaska Native Communities* (undated), 1, <https://www.fws.gov/nativeamerican/pdf/tek-federal-data.pdf>; Urban Indian Health Commission, *Invisible Tribes: Urban Indians and Their Health in a Changing World*, October 2007, at 2, <https://www2.census.gov/cac/nac/meetings/2015-10-13/invisible-tribes.pdf>; U.S. Dep’t of the Interior, Office of Policy Analysis, *2016 American Indian and Alaska Native Data Workshop Summary Report* (November 2016), 2–3, https://www.doi.gov/sites/doi.gov/files/uploads/indian_data_workshop_summary_report_final_draft_3_20_2017.pdf; Chase Sackett, U.S. Dep’t of Housing and Urban Development, Office of Policy

accurate data collection produces data that capture the community's true needs, and "thus can drive larger programmatic funding resulting in a cost-effective use of federal resources."⁶⁴ But as NCAI notes, Native Americans can be described as the "Asterisk Nation" because "an asterisk, instead of a data point, is often used in data displays when reporting racial and ethnic data due to various data collection and reporting issues, such as small sample size, large margins of error, or other issues related to the validity and statistical significance of data on American Indians and Alaska Natives."⁶⁵ NCAI opines that Native Hawaiians also experience their own host of data collection and reporting issues. Native Hawaiians often get grouped with other Asians, but they have a unique history as indigenous people, and experience unique challenges that differentiate them; therefore, many advocates and scholars have highlighted the need for disaggregated data about Native Hawaiians.⁶⁶

Another layer of complexity regarding Native American populations stems from the issue of identity in Native American communities. The ability to define tribal membership is an issue that has been continuously and contentiously debated among scholars, researchers, advocates, policymakers, and Native American individuals.⁶⁷ Identity for Native Americans can be seen as both membership in a political entity as well as a race, and the two are intertwined in the current legal definitions of tribes.⁶⁸ Courts have acknowledged the legal status of Native Americans as both a set of sovereign political entities and as a racial group with constitutionally guaranteed rights to equal protection.⁶⁹ The Supreme Court has repeatedly held that "classifications singling

Development and Research, *Who Counts? Identifying Native American Populations*, EVIDENCE MATTERS (Spring 2015), <https://www.huduser.gov/portal/periodicals/em/spring15/highlight2.html>.

⁶⁴ NCAI, *Federal Data Collection in American Indian/Alaska Native Communities*, 1, <https://www.fws.gov/nativeamerican/pdf/tek-federal-data.pdf>.

⁶⁵ NCAI, "Data Disaggregation: The Asterisk Nation," <http://www.ncai.org/policy-research-center/research-data/data> (last accessed July 17, 2018). See also U.S. Census Bureau, *American Community Survey Design and Methodology* (January 2014), 29–30, https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf. The ACS attempts to achieve accuracy in data collection to produce reliable estimates of populations in American Indian areas, Alaska Native areas, Hawaiian homelands, and American Indian tribal subdivisions—including those with active and functioning governments—by "[sampling] these areas with smaller populations at higher rates relative to those areas with larger populations." Ibid.

⁶⁶ U.S. Dep't of Education, "Data and Statistics on Native Hawaiian and Pacific Islanders," <https://sites.ed.gov/aapi/data-and-statistics/> (last accessed Sept. 24, 2018); Jamaal Abdul-Alim, *Disaggregation Key to Fighting "Model Minority" Myth for Asian-Americans, Pacific Islanders and Native Hawaiians*, DIVERSE: ISSUES IN EDUCATION, (Oct. 31, 2011), 1, <http://diverseeducation.com/article/16585/>. See also 42 U.S.C. § 11702(a) (recognizing "special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship" between the U.S. government and the indigenous peoples of Hawaii).

⁶⁷ Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, J. ANTHROP. (2011), Article ID 549521, at 1, <https://www.hindawi.com/journals/janthro/2011/549521/cta/>.

⁶⁸ Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012). See also Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 9–13 (2013) (where the author states that, "It is impossible to avoid the fact that racial ancestry is critical to tribal membership criteria.").

⁶⁹ See *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974) (characterizing Congress's power to create an employment preference for Native Americans in the Bureau of Indian Affairs as grounded in federal legislative authority to govern on behalf of "quasi-sovereign" tribes according to the trust relationship). Case law subsequent to *Morton v. Mancari* has noted the inclusion of Native Americans as a racial minority in race-based classifications designed to

out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians."⁷⁰

The 2016 American Community Survey of the U.S. Census (ACS) showed that the total U.S. population was 323.1 million. Out of the total U.S. population, 2.6 million people identified as American Indian and Alaska Native alone. See Table 1. In addition, 2.9 million people identified as American Indian and Alaska Native, in combination with one or more other races in the U.S. Together, 5.5 million people identified as American Indian and Alaska Native, either alone or in combination with one or more other races in the U.S.⁷¹ See also Appendix B: Total American Indian and Alaska Native Alone or in Any Combination by Selected Tribal Groupings.

Despite being relatively small, the Native American population is growing rapidly. The total U.S. population grew by 14 percent from 281.4 million in 2000 to 323.1 million in 2016. See Table 1. In comparison, the American Indian and Alaska Native alone or in combination population increased by about 35 percent, more than twice as fast as the total U.S. population.

remedy past discrimination. *See also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995) (observing that “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities” were presumed disadvantaged by racial bias in a law challenged under the Fifth Amendment’s Due Process Clause); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (examining a law that defined minority groups as “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”). *See also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 566–68 (1996) (discussing Supreme Court jurisprudence that has reviewed Native Americans’ rights as members of sovereign tribes and as a distinct racial minority).

⁷⁰ *See, e.g., U.S. v. Antelope*, 430 U.S. 641, 645 (1977) (citing *Worcester v. Georgia*, 31 U.S. 515 (1832) and *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

⁷¹ *See* OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 FED. REG. 58,582 (Oct. 30, 1997). Federal standards on racial and ethnic data require a minimum of five racial categories, including American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. These standards “were developed in cooperation with Federal agencies to provide consistent data on race and ethnicity throughout the Federal Government. Development of the data standards stemmed in large measure from new responsibilities to enforce civil rights laws.” *See also* USCCR, *A Quiet Crisis*, *supra* note 3, at 1.

TABLE 1: Native American (American Indian and Alaska Native) U.S. Population Alone and/or in Combination with Other Races/Ethnicities and Total U.S. Population in 2000, 2010, and 2016

Race	2000	2010	2016
Total U.S. Population	281,421,906	308,745,538	323,127,515
American Indian and Alaska Native alone or in combination.	4,119,301	5,220,579	5,586,703
American Indian and Alaska Native alone.	2,475,956	2,932,248	2,676,399
American Indian and Alaska Native in combination.	1,643,345	2,288,331	2,910,304
American Indian and Alaska Native; White.	1,082,683	1,432,309	1,926,535
American Indian and Alaska Native; Black or African American.	182,494	269,421	333,113
American Indian and Alaska Native; White; Black or African American.	112,207	230,848	308,494
American Indian and Alaska Native; Some Other Race.	93,842	115,752	104,436
American Indian and Alaska Native; Asian.	52,429	58,829	37,046

Source: 2016 American Community Survey 1-Year Estimates; U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (January 2012), 4, <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.⁷²

⁷² The Commission has chosen to use data from the U.S. Census Bureau to provide information about the American Indian and Alaska Native self-identified population in the U.S., while recognizing the challenges that the Bureau has historically had in achieving an accurate count of this population. See Carol Chiago Lujan, *American Indians and Alaska Natives Count: The US Census Bureau's Efforts to Enumerate the Native Population*, 38 *The American Indian Quarterly* 3, 2014, http://go.galegroup.com/ps/i.do?v=2.1&it=r&sw=w&id=GALE%7CA381053736&prodId=AONE&userGroupName=tel_k_clarkhigh; see also U.S. Census Bureau, "Press Release: Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census" (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html ("Coverage of the American Indian and Alaska Native population varied by geography. American Indians and Alaska Natives living on reservations were undercounted by 4.9 percent, compared with a 0.9 percent overcount in 2000. The net error for American Indians not living on reservations was not statistically different from zero in 2010 or 2000."). The U.S. Census Bureau has historically had challenges with achieving an accurate count of the American Indian/Alaska Native population, due to a number of factors including high mobility rates, a transient population, a mistrust of the federal government, geographical challenges, language barriers, and other methodological problems. Census data are used to determine things such as school district definitions, the allocation of Congressional seats in the House of Representatives, and the distribution of federal funds to tribal, state, and local governments for various programs in criminal justice, health care, education, housing, economic development, and others. Some tribes, for example, have been historically undercounted in the Census, and an inaccurate count of the American Indian/Alaska Native population can have serious implications for critical funding decisions for federal programs that serve Indian Country. The U.S. Census Bureau, however, has taken steps to address some of these challenges to achieve a more accurate count of the American Indian and Alaska Native population; IHS, *Trends in Indian Health*, *supra* note 49, at 10. Some federal agencies use alternate population estimates to calculate their service population. One example of

In 2016, the Native Hawaiian and Other Pacific Islander alone-or-in-combination population was 1.36 million in the U.S.,⁷³ increasing from 874,414 in 2000 and 1.22 million in 2010.⁷⁴ The Native Hawaiian and Other Pacific Islander alone-or-in-combination population increased 56 percent from 2000 to 2016, and 11.5 percent from 2010 to 2016. See Table 2.

this is IHS, that uses population data derived from the 2000 U.S. Census Population with Bridged-Race Categories to calculate mortality and nationality adjusted population rates for its service population. This report explains:

The 2000 Census allowed respondents to report more than one race category to describe their race. The birth and death certificates (vital events) used by the states for years 2007–2009 allow only a single race category to be reported. Vital event totals are used in the numerator and the 2000 Census bridged population is used as the denominator to produce the birth or death rates that occur in the population of interest. The denominator data are based on the 2000 Census bridge file, which re-categorizes responses to a single race where more than one race was reported. This corresponds to the single race categories used on birth and death certificates[.]

Corbrett Hodson, Congressional and Legislative Affairs, IHS, Email to the U.S. Commission on Civil Rights (Sept. 25, 2018) (on file). IHS has explained further that Census data may include individuals who are not eligible for IHS health care services (as the IHS service population is estimated at 2.2 million American Indians and Alaska Natives that are members or decedents of members of federally recognized tribes), as many of these individuals “are members of state recognized tribes or individuals who have a relative who was an American Indian or Alaska Native but have no records of tribal enrollment.” Additionally, many American Indian and Alaska Native individuals identified in the Census data reside in urban areas, and most of IHS’ services are provided in geographic areas “on or near reservations.” Ibid. IHS further explained:

The IHS service population estimates are based on official U.S. Census Bureau county data, representing self-identified American Indian and Alaska Native people who may or may not use IHS services. The IHS service population is based on the 2000 Census bridged-race file and consists of American Indians and Alaska Natives identified to be eligible for IHS services. IHS service populations between census years are estimated using a smoothing technique in order to show a gradual transition between census years. This normally results in upward revisions to service population figures projected prior to a census, since each Census tends to do a better job in enumerating American Indian and Alaska Native people. IHS service populations beyond the latest census year with available data are projected through linear regression techniques, using the most current ten years of American Indian and Alaska Native birth and death data provided by the National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Ibid.

⁷³ U.S. Census Bureau, *Native Hawaiian and Other Pacific Islander alone or in combination with one or more other races*, 2016 American Community Survey 1-Year Estimates, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_1YR/B02012.

⁷⁴ U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2010* (May 2012), 4, <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

TABLE 2: Native Hawaiian and Other Pacific Islander U.S. Population Alone and/or in Combination with Other Races/Ethnicities and Total U.S. Population in 2000, 2010, and 2016

Race	2000	2010	2016
Total U.S. Population	281,421,906	308,745,538	323,127,515
Native Hawaiian and Other Pacific Islander alone or in combination.	874,414	1,225,195	1,366,322
Native Hawaiian and Other Pacific Islander alone.	398,835	540,013	595,986
Native Hawaiian and Other Pacific Islander in combination.	475,579	685,182	770,336
Native Hawaiian and Other Pacific Islander; White.	112,964	169,991	201,252
Native Hawaiian and Other Pacific Islander; Asian.	138,802	165,690	204,186
Native Hawaiian and Other Pacific Islander; White; Asian	89,611	143,126	175,587
Native Hawaiian and Other Pacific Islander; Some Other Race.	35,108	58,981	38,875
Native Hawaiian and Other Pacific Islander; Black or African American.	29,876	50,308	40,543

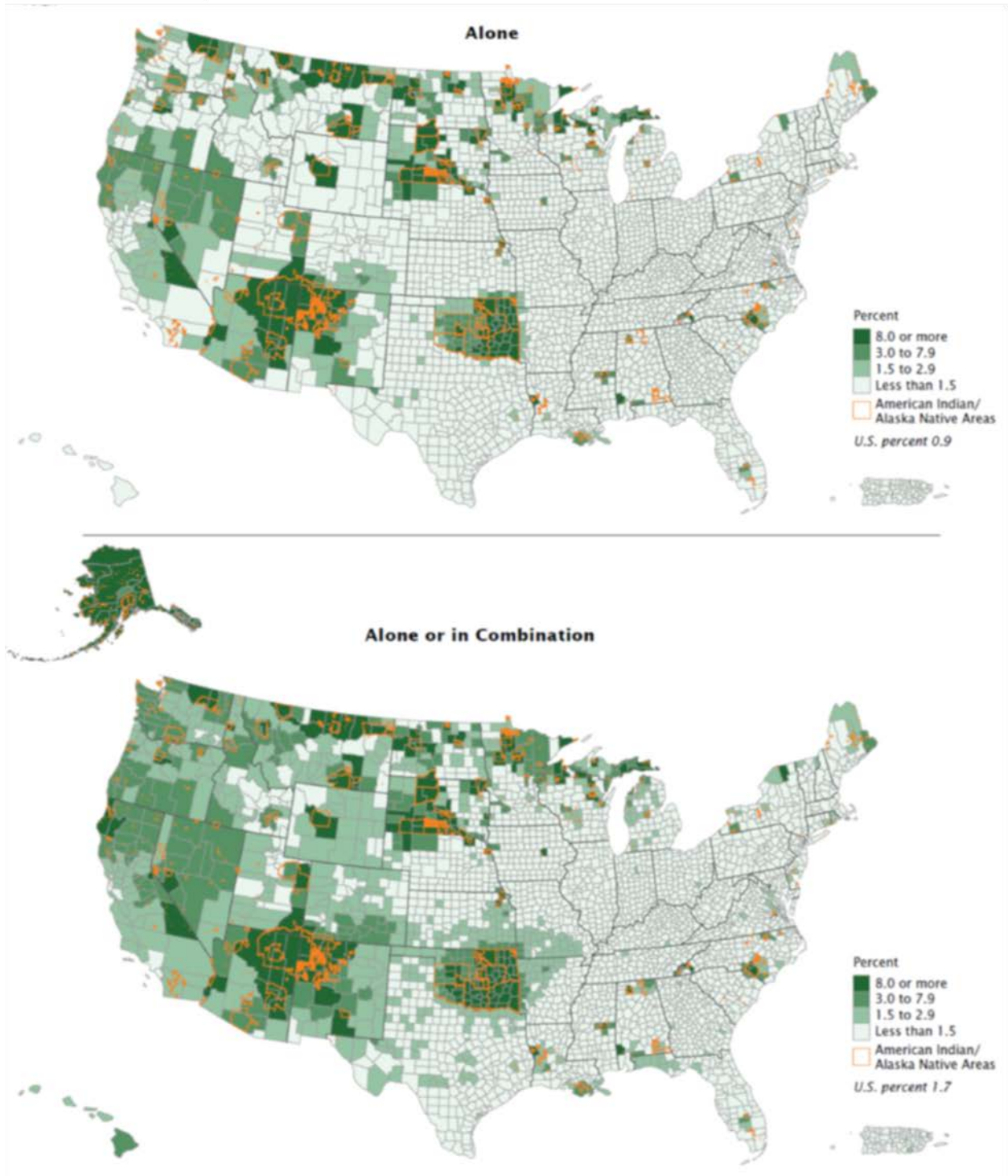
Source: 2016 American Community Survey 1-Year Estimates; U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2010* (May 2012), 4, <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

As of 2010, the American Indian and Alaska Native alone-or-in-combination population was highly concentrated in certain locations.⁷⁵ Of the 187 counties with relatively higher numbers of Native Americans, 55 (29 percent) were in Oklahoma, and most of the remaining counties were in the upper Midwest; the four corners area of the Southwest where Arizona, Colorado, New Mexico, and Utah meet; and in Alaska.⁷⁶ See Figure 1.

⁷⁵ U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (January 2012), 8, <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

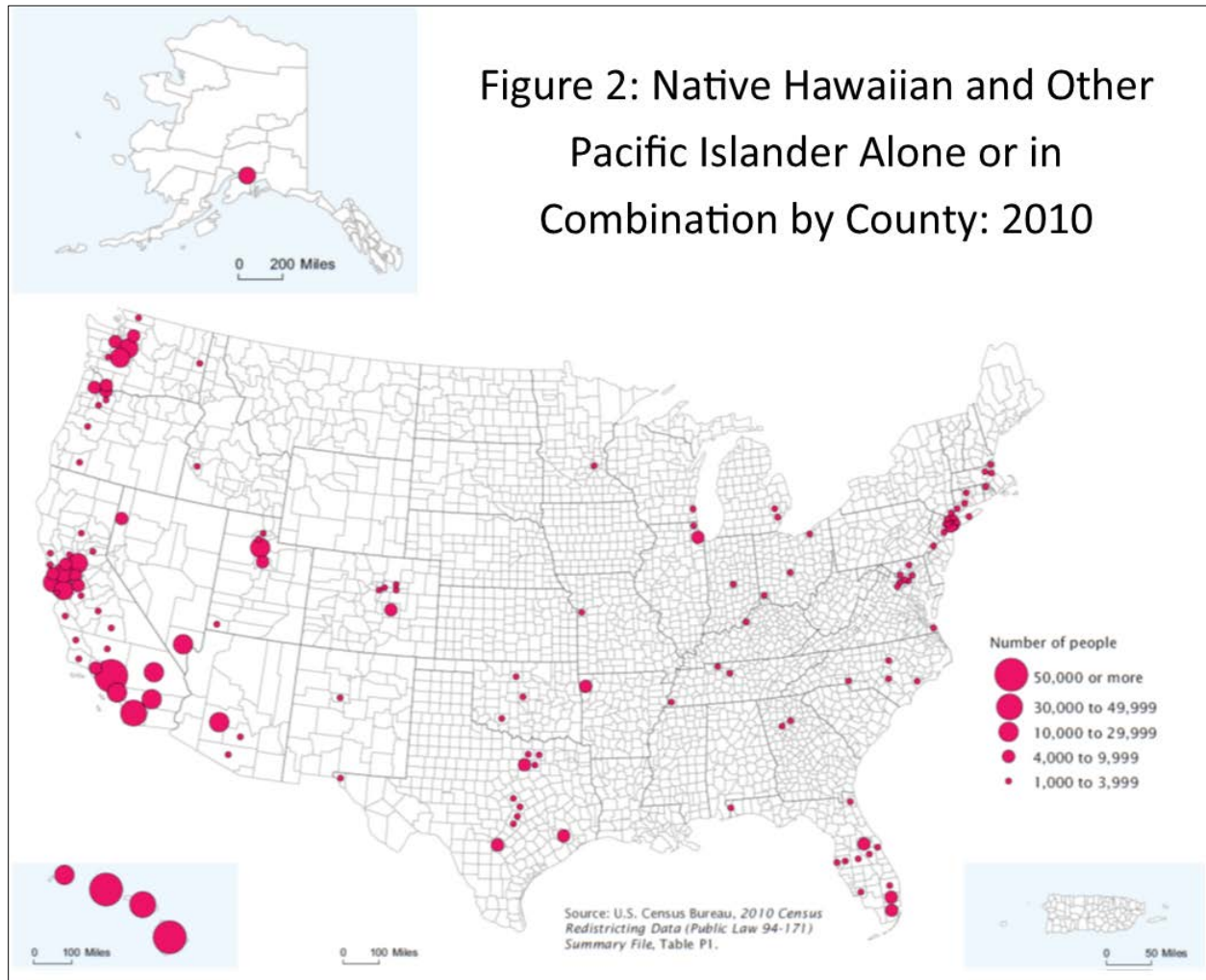
⁷⁶ Ibid.

Figure 1: American Indian and Alaska Native as a Percentage of County Population: 2010



Source: U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, January 2012, 8,
<https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

Similarly, the population of Native Hawaiians and Other Pacific Islanders was also highly concentrated as of 2010.⁷⁷ More than half (52 percent) of the Native Hawaiians and Other Pacific Islander alone-or-in-combination population lived in Hawaii and California.⁷⁸ Additionally, ten states (Hawaii, California, Washington, Texas, Florida, Utah, New York, Nevada, Oregon, and Arizona) represented over three-quarters of the U.S. Native Hawaiians and Other Pacific Islander population.⁷⁹ See Figure 2.



Source: U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2010*, May 2012, 8, <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

⁷⁷ U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2010* (May 2012), 7, <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

Overview of the Federal Budget for Native American Programs

Federal funding supports Native American programs in a number of areas, such as public safety, health care, education, housing, and economic development. More than 20 federal agencies provide services to Native Americans.⁸⁰ The primary agencies with responsibilities for Native American programs that have historically provided the largest amount of financial assistance are the U.S. Department of the Interior (DOI), the U.S. Department of Justice (DOJ), the U.S. Department of Health and Human Services (HHS), the U.S. Department of Education (ED), the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of Agriculture (USDA).⁸¹ These agencies and their roles with regard to the Native American community are discussed in more detail in later chapters of this report, while this section focuses on the overall federal budget process.

The federal budget process begins when the President submits a budget request to Congress, which then develops its own budget plan called the “budget resolution.” Congress next considers budget legislation through appropriations bills. The federal budget contains funding for both mandatory spending and discretionary spending. Mandatory funding represents about two-thirds of the overall budget and is required to support programs like Medicare, Social Security, and Medicaid. Discretionary funding is left up to Congress each year and supports defense, education, some low-income assistance, transportation, and other programs and services.⁸²

The term “set-aside” is used by federal agencies and in this report to identify funds allocated to Native American programs from funding for programs available to all populations.⁸³ For example, a program may be funded at \$100 million; from the \$100 million the amount of \$5 million or 5 percent might be specifically targeted or set aside for Native American individuals, governments, or organizations.⁸⁴

⁸⁰ These federal agencies include the U.S. Department of the Interior (DOI), under which the Bureau of Indian Affairs (BIA) and the Bureau of Indian Education (BIE) are housed; the U.S. Department of Justice (DOJ), under which the Office of Tribal Justice (OTJ) is housed; the U.S. Department of Health and Human Services (HHS), under which the Indian Health Service (IHS) is housed; the U.S. Department of Education (ED); the U.S. Department of Housing and Urban Development (HUD); the U.S. Department of Agriculture (USDA); the U.S. Department of Commerce, under which the U.S. Census Bureau and the National Oceanic and Atmospheric Administration are housed; the U.S. Department of the Treasury; the U.S. Department of Energy; the U.S. Department of Transportation; the U.S. Environmental Protection Agency; the U.S. Department of Labor; the U.S. Department of Homeland Security, under which the Federal Emergency Management Agency (FEMA) is housed; the U.S. Department of Defense; the U.S. Department of Veterans Affairs; the Small Business Association; the Federal Communications Commission (FCC); the U.S. Equal Employment Opportunity Commission; the National Science Foundation; the White House Council on Native American Affairs; and other agencies.

⁸¹ USCCR, *A Quiet Crisis*, *supra* note 3, at 11.

⁸² For an overview of the federal budgeting process, *see* Center on Budget and Policy Priorities, *Introduction to the Federal Budget Process* (Aug. 23 2017), <https://www.cbpp.org/sites/default/files/atoms/files/3-7-03bud.pdf>.

⁸³ *Ibid.*

⁸⁴ *See* Christopher D. Boesen, National American Indian Housing Council, Testimony before the Senate Committee on Indian Affairs, Feb. 23, 2000 (discussing examples of Native American funding set-asides).

Typically, federal programs that are funded through annual appropriations may have obligations to use those funds at the start of the fiscal year, however, certain programs may experience a delay in the availability of their funding until after the start of the fiscal year (October 1) or in subsequent fiscal years.⁸⁵ According to the Tribal Self-Governance Communication and Education Consortium (SGCE), delayed funding can have a significant impact upon program planning and operations, including budgeting, recruitment, retention, service delivery, facility maintenance and construction.⁸⁶ The SGCE provides technical assistance to the Office of Self-Governance (within DOI) and the Office of Tribal Self-Governance (within HHS).⁸⁷ As an example of how delayed funding can adversely affect the provision of services, the SGCE noted in its strategic plan that “[p]roviding sufficient, timely, and predictable funding is needed to ensure the federal government meets its obligation to provide health care for American Indians and Alaska Natives.”⁸⁸

The Indian Self-Determination and Education Assistance Act (Self-Determination Act) requires the HHS Secretary and DOI Secretary to consult with and solicit the participation of Indian tribes and tribal organizations annually in developing the budget for IHS and BIA.⁸⁹ The participation of Indian tribes and tribal organizations is sought in formulating annual budget requests, which the Secretary then submits to the President for submission to Congress.⁹⁰ The HHS also conducts annual budget consultation meetings with Indian tribes.⁹¹ Within the IHS specifically, the Budget Formulation Workgroup prepares tribal budget recommendations based on consultation meetings with the tribes.⁹² In addition, tribal leaders and federal officials within the Tribal-Interior Budget Council collaborate to develop annual budget requests for Indian programs in DOI.⁹³

In FY 2019, the total amount of federal funding requested for programs serving tribes and Native American Communities across over twenty federal agencies and sub-agencies was approximately

⁸⁵ Congressional Research Service, *Advance Appropriations, Forward Funding, and Advance Funding: Concepts, Practice, and Budget Process Considerations* (Oct. 8, 2015), <https://fas.org/sgp/crs/misc/R43482.pdf>.

⁸⁶ Tribal Self-Governance Communication and Education Consortium (SGCE), *National Tribal Self-Governance—A Legacy for the Future: National Tribal Self-Governance 2015–2017 Strategic Plan and Priorities* (Mar. 26, 2015), 12, <http://www.tribalseg.gov.org/wp-content/uploads/2017/04/17-19-SG-Strategic-Plan-online.pdf> [hereinafter Tribal Self-Governance Communication and Education Consortium, *National Tribal Self-Governance 2015–2017 Strategic Plan and Priorities*].

⁸⁷ Tribal Self-Governance Communication and Education Consortium, “About SGCE,” <https://www.tribalseg.gov.org/about-sgce/> (last accessed July 17, 2018).

⁸⁸ Tribal Self-Governance Communication and Education Consortium, *National Tribal Self-Governance 2015–2017 Strategic Plan and Priorities*, *supra* note 86, at 12.

⁸⁹ 25 U.S.C. § 5325(i).

⁹⁰ *Id.*

⁹¹ U.S. Dep’t of Health and Human Services, *Tribal Consultation Policy* (Dec. 12, 2010), 7, 10, <https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf>; *see also* U.S. Dep’t of Health and Human Services, “Tribal Consultation,” <https://www.hhs.gov/about/agencies/iea/tribal-affairs/consultation/index.html> (last accessed Sept. 24, 2018).

⁹² U.S. Dep’t of Health and Human Services, Indian Health Service, “Tribal Budget Consultation,” <https://www.ihs.gov/budgetformulation/tribalbudgetconsultation> (last accessed Sept. 24, 2018).

⁹³ U.S. Dep’t of the Interior, “Tribal-Interior Budget Council (TIBC),” <https://www.bia.gov/as-ia/ocfo/tibc> (last accessed July 17, 2018).

\$20.0 billion.⁹⁴ This is a decrease from the FY 2018 enacted federal funding level of \$22.0 billion, and a slight increase from the FY 2017 enacted federal funding level of \$19.9 billion.⁹⁵

Scope, Methodology and Organization of Report

The report reviews the adequacy of federal funding for programs and services targeting “American Indians, Federally Recognized Indian Tribal Governments and Native American Organizations.”⁹⁶ This report focuses on quantifying unmet needs, which are the portion of basic needs among Native Americans that the government is supposed to provide for under the trust relationship but does not. In preparing this report, the Commission analyzed budgets of federal agencies that have financial assistance responsibilities for Native American nations. The analysis focused on the funding amounts for Native American programs after the *A Quiet Crisis* report, that being between fiscal years (FY) 2003 and 2018, as well as requests for FY 2019.⁹⁷ The federal fiscal year runs from October 1 through September 30, beginning the previous calendar year.⁹⁸ The Commission reviewed the amount the relevant Presidential Administrations requested and the amount Congress appropriated, conducted a literature review, and analyzed documents pertinent to the topic. The Commission has attempted to provide the most updated information for requested and appropriated funding levels for federal programs, as well as specific program updates, when the information is available. This report also incorporates testimony and findings from the Commission’s February 2016 briefing, *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*.⁹⁹

This report refers to dollar values in a few different ways, and discussions about funding levels and values will be appropriately noted throughout the report. “Actual funding” or “current dollars” both refer to the dollar amount appropriated in the year discussed.¹⁰⁰ “Adjusted funding” or “constant dollars” both refer to the dollar value after adjusting for inflation.¹⁰¹

To facilitate comparison across agencies, this report uses actual budget authority as the definitive amount of funding, unless otherwise noted. Budget authority is the amount that Congress determines an agency is allowed to spend for a given fiscal year.¹⁰² OMB defines budget

⁹⁴ U.S. Dep’t of the Interior, *FY 2019 Federal Funding for Programs Serving Tribes and Native American Communities*, 6, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2019nativeamericancrosscut.pdf>.

⁹⁵ Ibid.

⁹⁶ USCCR, *A Quiet Crisis*, *supra* note 3, at 9.

⁹⁷ FY 2019 funds had not yet been appropriated at the time the final draft of this report was prepared for the Commissioners’ vote.

⁹⁸ U.S. Senate, “Glossary Term: Fiscal Year,” https://www.senate.gov/reference/glossary_term/fiscal_year.htm (last accessed July 17, 2018).

⁹⁹ U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Announces Panelists for Briefing Related to *Quiet Crisis: Federal Funding and Unmet Needs In Indian Country, 2016 Update*” (Feb. 16, 2016), http://www.usccr.gov/press/2016/PR_QuietCrisis2016.pdf.

¹⁰⁰ USCCR, *A Quiet Crisis*, *supra* note 3, at 120.

¹⁰¹ Ibid.

¹⁰² See Jason J. Fichtner and Robert Greene, *Curbing the Surge in Year-End Federal Government Spending: Reforming “Use It or Lose It” Rules*, Mercatus Ctr. at George Mason Univ., Working Paper, September 2014, at 31;

authority as, “the authority provided by law to incur financial obligations that will result in outlays.”¹⁰³ This report also uses the term “program level” when it refers to an agency’s budget authority in addition to its receivables, such as payment for products, services, and interest. The term “requested appropriations” generally refers to the amount of funding proposed by the President based on an agency’s past spending, its future estimates, and expressed priorities.

As noted, this report is organized into five chapters: criminal justice, health care, education, housing, and economic development. Each chapter attempts to quantify the needs of Native American communities and to investigate a baseline of services being offered to determine if those needs are being met. Other relevant civil rights data, such as disparate criminal justice and educational outcomes, along with related historical and legal issues, are also addressed.

See also LEONARD YOO, *Closing the Black Fiscal Hole: Alternatives to the “Spend It or Lose It” Policy for Agency Discretionary Spending*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 339, 340–41, 346 (2017). Yoo explains that budget appropriations for each federal agency expire at the end of the fiscal year and cannot “roll over” into the next fiscal year. Thus, agencies typically rush to spend unexpended funds in the final months of each fiscal year. Despite the dearth of data on year-end agency spending, one study found that agencies tend to spend disproportionately higher percentages of their budgets in the final month of the fiscal year. *Id.* at 346–47.

¹⁰³ OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, *Preparation, Submission, and Execution of the Budget*, Circulation No. A-11, § 20.3, at 3 (July 2013), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Offices_of_Goodness/Office%20of%20Mgmt%20Budget,%20Exec.%20Office%20of%20the%20President,%20Circular%20No.%20A-11.pdf.

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CHAPTER 1: CRIMINAL JUSTICE AND PUBLIC SAFETY

Native Americans as a group suffer from one of the nation's highest rates of crime victimization. At the same time, the criminal justice system in Indian Country faces structural barriers and struggles to fully recognize tribal sovereignty. The additional failure to provide sufficient federal funding undermines the ability of tribal governments to provide criminal justice and public safety for their citizens.

A myriad of factors, such as jurisdictional limitations in the tribal criminal justice system¹⁰⁴ and discrimination,¹⁰⁵ contribute to the discouraging crime victimization statistics in Indian Country. According to DOJ crime statistics, Native Americans are the victims of violent crime at a rate of two times the national average.¹⁰⁶ Native American youth experience a violent crime rate of up to ten times the national average.¹⁰⁷ Native American women are ten times more likely to be murdered and four times more likely to be sexually assaulted than the national average.¹⁰⁸ There is also a disproportionate number of unresolved or unprosecuted cases involving Native American women who have been murdered or gone missing.¹⁰⁹ Due in part to the violent crime rates, the average life expectancy for Native American men on some Indian reservations is less than 50 years.¹¹⁰ Native Americans are also being killed in police encounters at a higher rate than any other racial or ethnic group.¹¹¹

¹⁰⁴ See *infra* notes 120-155; see also Lyndsey Gilpin, *Why Native American women still have the highest rates of rape and assault*, HIGH COUNTRY NEWS (June 7, 2016), <https://www.hcn.org/articles/tribal-affairs-why-native-american-women-still-have-the-highest-rates-of-rape-and-assault>.

¹⁰⁵ See, e.g., Germaine Omish-Lucero, *After Centuries of Discrimination, We Need to Help Native American Victims of Violence*, CAL HEALTH REP. (Apr. 17, 2018), <http://www.calhealthreport.org/2018/04/17/centuries-discrimination-need-help-native-american-victims-violence/>.

¹⁰⁶ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Victimization, 2012* (Oct. 2013), 7, <http://www.bjs.gov/content/pub/pdf/cv12.pdf>.

¹⁰⁷ Indian Law and Order Commission (ILOC), *A Roadmap For Making Native America Safer: Report to the President and Congress of the United States (Summary Presentation)* (May 2015), 4, <http://www.aisc.ucla.edu/iloc/report/files/Roadmap%20For%20Making%20Native%20America%20Safer%20-%20Washington%20DC%20May%202015.pdf> [hereinafter ILOC, *A Roadmap For Making Native America Safer*, 2015].

¹⁰⁸ *Ibid.*, 6; see also Rebecca A. Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209, 216, 244 (Fall 2010) (discussing the epidemic of sexual assault in Indian country and the impact to Native women).

¹⁰⁹ Graham Lee Brewer, *The crisis of murdered and missing Indigenous women*, HIGH COUNTRY NEWS (May 4, 2018), <https://www.hcn.org/articles/indian-country-news-the-crisis-of-murdered-and-missing-indigenous-women>; *At Women's Marches, a spotlight on missing and murdered Indigenous women*, PBS NEWS HOUR, (Jan. 21, 2018), <https://www.pbs.org/newshour/nation/at-womens-marches-a-spotlight-on-missing-and-murdered-indigenous-women>.

¹¹⁰ ILOC, *A Roadmap For Making Native America Safer*, 2015, *supra* note 107, at 39.

¹¹¹ Centers for Disease Control and Prevention, Center for Health Statistics, "Underlying Cause of Death 1999–2016," CDC WONDER Online Database, <http://wonder.cdc.gov/ucd-icd10.html> (using data from the "Multiple Cause of Death Files, 1999–2016," compiled from the Vital Statistics Cooperative Program); see also Stephanie Woodard, *The Police Killings No One Is Talking About*, IN THESE TIMES (Oct. 17, 2016), http://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html; Olugbenga Ajilore,

The statistics regarding the treatment of Native Americans in the criminal justice system are equally discouraging. NCAI reports that Native American youth are arrested at a rate two-to-three times that of other groups, and evidence suggests that Native American defendants in federal and state courts may receive harsher sentences than other groups.¹¹²

Compounding the problem of crime and victimization in Indian Country is the systematic underfunding of tribal law enforcement and criminal justice systems, as well as structural barriers in the funding and operation of criminal justice systems in Indian Country.¹¹³ Michael S. Black, then-Acting Assistant Secretary – Indian Affairs for DOI, testified before the Commission in 2016 that resources can make a significant difference to the reduction of violent crime in Indian Country:

One of the successful initiatives [the Tiwahe Initiative] we've had over this administration is the effort to reduce violent crime in our Native communities. Our goal was to attack four communities and reduce violent crime by 5 percent over a two-year period.

The results are showing that by applying the significant or necessary resources to these communities we were able to reduce violent crime over those communities by a total of 35 percent over a two-year period. We followed this through a third year, and by the end of the third year at those four communities we had been able to reduce violent crime by a total of 56 percent.¹¹⁴

Urban Institute, *Urban Wire: Crime and Justice, Native Americans deserve more attention in the police violence conversation* (Dec. 4, 2017), <https://www.urban.org/urban-wire/native-americans-deserve-more-attention-police-violence-conversation> [hereinafter Ajilore, *Native Americans deserve more attention in the police violence conversation*]; Elise Hansen, *The forgotten minority in police shootings*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html> [hereinafter Hansen, *The forgotten minority in police shootings*].

¹¹² NCAI, *Fiscal Year 2016 Budget Request: Promoting Self-Determination, Modernizing the Trust Relationship* (January 2015), 38, http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/FY2016_NCAI_Budget_Booklet.pdf [hereinafter NCAI, *Fiscal Year 2016 Budget Request*]; see also Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, JUST. Q., VOL. 30 No. 2 (2013), 310–39 (passim) (using U.S. Sentencing Commission data for fiscal years 2006–2008 to examine the comparative sentencing of Native Americans), <https://www.tandfonline.com/doi/abs/10.1080/07418825.2011.605072>; see also John Stanton, “From Gunshots to Alleged Rapes, A Toxic Legacy of Police Relations on a Wisconsin Reservation,” BUZZFEED (Jan. 9, 2018), https://www.buzzfeed.com/johnstanton/from-gunshots-to-alleged-rapes-a-toxic-legacy-of-police?utm_term=.uyYRQ6dQk#.in5MWo2WV (documenting several cases of women who have been assaulted or raped by white law enforcement officials while serving their sentences).

¹¹³ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 34–40, <http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/fy2016>.

¹¹⁴ Michael S. Black, then-Acting Assistant Secretary – Indian Affairs, U.S. Department of the Interior, *Testimony, Briefing Transcript*, p. 136; see also Dep’t of the Interior, press release, March 4, 2014, https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc1-025752.pdf (announcing Tiwahe Initiative to promote the stability and security of Native American families). We note the President’s proposed FY 2018 budget eliminated funding for this initiative. See U.S. Department of the Interior, Bureau of Indian Affairs, *Indian Affairs Bureau Highlights*, at BH-78, https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_bib_bh077.pdf (“The reductions largely reflect elimination of funding for the pilot programs for the Tiwahe Initiative.”).

The Commission notes that the Trump Administration proposed eliminating funding for the Tiwahe Initiative.¹¹⁵ The safety and wellbeing of Native Americans is a long-standing responsibility for the federal government, initiating from treaty obligations to provide for welfare of Native American peoples.¹¹⁶ The DOJ and BIA have legal obligations to support tribal justice systems in Indian Country,¹¹⁷ and to prosecute certain criminal offenses.¹¹⁸ The Commission believes improved data collection, research, crime reporting, and analysis are all crucial for upholding law and order in Indian Country. This data can help improve safety within Native American communities by more accurately informing policymakers about threats to the security of the community and, correspondingly, the needs of the community.¹¹⁹

Jurisdictional Complexity in Indian Country

Federal, state, and tribal governments all share jurisdictional authority for law enforcement and criminal justice in Indian Country. Although tribal jurisdictional authority is crucial for self-determination, the overlap among federal, state, and tribal authorities has been described as a “jurisdictional maze” that undermines the efficient administration of criminal justice and may lead to higher rates of crime in Native American communities.¹²⁰ The exercise of criminal jurisdiction in Indian Country depends on a variety of factors, including for example, “where the crime was

¹¹⁵ In FY 18, the Trump Administration proposed elimination of funding for the Tiwahe Initiative. U.S. Dep’t. of Interior, Bureau of Indian Affairs, *Indian Affairs*, at BH-79 (2018), (“The budget includes \$22.0 million for Tribal Courts, a reduction of \$6.0 million, which eliminates increases provided under the Tiwahe initiative.”). The Trump Administration’s FY 19 request repeated this proposal, noting that the FY 2018 Continuing Resolution still included funding for the initiative. U.S. Department of Interior, Bureau of Indian Affairs, *Indian Affairs*, BH-88, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_bib_bh081.pdf.

¹¹⁶ See *Morton*, 417 U.S. 535, 552 (stating that “the United States [has] assumed the duty of furnishing [] protection, and with it the authority to do all that was required to perform that obligation.”)(internal quotations omitted); see also *Worcester*, 31 U.S. 515, 548–54 (noting that “under the protection of the United States” “is found in Indian treaties generally”).

¹¹⁷ See the Tribal Law and Order Act (TLOA), H.R. 1924 (111th Cong.) § 202(a)(1) (“the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian Country”); see also Indian Law Enforcement Reform Act of 1990, 25 U.S.C. § 2802(d)(1) (establishing a branch within BIA’s Division of Law Enforcement with responsibility to provide assistance to tribal law enforcement, and to partner with federal law enforcement); Department of Justice, Office of the Inspector General, *Review of the Department’s Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010* (Dec. 2017), 4–11, <https://oig.justice.gov/reports/2017/e1801.pdf> [hereinafter DOJ, IG, *Review of Enforcement Efforts*] (setting out DOJ and BIA’s respective law enforcement responsibilities to tribal communities in Indian Country).

¹¹⁸ See General Crimes Act of 1817, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction over certain felony crimes); Tribal Law and Order Act of 2010, Pub. L. No. 111–211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.); see also U.S. Dep’t of Justice, “Office of Tribal Justice,” <https://www.justice.gov/otj> (last accessed July 18, 2018).

¹¹⁹ See DOJ, IG, *Review of Enforcement Efforts*, *supra* note 117, at 41–48, 50 (recommending that DOJ improve the collection and utilization of data collecting pursuant to the Tribal Law and Order Act).

¹²⁰ Indian Law and Order Commission (ILOC), *A Roadmap For Making Native America Safer: Report to the President and Congress of the United States* (November 2013), viii, 137, https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [hereinafter ILOC, *A Roadmap For Making Native America Safer*, 2013].

committed, whether or not the perpetrator is an Indian or non-Indian, whether or not the victim is Indian or non-Indian, and the type of crime committed.”¹²¹ Table 1.1 illustrates jurisdictional authority in Indian Country. Such complexity can lead to confusion about which system is responsible for prosecuting the crime and where a victim of a crime should turn for help and protection. The combination of these factors and the maze-like structure can lead to a lack of trust in the justice system for Native Americans.¹²²

Table 1.1: Criminal Jurisdiction in Indian Country Where Jurisdiction Has Not Been Conferred on a State

Identify of the Offender	Identity of the Victim	Jurisdiction
Indian	Indian	If the offense is listed in the Major Crimes Act, as amended, (18 U.S.C. § 1153), the tribal and federal government have jurisdiction; the states do not. If the offense is not listed in the Major Crimes Act, tribal jurisdiction is exclusive.
Indian	Non-Indian	If the offense is listed in the Major Crimes Act, the tribal and federal government have jurisdiction; the states do not. If the offense is not listed in the Major Crimes Act, under the General Crimes Act (18 U.S.C. § 1153) the tribal and federal governments have jurisdiction; the states do not.
Non-Indian	Indian	Federal jurisdiction is exclusive; tribal and state governments do not have jurisdiction.
Non-Indian	Non-Indian	States have exclusive jurisdiction; tribal and federal governments do not have jurisdiction.

Source: U.S. Attorney’s Manual and the U.S. Government Accountability Office analysis of relevant statutory provisions. See: U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts* (February 2011), 8, <https://www.gao.gov/new.items/d11252.pdf>.

At a recent briefing of the Commission’s South Dakota State Advisory Committee on July 25, 2018, Barry Thompson, the Vice Chair of the Crow Creek Sioux Tribe, offered testimony during the public comment period on how this jurisdictional complexity can result in disparities in the legal consequences between Native American and non-Native offenders.¹²³ He described racial harassment incidents where non-Native students shot bullets over the heads of Native student athletes after a high school game, and non-Native aggressors received merely a slap on the wrist whereas “if the shoe was on the other foot, what if they came to Crow Creek, some of our kids did that to their players, they probably would end up locking them up and throwing away the key.”¹²⁴ He summed up the concern: “[W]e talk about civil rights. . . . Those violations have been happening for years, for decades. . . . [A]nd yet still nothing is being done. I guess as the Vice-

¹²¹ *Ibid.*, viii.

¹²² *Ibid.*, viii–ix.

¹²³ Barry Thompson, Vice-Chairman, Crow Creek Sioux Tribe, Testimony, Briefing Before the South Dakota Advisory Committee, U.S. Comm’n on Civil Rights, July 25, 2018, pp. 82–88 [hereinafter South Dakota SAC, *July 25 Briefing Transcript*].

¹²⁴ *Ibid.*, 83–84.

Chairman of the Crow Creek Sioux Tribe, I worry about those things every day for our kids.”¹²⁵ Also, toward the end of the same day, Harold Frazier, the Chairman of the Cheyenne River Sioux Tribe, testified to this point, noting that “If an Indian harms a non-Indian it’s federal. If . . . a non-Indian harms an Indian it’s local. So that’s the point. There should be fairness in the judicial system, but it’s not happening. . . . [The federal government] promised to protect our people, and that’s why I think the feds should be involved.”¹²⁶

These disparities seem to occur despite federal laws enacted over the years that provide the framework for criminal jurisdiction in Indian Country. The General Crimes Act of 1817 imposed federal criminal laws on Indian Country, and established federal criminal jurisdiction over many cases where either the victim or alleged offender is Native American.¹²⁷ The General Crimes Act did not confer federal jurisdiction where both parties are Native American, in which case the tribal courts retain jurisdiction.¹²⁸ Further, the Supreme Court ruled in 1882 that the state has exclusive jurisdiction when a covered crime by a non-Indian against another non-Indian occurs in Indian Country.¹²⁹ The Indian Major Crimes Act of 1885 (Major Crimes Act) expanded federal criminal jurisdiction (excluding state jurisdiction) in Indian Country to Native Americans charged with certain felony-level offenses or “major crimes” regardless of the victim’s identity.¹³⁰ In 1953, “Public Law 280” transferred criminal jurisdiction over Indian Country from the federal government to six state governments—California, Minnesota, Nebraska, Oregon, Wisconsin, and, later, Alaska.¹³¹ Public Law 280 applied to offenses covered under the General Crimes Act and the Major Crimes Act in these states, subjecting Native Americans to prosecution for federal crimes in state courts.¹³² According to Professor Robert Anderson, who directs the University of Washington’s Native American Law Center, this transfer of criminal jurisdiction over Indian

¹²⁵ *Ibid.*, 86.

¹²⁶ Harold Frazier, Cheyenne River Sioux Tribe, Testimony, South Dakota SAC *July 25 Briefing Transcript*, p. 133.

¹²⁷ See 18 U.S.C. § 1152 (codifying the General Crimes Act, also known as the Federal Enclaves Act or Indian Country Crimes Act, as amended) (specifying federal jurisdiction, defined in 18 U.S.C. § 7, and providing exceptions to this rule where tribal laws still govern).

¹²⁸ *Id.* (“This section shall not extend to offenses committed by one Indian against the person or property of another Indian”).

¹²⁹ *U.S. v. McBratney*, 104 U.S. 621 (1882).

¹³⁰ See 18 U.S.C. § 1153 (codifying the Major Crimes Act, as amended). The enumerated “major crimes” that subject a Native American offender in Indian Country to federal jurisdiction, even when the victim is Native American, are murder; manslaughter; kidnapping; maiming; felony provisions of the Sexual Abuse Act of 1986; incest; assault with intent to commit murder; assault with a dangerous weapon; assault resulting in serious bodily injury; assault against an individual who has not attained the age of 16 years; felony child abuse or neglect; arson; burglary; robbery; and felony larceny, theft, and embezzlement. Generally, for other crimes committed by Native Americans in Indian Country, jurisdiction is left to the state.

¹³¹ Pub. L. No. 83-280 (1953), which has become known as “Public Law 280,” is codified as amended in 18 U.S.C. § 1162, and scattered sections in Titles 25 and 28 of the U.S.C. It conveyed jurisdiction over crimes involving Native Americans to six state governments with substantial Native American populations, and voided the provisions of the General Crimes Act and the Major Crimes Act in those states. Note that later, tribes in the subject states who wished could seek to reinvoke federal jurisdiction to enforce criminal law, as opposed to relying solely on state or tribal jurisdiction. 18 U.S.C. § 1162(d).

¹³² 18 U.S.C. § 1162; see also Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. NO. 1564 (2016) at 1587 n.113, <https://www.uclalawreview.org/wp-content/uploads/2016/08/Riley-63-6.pdf>.

Country from the federal government to various state governments occurred without the consent of tribal governments and national Indian organizations, who largely opposed it.¹³³ The Tribal Law and Order Act of 2010 (TLOA) amended the statute to allow tribes to request federal jurisdiction over those crimes, but only with the consent of the U.S. Attorney General.¹³⁴

The TLOA also created the Indian Law and Order Commission (ILOC), an all-volunteer presidential and congressional advisory group.¹³⁵ In 2013, ILOC released a comprehensive report on the judicial and law enforcement systems of Indian Country, containing specific proposals to enhance safety and justice in Native American communities.¹³⁶ In addressing the complexity resulting from the jurisdictional interplay among federal, state, and tribal governments in Indian Country, ILOC concluded that “criminal jurisdiction in Indian Country is an indefensible morass of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions and without the consent of Tribal nations.”¹³⁷ ILOC noted that the potential for delays, miscommunications, and policy gaps stemming from the jurisdictional overlap of federal, state, and tribal justice systems in Indian Country might threaten public safety and lead to higher rates of crime.¹³⁸ For example, law enforcement is undermined when state authorities delay in turning over criminal suspects to tribal authorities, or when state authorities fail to share criminal history records or evidence obtained during investigations with their tribal counterparts. Further, the question of which jurisdiction—federal, state, or tribal—has authority over a criminal investigation may be difficult to determine when it is not immediately known if the victim or suspect are Native American, and evidence may be lost during the process of determining which governmental authority has jurisdiction over a matter.¹³⁹ ILOC concluded that the “extraordinary

¹³³ Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 945 (2012). *See also United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (noting that “Indian tribes were critical of Pub. L. 280 because section 7 authorized the application of state law to tribes without their consent and regardless of their needs or circumstances.”). Fifteen years at the passage of Pub. L. No. 280, in 1968, Congress repealed the provision of the law that “allowed states to acquire jurisdiction without tribal consent.” Anderson, *Negotiating Jurisdiction*, 87 Wash L. Rev. at 945.

¹³⁴ *See* 18 U.S.C. § 1162(d).

¹³⁵ 25 U.S.C. § 2812; *see also* Indian Law and Order Commission, <https://www.aisc.ucla.edu/iloc/> (last accessed July 18, 2018) (stating that ILOC was created pursuant to the TLOA to “help with the greatest challenges to securing equal justice for Native Americans living and working on Indian lands.” Also, TLOA directed the ILOC to conduct a comprehensive study of judicial and law enforcement systems in Indian country and to report back to the President and Congress “with specific proposals to make Indian country safer and more just.”).

¹³⁶ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at viii.

¹³⁷ *Ibid.*, ix.

¹³⁸ *Ibid.*, 4.

¹³⁹ *Ibid.*, 9–10, 71–75; *see also* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward A Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 694–95 (2009) (stating that “determining which government has jurisdiction over a crime committed in Indian Country is no simple matter . . . [Given] that criminal perpetrators naturally try to hide their identities (and in these circumstances may also try to hide their races), the considerable difficulty in bringing criminals to justice is not surprising.”).

waste of governmental resources resulting from the Indian Country ‘jurisdictional maze’ can be shocking, as is the cost in human lives.”¹⁴⁰

ILOC also found that the top-down imposition of federal and state judicial systems on Indian Country might lead Native Americans to view those “outside” institutions of criminal justice as illegitimate.¹⁴¹ ILOC explained that “because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy.”¹⁴² This is in part because the system of criminal justice imposed on Indian Country by federal and state authorities, according to ILOC, is viewed by Native Americans as being both geographically and culturally distant.¹⁴³ Federal courthouses are often great distances from reservations, requiring many crime victims and witnesses to travel far from home at their own expense.¹⁴⁴ Geographic distance may also affect the composition of jury pools for Native American defendants, thus imperiling the right of Native Americans to be tried by a true jury of their peers.¹⁴⁵

Some research indicates that Native Americans are also sentenced more harshly than white, African-American, and Latino defendants in federal courts.¹⁴⁶ A review of the U.S. Sentencing Commission’s data from fiscal years 2006 to 2008 revealed such disparities and spotlighted the particularly severe sentences imposed on young Native American men.¹⁴⁷ Likewise, research on felony incarceration in the State of Minnesota found that “Native Americans [were] receiving harsher treatment in sentencing decisions” than other racial groups.¹⁴⁸

Based on these findings and other studies suggesting sentencing disparities, DOJ recommended that a Tribal Issues Advisory Group formally investigate criminal justice processes affecting Native American crime victims and defendants.¹⁴⁹ DOJ noted that a comprehensive analysis of

¹⁴⁰ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at viii.

¹⁴¹ *Ibid.*, 4, 17.

¹⁴² *Ibid.*, 4.

¹⁴³ *Ibid.*; see also Aaron F. Arnold et. al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 808 (2011) (pointing out that some tribal members view certain features of the federal and state adjudication systems as “inconsistent with basic cultural principles.”).

¹⁴⁴ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 4 (offering the example of Colorado, where “the two Indian nations headquartered within the state’s boundaries, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, are located between 7 and 10 hours’ drive across the Rocky Mountains from Denver, where the entire U.S. District Court is housed in a single Federal courthouse.”).

¹⁴⁵ *Ibid.* (claiming that “Native defendants often are not tried by a true jury of their peers. Federal and State jury pools are drawn with little consideration of where Native people live and work.”).

¹⁴⁶ See, e.g., Franklin, *supra* note 112 (using U.S. Sentencing Commission data for fiscal years 2006–2008 to examine the comparative sentencing of Native Americans).

¹⁴⁷ *Ibid.*

¹⁴⁸ Keith A. Wilmot and Miriam A. Delone, *Sentencing of Native Americans: A Multistage Analysis Under the Minnesota Sentencing Guidelines*, 8 J. ETHNICITY CRIM. JUST. No. 3 (2010) 3, 8, 151, 172, <http://dx.doi.org/10.1080/15377938.2010.502821>.

¹⁴⁹ U.S. Attorneys Stewart and Purdon, letter to Chief Judge Patti B. Saris, the Chair of the U.S. Sentencing Commission (Oct. 20, 2014), 2, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public->

sentencing data was necessary to determine the extent, if any, of sentencing disparities among Native American defendants.¹⁵⁰ Even the mere perception of sentencing disparities, DOJ argued, would diminish Native Americans' confidence in the fairness of the legal process and impair the administration of justice in Native American communities.¹⁵¹ In its 2016 report, the Tribal Issues Advisory Group concluded that there is in fact a widespread perception among Native Americans, federal prosecutors, federal defenders, and some federal and state judges, that Native Americans are subject to sentencing disparities.¹⁵² The Advisory Group also noted that sentencing data "currently does not exist to conduct meaningful sentencing disparity analysis" for Native Americans, and recommended that changes be made in data collection to allow for an effective analysis of this disparity.¹⁵³

Indeed, as ILOC articulated:

The imposition of non-Indian criminal justice institution[s] in Indian Country extracts a terrible price: limited law enforcement; delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system and players unfamiliar with or hostile to Indians and Tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why the crime rate is so high in Indian Country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless.¹⁵⁴

Thus, the top-down approach to criminal justice that many Native Americans view as alien and illegitimate may result in higher rates of crime by discouraging victims and witnesses from coming forward, which in turn can be seen to encourage potential criminals to engage in lawless behavior.¹⁵⁵

[comment/20141020/public-comment-DOJ.pdf](#). The U.S. Sentencing Commission may call for such groups under 28 U.S.C. § 995 and its own Rule 5.4. *See, e.g.*, call for applications to a standing TIAG, 81 FED. REG. 58,003 (Aug. 24, 2016).

¹⁵⁰ U.S. Attorneys Stewart and Purdon, letter to Chief Judge Patti B. Saris, the Chair of the U.S. Sentencing Commission (Oct. 20, 2014), 2, <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20141020/public-comment-DOJ.pdf>.

¹⁵¹ *Ibid.*, 3.

¹⁵² U.S. Sentencing Commission, *Report of the Tribal Issues Advisory Group* (May 16, 2016), 15, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf.

¹⁵³ *Ibid.*, 27–28.

¹⁵⁴ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at ix.

¹⁵⁵ *Ibid.*, 5 (noting that, “[U]ltimately, the inequities of Federal and State authority in Indian country actually encourage crime. The [ILOC] Commission received extensive testimony from Indian[s] and non-Indians alike that Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation. Because Tribal members or relatives could be sent to prison or jail, which would have negative social and economic impacts on the family or local group, they will not bear witness against perpetrators.”).

Coordination between the U.S. Department of Justice and the Bureau of Indian Affairs

DOJ and BIA have several overlapping functions with regard to the funding and support of law enforcement and criminal justice programs in Indian Country. See Figures 1.1 and 1.2. Both governmental bodies have large, bureaucratic management structures for their Indian Country programming; both provide funding, training, and technical assistance for law enforcement, criminal investigation, prosecution, tribal courts, and detention; and both provide direct criminal justice services.¹⁵⁶ However, lack of communication and coordination between these two federal agencies has resulted in less than optimal results for Native American criminal justice and public safety. For example, DOJ has funded the construction of detention facilities in Indian Country—but upon completion, the facilities could not be staffed due to lack of funding in the BIA budget for facilities operation.¹⁵⁷ In another case, BIA and DOJ both provided funding for a computerized case management system that was never utilized because neither agency provided funds for training on the system.¹⁵⁸ Additionally, the U.S. Government Accountability Office (GAO) reports that BIA does not reliably share information with DOJ concerning its evaluations of tribal courts, and both agencies at times are unaware of unnecessary duplication in their tribal court training and technical assistance programs.¹⁵⁹ In assessing the overlapping functions of DOJ and BIA in relation to the funding and support of Indian Country criminal justice, ILOC concluded that “these arrangements create costly duplication, confusion concerning lines of accountability, and wasteful outcomes.”¹⁶⁰

¹⁵⁶ Ibid., 85.

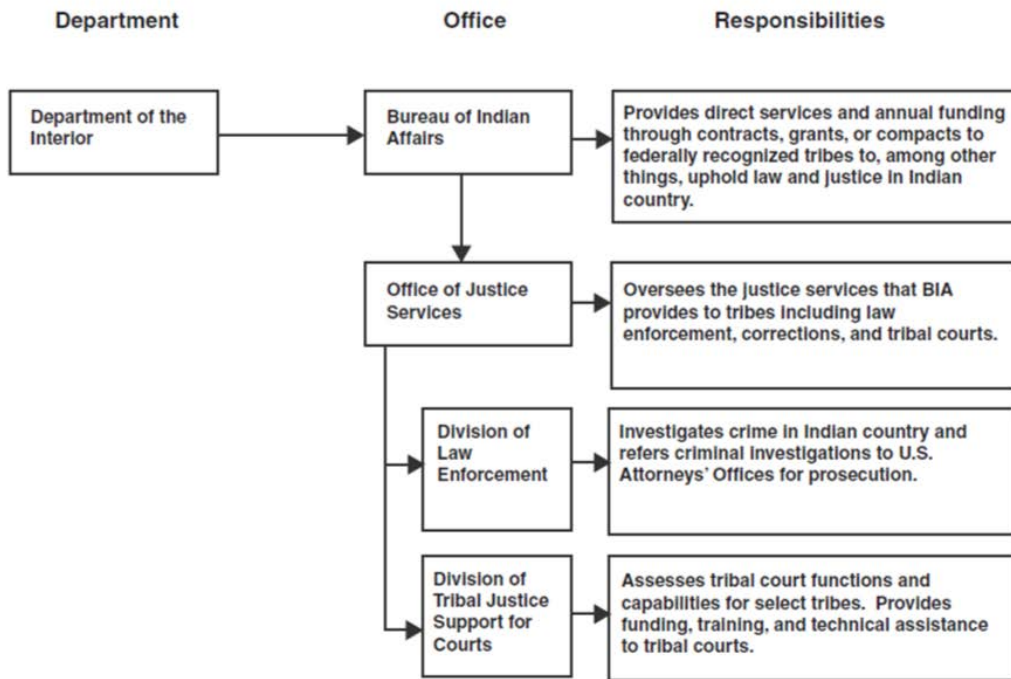
¹⁵⁷ Ibid., 87.

¹⁵⁸ Ibid.

¹⁵⁹ U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, 35 (Feb. 2011), <http://www.gao.gov/products/GAO-11-252> [hereinafter GAO, *Indian Country Criminal Justice*].

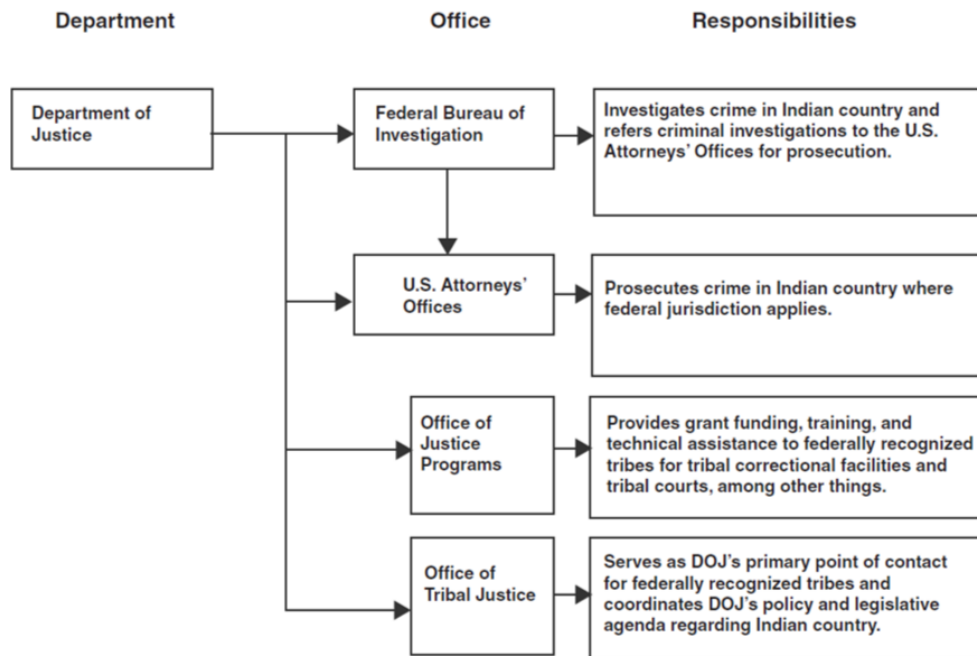
¹⁶⁰ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 85.

Figure 1.1: Overview of DOI Responsibilities to Support Tribal Justice Systems



Source: U.S. Government Accountability Office, Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts (February 2011), 10, <http://www.gao.gov/products/GAO-11-252>.

Figure 1.2: Overview of DOJ Responsibilities to Support Tribal Justice Systems



Source: U.S. Government Accountability Office, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts* (February 2011), 11, <http://www.gao.gov/products/GAO-11-252>.

Tribal Law and Order Act of 2010

In 2010, President Barack Obama signed into law the Tribal Law and Order Act of 2010 (TLOA).¹⁶¹ The stated purposes of the TLOA include “to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country.”¹⁶² Since its passing, the TLOA has reportedly “fostered greater self-determination and self-governance” in tribal justice systems.¹⁶³ The TLOA addresses all aspects of Indian Country criminal justice—including prevention, law enforcement, tribal courts, corrections, and rehabilitation.¹⁶⁴ For example, the enhanced sentencing authority provided by the TLOA allows tribal courts to impose a prison sentence of up to three years for certain criminal offenses,¹⁶⁵ an

¹⁶¹ Tribal Law and Order Act of 2010, Pub L. No. 111-211, 124 Stat. 2261 (July 29, 2010), (codified as amended in scattered sections of U.S.C. titles 18, 21, 25, 28, and 42, scattered sections (2018)). Initial information is provided at 25 U.S.C. § 2801, *et seq.*

¹⁶² 25 U.S.C. § 202(b)(3).

¹⁶³ Lawrence S. Roberts, Principal Deputy Assistant Secretary for Indian Affairs, U.S. Dep’t of the Interior, *Testimony to the Tribal Law and Order Act: Five Years Later: How Have the Justice Systems in Indian Country Improved?* (Dec. 2, 2015), 2, <https://www.doi.gov/ocl/tribal-justice-systems>.

¹⁶⁴ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 35.

¹⁶⁵ 25 U.S.C. § 1302(b).

increase from a previous one-year limitation.¹⁶⁶ This increased sentencing authority for tribal courts arose out of concerns that the one-year limit on prison sentences did not serve as an effective deterrent against criminal activity, and forced tribes to rely on the federal government to prosecute more serious crimes.¹⁶⁷ However, as of 2015, only 10 of 70 tribes surveyed had implemented the enhanced sentencing authority provided by the TLOA.¹⁶⁸

Another objective of the TLOA is to encourage greater intergovernmental cooperation and communication between federal, state, and tribal governments in fighting crime and ensuring public safety in Indian Country.¹⁶⁹ For example, it requires that relevant federal government agencies (DOJ and DOI in particular, as well as the Indian Health Service (IHS)) coordinate among themselves, as well as with tribal governments and any state government entities involved in Native American affairs.¹⁷⁰ The law also requires greater collection and reporting of crime data in Indian Country, and requires that DOJ and DOI develop a long-term plan to examine alternatives to incarceration in Indian Country.¹⁷¹ Community-based alternatives to incarceration, such as treatment or supervision programs that allow an offender to remain in the community, are viewed by tribal officials as more appropriate and effective, especially since many of the alleged offenders are confronting endemic poverty, isolation, and substance abuse.¹⁷² However, a survey of tribal

¹⁶⁶ For discussion, see generally U.S. Dep't of Justice, *Tribal Law and Order Act*, <http://www.justice.gov/tribal/tribal-law-and-order-act> (last accessed July 18, 2018); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, "Tribal Law and Order Act (TLOA)," https://www.bja.gov/ProgramDetails.aspx?Program_ID=88 (last accessed July 18, 2018); Michelle Rivard Parks, Tribal Judicial Institute, Univ. N. Dakota School of Law, *Tribal Law and Order Act: Enhanced Sentencing Authority* (July 2015), 2, <https://www.bja.gov/Publications/TLOAESAQuickReferenceChecklist.pdf>.

¹⁶⁷ GAO, *Indian Country Criminal Justice*, *supra* note 159, at 14, (elaborating on the purposes provided in 25 U.S.C. § 2801(b)).¹⁶⁸ NCAI, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing* (Oct. 5, 2015), http://tloa.ncai.org/documentlibrary/2015/10/Copy%20of%20July%2024%20Implementation%20chart%20-%20VAWA%20enhanced%20jurisdiction%20and%20TLOA%20enhanced%20sentencing_revised1.pdf.

¹⁶⁸ NCAI, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing* (Oct. 5, 2015), http://tloa.ncai.org/documentlibrary/2015/10/Copy%20of%20July%2024%20Implementation%20chart%20-%20VAWA%20enhanced%20jurisdiction%20and%20TLOA%20enhanced%20sentencing_revised1.pdf.

¹⁶⁹ Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (July 29, 2010) § 202(b)(2), codified in 25 U.S.C. § 2801, *et seq.*

¹⁷⁰ 25 U.S.C. § 2804. See also U.S. Dep't of Justice and U.S. Dep't of Interior, *Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems* (Aug. 2011), 8, 10–11, 15, 20, 39, <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf> (outlining examples of how these agencies must coordinate).

¹⁷¹ 25 U.S.C. § 2802(f). See also U.S. Dep't of Justice and U.S. Dep't of Interior, *Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems* (Aug. 2011), 10, <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf>.

¹⁷² U.S. Dep't of Justice and U.S. Dep't of Interior, *Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems* (Aug. 2011), 13, <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf> (citing the benefits of incarceration alternatives, including "[t]reating the root causes of criminal behavior, such as substance abuse, mental illness, and the impact of victimization, rather than treating only the symptoms of criminal activity.").

courts in 2010 revealed that securing and sustaining funding are significant impediments to the development of incarceration alternatives.¹⁷³

Also, according to GAO, the overwhelming majority of tribes (86 of the 109 tribes surveyed) cited funding limitations as a major obstacle to implementing their newly enhanced sentencing authority.¹⁷⁴ During a roundtable discussion focusing on the efficacy of the TLOA in February, 2016, including representatives from the federal government and local tribes, a recurring topic was how difficult it was to implement many of the new sentencing law's provisions due to a lack of funding. This concern clearly echoed that of many tribes previously surveyed by GAO.¹⁷⁵ While the TLOA does allow for the modest expansion of certain tribal justice development grant programs to pay for criminal defense services (e.g., salaries for defense counsel or other tribal court personnel), which the law requires as a necessary component of felony sentencing powers, these and other requirements add significant costs to the operation of a tribal justice system.¹⁷⁶ Meeting these requirements can be challenging, because there has been no increase in base funding for tribal courts, and the funding that is available is often inefficiently distributed.¹⁷⁷

Some tribes are also unclear about or unaware of their eligibility for the limited funding that is available, and how that funding that may help them to implement their new sentencing authority.¹⁷⁸ GAO found that because overall funding has not increased and is therefore scarce, some tribes might need to choose between meeting the TLOA requirements and shortchanging other programs, or completely forgoing their new felony sentencing powers.¹⁷⁹ The result is relinquishing authority to the federal government, while knowing that the federal criminal justice system is inefficient for Native Americans and, at times, even considered illegitimate by tribal communities.¹⁸⁰

Despite these challenges, some tribes have reported greater levels of collaboration between tribes and federal law enforcement since the passing of TLOA, noting improved communication and an

¹⁷³ Ibid., 16.

¹⁷⁴ U.S. Government Accountability Office, *Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds* (May 2012), 3, <http://www.gao.gov/products/GAO-12-658R> [hereinafter GAO, *TLOA Sentencing and Grants*].

¹⁷⁵ Tanya H. Lee, *Tribal Law and Order Act Five Years Later: What Works and What Doesn't*, INDIAN COUNTRY TODAY (Mar. 8, 2016), <https://indiancountrymedianetwork.com/news/politics/tribal-law-and-order-act-five-years-later-what-works-and-what-doesnt/>; see also GAO, *TLOA Sentencing and Grants*, *supra* note 174, at 3.

¹⁷⁶ Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 91, 97 (2013), <https://www.uclalawreview.org/pdf/discourse/61-7.pdf> [hereinafter Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*]; 25 U.S.C. § 3613(b) (addressing grants for criminal defense services). Tribal courts are not bound by Fifth Amendment due process guarantees and the Sixth Amendment right to counsel. Under the Indian Civil Rights Act of 1968, Native Americans have a right to counsel in criminal proceedings in tribal courts, but only at their own expense. See Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 319–20 (2013).

¹⁷⁷ Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, *supra* note 176, at 97–98 (discussing GAO findings).

¹⁷⁸ GAO, *TLOA Sentencing and Grants*, *supra* note 174, at 3.

¹⁷⁹ Ibid., 98.

¹⁸⁰ See *supra* notes 120-155 (discussing jurisdictional complexity in Indian Country).

increase in prosecutions.¹⁸¹ South Dakota offers one example of such greater collaboration: Leroy “J.R.” LaPlante, a Native American and the former state secretary of tribal relations, was recently hired as an Assistant U.S. Attorney to lead the Community Prosecution and Outreach Initiative, formed to address high crime rates in a number of tribal communities throughout Indian Country.¹⁸² South Dakota Governor Dennis Daugaard noted that LaPlante had done “important work of strengthening the bonds between state and tribal governments, and of building relationships with tribal leaders” as Secretary of Tribal Relations in South Dakota.¹⁸³

TLOA’s intent to promote collaboration and treatment-based alternatives to incarceration has been frustrated by a lack of treatment facilities for people with substance abuse disorders.¹⁸⁴ But partnering with other agencies with the resources to provide such treatment services could be helpful. For example, the Bureau of Prisons Tribal Law and Order Pilot Program reportedly worked well, because it provided rehabilitation services for substance abusers and sex offenders, as well as education and vocational training.¹⁸⁵

One issue that tribes continue to encounter, despite the passing of TLOA, is their courts’ inability to prosecute non-Indians. This is due to the 1978 Supreme Court decision *Oliphant v. Suquamish Indian Tribe*, which removed tribes’ authority to prosecute non-Indians for crimes committed on Indian lands.¹⁸⁶ Consequently, many non-Indian offenders can commit crimes in Indian Country without criminal consequences from tribal authorities.¹⁸⁷ This has led to a strained relationship between tribes and federal law enforcement.¹⁸⁸ Some tribes would like to see a complete *Oliphant* fix, with an expansion of tribal authority to include non-Indians.¹⁸⁹

In other respects, the TLOA has made strides to address the jurisdictional complexities and challenges of law enforcement in Indian Country with initiatives such as cross-deputization. The Tribal Liaison program, for example, appoints Assistant U.S. Attorneys to work with tribes.¹⁹⁰ Through cross-deputization, law enforcement officers at the state, county, and local levels can be

¹⁸¹ Nicole Iaci, Indian Law Resource Center, *Looking Ahead: The Tribal Law and Order Act Five Years Later and Beyond*, <http://indianlaw.org/safewomen/looking-ahead-tribal-law-and-order-act-five-years-later-and-beyond> (last accessed July 18, 2018).

¹⁸² Randy Dockendorf, *LaPlante Resigns As Sec. of Tribal Relations*, YANKTON DAILY PRESS AND DAKOTAN, Apr. 23, 2014, https://www.yankton.net/community/article_a77fd364-cb5e-11e3-be06-001a4bcf887a.html (last accessed Sept. 21, 2018).

¹⁸³ *Ibid.*

¹⁸⁴ See 25 U.S.C. § 2802(f); see also Lee, *Tribal Law and Order Act Five Years Later: What Works and What Doesn’t*, *supra* note 175.

¹⁸⁵ Iaci, *Looking Ahead: The Tribal Law and Order Act Five Years Later and Beyond*, *supra* note 181.

¹⁸⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204-05, 212 (1978). See also *Ibid.*

¹⁸⁷ Iaci, *Looking Ahead: The Tribal Law and Order Act Five Years Later and Beyond*, *supra* note 181.

¹⁸⁸ *Ibid.*

¹⁸⁹ Lee, *Tribal Law and Order Act Five Years Later: What Works and What Doesn’t*, *supra* note 175 (discussing a roundtable discussion by the Senate Committee on Indian Affairs on the TLOA, where “[s]everal panelists called for an *Oliphant* fix.”). The partial *Oliphant* fix included in the 2013 Violence Against Women Act is discussed *infra*.

¹⁹⁰ *Ibid.*

granted enforcement authority in Indian Country, which can enhance their ability to provide mutual aid to tribes within their jurisdiction.¹⁹¹ For example, Alfred Urbina, attorney general of the Pascua Yaqui tribe, noted that the teams of tribal, state and federal law enforcement personnel who coordinate to prosecute child abuse cases have worked well because all parties have access to the same information.¹⁹² Attorney General Urbina adds that this structure can help for planning in cases where it is appropriate to move cases from one venue to another.¹⁹³

The TLOA also served to address the victimization of women in Indian Country, who have experienced some of the highest rates of domestic abuse and sexual violence in the U.S. compared to any other demographic.¹⁹⁴ Native American women are the victims of violent crime at a rate three-and-a-half times greater than the national average.¹⁹⁵ Statistics reflect that one in three Native American women will be raped in their lifetimes.¹⁹⁶ As a result of TLOA, the IHS directed a pilot program to standardize sexual assault policies and protocols, which is designed to improve the collection of evidence and thus increase conviction rates.¹⁹⁷ However, critics argued that TLOA did not go far enough in creating programs to adequately address the demand, that implementation of TLOA provisions requires additional funding, and that the “jurisdictional labyrinth” remains as an outstanding obstacle to protecting Native American women against violence.¹⁹⁸

Violence Against Women Reauthorization Act of 2013

In part to address the national and tribal epidemic of violent crime against women, Congress enacted the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).¹⁹⁹ This important piece of legislation vests tribal nations with the jurisdictional authority to “investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country.”²⁰⁰ The law also clarifies the authority of

¹⁹¹ National Sheriff’s Association and Office of Community Oriented Policing Services, *Cross-Deputization in Indian Country* (2018), 1, <https://ric-zai-inc.com/Publications/cops-p363-pub.pdf>.

¹⁹² Lee, *Tribal Law and Order Act Five Years Later: What Works and What Doesn’t*, *supra* note 175; *see also* Jennifer Fahey et al., *Crime and Justice in Indian Country: A summary of talking circle findings and the Tribal Law and Order Act of 2010*, CRIME AND JUSTICE INSTITUTE (2011), 25, http://www.crj.org/assets/2017/07/32_Talking_Circles_Report_Final_Jul11.pdf.

¹⁹³ Lee, *Tribal Law and Order Act Five Years Later: What Works and What Doesn’t*, *supra* note 175.

¹⁹⁴ 25 U.S.C. § 2801(b); *see also* Dominique Daye Hunter, *What is the Tribal Law and Order Act? And Why Does it Matter?*, *supra* note 48; Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, *supra* note 48.

¹⁹⁵ *See* Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, *supra* note 48.

¹⁹⁶ *Ibid.*

¹⁹⁷ Daye Hunter, *What is the Tribal Law and Order Act? And Why Does it Matter?*, *supra* note 48.

¹⁹⁸ *Ibid.*

¹⁹⁹ Pub. L. No. 113-4, 127 Stat. 54 (2013).

²⁰⁰ U.S. Dep’t of Justice, “Violence Against Women Act (VAWA) Reauthorization 2013,” <http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0> [hereinafter DOJ, VAWA 2013] (last accessed July 18, 2018). *See also* 34 U.S.C. § 10441 (formerly 42 U.S.C. § 3796gg).

tribal nations to issue and enforce protection orders against Indians and non-Indians. In 2014, the tribal provisions and protections of VAWA 2013 were extended to Alaska Native women.²⁰¹

VAWA 2013 affirms the sovereign right of tribes to exercise “special domestic violence criminal jurisdiction” over both Indian and non-Indian defendants who engage in acts of domestic violence or dating violence.²⁰² VAWA 2013 created a partial fix to *Oliphant*, as it allows tribes to prosecute non-Native American defendants for domestic or dating violence, or violations of protection orders that occur in the Indian Country of the participating tribe.²⁰³ There are limitations, however, as VAWA 2013’s jurisdictional authority does not include sexual assault outside of the context of domestic violence, dating violence, or the violation of a protective order.²⁰⁴ Prior to the enactment of VAWA 2013, tribal judicial systems lacked criminal jurisdiction to prosecute non-Indian abusers of women.²⁰⁵

As of March 2018, 18 tribes had implemented VAWA’s special domestic violence criminal jurisdiction.²⁰⁶ In 2018, Congress appropriated \$4 million to the Office on Violence Against Women for grants to assist tribal governments in exercising special domestic violence criminal jurisdiction under VAWA 2013.²⁰⁷ For FY 2019, DOJ requested an additional \$1.5 million from the FY 2018 budget for the Tribal Domestic Violence Criminal Jurisdiction program, because VAWA 2013 authorized the U.S. Attorney General to award grants to tribal governments to assist their special domestic violence criminal jurisdiction activities.²⁰⁸ Finally, NCAI has noted that “VAWA funding streams are going to be critical to the success of tribal efforts to combat violence against women in their communities.”²⁰⁹

²⁰¹ Pub. L. No. 113-278, 128 Stat. 2988 (2014). *See also* Krista Langlois, *New law protects Alaska Native women*, HIGH COUNTY NEWS (Dec. 24, 2014), <https://www.hcn.org/articles/new-law-protects-alaska-native-women>.

²⁰² 25 U.S.C. § 1304.

²⁰³ 25 U.S.C. § 1304(a)-(b); *see also* Tribal Court Clearinghouse, Tribal Law and Policy Institute, *Introduction to the Violence Against Women Act*, http://www.tribal-institute.org/lists/title_ix.htm (last accessed July 18, 2018).

²⁰⁴ 25 U.S.C. § 1304 (including no discussion of sexual assault outside of the context of domestic violence, dating violence, or violations of protective orders); *see also* DOJ, *VAWA 2013*, *supra* note 200.

²⁰⁵ Jodi Gillette and Charles Galbraith, THE WHITE HOUSE, *President Signs 2013 VAWA—Empowering Tribes to Protect Native Women* (Mar. 7, 2013), <https://obamawhitehouse.archives.gov/blog/2013/03/07/president-signs-2013-ava-empowering-tribes-protect-native-women>.

²⁰⁶ NCAI, *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report* (Mar. 20, 2018), at 16, http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

²⁰⁷ Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat 348, Mar. 23, 2018, at 71, <https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf> [hereinafter *Consolidated Appropriations Act of 2018*].

²⁰⁸ 25 U.S.C. § 1304(f). *See also* U.S. Dep’t of Justice, Office on Violence Against Women, *FY 2019 Budget Request At A Glance*, at 2, <https://www.justice.gov/jmd/page/file/1033176/download>.

²⁰⁹ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 40.

Federal Funding

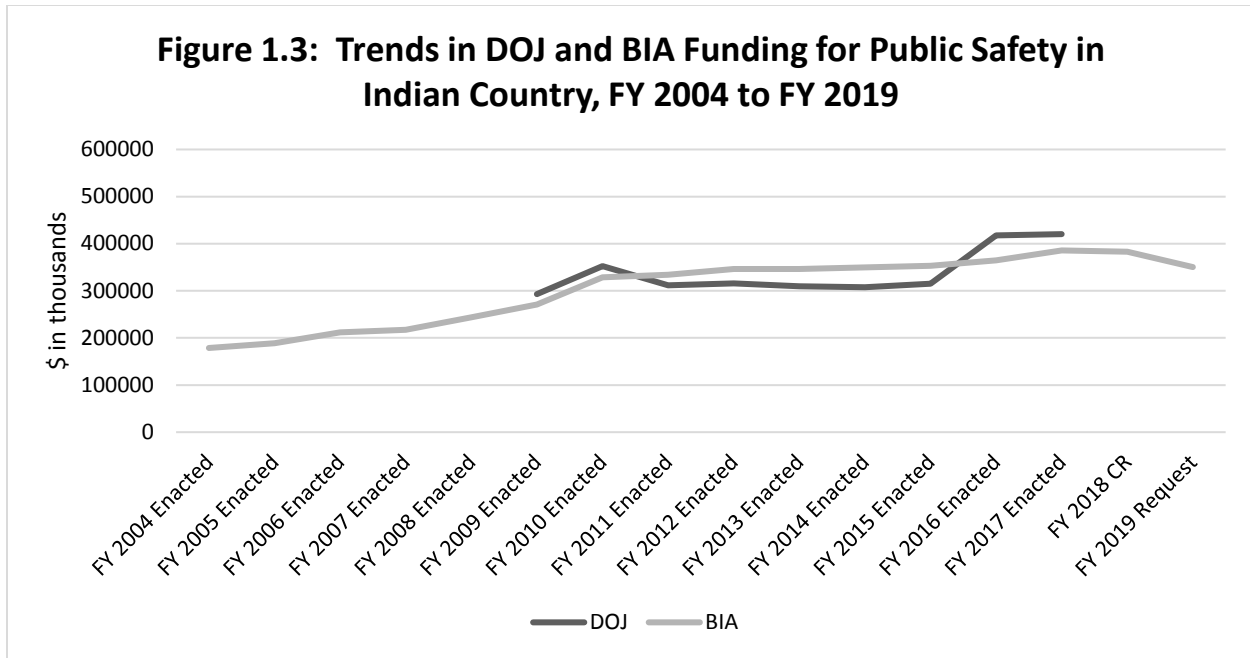
Indian Country receives federal funding for public safety and criminal justice programs from DOJ and from BIA, which is within DOI. BIA's Office of Justice Services (OJS) manages tribal law enforcement agencies, tribal corrections programs, and tribal court systems (see Figure 1.1, *supra*).²¹⁰ BIA special agents investigate crimes that occur in Indian Country and refer federal matters to U.S. Attorneys' Offices for prosecution as warranted. Likewise, several DOJ components provide support to tribal justice systems, including the FBI, which conducts criminal investigations; the U.S. Attorneys' Offices, which prosecute federal crimes in Indian Country; and the Office of Justice Programs (OJP), which enhances tribal court capabilities with grant funding, training, and technical assistance for federally recognized tribes (see Figure 1.2, *supra*).²¹¹ The President's budget for fiscal year 2019 requests \$486 million for DOJ public safety initiatives in Indian Country and \$350 million for BIA public safety and justice programs in Indian Country.²¹² Federal funding allocated by DOJ and BIA for Indian Country criminal justice and public safety from 2004–2019 reflects increases in overall federal law enforcement funding but reductions in Community Relations Services, Law Enforcement Special Initiatives, the Indian Police Academy, and Law Enforcement Program Management.²¹³ See Figure 1.3.

²¹⁰ See GAO, *Indian Country Criminal Justice*, *supra* note 159, at 8–9. The OJS Law Enforcement Division supports 191 tribal law enforcement agencies. The OJS Division of Corrections supports 91 tribal corrections programs. Approximately 90 BIA special agents are responsible for investigating violations of federal and tribal law within Indian country. The OJS Division of Tribal Justice Support for Courts works with tribal judicial systems to provide training and technical assistance on topics ranging from the collection of caseload data to the establishment of legal codes.

²¹¹ *Ibid.*, 10–11.

²¹² U.S. Dep't of Justice, *FY 2019 Budget Request At A Glance* (2018), 5, <https://www.justice.gov/jmd/page/file/1033086/download>; U.S. Dep't of the Interior, Bureau of Indian Affairs, *2019 Budget in Brief* (2018), BH-83, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_bib_bh081.pdf.

²¹³ See *infra* Appendix C.



SOURCE: U.S. Department of the Interior, Bureau of Indian Affairs

The steady recent increase in federal funding must be analyzed in relation to tribal law enforcement needs. For example, in 2009, BIA found that then-current funding met only 42 percent of need for law enforcement personnel in Indian Country.²¹⁴ While law enforcement agencies nationwide had an average of 3.5 officers per 1,000 residents in FY 2010,²¹⁵ the ratio for Indian Country law enforcement personnel (both OJS and tribal-funded) was only approximately 1.91 officers per 1,000 residents.²¹⁶ BIA analysis found that an additional \$337 million in funding was needed in 2016 to bring Indian Country law enforcement staffing levels up to par with those of county government law enforcement nationwide.²¹⁷ Another illustration of federal funding inequity between the Native American criminal justice system and the nation's criminal justice system as a whole involves the Victims of Crime Act, which is the largest source of federal funding for victims of crime. In FY 2015, funding for the U.S. Crime Victims Fund increased threefold to over \$2.3 billion, and in FY 2016–17, the fund saw an increase to over \$3 billion.²¹⁸ However, despite having the highest rates of crime victimization in the nation, tribal governments do not directly

²¹⁴ See U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON APPROPRIATIONS, SUBCOMMITTEE ON INTERIOR, ENVIRONMENT, AND RELATED AGENCIES, *Law Enforcement Issues in Indian Country* (Apr. 22, 2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg52296/html/CHRG-111hrg52296.htm>.

²¹⁵ See U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Report, Crime in the U.S. 2010*, Table 74, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl74.xls>.

²¹⁶ See ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 67.

²¹⁷ See NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 35–36 (“Indian country law enforcement officers patrol approximately two percent of the landmass of the United States and assist one percent of the population, but represent less than 0.004 percent of the total 675,734 state, city, and county law enforcement officers in the United States.”).

²¹⁸ NCAI, *Honoring the Promises, Building Strong Nations: Indian Country FY 2019 Budget Request*, at 33, <http://www.ncai.org/NCAI-FY19-BudgetReport-FINAL.pdf> [hereinafter NCAI, *FY 2019 Budget Request*].

receive these funds, and rather rely on “pass-through” funding²¹⁹ from the states.²²⁰ Sarah Deer, tribal legal scholar and advocate/professor at the Mitchell Hamline School of Law, commented in the 2016 briefing:

Now, these [Crime Victims] funds are a vital link for a victim to find safety because they can fund things like emergency housing, transportation, child care, food, [and] basic provisions that are needed by the victim of crime, especially perhaps one that has to flee her home due to the abuse that she's experiencing. But more concerning is that[,] unlike state and territorial governments wh[ich] receive an annual formula distribution from the Crime Victims Fund, Indian tribes are currently only able to access these funds through pass-through grants from the states, or by competing for these funds administered by the Department of Justice.²²¹

Less than one percent of funds have been passed through from states to tribal governments over the past five years.²²² Starting in FY 2018, however, three percent—approximately 100 million dollars—of the Crime Victims Fund will be set aside for victims in Indian Country.²²³

For FY 2019, DOJ requested \$1.4 billion (a \$193.1 million decrease from FY 2018) in discretionary funding and \$2.4 billion (a \$231 million decrease from FY 2018) in mandatory funding for OJP.²²⁴ DOJ also requested the elimination of the Justice Reinvestment Initiative program, which currently helps states develop cost-effective alternatives to incarceration.²²⁵ For the Edward Byrne Memorial Justice Assistance Grant (JAG) program, which helps states prevent crime and boost public safety, the department requested \$402 million for FY 2019.²²⁶ The department proposed eliminating FY 2019 funding for the Office of Community Oriented Policing

²¹⁹ For discussion of the meaning of “pass-through” funding, see Grants.gov, Community Blog, *What Is a Government Grant and Pass-Through Funding?* (Aug. 16, 2016), <https://blog.grants.gov/2016/08/30/what-is-a-government-grant-and-pass-through-funding/>.

²²⁰ *Ibid.*, 37; see also National Indigenous Women’s Resource Center, *Addressing Tribal Victims of Crime* (Mar. 30, 2016), <http://www.niwrc.org/resources/addressing-tribal-victims-crime> (indicating that “[u]nlike state and territorial governments, who receive an annual formula distribution from the Crime Victim Fund, Indian tribes are only able to access these funds via pass-through grants from the states or by competing for very limited resources administered by DOJ. According to DOJ, from 2010–2014, state governments passed through 0.5% of available funds to programs serving tribal victims—less than \$2.5 million annually nationwide. In 2013—the year with the highest number of state subgrants to date—more than 60% of states with Indian tribes made no subgrants to tribal programs.”).

²²¹ Sarah Deer, Mitchell Hamline School of Law, Testimony, *Briefing Transcript*, p. 38.

²²² *Ibid.*

²²³ U.S. Dep’t of Justice, *Department of Justice Announces \$110 Million Set Aside Grant Program to Assist Crime Victims in Indian Country* (June 26, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-110-million-set-aside-grant-program-assist-crime-victims-indian>; see also *Tribes eligible for victim services funding for the first time*, INDIANZ.COM (June 26, 2018), <https://www.indianz.com/News/2018/06/26/tribes-eligible-for-victim-services-fund.asp>.

²²⁴ U.S. Dep’t of Justice, Office of Justice Programs, *FY 2019 Budget Request At A Glance*, 1, <https://www.justice.gov/jmd/page/file/1033166/download>.

²²⁵ *Ibid.*, 4.

²²⁶ *Ibid.*, 3.

Services (COPS), which currently promotes strategies to build trust and respect between communities and state and local law enforcement, and instead merging the COPS program into the OJP.²²⁷ The department also proposed eliminating funding for the Community Relations Service, which was created by the 1964 Civil Rights Act to help states and local communities prevent and resolve racial tension and violence.²²⁸ For example, Community Relations Service staff were deployed as mediators during the Standing Rock protests in North Dakota in 2016 in order to ease tensions between Native activists and law enforcement.²²⁹

Congress declined to follow all the President's funding requests for these programs. For example, the 2018 omnibus spending bill, enacted to fund the government through FY 2018 (ending September 30, 2018), allocated \$415 million for the JAG program.²³⁰ Congress appropriated \$225.5 million for COPS grants "for the hiring and rehiring of additional career law enforcement officers" within the program.²³¹ Congress also rejected the Justice Department's proposal to eliminate the Community Relations Service, funding it at \$15.5 million.²³²

Competitive Grant Funding

DOJ provides mostly short-term, competitive grants to fund public safety initiatives in Indian Country. From 2010 to 2014, DOJ awarded over 1,100 grants to Native American tribes, totaling more than \$530 million.²³³ However, tribal governments have expressed concerns about the effectiveness and fairness of the competitive grant funding process. The NCAI has identified numerous problems faced by tribal governments in utilizing DOJ competitive grant funds:

One of the most significant issues with DOJ funding is that it is competitive funding for whatever issue DOJ deems the priority. In order to obtain this funding, tribes—on behalf of their tribal courts—must compete against each other under DOJ's priorities and guidelines. In the end, the tribes that have the financial and human resources to employ experienced grant writers end up receiving funding, while the under-resourced tribes may be left without. Moreover, tribes cannot count on funding continuing beyond the current grant period, and Indian Country has

²²⁷ U.S. Dep't of Justice, Office of Community Oriented Policing Services (COPS), *FY 2019 Budget Request At A Glance*, <https://www.justice.gov/jmd/page/file/1033171/download>.

²²⁸ U.S. Dep't of Justice, Community Relations Service, *FY 2019 Budget Request At A Glance*, <https://www.justice.gov/jmd/page/file/1033131/download>.

²²⁹ See Don Haney, *U.S. Attorney General issues appeal in hopes of defusing tensions over Dakota Access Pipeline*, KFGO (Dec. 3, 2016), <http://kfgo.com/news/articles/2016/dec/03/us-attorney-general-issues-appeal-in-hopes-of-defusing-tensions-over-dakota-access-pipeline/>.

²³⁰ *Consolidated Appropriations Act 2018*, *supra* note 207, at 73, <https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf>.

²³¹ *Id.* at 77.

²³² *Id.* at 66.

²³³ U.S. Dep't of Justice, *Indian Country Accomplishments of the Justice Department, 2009–Present* (2014), 11, https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/02/doj-ic-accomplishments_1.pdf.

countless stories of successful programs disappearing at the end of a two or three year grant cycle.²³⁴

Furthermore, ILOC noted that the predominance of short-term, grant-based funding for criminal justice programs in Indian Country is inconsistent with the funding mechanisms in place for state and local criminal justice systems, which typically depend far less on short-term grants to fund essential services.²³⁵ ILOC concluded that “DOJ’s grant-based funding approach creates uncertainties in system planning; tribal governments legitimately ask why—unlike their state and local counterparts—should they rely on such inconsistent sources to pay for governmental functions.”²³⁶ In response to these concerns, DOJ introduced the Coordinated Tribal Assistance Solicitation (CTAS) program in 2010, which streamlines the grant application process by providing a single application for tribal government-specific grant programs administered by DOJ’s OJP, Community Oriented Policing Services, and Office on Violence Against Women.²³⁷ The goal of the CTAS program is to address tribal government concerns that DOJ’s grants lack flexibility, and to provide a single, consolidated application to improve the likelihood of a tribe receiving grant funding.²³⁸ As of 2018, the program has awarded over 1,800 grants, totaling more than \$823 million, to hundreds of American Indian and Alaska Native communities.²³⁹ Given the relative newness of CTAS and its applicability to grants administered by three different DOJ programs, the measurable benefits of CTAS to the grant application and reward process remain uncertain at this time.

Tribal Courts and the Lack of Federal Protection

In 2011, GAO visited 12 tribes and found that funding for tribal courts is often inadequate to allow them to carry out their judicial duties.²⁴⁰ The GAO study was prompted because Native Americans

²³⁴ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 36. *See also* U.S. Dep’t of Justice, *Tribal Consultation on Department of Justice, Office of Justice Programs, Fiscal Year 2018 and 2019 Tribal Funding Policy*, <https://www.justice.gov/tribal/page/file/1028441/download>. DOJ issued a “Dear Tribal Leaders” letter on October 13, 2017, announcing its intent to seek written comments and conduct a series of listening sessions, consultations, and webinars regarding the proposed discretionary funding set aside for Tribal justice assistance programs for FY 2018 and FY 2019 budgets. Two listening sessions and a consultation meeting were held, and DOJ continued to seek input via written comments. *Ibid*.

²³⁵ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at xvii.

²³⁶ *Ibid*.

²³⁷ U.S. Dep’t of Justice, *Fact Sheet: Department of Justice Fiscal Year 2018 Coordinated Tribal Assistance Solicitation*, at 1, (aa) <https://www.justice.gov/tribal/page/file/913416/download>.

²³⁸ U.S. Dep’t of Justice, *Indian Country Accomplishments of the Justice Department, 2009–Present* (2014), 11, https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/02/doj-ic-accomplishments_1.pdf.

²³⁹ U.S. Dep’t of Justice, *Fact Sheet: Department of Justice Fiscal Year 2018 Coordinated Tribal Assistance Solicitation*, *supra* note 237, at 1.

²⁴⁰ GAO, *Indian Country Criminal Justice*, *supra* note 159, at 22 (“Tribal justice officials also stated that their tribal courts face various challenges in recruiting and retaining qualified judicial personnel including: (1) inability to pay competitive salaries, (2) housing shortages on the reservation, and (3) rural and remote geographic location of the reservation, among other things.”)

were experiencing violent crimes at twice the national average.²⁴¹ Officials representing a majority of the 12 surveyed tribes²⁴² reported that tribal court funding is insufficient to allow for the hiring of key personnel such as prosecutors, public defenders, and probation officers.²⁴³ For example, at three New Mexico pueblos, law enforcement officers with no legal training also served as prosecutors.²⁴⁴ In addition, many of the tribes reported that judicial positions often can only be temporarily funded with the use of short-term DOJ grants, and that once these grant funds expire the positions must be eliminated.²⁴⁵ Likewise, BIA has also concluded that “federal funding for tribal courts has been less than what tribes deemed necessary to meet the needs of their judicial systems.”²⁴⁶

The need for tribal courts to receive adequate funding to fulfill their judicial duties, including the prosecution of criminal activity, is exacerbated by the failure of the federal government to prosecute many of the serious crimes occurring in Indian Country. Of the approximately 9,000 Indian Country criminal matters resolved by federal prosecutors between 2005 and 2009, the U.S. Attorneys’ Offices declined to prosecute half of the matters.²⁴⁷ DOJ cited “weak or insufficient admissible evidence” (42 percent) or “no federal offense evident” (18 percent) as the primary reasons for declining the prosecution of Indian country criminal matters.²⁴⁸

However, according to DOJ, declination rates for Indian country criminal matters have decreased in more recent years.²⁴⁹ For example, USAO data indicates that 34 percent (853) of Indian country submissions for federal prosecution (2,542) were declined by the USAOs in 2013.²⁵⁰ This was a decrease from 2011, when the declination rate for Indian Country submissions for federal prosecution was 37 percent (1,041 of 2,840 cases submitted).²⁵¹ Comparatively, the declination rate for all criminal matters received by the U.S. Attorneys’ Offices in FY 2013 was approximately

²⁴¹ Ibid., 1.

²⁴² Ibid., 39. The twelve tribes surveyed were: (1) Cheyenne River Sioux Tribe; (2) Gila River Indian Community; (3) Pueblo of Isleta; (4) Pueblo of Laguna; (5) Navajo Nation; (6) Oglala Sioux Tribe; (7) Pueblo of Pojoaque; (8) Rosebud Sioux Tribe; (9) Standing Rock Sioux Tribe; (10) Pueblo of Taos; (11) Three Affiliated Tribes; and (12) Tohono O’odham Nation. Ibid.

²⁴³ GAO, *Indian Country Criminal Justice*, *supra* note 159, at 21.

²⁴⁴ Ibid.

²⁴⁵ Ibid. at 22–23. In addition, a majority of tribes surveyed by GAO reported that their tribal courts have insufficient capacity to conduct jury trials because of “limited courtroom space, funding, and transportation.” Ibid., 23.

²⁴⁶ Ibid., 21.

²⁴⁷ U.S. Government Accountability Office, *U.S. Department of Justice Declinations of Indian Country Criminal Matters* (Dec. 2010), 5, <http://www.gao.gov/assets/100/97229.pdf>. Note that a “resolved matter” is one in which the USAO has filed for prosecution, declined, or administratively closed (as opposed to a “pending matter,” in which the USAO has not yet taken action). Ibid.

²⁴⁸ Ibid., 3.

²⁴⁹ U.S. Dep’t of Justice, *Indian Country Accomplishments of the Justice Department, 2009–Present* (2014), 5, https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/02/doj-ic-accomplishments_1.pdf.

²⁵⁰ Ibid.

²⁵¹ Ibid.

15%, with 25,629 declined for prosecution out of a total 174,024 criminal matters.²⁵² DOJ cited similar primary reasons for declining prosecution of these criminal matters, with 20 percent declined for “weak or insufficient evidence” and 19 percent declined for “lack of criminal intent.”²⁵³ Many tribes also complained that after declining prosecution of Indian Country criminal matters, federal officials often do not share evidence obtained during investigations with tribal courts or provide timely notice of declinations, thereby undermining the ability of tribes to prosecute these matters pursuant to their concurrent jurisdictional authority.²⁵⁴ Under concurrent jurisdictional authority, when federal officials decide not to prosecute, the tribe can opt to prosecute as long as the tribal statute of limitations has not expired.²⁵⁵ GAO found that in light of the federal government’s refusal to prosecute a significant percentage of serious crimes occurring in Indian Country, equitable funding of Native American criminal justice systems is critical to allow for tribal court prosecution of crime. Otherwise, the failure to prosecute serious crimes in Indian Country “sends a signal to crime victims and criminals that there is no justice or accountability.”²⁵⁶

Tribal Detention Facilities

Indian Country often lacks sufficient detention space to house criminal defendants convicted in tribal courts, resulting in overcrowding at tribal detention facilities.²⁵⁷ Both BIA and DOJ have concluded that detention space in Indian Country is insufficient.²⁵⁸ In 2012, for example, six inmates were housed in cells designed for one person at the Rosebud Sioux Nation Detention Center in South Dakota.²⁵⁹ The DOI Inspector General found that in addition to being understaffed, fifty percent of surveyed BIA detention facilities are in unsatisfactory or poor physical condition, with leaky roofs, defective heating and fire systems, rust-stained bathroom facilities, and an overall lack of cleanliness among other issues.²⁶⁰ Another investigation found that most detention facilities on reservations “have no in-house nurses or other medical staff, often leaving corrections offers to

²⁵² U.S. Dep’t of Justice, *United States Attorneys’ Annual Statistical Report: Fiscal Year 2013* (2014), 5, <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf>.

²⁵³ *Ibid.*, 106.

²⁵⁴ See GAO, *Indian Country Criminal Justice*, *supra* note 159, at 17–18, <http://www.gao.gov/products/GAO-11-252>.

²⁵⁵ *Ibid.*; see also Janine Robben, *Life in Indian Country How the Knot of Criminal Jurisdiction Is Strangling Community Safety*, OR. ST. B. BULL. (Jan. 2012), at 28, 31–32 (discussing concurrent jurisdictional authority shared by federal and tribal governments).

²⁵⁶ GAO, *Indian Country Criminal Justice*, *supra* note 159, at 16, <http://www.gao.gov/products/GAO-11-252>.

²⁵⁷ *Ibid.*, 18.

²⁵⁸ *Ibid.* See also U.S. Dep’t of Justice, Bureau of Justice Statistics, *Jails in Indian Country, 2011* (Sept. 2012), 5, <http://www.bjs.gov/content/pub/pdf/jic11.pdf> (showing that 20 percent of jails in Indian country operated at above 150 percent of capacity in 2011).

²⁵⁹ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 123.

²⁶⁰ U.S. Dep’t of the Interior, Office of Inspector General, *Semi-Annual Report to Congress* (April 2011), 7, <https://www.doioig.gov/sites/doioig.gov/files/SemiannualApril2011Public.pdf>.

scramble in emergencies to determine whether to send an inmate to the hospital, or provide basic care themselves—sometimes with unfortunate consequences.”²⁶¹

GAO found that lack of detention space may force tribal courts “to make difficult decisions such as (1) for[going] sentencing a convicted offender to prison, (2) releasing inmates to make room for another offender who is considered to be a greater danger to the community, and (3) contracting with state or tribal detention facilities to house convicted offenders, which can be costly.”²⁶² Many tribes lack the financial ability to contract with non-tribal state detention facilities and to transport inmates between those facilities and tribal courts for trials and other court appearances.²⁶³ Furthermore, the enhanced jurisdictional and sentencing authority provided to tribal courts by TLOA can be exercised only if there is adequate tribal detention space to house additional offenders.²⁶⁴

There is ample evidence to demonstrate that funding Indian Country criminal justice systems at the same level as federal and state criminal justice systems may lead to significant reductions in crime. Beginning in 2009, OJS launched a “High Performance Priority Goal” initiative that increased law enforcement personnel on four Indian reservations to levels comparable with non-tribal police forces.²⁶⁵ In addition to increasing the number of law enforcement officers on the target reservations, the initiative relied on a proactive strategy involving data-driven intervention planning, crime tracking, and ongoing evaluation of officer deployment.²⁶⁶ As a result of the High Performance Priority Goal initiative, violent crime rates at the four participating reservations fell thirty-five percent during a two-year period.²⁶⁷

ILOC stresses that there is also the need for viable alternatives to detention in some cases, which can serve to reduce recidivism by “addressing the core problems that lead offenders to crime, which may include substance abuse, mental health problems, and limited job market skills, and by helping them develop new behaviors, such as anger management, job skills, among others that support the choice to not commit crimes.”²⁶⁸ In these cases, a formal jail or prison sentence may

²⁶¹ Mary Hudetz, *Patchwork Health Care for Reservation Inmates Raises Concern*, ASSOCIATED PRESS (Mar. 31, 2018), <https://www.usnews.com/news/best-states/new-mexico/articles/2018-03-31/patchwork-health-care-for-reservation-inmates-raises-concern?eType=EmailBlastContent&eId=5044b3c6-82ec-4787-8165-ec65f83234f4>.

²⁶² GAO, *Indian Country Criminal Justice*, *supra* note 159, at 18.

²⁶³ *Ibid.* See also U.S. Dep’t of Justice, *Indian Country Accomplishments of the Justice Department, 2009–Present* (2014), 8. This report states that, in 2010, the Federal Bureau of Prisons (BOP) launched a four-year pilot program to house in federal detention facilities some tribal offenders who were sentenced in tribal courts for violent crimes.

²⁶⁴ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 161.

²⁶⁵ *Ibid.*, 64.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, 121. See also U.S. Department of the Interior, Bureau of Indian Affairs, Office of Justice Services, *Lessons Learned, High Priority Performance Goals (HPPG), 2009–2011: Mescalero, Rocky Boy’s, Standing Rock, Wind River* (2012), 13, <http://niccsa.org/uploads/file/be1ddb5e695b4e2bb936e6e1656c2262/CRIMEREDUCTIONBESTPRACTICESHANDBOOK.pdf> (showing that the High Priority Performance Goals Initiative led to a 68 percent decrease in violent crime at the Mescalero Reservation in New Mexico).

²⁶⁸ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 129.

still be used sparingly for certain nonviolent offenders, as a component of a more comprehensive rehabilitation plan which includes the provision of services, supervision, and offender accountability.²⁶⁹ Programs like this have proven benefits in some cases, where participants in such programs tend to reoffend at rates 10 to 20 percent lower than non-participants.²⁷⁰ These programs can also lead to cost-savings to taxpayers in the long-run.²⁷¹

Criminal Justice for Native Hawaiians

In 2010, the Office of Hawaiian Affairs (OHA) co-published a report with the University of Hawaii at Mānoa, the Justice Policy Institute, and Georgetown University, entitled *The Disparate Treatment of Native Hawaiians in the Criminal Justice System*.²⁷² The report found that Native Hawaiians were disproportionately overrepresented in every stage of the criminal justice process.²⁷³ For example, despite constituting 24 percent of the Hawaiian population, Native Hawaiians represented 39 percent of the state's incarcerated population.²⁷⁴ Native Hawaiians were also more likely to be incarcerated for drug offenses and to receive longer prison sentences for the same offenses than other racial/ethnic groups.²⁷⁵ The report recommended that Hawaii establish a government collaborative to investigate these disparities, leading to legislation that created the Native Hawaiian Justice Task Force.²⁷⁶ The Hawaii legislature directed the Task Force to investigate the OHA report's findings and recommend policies and legislation to reduce the disproportionate representation of Native Hawaiians in the criminal justice system.²⁷⁷ The Task Force followed and completed this statutory directive in 2012 with the release of its report that echoed the 2010 OHA report's findings and recommended investment in "community-based alternatives to incarceration" as one means to reduce the overrepresentation of Native Hawaiians in the criminal justice system.²⁷⁸

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), http://www.justicepolicy.org/uploads/justicepolicy/documents/10-09_exs_disparatetreatmentofnativehawaiians_rd-ac.pdf.

²⁷³ Ibid., 10.

²⁷⁴ Ibid.

²⁷⁵ Ibid., 11–12.

²⁷⁶ S.B. 986, 26th Legis., 2011 Regs. Sess. (Haw. 2011), § 1, https://www.capitol.hawaii.gov/session2011/bills/SB986_CD1_.pdf (establishing "a nine-member task force to formulate policies and procedures to eliminate the disproportionate representation of Native Hawaiians in Hawaii's criminal justice system").

²⁷⁷ *Id.*

²⁷⁸ Office of Hawaiian Affairs, *The Native Hawaiian Justice Task Force Report* (2012), 17–26, 29–30, https://www.oha.org/wp-content/uploads/2012NHJTF_REPORT_FINAL_0.pdf.

In 2011, the U.S. Commission on Civil Rights' Hawaii State Advisory Committee released a report on the unequal administration of justice for Native Hawaiians in Hawaii.²⁷⁹ The committee confirmed that Native Hawaiians were overrepresented in the criminal justice system and concluded that Hawaii's overreliance on incarceration was "problematic not only from a civil rights perspective, but from an economic resource concern as well."²⁸⁰ During the committee's community forum on the topic, Native Hawaiian speakers testified about unequal treatment in the criminal justice system, but law enforcement representatives denied that racial bias influenced the administration of justice in Hawaii.²⁸¹

Through OJP and COPS, DOJ offers federal grants for states to improve their criminal justice systems.²⁸² Hawaii's Crime Prevention and Justice Assistance Division administers many of these federal grants, which Hawaii can use to strengthen partnerships between law enforcement and Native Hawaiians (or other minority communities).²⁸³ Via these grants and programs, federal resources flow toward state and local efforts to increase public safety, reduce incarceration, and prevent racial conflict.

Data Deficits

Currently, there is no system in place to collect or report victimization and crime data in Indian Country, and furthermore, many tribes lack computerized systems for collecting such data.²⁸⁴ In addition to other requirements centered on tribal-based jurisdiction discussed above, the 2010 Tribal Law and Order Act requires the U.S. Bureau of Justice Statistics to establish and implement a tribal data collection system and to support tribal participation in national records and information systems.²⁸⁵ In addition to encouraging the collection and reporting of relevant crime data in Indian Country, the TLOA also encourages the sharing of crime and law enforcement data between federal, state, and tribal agencies. Toward this end, DOJ in 2015 launched the Tribal Access Program for National Crime Information (TAP) to provide tribes with access to national

²⁷⁹ Hawaii Advisory Committee to the United States Commission on Civil Rights, *Is There an Uneven Administration of Justice for Native Hawaiians in Hawai'i?* (2011), <https://www.usccr.gov/pubs/docs/HawaiiAdministrationJusticeNativeHawaiiansReport.pdf>.

²⁸⁰ *Ibid.*, 12.

²⁸¹ *Ibid.*, 2–4, 7–8.

²⁸² U.S. Dep't of Justice, *Grants*, <https://www.justice.gov/grants> (last accessed July 19, 2018).

²⁸³ Hawaii Crime Prevention and Justice Assistance Division, "Grants and Planning Branch," <http://ag.hawaii.gov/cpja/gp/> (last accessed July 19, 2018).

²⁸⁴ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at 103–05.

²⁸⁵ 34 U.S.C. § 10132. *See also* DOJ, IG, *Review of Enforcement Efforts*, *supra* note 117, at 10; *see also supra* notes 161–198 (for further information on the Tribal Law and Order Act of 2010).

crime information databases.²⁸⁶ In August of 2017, DOJ announced its intention to expand the TAP program by providing access to both criminal and civil data regarding human trafficking.²⁸⁷

Tribal nations need accurate data in order to plan and evaluate their law enforcement and judicial programs. ILOC found that without data, tribes are unable to assess the nature and magnitude of crime in their communities, or develop targeted action to deal with crime.²⁸⁸ However, ILOC continued, “systems for generating crime and law enforcement data about Indian Country either are nascent or undeveloped.”²⁸⁹ Though the FBI began training tribal law enforcement personnel in Uniform Crime Reporting (UCR) methods in 2009, ILOC found in 2013 that “nothing close to a comprehensive, longitudinal dataset is available for Indian Country.”²⁹⁰ Importantly, although federal law enforcement agencies are *required* to report crime data to the UCR, participation of tribal law enforcement in UCR is merely *voluntary*. This likely leads to underreported Native American crime statistics and creates challenges in fully understanding crime and law enforcement issues in Indian Country.²⁹¹ Michael S. Black, then-Acting Assistant Secretary of Indian Affairs for DOI, stated in his testimony before the Commission that “[t]he ability to access and analyze data to support such decisions is critical to understanding the benefits and impacts of the policy and program decisions,” and that “collection and analysis of data by the federal government is . . . critical to ensuring that federal agencies and programs are delivering effective services to tribes to meet tribal needs and deliver on federal responsibilities.”²⁹²

²⁸⁶ U.S. Dep’t of Justice, *Tribal Access Program for National Crime Information*, <https://www.justice.gov/tribal/tribal-access-program-tap> (last accessed July 19, 2018).

²⁸⁷ U.S. Dep’t of Justice, Office of Public Affairs, *Justice Department Announces Actions to Strengthen Public Safety in Indian Country* (Aug. 17, 2017), <https://www.justice.gov/opa/pr/justice-department-announces-actions-strengthen-public-safety-indian-country>. But the Commission notes that this funding “to combat human trafficking” is tied to local law enforcement being used for federal civil immigration enforcement, which raises constitutional concerns. *See, e.g., Arizona v. United States*, 567 U.S. 387, 396 (2012) (“asserting that removal of noncitizens from the United States “is a civil, not a criminal matter.”); *Morales v. Chadbourne*, 793 F.3d 208, 215–217 (1st Cir. 2015) (noting that civil immigration detainees require probable cause, and detaining a person in state prison beyond her court-ordered release date constituted an arrest under the Fourth Amendment); *Galarza v. Szalczyk*, 745 F.3d 634, 641–645 (3d Cir. 2014) (observing that because immigration detainers are requests and not commands to local law enforcement, county officials could still be liable for unlawfully detaining the plaintiff); *Lunn v. Commonwealth*, 477 Mass 517, 535–537 (2017) (finding that neither federal nor state law authorizes state officers to arrest individuals based solely on civil immigration detainers); *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 465 (4th Cir. 2013) cert. denied, 134 S. Ct. 1541 (2014) (hereafter *Santos v. Frederick County*) (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.”); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1242, 1258–59 (E.D. Wash. 2017) (concluding that local law enforcement lacked the authority to detain the plaintiff based solely on an “administrative warrant” issued by federal immigration officials).

²⁸⁸ ILOC, *A Roadmap For Making Native America Safer*, 2013, *supra* note 120, at xv.

²⁸⁹ *Ibid.*, 70.

²⁹⁰ *Ibid.*

²⁹¹ DOJ, IG, *Review of Enforcement Efforts*, *supra* note 117, at 47.

²⁹² Black Testimony, *Briefing Transcript*, p. 133.

One example of this deficit is manifest in police killings of Native Americans.²⁹³ The best available data suggests that Native Americans are being killed in police encounters at a higher rate than other racial groups,²⁹⁴ but these killings may be undercounted by federal agencies, and are underreported by the media.²⁹⁵ When these police killings occur (especially on rural reservations), these deaths are often not reported, or they are miscategorized in the existing crime databases.²⁹⁶ Given that other independent databases largely depend on media reports and public records, the undercounting is compounded as tribes often lack media presence on their reservations, and lack monetary resources to create and disseminate these public records.²⁹⁷ For example, research shows that tribal governments often operate with anywhere from 55 percent to 75 percent less monetary resources than non-tribal governments, which can lead to a lack of data collection surrounding police killings.²⁹⁸ There have been a couple of recent notable journalist-driven initiatives to address

²⁹³ See U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (November 2018), 23, 47, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>. See also Maggie Koerth-Baker, *Police Violence Against Native Americans Goes Far Beyond Standing Rock*, FIVETHIRTYEIGHT (Dec. 2, 2016), <https://fivethirtyeight.com/features/police-violence-against-native-americans-goes-far-beyond-standing-rock/> [hereinafter Koerth-Baker, *Police Violence Against Native Americans*]. Note that, generally, data about police killings in America are unreliable for all racial or ethnic groups. See also Reuben Fischer-Baum, *Nobody Knows How Many Americans the Police Kill Each Year*, FIVETHIRTYEIGHT (Aug. 19, 2014), <https://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year/>; Feldman, JM *et al.*, *Quantifying underreporting of law-enforcement-related deaths in United States vital statistics and news-media-based data sources: A capture-recapture analysis*, PLOS MED 14(10): e1002399 (2017), <https://doi.org/10.1371/journal.pmed.1002399>; Mark Tran, *FBI chief: ‘unacceptable’ that Guardian has better data on police violence*, GUARDIAN (Oct. 8, 2015), <https://www.theguardian.com/us-news/2015/oct/08/fbi-chief-says-ridiculous-guardian-washington-post-better-information-police-shootings> (finding that two international newspapers knew more about U.S. police shootings than the U.S. FBI). According to Tran, former FBI director James Comey stated at the U.S. Department of Justice’s Summit on Violent Crime Reduction: “It is unacceptable that the Washington Post and the Guardian newspaper from the U.K. are becoming the lead source of information about violent encounters between police and civilians.” *Ibid.*

²⁹⁴ Koerth-Baker, *Police Violence Against Native Americans*, *supra* note 293; Stephanie Woodard, *The Police Killings No One Is Talking About*, IN THESE TIMES (Oct. 17, 2016), http://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html; see also CDC WONDER Online Database, Centers for Disease Control and Prevention, National Center for Health Statistics, “*Underlying Cause of Death 1999–2016*,” CDC WONDER Online Database, December 2017, <http://wonder.cdc.gov/ucd-icd10.html>. Data are from the Multiple Cause of Death Files, 1999–2016, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. See also Hansen, *The forgotten minority in police shootings*, *supra* note 111.

²⁹⁵ Koerth-Baker, *Police Violence Against Native Americans*, *supra* note 293; Ajilore, *Native Americans deserve more attention in the police violence conversation*, *supra* note 111.

²⁹⁶ Maggie Koerth-Baker, *Police Violence Against Native Americans*, *supra* note 293.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* (citing U.S. Dep’t of Justice, Office of Justice Programs, *Policing on Indian Reservations*, July 2001, <https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>).

the data deficit,²⁹⁹ but there generally remains a lack of initiatives to address this data deficit. Former U.S. Attorney General Eric Holder called the lack of data “unacceptable.”³⁰⁰

²⁹⁹ Media Interactive, *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> (last accessed Sept. 21, 2018); Media Interactive, *The Counted: People Killed by Police in the U.S.*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last accessed Sept. 21, 2018).

³⁰⁰ John Swaine, *Eric Holder calls failure to collect reliable data on police killings unacceptable*, GUARDIAN (Jan. 15, 2015), <https://www.theguardian.com/us-news/2015/jan/15/eric-holder-no-reliable-fbi-data-police-related-killings>.

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CHAPTER 2: HEALTH CARE

The Special Trust Responsibilities and Legal Obligations in Indian Health Care

Treaties between the United States and tribal nations provide the original legal foundation for the federal government's obligation to provide health care for Native Americans.³⁰¹ Through these treaties, the seizure of tribal nations' land and resources by the United States was to be compensated by the federal government's promise to provide payments and services—including the promise to provide health care to tribal citizens.³⁰² As discussed below, the modern authorization for the provision of health services to Native Americans is the Indian Health Care Improvement Act, and the primary authorization to pay for federal services for the general welfare remains the Snyder Act. Congress has also passed additional statutes directing the Indian Health Service (IHS) to provide health care to Native Americans.³⁰³ Based on this body of law, the IHS describes the trust responsibility as follows:

The trust relationship establishes a responsibility for a variety of services and benefits to Indian people, including health care. This relationship has been defined in case law and statute as a political relationship . . . Treaties between the United States [g]overnment and Indian [t]ribes frequently call for the provision of medical

³⁰¹ See, e.g., Treaty with the Makah, 12 Stat. 939, art. 11 (Jan. 31, 1855) (“And the United States further agrees to employ a physician to reside at the said central agency, or as such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.”); Treaty with the Klamath, 16 Stat. 707, art. 5 (Oct. 14, 1864) (“The United States further engages to furnish and pay for the service and subsistence . . . for the term of twenty years of one physician . . .”); Treaty with the Kiowa and Comanche, 15 Stat. 581, art. 14 (Oct. 21, 1867) (“The United States hereby agrees to furnish annually to the Indians the physician . . . and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such [person].”).

³⁰² *Id.*; see also U.S. Dep’t of Health and Human Services, Indian Health Service, *Indian Health Service Gold Book—The First 50 Years of the Indian Health Service: Caring and Curing* (2005), 8, https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/GOLD_BOOK_part1.pdf [hereinafter IHS, *First 50 Years of the Indian Health Service*].

³⁰³ See U.S. Dep’t of Health and Human Services, Indian Health Service, *Fact Sheet: Basis for Health Services* (Jan. 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/BasisforHealthServices.pdf [hereinafter IHS, *Basis for Health Services*] (citing the U.S. Constitution, the Snyder Act of 1921, the Transfer Act of 1954, Indian Sanitation Facilities and Services Act of 1959, The Indian Self-Determination and Education Assistance Act (enacted in 1975), Indian Health Care Improvement Act of 1976, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, and the Indian Child Protection and Family Violence Prevention Act of 1990 as “not an all-inclusive list” of legal bases for federal services to American Indians and Alaska Natives); Brett Lee Shelton, The Henry J. Kaiser Family Foundation, *Legal And Historical Roots Of Health Care For American Indians And Alaska Natives In The United States* (February 2004), 4, <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/legal-and-historical-roots-of-health-care-for-american-indians-and-alaska-natives-in-the-united-states.pdf>.

services, the services of physicians, or the provision of hospitals for the care of Indian people.³⁰⁴

The modern federal statutory framework by which Congress fulfills its trust obligation to provide health care to Native American is found in the Indian Health Care Improvement Act.³⁰⁵ In the most recent amendments to the Health Care Improvement Act, Congress found that:

- A. Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.
- B. A major national goal of the United States is to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.
- C. A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.
- D. Federal health services to Indians have resulted in a reduction in the prevalence and incidence of preventable illnesses among, and unnecessary and premature deaths of, Indians.
- E. Despite such services, the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States.³⁰⁶

The statutory language in subsection (a) describes the ongoing legal basis for requiring provisions for the health care of Indians, and the language in subsection (b) shows that Congress found that these requirements are for the highest possible level of quantity and quality of health care, with the maximum participation of Indians in health care services.³⁰⁷ The statute further declared that U.S. policy, “in fulfillment of its special trust responsibilities and legal obligations” to Native Americans, was to “ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.”³⁰⁸

³⁰⁴ IHS, *Basis for Health Services*, 2016, *supra* note 303.

³⁰⁵ Indian Health Care Improvement Act of 1976, as amended, codified in part at 25 U.S.C. 1601; *see also* Koral E. Fusselman, note “Native American Health Care: Is the Indian Health Care Reauthorization and Improvement Act of 2009 Enough to Address the Persistent Health Problems within the Native American Community?” 18 *Wash. & Lee J. Civil Rts. & Soc. Just.* 389, 397-401 (2012) (discussing the most recent reauthorization and amendments to the Indian Health Care Improvement Act).

³⁰⁶ Indian Health Care Improvement Act of 1976, as amended (codified at 25 U.S.C. § 1601 *et seq.*).

³⁰⁷ *Id.*

³⁰⁸ 25 U.S.C. § 1602(1).

History of Federal Health Care Services for Native Americans

Federal provision of Native American health care began in 1832, when Congress authorized \$12,000 for small pox vaccinations for Indians.³⁰⁹ During the following years, the federal government gradually assumed a larger role in Native health care by providing physician services and medications to tribes. In 1921, Congress passed the Snyder Act, which authorized federal funding for the “relief of distress and conservation of health” of Native peoples.³¹⁰ Several studies conducted during the following decades highlighted the poor health conditions of Native Americans, specifically noting their high rates of infant mortality and death from infectious disease.³¹¹ As a result, in 1954 Congress transferred the responsibility for Native health care from DOI to the agency known today as the Department of Health and Human Services (HHS)—and ultimately to the newly created IHS.³¹²

As federal policy evolved toward the recognition of tribal sovereignty³¹³ and encouragement of self-determination, tribal governments were given the option of assuming control over various federal programs.³¹⁴ The Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act) provided tribes with the option of managing IHS health care programs in their communities pursuant to contracts with the federal government, as well as funding to improve the tribal capacity to operate those health care programs.³¹⁵ The Indian Health Care Improvement Act of 1976³¹⁶ authorized increased funding levels for IHS, with the goal of eliminating the health disparities between Native Americans and the general population.³¹⁷ The Health Care Improvement Act allocated additional resources for the expansion of health services, the construction of medical facilities and sanitation systems, and the establishment of a scholarship program to increase the availability of Native health care professionals.³¹⁸ Additionally, section

³⁰⁹ See American Law Institute, Restatement of the Law: The Law of American Indians, Tentative Draft No. 1 (April 22, 2015), Section 4, Comment e, p. 82 (“Congress’s provision of health-care services to Indians began in the earliest decades of the American republic.”)(citing Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades & Rose L. Pfefferbaum, *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 Am. Indian L. Rev. 366, 368–369 (1995/1996)); see also U.S. Senator Maria Cantwell, testimony before the U.S. Senate Committee on Indian Affairs, Jun 12, 2013, <https://www.congress.gov/113/chrg/shrg85220/CHRG-113shrg85220.htm>.

³¹⁰ 25 U.S.C. § 13, which provides expenditures for “relief of distress and conservation of health.” *Id.* The Snyder Act of 1921 specifically authorizes funding for the employment of physicians to serve Native American communities.

³¹¹ IHS, *First 50 Years of the Indian Health Service*, *supra* note 302, at 8.

³¹² *Ibid.*; Transfer Act, Pub. L. No. 83-568, § 1, 68 Stat. 674 (1954).

³¹³ U.S. Const., Art. I, § 2, Cl. 3, as amended by Amend. IV, §2; and U.S. Const. Art. I, §8.

³¹⁴ IHS, *First 50 Years of the Indian Health Service*, *supra* note 302, at 9.

³¹⁵ 25 U.S.C. § 5321; IHS, *Trends in Indian Health*, *supra* note 49, at 1.

³¹⁶ 25 U.S.C. § 1601 *et seq.*

³¹⁷ 25 U.S.C. § 1680o; see also USCCR, *A Quiet Crisis*, *supra* note 3, at 34 (citing H.R. Rep. No. 94-1026, pt. I, at 13 (1976)). The Act set forth a goal of improving “the status of healthcare for American Indians and Alaska Natives over a seven-year period to a level equal to that enjoyed by other American citizens.” *Id.*

³¹⁸ See Pub. L. No. 111–211, 124 Stat. 2258 IHS, § 241 (July 29, 2010) (amending various subsections of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, codified at 25 U.S.C. § 2411 *et. seq.*); see also

241 of the Tribal Law and Order Act expands the number of federal agencies that are tasked with coordinating efforts on alcohol and substance abuse in Indian Country.³¹⁹

With regard to health care, the government seeks to meet its trust obligations³²⁰ by providing funding to IHS which, in turn, provides health care to members of the 573 federally recognized tribes, with 2.2 million American Indian and Alaska Native people eligible to receive services.³²¹ For many Native Americans, “IHS-supported programs are the only source of health care.”³²² These services are funded and organized through the IHCA. The IHS health care system consists of three components:

- One operated directly by IHS;
- One operated by tribes through contracts or compacts with HIS; and
- One involving contracts and grants to Urban Indian Organizations that provide health care and referral services to Urban Indian Health programs.³²³

IHS also contracts with medical providers in the private sector to supplement its Native American health care services.³²⁴

The administration of IHS services occurs at 12 area offices and 170 IHS- and tribally-managed local service units.³²⁵ Delivery of health care services to Native Americans is provided by 46 hospitals, 344 health centers, 105 health stations, and 150 Alaska village clinics.³²⁶ These facilities

IHS, *Trends in Indian Health*, *supra* note 49, at 1; IHS, *First 50 Years of the Indian Health Service*, *supra* note 302, at 10.

³¹⁹ U.S. Department of Health and Human Services, Indian Health Service, Division of Behavioral Health, *American Indian/Alaska Native Behavioral Health Briefing Book* (Aug. 2011), 6, https://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/2011_Letters/AIANBHBrifingBook.pdf.

³²⁰ 25 U.S.C. § 1602(7) (“Congress declares that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians . . . to provide funding for programs and facilities operated by Indian tribes and tribal organizations in amounts that are not less than the amounts provided to programs and facilities operated directly by the Service.”).

³²¹ U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: IHS Profile* (May 2018), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/IHSProfile.pdf [hereinafter cited as IHS, *Fact Sheet: IHS Profile*].

³²² U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: Health Facilities Construction* (October 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/HealthFacilitiesConstruction.pdf [hereinafter HHS, *IHS Fact Sheet: Health Facilities Construction*].

³²³ IHS, *First 50 Years of the Indian Health Service*, *supra* note 302, at 11.

³²⁴ U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: Purchased/Referred Care* (June 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/PurchasedReferredCare.pdf [hereinafter HHS, *IHS Fact Sheet: Purchased/Referred Care*]. The Purchased/Referred Care program was formerly known as the Contract Health Services program.

³²⁵ IHS, *Fact Sheet: IHS Profile*, *supra* note 321.

³²⁶ *Ibid.*

are operated either directly by IHS or by tribes that make self-determination contracts or self-governance compacts with IHS. Today, over half of the IHS budget is directly allocated to tribes for the self-management of their own health care programs.³²⁷ In addition to reservation-based health care services, there are 34 Urban Indian Organizations that serve urban Indians with services ranging from outreach and referral to comprehensive ambulatory care.³²⁸

The efforts of the federal government have been insufficient to meet the promises of providing for the health and wellbeing of tribal citizens, as a vast health disparity exists today between Native Americans and other population groups. The life expectancy for Native peoples is 5.5 years less than the national average.³²⁹ Native Americans die at higher rates than those of other Americans from chronic liver disease and cirrhosis, diabetes mellitus, unintentional injuries, assault/homicide, intentional self-harm/suicide, and chronic lower respiratory diseases.³³⁰ See Figure 2.1 (depicting mortality disparity rates for Indians). According to one study, Native American women are 4.5 times more likely than non-Hispanic white women to die while pregnant or “within 42 days of the termination of pregnancy, irrespective of the duration and site of the pregnancy or its management, but not from accidental or incidental causes.”³³¹ The Center for Disease Control (CDC) found that, between 2005 and 2014, every racial group experienced a decline in infant mortality, except for Native Americans.³³² Native Americans experience infant mortality rates 1.6 times higher than non-Hispanic whites and 1.3 times the national average.³³³

³²⁷ Ibid.

³²⁸ U.S. Department of Health and Human Services, Indian Health Service, *FY 2019, Justification of Estimates for Appropriations Committees*, CJ-147, https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2019CongressionalJustification.pdf [hereinafter IHS, *FY 19 Justification of Estimates*].

³²⁹ HHS IHS, *Fact Sheet: Disparities*, *supra* note 48.

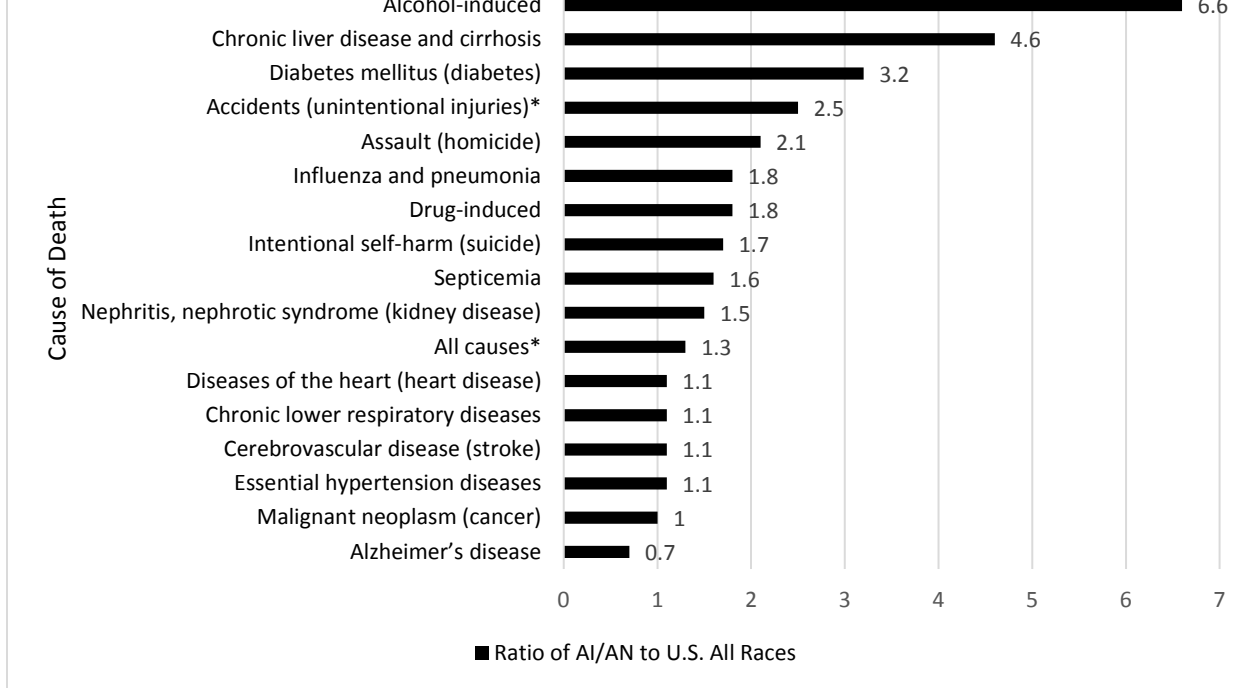
³³⁰ Ibid.

³³¹ Urban Indian Health Institute, Seattle Indian Health Board, *Community Health Profile: National Aggregate of Urban Indian Health Program Service Areas* (2016), 37, http://www.uihi.org/wp-content/uploads/2017/08/UIHI_CHP_2016_Electronic_20170825.pdf.

³³² T.J. Mathews and Anne K. Driscoll, “Trends in Infant Mortality in the United States, 2005–2014,” National Center for Health Statistics, Division of Vital Statistics, March 2017, at 1, <https://www.cdc.gov/nchs/data/databriefs/db279.pdf>.

³³³ Ibid.

Figure 2.1: Mortality Disparity Rates of American Indian/Alaska Natives (AI/AN) years 2009-2011, and U.S. All Races year 2010



Source: Indian Health Service, “Disparities”, 2018, [https://www.ihs.gov/newsroom/factsheets/disparities/?mobileFormat=0;Indian Health Service, Indian Health Disparities](https://www.ihs.gov/newsroom/factsheets/disparities/?mobileFormat=0;Indian%20Health%20Service,%20Indian%20Health%20Disparities), April 2018, p. 2, Indian Health Services, *Indian Health Disparities*, April 2018, p.2, https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/Disparities.pdf.

Sadly, instances of depression, substance abuse, and suicide are all too common among Native youth.³³⁴ As discussed below, these poor health conditions are compounded by poor levels of access to quality health care in Indian Country.

Federal Funding

Over the years, Native American health care has been chronically underfunded. In 2016, IHS health care expenditures per person were only \$2,834, compared to \$9,990 per person for federal health care spending nationwide.³³⁵ In 2017, IHS health care expenditures per person were \$3,332,

³³⁴ IHS, *Trends in Indian Health*, *supra* note 49, at 75–76; National Institutes of Health, National Institute on Drug Abuse, “Substance Use in American Indian Youth is Worse than We Thought,” Sept. 11, 2014, <https://www.drugabuse.gov/about-nida/noras-blog/2014/09/substance-use-in-american-indian-youth-worse-than-we-thought>; Seattle Indian Health Board, Urban Indian Health Institute, *Addressing Depression Among American Indians and Alaska Natives: A Literature Review*, August 2012, at 8, <http://www.uihi.org/wp-content/uploads/2012/08/Depression-Environmental-Scan-All-Sections-2012-08-21-ES-FINAL.pdf>; For discussion of the possible underlying causes, see *infra* notes 413–430 (discussing depression and suicide).

³³⁵ National Tribal Budget Formulation Workgroup, *Honoring the Federal Trust Responsibility: A New Partnership to Provide Quality Healthcare to America’s First Citizens: Recommendations on the Indian Health Service Fiscal*

compared to \$9,207 for federal health care spending nationwide.³³⁶ Figure 2.2 illustrates the disparity in per capita spending between IHS and other federal health care programs in 2016. According to the Tribal Budget Workgroup, the 2019 IHS budget request of \$5.4 billion, which is \$413 million above FY 2018 annualized funds,³³⁷ would meet only a fraction of the Native American health care need.³³⁸ The Workgroup estimated that \$32 billion would be required to fully fund IHS based on health care need.³³⁹ According to the National Congress of American Indians (NCAI), although funding for IHS has increased significantly since 2009, “when compounded with rising medical inflation and population growth, Indian health budgets are quickly trending backwards.”³⁴⁰ Indeed, when adjusted for inflation and population growth, the IHS budget has remained static in recent decades, with little additional funding available to target the chronic health disparities facing Native communities (*see* Appendix D, Funding for Native American Health Care).³⁴¹

Year 2019 Budget, Mar. 2017, at 10, <https://www.nihb.org/docs/04032017/TBFWG%20Testimony%20FY%202019%20FINAL.pdf> [hereinafter Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*].

³³⁶ Indian Health Service, *2017 IHS Expenditures Per Capita and Other Federal Health Care Expenditures Per Capita* (March 2018), https://www.ihs.gov/ihcif/includes/themes/responsive2017/display_objects/documents/2018/2017_IHS_Expenditures.pdf.

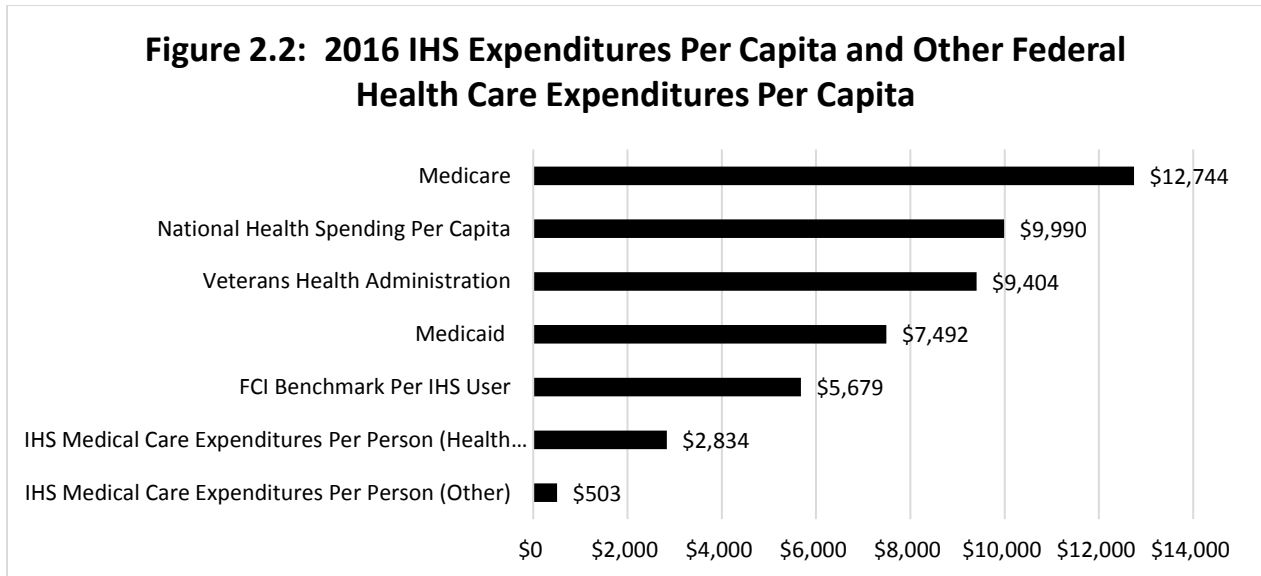
³³⁷ U.S. Department of Health and Human Services, Indian Health Service, *FY 2019 Budget in Brief* (Feb. 19, 2018), 27, <https://www.hhs.gov/sites/default/files/fy-2019-budget-in-brief.pdf> [hereinafter cited as IHS, *FY 2019 Budget in Brief*].

³³⁸ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 14.

³³⁹ *Ibid.*

³⁴⁰ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 57.

³⁴¹ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 3, 7. The population of American Indians and Alaska Natives has been increasing at an average annual rate of 1.5 percent in recent years. *See also* DAN FROSCHE AND CHRISTOPHER WEAVER, ‘People Are Dying Here’: Federal Hospitals Fail Tribes, WALL STREET JOURNAL, Jul. 7, 2017, <https://www.wsj.com/articles/people-are-dying-here-federal-hospitals-fail-native-americans-1499436974> (noting that Native American and low-income patients who live on remote reservations may find themselves without adequate health services due to dangerous IHS facilities and faulty care).



Source: Honoring The Federal Trust Responsibility: A New Partnership to Provide Quality Healthcare to America's First Citizens: The National Tribal Budget Formulation Workgroup's Recommendations on the Indian Health Service Fiscal Year 2019 Budget, March 2017, p. 14, <https://www.nihb.org/docs/04032017/TBFWG%20Testimony%20FY%202019%20FINAL.pdf>.

The 2013 federal budget sequester (or automatic spending cuts) also had a devastating impact on Native American health care. In an already underfunded health care system, sequestration resulted in a \$220 million (or 5.1 percent) further decrease in the IHS budget.³⁴² As a result, many IHS facilities were forced to reduce operating hours and services, and lay off staff.³⁴³ Furthermore, IHS was the only federally funded health care program subject to full sequestration—Congress exempted other major federal direct-care programs from across-the-board cuts.³⁴⁴

The following table shows trends in IHS budget (and the President's requested budget) items from FY 2015–2019. See Table 2.1.

³⁴² Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 37–38.

³⁴³ Bohlen Testimony, *Briefing Transcript*, p. 25.

³⁴⁴ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 38.

Table 2.1: Trends in IHS Budget from FY 2015 to FY 2019

Trend in Indian Health Service Budget					
<i>(Amounts in thousands)</i>					
Category	FY 2015	FY 2016	FY 2017	FY 2018 CR	FY 2019 Request
<i>Clinical Services</i>	3,197,036	3,237,055	3,359,038	3,336,226	3,688,883
<i>Preventive Health Services</i>	153,961	155,734	159,730	158,645	89,058
<i>Facilities</i>	460,234	523,232	545,424	541,721	505,821
<i>Other Services</i>	831,150	173,598	175,694	174,501	168,034
Contract Support Costs*		717,970	800,000	800,000	822,227
Special Diabetes Program for Indians (SDPI)	-	-	-	-	150,000
TOTAL, BUDGET AUTHORITY	4,642,381	4,807,589	5,039,886	5,011,093	5,424,023
Medicare/Medicaid Collections	1,038,893	1,056,243	1,056,243	1,056,243	1,056,243
Private Insurance Collections	104,272	109,272	109,272	109,272	109,272
VA Reimbursement	7,530	28,062	28,062	28,062	28,062
Quarters Collections	8,000	8,500	8,500	8,500	8,500
Special Diabetes Program for Indians (SDPI)	150,000	150,000	147,000	150,000	-
Opioid Prevention, Treatment, and Recovery Support	-	-	-	-	150,000
TOTAL IHS -- CURRENT \$s	5,951,076	6,159,666	6,388,963	6,363,170	6,776,100
*Contract support costs are included in the "other services" total unless otherwise noted					
SOURCE: IHS HQ/OFA/Division of Budget Formulation					
http://www.ncai.org/2017.05.23_FY_2018_NCAI_Pres_Budget_Analysis.pdf					

Table 2.1 shows an overall dollar increase in federal spending. The chart also shows Clinical and Preventive Health Services budget items from FY 2015 to FY 2018, with a similar requested increase for FY 2019. There is an overall dollar amount increase for those programs in those years, but a decrease in the FY 2019 requests for the Indian Health Professions, Tribal Management, and Self Governance programs.

Elizabeth Fowler, Deputy Director for Management Operations of IHS, noted in her 2016 testimony before the Commission:

IHS has benefitted from increases in its budget. However, challenges remain. Some of the biggest challenges we face are associated with providing healthcare in rural, geographically isolated communities. These challenges include recruiting and retaining qualified healthcare staff, providing competitive salaries, and the availability of suitable housing, schools, and community resources for staff.³⁴⁵

³⁴⁵ Elizabeth Fowler, Deputy Director for Management Operations of the Indian Health Service, Testimony, *Briefing Transcript*, pp. 121–122.

Issues with Advance Appropriations

From FY 1998 to FY 2015, there was only one year (FY 2006) in which the IHS budget was enacted prior to the start of the fiscal year.³⁴⁶ The IHS budget faces similar challenges to other federal budgets, as late and unpredictable funding makes it difficult for IHS and tribal health care providers to engage in long-term planning and budgeting for providing services; recruiting and retaining medical personnel; and maintaining and constructing health care facilities.³⁴⁷ To mitigate this problem, tribes have called on Congress to provide advance appropriations for IHS so that health care planners would know the amount of available funding two years in advance.³⁴⁸ As a matter of fairness, providing advance appropriations for IHS would place the agency in the same position as other federally funded health care programs. For example, the Veterans Health Administration began receiving advance appropriations in 2009.³⁴⁹ In commenting on the advantages of advance appropriations for IHS, NCAI explained:

Tribal health programs must make long-term decisions without the guarantee of sustained funding. Often programs must determine whether and how they can enter into contracts with outside vendors and suppliers, plan programmatic activities, or maintain current personnel. Advance appropriations would allow Indian health programs to effectively and efficiently manage budgets, coordinate care, and improve health quality outcomes for American Indian/Alaska Natives.³⁵⁰

Toward this end, the IHS Advance Appropriations Act was initially introduced in the U.S. House of Representatives in 2015 and reintroduced in 2017, but these bills were not voted upon and did not lead to any advance appropriations for IHS.³⁵¹

Issues with Contract Support Costs

For many years, the amount of funding provided by Congress was insufficient to meet tribal contract support costs under the Self-Determination Act.³⁵² The Self-Determination Act empowers tribal nations to contract or compact with the federal government in order to operate tribal health

³⁴⁶ Tribal Self-Governance Communication and Education Consortium, *National Tribal Self-Governance Strategic Plan 2017–2019*, *supra* note 86, at 12.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ Veterans of Foreign Wars, “House Approves Advance Appropriations for VA,” Jul. 10, 2009, <https://www.vfw.org/media-and-events/latest-releases/archives/2009/7/house-approves-advance-appropriations-for-va>.

³⁵⁰ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 58.

³⁵¹ See H.R. 395, (114th Congress): “Indian Health Service Advance Appropriations Act of 2015,” <https://www.govtrack.us/congress/bills/114/hr395>; H.R. 235, 115th Congress: Indian Health Service Advance Appropriations Act of 2017, <https://www.govtrack.us/congress/bills/114/hr395>. U.S. Representative Don Young of Alaska introduced the Indian Health Service Advance Appropriations Act of 2015 on January 14, 2015. The legislation would have authorized a 2-fiscal-year budget authority for IHS. On January 3, 2017, the bill was updated and reintroduced as H.R. 235.

³⁵² USCCR, *A Quiet Crisis*, *supra* note 3, at 45.

care programs previously managed by IHS.³⁵³ The Self-Determination Act also requires the federal government to provide funding to cover contract support costs for tribal nations that assume operation of their own health care programs. These contract support costs are the costs for activities that the federal government normally does not carry out, or carries out using resources not transferred to the tribe, and that are necessary for the management of tribal health care programs. According to the NCAI, without full funding for contract support costs, “tribes are forced to reduce” the level of direct health care service in order to cover the administrative costs of operating their own health care systems.³⁵⁴

The issue came to a head in 2012, when the U.S. Supreme Court ruled that the federal government is obligated to fully fund a contract made by the U.S. government with an Indian tribe—even if Congress fails to appropriate sufficient funds.³⁵⁵ Thus, the government must now pay fully the contract support costs of tribal contractors under the Self-Determination Act. In line with this ruling, the IHS FY 2016 budget request included a proposal to reclassify contract support costs from an annual discretionary appropriation to a mandatory appropriation, beginning in FY 2017.³⁵⁶ According to HHS, “now that contract support costs are fully funded, tribes are showing more interest in contracting and compacting” with IHS to operate their own health care systems—an outcome consistent with the goal of tribal self-determination.³⁵⁷ Since 2016, contract support costs have been a separate discretionary indefinite annual appropriation. For example, the FY 2019 budget proposal requests \$822 million to continue to fully fund contract support costs, which would allow HHS to guarantee IHS full funding of this program.³⁵⁸

Purchased/Referred Care

The Purchased/Referred Care program provides funding for IHS to purchase essential health care services from private health care providers, when such services are not available at IHS or tribal

³⁵³ 25 U.S.C. § 5321.

³⁵⁴ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 59,

³⁵⁵ *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012).

³⁵⁶ U.S. Department of Health and Human Services, *Indian Health Service FY 2016: Justification of Estimates for Appropriations Committees* (2015), CJ-147, <http://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2016CongressionalJustification.pdf> [hereinafter cited as HHS, *IHS FY 2016 Congressional Justification*].

³⁵⁷ *Ibid.*

³⁵⁸ IHS, *FY 2019 Budget in Brief*, *supra* note 337, at 29–30.; U.S. Department of Health and Human Services, *Indian Health Service Budget 101: 2017 Annual Tribal Self-Governance Consultation Conference* (Apr. 2017), 12, <http://www.tribalselfgov.org/wp-content/uploads/2017/05/IHS-Budget-101-SG-Conf-april-26-2017.pdf>; U.S. Department of Health and Human Services, *Putting America’s Health First: FY 2018 President’s Budget for HHS*, 27, https://www.hhs.gov/sites/default/files/Consolidated%20BIB_ONLINE_remediated.pdf; *Fiscal Year 2017 Budget in Brief: Strengthening Health and Opportunity for All Americans*, <https://www.hhs.gov/sites/default/files/fy2017-budget-in-brief.pdf>.

health care facilities.³⁵⁹ This funding, however, is highly limited.³⁶⁰ Services purchased from private health care providers by IHS under the Purchased/Referred Care program include essential hospital and outpatient care; emergency care; transportation; laboratory; pharmacy; and physical therapy services, among others.³⁶¹ IHS is authorized to purchase health care services under the Purchased/Referred Care program only after patients exhaust all other health care resources, including Medicare, Medicaid, state health programs, and private insurance.³⁶²

According to the National Tribal Budget Formulation Workgroup, funding levels for the Purchased/Referred Care program are inadequate to meet the current demand for purchased and referred health care services.³⁶³ Therefore, the Purchased/Referred Care program utilizes a medical priority system to fund the most urgent cases first. In FY 2013, IHS denied an estimated 147,000 medical services requested through the Purchased/Referred Care program as needed by tribal citizens—amounting to \$761 million in unmet need.³⁶⁴

Most IHS-operated Purchased/Referred Care programs are only able to purchase services at the Priority I level—that is, emergency care for the preservation of life and limb.³⁶⁵ According to the IHS National Tribal Budget Formulation Workgroup, this leads to many tribal citizens being denied preventative and specialty health care service referrals, leading to “worse health outcomes and increased long-term costs” for the Native health care system.³⁶⁶ Increases in the Purchased/Referred Care program funding and third-party reimbursements—under the ACA’s³⁶⁷ expansion of Medicaid and private insurance coverage—have allowed the Purchased/Referred Care program to “purchase preventive care [that goes] beyond emergency care services, including procedures such as mammograms or colonoscopies.”³⁶⁸ However, the Tribal Budget Workgroup

³⁵⁹ HHS, IHS, *Fact Sheet: Purchased/Referred Care*, *supra* note 324. The Purchased/Referred Care program pays for critical health services in certain situations. This includes when there are no IHS or tribal health care facilities available; when IHS or tribal health care facilities are not capable of providing the necessary services; or when IHS or tribal health care facilities are unable to provide the services due to an excessive workload. *See also* HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-97.

³⁶⁰ *See supra* notes 335–345 (discussing limited funding).

³⁶¹ Alaska Native Health Board, “IHS Announces New Medicare-Like Rates Regulation,” Mar. 21, 2016, <http://www.anhb.org/ihs-announces-new-medicare-like-rates-regulation/>. NCAI asserts that Purchased/Referred Care program funding is “critical to securing the care needed to treat injuries, cardiovascular and heart disease, diabetes, digestive diseases, and cancer,” which are among the leading causes of death for Native Americans. NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 62.

³⁶² HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-98.

³⁶³ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 27.

³⁶⁴ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-99.

³⁶⁵ *Ibid.*

³⁶⁶ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 28.

³⁶⁷ *See* Chapter 2, “Affordable Care Act (ACA)” subsection; *see also infra* notes 534–563 (providing additional information about the Affordable Care Act’s provisions and its current challenges for Native American Communities).

³⁶⁸ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-99. “In FY 2013, 23 percent of IHS-operated Purchased/Referred Care programs were able to purchase services beyond Medical Priority I—Emergent or

found that, given the increasing difficulty of recruiting and retaining qualified health care personnel, the need for purchased and referred care in Indian Country will likely continue to grow in the coming years.³⁶⁹ For FY 2019, the President's Budget requested \$903.5 million for the Purchased/Referred Care program, an increase of \$32.1 million from the 2018 annualized amount.³⁷⁰

Urban Indian Health Program

Approximately 70 percent of Native Americans live in urban areas today, compared with 38 percent in 1990.³⁷¹ Data show that many of the recurring health problems faced by Native Americans in general are more acute for those living in urban areas. According to IHS, Native youth residing in cities “are at greater risk for serious mental health and substance abuse problems, suicide, increased gang activity, teen pregnancy, abuse, and neglect.”³⁷² These persistent health problems are often compounded by urban Indians' inadequate access to health care service.³⁷³ The Kaiser Family Foundation has found that “the share of IHS funding going toward urban programs over time has not reflected the overall demographic shift of American Indians away from reservations.”³⁷⁴ In recent years, on average, only one percent of the IHS budget has been allocated to urban Indian health care.³⁷⁵

Though IHS' budget is limited, IHS enters into contracts and grants with 34 nonprofit Urban Indian Organizations that provide health care services to approximately 54,500 urban Indians who lack access to IHS and tribally operated health care facilities.³⁷⁶ According to 2014 estimates published by IHS, approximately one million Native Americans live in the service area of the Urban Indian

Acutely Urgent Care Services. This number increased to 41 percent in FY 2014.” *See also infra* Chapter 2, “Affordable Care Act (ACA).”

³⁶⁹ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 27.

³⁷⁰ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-126.

³⁷¹ U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: Urban Indian Health Program* (Oct. 2015), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/UrbanIndianHealthProgram_FactSheet_October2015.pdf [hereinafter IHS, *Urban Indian Health Program*]. *See also* USCCR, *A Quiet Crisis*, *supra* note 3, at 46. The Commission found that the dramatic increase in the number of Native Americans living in cities is the result of “poor economic conditions on reservations” and the failure of federal programs that serve reservation-based communities.

³⁷² IHS, *Urban Indian Health Program*, *supra* note 371.

³⁷³ *Ibid.*

³⁷⁴ Samantha Artiga, et al., Kaiser Family Foundation, *Health Coverage and Care for American Indians and Alaska Natives* (Oct. 2013), <http://kff.org/report-section/health-coverage-and-care-for-american-indians-and-alaska-natives-issue-brief/>.

³⁷⁵ IHS, *Trends in Indian Health*, *supra* note 49, at 22.

³⁷⁶ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-147. The 34 Urban Indian Organizations include full ambulatory care, limited ambulatory care, outreach and referral, and residential substance abuse treatment programs and facilities.

Organizations and, in 2013, the organizations managed 526,016 patient encounters.³⁷⁷ Moreover, Urban Indian Organizations often “provide the only affordable, culturally competent health care services available in these urban areas.”³⁷⁸

But unfortunately, the budget for urban Indian health care has failed to keep pace with inflation and the growing urban Indian population. Indeed, according to the Tribal Budget Workgroup, the funding allocated for urban Indian health “is estimated at [only] 22 percent of the projected need for primary care services.”³⁷⁹ The FY 2019 President’s Budget requested \$46.4 million for Urban Indian Health—down from the FY 2018 annualized amount of \$47.3 million and the FY 2017 enacted level of \$47.6 million.³⁸⁰ See Figure 2.3.

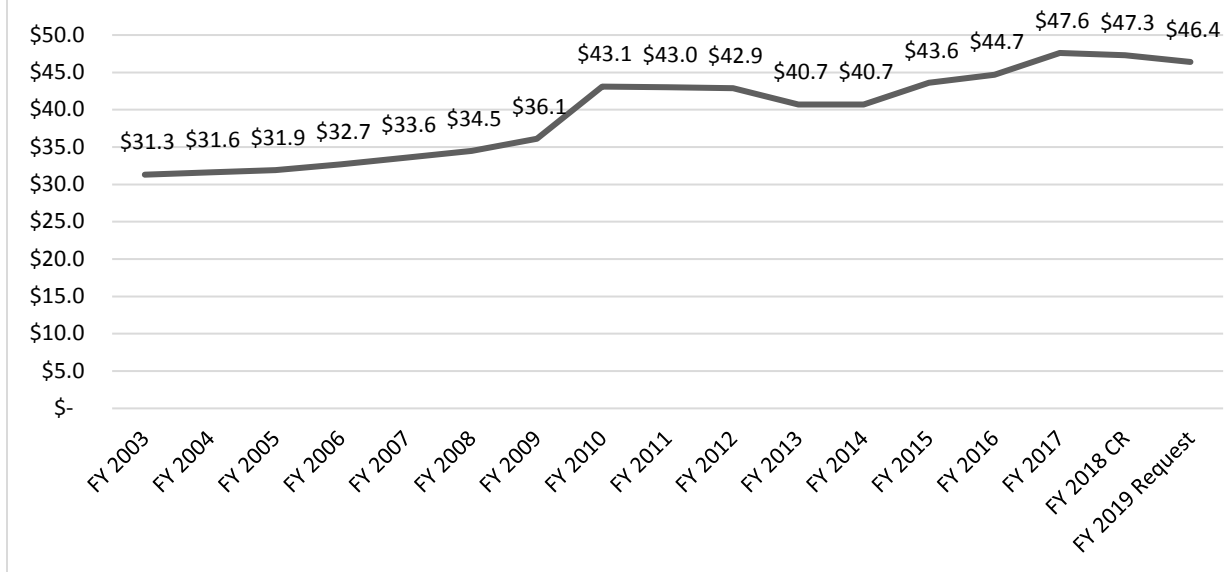
³⁷⁷ IHS, *Trends in Indian Health*, *supra* note 49, at 32, 152.

³⁷⁸ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-125.

³⁷⁹ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 57. The Workgroup further claims eighteen additional cities have significant Native American populations.

³⁸⁰ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-147.

Figure 2.3: Funding Trends for the Urban Indian Health Program from FY 2003 to FY 2019 (in millions)



Source: IHS HQ/OFA/Division of Budget Formulation,

http://www.ncai.org/2017.05.23_FY_2018_NCAI_Pres_Budget_Analysis.pdf;

https://www.ihs.gov/budgetformulation/includes/themes/newihsthem/display_objects/documents/FY2018CongressionalJustification.pdf; and

https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2019CongressionalJustification.pdf.

As a result of static funding, Urban Indian Organizations must continue to leverage additional health care funds from other federal agencies, states, and foundations. Here, too, their access to such funds is also limited.³⁸¹ The increasingly urban context of Native American life documented above shows that the low funding federally appropriated for urban Indian health care is concerning,³⁸² and likely fails to meet the obligations of the federal government under the trust relationship.³⁸³

Behavioral Health Services

According to the Chairman of the National Indian Health Board, behavioral health services in Indian Country lack solid infrastructure support.³⁸⁴ Native Americans who struggle with

³⁸¹ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 29. For example, Urban Indian Health programs are not authorized to receive Purchased/Referred Care funding provided for in the IHS budget.

³⁸² *Ibid.* The Tribal Budget Workgroup requested an \$11.7 million (or 26.8 percent) funding increase for FY 2017 (over the FY 2016 budget) for Urban Indian Health programs.

³⁸³ See 25 U.S.C. §1601; see also *supra* notes 301–308 (discussing the federal trust relationship).

³⁸⁴ Vinton Hawley, testimony before the House Appropriations Subcommittee, Apr. 26, 2018, at 3.

behavioral health challenges often encounter limited access to behavioral health services.³⁸⁵ Professor Sarah Deer discussed this issue in her Commission testimony:

I'd like to emphasize [] the rate of posttraumatic stress disorder in the lives of Native children[,] which is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population. [W]e [also] found that the PTSD rate in Native American adults is 4.4 times the national average. Now, this data tells us that victims of crime in Indian country are not receiving the services they need.³⁸⁶

With disproportionately high rates of depression, suicide, alcohol abuse, and substance abuse among the Native American community,³⁸⁷ and Native Americans and Alaska Natives experiencing some of the highest rates of psychological and behavioral health issues as compared to other racial and ethnic groups,³⁸⁸ there is a great need for access to services and adequate funding for quality behavioral health programs.

Compared to the general population, Native Americans experience significantly higher rates of psychological distress, mental health disorders, suicide, and alcohol and substance abuse.³⁸⁹ For example, in 2014, both Native American males and females had the highest suicide rates among other racial and ethnic groups at 27.4 deaths and 8.7 deaths respectively per 100,000.³⁹⁰ Substance abuse disorder rates were found to be higher among the Native American population than among any other racial or ethnic group at 16 percent, as compared to non-Latino white people at 8 percent, non-Hispanic black people at 8.6 percent, Hispanic people at 8.5 percent, Asian people at 4.5 percent, and Native Hawaiian or Other Pacific Islander people at 10 percent.³⁹¹ Additionally, the rate of alcohol-related deaths for Native Americans is six times greater than the rate for all races, at 49.6 deaths as compared to 8.0 deaths per 100,000.³⁹² These behavioral health issues have a profound impact on individuals and communities in Indian Country.

³⁸⁵ The National Tribal Budget Formulation Workgroup, *Federal Indian Trust Responsibility: The Quest for Equitable and Quality Indian Healthcare* (June 2016), 83, <https://www.nihb.org/docs/06212016/FINAL%20FY%202018%20IHS%20Budget%20Workgroup%20Recommendations.pdf>.

³⁸⁶ Deer Testimony, *Briefing Transcript*, p. 36.

³⁸⁷ See *infra* notes 413–451 (discussing depression, suicide, and alcohol/substance abuse).

³⁸⁸ Walls, et al., *Mental Health and Substance Abuse Services Preferences among American Indian People of the Northern Midwest*, *COMMUNITY MENTAL HEALTH J.*, Vol. 42, No. 6 (2006) at 522, <https://link.springer.com/content/pdf/10.1007%2Fs10597-006-9054-7.pdf>.

³⁸⁹ IHS, *Trends in Indian Health*, *supra* note 49, at 73–76; see also NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 56.

³⁹⁰ Congressional Research Service, *Behavioral Health Among American Indian and Alaska Natives: An Overview* (Sept. 16, 2016), 7, <https://fas.org/sgp/crs/misc/R44634.pdf>.

³⁹¹ *Ibid.*

³⁹² *Ibid.*; U.S. Department of Health and Human Services, Indian Health Service, *Justification of Estimates for Appropriations Committees for Fiscal Year 2017*, CJ-100, <https://www.ihs.gov/budgetformulation/congressionaljustifications/>. The rates of alcohol-related deaths are age-adjusted. The rate for the AI/AN population is a three-year average for 2007–2009, and the rate for all races is for 2008. See also Emily Guarnotta, “Native Americans and Alcoholism,” May 21, 2018,

There are varying viewpoints among researchers and advocates regarding the reasons why Native Americans experience disproportionately high rates of behavioral health issues. Some research attributes “inadequate education, disproportionate poverty, discrimination in the delivery of health services, and cultural differences,”³⁹³ to this disparity, as the Native American population in the aggregate has been found to be “poorer, less educated, less employed, less healthy . . . than virtually any other demographic group in the United States.”³⁹⁴ As of 2012, only 85 percent of Native American adults had a high school diploma as compared to 92 percent of non-Hispanic whites. The median income of Native Americans was two-thirds that of non-Hispanic whites: \$37,353, as compared to \$56,565.³⁹⁵ Additionally, the poverty rate of Native Americans is twice the national average.³⁹⁶

Other research asserts that Native Americans are more likely than people in other U.S. demographics to experience trauma, physical abuse, neglect, and post-traumatic stress disorder.³⁹⁷ The rate of violence is also twice as high among Native American communities as the national average, which could be caused by forced relocation, cultural assimilation, and other causes of suffering among the Native population.³⁹⁸ The disproportionate rates of mental and behavioral health issues faced by Native Americans have been attributed in part to the ongoing impact of historical trauma.³⁹⁹

There are limited federal programs to address these significant issues.⁴⁰⁰ The IHS Mental Health/Social Services program is a community-oriented clinical and preventive service program

<https://www.recovery.org/topics/native-americans-alcoholism/> (last accessed July 20, 2018). Factors such as economic disadvantage, cultural loss, history of abuse, and physical and mental health problems can cause high rates of alcoholism among Native Americans, although individuals are influenced by these factors in different ways.

³⁹³ Congressional Research Service, *Behavioral Health Among American Indian and Alaska Natives: An Overview*, Sept. 16, 2016, <https://fas.org/sgp/crs/misc/R44634.pdf>, at 6, n. 20 (quoting U.S. Department of Health and Human Services, Indian Health Service, Disparities, March 2016, <https://www.ihs.gov/newsroom/factsheets/disparities/>).

³⁹⁴ Congressional Research Service, *Behavioral Health Among American Indian and Alaska Natives: An Overview*, Sept. 16, 2016, at 6, n. 21, <https://fas.org/sgp/crs/misc/R44634.pdf> (quoting Joseph P. Gone and Joseph E. Trimble, “Native American and Alaska Native Mental Health: Diverse Perspectives on Enduring Disparities,” *ANN. REV. CLINICAL PSYCHOL.*, Vol. 8 (2012), at 131–160).

³⁹⁵ Congressional Research Service, *Behavioral Health Among American Indian and Alaska Natives: An Overview* (Sept. 16, 2016), 7, <https://fas.org/sgp/crs/misc/R44634.pdf>; U.S. Department of Health and Human Services, Office of Minority Health, “Profile: American Indian/Alaska Native,” Mar. 28 2018, <http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62>.

³⁹⁶ Abilene Slaton, *Federal Statutory Responsibility and the Mental Health Crisis Among American Indians*, 40 *AM. INDIAN L. REV.* 71, 74 (2016), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1024&context=ailr>.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 56; *see also* Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, *PROF'L COUNS.*, <http://tpcjournl.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans/>.

⁴⁰⁰ *See, e.g., supra* notes 387–88 (discussing the “great need for access to services and adequate funding for quality behavioral health programs”).

that provides tribal citizens with outpatient mental health counseling as well as access to diagnostic and case management services, mental health crisis response, and community-based prevention programs.⁴⁰¹ The standard IHS mental health treatment program for tribal citizens involves “an acute, crisis-oriented outpatient service” staffed by mental health professionals with the ability to deliver psychotherapy and case management services.⁴⁰² For most other mental health services—including after hour emergency and inpatient mental health services—tribal citizens usually rely upon non-IHS hospitals and local emergency departments.⁴⁰³

Tribes directly manage over half of the mental health budget and associated programs through self-determination contracts or compacts with the federal government.⁴⁰⁴ However, IHS still plays a critical role assisting tribal programs with the development and delivery of mental health services and “connecting individual programs in a national network to share information, practices, and leadership development.”⁴⁰⁵

The IHS FY2019 Budget requested \$105.1 million in funding for mental health services, an increase from the final budgeted amount of \$94 million in FY 2017 and the FY 2017 annualized amount of \$93.4 million.⁴⁰⁶ As discussed above, overall, IHS funding is insufficient.⁴⁰⁷ For FY 2019, NCAI recommends that the behavioral health service budget for Native Americans increase by \$122.6 million. For support, they note that tribal leaders consider this issue a significant priority, and the increase is needed so that tribal communities can “develop innovative and culturally appropriate prevention programs that are so greatly needed in Tribal communities.”⁴⁰⁸

In 2011, IHS released the *American Indian/Alaska Native National Behavioral Health Strategic Plan*, which establishes goals and objectives for combating the mental health and substance abuse problems endemic to Indian Country.⁴⁰⁹ The *Strategic Plan* calls for a holistic approach to the treatment of behavioral health issues—one that engages all members of the community, from elders to youth, and one that incorporates traditional Native American cultural-based approaches

⁴⁰¹ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-84.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.* Intermediate services such as group homes, transitional living support, and intensive case management are generally not reimbursable by IHS, though they may be available through state and local resources.

⁴⁰⁴ U.S. Department of Health and Human Services, Indian Health Service, *American Indian/Alaska Native National Behavioral Health Strategic Plan, 2011–2015* (2011), 18, http://www.ihs.gov/dbh/includes/themes/newihstheme/display_objects/documents/AIANNationalBHStrategicPlan.pdf [hereinafter HHS, IHS, *American Indian/Alaska Native National Behavioral Health Strategic Plan, 2011–2015*].

⁴⁰⁵ *Ibid.*, 18 (also stating that, “Moving from individual systems toward an integrated and responsive IHS, Tribal, and Urban Indian behavioral health system may be the single most important area for strategic development in the next 5 years as it touches every other aspect of prevention, care, and education.”).

⁴⁰⁶ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-8.

⁴⁰⁷ *See supra* notes 335–345 (discussing IHS funding) and Figure 2.3.

⁴⁰⁸ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 60.

⁴⁰⁹ HHS, IHS, *American Indian/Alaska Native National Behavioral Health Strategic Plan, 2011–2015*, *supra* note 404.

to individual health and wellbeing.⁴¹⁰ The *Strategic Plan* also highlights the need for cooperation between IHS, tribal, and urban Indian health care delivery systems to develop an effective nationwide behavioral health care system for Native Americans—one that is seamless and holistic in meeting the full spectrum of needs.⁴¹¹ In order to create a strong and effective behavioral health care system in Indian Country, the *Strategic Plan* recommends:

- Encouraging the development of behavioral health standards and credentials;
- Integrating behavioral health within the structure of health services and primary care;
- Developing a skilled and culturally competent workforce and increasing the number of behavioral health care providers to meet the demand for services;
- Securing necessary reimbursement for behavioral health services; and
- Sustaining interagency partnerships to support behavioral health.⁴¹²

Depression and Suicide

Native Americans experience suicide rates that are 1.6 times greater than the national average.⁴¹³ The suicide death rate for Native male youth is two-and-a-half times greater than that of their non-Native peers.⁴¹⁴ In comparison to other groups where suicide rates increase with age, the Native American suicide rate is highest among the young and decreases with age.⁴¹⁵ According to IHS, “some of the social, educational, and cultural issues which underlie suicide include poverty, lack of economic opportunity, limited educational alternatives, community breakdown, familial

⁴¹⁰ Ibid., 1 (examples include equine therapy, canoe journeys, elders meditation, and healing circles).

⁴¹¹ Ibid., 18 (connecting Native communities and behavioral health programs with national information networks and “promoting national sharing of prevention, treatment, and education information” are key components of the *Strategic Plan*).

⁴¹² Ibid., 26. See, e.g., “Memorandum of Agreement between the Department of Health and Human Services, Indian Health Service and the Department of the Interior, Bureau of Indian Affairs on Indian Alcohol and Substance Abuse Prevention and Treatment,” Mar. 8, 2011, https://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/2011_Letters/DTLL_DOI_IHS_MOA_030811.pdf.

⁴¹³ U.S. Department of Health and Human Services, Indian Health Service, *Fact Sheet: Behavioral Health* (Jan. 2015), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/BehavioralHealth.pdf.

⁴¹⁴ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 24.

⁴¹⁵ Ibid.

disruption, and stigma.”⁴¹⁶ Depression has also been identified as an underlying factor in cases of suicide.⁴¹⁷

Recent decades have seen the rise of innovative tribal-based approaches to address and combat the high suicide rates in Indian Country, moving beyond “mainstream” suicide prevention programs such as “trainings, crisis lines, mentoring, and school-based programs.”⁴¹⁸ For example, the American Indian Life Skills Development program, a school based initiative for Native American youth, has been shown to reduce feelings of hopelessness and increase problem-solving skills.⁴¹⁹ The White Mountain Apache tribe has established a community-based surveillance system, which identifies “unique risk and protective factors for particular populations” to support its suicide prevention initiative.⁴²⁰ In addition, an Athabaskan tribe in the southwestern United States has developed a successful community-based suicide prevention program that reduces youth suicide attempts through community awareness programs, identifying high-risk individuals, and implementing prevention activities.⁴²¹ These community-based prevention programs offer some encouragement amid the ongoing suicide crisis.

For its part, IHS is working with tribes to develop and share effective behavioral health programs throughout Indian Country. The integration of behavioral health issues into the primary care system was a major objective in 2016.⁴²² Accordingly, a Behavioral Health Integration Initiative (BH2I) was launched in FY 2017, with a \$6 million appropriation used to fund twelve IHS, Tribal, and Urban Indian organizations.⁴²³ In addition, IHS launched an Improving Patient Care learning intensive program which focused on key areas of the BH2I, and IHS contracted with a technical

⁴¹⁶ U.S. Department of Health and Human Services, Indian Health Service, *American Indian/Alaska Native National Suicide Prevention Strategic Plan, 2011–2015* (2011), 2, http://www.ihs.gov/newsroom/includes/themes/newihs/theme/display_objects/documents/2011_Letters/AIANNationalsSPStrategicPlan.pdf. See also Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 24 (opining that “[g]eographically isolated reservations may amplify [suicide] risks and contribute to a sense of hopelessness, particularly among young people.”).

⁴¹⁷ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-87. According to IHS, depression can be an underlying factor in cases of domestic violence, alcohol abuse, and substance abuse. Native American youth ages 12 to 17 “have the highest lifetime prevalence of major depressive episodes” among all population groups in the United States.

⁴¹⁸ U.S. Department of Health and Human Services, Office of the Surgeon General, and National Action Alliance for Suicide Prevention, *2012 National Strategy for Suicide Prevention: Goals and Objectives For Action* (2012), 102, http://www.surgeongeneral.gov/library/reports/national-strategy-suicide-prevention/full_report-rev.pdf.

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*, 102–103.

⁴²¹ Philip A. May, *et al.*, *Outcome Evaluation of a Public Health Approach to Suicide Prevention in an American Indian Tribal Nation*, *AM. J. PUB. HEALTH*, Vol. 95, No. 7, 2005, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1380310/>.

⁴²² HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-86.

⁴²³ *IHS FY 19 Justification of Estimates*, *supra* note 328, at CJ-111.

assistance provider to help guide the pilot project and complete a program evaluation to assess its impact.⁴²⁴

Enhanced screening and tracking tools for depression were incorporated into the IHS Electronic Health Record system at over 400 (or 60 percent of) Native American health care facilities around the nation.⁴²⁵ During 2012–2014, these additional depression screenings resulted in treatment for 16,490 new patients in Indian Country. According to IHS, behavioral health programs “that are collaborative, community driven, and nationally supported offer the most promising potential for long term success and sustainment.”⁴²⁶ In 2016, the agency also clarified that early identification of depression was a major goal in order to develop proactive intervention and treatment strategies for Native Americans with depression. As such, the agency emphasized the need for additional training in depression screening and suicide surveillance activities among relevant health care providers.⁴²⁷

According to the Substance Abuse and Mental Health Services Administration, access to depression prevention and treatment programs is crucial for the wellbeing of Native American communities.⁴²⁸ However, the Tribal Budget Workgroup, among other organizations, maintains that additional financial resources are required to overcome staffing deficiencies for sufficient tribe-based clinical and preventive services.⁴²⁹ The Workgroup warns: “without adequate resources to address mental health needs,” the suicide rates for Native Americans will continue at their current levels.⁴³⁰

Alcohol and Substance Abuse

Alcohol and substance abuse are among the most serious public health issues facing Native American communities. In 2010, the National Survey on Drug Use and Health revealed that the percentage of Native Americans requiring treatment for problems related to alcohol or drug use was nearly twice the national average (18.0 percent vs. 9.6 percent).⁴³¹ In addition, the drug-related death rate for Native Americans is 1.8 times greater than the rate for all races nationwide (22.7

⁴²⁴ Ibid.

⁴²⁵ Ibid., CJ-87 (also finding that staff turnover and the resulting need to train new staff in depression screening processes have been identified as obstacles confronted by health care providers serving Native populations).

⁴²⁶ Ibid., CJ-86.

⁴²⁷ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-88.

⁴²⁸ U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Affordable Care Act Offers Behavioral Health Services to AI/AN Communities* (Feb. 3, 2015), <http://www.hhs.gov/blog/2015/02/03/affordable-care-act-offers-health-services-aian-communities.html>.

⁴²⁹ Tribal Budget Workgroup, *Recommendations on the IHS FY 2017 Budget*, *supra* note 50, at 23.

⁴³⁰ Ibid., 24.

⁴³¹ U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *The National Survey on Drug Use and Health Report: Substance Use Among American Indian or Alaska Native Adults* (2010), 1, <http://www.iaia.edu/wp-content/uploads/2011/04/Substance-Use-Among-AI-Adults.pdf>. Native Americans also experience higher rates of binge alcohol episodes and illicit drug use than the general population.

deaths per 100,000 vs. 12.6 deaths per 100,000).⁴³² HHS argues that alcohol and substance abuse in Indian Country contribute to “high rates of mortality from liver disease, unintentional injury, and suicide.”⁴³³ In addition, Native communities suffer from some of the highest rates of Fetal Alcohol Spectrum disorders in the nation.⁴³⁴

With tribes directly managing eighty-five percent of the alcohol and substance abuse budget and programs using self-determination contracts, IHS now supports and aids tribes in developing community level treatment programs that incorporate best practice approaches.⁴³⁵ The goal of IHS and its tribal partners is the “integration of substance abuse treatment into primary care and emergency services” through screening, early intervention, and treatment referral.⁴³⁶ IHS has also found that “one of the fundamentals to helping Native youth is access to behavioral health professionals that are trained in culturally tailored interventions.”⁴³⁷ The federal government has launched several initiatives as part of its alcohol and substance abuse program to combat the mental health and substance abuse problems endemic to Indian Country, including:

- *Youth Regional Treatment Centers (YRTCs)*, located in each of the 12 IHS service areas, which provide residential substance abuse and mental health treatment services to Native youth.⁴³⁸
- *Substance Abuse and Suicide Prevention Program (SASP)*, which is a nationally-coordinated, community-administered pilot program providing culturally appropriate resources for substance use and suicide prevention.⁴³⁹ According to HHS, the early success

⁴³² IHS, *Trends in Indian Health*, *supra* note 49, at 192. See also U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings* (2014), 88, <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

⁴³³ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-89. Between 2002–2011, alcohol was associated with 63 percent of intentional injury hospitalizations and 32 percent of unintentional injury hospitalizations among Native Americans, and alcohol and other substance abuse is “often a precursor” to the serious problems of violence and domestic abuse in Indian country. Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 25–26 (also stating that in 2013, the rate of substance dependence or abuse among Native Americans aged 12 or older was 14.9 percent—the highest rate among all population groups nationwide).

⁴³⁴ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-89.

⁴³⁵ HHS, IHS, *American Indian/Alaska Native National Behavioral Health Strategic Plan, 2011–2015*, *supra* note 404; Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, p. 26. Community-level treatment programs for alcohol and substance abuse include individual and group counseling, peer support, inpatient treatment, and residential placement. Some examples of successful drug and alcohol treatment approaches based upon traditional Native American cultural practices include the Wellbriety. See the Wellbriety Movement (wellness and sobriety) and the GONA (Gathering of Native Americans) process.

⁴³⁶ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-90.

⁴³⁷ *Ibid.*, CJ-93.

⁴³⁸ *Ibid.*, CJ-90.

⁴³⁹ U.S. Department of Health and Human Services, Indian Health Service, *Fiscal Year 2018 Justification of Estimates for Appropriation Committees*, https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2018CongressionalJustification.pdf [hereinafter HHS, IHS, *Fiscal Year 2018 Congressional Justification*]. This pilot program’s

of the SASP reveals the centrality of social connectedness and cultural activities to Native American wellness, especially for suicide prevention and substance abuse efforts.⁴⁴⁰

- *Tele-Behavioral Health Center of Excellence (TBHCE)* provides a range of behavioral health services and trainings via tele-video. This program is targeted toward clinical providers working in remote areas. It helps them maintain continuing education requirements for licensure, get up-to-date on clinical guidelines, and more effectively provide behavioral health services to their clients.⁴⁴¹
- *Indian Children’s Program (ICP) (formerly, Fetal Alcohol Spectrum Disorders)*, funded by IHS, which provides training to clinicians on developmental and neurobiological issues. In addition, the program consults with clinicians to help them properly diagnose, manage, and/or treat these conditions.⁴⁴² In FY 2016, the Tele-Behavioral Health Center of Excellence provided 152 hours of clinician training on autism spectrum disorders, and 369 hours on FASD. A formal training series on FASD was slated for FY 2017.⁴⁴³

The President’s FY 2019 budget requested \$235.2 million in funding for the IHS Alcohol and Substance Abuse Program, an increase from the FY 2018 annualized amount of \$216.8 million and the FY 2017 enacted amount of \$218.3 million.⁴⁴⁴

In 2015, the Tribal Budget Workgroup⁴⁴⁵ found that “without a major infusion of funding, Native peoples will continue to be consistently overrepresented in statistics on alcohol and substance abuse disorders.”⁴⁴⁶ The Workgroup recommended a \$114.8 million increase above the FY 2016 funding level, as existing funding levels are insufficient to provide the proper treatment and prevention programs to combat alcohol and substance abuse among the Native American community.⁴⁴⁷

These needs could also be addressed through Substance Abuse and Mental Health Services Administration, which is the lead federal agency on behavioral health care among the general and Native American populations (whereas IHS is the lead federal agency on health care and

evaluation is scheduled for completion in FY 2016 and “will be used to identify successful practice-based and evidenced interventions that can be replicated across the Indian health system.” Ibid.

⁴⁴⁰ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-93.

⁴⁴¹ Ibid., CJ-87.

⁴⁴² HHS, IHS, *Fiscal Year 2018 Congressional Justification*, *supra* note 439, at CJ-93.

⁴⁴³ Ibid.

⁴⁴⁴ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-119 (noting that these funds are subject to tribal shares and transferred to tribes when they assume responsibility for carrying them out, with a portion reserved for IHS for “federally inherent functions . . . to perform the basic operational services of the agency”).

⁴⁴⁵ This is a workgroup of tribal leaders convened to advise the IHS. Tribal Budget Workgroup, *Recommendations on IHS 2017 Budget*, 43, <https://www.nihb.org/docs/06242015/Final%20FY%202017%20IHS%20budget%20full%20report.pdf> [hereinafter Tribal Budget Workgroup, *Recommendations on IHS 2017 Budget*].

⁴⁴⁶ Ibid., 25.

⁴⁴⁷ Ibid., 24–26.

behavioral health care among only the American Indian and Alaska Native population).⁴⁴⁸ Substance Abuse and Mental Health Services Administration uses grant programs and other activities, such as technical assistance and data collection, to support community-based mental health and substance abuse services.⁴⁴⁹ Two specific grant programs award a portion of funds to a single tribal entity, the Substance Abuse Prevention and Treatment Block Grant that distributes funds to states and the Red Lake Band of the Chippewa, and the Protection and Advocacy for Individuals with Mental Illness program that distributes funding to designated state protection and advocacy systems⁴⁵⁰ as well as the American Indian Consortium.⁴⁵¹

Diabetes

Native Americans as a group suffer from the highest rate of diagnosed diabetes in the nation.⁴⁵² Approximately sixteen percent of the Native population has been diagnosed with diabetes—a rate roughly double that of the national average.⁴⁵³ According to IHS, diabetes and resulting complications are “major contributors to death and disability in every tribal community.”⁴⁵⁴ In 1997, Congress established the Special Diabetes Program for Indians (SDPI) grant program in order to combat the diabetes epidemic in Indian Country. The SDPI is a \$150-million-per-year program that provides grant funding to support diabetes education, treatment, and prevention programs in thirty-five states.⁴⁵⁵ According to IHS in 2016, “diabetes health outcomes have improved significantly in Native American communities since the inception of the SDPI.”⁴⁵⁶ The SDPI has dramatically increased Native American access to diabetes clinics as well as nutrition services. At the inception of the SDPI in 1997, thirty-one percent of Native Americans had access

⁴⁴⁸ Congressional Research Service, *Behavioral Health Among American Indian and Alaska Natives: An Overview* (Sep. 16, 2016), 3, <https://fas.org/sgp/crs/misc/R44634.pdf>.

⁴⁴⁹ *Ibid.*, 4.

⁴⁵⁰ Protection and Advocacy (P&A) systems protect the rights of adults and children with serious mental illness or emotional disturbance in both the community and in the care of treatment facilities. The Protection and Advocacy for Individuals with Mental Illness program provides these protections as well as protection for those who are at risk for abuse, neglect, or rights violations. *See generally* 42 CFR 51 *et seq.*; “Civil Rights Protections,” *Substance Abuse and Mental Health Services Administration*, <https://www.samhsa.gov/laws-regulations-guidelines/civil-rights-protections#paimi>.

⁴⁵¹ *Ibid.* Also, the Protection and Advocacy for Individuals with Mental Illness program may fund programs of virtually “any public or private entity, including an Indian tribe or tribal organization. 42 C.F.R. § 51a(3).”

⁴⁵² Centers For Disease Control and Prevention (CDC), *National Diabetes Statistics Report* (2017), 3–4, <https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf> [hereinafter *CDC National Diabetes Statistics Report*]; *see also* Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 40.

⁴⁵³ CDC, *National Diabetes Statistics Report*, *supra* note 452, at 3.

⁴⁵⁴ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-154.

⁴⁵⁵ U.S. Department of Health and Human Services, Indian Health Service, *2011 Report to Congress: Special Diabetes Program For Indians—Making Progress Toward a Healthier Future* (2011), 9, http://www.ihs.gov/newsroom/includes/themes/newihstheme//display_objects/documents/RepCong_2012/2011RT_C_Layou_10102012_508c.pdf [hereinafter IHS, *Special Diabetes Program for Indians*].

⁴⁵⁶ *Ibid.*

to a diabetes clinic.⁴⁵⁷ In 2016, seventy-one percent of the Native population had access to a diabetes clinic and almost one hundred percent of the Native population has access to a diabetes clinical team.⁴⁵⁸ More importantly, since the inception of the SDPI, the average blood sugar level for Native Americans diagnosed with diabetes has decreased by ten percent.⁴⁵⁹ The diabetes death rate for Native Americans decreased from 84.8 per 100,000 in 1998⁴⁶⁰ to 38.4 per 100,000 in 2015.⁴⁶¹ The national diabetes death rate for all demographic populations is 24.7 per 100,000.⁴⁶²

Despite the relative success of the SDPI in improving diabetes health outcomes for Native Americans, the program has been level-funded from 2002 through 2018, without increases for inflation.⁴⁶³ When adjusted for inflation, funding for the SDPI has actually decreased by twenty-three percent over the same period.⁴⁶⁴ Further, when Native American population increases are factored in, the level of funding per capita is even less. The Tribal Budget Workgroup has called for long-term reauthorization and full funding for the SDPI “in order to keep the momentum of this important program alive.”⁴⁶⁵

Health Care and Sanitation Facilities

Health status disparities are further compounded by the limited sanitation facilities of IHS and tribal health care programs.⁴⁶⁶ IHS plays a vital role in the construction and maintenance of water supply and sanitation facilities in Indian Country. Research has shown that families with safe water and sanitation systems in their homes require significantly fewer medical services.⁴⁶⁷ According to IHS, “a recent cost benefit analysis indicated that for every dollar IHS spends on sanitation facilities to serve eligible existing homes, at least a twentyfold return in health benefits is achieved.”⁴⁶⁸ Despite this success, approximately thirteen percent of Native American homes lack safe water or adequate wastewater disposal facilities, as compared with under one percent of homes

⁴⁵⁷ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-156.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ IHS, *Special Diabetes Program for Indians*, *supra* note 455 (Blood sugar control is critical for reducing complications from diabetes.).

⁴⁶⁰ IHS, *Trends in Indian Health*, *supra* note 49, at 60.

⁴⁶¹ Center for Disease Control, “Deaths: Final Data for 2015,” *National Vital Statistics Reports* (Nov. 27, 2017), 42, https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06.pdf.

⁴⁶² *Ibid.*

⁴⁶³ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 40.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ HHS IHS, *Fact Sheet: Health Facilities Construction*, *supra* note 322.

⁴⁶⁷ Indian Health Service, *Fact Sheet: Safe Water and Waste Disposal Facilities* (September 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/SafeWaterandWasteDisposalFacilities.pdf.

⁴⁶⁸ *Ibid.* (finding that in this sense, the IHS Sanitation Facilities Construction Program may be viewed as highly successful).

nationwide.⁴⁶⁹ The cost of providing safe drinking water and adequate sewerage systems for all Native American homes is estimated to be \$2.8 billion.⁴⁷⁰ Unfortunately, due to inflation, population growth, and new environmental regulations, the current funding for sanitation facilities construction is not sufficient to reduce the backlog and meet the need.⁴⁷¹

According to IHS, there is also a “significant need for expansion or replacement of many buildings.”⁴⁷² With an average age of 47 years, many existing health- and sanitation-related facilities have “surpassed their useful lives” and are “grossly undersized” for their user populations, often resulting in “crowded, even unsafe, conditions” for patients and staff.⁴⁷³ As of FY 2016, the total amount needed for Health Care Facilities Construction (HCFC) projects exceeds \$2.1 billion.⁴⁷⁴ However, the FY 2018 annualized funding level for HCFC amounted to only \$117.1 million, and the President’s Budget for FY 2019 only requested \$79.5 million, which is a \$37.6 million decrease from FY 2018.⁴⁷⁵ In addition to funding for new construction, there is also a great need for additional dollars for maintaining and repairing facilities. For FY 2016, the amount of funding required to address the backlog of essential maintenance and repair at IHS and tribal health care facilities was \$467 million.⁴⁷⁶ Funding to maintain and repair facilities generates long-term investment returns by extending the life of existing facilities.⁴⁷⁷ However, the FY 2015 enacted funding level of \$53.6 million for health care facilities maintenance and repair had little impact in reducing the current backlog of maintenance needs, including those for the facilities serving the Native American community.⁴⁷⁸ Since then, the appropriated amounts for maintenance and repair have increased.⁴⁷⁹ In FY 2018, the annualized amount⁴⁸⁰ for maintenance and repair was \$75.2 million, a slight decrease from the appropriated amount from FY 2017 of \$75.7

⁴⁶⁹ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-156. *See also* Indian Health Service, *Fact Sheet: Safe Water and Waste Disposal Facilities* (September 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/SafeWaterandWasteDisposalFacilities.pdf [hereinafter IHS, *Fact Sheet: Safe Water and Waste Disposal Facilities*].

⁴⁷⁰ IHS, *Fact Sheet: Safe Water and Waste Disposal Facilities*, *supra* note 469 (as of 2015, there was a need projects to construct 2,878 sanitation facilities).

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ Tribal Budget Workgroup, *Recommendations on IHS 2017 Budget*, *supra* note 445, at 34.

⁴⁷⁴ *Ibid.*; *see also* HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-172. IHS utilizes the Health Facilities Construction Priority System (HFCPS) to prioritize new facilities construction needs. Prioritization factors include “total amount of space needed, age and condition of the existing health care facility . . . and availability of alternate health care resources.”

⁴⁷⁵ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-172; IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-185.

⁴⁷⁶ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-165.

⁴⁷⁷ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 32.

⁴⁷⁸ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-165.

⁴⁷⁹ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-176.

⁴⁸⁰ The annualized amount refers to the amount allocated through the 2018 continuing resolution.

million.⁴⁸¹ The FY 2019 President’s Budget requested \$75.7 million, the same amount that was appropriated in FY 2017, and a \$514,000 increase from the annualized amount in FY 2018.⁴⁸²

In addition to the unmet need for facilities construction and maintenance, funding for medical equipment purchases has not kept pace with replacement requirements in Native American communities.⁴⁸³ IHS reports that “medical and laboratory equipment, which has an average useful life of 6 years, generally is used at least twice that long in Indian health care facilities.”⁴⁸⁴

Native Hawaiian Health Care Systems Program

The Health Resources & Services Administration (HRSA), an agency of HHS, receives funding for its HRSA Health Center Program. This appropriation supports the Native Hawaiian Health Care Systems Program, which is authorized by the Native Hawaiian Health Care Act of 1988.⁴⁸⁵ Under this statute, Congress recognizes the “special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship” between the U.S. and the indigenous peoples’ government.⁴⁸⁶ This was based on Congressional findings that the United States “conspired with a small group of non-Hawaiian residents of the [Hawaiian] Kingdom . . . to overthrow the indigenous and lawful Government of Hawaii.”⁴⁸⁷ And in the same way it treated Native Americans, the U.S. took the land of the indigenous people without consent or compensation⁴⁸⁸ and removed Native Hawaiians, thereby establishing a trust relationship⁴⁸⁹ that included comprehensive health programs.⁴⁹⁰ The Native Hawaiian Health Care Act therefore declares its intent to “raise the health status of Native Hawaiians to the highest possible health level” and “provide existing Native Hawaiian health care programs with all resources” needed to achieve this goal.⁴⁹¹

⁴⁸¹ IHS, *FY 19 Justification of Estimates*, *supra* note 328, at CJ-176.

⁴⁸² *Ibid.*

⁴⁸³ Tribal Budget Workgroup, *Recommendations on IHS Budget*, 35, <https://www.nihb.org/docs/04032017/TBFWG%20Testimony%20FY%202019%20FINAL.pdf>; HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-181.

⁴⁸⁴ HHS, IHS, *Fact Sheet: Health Facilities Construction*, *supra* note 322.

⁴⁸⁵ 42 U.S.C. § 11701 *et seq.*, Native Hawaiian Health Care Act of 1988 (Oct. 1988). *See also* Health & Human Services Administration, “Native Hawaiian Health Centers,” (aa) <https://www.hrsa.gov/opa/eligibility-and-registration/health-centers/native-hawaiian/> (last accessed July 23, 2018).

⁴⁸⁶ 42 U.S.C. § 11702(a).

⁴⁸⁷ 42 U.S.C. § 11701(7).

⁴⁸⁸ *Id.* § 11701(11).

⁴⁸⁹ *Id.* § 11701(12)-(13). *See also* 42 U.S.C. § 11701(19) (asserting that “[t]his historical and unique legal relationship has been consistently recognized and affirmed by the Congress through the enactment of Federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities[.]” (citations omitted)).

⁴⁹⁰ *Id.* § 11701(18).

⁴⁹¹ *Id.* § 11702(a).

The Act also authorizes the HHS Secretary to award grants to the Papa Ola Lokahi, a nonprofit consortium charged with “coordinating, implementing and updating a Native Hawaiian comprehensive health care master plan designed to promote comprehensive health promotion and disease prevention services and to maintain and improve the health status of Native Hawaiians[.]”⁴⁹²

According to the Centers for Disease Control and Prevention (CDC), rates of HIV infection among Native Hawaiians and other Pacific Islanders are higher than those among whites in the United States.⁴⁹³ In 2014, the HIV rate was 22 per 100,000 people for Native Hawaiian and other Pacific Islander men versus 12.6 for white men, and 3.5 per 100,000 people for Native Hawaiian and other Pacific Islander women versus 1.7 for white women.⁴⁹⁴ In addition, the rate of gonorrhea for Native Hawaiians and other Pacific Islanders was 2.7 times the rate for white people; the rate of chlamydia for Native Hawaiians and other Pacific Islanders was 5.6 times the rate for white people; and the rate of syphilis for Native Hawaiians and other Pacific Islanders was 1.9 times the rate for white people.⁴⁹⁵ Research also revealed that a higher percentage of Native Hawaiian and other Pacific Islander adults suffered from diabetes (15.6 percent) compared with all U.S. adults (8.7 percent).⁴⁹⁶

The Native Hawaiian Health Care Systems Program funds Native Hawaiian Health Centers, which provide health education and disease prevention services. The Centers’ services include nutrition programs, screening and control of hypertension and diabetes, immunizations, and basic primary care services. HRSA reported that its Health Center Program received \$29.7 million in FY 2017.⁴⁹⁷ The Native Hawaiian Health Care Program in particular received about \$13 million in FY 2017.⁴⁹⁸ For FY 2019, HRSA requested about \$5 billion in funding for its Health Center Program overall (which includes Native Hawaiian Health Care Centers).⁴⁹⁹ The 2018 omnibus spending bill, enacted to fund the government through FY 2018 (ending September 30, 2018), allocated \$1.6 billion for HRSA to support “primary health care and the Native Hawaiian Health Care Act.”⁵⁰⁰

⁴⁹² *Id.* § 11703(a).

⁴⁹³ Centers for Disease Control and Prevention (CDC), *Health Disparities in HIV/AIDS, Viral Hepatitis, STDs, and TB: Native Hawaiians and Other Pacific Islanders*, <https://www.cdc.gov/nchhstp/healthdisparities/hawaiians.html> (last accessed July 23, 2018).

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ Galinsky A, Zelaya C, Barnes P, Simile C. *Selected Health Conditions Among Native Hawaiian and other Pacific Islander Adults: United States, 2014*, NCHS Data Brief, No. 277 (March 2017), 2, http://www2.jabsom.hawaii.edu/native/docs/publications/2017/NCHS_data_brief_277_March_2017.pdf.

⁴⁹⁷ Health Resources and Services Administration, *HRSA Fact Sheet: FY 2017—Hawaii*, September 2017, <https://data.hrsa.gov/api/factsheet/3/15/2017>.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ U.S. Department of Health and Human Services, Health Resources and Services Administration, *Justification of Estimates for Appropriations Committees, FY 2019*, 27, 64, <https://www.hrsa.gov/sites/default/files/hrsa/about/budget/budget-justification-fy2019.pdf>.

⁵⁰⁰ Consolidated Appropriations Act, 2018, at 367, <https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf> (last accessed Sept. 3, 2018).

Native Hawaiian Health Centers in particular reportedly received \$17.5 million, an increase of about \$1 million from the prior year.⁵⁰¹

Health Legislation

Affordable Care Act

The Patient Protection and Affordable Care Act of 2010 (ACA)⁵⁰² provided new opportunities for the estimated 579,000 uninsured Native Americans to obtain health insurance coverage through either health insurance exchanges or expanded Medicaid eligibility.⁵⁰³ As of 2016, roughly 19 percent of Native Americans lacked health insurance—compared to 8.6 percent uninsured nationwide.⁵⁰⁴ Under the ACA, as of April 2014, approximately 48,000 members of federally recognized tribes had selected health insurance plans through state or federal health insurance exchanges.⁵⁰⁵ The ACA provides that members of federally recognized tribes may qualify for insurance plans with reduced or zero co-pays and deductibles.⁵⁰⁶ The ACA also has the potential to benefit IHS and tribal health care programs by increasing the availability of third-party reimbursements as more tribal members gain access to Medicaid and private health insurance.⁵⁰⁷ According to GAO, this increase in third-party reimbursements “may free up resources and help alleviate some of the pressures” on Native health care facilities “that contribute to unmet health care needs.”⁵⁰⁸

As part of the ACA implementation, IHS and its tribal partners have embarked on education and outreach initiatives to assist tribal members with enrollment in Medicaid, CHIP, and the health insurance exchanges.⁵⁰⁹ However, in 2013, GAO found that more needs to be done to maximize the opportunities available to Native Americans under the ACA. Specifically, GAO recommended that IHS and the Centers for Medicare and Medicaid Services (CMS) “increase direct outreach” to

⁵⁰¹ U.S. Senator Brian Schatz, “Schatz—Federal Funding for Hawaii to Rise,” Mar. 22, 2018, <https://www.schatz.senate.gov/press-releases/schatz-federal-funding-for-hawaii-to-rise>.

⁵⁰² Affordable Care Act, 42 U.S.C. § 18001 *et seq.*; Pub. L. No. 111-148 (111th Congress), Mar. 23, 2010.

⁵⁰³ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 59. *See also* U.S. Census Bureau, *Facts for Features: American Indian and Alaska Native Heritage Month: November 2017*, <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> (citing the 2016 American Community Survey to show that as of 2016, roughly 19 percent of Native Americans lacked health insurance, compared to 8.6 percent uninsured nationwide).

⁵⁰⁴ *Ibid.*

⁵⁰⁵ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 59.

⁵⁰⁶ *Ibid.* *See also* IHS, *Trends in Indian Health*, *supra* note 49, at 2, (noting that, in addition, the reauthorized the Indian Health Care Improvement Act allows tribes to purchase health insurance coverage for IHS beneficiaries).

⁵⁰⁷ U.S. Government Accountability Office, *Indian Health Service: Most American Indians and Alaska Natives Potentially Eligible for Expanded Health Coverage, but Action Needed to Increase Enrollment* (September 2013), 38, <http://www.gao.gov/products/GAO-13-553> [hereinafter GAO, *Indian Health Service*, Sept. 2013].

⁵⁰⁸ *Ibid.*

⁵⁰⁹ HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-139.

Native Americans and improve communications between health care facilities and tribal leaders regarding the eligibility requirements for ACA health care (*i.e.*, expanded Medicaid care and care on the health insurance exchanges).⁵¹⁰ Researchers for the Kaiser Family Foundation have also found that access to Medicaid is particularly crucial to Native Americans, who disproportionately lack health coverage.⁵¹¹ This is partially due to the fact that a higher percentage of Native Americans compared to other racial and ethnic groups are low-income and underemployed, and thus have less access to private insurance and lower rates of health coverage.⁵¹² The research also found that ACA implementation has revealed a more fundamental problem—that is, the inconsistent expansion of Medicaid eligibility from state to state.⁵¹³ For example, in the state of Oklahoma, at least 76,000 Native Americans potentially eligible for Medicaid coverage under the ACA have been adversely affected by the state’s decision not to participate in the expanded program.⁵¹⁴ The decision not to accept Medicaid expansion not only harms Native individuals, but results in additional financial distress for IHS and tribal health care programs that fail to receive payment for the services provided to lower income patients.⁵¹⁵

Sarah Deer noted in her testimony before the U.S. Commission on Civil Rights:

[T]he Affordable Care Act has created many, many new opportunities for American Indians and Alaska Natives. And I think it's really important to make the point that the federal government's trust responsibility does not begin and end with the Indian Health Service. . . . We are very, very clear that the Medicaid expansions alone have provided tremendous opportunity for Indian people under the Affordable Care Act. [Many Indian people now have t]he ability to be in health insurance, some for the very first time in their lives, and have the additional spectrum of care that's available because of that. Those are life-saving improvements. They've made tremendous differences in Indian Country. And I think that the marginal success that we've really achieved in terms of enrollment is a matter of very limited funds to do outreach.⁵¹⁶

⁵¹⁰ GAO, *Indian Health Service, Sept. 2013*, *supra* note 507, at 39.

⁵¹¹ Henry J. Kaiser Family Foundation, *Race, Ethnicity, & Health Care Issue Brief: A Profile of American Indians and Alaska Natives and Their Health Coverage* (September 2009), 6, <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7977.pdf>.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*, 9; *See also* Henry J. Kaiser Family Foundation, *Status of State Action on the Medicaid Expansion Decision*, <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>. As of Jul. 27, 2018, 34 states (including Washington, D.C.) had adopted Medicaid expansion.

⁵¹⁴ *See, e.g.*, GAO, *Indian Health Service, Sept. 2013*, *supra* note 507, at 26 (discussing Oklahoma’s 2102 announcement that it would not pursue Medicaid expansion).

⁵¹⁵ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 28.

⁵¹⁶ Deer Testimony, *Briefing Transcript*, pp. 68–69.

Since 2013, research has shown that in Medicaid expansion states, there is a reduction in the number of uninsured with concurrent gains in health coverage among low-income individuals.⁵¹⁷ Medicaid expansion has also had an overall positive effect in states where it was adopted, in the areas of access to care, utilization of services, affordability of care, financial security, and even health outcomes among residents of those states.⁵¹⁸ Native Americans are also reportedly benefitting from Medicaid expansion. In the states that adopted it, the Medicaid expansion has provided a “much-needed boost” to the IHS by increasing Native American eligibility for Medicaid and providing direct compensation to IHS care.⁵¹⁹

In January 2018, the Trump administration released guidance permitting states to impose work requirements as a condition of eligibility for Medicaid.⁵²⁰ Since then, Arkansas, Indiana, Kentucky and New Hampshire have won approval for waivers requiring many Medicaid beneficiaries to work, volunteer, or train for a job to qualify for coverage.⁵²¹ Tribal leaders and a bipartisan group of U.S. Senators have questioned the legality of imposing Medicaid work requirements on Native Americans.⁵²² In a letter to HHS Secretary Azar, ten senators asked HHS to grant exemptions to the Medicaid work requirements for Native Americans, in response to HHS’ assertion that an exemption to the work requirements for Native Americans would be “race-based” and would raise civil rights concerns.⁵²³ The letter noted that “federal classifications fulfilling federal obligations

⁵¹⁷ Henry J. Kaiser Family Foundation, *The Effects of Medicaid Expansion under the ACA: Updated Findings from Literature Review—Issue Brief* (Mar. 2018), <https://www.kff.org/medicaid/issue-brief/the-effects-of-medicaid-expansion-under-the-aca-updated-findings-from-a-literature-review-march-2018/>.

⁵¹⁸ Ibid.

⁵¹⁹ Allison Herrera, *In Indian Country, the survival of Obamacare's Medicaid expansion brings a sigh of relief*, PUBLIC RADIO INTERNATIONAL, Mar. 29, 2017, <https://www.pri.org/stories/2017-03-29/indian-country-survival-obamacares-medicaid-expansion-brings-sigh-relief>.

⁵²⁰ U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *RE: Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries*, Jan. 18, 2018, <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>.

⁵²¹ Henry J. Kaiser Family Foundation, *Medicaid Waiver Tracker: Which States Have Approved and Pending Section 1115 Medicaid Waivers?*, July 17, 2018, <https://www.kff.org/medicaid/issue-brief/which-states-have-approved-and-pending-section-1115-medicaid-waivers/>. Note that several more states are in the process of seeking approval for tying work requirements to Medicaid. Ibid. Note also that a federal court has vacated HHS’ approval of Kentucky’s waiver and remanded the matter for further HHS review. *Ronnie Maurice Stewart v. Alex M. Azar II, et al.*, Case No. 18-152 (D.D.C. Jun. 29, 2018), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0152-74.

⁵²² U.S. Senate, “Letter to Alex Azar, Secretary, U.S. Department of Health and Human Services,” Apr. 27, 2018, p. 1, <https://www.politico.com/f/?id=00000163-092f-da04-a1fb-1dffcc1d0001>. Senators Tom Udall, Charles E. Schumer, Maria Cantwell, Lisa Murkowski, Jeffrey A. Merkley, Heidi Heitkamp, Martin Heinrich, Catherine Cortez Masto, Elizabeth Warren, and Tina Smith all signed onto this letter. See also Jessie Hellmann, *Senators warn against placing Medicaid work requirements on tribes*, THE HILL, Apr. 30, 2018, <http://thehill.com/policy/healthcare/385486-senators-warn-against-placing-medicaid-work-requirements-on-tribes>; Saint Regis Mohawk Tribe, *Press Release: Saint Regis Mohawk Tribe Supports House Letter Opposing Medicaid Work Requirements for Tribal Members*, May 21, 2018, <https://www.srmt-nsn.gov/news/2018/saint-regis-mohawk-tribe-supports-house-letter-opposing-medicaid-work-requirements-for-tribal-members> [hereinafter *Saint Regis Mohawk Tribe, Press Release*].

⁵²³ U.S. Senate, “Letter to Alex Azar, Secretary, U.S. Department of Health and Human Services,” *supra* note 522, at 1.

to Indians are not based on race but instead on a political relationship between the tribes and the federal government.” Thus, they contended, federal benefits should be extended to Native Americans as a means of fulfilling the U.S. trust obligation.⁵²⁴

Arguably, the ACA should exempt Native Americans from work requirements due to their sovereign status and trust relationship with the federal government. The ACA already exempts IHS-eligible Native Americans from paying a fee for declining health coverage, and does not charge Medicaid-eligible beneficiaries enrollment fees, copayments, coinsurance, or deductibles.⁵²⁵ But according to the Saint Regis Mohawk tribe in New York, CMS directly informed tribal governments that they would not be exempt from work requirements because the Trump Administration classified Native Americans as a racial group.⁵²⁶ Therefore, CMS argued, an exemption for Native Americans would constitute a racial preference and raise civil rights concerns.⁵²⁷ Legislators and tribal leaders have countered that the work requirements would violate the federal trust relationship and cause thousands of Native Americans to lose their health care.⁵²⁸ Native American leaders point out that Medicaid work requirements would erect an additional barrier for Native Americans to access Medicaid and hamper tribal governments’ ability to deliver critical health care services.⁵²⁹

The Commission notes that on June 29, 2018, a federal judge struck down Kentucky’s approved Medicaid waiver program, which would impose work requirements on new enrollees, on the grounds that in permitting the state action, HHS Secretary Azar failed to analyze whether the work requirement would result in loss of health coverage, or if it “would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid.”⁵³⁰ The court blocked the work requirement on the grounds that the HHS Secretary’s decision was “arbitrary and capricious.”⁵³¹ This decision, which is likely to be contested by the Administration,⁵³² applies to all Medicaid

⁵²⁴ *Ibid.*, 2; *see also supra* notes 26–61 (discussing the federal trust relationship).

⁵²⁵ Centers for Medicare & Medicaid Services, *Coverage exemptions for American Indians, & Alaska Natives, and others eligible for services from Indian health programs*, <https://www.healthcare.gov/american-indians-alaska-natives/exemptions/> (last accessed July 23, 2018); Centers for Medicare & Medicaid Services, *Medicaid & CHIP for American Indians and Alaska Natives*, <https://www.healthcare.gov/american-indians-alaska-natives/medicaid-chip/> (last accessed July 23, 2018).

⁵²⁶ Saint Regis Mohawk Tribe, *Press Release*, *supra* note 522.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ Memorandum Op., *Stewart v. Azar*, No. 18-152, 3 (D.D.C. 2018), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0152-74.

⁵³¹ *Id.*

⁵³² *See* Amy Goldstein, *Trump Administration to Give Kentucky Medicaid Work Requirement a Second Chance*, Washington Post (July 20, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-to-give-kentucky-medicaid-work-requirement-a-second-chance/2018/07/18/95c866e6-8ac6-11e8-a345-a1bf7847b375_story.html?utm_term=.e353d8af1ea8.

recipients, not just Native Americans. It also suggests that certain work programs may successfully be implemented provided that CMS adequately addresses the issues in the opinion.⁵³³

Indian Health Care Improvement Act

The ACA also provided permanent reauthorization for the Indian Health Care Improvement Act, which had expired in 2000.⁵³⁴ The reauthorized IHCIA has no expiration date and contains numerous IHS modernization provisions. The ACA's amended the Indian Health Care Improvement Act as follows:

- Updates health delivery services, including “cancer screenings, home and community based services[,] and long-term care for the elderly and disabled;”⁵³⁵
- Expands the ability of IHS and tribal health care facilities to recover third-party reimbursements from Medicare, Medicaid, and CHIP;⁵³⁶
- Provides funding for demonstration programs to “address chronic shortages of health professionals” in Indian Country and establishes a mental health technician training program;⁵³⁷
- Authorizes IHS to enter into agreements with the Veterans Health Administration and Department of Defense to “share medical facilities and services;”⁵³⁸ and
- Establishes integrated behavioral health prevention and treatment programs for Native Americans to address alcohol and substance abuse problems and mental health needs.⁵³⁹

The reauthorized and expanded IHCIA has great potential for reducing the vast health disparities that exist today between Native Americans and other demographics. Unfortunately, to date, NCAI reports that many of the provisions and authorities in the law remain unfunded.⁵⁴⁰ According to

⁵³³ Memorandum Op., Stewart, No. 18-152, 3; *see also* Manatt Health, *Work and Community Engagement Requirements in Medicaid: State Implementation Requirements and Considerations* (Aug. 27, 2018), 1, <https://www.jdsupra.com/legalnews/work-and-community-engagement-89374/>.

⁵³⁴ 25 U.S.C. § 1601–03; *see also* Indian Health Care Improvement Act (Pub. L. No. 94-437), as amended by the Patient Protection and Affordable Care Act (ACA) (Pub. L. No. 111-148), § 10221, 124 Stat. 119, 935 (2010).

⁵³⁵ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 40.

⁵³⁶ IHS, *Trends in Indian Health*, *supra* note 49, at 2. *See also* HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-149. In FY 2014, “\$1.060 billion was collected from third party insurers, of which an estimated \$752 million was [Medicare and Medicaid] collections and \$90.2 million, or 8.5 percent was from private insurers.”

⁵³⁷ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 30, 37 (noting that “[s]ome IHS Areas experience vacancies for medical professionals up to five years.”). *See also* HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-128. The IHCIA authorizes IHS Indian Health Professions (IHP) Program, which manages the Scholarship program, Loan Repayment Program (LRP), health professions training grants, and recruitment and retention activities.

⁵³⁸ IHS, *Trends in Indian Health*, *supra* note 49, at 2. *See also* HHS, *IHS FY 2016 Congressional Justification*, *supra* note 356, at CJ-202 (noting that in FY 2014, IHS collected over \$11 million from Veterans Affairs for services provided to Native American veterans).

⁵³⁹ IHS, *Trends in Indian Health*, *supra* note 49, at 2; *see also* Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 37.

⁵⁴⁰ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 63.

the Tribal Budget Workgroup, “at least an additional \$300 million is critically needed in order to begin to implement and fund the new priorities in IHCI A.”⁵⁴¹

⁵⁴¹ Tribal Budget Workgroup, *Recommendations on IHS 2019 Budget*, *supra* note 335, at 36–37.

CHAPTER 3: EDUCATION

The Historical Trust Relationship and Native American Education

As a part of its trust responsibilities, the federal government has an obligation to provide financial assistance for providing educational services to Native Americans in order to promote educational opportunity.⁵⁴² The trust relationship obligations stem from treaties and statutes in which education is promised.⁵⁴³

Historically, Native American students were segregated in public education, where they encountered a “colonial education” that forced students to part ways with their names, native languages, and religions.⁵⁴⁴ This education policy was implemented in the late 1800s after brigadier general Richard Henry Pratt came up with the clearly prejudicial idea to “kill the Indian in him, and save the man.”⁵⁴⁵ He founded and served as superintendent of the infamous Carlisle Indian Industrial Boarding School in Pennsylvania, the model for an estimated 150 other such boarding schools where only English could be spoken, and children were not allowed to use, speak about, or learn about their Native names, religion or culture.⁵⁴⁶ In 1882, the federal Indian Appropriation Act set aside money to fund the boarding schools, and in 1893 “Congress allowed the Bureau of Indian Affairs . . . to withhold food rations and supplies from American Indian parents or guardians who refused to enroll and keep their children in the Boarding Schools.”⁵⁴⁷ In 1898, President William McKinley appointed a superintendent of American Indian Boarding

⁵⁴² See e.g., Treaty with the Comanche, art. 13, 9 Stat. 844 (May 15, 1846) (“It is further agreed that school-teachers, at the discretion of the President, shall be sent among the said tribes or nations for the purpose of instructing them . . .”); Treaty with the Makah, art. 11, 12 Stat. 939 (Jan. 31, 1855) (“The United States further agree to establish at the general agency for the district of Puget’s Sound, . . . an agricultural and industrial school, to be free to children of the said tribe . . .”). See also 25 U.S.C. § 5301 (acknowledging the historical and current “[f]ederal responsibility for and assistance to education of Indian children . . .”); see also Friends Committee on National Legislation, “The Origins of our Trust Responsibility Towards the Tribes,” Sept. 29, 2010, <https://www.fcnl.org/updates/the-origins-of-our-trust-responsibility-towards-the-tribes-132>. See also *supra* notes 26-61 (discussing the federal trust relationship).

⁵⁴³ See *supra* note 542; see also Native American Rights Fund, *Federal Indian Law and Policy Affecting American Indian and Alaska Native Education* (October 2000), 21, <http://www.narf.org/wordpress/wp-content/uploads/2015/01/purple.pdf>.

⁵⁴⁴ Martinez, *School Culture and American Indian Educational Outcomes*, *supra* note 51, at 200.

⁵⁴⁵ Official Report of the Nineteenth Annual Conference of Charities and Correction (1892), 46–59. Reprinted in Richard H. Pratt, “The Advantages of Mingling Indians with Whites,” *Americanizing the American Indians: Writings by the “Friends of the Indian” 1880–1900* (Cambridge, Mass.: Harvard University Press, 1973), 260–71, <http://historymatters.gmu.edu/d/4929>.

⁵⁴⁶ Becky Little, “How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation,” History.com, Aug. 16, 2017, <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> (last accessed July 23, 2018).

⁵⁴⁷ Ziibiwing Center of Anishinabe Culture & Lifeways, *American Indian Boarding Schools: An Exploration of Global Ethnic & Cultural Cleansing*, 2011, at 6, <http://www.sagchip.org/ziibiwing/planyourvisit/pdf/aibscurrguide.pdf> [hereinafter Ziibiwing Center, *American Indian Boarding Schools*]. See also The Indian Appropriation Act, Ch. 163, 47th Cong. (1st Sess. 1882), <https://www.loc.gov/law/help/statutes-at-large/47th-congress/session-1/c47s1ch163.pdf>.

Schools who “held the belief that American Indians and other non-white races were inferior in their intellect and physical abilities.”⁵⁴⁸

The policy entailed Native American children being forcibly separated from their parents and sent far from their communities into segregated boarding schools.⁵⁴⁹ The late Indian activist Floyd Red Crow stated, “I’ll never forget. All the mothers were crying [when their children were sent to boarding school].”⁵⁵⁰ According to the National Native American Boarding School Healing Coalition, there were 357 boarding schools in 30 states, and in 1926, nearly 83 percent of Native American children were attending off-reservation boarding schools.⁵⁵¹ Conditions were racially discriminatory and sometimes abusive.⁵⁵² In 1928, an investigation commissioned by the Secretary of the Interior surveyed conditions and found that taking Indian children away from their homes contradicted studies showing the essential importance of family in education,⁵⁵³ and moreover, “[t]he survey staff [found itself] obliged to say frankly and unequivocally that the provisions for the care of Indian children in boarding schools [were] grossly inadequate.”⁵⁵⁴

The survey report historically reviewed not only boarding schools but also public schools that Native American children sometimes were permitted to attend, which were largely segregated. It found that “the work of the government directed towards the education and advancement of the Indian himself, as distinguished from the control and conservation of his property, is largely

⁵⁴⁸ Ziibiwing Center, *American Indian Boarding Schools*, *supra* note 547, at 6.

⁵⁴⁹ The National Native American Boarding School Healing Coalition, “U.S. Boarding School History,” <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last accessed July 23, 2018).

⁵⁵⁰ Charla Bear, *American Indian Boarding Schools Haunt Many*, NATIONAL PUBLIC RADIO (May 12, 2008), <https://www.npr.org/templates/story/story.php?storyId=16516865>.

⁵⁵¹ The National Native American Boarding School Healing Coalition, “U.S. Boarding School History,” <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last accessed July 23, 2018).

⁵⁵² *Ibid.* See, e.g., Denise K. Lajimodiere, “American Indian Boarding Schools in the United States: A Brief History and Their Cultural Legacy,” Institute for the Study of Human Rights, Columbia University (2014) at 255–57, <https://academiccommons.columbia.edu/catalog/ac:184841>; Andrea Smith, “Soul Wound: The Legacy of Native American Souls,” *Amnesty Magazine*, 2006, <https://web.archive.org/web/20060208092347/http://www.amnestyusa.org/amnestynow/soulwound.html>; Ziibiwing Center, *American Indian Boarding Schools*, *supra* note 547, at 10 (“Children as young as 5 years of age arrived by car, train, or wagon and immediately were told they were ‘dirty Indians.’ They were stripped and disinfected by having alcohol, kerosene, or DDT (dichlorodiphenyltrichloroethane), one of the most well-known synthetic pesticides, poured on them. Long hair, valued for its cultural and spiritual significance, was cut. Any personal belongings such as medicine pouches, beadwork, family photographs, etc. were taken from them and never returned. Students were given uniforms that were made of low quality, uncomfortable materials to help teach them “sameness, regularity, and order.” School administrators renamed the students, giving them common English first and last names. It was a humiliating and traumatic experience for the students.”).

⁵⁵³ The Institute for Government Research Studies in Administration, *The Problem of Indian Administration: Report of a Survey Made at the Request of Hubert Work, Secretary of the Interior* (1928), at Chapter IX: Education (passim), http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Chapter9.html#chap9.

⁵⁵⁴ *Ibid.*, Chapter I: General Summary of Findings and Recommendations, http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Chapter1.html#chap1.

ineffective[.]”⁵⁵⁵ and that “the chief explanation” is that the government did not appropriate enough funds.⁵⁵⁶

By the late 20th century, particularly with the passing of the Indian Self-Determination and Education Assistance Act (Self-Determination Act) of 1975 and several other laws concerning the education of Native American students, federal policies shifted to place a greater emphasis on Native American self-determination in education, and allowed tribes to operate schools and education programs formerly run by the federal government.⁵⁵⁷ Before the enactment of the Self-Determination Act and these subsequent statutes, many tribal leaders felt that the laws governing Native American schools did not sufficiently address or permit tribal control over tribal education.⁵⁵⁸

Many advocates believe that the trauma caused by the boarding schools and their policies of family separation and cultural eradication is still felt by Native American communities.⁵⁵⁹ Researchers have found that:

The removal of children from their families is considered one of the most devastating traumas that occurred to the Native American people because it resulted in the disruption of the family structure, forced assimilation of children, and a disruption in the Native American community. This situation is considered the crucial precursor to many of the existing problems for some Native Americans.⁵⁶⁰

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Native American Rights Fund, *Federal Indian Law and Policy Affecting American Indian and Alaska Native Education* (October 2000), 21–23, <http://www.narf.org/wordpress/wp-content/uploads/2015/01/purple.pdf> (citing the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450n; the Impact Aid Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2315; the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801–1815; the Tribally Controlled School Grants Act of 1988, 25 U.S.C. §§ 2501–2511; and the Native American Language Act of 1990, 25 U.S.C. §§ 2901–2906).

⁵⁵⁸ Ibid.

⁵⁵⁹ See, e.g., The National Native American Boarding School Healing Coalition, “U.S. Boarding School History,” <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last accessed July 23, 2018); NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 56.

⁵⁶⁰ See Kathleen Brown-Rice, “Examining the Theory of Historical Trauma Among Native Americans,” *The Professional Counselor*, <http://tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans/>, at “Historical Losses,” documenting that:

Government and church-run boarding schools would take Native American children from their families at the age of 4 or 5 and not allow any contact with their Native American relations for a minimum of 8 years. In the boarding schools, Native American children had their hair cut and were dressed like European American children; additionally, all sacred items were taken from them and they were forbidden to use their Native language or practice traditional rituals and religions. Many children were abused physically and sexually and developed a variety of problematic coping strategies (e.g., learned helplessness, manipulative tendencies, compulsive gambling, alcohol and drug use, suicide, denial, and scapegoating other Native American children). Such circumstances led many Native Americans to not engage in traditional ways and religious practices, which led to a loss of ethnic identity (internal citations omitted).

At a July 2018 briefing of the Commission’s South Dakota State Advisory Committee, Barry Thompson, the vice chair of the Crow Creek Tribe, noted, “those historical traumas that are shown to [young people] and . . . they have to live through . . . affect them and it affects us, back to boarding school days.”⁵⁶¹

Self Determination in Education

Tribal advocates like the National Indian Education Association and NCAI now call for the strengthening of tribal self-determination in the education of Native students, and highlight the need for bringing about an “academically rigorous and culturally appropriate” education.⁵⁶² Their advocacy is challenged by the reality that 93 percent of Native students attend public schools operated by state and local authorities⁵⁶³ that have historically excluded tribal input concerning “academic goals, funding, staffing, and curriculum.”⁵⁶⁴ The Bureau of Indian Education (BIE) funds the reservation-based schools that the remaining 7 percent of Native students attend and yet, according to BIE, these schools remain under-resourced and lack decision making authority about how reservation-based schools are run.⁵⁶⁵ Acknowledging these challenges in a 2014 report, the White House argued that tribal educators “are in the best position to address the unique needs of their students”⁵⁶⁶ and can develop initiatives that address local needs and circumstances.⁵⁶⁷ These advocates also argue that tribal nations are more likely to be accountable for the educational outcomes of their youth, in comparison to the accountability of a distant federal agency. The BIE Study Group found that:

⁵⁶¹ Thompson Testimony, South Dakota SAC, *July 25 Briefing Transcript*, pp. 82–88.

⁵⁶² National Indian Education Association and National Congress of American Indians, *Joint Organizational Comments on the Indian Education Study Group Strategic Plan for Reform*, June 2, 2014, at 1–2, <http://www.usefinc.org/wp-content/uploads/bvenuti/WeeklyWampum/PDF/NIEA%20NCAI%20Joint%20BIE%20Reform%20Comments%206.2.14.pdf> (quoting Interior Secretary Sally Jewell’s testimony before the Senate Committee on Indian Affairs, May 15, 2013, <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg85178/html/CHRG-113shrg85178.htm>).

⁵⁶³ National Indian Education Association, “Tribal Choice and Native Students,” <http://www.niea.org/tribal-choice-and-native-students/> (last accessed July 23, 2018).

⁵⁶⁴ The White House, Executive Office of the President, *2014 Native Youth Report* (December 2014), 19, https://obamawhitehouse.archives.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf [hereinafter White House, *2014 Native Youth Report*].

⁵⁶⁵ U.S. Dep’t of the Interior, Bureau of Indian Education, “Bureau of Indian Education Reorganizing: Synopsis of the Reprograming,” <https://www.bie.edu/BFRI/index.htm> (last accessed Sept. 20, 2018) (“While additional investment is key, we must also partner with tribal leaders. After countless consultations and listening sessions, we now understand why our schools have been failing—tribal nations haven’t had a seat at the table. The sad reality is that tribal governments often have little say in how schools located on their own reservations are run even though they are the ones who know their children best.”).

⁵⁶⁶ White House, *2014 Native Youth Report*, *supra* note 564, at 19, 28. In this report, the White House concluded that the low high school graduation rate for Native students may result in part from the “lack of culturally-relevant curriculum and culturally competent staff that understand how to reach Native youth.”

⁵⁶⁷ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 48.

Supporting the efforts of tribal nations to govern their own schools will also lead to improved student achievement. As demonstrated in other areas in which tribal governments have assumed control of government services, tribal nations often improve the delivery of services because tribes: (1) understand the needs of their communities better than the Federal Government does; and (2) are more likely to be held accountable for results by local communities.⁵⁶⁸

The Role of the Every Student Succeeds Act in Education of Native American Students

President Barack Obama signed the Every Student Succeeds Act (ESSA) into law in December 2015.⁵⁶⁹ ESSA reauthorized the Elementary and Secondary Education Act (ESEA)⁵⁷⁰ and aimed to improve educational equity and opportunity by providing funding (authorized under Title I of the Act) to school districts that serve disadvantaged and high-needs students.⁵⁷¹ Specifically, ESSA amended Title VI (formerly Title VII) Indian education programs that had been codified under ESEA, making changes to address some longstanding concerns about self-determination in Native students' education.⁵⁷² ESSA provides grant funding to promote the coordination and collaboration of tribal education agencies with state and local education agencies "to meet the unique educational and culturally related academic needs of Indian students."⁵⁷³

ESSA also strengthens Native American self-determination in education by requiring state and local education agencies to consult with tribes on policies impacting Native students.⁵⁷⁴ This consultation requirement gives tribal authorities a voice in decisions concerning the education of Native youth in public schools—from the use of federal grants to the development of academic

⁵⁶⁸ Bureau of Indian Education Study Group, *Findings and Recommendations: Submitted to the Secretaries of the Departments of the Interior and Education* (July 9, 2014), 18, <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Study-Group-Blueprint-DOI-FINAL.pdf> [hereinafter BIE Blueprint].

⁵⁶⁹ 20 U.S.C. § 6301, *et seq.*; Every Student Succeeds Act, Pub. L. No. 114-95, Dec. 10, 2015, 129 Stat. 1802 (subsequently amended and renamed by Pub. L. No. 115-64, § 1, Sept. 29, 2017, 131 Stat. 1187).

⁵⁷⁰ 20 U.S.C. § 6301 *et seq.*; Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, Apr. 11, 1965 (subsequently amended).

⁵⁷¹ 20 U.S.C. § 6302; *see also* U.S. Department of Education, "Every Student Succeeds Act (ESSA)," <https://www.ed.gov/essa> (last accessed July 23, 2018).

⁵⁷² *See* 20 U.S.C. § 6301 *et seq.*; *see also* Education Commission of the States, *State and Federal Policy: Native American Youth*, 1, 4 (Nov. 2016), https://www.ecs.org/wp-content/uploads/State_and_Federal_Policy_for_Native_American_Youth.pdf.

⁵⁷³ 20 U.S.C. § 7402; *see, e.g.*, 20 U.S.C. § 7422 (codifying grant programs for Indian education such as the State-Tribal Education Partnership (STEP)). *See also* U.S. Department of Education, Office of Elementary and Secondary Education, "Frequently Asked Questions: ESEA, Section 8538, Consultation with Indian Tribes and Tribal Organizations," Sept. 26, 2016, <https://ed.gov/policy/elsec/leg/essa/faq/essafaqtribalconsultation.pdf>.

⁵⁷⁴ 20 U.S.C. § 6301 *et seq.*; *see also* 20 U.S.C. §§ 7701–7714. ESSA also makes significant changes to the Impact Aid program, which reimburses public school districts that educate students living on federal lands (e.g., Indian reservations) where many of the residents are not required to pay local property taxes—the primary funding source for public schools. ESSA improves the Impact Aid program by expediting payments to eligible schools and by creating greater budget certainty from year to year.

programs and curricula.⁵⁷⁵ For example, under ESSA, states and local educational agencies must consult with any tribes or tribal organizations in their districts prior to submitting their state plans for educational programs funded by Title I grants.⁵⁷⁶ The executive director of the National Indian Education Association, Ahniwake Rose, has said that “consultation means better decisions will be made for our students. . . . We believe that this provision alone is going to change the way our students are perceived and worked with in our school systems.”⁵⁷⁷ ESSA allows for Title VI funds to be used for Native language immersion programs in public schools.⁵⁷⁸ Under ESSA, tribes can enter into cooperative agreements with states and local educational agencies to carry out Title VI activities, which is important for tribes who desire greater autonomy in administering these programs.⁵⁷⁹ Furthermore, under ESSA, the BIE is eligible to apply for all discretionary funding within ESSA.⁵⁸⁰

In addition, ESSA recognizes the importance of providing comprehensive support for Native students. Native American youth often face numerous challenges arising from extreme poverty that undermine their academic achievement.⁵⁸¹ A 2014 White House report found that Native youth often must confront a range of issues affecting their communities, including “mental health, nutrition, wellness, substance abuse, family life issues, exposure to bullying and violence, housing shortages, and other critical needs.”⁵⁸² As such, advocates recommend taking “a holistic approach to provide comprehensive support to BIE students so they can come to class ready to learn.”⁵⁸³

⁵⁷⁵ See NIEA, “Statement on the Passing of the ESSA,” Facebook, Dec. 10, 2015, <https://www.facebook.com/NIEAFanPage/>. (The NIEA analyzed the consultation requirement of the ESSA as follows: “The States must engage in meaningful consultation with tribes in the development of state plans for Title I grants. LEAs must consult with tribes in the design and development of programs under the Act, and they must consult with tribes prior to making any decision affecting the opportunities of Indian children in programs, services, or activities funded by ESSA.”)

⁵⁷⁶ U.S. Department of Education, Office of Elementary and Secondary Education, “Frequently Asked Questions: ESEA, Section 8538, Consultation with Indian Tribes and Tribal Organizations,” Sept. 26, 2016, <https://ed.gov/policy/elsec/leg/essa/faq/essafaqtribalconsultation.pdf>. See also 20 U.S.C. §§ 6301–6339; U.S. Department of Education, “Improving Basic Programs Operated by Local Educational Agencies, Program Description, Title I, Part A,” <https://www2.ed.gov/programs/titleiparta/index.html> (Title I grants are federal funds that are provided to virtually every public school in America. The grants are for “local educational agencies and schools with high numbers or percentages of children from low-income families to help ensure that all children meet challenging state academic standards.”).

⁵⁷⁷ Tanya H. Lee, “9 Ways the New Education Law Is a Win for Indian Country,” INDIAN COUNTRY TODAY (Feb. 1, 2016), <https://indiancountrymedianetwork.com/education/native-education/9-ways-the-new-education-law-is-a-win-for-indian-country/> [hereinafter Lee, “9 Ways the New Education Law Is a Win for Indian Country”].

⁵⁷⁸ 20 U.S.C. § 7453; see also National Indian Education Association, *Side-By-Side Comparison: Indian Education Titles* (2017), 6, <http://www.niea.org/wp-content/uploads/2016/02/NIEA-Side-by-Side-Comparison-IndianEducationTitles-Short-Version.pdf>.

⁵⁷⁹ Lee, “9 Ways the New Education Law Is a Win for Indian Country,” *supra* note 577.

⁵⁸⁰ *Ibid.*

⁵⁸¹ White House, *2014 Native Youth Report*, *supra* note 564, at 20.

⁵⁸² *Ibid.*

⁵⁸³ BIE Blueprint, *supra* note 568, at 19.

Some scholars have argued that there are also certain challenges to this structure. While tribally controlled academic programs can be more dynamic and culturally enriching, chronic underfunding, the inability to invest in building and maintaining adequate school facilities, and a growing and more centralized BIE bureaucracy due to several restructuring efforts are all obstacles that have “limited the positive impacts of the [Self-Determination Act]” in education.⁵⁸⁴

Given the special federal legal status of Native Americans, several types of federal and tribal educational programs and schools have developed, which are discussed below.

Tribal Education Departments

More than 200 federally recognized tribes in the United States have Tribal Education Departments (TEDs), which are authorized by tribal governments to “implement education goals and priorities.”⁵⁸⁵

In 2012, the U.S. Department of Education (ED) launched the State-Tribal Education Partnership grant program to encourage collaboration between TEDs and state educational agencies in order to enhance the administrative capabilities of TEDs.⁵⁸⁶ The State Tribal Education Partnership program has awarded \$1.9 million in competitive grants to TEDs in order to further their role in the education of Native students. Specifically, the State Tribal Education Partnership program allows TEDs in collaboration with state educational agencies to “perform some State-level functions for certain federal grant programs” at reservation-based schools.⁵⁸⁷

According to NCAI, because TEDs are administered by tribes at the local level, they are well-positioned to tailor educational programs to maximize the academic performance of Native students.⁵⁸⁸ But, unfortunately, many TEDs lack sufficient funding to fully develop tribal expertise in education administration—and thus to fulfill their potential.⁵⁸⁹ NCAI believes that adequate funding for TEDs would allow these critical agencies to “develop academic standards, assess

⁵⁸⁴ Geoffrey D. Strommer and Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 29 (2015), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1001&context=ailr>.

⁵⁸⁵ Tribal Education Departments National Assembly, *Tribal Education Departments Report*, 2011, at 1, <http://www.narf.org/nill/resources/education/reports/tednareport2011.pdf>.

⁵⁸⁶ U.S. Department of Education, *Department Launches New \$2 Million Pilot Program to Support State-Tribal Education Partnerships*, May 29, 2012, <http://www.ed.gov/news/press-releases/department-launches-new-2-million-pilot-program-support-state-tribal-education-partnerships> [hereinafter ED, “Department Launches New \$2 Million Pilot Program”]. Through these state-tribal collaborative agreements, state education agencies “also have the opportunity to increase their knowledge of the unique needs of American Indian and Alaska Native students and build their capacity to improve the educational outcomes of these students.” See also NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 48.

⁵⁸⁷ ED, *Department Launches New \$2 Million Pilot Program*, *supra* note 586.

⁵⁸⁸ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 48.

⁵⁸⁹ White House, *2014 Native Youth Report*, *supra* note 564, at 21.

student progress, and create math and science programs that require high academic standards.”⁵⁹⁰ In a survey conducted by the TEDs National Assembly, the TEDs that participated identified numerous initiatives and goals to improve educational outcomes for Native students, including:

Local community-determined educational challenges, needs, and future goals;

- Collection of data about students;
- Movement to incorporate Native American language and culture into schools and curricula;
- Desire to control and define how children are educated, what they learn, and how they learn;
- Partnerships with state and local education authorities, universities, and private companies; and
- Programs serving native and non-native children, students, and families (cradle-to-grave).⁵⁹¹

Bureau of Indian Education Schools

In 2013, a GAO report called into question the effectiveness of BIE in operating tribal schools and their ability to deliver quality educational programs to Native youth.⁵⁹² GAO observed that Native students who attended public schools consistently outperformed their Native peers at BIE schools on national assessments⁵⁹³ See figure 2.3. In addition, Native students who attended public schools were more likely to graduate from high school than Native students who attended BIE schools.⁵⁹⁴ GAO attributed the relatively poor educational outcomes at BIE schools to structural and operational inefficiencies of BIA and BIE.⁵⁹⁵ According to this report, most recommendations had

⁵⁹⁰ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 48.

⁵⁹¹ Tribal Education Departments National Assembly, *Tribal Education Departments Report* (2011), 1, <https://www.narf.org/nill/resources/education/reports/tednareport2011.pdf>.

⁵⁹² U.S. Government Accountability Office, Report to the Chairman, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, U.S. House of Representatives, *Indian Affairs: Better Management and Accountability Needed to Improve Indian Education* (September 2013), <http://www.gao.gov/assets/660/658071.pdf> [hereinafter GAO, *Indian Affairs: Better Management and Accountability Needed*].

⁵⁹³ *Ibid.*, 6. The results of the 2011 National Assessment of Educational Progress (NAEP) examinations revealed that Native fourth-grade students who attended BIE schools scored 22 points lower in reading proficiency and 14 points lower in math proficiency than their Native peers who attended public schools.

⁵⁹⁴ *Ibid.*, 9. See also U.S. Department of Education, National Center For Education Statistics, *Public High School Four-Year On-Time Graduation Rates and Event Dropout Rates: School Years 2010–11 and 2011–12* (April 2014), 9–10, <http://nces.ed.gov/pubs2014/2014391.pdf>. For SY 2011–2012, the average high school graduation rate nationwide was 80 percent. In comparison, the high school graduation rate for Native students attending public schools was 67 percent and the high school graduation rate for Native students attending BIE schools was even lower—at 53 percent.

⁵⁹⁵ U.S. Government Accountability Office, Testimony before the Senate Committee on Indian Affairs, *HIGH RISK: Status of Prior Recommendations on Federal Management of Programs Serving Indian Tribes* (September 2017), 5–11, <https://www.gao.gov/assets/690/687143.pdf> [hereinafter GAO, *HIGH RISK*]; see also U.S. Government Accountability Office, *Actions Needed to Better Manage Indian School Construction Projects* (May 2017), <https://www.gao.gov/products/GAO-17-447> (stating that “Indian Affairs has not consistently used accountability

not been implemented, or BIE had informed GAO it had taken steps to address the recommendations, but provided no documentation.⁵⁹⁶ Over the past decade, BIA “has undergone several organizational realignments, resulting in multiple offices across different units being responsible for BIE schools’ education and administrative functions.”⁵⁹⁷ While BIE is primarily responsible for the educational functions of BIE schools, the administrative functions are divided between BIE and BIA’s Office of the Deputy Assistant Secretary of Management.⁵⁹⁸

BIE continues to undergo reformation. Vicky Forrest, Deputy Bureau Director of the BIE, provided information in her testimony before the Commission in 2016 about what steps BIE has taken to make these reforms and improvements to its schools:

[H]aving that green light to go ahead, we're in the very initial phases of implementation. Having said that, because of the state of education in BIE schools, we are trying to use the existing staff. We're not waiting. We're trying to take every kind of classroom innovation, or, on my side, the business innovation, to ensure that my job is to get the classrooms what they need, get the teachers what they need on time.

So, in terms of the reorganization in its bigger sense, we feel like we've already started that. There's a lot of communication and collaboration with tribes that hadn't been there from the Bureau of Indian Education before. Our trust responsibility is with the government-to-government relationship between the United States and tribes. . . . What we want to do is ensure that all partners are at the table talking about, for each tribe, that the tribe is very involved in [its] schools and how [it] want[s] the direction of those to go.⁵⁹⁹

The Department of Education (ED) charts of performance data in Figure 3.1 shows the disparities in performance between Native American students in BIE schools compared to Native American students in other types of public schools. In the following charts, school density indicates the proportion of American Indian/Alaskan Native (AI/AN) students enrolled. Low density public schools have less than 25 percent AI/AN students. High density public schools have 25 percent or

measures or conducted sufficient oversight to ensure that BIE school construction projects are completed on time, within budget, and meet schools’ needs. For instance, Indian Affairs does not always use accountability measures, such as warranties, to have builders replace defective parts or repair poor workmanship.”).

⁵⁹⁶ GAO, *HIGH RISK*, *supra* note 595, at 5–11.

⁵⁹⁷ U.S. Government Accountability Office, Testimony before the Senate Committee on Indian Affairs, *Indian Affairs: Further Actions on GAO Recommendations Needed to Address Systemic Management Challenges with Indian Education* (May 2015), introductory summary, <http://www.gao.gov/assets/680/670192.pdf> [hereinafter GAO, *Indian Affairs: Further Actions on GAO Recommendations Needed*]. The BIA’s administration of BIE schools is fragmented between the BIE and multiple other offices within the BIA including the Office of the Deputy Assistant Secretary of Management.

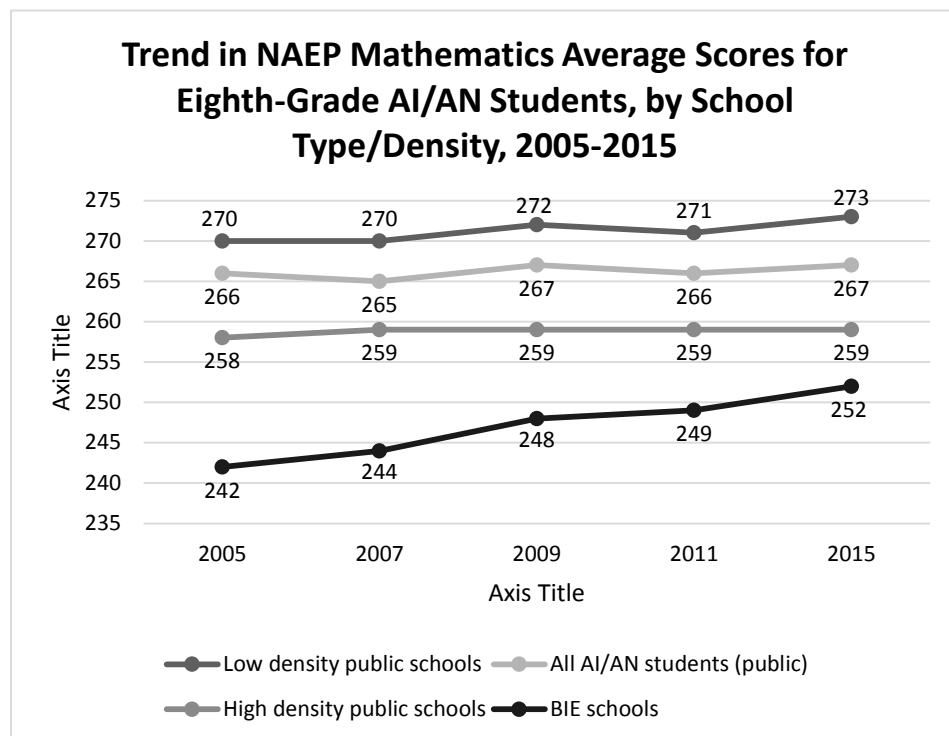
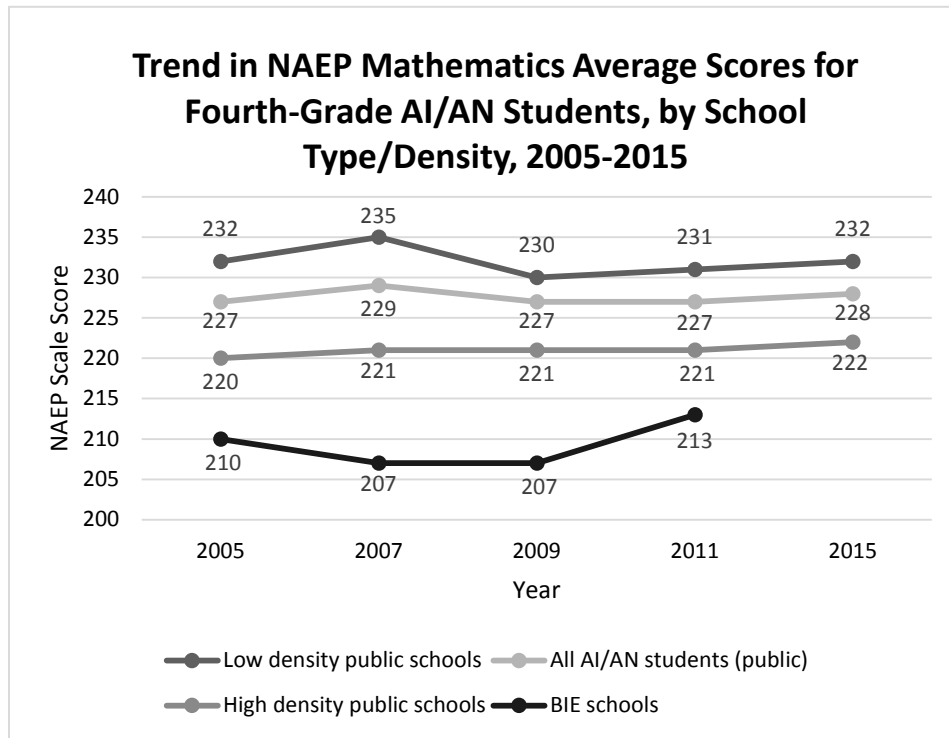
⁵⁹⁸ *Ibid.*, 8.

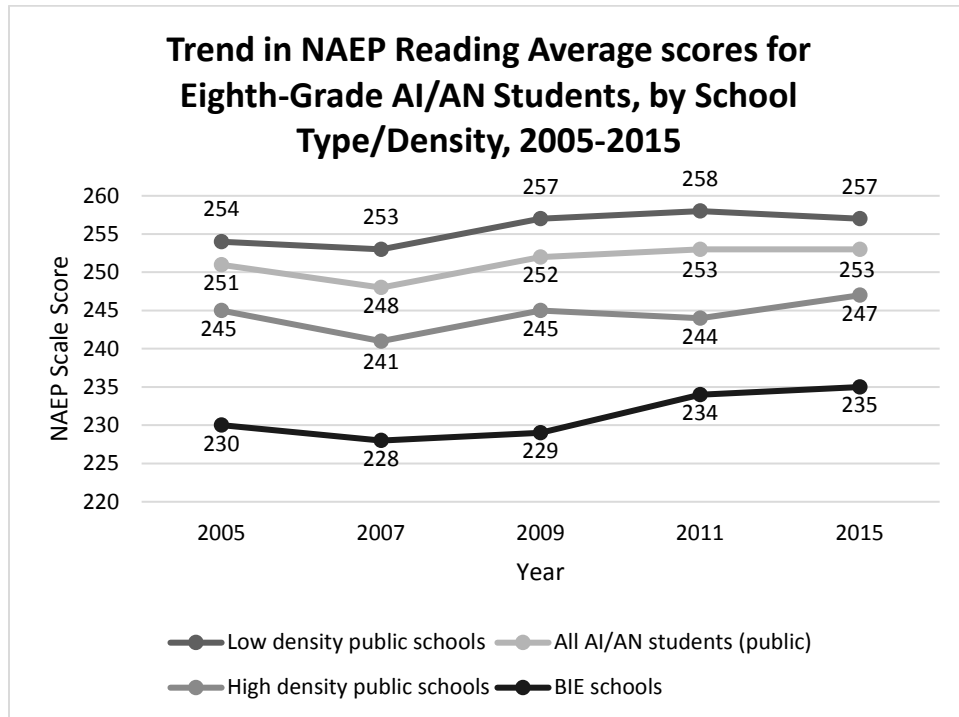
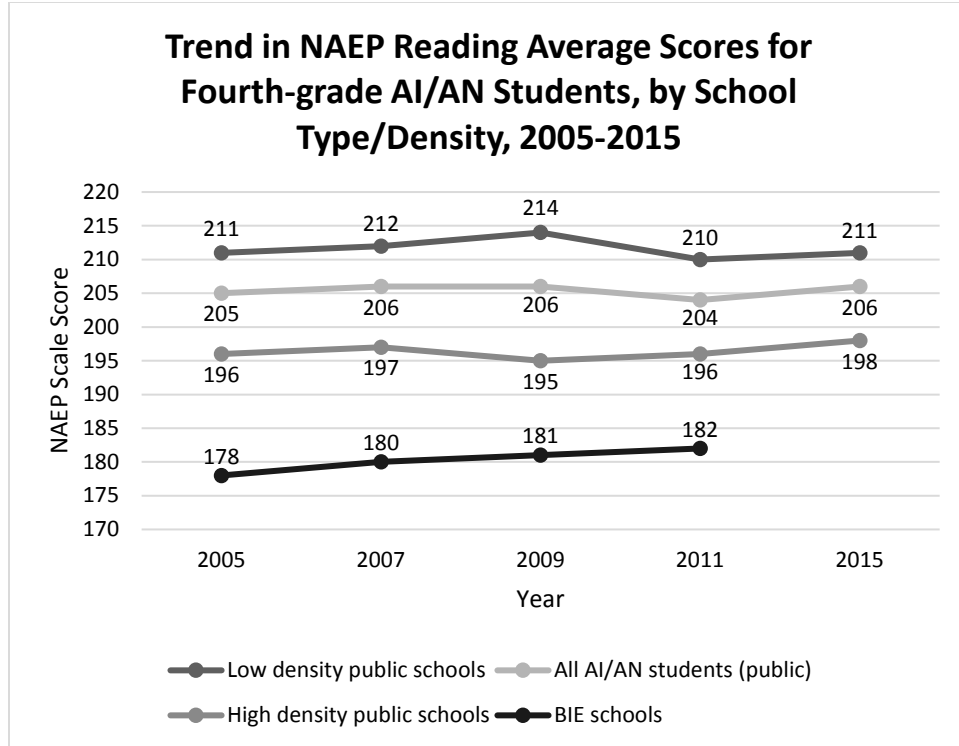
⁵⁹⁹ Vicky Forrest, Deputy Bureau Director for the Bureau of Indian Education, Testimony, *Briefing Transcript*, pp. 182–83.

more. All AI/AN students (public) includes only students in public and BIE schools. Performance results are not available for BIE schools at fourth grade in 2015 because school participation rates did not meet the 70 percent criteria.⁶⁰⁰ These charts all show that public schools with high densities of AI/AN students and BIE schools have consistently lower performance results.

⁶⁰⁰ U.S. Dep't of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress 2005–2015, *National Indian Education Study 2015: American Indian and Alaska Native Students at Grades 4 and 8*, 22–23, <https://nces.ed.gov/nationsreportcard/subject/publications/studies/pdf/2017161.pdf>.

Figure 3.1: Trend in Nat'l Assessment of Educational Progress (NAEP) in Mathematics and Reading Average Scores for Fourth-Grade and Eighth-Grade American Indian and Alaska Native (AI/AN) Students, by School Type/Density, 2005–2015





Source: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress 2005–2015; U.S. Department of Education, Institute of Education Sciences, *National Indian Education Study 2015: American Indian and Alaska Native Students at Grades 4 and 8*, at 22–23, <https://nces.ed.gov/nationsreportcard/subject/publications/studies/pdf/2017161.pdf>. (Charts adapted by the U.S. Commission on Civil Rights.).

Moreover, according to GAO, the fragmentation of responsibility within DOI for BIE schools is compounded by poor communication and incompatible procedures between the organizational divisions, and a lack of clear roles for agency staff.⁶⁰¹ Problems in managing this bureaucratic complexity “ha[ve] led to confusion among schools about whom to contact about problems, as well as delays in the delivery of key educational services and supplies.”⁶⁰² GAO has found that management and administrative weaknesses of BIE have resulted in “delays in the delivery of key educational services and supplies, such as textbooks” and difficulties in administering student academic assessments.⁶⁰³ In addition, DOI has observed that operational weaknesses of BIA have resulted in a failure to provide services, supplies, and textbooks to BIE schools in a timely manner.⁶⁰⁴ Specifically, DOI noted that BIA neglected to assign an acquisitions team to BIE for the purpose of timely acquiring supplies and services for BIE schools, and instead relied on an acquisitions team that served the entire BIA.⁶⁰⁵ Further, according to DOI, BIA reportedly lacked the expertise to make informed hiring decisions regarding specialized educators for BIE schools, and the hiring process for BIE faculty was often not completed by the start of the school year.⁶⁰⁶

In 2013, ED and DOI established the American Indian Education Study Group (Indian Education Study Group) to examine the causes of academic underachievement at BIE schools, and to develop recommendations for transforming BIE into a more effective organization.⁶⁰⁷ Following numerous consultations with tribal authorities and a review of primary and secondary data, the Indian Education Study Group released its findings and recommendations, which called for a complete redesign of BIE.⁶⁰⁸ Specifically, the Indian Education Study Group recommended that instead of directly operating tribal schools, BIE should play a supporting role to tribes in the operation of their own schools.⁶⁰⁹

⁶⁰¹ GAO, *Indian Affairs: Better Management and Accountability Needed*, *supra* note 592, at 18.

⁶⁰² GAO, *Indian Affairs: Further Actions on GAO Recommendations Needed*, *supra* note 597, at introductory summary.

⁶⁰³ GAO, *Indian Affairs: Better Management and Accountability Needed*, *supra* note 592, at introductory summary.

⁶⁰⁴ U.S. Dep’t of the Interior, Indian Affairs, *Final Report: Examination, Evaluation, and Recommendations for Support Functions* (March 2012), 54, <http://fiseheadquarters.org/wp-content/uploads/2017/08/bronnerreport.pdf>.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*, 89.

⁶⁰⁷ Bureau of Indian Education, “Indian Education Study Group,” <https://www.bie.edu/NewsEvents/StudyGroup/index.htm> (last accessed July 24, 2018).

⁶⁰⁸ BIE Blueprint, *supra* note 568, at 2–3.

⁶⁰⁹ *Ibid.*, 3. The basis for these recommendations is generally as follows:

Based on extensive listening sessions in fall 2013 with tribal leaders, educators, and community members across Indian Country, and analysis of a wide range of primary and secondary data, the Study Group proposed to tribal leaders a redesigned BIE. The redesigned BIE reflects its evolution from a direct education provider to an expert service and support provider, which promotes self-governance and self-determination through tribal operation of schools. The Study Group conducted four tribal consultations on its proposal in spring 2014. The redesign seeks to achieve one overarching goal: that all BIE students receive a world-class education delivered by tribes and supported by the Department of the Interior.

In 2014, based upon the recommendations of the Indian Education Study Group, DOI issued Secretarial Order 3334, to begin the process of restructuring BIE into an innovative organization designed to support the tribal operation of schools.⁶¹⁰ The primary objectives of the BIE reorganization are to “centralize the administration of schools, decentralize services to schools, and increase the capacity of tribes to directly operate” their own schools.⁶¹¹ The White House’s *2014 Native Youth Report* explained the goal of reorganizing BIE as follows:

BIE is working to change from a direct operator of schools into a resource provider that serves tribally controlled schools, similar to a state department of education. This would include reshaping the function of BIE’s technical assistance capacity so that it is better positioned to support tribes as the leaders of their own highly effective schools, as well as providing assistance to schools so they are better positioned to support student academic success in a setting that embraces tribal values and traditions.⁶¹²

BIE has transferred operational responsibilities for two-thirds of its schools to tribal educational authorities. As part of the 2014 BIE realignment, three area divisions of the agency have been reorganized so that each division supports the needs of a specific school type—BIE operated or tribally operated—rather than supporting the needs of all school types in a particular geographic area.⁶¹³ In addition, the BIE Education Line Offices have been transformed into Education Resource Centers, which are located closer to the schools, in order to provide customized support and expertise in the areas of professional development, special education, federal programs, and grant management.⁶¹⁴ However, in 2015, GAO found that BIE had not fully implemented reforms necessary to improve communications between the agency and schools, nor had BIE revised its

Ibid., 2.

⁶¹⁰ U.S. Dep’t of the Interior, Order No. 3344, June 12, 2014, <https://www.bie.edu/cs/groups/xbie/documents/document/idc1-031626.pdf>.

⁶¹¹ GAO, *Indian Affairs: Further Actions on GAO Recommendations Needed*, *supra* note 597, at 10.

⁶¹² White House, *2014 Native Youth Report*, *supra* note 564, at 29. Following President Barack Obama’s visit to Indian Country in 2014, the White House released this report, which examines the problems confronted by Native American youth and proposes recommendations to maximize educational opportunities in Indian Country.

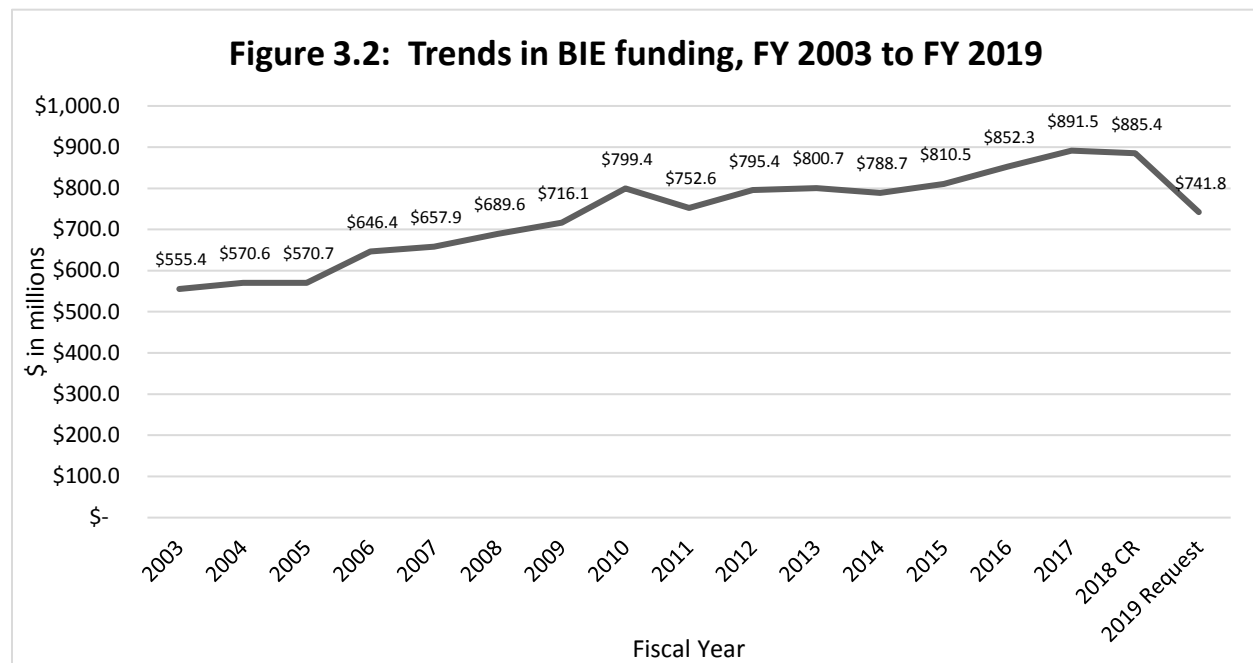
⁶¹³ U.S. Dep’t of the Interior, Indian Affairs, *Budget Justifications and Performance Information, Fiscal Year 2016*, at IA-SOPS-8, https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_IA_Greenbook.pdf [hereinafter DOI, *Budget Justifications FY 2016*].

⁶¹⁴ Ibid. See also U.S. Dep’t of the Interior, Indian Affairs, *Budget Justifications and Performance Information, Fiscal Year 2019*, IA-BIE-5, IA-BIE-6, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_ia_budget_justification.pdf [hereinafter DOI, *Budget Justifications FY 2019*]; U.S. Dep’t of the Interior, Indian Affairs, *Budget Justifications and Performance Information, Fiscal Year 2018*, IA-BIE-10, https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_ia_budget_justification.pdf [hereinafter DOI, *Budget Justifications FY 2018*]. BIE did undergo a restructuring in 2017, but it appears that Education Program Management may see a reduction of funding for 2018 due to a proposed budget reduction of \$842,000, which will likely impact the hiring of new staff for the Education Resource Centers and School Operations Division.

workforce plan to ensure that employees had the knowledge and skills to support schools.⁶¹⁵ GAO also noted that BIE had not yet adopted procedures necessary to improve the oversight of school construction and school spending.⁶¹⁶

Federal Funding

Unlike funding for most of the nation’s public schools,⁶¹⁷ nearly all of the funds for BIE schools come from the federal government.⁶¹⁸ In 2017, BIE schools received approximately \$891 million from federal sources.⁶¹⁹ See Figure 3.2 for the trends in BIE funding since 2003.



Source: U.S. Department of the Interior, Bureau of Indian Affairs

For FY 2019, the President’s Budget requested \$741 million in federal funding for BIE program operations (see figure 3.2), which requests \$625 million (74 percent) from DOI for BIE elementary

⁶¹⁵ GAO, *Indian Affairs: Further Actions on GAO Recommendations Needed*, *supra* note 597, at introductory summary.

⁶¹⁶ *Ibid.* See also *supra* notes 596–98 (discussing relevant GAO findings).

⁶¹⁷ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (January 2018), 28–29, <http://www.usccr.gov/pubs/2018-01-10-Education-Inequity.pdf> [hereinafter USCCR, *Public Education Funding Inequity*]. The majority of K-12 schools in the U.S. receive a combination of funds from local, state, and federal funding streams. On average, only 9 percent of funds for America’s public schools come from federal sources.

⁶¹⁸ U.S. Government Accountability Office, *Bureau of Indian Education Needs to Improve Oversight of School Spending* (November 2014), 8, <https://www.gao.gov/assets/670/666890.pdf> [hereinafter, GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*].

⁶¹⁹ DOI, *Budget Justifications FY 2019*, *supra* note 614, at IA-BIE-1.

and secondary school operations.⁶²⁰ Additionally, \$215 million will be transferred from ED “to educate and provide services to students attending BIE-funded elementary and secondary schools.”⁶²¹ As shown, this overall amount requested represents a decrease of over \$144 million.

The largest component of DOI’s budget for BIE is the Indian School Equalization Program (ISEP), which provides funding for teacher instruction, dormitory staffing, and food service.⁶²² The other major components of DOI’s budget for BIE include funding for school facilities’ operations and maintenance, student transportation, and tribal grant support costs.⁶²³ While DOI provides the largest share of funding for BIE schools, annual formula grants from ED also provide significant funds.⁶²⁴ In 2017, BIE schools received nearly \$165 million from ED, which included \$100 million in grant funding pursuant to programs under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by ESSA.⁶²⁵ For FY 2019, the President’s Budget requests the same levels of funding to help support BIE schools.⁶²⁶ As discussed above, Title I of ESEA provides federal grant funding to enhance educational programs in schools with many low-income students to improve educational equity and opportunity.⁶²⁷ Additionally, Title VI of the ESEA provides grants to support schools and school programs that serve Native American students.⁶²⁸ BIE schools also receive ED grant funding pursuant to the Individuals with Disabilities Education Act⁶²⁹ to support special education programs for children with disabilities.⁶³⁰ See Figure 3.3 for the allocation of FY 2019 funds.

⁶²⁰ Ibid., IA-BIE-1, IA-BIE-5.

⁶²¹ Ibid., IA-BIE-1, IA-BIE-5.

⁶²² GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 9–10.

⁶²³ Ibid.

⁶²⁴ Ibid., 3.

⁶²⁵ U.S. Dep’t of Education, *Indian Education: Fiscal Year 2019 Budget Request*, E-3, E-7, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf> [hereinafter ED, *Indian Education: FY 2019 Budget Request*].

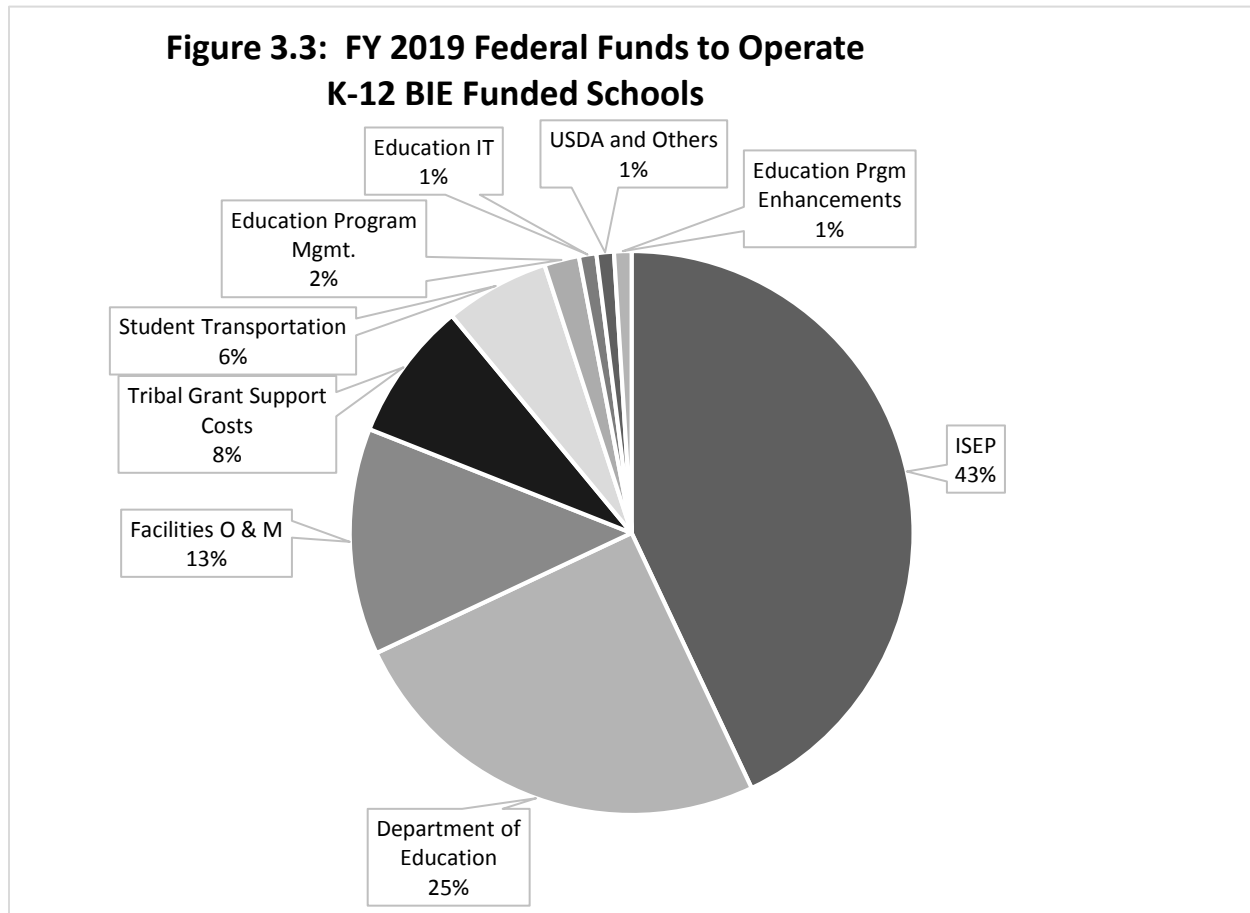
⁶²⁶ Ibid., E-7.

⁶²⁷ 20 U.S.C. § 6301 *et seq.*; *see also* U.S. Dep’t of Education, “Every Student Succeeds Act (ESSA),” <https://www.ed.gov/essa?src=rn> (last accessed July 24, 2018); *see also supra* notes 569–71 (discussing ESEA and its 2015 reauthorization).

⁶²⁸ 20 U.S.C. §§ 7421–7429.

⁶²⁹ Individuals with Disabilities Education Act, Pub. L. No. 101-146 (101st Cong.), Oct. 1990, codified at 20 U.S.C. § 1400 *et seq.*

⁶³⁰ DOI, *Budget Justifications FY 2019*, *supra* note 614, at IA-BIE-7; *see also* Bureau of Indian Education, “Special Education,” <https://www.bie.edu/Programs/SpecialEd/index.htm> (last accessed July 24, 2018); National Indian Education Association, “Students with Disabilities,” <http://www.niea.org/for-advocates/education-priorities/individuals-with-disabilities-education-act-idea/> (last accessed July 24, 2018).



DOI, Budget Justifications and Performance Information, Fiscal Year 2019, p. IA-BIE-6

The National Advisory Council on Indian Education (NACIE) is authorized by ESEA as amended by ESSA, to advise the Secretaries of ED and DOI on matters concerning the funding and administration of education programs that benefit Native American students.⁶³¹ NACIE also submits annual reports to Congress that include recommendations for the improvement of these education programs.⁶³² In a 2016 report, NACIE noted that “the historical underfunding of Title VI [of ESEA, as reauthorized by ESSA of 2015] has hindered the quantity and quality of culturally responsive services that can be provided to Native students and has limited the achievement gains that can be realized.”⁶³³ NACIE has recommended that Congress increase funding for Title VI of the Elementary and Secondary Education Act to support the “unique educational, language, and cultural needs of American Indian and Alaska Native and Native Hawaiian students.”⁶³⁴

⁶³¹ 20 U.S.C. § 7471(b)(1); *see also* U.S. Dep’t of Education, “National Advisory Council on Indian Education,” <https://www2.ed.gov/about/offices/list/oese/oie/nacie.html> (last accessed July 24, 2018).

⁶³² 20 U.S.C. § 7471(b)(3).

⁶³³ National Advisory Council on Indian Education, *Annual Report to Congress 2015–2016* (2016), 3, <https://www2.ed.gov/about/offices/list/oese/oie/nacieannrpt2016.pdf>.

⁶³⁴ *Ibid.*, 6.

As evidenced in Figure 3.2, from FY 2007 to FY 2018, the actual amount of federal funding provided to BIE schools has remained relatively static. See also Appendix E, Funding for Native American Education. Excluding the special, short-term appropriations provided by the American Recovery and Reinvestment Act of 2009, GAO found that annual funding for BIE schools increased by roughly 6 percent in nominal terms from 2009 to 2014.⁶³⁵ However, when adjusted for inflation, federal funding for BIE schools actually decreased by about 1 percent between 2009 and 2014.⁶³⁶ Furthermore, because BIE schools receive virtually all of their funding from the federal government,⁶³⁷ the budget sequester in March 2013 that lasted 16 days had a disproportionately negative impact on the schools for Native American youth (as compared with non-BIE public schools, which are primarily funded by non-federal sources)⁶³⁸

In addition to ongoing budgetary constraints, BIE schools have experienced episodes of financial mismanagement—due in part to inadequate oversight by BIE.⁶³⁹ In 2015, GAO found that BIE did not consistently monitor BIE school spending to ensure that funds were being properly spent on educational services.⁶⁴⁰ External auditors have uncovered serious financial management issues at some BIE schools, including \$13.8 million in unallowable spending by 24 different schools.⁶⁴¹ Rather than utilizing an auditor-recommended risk-based approach to monitor school expenditures, GAO found that BIE “relie[d] primarily on ad hoc suggestions by staff regarding which schools to target for greater oversight.”⁶⁴² GAO also found that BIE did not have written procedures in place to monitor the schools’ use of Indian School Equalization Program funds, which account for roughly half of their operational funding.⁶⁴³

Tribal Grant Support Costs

Federal appropriations for tribal grant support costs are provided to tribes that operate their own schools under the grant authority of the Tribally Controlled Schools Act of 1988.⁶⁴⁴ These funds allow tribally operated BIE schools to meet the administrative costs of operating their own schools.⁶⁴⁵ Without adequate funding for tribal grant support costs, tribally operated BIE schools

⁶³⁵ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 10.

⁶³⁶ *Ibid.*

⁶³⁷ USCCR, *Public Education Funding Inequity*, *supra* note 617, at 27–29 (discussing sources of funding for BIE and non-BIE public schools).

⁶³⁸ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 44–46.

⁶³⁹ GAO, *Indian Affairs: Further Actions on GAO Recommendations Needed*, *supra* note 597, at 20.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.*, 19.

⁶⁴² *Ibid.*, 20.

⁶⁴³ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 27–28.

⁶⁴⁴ 25 U.S.C. § 2501 *et seq.*, Indian Education Amendments of 1988: Tribally Controlled Schools Act of 1988, Pub. L. 100-297, 102 Stat. 130 (April 28, 1988).

⁶⁴⁵ DOI, *Budget Justifications FY 2016*, *supra* note 613, at IA-BIE-16. Administrative overhead costs for the tribally operated BIE schools include “business operations, payroll, personnel, school board, legal, annual audits, information technology, and reporting.” *Ibid.*

must divert their limited financial resources from classroom instruction to cover administrative costs.⁶⁴⁶ Indeed, the Indian Education Study Group found that any shortfall in the funding of tribal grant support costs “is a major obstacle to tribal operation of BIE-funded schools and a major deterrent for tribes to assume operations over BIE-operated schools.”⁶⁴⁷ In 2013, tribally operated BIE schools received only 63 percent of the funding that BOI considered to be needed to cover their tribal grant support costs.⁶⁴⁸ In recent years, however, tribal grant support costs have been better funded. In FY 2017, tribal grant support costs were fully funded at \$80.1 million, and DOI budget requests for FY 2018 and FY 2019 (\$74.3 million and \$73.9 million, respectively) claim they would fund 100 percent of the tribal grant support costs.⁶⁴⁹

Education Programs for Native Hawaiians

Under the Native Hawaiian Education Act, Congress recognized that “Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty[.]”⁶⁵⁰ The United States government annexed Native Hawaiian lands and usurped the indigenous peoples’ sovereignty, leading to disparities in education and other issues. The Act authorizes funds for a Native Hawaiian Education Council to support and improve Native Hawaiian education programs and services.⁶⁵¹ The statute also allows ED to award grants to Native Hawaiian education organizations,⁶⁵² and directs the U.S. Education Secretary to prioritize grant projects to address early education reading and literacy; the needs of at-risk children and youth; needs in fields in which Native Hawaiians are underemployed; and the instructional use of the Hawaiian language.⁶⁵³ Congress authorized the appropriation of \$32.4 million for fiscal years 2017 through 2020 to support the statute, reserving \$500,000 of that amount each year to directly fund the Native Hawaiian Education Council.⁶⁵⁴ The 2018 omnibus spending bill, enacted to fund the government through FY 2018, included \$36.4 million for the “construction, renovation, and modernization” of any elementary or secondary schools operated by Hawaii’s Education Department to serve “a

⁶⁴⁶ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 50.

⁶⁴⁷ BIE Blueprint, *supra* note 568, at 23.

⁶⁴⁸ DOI, *Budget Justifications FY 2016*, *supra* note 613, at IA-BIE-16.

⁶⁴⁹ DOI, *Budget Justifications FY 2019*, *supra* note 614, at IA-BIE-1–IA-BIE-2; DOI, *Budget Justifications FY 2018*, *supra* note 614, at IA-BIE-1, IA-BIE-4; DOI, *Budget Justifications FY 2017*, at IA-BIE-1.

⁶⁵⁰ 20 U.S.C. § 7512(12)(A).

⁶⁵¹ *Id.* § 7514. *See also* Congressional findings at *id.* § 7512(6), 7512(8)–(13).

⁶⁵² *Id.* § 7515(a)(1).

⁶⁵³ *Id.* § 7515(a)(2).

⁶⁵⁴ *Id.* § 7515(c).

predominantly Native Hawaiian student body.”⁶⁵⁵ The President’s FY 2019 budget request, however, proposed eliminating the Native Hawaiian Education program.⁶⁵⁶

There are ongoing disparities in educational attainment for Native Hawaiians. For example, recent research showed that 28.4 percent of Native Hawaiian students were deemed proficient in math, compared with 46.8 percent of non-Native Hawaiian students.⁶⁵⁷ In reading, 34.8 percent of Native Hawaiian students were proficient, compared with 54.3 percent of non-Native Hawaiian students.⁶⁵⁸ The disparities in proficiency rates were particularly severe among economically disadvantaged Native Hawaiian students.⁶⁵⁹ And more than three out of four Native Hawaiian kindergarteners live in economically disadvantaged homes.⁶⁶⁰

Disparities in Education

Educational attainment rates for Native American students are the lowest of any racial or ethnic group in the U.S.⁶⁶¹ As a group, Native American students are underperforming academically, as evidenced by relatively low reading and math proficiency, low test scores, and less access to high-rigor courses.⁶⁶² The dropout rate for Native American students is highest of any racial or ethnic group: 13.1 percent of male students (ages 16–24) and 9.9 percent of female students (ages 16–24) have dropped out, as compared with 7.2 percent of male students (ages 16–24) and 5.2 percent

⁶⁵⁵ *Consolidated Appropriations Act 2018*, *supra* note 207, at 395.

⁶⁵⁶ NCAI, *Analysis of the FY 2019 President’s Budget*, February 2018, at 9–10, http://www.ncai.org/FY2019_Presidents_Budget_Analysis7.pdf [hereinafter NCAI, *Analysis of the FY 2019 President’s Budget*].

⁶⁵⁷ Office of Hawaiian Affairs Research Division, *A Native Hawaiian Focus on the Hawaii Public School System, SY2015: Ho‘ona‘auao (Education) Fact Sheet*, Vol. 2017, No.1, April 2017, at 8, <https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/A-Native-Hawaiian-Focus-on-the-Hawaii-Public-School-System.pdf>.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.*, 14.

⁶⁶⁰ *Ibid.*, 13.

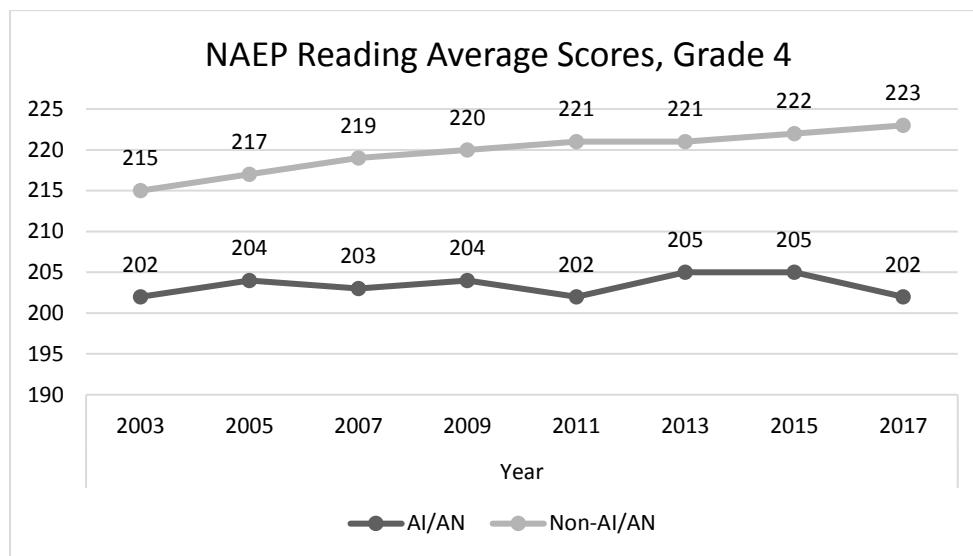
⁶⁶¹ Donna Martinez, *School Culture and American Indian Educational Outcomes*, *supra* note 51, at 199.

⁶⁶² USCCR, *Public Education Funding Inequity*, *supra* note 617, at 59–60, 63; U.S. Dep’t of Education, National Center for Education Statistics, *Explore Assessment Data*, National Assessment of Educational Progress, <https://nces.ed.gov/nationsreportcard/data/>; Adaku Onyeka-Crawford *et al.*, *Let Her Learn: Stopping School Pushout for Girls of Color*, National Women’s Law Center (2017) 9–10, https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf [hereinafter Onyeka-Crawford *et al.*, *Let Her Learn*]; *see also* Rebecca Klein, *The Education System Is Failing Native American Students. Here’s Proof*, HUFFINGTON POST (July 18, 2014), https://www.huffingtonpost.com/2014/07/18/native-american-education_n_5593253.html.

of female students (ages 16–24) of all races.⁶⁶³ Only 17 percent of Native American students begin college, as compared to 62 percent of all students nationwide.⁶⁶⁴

Native American students, in the aggregate, score far lower than their non-Native peers on national assessments of reading and math proficiency. For example, in 2017, fourth grade Native American students scored an average of 21 points lower on reading assessments, and an average of 14 points lower on math assessments than non-Native students; likewise, eighth grade Native American students scored an average of 14 points lower on reading assessments, and an average of 17 points lower on math assessments than non-Native students.⁶⁶⁵ From 2003–2017, score gaps between fourth grade Native American students and non-Native students increased by 8 points for reading and 4 points for mathematics assessments; while average scores of Native American students in reading remained the same and average mathematics scores increased over that period.⁶⁶⁶ From 2003–2017, score gaps between eighth grade Native American students and non-Native students increased one point for reading assessments and 6 points for mathematics assessments, and the average scores of Native American students in both reading and math increased over that time.⁶⁶⁷ See Figures 3.4 and 3.5.

Figure 3.4: Trend in NAEP Reading Average Scores for Fourth and Eighth Grade American Indian and Alaska Native and Non-American Indian and Non-Alaska Native Students



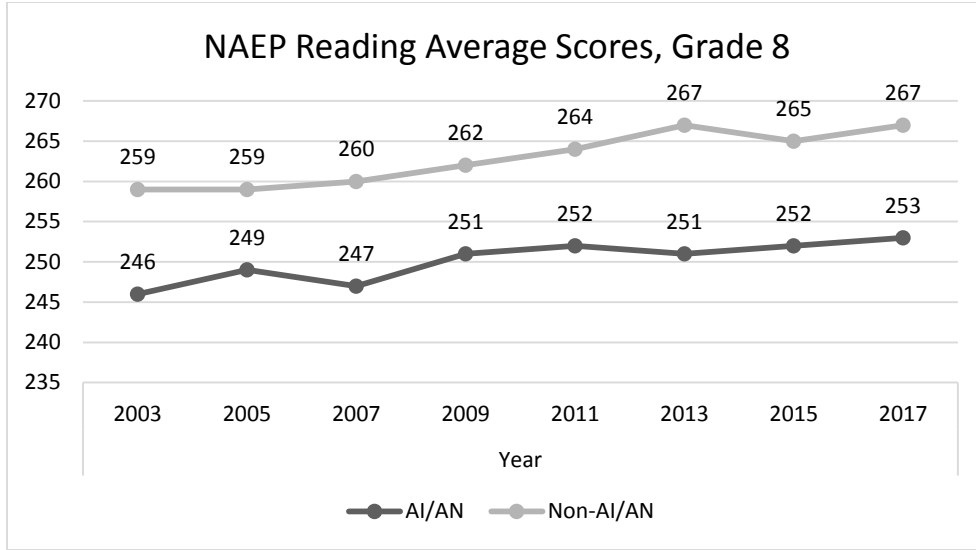
⁶⁶³ U.S. Dep't of Education, National Center for Education Statistics, Institute of Education Sciences, *Trends in High School Dropout and Completion Rates in the United States: 2014* (March 2018), 24, <https://nces.ed.gov/pubs2018/2018117.pdf>.

⁶⁶⁴ Donna Martinez, *School Culture and American Indian Educational Outcomes*, *supra* note 51, at 199.

⁶⁶⁵ U.S. Dep't of Education, National Center for Education Statistics, Institute of Education Sciences, *National Indian Education Study 2011: The Educational Experiences of American Indian and Alaska Native Students at Grades Four and Eight* (2011), 2–3, <http://nces.ed.gov/nationsreportcard/pdf/studies/2012466.pdf>.

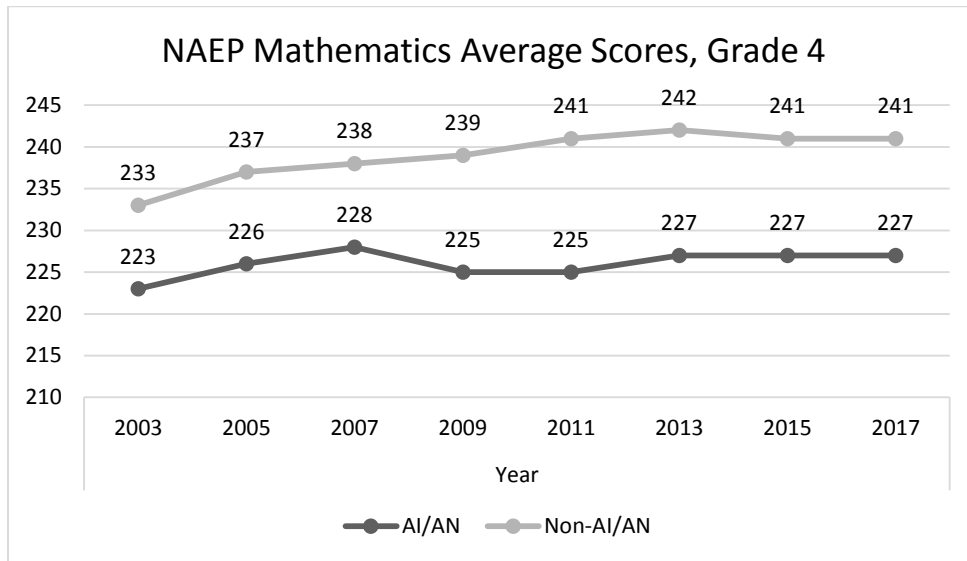
⁶⁶⁶ *Ibid.*

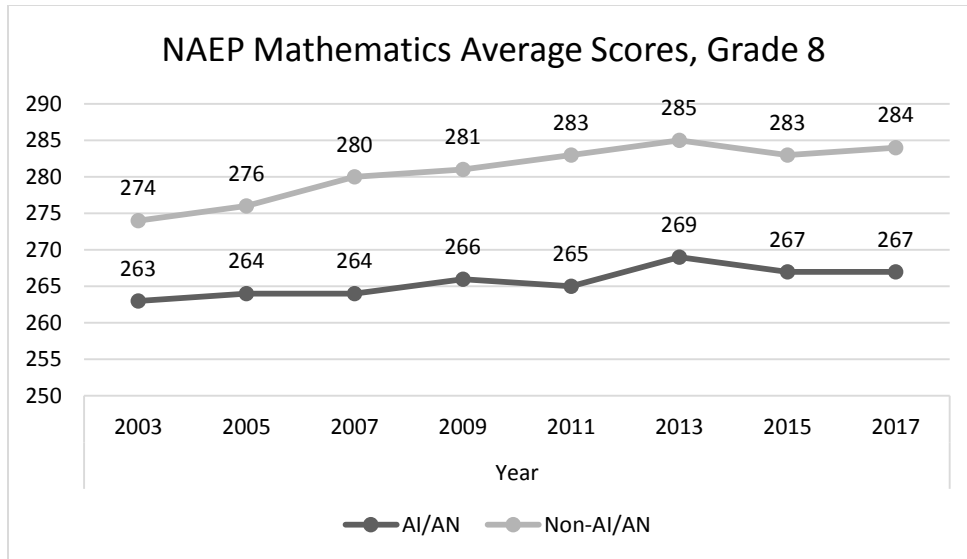
⁶⁶⁷ *Ibid.*



Source: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 2003–2017, reading assessments.

Figure 3.5: Trend in NAEP Mathematics Average Scores for Fourth, and Eighth Grade American Indian and Alaska Native and Non-American Indian and Non-Alaska Native Students





Source: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 2003–2017, mathematics assessments.

These disparities in tests measuring academic achievement coexist with gaps in the educational opportunities available in the schools that Native American students attend. Studies have shown that there are discernable achievement gaps between white students and students of color, including Native American students,⁶⁶⁸ and that these gaps open up among students by the time they enter kindergarten.⁶⁶⁹ Nevertheless, more than half of 3 to 4 year old Native American students are not enrolled in any sort of school programs.⁶⁷⁰ Moreover, among all students nationwide, Native Americans are the least likely to attend a high school that offers Advanced Placement courses, and the majority of Native students attend a high school that lacks a complete range of math and science courses.⁶⁷¹ As is true for any student, substandard programs of primary and secondary education may affect access to and the ability to succeed at the college level.

In 2012, the high school graduation rate for Native students was 68 percent, and the dropout rate for Native students is close to twice that of all students.⁶⁷² Furthermore, Native students who enter college are less likely than their counterparts to graduate with a degree.⁶⁷³ The best available data indicate there was no measurable difference in Native American associate's and bachelor's degree attainment levels from 2000 to 2017 despite increases observed nationally: 27 percent of Native Americans aged 25- to 29-years old obtained an associate's degree or higher compared to 46 percent

⁶⁶⁸ The Education Trust, *The State of Education for Native Students* (Aug. 13, 2013), 3, https://1k9g11yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/NativeStudentBrief_0.pdf.

⁶⁶⁹ Elliot M. Tucker-Drob, *Preschools Reduce Early Academic Achievement Gaps: A Longitudinal Twin Approach*, 23 *Psychological Science* 3 (2012), 316, <https://labs.la.utexas.edu/tucker-drob/files/2015/02/Tucker-Drob-Psychological-Science-Preschools-Reduce-Achievement-Gaps.pdf> (finding that preschool enrollment is associated with higher achievement in math and reading at age 5, “particularly for racial and ethnic minorities, children from lower-SES (socio-economic status) families, and children whose parents were rated as less cognitively stimulating. Moreover, SES significantly predicted the likelihood of being enrolled in preschool, a fact suggesting that the very children who would benefit most from preschools are those who are least likely to be enrolled in preschools. Therefore, differences in the rate of preschool enrollment across families may actually serve to perpetuate achievement disparities at the population level.”).

⁶⁷⁰ Annie E. Casey Foundation, *Kids Count Data Book: State Trends in Child Well-Being* (2016), 26, <http://www.aecf.org/m/resourcedoc/aecf-the2016kidscountdatatbook-2016.pdf>.

⁶⁷¹ White House, *2014 Native Youth Report*, *supra* note 564, at 18; Education Trust, *Finding America's Missing AP And IB Students*, Shattering Expectations Series (June 2013), 3, https://1k9g11yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/Missing_Students.pdf; U.S. Dep't of Education, Office for Civil Rights, Civil Rights Data Collection, *Data Snapshot: College and Career Readiness*, Issue Brief No. 3 (March 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf>.

⁶⁷² U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2014* (May 2014), 139, <https://nces.ed.gov/pubs2014/2014083.pdf>; U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2015* (May 2015), 182, <https://nces.ed.gov/pubs2015/2015144.pdf>.

⁶⁷³ White House, *2014 Native Youth Report*, *supra* note 564, at 14, n.40. *See also* U.S. Dep't of Education, National Center For Education Statistics, Institute of Education Sciences, *Enrollment in Postsecondary Institutions, Fall 2010; Financial Statistics, Fiscal Year 2010; and Graduation Rates, Selected Cohorts, 2002–07, 2012*, at 17, <http://nces.ed.gov/pubs2012/2012280.pdf>. The education statistics reveal that only 39 percent of Native American students who entered a four-year college in the fall of 2004 earned a bachelor's degree by 2010, compared with 58 percent of students overall.

for all groups, and only 16 percent of Native Americans obtained a bachelor's degree or higher, compared to 36 percent for all groups.⁶⁷⁴

According to ED's Civil Rights Data Collection (CRDC) for 2015–2016, Native American students comprised 1.1 percent (0.5 million) of the total 50.6 million public school students in the U.S.⁶⁷⁵ Despite their relatively small numbers, though, they experience discernable disparities in access to educational opportunities; they appear to be more commonly subject to school discipline, have fewer experienced teachers, and permit students (and their teachers) to remain in schools if they have high absentee rates.⁶⁷⁶ The data showed Native American boys received school discipline at a disproportionate rate, as 11 percent received one or more out-of-school suspensions compared with 6 percent of all students, and 2 percent of Native American boys were expelled without educational services when they represented only 0.6 percent of all students.⁶⁷⁷ Native American girls were 3 times more likely to be suspended than white girls.⁶⁷⁸ Twenty seven percent of Native American high school students were chronically absent, as compared to 19 percent of all high school students nationwide.⁶⁷⁹ Native American students were likely to have inexperienced teachers, as 6 percent of students attended schools where more than 20 percent of teachers were beginning teachers as compared to 3 percent of white students and 3 percent of Asian students.⁶⁸⁰

Native American students are also often mistreated at school, which makes for a negative learning environment. Being bullied is a huge problem among the Native American student population. A 2013 survey study in Minnesota reported that more than half of Native American students had experienced some form of bullying, with 29.3 percent experiencing verbal threats, 47.5 percent experiencing physical violence, and 23.5 percent experiencing both.⁶⁸¹ Additionally, in several other states with high Native American student populations, these students were the most likely or second most likely to be bullied of any other demographic.⁶⁸² Research has found that bullying is potentially linked to several detrimental issues for Native American students, such as not feeling

⁶⁷⁴ U.S. Dep't of Education, National Center for Education Statistics, Institute of Education Sciences, *The Condition of Education 2018* (May 2018), 238–39, <https://nces.ed.gov/pubs2018/2018144.pdf>.

⁶⁷⁵ U.S. Dep't of Education, Office for Civil Rights, 2015–16 Civil Rights Data Collection, *School Climate and Safety* (April 2018), 1, 13–15, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

⁶⁷⁶ U.S. Dep't of Education, Office for Civil Rights, 2013–2014 Civil Rights Data Collection, *A First Look* (October 2016), 3–4, 8–9, <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [hereinafter OCR, *A First Look*].

⁶⁷⁷ *Ibid.*, 4–5.

⁶⁷⁸ Onyeka-Crawford *et al.*, *Let Her Learn*, *supra* note 662, at 14.

⁶⁷⁹ OCR, *A First Look*, *supra* note 676, at 7.

⁶⁸⁰ *Ibid.*, 9.

⁶⁸¹ Evelyn M. Campbell and Susan E. Smalling, “American Indians and Bullying in Schools,” *Journal of Indigenous Social Development*, Vol. 2, Issue 1 (September 2013), 8–9 (discussing the Minnesota survey), http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/29815/v2i1_03campbell.pdf?sequence=1. See also U.S. Dep't of Education, White House Initiative on American Indian and Alaska Native Education, *School Environment Listening Sessions Final Report* (October 2015), 48, <https://sites.ed.gov/whiaiane/files/2015/10/school-environment-listening-sessions-final-report.pdf> [hereinafter U.S. Dep't of Education, *School Environment Listening Sessions*].

⁶⁸² U.S. Dep't of Education, *School Environment Listening Sessions*, *supra* note 681, at 27.

safe in school, a decline in academic performance, dropping out of school, and increased rates of suicide.⁶⁸³

The disparity in educational opportunities and outcomes for Native American youth has a profound impact on the socioeconomic opportunities and wellbeing of both tribal nations and individuals.⁶⁸⁴ Without quality educational opportunities, the White House finds in its *Native Youth Report*, Native youth have fewer opportunities to obtain higher education, career training, or meaningful jobs, which can in turn hinder the opportunities for tribal nations to “develop leaders who can build stronger tribal economies and contribute to the overall rebuilding of Native nations.”⁶⁸⁵ Education is essential to improve opportunities for Native youth and strengthen tribal nations; and self-determination in education, where tribes have greater control over the curriculum of Native students, can strategically help improve the wellbeing of Native Americans.⁶⁸⁶

The Impact of Stereotypical Native American Imagery in Schools

Many Native American advocates have also voiced serious concerns about the use of Native mascots, and the U.S. Commission on Civil Rights has condemned this practice, stating that “[t]he stereotyping of any racial, ethnic, religious or other group[s.] when promoted by our public educational institutions, teach[es] all students that stereotyping of minority groups is acceptable, a dangerous lesson in a diverse society.”⁶⁸⁷ A 2018 report titled *Reclaiming Native Truth: A Project to Dispel America’s Myths and Misconceptions* stated:

In focus groups with Native Americans, four out of five said they are offended by Native-themed mascots. This is in contrast to two national surveys (conducted independently of our research and highly contested by leaders in Indian Country for their methodology) that found that Native Americans are not offended by Native American mascots.⁶⁸⁸

⁶⁸³ National Education Association, Focus on American Indians and Alaska Natives, *Bullying Emerges as a Contributing Factor: The Scourge of Suicides among American Indian and Alaska Native Youth*, September 2011, <http://www.nea.org/assets/docs/aianfocus2011-2012.pdf>; ED, *School Environment Listening Sessions*, *supra* note 681, at 28.

⁶⁸⁴ White House, *2014 Native Youth Report*, *supra* note 564, at 13–14.

⁶⁸⁵ *Ibid.*, 14.

⁶⁸⁶ *Ibid.*, 28.

⁶⁸⁷ U.S. Commission on Civil Rights, *Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols* (2001), <http://www.usccr.gov/press/archives/2001/041601st.htm>. See also National Congress of American Indians, *Ending the Legacy of Racism in Sports & the Era of Harmful “Indian” Sports Mascots* (October 2013), http://www.ncai.org/resources/ncai_publications/ending-the-legacy-of-racism-in-sports-the-era-of-harmful-indian-sports-mascots; American Psychological Association, *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations* (2005), <http://www.apa.org/about/policy/mascots.pdf>; ED, *School Environment Listening Sessions*, *supra* note 681, at 40.

⁶⁸⁸ First Nations Development Institute and Echo Hawk Consulting, *Reclaiming Native Truth: A Project to Dispel America’s Myths and Misconceptions, Research Findings: Compilation of All Research* (June 2018), 15, <https://www.reclaimingnativetruth.com/wp-content/uploads/2018/06/FullFindingsReport-screen.pdf>.

A lack of appropriate cultural awareness in school curriculum focusing on Native American history or culture also raises concerns.⁶⁸⁹ The White House Initiative on American Indian and Alaska Native Education found that the use of Native mascots by school institutions can perpetuate negative stereotypes, encourage bullying, and can harm students psychologically.⁶⁹⁰

The White House Initiative on American Indian and Alaska Native Education heard concerns that curricula surrounding Native American history or culture may be irrelevant or inaccurate, and may sometimes use inappropriate Native American clothing, songs, dances, customs, and arts, which can potentially have harmful effects on Native American students.⁶⁹¹ Moreover, the White House Initiative on American Indian and Alaska Native Education found that this can contribute to a negative learning environment, as Native students may be confronted with misinformation that they may feel compelled to correct, which can cause uncomfortable and difficult situations, and can possibly trigger bullying.⁶⁹²

Recent national public opinion polling also shows that lack of accurate history about Native Americans in U.S. public education may contribute to negative stereotypes across the board.⁶⁹³ This research found that “the invisibility and erasure of Native Americans in all aspects of modern U.S. society” is the most significant barrier to public sympathy for Native American rights, and representation of Native Americans in K–12 education, pop culture, news media, and politics is virtually non-existent.⁶⁹⁴ According to one researcher, this can lead to “warped perspectives” about contemporary Native American life, as evidenced by only 36 percent of people surveyed reporting that Native Americans experience significant discrimination.⁶⁹⁵ This research also found that Native Americans, on the rare occasions they are portrayed in the media, are often associated with negative outcomes (e.g., alcoholism, drug abuse, gambling, addictions, etc.) which reinforce negative stereotypes about Native Americans and may lead to diminished public support of certain rights and social justice issues for Native Americans.⁶⁹⁶

⁶⁸⁹ ED, *School Environment Listening Sessions*, *supra* note 681, at 31.

⁶⁹⁰ *Ibid.*, 39; *see also* Stephanie Ann Fryberg, *Really? You Don't Look Like an American Indian: Social Representations and Group Identities*, Ph.D. dissertation, Stanford University, 2002, http://www.indianmascots.com/ex-17---fryberg-final_disse.pdf. *See also* J.R. LaPlante, Director of Tribal Relations, Testimony, South Dakota SAC, *July 25 Briefing Transcript*, pp. 45–46 (noting that “One microaggression . . . Native American people Americans constantly deal with is buildings and monuments and geographic places in our state that are named after historical figures who committed crimes against Indians,” communicating the message that Native Americans “do not matter and therefore can be denigrated or demeaned.”).

⁶⁹¹ ED, *School Environment Listening Sessions*, *supra* note 681, at 39.

⁶⁹² *Ibid.*

⁶⁹³ Rebecca Nagle, *Research reveals media role in stereotypes about Native Americans*, Women’s Media Center (July 18, 2018), <http://www.womensmediacenter.com/news-features/research-reveals-media-role-in-stereotypes-about-native-americans#.W3KvX1LQIXQ.twitter>.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.*

Outdated and Deteriorating School Facilities, Resources, and Technology

GAO has reported on the poor conditions of some school facilities in Indian Country,⁶⁹⁷ and others as well have reported poor economic conditions and additional factors that can hinder the overall achievement of Native American students.⁶⁹⁸ The Office of Inspector General has also reported “major facility deficiencies and health and safety concerns” in schools in Indian Country, and has acknowledged that poor conditions can affect “learning, health, and staff and student morale.”⁶⁹⁹

This Commission and the Office for Civil Rights at ED have documented that high-quality school facilities matter for both student achievement and teacher retention, and that access to school resources and technology can provide students with an enhanced learning experience.⁷⁰⁰ Low-quality school facilities can have a negative impact on the health and wellbeing of students and can affect their ability to learn.⁷⁰¹ Furthermore, poor school facilities and a lack of resources can “exacerbate existing inequities in student outcomes.”⁷⁰²

Several studies have found significant links between inadequate school facilities and poor academic performance by students.⁷⁰³ These studies have determined that “the quality of physical environments—including temperature, lighting, acoustics, and age of facilities—affects dropout rates, teacher retention, test scores, and student behavior.”⁷⁰⁴ Research indicates that the difference between student achievement in poor buildings and in acceptable buildings ranges from 5 to 17

⁶⁹⁷ U.S. Government Accountability Office, *School Facilities: Physical Conditions in School Districts Receiving Impact Aid for Students Residing on Indian Lands*, Report to Senate Committee on Indian Affairs (October 2009), <http://www.gao.gov/assets/300/297503.pdf>.

⁶⁹⁸ National Caucus of Native American State Legislators, *Striving to Achieve: Helping Native American Students Succeed* (2008), 5, <http://www.ncsl.org/research/state-tribal-institute/striving-to-achieve-helping-native-american-stude.aspx>; Lisa J. Ellwood, “Native American Students Face Ongoing Crises in Education,” INDIAN COUNTRY TODAY, September 3, 2017, <https://indiancountrymedianetwork.com/education/native-education/native-american-students-face-ongoing-crises-education/>.

⁶⁹⁹ U.S. Dep’t of the Interior, Office of Inspector General, *Condition of Indian School Facilities* (September 2016), 1, 3, https://www.doiig.gov/sites/doiig.gov/files/FinalEval_BIESchoolFacilitiesB_093016.pdf.

⁷⁰⁰ Catherine E. Lhamon, U.S. Dep’t of Education, Office for Civil Rights, “Dear Colleague Letter: Resource Comparability,” Oct. 1, 2014, at 11–19, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> [hereinafter OCR, *Dear Colleague Letter: Resource Comparability*]; USCCR, *Public Education Funding Inequity*, *supra* note 617, at 47–48.

⁷⁰¹ OCR, *Dear Colleague Letter: Resource Comparability*, *supra* note 700, at 17. *See also* 21st Century School Fund, National Council on School Facilities, and The Center for Green Schools, *State of Our Schools: America’s K–12 Facilities* (2016), 6, <https://kapost-files-prod.s3.amazonaws.com/published/56f02c3d626415b792000008/2016-state-of-our-schools-report.pdf?kui=wo7vkgV0wW0LGSjxek0N5A> [hereinafter *State of Our Schools*].

⁷⁰² USCCR, *Public Education Funding Inequity*, *supra* note 617, at 48; *State of Our Schools*, *supra* note 701, at 6.

⁷⁰³ USCCR, *Public Education Funding Inequity*, *supra* note 617, at 47–48; OCR, *Dear Colleague Letter: Resource Comparability*, *supra* note 700, at 4; No Child Left Behind School Facilities and Construction Negotiated Rulemaking Committee, *Broken Promises, Broken Schools*, December 2011, at 9–11, 68–71, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-032049.pdf> [hereinafter Negotiated Rulemaking Committee, *Broken Promises, Broken Schools*].

⁷⁰⁴ Negotiated Rulemaking Committee, *Broken Promises, Broken Schools*, *supra* note 703, at 9.

percentile points.⁷⁰⁵ Another study found that improving a school’s physical condition can increase student test scores by up to 11 percent.⁷⁰⁶ Upon reviewing research on the relationship between school facility conditions and student performance, GAO summarized, “a majority of the studies indicated that better school facilities were associated with better student outcomes—such as higher scores on achievement tests or higher student attendance rates.”⁷⁰⁷

In assessing the educational infrastructure of BIE schools, the Indian Education Study Group found in 2014:

BIE currently lacks the necessary infrastructure that would undergird any serious effort to reform this set of schools. During recent tribal consultations, the Study Group repeatedly heard that issues related to the poor condition of school facilities demanded so much time and attention from principals that they were diverted from their primary mission of instructional leadership.⁷⁰⁸

At a 2015 Congressional hearing on “Challenges Facing Native American Schools,” U.S. Representative Todd Rokita made the following remarks about the state of Native American schools:

Too many schools lack adequate infrastructure and educational resources, compromising the health, safety, and future postsecondary and professional opportunities of the children they are intended to serve. And it has been this way for far too long. . . . The conditions at these schools are deplorable. Some classrooms lack desks, books, computers, pencils, and paper, while others lack proper flooring, roofing, and ventilation. Some schools are missing a working water heater. Others are missing front doors and are rodent-infested. And for many students, attending these unsafe and unhealthy schools is their only option.⁷⁰⁹

GAO found that as of 2013, one-third of BIE school facilities were in poor condition.⁷¹⁰ In comparison, only 3 percent of public schools nationwide reported that their facilities were in poor condition during the 2012–2013 school year, and the 2017 Infrastructure Report Card from the American Society of Civil Engineers reported in 2017 that 24 percent of public schools with

⁷⁰⁵ Ibid., 68–71 (controlling for student socioeconomic status when comparing students in poor or acceptable school facilities).

⁷⁰⁶ BIE Blueprint, *supra* note 568, at 21.

⁷⁰⁷ U.S. Government Accountability Office, *School Facilities: Physical Conditions in School Districts Receiving Impact Aid for Students Residing on Indian Lands*, Report to the Chairman, Committee on Indian Affairs, U.S. Senate (October 2009), 18, <http://www.gao.gov/assets/300/297503.pdf>.

⁷⁰⁸ BIE Blueprint, *supra* note 568, at 20.

⁷⁰⁹ Todd Rokita, testimony before the House Subcommittee on Early Childhood, Elementary, and Secondary Education, Apr. 22, 2015, <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg94209/html/CHRG-114hhrg94209.htm>.

⁷¹⁰ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 19. See also Negotiated Rulemaking Committee, *Broken Promises, Broken Schools*, *supra* note 703, at 9. As of 2011, an estimated \$1.3 billion was required to elevate the 63 BIE schools in poor physical condition to an acceptable level; Ibid., 6. The physical condition of a school is considered “poor” when the cost of repairs is greater than 10 percent of the replacement value of the school itself; White House, *2014 Native Youth Report*, *supra* note 564, at 17.

permanent buildings were rated as being in fair or poor condition across the U.S.⁷¹¹ DOI estimates that the backlog of unfunded repairs and renovations at BIE schools amounts to approximately \$634 million.⁷¹² The Indian Education Study Group found that DOI's funding for BIE school facilities had not kept pace with the rate of deterioration, and that the substandard building conditions "unfairly restrict[ed] learning opportunities for students."⁷¹³ The NCAI has noted that "schools operating within the BIE system are woefully outdated and, in some cases, dangerous for students and staff."⁷¹⁴

In addition to inadequate funding for construction and renovation of school facilities, BIE schools lack sufficient funding to meet basic operating expenses. The NCAI observed that in recent years, BIE schools have received only 50 percent of the funding required to cover such operating expenses as electricity, heating fuel, communications, and custodial services.⁷¹⁵ The FY 2019 President's Budget requested \$60.4 million, which is approximately \$5 million less than the FY 2018 appropriated amount of \$65.7 million.⁷¹⁶ For FY 2016, the calculated need for facilities operations was \$106 million, and the FY 2018 requested amount of \$60.2 million was estimated to meet about 56.7 percent of that need.⁷¹⁷ Advocates frequently point to the disparity in funding between Department of Defense-operated schools and BIE-operated schools:

At a 2014 Senate hearing where the Department of Defense testified, it was noted that the fiscal year budget request for replacement of Department of Defense schools was \$315 million compared to a budget request of \$2 million for BIE schools. This is despite a demonstrated need of 1.3 billion to clear the construction backlog at BIE schools.⁷¹⁸

⁷¹¹ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 19. GAO has noted "that issues with the quality of data on school conditions—such as inconsistent data entry by schools and insufficient quality controls—continue to make it difficult to determine the actual number of schools in poor condition, which impedes Indian Affairs' ability to effectively track and address school facility problems." U.S. Government Accountability Office, Testimony before the Committee on Appropriations, U.S. House of Representatives, *Indian Affairs: Preliminary Results Show Continued Challenges to the Oversight and Support of Education Facilities* (February 2015), 8, <http://www.gao.gov/assets/670/668746.pdf> [hereinafter GAO, *Challenges to the Oversight and Support of Education Facilities*]; American Society of Civil Engineers, *2017 Infrastructure Report Card*, 2017, at 1, <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Schools-Final.pdf> [hereinafter ASCE, *2017 Infrastructure Report Card*] (stating: "Among public schools with permanent buildings—99% of public schools—almost a quarter (24%) were rated as being in "fair" or "poor" condition. But 31 percent of schools have temporary buildings, either in addition to or instead of permanent buildings, and the number of these schools in "fair" or "poor" condition rises to 45 [percent].").

⁷¹² U.S. Dep't of the Interior, DOI Maintenance Backlog, Statement of U.S. Department Of The Interior before the House Natural Resources Committee on Exploring Innovative Solutions to Reduce The Department of The Interior's Maintenance Backlog, Mar. 6, 2018, <https://www.doi.gov/ocl/doi-maintenance-backlog>.

⁷¹³ BIE Blueprint, *supra* note 568, at 21.

⁷¹⁴ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 49.

⁷¹⁵ *Ibid.*, 50.

⁷¹⁶ DOI, *Budget Justifications FY 2019*, *supra* note 614, at IA-BIE-1, IA-BIE-12.

⁷¹⁷ DOI, *Budget Justifications FY 2018*, *supra* note 614, at IA-BIE-4.

⁷¹⁸ Brian Cladoosby, testimony before the House Subcommittee on Early Childhood, Elementary, and Secondary Education, Apr. 22, 2015, at 5, <https://democrats-edworkforce.house.gov/imo/media/doc/CladoosbyTestimony.pdf>.

The BIE currently funds a total of 183 schools and dormitories in 23 states in the U.S.⁷¹⁹ Fifty-three of these schools are operated by the BIE, and one hundred thirty of the schools are tribally controlled.⁷²⁰ The U.S. Department of Defense Education Activity operates one hundred sixty-six schools worldwide.⁷²¹

Chronic underfunding leads to schools' inability to fund maintenance projects.⁷²² This underfunding ultimately contributes to accelerated deterioration of buildings and systems.⁷²³ Poorer schools often wind up spending more in the long-run on upkeep and repair costs, due to decisions to either defer maintenance or opt for less expensive, temporary fixes in lieu of capital investments for system upgrades or overall modernization.⁷²⁴

In 2015, GAO noted that a number of BIE schools "reported facing a variety of facility-related challenges, including remoteness of their locations, aging buildings and infrastructure, limited funding, and problems with the quality of new construction."⁷²⁵ The Commission recognizes that all of these educational facility issues could impact student safety and learning.⁷²⁶ In a report on BIE schools, GAO identified several organizational challenges that BIA faces in effectively managing BIE school facilities:

Specifically, GAO found declines in staffing levels and gaps in technical expertise among facilities personnel in Indian Affairs. . . . BIA's facility management is also hindered by poor communication with schools and tribes and confusion about whom to contact to address facility problems. Poor communication has led to some school facility needs not being met. For example, school officials submitted a request for funding to address their school's lack of hot water almost a year before GAO visited the school, but Indian Affairs facility officials were unaware of this request until notified by GAO.⁷²⁷

See also Lauren Camera, *Bureau of Indian Education Schools: Who Is Responsible for Fixing Them?* EDUCATION WEEK, Apr. 22, 2015, http://blogs.edweek.org/edweek/campaign-k-12/2015/04/hearing_on_native_american_sch.html.

⁷¹⁹ U.S. Dep't of the Interior, Bureau of Indian Education, "Schools," <https://bie.edu/Schools/> (last accessed July 24, 2018) [hereinafter BIE, "Schools"]; DOI, *Budget Justifications FY 2019*, *supra* note 614, at IA-CON-SUM-8.

⁷²⁰ BIE, "Schools," *supra* note 719.

⁷²¹ U.S. Dep't of Defense Education Activity, "About DoDEA—DoDEA Schools Worldwide," <https://www.dodea.edu/aboutDoDEA/today.cfm> (last accessed Sept. 22, 2018)

⁷²² ASCE, *2017 Infrastructure Report Card*, *supra* note 711, at 2.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*; USCCR, *Public Education Funding Inequity*, *supra* note 617, at 48; *State of Our Schools*, *supra* note 701, at 6.

⁷²⁵ GAO, *Challenges to the Oversight and Support of Education Facilities*, *supra* note 711, at 10.

⁷²⁶ USCCR, *Public Education Funding Inequity*, *supra* note 617, at 47–48.

⁷²⁷ GAO, Testimony Before the Subcommittee on Interior, Environment, and Related Agencies; Committee on Appropriations, House of Representatives, Statement of Melissa Emrey-Arras, Director Education, Workforce and Income Security (Feb. 27, 2015), *Preliminary Results Show Continued Challenges to the Oversight and Support of Education Facilities*, *supra* note 711, at introductory summary, <https://www.gao.gov/assets/670/668746.pdf>.

GAO has also found that BIA does not provide consistent or adequate oversight of school construction projects.⁷²⁸ For example, BIA managed a \$3.5 million roof replacement project at one BIE school in 2010. Following completion of the contractor's work, the roof continued to leak, causing mold and additional damage to the building. Four years later, the problem had not been corrected. GAO then concluded that BIA does not consistently apply management practices to ensure that the work of construction contractors is satisfactory.⁷²⁹

In February 2018, President Trump announced that his administration's FY 2019 budget proposed legislation to establish a Public Lands Infrastructure Fund to improve schools in Indian Country.⁷³⁰ This proposed fund would provide up to \$18 billion for maintenance and improvement of BIE funded schools, national wildlife refuges, and national parks, and would draw on revenue from federal energy leasing and development. It was not clear from the announcement how much of the fund would be devoted to school maintenance and improvements.⁷³¹ The Office of the Secretary of BIA estimated in 2018 that the deferred maintenance backlog for BIE schools was \$634 million.⁷³²

Broadband and Information Technology

The majority of BIE schools have only a low level of internet connectivity, T1, which, according to the Indian Education Study Group, is “woefully inadequate to meet the demands of twenty-first century teaching and learning.”⁷³³ In addition, many BIE schools lack state-of-the-art computers and operating systems.⁷³⁴ Access to computers and high-speed internet service is essential in today's classroom for the delivery of digital textbooks and other educational tools, as well as for the administration of online national assessments.⁷³⁵ Digital textbooks and other interactive educational tools allow for instruction that is customized to each student's level of learning.⁷³⁶

⁷²⁸ Ibid., 19.

⁷²⁹ Ibid.

⁷³⁰ U.S. Dep't of the Interior, Office of the Assistant Secretary of Indian Affairs, *President's proposed \$2.4 Billion FY19 Indian Affairs Budget includes legislation to establish infrastructure fund to improve schools*, Feb. 12, 2018, at 1, https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/2018.02.12%20President%E2%80%99s%20proposed%20%24.4%20Billion%20FY19%20Indian%20Affairs%20Budget%20includes%20legislation%20to%20establish%20infrastructure%20fund%20to%20improve%20schools.pdf [hereinafter Office of the Assistant Secretary of Indian Affairs, *\$2.4 Billion FY 19 Indian Affairs Budget*].

⁷³¹ Ibid.

⁷³² Ibid., 2.

⁷³³ BIE Blueprint, *supra* note 568, at 22. See also OCR, *Dear Colleague Letter: Resource Comparability*, *supra* note 700, at 18–19.

⁷³⁴ BIE Blueprint, *supra* note 568, at 22. The BIE Study Group noted that the information technology infrastructure (e.g., wiring, routers, etc.) at many BIE schools was insufficient to support well-functioning networks. BIE educators were also in need of training in the use of new technologies and online educational tools.

⁷³⁵ Ibid.

⁷³⁶ White House, *What is ConnectED?* June 6, 2013, <https://www.whitehouse.gov/blog/2013/06/06/what-connected> (last accessed July 24, 2018).

They also provide instant feedback to teachers regarding student progress and the effectiveness of lessons and activities.⁷³⁷ High-speed internet access is especially important at BIE schools, which tend to be located in remote areas on or near reservations.⁷³⁸ The use of online educational tools in these rural settings gives Native students access to teachers and resources that would otherwise be unavailable.

The federal government has several programs that can be utilized by tribal schools to increase their level of internet connectivity. For example, President Barack Obama launched the ConnectED initiative in 2013 with the goal of providing high-speed internet access to 99 percent of the nation's students by the year 2018.⁷³⁹ As of June 2015, the White House reported that ConnectED successfully cut the "connectivity divide" in half by increasing the percentage of school districts with high-speed broadband in their classrooms from 30 percent to 77 percent—which was on track to meet its goal of connecting 99 percent of students by 2018.⁷⁴⁰ Also, over 5 million students gained access to hardware, software and digital content through commitments from the private sector.⁷⁴¹ In addition, the FCC's Universal Service Program for Schools and Libraries (E-rate) program provides discounts of up to 90 percent to schools and libraries in low-income areas for the purpose of acquiring affordable internet and telecommunications services.⁷⁴²

In recent years, DOI has also engaged with the private sector to upgrade internet connectivity at 45 BIE schools and at dormitories serving Native American students.⁷⁴³ BIE schools received \$4.3 million in E-rate program discounts during the 2014–2015 school year, which allowed for internet service upgrades at 35 additional BIE schools.⁷⁴⁴ For its part, DOI provides technical assistance to BIE schools in order to improve the competitiveness of their applications for E-rate program discounts.⁷⁴⁵

⁷³⁷ Ibid.

⁷³⁸ BIE Blueprint, *supra* note 568, at 22.

⁷³⁹ The White House, Office of the Press Secretary, *President Obama Unveils ConnectED Initiative to Bring America's Students into Digital Age*, June 6, 2013, <https://www.whitehouse.gov/the-press-office/2013/06/06/president-obama-unveils-connected-initiative-bring-america-s-students-di>.

⁷⁴⁰ The White House, Office of the Press Secretary, *ConnectED: Realizing the Promise of Digital Learning*, Dec. 15, 2016, https://obamawhitehouse.archives.gov/sites/default/files/docs/fact-sheet_connected_realizing-the-promise-of-digital-learning.pdf [hereinafter *The White House, ConnectED*]. USCCR was unable to find any updates regarding the status of the E-rate program since 2016. See Federal Communications Commission, "Universal Service Program for Schools and Libraries (E-Rate)," <https://www.fcc.gov/consumers/guides/universal-service-program-schools-and-libraries-e-rate> (last accessed Sept. 21, 2018) (explaining that E-rate is a program administered by the Federal Communications Commission to improve the affordability of telecommunications in schools and libraries).

⁷⁴¹ The White House, *ConnectED*, *supra* note 740.

⁷⁴² Federal Communications Commission, "Universal Service Program for Schools and Libraries (E-Rate)," <https://www.fcc.gov/consumers/guides/universal-service-program-schools-and-libraries-e-rate> (last accessed July 24, 2018). USCCR was unable to find any updates regarding the status of the E-rate program since 2016.

⁷⁴³ White House, *2014 Native Youth Report*, *supra* note 564, at 34.

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.

The fate of these initiatives is unclear under the current Administration. Concerning the E-rate program, it appears that the administration has taken no position, but some educators fear that the FCC may roll back the program.⁷⁴⁶ On January 18, 2017, the FCC released its progress report that provided documentation of the successes of the E-Rate program, but the FCC rescinded the report shortly thereafter.⁷⁴⁷

Also in 2017, the Consortium of School Networks found that while progress has been made, there were still challenges to meeting broadband goals for Native students—especially in rural areas—such as a lack of competitive pricing due to fewer providers, and lesser access to consortium buying for E-rate services in comparison to urban areas.⁷⁴⁸

Teacher Recruitment and Development

Research indicates that the quality of teachers is one of the most important factors affecting student learning in school.⁷⁴⁹ One seminal study revealed that when “two average 8-year old students were given different teachers—one of them a high performer, the other a low performer—their performance deviated by more than 50 percentile points within 3 years.”⁷⁵⁰ A 2014 White House report found that BIE schools face numerous obstacles in recruiting and retaining effective teachers, including “uncompetitive salaries, isolated rural settings, tough working conditions, few amenities, lack of job opportunities for spouses, and marginal housing.”⁷⁵¹ Several BIE officials

⁷⁴⁶ Laura Fay, *First, the FCC Targeted ‘Net Neutrality.’ Could the E-rate Program, and Subsidized School Internet, Be Next?*, THE 74, Nov. 27, 2017, <https://www.the74million.org/first-the-fcc-targeted-net-neutrality-could-the-e-rate-program-and-subsidized-school-internet-be-next/>.

⁷⁴⁷ Benjamin Herold, *Under New Leadership, FCC Quashes Report on E-rate Program’s Success*, EDUCATION WEEK, Feb. 8, 2017, http://blogs.edweek.org/edweek/DigitalEducation/2017/02/fcc_quashes_erate_report.html. See also Federal Communications Commission, *E-rate Modernization: Progress and the Road Ahead*, Jan. 18, 2017, http://blogs.edweek.org/edweek/DigitalEducation/FCC_Jan27ErateReport_DOC-343099A1.pdf. The January 18th report detailed some of the E-rate program’s successes: In 2016, 77 percent of school districts, representing 68 percent of schools and 67 percent of students, met short-term connectivity targets, as compared to only 30 percent of districts in 2013. The cost per Mbps was reduced from \$22 to \$7.05 from 2013–2016. Also, due to stable funding commitments, the program paid out less than the capped amount of \$3.9 billion in 2015 and 2016.

⁷⁴⁸ Consortium for School Networking, *CoSN’s 2017 Annual Infrastructure Survey Report* (2017), 12–13, https://cosn.org/sites/default/files/CoSN_5th_Annual_Infrastructure_Survey_0.pdf.

⁷⁴⁹ See RAND Education, “Teachers Matter: Understanding Teachers’ Impact on Student Achievement,” <http://www.rand.org/education/projects/measuring-teacher-effectiveness/teachers-matter.html> (last accessed July 24, 2018). For example, RAND Education found that, “when it comes to student performance on reading and math tests, a teacher is estimated to have two to three times the impact of any other school factor, including services, facilities, and even leadership.” See also USCCR, *Public Education Funding Inequity*, *supra* note 617, at 69–70.

⁷⁵⁰ BIE Blueprint, *supra* note 568, at 13 (citing William L. Sanders and June C. Rivers, *Cumulative and Residual Effects of Teachers on Future Academic Achievement*, Research Progress Report, University of Tennessee, November 1996, <https://www.beteronderwijsnederland.nl/files/cumulative%20and%20residual%20effects%20of%20teachers.pdf>).

⁷⁵¹ White House, *2014 Native Youth Report*, *supra* note 564, at 20 (citing U.S. Dep’t of Education, Tribal Leaders Speak: The State of American Indian Education, Report of the Consultations with Tribal Leaders in Indian Country (2010), 27–31, <http://sites.ed.gov/whiaiane/files/2012/04/Tribal-Leaders-Speak-2010.pdf>). See also MADELEINE CUMMINGS, *How to Attract Teachers to Poor, Rural Schools*, SLATE, Mar. 13, 2015,

as well as ED have identified the shortage of adequate housing for teachers on reservations as the most significant challenge in recruiting teachers to BIE schools.⁷⁵² BIE officials have also expressed concerns that BIA, which manages the hiring process for BIE schools, lacks the expertise to make informed hiring decisions for special education teachers, and that the hiring process for BIE faculty is often not completed prior to the start of the school year.⁷⁵³

Furthermore, community advocates have identified the need for culturally competent teachers in Indian Country, due to the unique connection that Native teachers can have with Native students. They note that Native Americans comprise only 1 percent of students in the U.S., and that fewer than one-half percent of Native Americans are school teachers.⁷⁵⁴ While teacher shortages continue to be a challenge for rural and Indian Country schools, steps have been taken attempting to address these shortages. For example, Senator Jon Tester, member and former vice chair of the Indian Affairs Committee, has proposed two pieces of legislation—the Rural Educator Support and Training Act (REST Act, 115th Cong., S. 457) and the Native Education Support and Training Act (NEST Act, 115th Cong., S. 458)—to address some of the challenges that face rural and Indian Country schools by providing financial and instructional support for teachers who are currently serving or will serve in rural and Indian Country districts.⁷⁵⁵

Data shows that the student-to-teacher ratio at BIE schools is slightly better than that of public schools nationwide. In 2010, the student-teacher ratio at BIE schools was 11.4 students per teacher as compared to 15.5 students per teacher at public schools.⁷⁵⁶ While teacher salaries are generally

http://www.slate.com/blogs/schooled/2015/03/13/teacher_recruitment_poor_rural_schools_need_better_marketing.html.

⁷⁵² BIE Blueprint, *supra* note 568, at 13; *see also* U.S. Dep’t of Education, Office of Postsecondary Education, *Teacher Shortage Areas Nationwide Listing 1990–1991 through 2017–2018*, May 2017, <https://www2.ed.gov/about/offices/list/ope/pol/ateachershortageareasreport2017-18.pdf>.

⁷⁵³ U.S. Department of the Interior, Bureau of Indian Affairs, *Final Report: Examination, Evaluation, and Recommendations for Support Functions* (March 2012), 89, <http://fiseheadquarters.org/wp-content/uploads/2017/08/bronnerreport.pdf>.

⁷⁵⁴ National Indian Education Association, *Support for the Establishment of a Native American Teacher Campaign*, NIEA Resolution 2016–09, Sept. 13, 2016, <http://www.niea.org/wp-content/uploads/2017/11/Recruiting-and-Retaining-Teachers-of-Native-Students/2016-09.pdf>; Richard M. Ingersoll and Henry May, *Minority Teacher Recruitment, Employment, and Retention: 1987 to 2013*, Learning Policy Institute, September 2016, at 3, https://learningpolicyinstitute.org/sites/default/files/product-files/Minority_Teacher_Recruitment_Employment_Retention%20_BRIEF.pdf; Miriam Hall, *Where Do You Grow Great Teachers?*, SLATE, Jun. 7, 2016, http://www.slate.com/articles/life/tomorrows_test/2016/06/the_blackfeet_tribe_needs_more_teachers_so_it_s_letting_them_train_without.html; Madeleine Cummings, *Do American Indian Students Perform Better When They Have American Indian Teachers?*, SLATE, Aug. 19, 2015, http://www.slate.com/blogs/schooled/2015/08/19/hays_lodge_pole_school_district_an_indian_reservation_schools_are_finding.html.

⁷⁵⁵ National School Boards Association, “School boards applaud bills to address teacher shortages in rural and Native American community schools,” Feb. 28, 2017, <https://www.nsba.org/newsroom/school-boards-applaud-bills-address-teacher-shortages-in-rural-and-native-american>.

⁷⁵⁶ U.S. Dep’t of Education, National Center for Education Statistics, *Documentation to the NCES Common Core of Data Public Elementary/Secondary School Universe Survey: School Year 2009–10*, Version Provisional 2a (August 2012), B20–B21, <https://nces.ed.gov/ccd/pdf/INsc90102a.pdf>.

higher at BIE-operated schools than at public schools nationwide, teacher salaries at tribally-operated BIE schools are generally lower than at public schools nationwide.⁷⁵⁷ The above average compensation for teachers at BIE-operated schools is due to a federal law that requires BIE to compensate its teachers at the same rate of pay as teachers at overseas Department of Defense schools.⁷⁵⁸ Tribally-operated BIE schools are under no such obligation—and have below average teacher compensation.⁷⁵⁹ Finally, although teachers at BIE schools generally have the same level of experience as their public school counterparts, they are less likely to have obtained a master’s degree.⁷⁶⁰

In order to support the recruitment and retention of highly qualified teachers, the Indian Education Study Group highlighted the importance of providing BIE with funding sufficient to develop an appropriate salary and benefit structure for its teaching staff.⁷⁶¹ In addition, the Study Group recommended that tribal schools be given greater flexibility to direct federal education funds to teachers for housing development, student loan forgiveness, educational benefits, and other teacher recruitment incentives.⁷⁶² Furthermore, in light of the challenges that BIE schools face in recruiting teachers to remote reservation locations, professional development programs to enhance the skills of current teachers are critical. The Study Group also emphasized the importance of “developing the skills of current instructional staff by providing them with robust, sustained professional development, including incentives for teachers to enroll in the National Board Certification program.”⁷⁶³ Toward this end, the BIE Study Group noted the importance of providing BIE with the “budgetary capacity” to promote professional development of faculty.⁷⁶⁴

⁷⁵⁷ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 16–17. GAO found that the average annual base salary in 2011 for a teacher with “a bachelor’s degree and no experience” at BIE-operated schools was \$39,775, compared to \$35,500 at public schools.

⁷⁵⁸ 25 U.S.C. § 2012(g)(1)(B); *see also* GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 17.

⁷⁵⁹ GAO, *Bureau of Indian Education Needs to Improve Oversight of School Spending*, *supra* note 618, at 17 (citing U.S. Dep’t of Education, National Center for Education Statistics, Institute of Education Sciences, *Characteristics of Public, Private, and Bureau of Indian Education Elementary and Secondary School Teachers in the United States*, June 2009, which found that during the 2007–08 school year, the average base salary for teachers at all BIE schools (both tribally-operated and BIE-operated) was \$41,500—in comparison to an average base salary of \$49,600 for teachers at public schools nationwide and \$44,000 for teachers at rural public schools).

⁷⁶⁰ U.S. Dep’t of Education, National Center for Education Statistics, Institute of Education Sciences, *Characteristics of Public, Private, and Bureau of Indian Education Elementary and Secondary School Teachers in the United States* (June 2009), 11, 13, <http://nces.ed.gov/pubs2009/2009324.pdf>.

⁷⁶¹ BIE Blueprint, *supra* note 568, at 15.

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*, 13.

⁷⁶⁴ *Ibid.*, 14. An essential component of teacher professional development is the use of performance-based evaluations to identify skill deficits among teaching staff. The BIE has piloted a performance-based evaluation system at several BIE schools with the intent of expanding the program to additional schools.

Teaching of Native Languages and Cultures

According to the National Indian Education Association (NIEA), the inclusion of the “unique cultural and linguistic traditions” of Native American communities in tribal education curricula is critical for the success of Native students.⁷⁶⁵ Research supports the view that Native American language immersion programs are effective in increasing the academic achievement of participating Native students.⁷⁶⁶ Nonetheless, tribal educators have complained that restrictive BIE policies often prevent schools from developing culturally and linguistically relevant educational programs.⁷⁶⁷

In recent years, the federal government has begun to recognize the importance of preserving Native American languages. In 2012, ED, BIE, and HHS signed a Memorandum of Agreement to collaborate on programming, resource development, and policy initiatives across the government for the purpose of preserving and revitalizing Native American languages.⁷⁶⁸ As part of this initiative, BIE has developed the “Native Language Policy Framework” to promote the teaching of Native American languages at BIE schools.⁷⁶⁹ Also, as mentioned earlier, ESSA provides grant funding to support schools that use a Native language as the primary language of instruction.⁷⁷⁰ The goal of such federal initiatives is to promote maintaining and revitalizing Native American languages, while simultaneously improving educational outcomes for Native youth. Similarly, the Native Hawaiian Educational Act promotes and prioritizes funding education in the Native Hawaiian Language, which the U.S. government had historically prohibited in public schools.⁷⁷¹

Moreover, Executive Order 13166, signed on August 11, 2000, requires federally funded services to provide language assistance to people who have limited-English proficiency, as mandated by

⁷⁶⁵ Melvin Monette, testimony before the Senate Committee on Indian Affairs, May 21, 2014, at 45, <http://www.indian.senate.gov/sites/default/files/upload/files/CHRG-113MAY%2021,%202014%20.pdf>.

⁷⁶⁶ NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 55. *See also* U.S. Census Bureau News, *American Indian and Alaska Native Heritage Month: November 2012*, Oct. 25, 2012, at 4, http://www.census.gov/newsroom/releases/pdf/cb12ff-22_ainan.pdf (as of 2011, 27 percent of Native American youth over the age of five spoke a language other than English at home, compared with 20.8 percent for the nation as a whole).

⁷⁶⁷ BIE Blueprint, *supra* note 568, at 8.

⁷⁶⁸ The White House, Office of the Press Secretary, *Fact Sheet: White House Tribal Youth Gathering*, July 8, 2015, <https://www.whitehouse.gov/the-press-office/2015/07/09/fact-sheet-white-house-tribal-youth-gathering>. *See also* NCAI, *Fiscal Year 2016 Budget Request*, *supra* note 112, at 50 (The United Nations Economic Scientific and Cultural Organization reported that “74 Native languages stand to disappear in the next decade, with only 20 Native languages being spoken by 2050.”).

⁷⁶⁹ Bureau of Indian Education, *Native American Languages Policy Framework*, webinar, Mar. 12, 2015, slide 6, <http://www.bie.edu/cs/groups/webteam/documents/document/idc1-029603.pdf>.

⁷⁷⁰ 20 U.S.C. §§ 74227425(b)(1). For a discussion of other provisions of the ESSA, *see supra* note 578 (discussing how Title VI funds can be used for Native language immersion programs in public schools). *See also* Jen Fifield, *As School Starts, More States Focus on Native American Students*, The Pew Charitable Trusts, STATELINE, September 8, 2016, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/08/as-school-starts-more-states-focus-on-native-american-students>.

⁷⁷¹ 20 U.S.C. § 7515(a)(1)(C)-(b)(2)(D), § 7511.

Title VI of the Civil Rights Act (prohibiting discrimination based on national origin).⁷⁷² Therefore, recipients of federal funds are “required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.”⁷⁷³ In the education context, information and services must be provided to students and parents. Additionally, federal law requires that English Language Learners (ELL) who are students be provided with in-language education in all subjects that are offered in English, as well as the means to become proficient in English. ELL programs were also specifically funded under the ESSA,⁷⁷⁴ and in 2016, ED provided \$3 million in grants for Native American ELL students.⁷⁷⁵ Some researchers have found that these programs are currently insufficient for Native Americans, who are frequently not considered to have language barriers when in fact research shows they do.⁷⁷⁶ Another factor is that many educators are much less familiar with Native languages, as compared to languages spoken by recent immigrants.⁷⁷⁷

Data Issues

It is important to note that there is a lack of detailed demographic data on Native American students.⁷⁷⁸ Considering the incomplete data, the disparities discussed above might be even worse than reported. For example, NCAI has raised concerns that the data collection masks information because under relatively new guidelines, ED only reports data on American Indian and Alaska Native students who indicate they are not Hispanic or Latino (which is a separate category termed ethnicity), so consequently American Indian and Alaska Native students who indicate that they are also Hispanic/Latino will be reported in the Hispanic/Latino category only.⁷⁷⁹ Similarly, NCAI has indicated that Native students will be reported as “multiracial” (rather than Native American and another race) if they select any additional racial category.⁷⁸⁰ Furthermore, Native American communities include a large number of individuals who identify as mixed heritage, evidenced by

⁷⁷² See 65 FED. REG. 50,121, Exec. Order No. 13166 (Aug. 11, 2000), <https://www.gpo.gov/fdsys/pkg/FR-2000-08-16/pdf/00-20938.pdf>.

⁷⁷³ See Dep’t of Justice, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affected Limited English Proficient Persons*, 67 FED. REG. 41,455-01, <https://www.gpo.gov/fdsys/pkg/FR-2002-06-18/pdf/02-15207.pdf>.

⁷⁷⁴ Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat 1802 (Dec. 10, 2015) (codified at U.S.C. §§ 3001–3004). See also Scott Sargrad, *Hope for English-Language Learners*, U.S. NEWS & WORLD REPORT, Jan. 13, 2016, <https://www.usnews.com/opinion/knowledge-bank/articles/2016-01-13/every-student-succeeds-act-brings-new-hope-for-english-language-learners>.

⁷⁷⁵ See, e.g., Corey Mitchell, *Native American English-Learners Target of \$3 Million in Federal Grants*, EDUCATION WEEK, Sept. 20, 2016, http://blogs.edweek.org/edweek/learning-the-language/2016/09/Native_American_English_Learners_Federal_Grants.html.

⁷⁷⁶ See, e.g., Jioanna Carjuzaa and William G. Ruff, *American Indian English Language Learners: Misunderstood and under-served*, *Cogent Education*, Vol. 3, Issue 1 (2016) at 2, <https://www.tandfonline.com/doi/full/10.1080/2331186X.2016.1229897>.

⁷⁷⁷ *Ibid.*, 3.

⁷⁷⁸ ED, *School Environment Listening Sessions*, *supra* note 681, at 16.

⁷⁷⁹ National Congress of American Indians, “Data Disaggregation: The Asterisk Nation,” <http://www.ncai.org/policy-research-center/research-data/data> (last accessed July 24, 2018).

⁷⁸⁰ *Ibid.*

approximately 40 percent of individuals who identified themselves as fully or partially Native American also saying that they are of mixed race/ethnicity.⁷⁸¹ And due to new ED guidelines,⁷⁸² it is estimated that ED reported 31,000 fewer American Indian and Alaska Native students in 2010–2011 than in 2009–2010.⁷⁸³ This is despite the fact that the total Native American population grew at twice the rate of the total U.S. population during that period.⁷⁸⁴ In some states, this change in the guidelines may have led to the underreporting of American Indian and Alaska Native students by 30 percent.⁷⁸⁵

⁷⁸¹ William G. Demmert, David Grissmer, and John Towner, *A Review and Analysis of the Research on Native American Students*, *Journal of American Indian Education*, Vol. 45, No. 3 (2006) at 5–6, https://jaie.asu.edu/sites/default/files/453_2006_2_demmert_et_al.pdf.

⁷⁸² U.S. Dep't of Education, *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education*, 72 FED. REG. 59,266 (October 19, 2007).

⁷⁸³ U.S. Dep't of Education, *School Environment Listening Sessions*, *supra* note 681, at 16; U.S. Dep't of Education, National Center for Education Statistics, *State Enrollments by Race/Ethnicity 2009–10 and 2010–11*, compiled from the Elementary/Secondary Information System, <http://nces.ed.gov/ccd/elsi/.expressTables.aspx>.

⁷⁸⁴ U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (January 2012), 4, <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

⁷⁸⁵ U.S. Dep't of Education, *School Environment Listening Sessions*, *supra* note 681, at 16.

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CHAPTER 4: HOUSING

The Federal Trust Obligations Regarding Housing

As a part of its trust responsibilities, Congress has promised that the federal government will provide resources in order to improve housing opportunities for Native Americans.⁷⁸⁶ According to the Office of Policy Development and Research of the U.S. Department of Housing and Urban Development (HUD):

Under the Dawes Act of 1887, 90 million acres of tribal land was lost through sales to non-Indians, resulting in four types of land ownership in Indian Country (tribal trust land, individual trust land, fee simple land owned by Indians, and fee simple land owned by non-Indians) that continue to complicate development because of the different rules governing the use of each land type. In 1934, Congress passed the Indian Reorganization Act (IRA), which halted the sale of Indian land and allowed tribes that created constitutions based on federal regulations to take on some self-governance.⁷⁸⁷

Then in the 1950s, Congress unilaterally began severing federal-tribal relationships and ending self-governance.⁷⁸⁸ Through termination, Congress dissolved the reservations of five large tribes and terminated all tribes in four states, taking even more land and severing treaty relationships along with any related obligations to provide funding and services.⁷⁸⁹ The Civil Rights era ushered in activism that resulted in reclaiming tribal lands and revitalizing self-determination.⁷⁹⁰ For example, in 1975, Congress passed the Indian Self-Determination and Education Assistance Act

⁷⁸⁶ See 25 U.S.C. § 4101(5) (acknowledging, *inter alia*, that “providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status[.]”); see also Janeen Comenote, *No Home in Indian Country*, Poverty and Race Research Action Council, POVERTY AND RACE, Nov/Dec 2009, at 1, http://kirwaninstitute.osu.edu/FairHousing_FairCredit/janeen_comenote_no_home_indian_country_merge.pdf. See e.g., Treaty with the Miami, art. 2, 7 stat. 309 (May 7, 1828) (“[t]hat the United States shall . . . build twelve log houses,”); Treaty with the Delawares, 7 Stat. 327 (Sept. 24, 1829) (“[T]he United States hereby agrees . . . to assist the nation in removing their heavy articles; and to supply them with all necessary farming utensils and tools necessary for building houses”); Treaty with the Sacs and Foxes of Missouri, art. 2, 10 Stat. 1074 (May 18, 1854) (“In consideration of the cession and relinquishment made in the preceding article, the United States agrees to pay [annuities] to the Sacs and Foxes of Missouri . . . for building houses.”).

⁷⁸⁷ U.S. Dep’t of Housing and Urban Development, Office of Policy Development and Research, *Obstacles, Solutions, and Self-Determination in Indian Policy*, EVIDENCE MATTERS (Spring 2015), <https://www.huduser.gov/portal/periodicals/em/spring15/highlight1.html> [hereinafter HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*].

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Ibid.*; see also H. CON. RES. 108, 83rd Congress, 67 Stat. B132, Aug. 1, 1953, https://web.archive.org/web/20070608052514/http://www.digitalhistory.uh.edu/native_voices/voices_display.cfm?id=96.

⁷⁹⁰ See, e.g., Samuel R. Cook, *What is Indian Self-Determination?*, *RED INK*, Vol. 3, No. 1 (1994), <http://faculty.smu.edu/twalker/samrcook.htm>.

(Self-Determination Act).⁷⁹¹ Among other measures, the Act allowed tribes to administer the Housing Improvement Program funded by BIA.⁷⁹² The BIA and federally recognized tribes now jointly administer the Housing Improvement Program.⁷⁹³

The Native American Housing Crisis

There is a pervasive housing crisis in Indian Country, which is reflected in substandard housing conditions as well as a shortage of affordable housing.⁷⁹⁴ As HUD explained in 2017, “the lack of housing and infrastructure in Indian Country is severe and widespread, and far exceeds the funding currently provided to tribes.”⁷⁹⁵ As of 2010, HUD determined that approximately 543,000 Native American households experienced “severe housing needs,” defined as “living in conditions that are overcrowded, substandard, or cost-burdensome.”⁷⁹⁶ Eight percent (or 65,000) of Native households are considered overcrowded, compared to 3 percent for the nation as a whole.⁷⁹⁷ HUD research also shows that such overcrowding has a negative effect on family health and contributes to the ongoing problems of domestic violence and poor school performance in Indian Country.⁷⁹⁸ With regard to housing quality, the number of Native American households with incomplete plumbing facilities is ten times greater than the national average; and the number with incomplete kitchen facilities is seven times greater than the national rate.⁷⁹⁹ In addition, the Native American

⁷⁹¹ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638 (Jan. 4, 1975), 88 Stat. 2203, now codified at 25 U.S.C. § 5301 *et seq.* See also HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787.

⁷⁹² HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787.

⁷⁹³ U.S. Dep’t of the Interior, Indian Affairs, Bureau of Indian Affairs, “Housing Improvement Program,” <https://www.bia.gov/bia/ois/dhs/housing-improvement-program> (last accessed Sept. 22, 2018).

⁷⁹⁴ HUD, *Housing Conditions of American Indians and Alaska Natives*, *supra* note 52, at xv.

⁷⁹⁵ U.S. Dep’t of Housing and Urban Development, *Fiscal Year 2017 Congressional Justifications*, 11–12, https://www.hud.gov/sites/documents/FY_2017_CJS_COMBINED.PDF [hereinafter HUD, *FY 2017 Congressional Justifications*]. See also HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787. Exacerbating the problem of insufficient federal funding for tribal housing development is the fact that “many tribal communities lack a developed housing and lending market” and thus are “almost completely dependent on federal funding to address housing need.” *Ibid.*

⁷⁹⁶ Shaun Donovan, Secretary, U.S. Dep’t of Housing and Urban Development, testimony before the Senate Committee on Banking, Housing, and Urban Affairs and Committee on Indian Affairs, Aug. 25, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg62798/html/CHRG-111shrg62798.htm>.

⁷⁹⁷ HUD, *Housing Conditions*, at xv. An overcrowded household is considered one that contains more than one person per room.

⁷⁹⁸ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11–4.

⁷⁹⁹ Housing Assistance Council, *Housing on Native American Lands*, Rural Research Report (September 2013), 7, http://www.ruralhome.org/storage/documents/rpts_pubs/ts10_native_land.pdf. (also noting that as of 2010, “5.3 percent of homes on Native American lands lack complete plumbing and 4.8 percent lack complete kitchens. The comparable nationwide figures are 0.5 and 0.7 percent respectively.”)

Indian Housing Council estimated in 2013 that 70 percent of the homes in Indian Country were “in need of upgrades and repairs, many of them extensive.”⁸⁰⁰

The lack of *affordable* housing is also a problem in Indian Country, with 37.5 percent of Native households spending more than 30 percent of income on housing expenses—an amount considered to be a cost burden.⁸⁰¹ Finally, the lack of affordable housing in Indian Country also manifests itself in homelessness that often produces overcrowding at rates far higher than the national average, with 15.9 percent of households experiencing overcrowding as compared to 2.2 percent of all U.S. households.⁸⁰² Furthermore, housing conditions at the poorest reservations are substandard:

On the Pine Ridge Reservation in South Dakota, in one of the poorest counties in the United States, many residents live in dilapidated mobile homes, homes without adequate insulation, homes with black mold, or even in tents and old cars[,] because their actual homes are overcrowded.⁸⁰³

Another account of substandard housing conditions was noted by Robert Ecoffey, Police Chief of the Oglala Sioux Tribe, during testimony to the Commission’s South Dakota State Advisory Committee:

[W]hen I took the job here a few months ago, I drove through a lot of our communities and [saw] our housing situations, our houses boarded up, our streets in disrepair within our housing areas, and the high rate of suicide, sense of hopelessness in many of our communities.⁸⁰⁴

Since 2003, when the U.S. Commission on Civil Rights first reported on the housing crisis in Indian Country, the situation has deteriorated further. According to HUD, between 2003 and 2015, “the number of overcrowded households, or households without adequate kitchens or plumbing, grew by 21 percent, from 91,032 households to 109,811 households; and the number of families with severe housing costs grew by 55 percent, from 42,401 families, to 65,667 families.”⁸⁰⁵ Given that the strength and stability of Native families and communities is dependent upon the

⁸⁰⁰ Cheryl A. Causley, testimony before the Senate Committee on Indian Affairs, April 10, 2013, <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg80495/html/CHRG-113shrg80495.htm>.

⁸⁰¹ HUD, *Housing Needs*, *supra* note 52, at 67.

⁸⁰² *Ibid.*

⁸⁰³ HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787, at 1 (citing Dana Tell and Axton E. Betz, *Housing Issues and Solutions for the Residents on the Pine Ridge Reservation, South Dakota*, J. CONSUMER EDUC., Vol. 29, at 71 (2012)).

⁸⁰⁴ Robert Ecoffey, Chief of Police for the Oglala Sioux Tribe, Testimony, Briefing before the South Dakota Advisory Committee, U.S. Comm’n on Civil Rights, Briefing Meeting, July 24, 2018, p. 142 [hereinafter South Dakota SAC, *July 24 Briefing Transcript*].

⁸⁰⁵ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11–13.

availability of “decent, safe, affordable housing,” resolution of the tribal housing crisis is critically and immediately important.⁸⁰⁶

Lack of Housing Infrastructure

The location of tribal lands and underdeveloped infrastructure also serve as impediments to improving housing conditions in Indian Country.⁸⁰⁷ Some Native Americans were forcibly removed from their lands, and after long, treacherous marches including the infamous “Trail of Tears” following former President Andrew Jackson’s Indian Removal Act of 1830, those who survived were made to live on reservations in locations chosen by the federal government.⁸⁰⁸

The location of many tribal communities increases both the material and labor costs of home construction. For example, often, building materials must be brought into tribal communities from miles away over substandard roads or even by air, and the availability of “qualified and affordable contractors” may be limited.⁸⁰⁹ According to the GAO, in 2014, the “location of tribal lands and lack of infrastructure such as running water and sewer systems” leads to higher housing development costs for many Native American communities.⁸¹⁰ Since tribal communities often lack the necessary infrastructure for housing development, tribes must first build roads, basic utilities, and sanitation systems before home construction can begin.⁸¹¹ In sum, the location of tribal communities and lack of infrastructure continue to impose additional housing development costs upon communities already confronting enormous economic challenges.

Native American Housing Assistance and Self Determination Act of 1996 and the Indian Housing Block Grant Program

The Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA) further changed the way in which HUD and other federal government auspices facilitated housing

⁸⁰⁶ *Ibid.*, 11–15.

⁸⁰⁷ *See also, infra*, Chapter 5. Chapter 5 of this report discusses trust lands and infrastructure concerns in Indian Country in the context of economic development.

⁸⁰⁸ *See, e.g.*, Trail of Tears, History.com, <https://www.history.com/topics/native-american-history/trail-of-tears> (last accessed Sept. 24, 2018) (documenting that Native American tribes were “removed” primarily from southeastern states and forced to exchange their fertile tribal territories for government-designated locations west of the Mississippi River. Resistant tribes, most notably the Cherokee, strategized and brought legal actions to retain their ancestral lands, but ultimately were forced at gunpoint by U.S. soldiers to walk over a thousand miles away to an unfamiliar, undesirable location. Many died during that brutal journey.). The Indian Removal Act was debated as S. 102 in the 21st Congress and was signed and enacted on May 28, 1930. *See generally* LIBRARY OF CONGRESS, Web Guides, Primary Documents in American History, Indian Removal Act, at <https://www.loc.gov/rr/program/bib/ourdocs/indian.html#American> (last accessed Sept. 7, 2018); *see also*, USCCR, *A Quiet Crisis*, *supra* note 3, at 2–3.

⁸⁰⁹ *Ibid.*, 10–12.

⁸¹⁰ GAO, *Additional Actions Needed*, *supra* note 52, at introductory summary.

⁸¹¹ *Ibid.*, 12–13.

development and assistance in Indian Country.⁸¹² NAHASDA eliminated several separate housing assistance programs that served Native Americans and replaced them with a single grant program—the Indian Housing Block Grant (Block Grant).⁸¹³ NAHASDA also authorized the Title VI Loan Guarantee program, which provides federal guarantees for private market financing of housing development in Indian Country.⁸¹⁴ In addition to simplifying the process of supporting tribal housing development, NAHASDA was instrumental in furthering tribal self-determination.⁸¹⁵ NAHASDA provides direct funding to tribes or their tribally designated housing entities (TDHEs), and allows tribal communities to develop their own housing programs based on local conditions and priorities.⁸¹⁶ Under NAHASDA, tribes have the authority to determine “whom they serve (e.g., giving preference to members of the participating tribe); the types of eligible activities they offer; and the method of delivering their programs and projects.”⁸¹⁷ In furtherance of tribal self-determination, NAHASDA also requires HUD officials to consult with tribes on matters of housing regulation through a process of negotiated rulemaking.⁸¹⁸

The Block Grant program—authorized by NAHASDA—is the largest source of federal funding for housing development and assistance in Indian Country. The Block Grant program is a formula grant that provides funding to tribes for the construction, acquisition, and rehabilitation of affordable housing for low-income tribal citizens.⁸¹⁹ In addition, Block Grant funds may be used by tribes for the modernization or operation of housing that was previously developed using HUD resources under the 1937 Housing Act.⁸²⁰ Under the Block Grant program, tribal governments may receive housing grants directly or they may establish a TDHE to administer their housing

⁸¹² See NAHASDA at 25 U.S.C. § 4101 *et seq.* Prior to NAHASDA, federal housing development and assistance programs for Native Americans were administered primarily under the U.S. Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (Sept. 1, 1937), codified at 42 USCS §§ 1437 *et seq.*

⁸¹³ U.S. Dep’t of Housing and Urban Development, “NAHASDA,” http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/codetalk/nahasda (last accessed July 24, 2018).

⁸¹⁴ *Ibid.*

⁸¹⁵ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 111–112.

⁸¹⁶ U.S. Government Accountability Office, *Native American Housing: Tribes Generally View Block Grant Program as Effective, but Tracking of Infrastructure Plans and Investments Needs Improvement* (February 2010), <https://www.gao.gov/assets/310/301157.pdf> [hereinafter GAO, *Block Grant Program*]. Prior to NAHASDA, tribes did not receive housing development funds directly from HUD, but rather through Indian Housing Authorities. *Ibid.*, 10. See also NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 112 (noting that as of 2016, there were approximately 500 TDHEs in Indian Country).

⁸¹⁷ GAO, *Additional Actions Needed*, *supra* note 52, at 9.

⁸¹⁸ GAO, *Block Grant Program*, *supra* note 816, at 5–6.

⁸¹⁹ U.S. Dep’t of Housing and Urban Development, “Indian Housing Block Grants (IHBG),” <http://portal.hud.gov/hudportal/HUD?src=/programdescription/ihbg> (last accessed July 25, 2018). IHBG funds may be used by tribes for “modernization or operating assistance for housing previously developed using HUD resources; acquisition, new construction, or rehabilitation of additional units; “housing-related services such as housing counseling, self-sufficiency services, energy auditing, and establishment of resident organizations; housing management services; crime prevention and safety activities; rental assistance; model activities; and administrative expenses.” *Ibid.*

⁸²⁰ *Ibid.*

programs.⁸²¹ Though not a competitive grant program, Block Grant recipients are required to annually submit an Indian Housing Plan, which identifies their “affordable housing needs” and describes “the housing activities they plan to pursue to address those needs.”⁸²² In awarding Block Grant funds, HUD utilizes an allocation formula that considers a tribe’s “costs of operating and modernizing pre-NAHASDA, HUD-funded units” and “the need to provide new affordable housing.”⁸²³

Since the Block Grant program’s inception in FY 1998, grant recipients have developed approximately 38,000 affordable housing units and rehabilitated an additional 770,000 housing units in Indian Country.⁸²⁴

But the Block Grant program has been flat-funded since the program’s inception in FY 1998.⁸²⁵ According to Randall R. Akers, then Acting Deputy Assistant Secretary at HUD, “funding for Block Grant has not kept pace with inflation, nor with the rising demand for housing in Indian Country,” and “one of the greatest impediments to developing affordable housing in Indian Country is the flat funding of the Indian Housing Block Grant for most of the program’s history.”⁸²⁶ In his testimony before the Commission in 2016, Akers also noted:

[The Indian Housing Block Grant is] a formula-based block grant. Tribes like it. They absolutely think it's a good thing. But the downside of it is that there's not enough money to be able to really get tribes effectively where they need to go on these things.

And what we see happen, as opposed to a competitive grant where it's a smaller amount of money but it's competitively awarded as the Indian Community Development Block Grant program, is that for NAHASDA[,] because it's been perennially underfunded[,] the tribes aren't able to do really much more than simply

⁸²¹ GAO, *Additional Actions Needed*, *supra* note 52, at 8.

⁸²² GAO, *Block Grant Program*, *supra* note 816, at 12.

⁸²³ GAO, *Additional Actions Needed*, *supra* note 52, at 8. The component of the IHBG allocation formula that considers a tribe’s need to provide new affordable housing is based upon such factors as the grant recipient’s population, number of households, household income levels, local rents, and local construction costs. *Ibid.* See also GAO, *Block Grant Program*, *supra* note 816, at 39, for tribal concerns about the grant allocation formula. Some tribes allege the formula relies on faulty information (e.g., inaccurate tribal census data,) or that it does not accurately reflect housing development costs (e.g., when a tribe without buildable land must use grant funds first to purchase land on which to construct housing).

⁸²⁴ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11–6.

⁸²⁵ Lourdes Castro Ramírez, Principal Deputy Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development, testimony before the Senate Committee on Indian Affairs, Mar. 9, 2016, at 2, <https://www.indian.senate.gov/sites/default/files/upload/files/3.9.16%20Lourdes%20Castro%20Ramirez%20Testimony.pdf>; National American Indian Housing Council, “A Resolution in Support of FY 2016 HUD Indian Housing Block Grant Funding,” Resolution #2015-02, at 2, <http://naihc.net/wp-content/uploads/2015/06/NAIHC-Resolution-2015-02-FINAL.pdf>.

⁸²⁶ Randall R. Akers, then Acting Deputy Assistant Secretary at HUD, Testimony, *Briefing Transcript*, pp. 166–67.

maintain their stock of housing, and their eroding infrastructure, and really just basically rehabbing what they've got, aging housing.⁸²⁷

When the year-to-year funding levels of the Block Grant program are adjusted for inflation, the constant dollar amounts show a steady decline.⁸²⁸ See Figure 4.1, below. While the average annual appropriation for the Block Grant program in recent years has totaled \$639 million, HUD estimates that the program should be funded at \$875 million in FY 2017 merely to compensate for inflation.⁸²⁹ This is a significant difference, amounting to \$236 million or 36.9 percent of the base program funds. Compounding the problems of insufficient federal funding and inflation is the fact that the Native American population is growing at twice the rate of the national average—resulting in a greater need for housing development in Indian Country.⁸³⁰

In FY 2017, the Block Grant program received \$654 million, and received the same amount in FY 2018 through the annualized continuing resolution.⁸³¹ The President's Budget for FY 2019 requested \$600 million for the program, which is a \$54 million decrease from FY 2018.⁸³² See also Appendix F, Funding for Native American Housing.

⁸²⁷ Ibid.

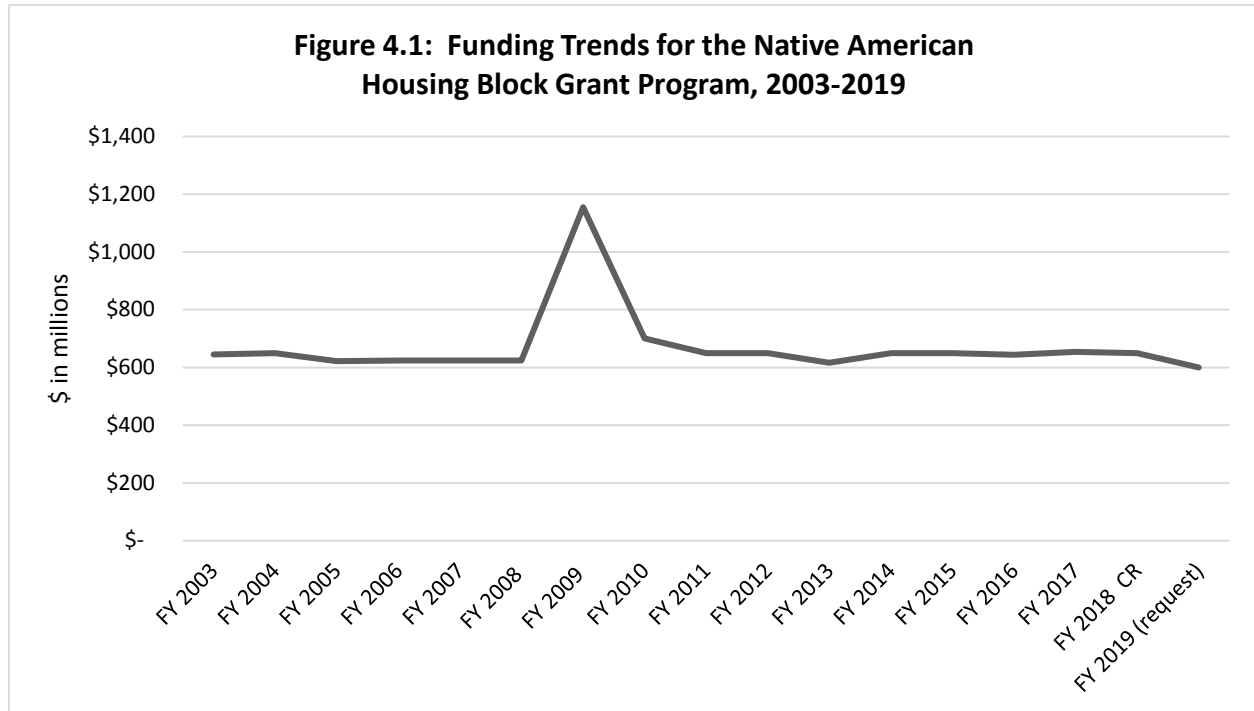
⁸²⁸ GAO, *Block Grant Program*, *supra* note 816, at 8.

⁸²⁹ Ibid.

⁸³⁰ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 111 (between 2000 and 2010, the Native American population increased by 18 percent, while the national growth rate was about 9 percent).

⁸³¹ U.S. Dep't of Housing and Urban Development, *Fiscal Year 2019 Congressional Justifications*, 10-1, <https://www.hud.gov/sites/dfiles/CFO/documents/FY%202019%20Congressional%20Justifications%20-%20Combined%20PDF%20-%20Updated.pdf> [hereafter cited as HUD, *FY 19 Congressional Justifications*].

⁸³² Ibid.



SOURCE: <https://www.hud.gov/budget>, Congressional Justifications, 2005–2019. In 2009, the Recovery Act appropriated \$510 million for the Native American Housing Block Grant Program.⁸³³

The flat-funding of the Block Grant program, as reflected in Figure 4.1—combined with inflation in construction costs over time—has resulted in a sharp decrease in the number of affordable housing units developed in Indian Country in recent years.⁸³⁴ See Figure 4.2, below. As of 2010, there were 2.1 million tribal housing units developed, reflecting an eight percent increase since 2000—compared to a fourteen percent increase in the number of housing units developed nationwide during the same period.⁸³⁵ According to HUD, unless additional funding is allocated for the Block Grant program, affordable housing development and assistance services in Indian Country “will continue to erode.”⁸³⁶

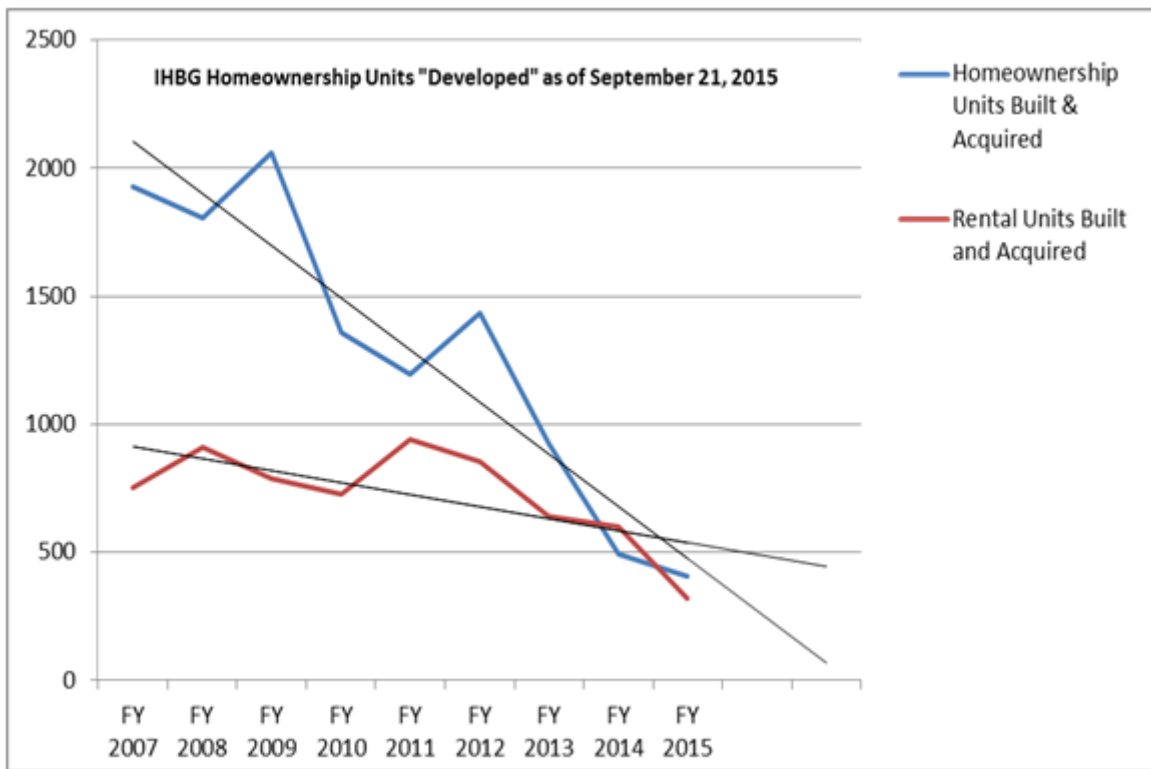
⁸³³ Public Law 111-5 (2009); U.S. Department of Housing and Urban Development, “American Recovery and Reinvestment Act of 2009 (Recovery Act Programs),” <https://www.hud.gov/hudprograms/arra2009>.

⁸³⁴ Akers Testimony, *Briefing Transcript*, p. 126. Former HUD Acting Deputy Assistant Secretary Akers added that since FY 1998, “HUD’s tribal housing and community development programs ([i.e.,] (Indian Housing Block Grant, Title VI Loan Guarantee, Indian Community Development Block Grant, and Loan Guarantees for Indian Housing) have invested more than \$14 billion dollars in Indian Country, resulting in more than 154,841 new and rehabbed [*sic.*] units in Indian Country.” *Ibid.*

⁸³⁵ HUD, *Housing Conditions of American Indians and Alaska Natives*, *supra* note 52, at 51.

⁸³⁶ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11-5.

**Figure 4.2: Indian Housing Block Grant Homeownership Units
as of September 21, 2015**



Source: U.S. Department of Housing and Urban Development, Acting Deputy Assistant Secretary Randall R. Akers, "Statement to the United States Commission on Civil Rights, *Quiet Crisis Briefing*," Feb. 19, 2016, p. 8.

GAO issued a report in 2010 based on data collected from surveys and interviews from all NAHASDA funding grantees, and site visits from selected grantees, that assessed the efficacy of the NAHASDA program.⁸³⁷ GAO reported that tribes generally viewed NAHASDA as "an effective affordable housing program," especially as it relates to "providing homeownership opportunities and improving housing conditions for low-income Native Americans."⁸³⁸ GAO found that 90 percent of NAHASDA grantees "reported that the program has had a positive effect in helping them to meet their affordable housing needs."⁸³⁹ According to GAO's study, the popularity of NAHASDA among tribal leaders is based upon the program's emphasis on tribal self-determination in developing affordable housing.⁸⁴⁰ Under NAHASDA, tribes are given great autonomy in using grant funds "to design and implement appropriate, place-based housing

⁸³⁷ GAO, *Block Grant Program*, *supra* note 816.

⁸³⁸ *Ibid.*, 33.

⁸³⁹ *Ibid.*, 34.

⁸⁴⁰ *Ibid.*, 33, 37. For example, one tribal housing authority observed that "each tribe has unique housing needs influenced by their specific cultures, economic conditions, and physical environments and that NAHASDA has been a drastic improvement [over previous federal funding programs] because it allows tribes the flexibility to meet those needs." *Ibid.*

programs, according to local needs and customs.”⁸⁴¹ With minimal restrictions on the usage of grant funds, NAHASDA places tribal communities in the driver’s seat with regard to the development of housing that is both affordable and sensitive to “local conditions, needs, and cultures.”⁸⁴² Also, given that NAHASDA replaced several separate housing assistance programs with a single block grant program, tribal housing authorities have praised NAHASDA for simplifying the “the process of providing housing benefits for their tribes.”⁸⁴³

Although GAO reported that the vast majority of tribes view NAHASDA in a positive light, it found that some tribal authorities complained that the program contains “onerous” regulatory and administrative requirements that can be a challenge to meet.⁸⁴⁴ Tribes specifically mentioned that the program’s “mandatory environmental reviews” required prior to developing housing and infrastructure projects can be “overly cumbersome.”⁸⁴⁵ Tribes also noted that NAHASDA had not lived up to its promise of developing more effective mechanisms for housing finance in Indian Country.⁸⁴⁶ A 2014 GAO report found that additional actions were needed to more effectively support tribal efforts, and highlighted certain challenges that tribes were facing.⁸⁴⁷ Some of these challenges included remote locations, lack of adequate infrastructure, land use regulations, differing federal agency requirements, and limited administrative capacity.⁸⁴⁸

NCAI indicated that NAHASDA granted tribal governments the flexibility to address the particular housing needs of their own communities, “resulting in tens of thousands more housing units being constructed as well as increased tribal capacity to address related infrastructure and economic development challenges.”⁸⁴⁹ NCAI also noted that the original intention of NAHASDA was to “further Tribal self-governance and, streamline and simplify the process of providing housing assistance to [t]ribes and [t]ribal members.”⁸⁵⁰ They noted, however, that the current authorization for NAHASDA had expired in 2013, and Congress had not granted final approval to

⁸⁴¹ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11-5.

⁸⁴² *Ibid.* According to HUD, “local control has empowered Indian community planners to strategically consider long-term housing development that makes sense for their particular circumstances, taking into consideration climate, geography, and their population’s needs and preferences.” *Ibid.*

⁸⁴³ GAO, *Block Grant Program*, *supra* note 816, at 34.

⁸⁴⁴ *Ibid.*, 33.

⁸⁴⁵ *Ibid.*, 38.

⁸⁴⁶ *Ibid.*, 35.

⁸⁴⁷ GAO, *Additional Actions Needed*, *supra* note 52, at 10.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 121.

⁸⁵⁰ National Congress of American Indians, Resolution #ANC-14-029 To Support Tribal Housing Provisions in the NAHASDA Reauthorization that Address Historical Issues, 2014, http://www.ncai.org/attachments/Resolution_cziAuPKILtUKAnDHSqikXNRwwWbhcMTToVfItglEYwUwaFNWpXYy_ANC-14-029.pdf.

subsequent reauthorizations introduced since then.⁸⁵¹ Although Congress has continued to fund the Block Grant program, as discussed above, funding levels have not kept pace with inflation.⁸⁵²

A 2017 report by the Urban Institute reported that buying power of the Block Grant program had declined significantly, as the program allocations in inflation-adjusted constant dollars have steadily decreased.⁸⁵³ For example, in 1998, the program was funded at \$599 million nominally, yet in 2013, the program was funded at only \$428 million in constant 1998 dollars, which is a significant reduction in the purchasing power of the program at that 1998 constant dollars level.⁸⁵⁴ Note also that the Native American population grew 59 percent from 1999 to 2014, which reduced the per capita Block Grant allocation from \$573 to \$386 (in nominal dollars), and construction costs have outpaced inflation-related price increases.⁸⁵⁵ The NCAI therefore claims that NAHASDA reauthorization and adequate funding is “vital” for housing programs like the Block Grant, the Indian Community Development Block Grant, Sections 184 and 184A Guaranteed Loan Program, the Title VI Guaranteed Loan Program, NAHASDA’s Training and Technical Assistance Funding, and Title VIII Housing Assistance for Native Americans.⁸⁵⁶

In March 2018, Congress passed its full year FY 2018 spending bill, which granted an additional \$100 million funding increase for the Block Grant.⁸⁵⁷ The National American Indian Housing Council (NAIHC) applauded the funding increase, noting that “tribal housing programs across the Country have been fighting for more funding for years.”⁸⁵⁸ The Block Grant will receive a total of \$755 million in funding for FY 2018, which is the highest level of regular appropriations since the program was enacted under NAHASDA.⁸⁵⁹ Tony Walters, the Executive Director for NAIHC, also indicated that the funding increase was one of NAIHC’s main goals, along with reauthorizing NAHASDA, and stated, “[t]he omnibus was a big step in the right direction on funding and I look forward to Members of Congress and staff to get NAHASDA across the finish line as well.”⁸⁶⁰ It remains unclear, however, if this funding increase of \$100 million will be sufficient to meet the housing needs of Native Americans. See also Appendix F, Funding for Native American Housing.

⁸⁵¹ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 121.

⁸⁵² HUD, *Housing Needs*, *supra* note 52, at xv.

⁸⁵³ *Ibid.*, 101.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ *Ibid.*

⁸⁵⁶ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 121.

⁸⁵⁷ National American Indian Housing Council, “NAIHC Applauds \$100 Million Funding Increase to Indian Housing Block Grant,” Mar. 30, 2018, <http://naihc.net/naihc-applauds-100-million-funding-increase-to-indian-housing-block-grant/>; *see also Consolidated Appropriations Act of 2018*, *supra* note 207, at 668–69.

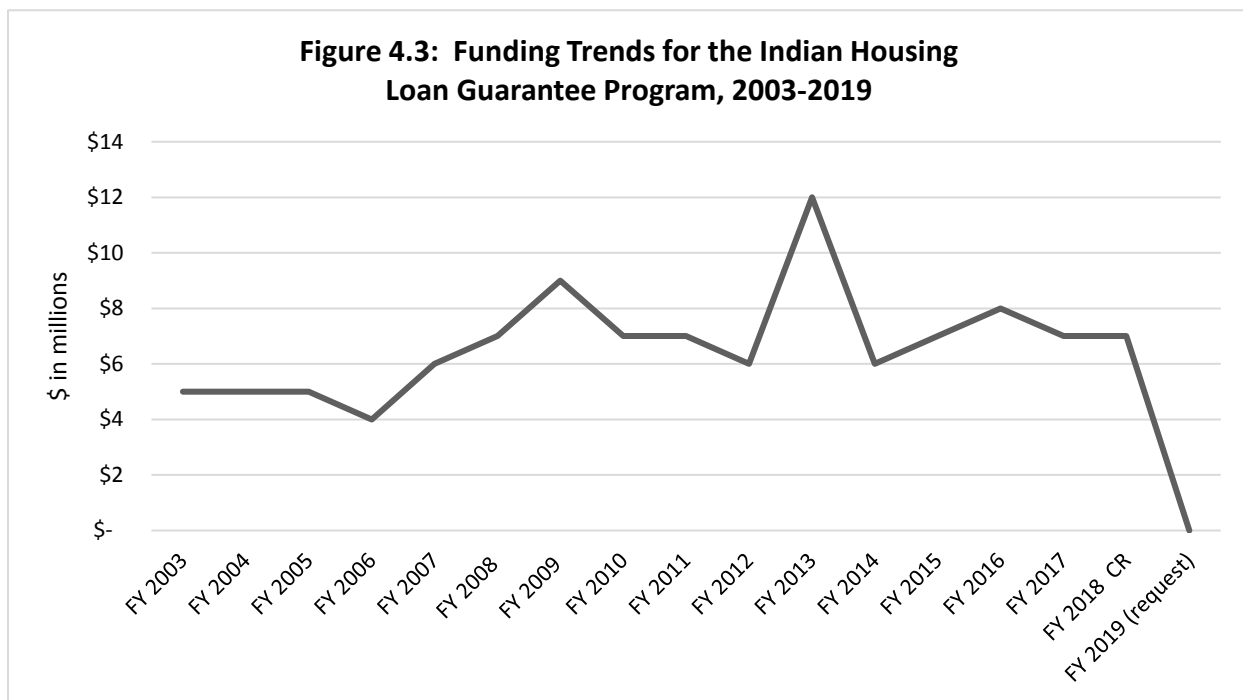
⁸⁵⁸ *Ibid.*

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

The Indian Housing Loan Guarantee Fund (Section 184)

NAHASDA also authorizes the Indian Housing Loan Guarantee Fund, which allows tribes to leverage their Block Grant funds in order to obtain federally guaranteed loans from private financial institutions for the development of affordable housing.⁸⁶¹ Under this program, tribes are required to pledge their future Block Grant funds to HUD as security in return for a federal guarantee on bank notes and other obligations.⁸⁶² The federal guarantee allows tribes to obtain private funding at favorable interest rates for the development of housing and housing-related infrastructure.⁸⁶³ In FY 2017, the Indian Housing Loan Guarantee Fund was appropriated \$7.2 million, and the funding level remained at \$7.2 million in FY 2018.⁸⁶⁴ As discussed in more detail in the next section, the President’s Budget did not include a request for funding for this program in FY 2019.⁸⁶⁵ See Figure 4.3. See also Appendix F, Funding for Native American Housing.



SOURCE: <https://www.hud.gov/budget>, Congressional Justifications, 2005–2019.

Federal Funding

For federal funding trends for the years 2003–2019 related to HUD administered Native American housing and community development programs, see Appendix F, Funding for Native American

⁸⁶¹ U.S. Dep’t of Housing and Urban Development, “Section 184 Indian Home Loan Guarantee Program,” https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 (last accessed Sept. 22, 2018).

⁸⁶² HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11-2.

⁸⁶³ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 112.

⁸⁶⁴ HUD, *FY 19 Congressional Justifications*, *supra* note 831, at 12-1.

⁸⁶⁵ *Ibid.*

Housing. As will be discussed below, these funding levels have been insufficient to address the dire, documented needs of Native American communities.

Leveraging Federal Program Resources

As discussed earlier, NAHASDA, unlike prior tribal housing development programs, encourages tribes to leverage their Block Grant appropriations with funding from additional federal sources.⁸⁶⁶ In fact, because Block Grant funding alone is often insufficient to satisfy the housing needs of tribal communities, GAO maintains the pooling of resources from a variety of federal programs is essential.⁸⁶⁷ Indeed, approximately one-half of the Block Grant recipients indicate that pooling federal resources plays a “great or very great role” in the funding of affordable housing development.⁸⁶⁸ Therefore, tribes often combine funding from the program with additional financial resources from other federal programs, such as the Indian Community Development Block Grant program and the Section 184 Indian Home Loan Guarantee program in order to finance affordable housing in Indian Country.⁸⁶⁹ Figure 4.4 shows the FY 2017 HUD funding request for the various programs supporting housing development and assistance in Indian Country.

- *Section 184 Indian Housing Loan Guarantee*—provides a 100 percent federal guarantee on home mortgages issued to tribes, tribal members, and TDHEs by private lenders.⁸⁷⁰ Congress established the Section 184 program in 1992, and as of June 2018, more than 41,000 loans totaling approximately \$7 billion had been guaranteed.⁸⁷¹
- *Indian Community Development Block Grant*—provides competitively awarded grant funding to Native American tribes and Alaska Native villages for housing, infrastructure, and economic development.⁸⁷² In 2014, grantees reported, “1,151 affordable units were rehabilitated, 86 jobs were created, and 23 community buildings were built using [Indian Community Development Block Grant] funds.”⁸⁷³

⁸⁶⁶ GAO, *Block Grant Program*, *supra* note 816, at 22–23.

⁸⁶⁷ *Ibid.*, 23.

⁸⁶⁸ *Ibid.*, 22–23.

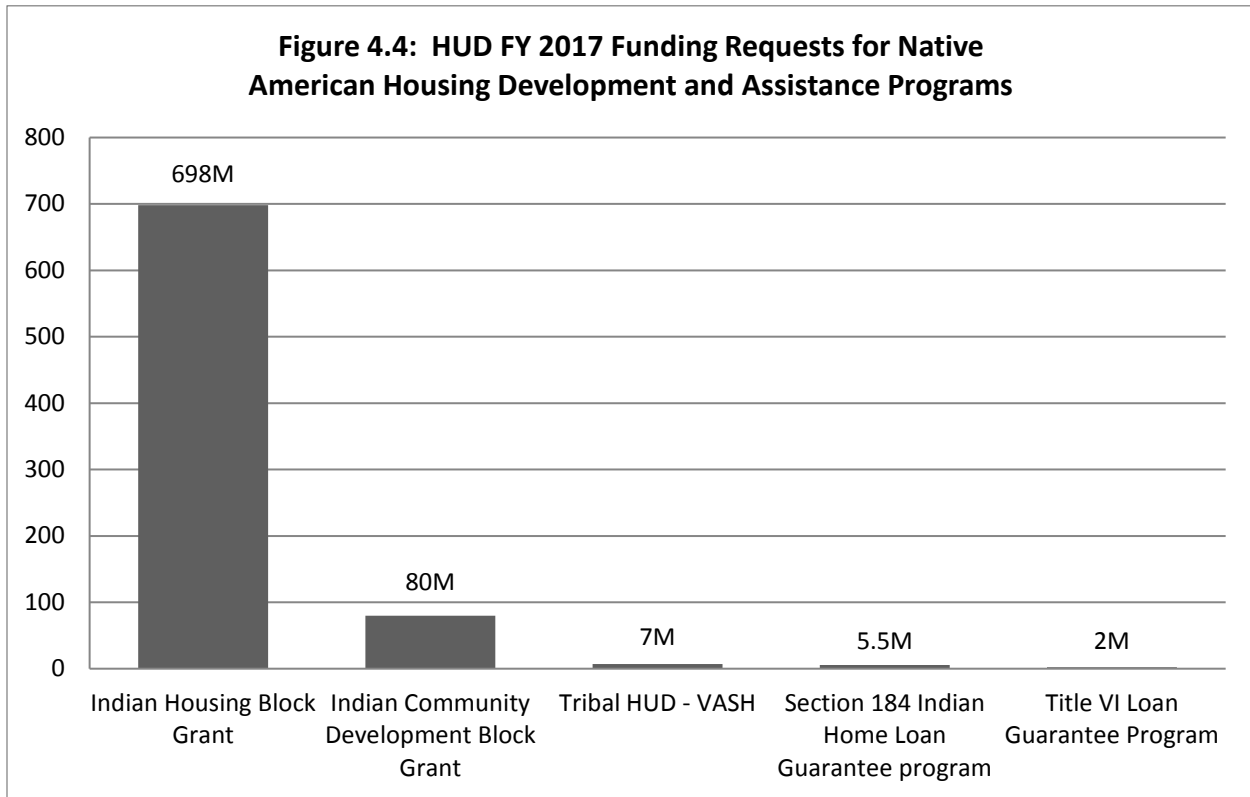
⁸⁶⁹ *Ibid.*, 23. Some tribes also utilize the U.S. Department of Agriculture (USDA) Rural Development program or the Low-Income Housing Tax Credit program to finance affordable housing activities.

⁸⁷⁰ *See* 12 U.S.C. § 1715z-13a.

⁸⁷¹ U.S. Dep’t of Housing and Urban Development, “Section 184 Indian Home Loan Guarantee Program,” https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 (last accessed July 25, 2018). The Indian Housing Loan Guarantee program is authorized pursuant to Section 184 of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3739 (1992).

⁸⁷² *See* 25 U.S.C. § 4111.

⁸⁷³ U.S. Dep’t of Housing and Urban Development, Community Planning and Development, *Community Development Fund: Fiscal Year 2016 Budget Request*, 15–11, <https://www.hud.gov/sites/documents/18-FY16CJ-CDFUND.PDF>. *See also* U.S. Dep’t of Housing and Urban Development, “Indian Community Development Block Grant Program,” http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/grants/icdbg (last accessed July 25, 2018). Infrastructure development activities allowed under the Indian Community Development Block Grant program include construction of roads, water and sanitation facilities, and community



Source: U.S. Department of Housing and Urban Development, Acting Deputy Assistant Secretary Randall R. Akers, “Statement to the United States Commission on Civil Rights, *Quiet Crisis* Briefing,” Feb. 19, 2016, p. 7. Note: The Tribal HUD Veterans Affairs Supportive Housing (HUD-VASH) demonstration program addresses homelessness among American Indian and Alaska Native veterans.

GAO has identified several obstacles that tribes face in leveraging resources from a variety of federal housing development programs, including: limited tribal administrative capacity; burdensome administrative requirements from the funding source; incompatibility and lack of coordination between agency programs (include *e.g.*, the differing definitions of “rural area” for federal agency rural programs; the differing requirements for lead paint remediation for HUD and the EPA);⁸⁷⁴ and exclusion from some programs due to a tribe’s small size.⁸⁷⁵

Because limited funding forces Tribally Designated Housing Entity officials to solicit funding from various sources, tribes must often spend more time and money on satisfying the various

buildings; economic development activities permitted under the ICDBG program include commercial, industrial, and agricultural projects; and housing development activities allowed pursuant to the ICDBG program include “housing rehabilitation, land acquisition to support new housing construction, and under limited circumstances, new housing construction.” *Ibid.*

⁸⁷⁴ GAO, *Additional Actions Needed*, *supra* note 52, at 18.

⁸⁷⁵ GAO, *Block Grant Program*, *supra* note 816, at 30–33. For example, the Low-Income Housing Tax Credit program may “require the development of a minimum number of housing units,” which could potentially exclude smaller IHGB recipients from participation.

conditions that the different sources attach to such funding.⁸⁷⁶ For instance, multiple agencies that fund one project can require entirely different environmental reviews, which can cost “between \$2,000 and \$4,000 for each agency involved.”⁸⁷⁷ Each agency must conduct an assessment of the environmental effects of proposed development projects under the Environmental Protection Policy Act of 1969, and each agency develops its own standards for environmental reviews.⁸⁷⁸ Tribal authorities have complained that the burden of satisfying the unique environmental review requirements for each agency increases the costs of developing affordable, safe, and sustainable housing in Indian Country—and may result in substantial delays.⁸⁷⁹ GAO has reported that “an assessment of broad environmental effects for subdivisions and larger multifamily projects could range from \$4,000 to \$50,000, while a survey to identify hazardous chemical deposits on land chosen for development could range from \$1,000 to \$10,000.”⁸⁸⁰ In the current funding environment, where it is often necessary for tribal communities to utilize a variety of funding sources for the development of affordable housing, incompatible agency requirements, especially relating to environmental review, pose a significant impediment to housing development in Indian Country. Accordingly, GAO in 2014 called for the development and implementation of “a coordinated environmental review process for all agencies overseeing tribal housing development.”⁸⁸¹ In response, the Coordinated Environmental Review Process Workgroup was formed in 2015, comprised of members of all affected agencies.⁸⁸² It conducted a thorough data collection and review concurrently, which included interviewing 19 tribes and tribally designated housing entities, and two formal tribal consultations.⁸⁸³ This workgroup issued a final report in December 2015 that included a set of short-term and long-term recommendations for future improvements.⁸⁸⁴

⁸⁷⁶ GAO, *Additional Actions Needed*, *supra* note 52, at 18. Tribal housing officials stated that “the current funding environment made it difficult to develop a housing project without going to several sources and . . . the agencies’ different standards were a hindrance” to their housing efforts.

⁸⁷⁷ *Ibid.*, 16–17. Tribal housing authorities have observed that “various agencies that assisted tribes, including USDA, BIA, Department of Energy, HUD, IHS, and the U.S. Department of the Treasury (for low-income housing tax credits[,]) had different environmental review requirements.” *Ibid.*

⁸⁷⁸ 42 U.S.C. §§ 4321–4347.

⁸⁷⁹ GAO, *Additional Actions Needed*, *supra* note 52, at 16–17. For example, one tribal housing official noted that the process of conducting environmental reviews for four different government agencies took approximately two years.

⁸⁸⁰ *Ibid.*, 18.

⁸⁸¹ *Ibid.*, 34. *See also infra*, Chapter 5 (detailing how natural resources are critically important to Native Americans—not only for the advancement of tribal economies, but culturally as well). The present section discusses significant burdens that the environmental review process has on the development of affordable housing, but it should be noted that the protection of natural resources is also a priority for some Native American communities. *See infra* notes 950–952, 1087–1231.

⁸⁸² U.S. Dep’t of Housing and Urban Development, *Coordinated Environmental Review Process Final Report*, The Coordinated Environmental Review Process Workgroup (Dec. 15, 2015), 1, <https://www.hud.gov/sites/documents/COORENVIRREVIEW.PDF>.

⁸⁸³ *Ibid.*

⁸⁸⁴ *Ibid.*, 3–4. There has been no formal assessment of whether the affected agencies have adopted the Workgroup’s recommendations.

Other Obstacles to Improving Housing Conditions

Limited Access to Capital

Another obstacle to improving housing conditions in Indian Country is limited access to capital.⁸⁸⁵ The ability to finance home construction and home ownership is often dependent upon access to private capital. In 2001, the U.S. Department of the Treasury’s Community Development Financial Institutions Fund (CDFI) issued a report on the Native American Lending Study, which identified several barriers to capital access in Indian Country, including the lack of financial institutions on or near reservations; the inadmissibility of trust land as collateral; Native Americans’ and Native Hawaiians’ limited experience with traditional financial institutions; and, at times, outright discrimination against Native Americans and Native Hawaiians.⁸⁸⁶ The CDFI report also found that financial institutions were hesitant to provide lending services in Indian Country due to a poor understanding of tribal sovereignty, the absence of a politically independent judicial and dispute resolution system, and the lack of certainty in tribal commercial laws.⁸⁸⁷ According to GAO in 2010, “many banks [were] reluctant to do business with tribes because of cumbersome procedures” related to the development of Native American trust lands.⁸⁸⁸ Specifically, BIA’s “process for issuing land title or trust status reports when a mortgage is made on trust lands . . . can take months or years, making such transactions impractical for lenders.”⁸⁸⁹

The issue of limited access to capital for Native Americans was discussed at a briefing held by the Commission’s South Dakota Advisory Committee in July 2018. Nick Tilsen, founder and former executive director of the Thunder Valley Community Development Corporation and founder of the NDN Collective, in his testimony indicated:

There needs to be a way to incentivize access to capital for Native American communities on [*sic.*]—and the federal regulations around investment don't reach our communities because our communities are underinvested as it is.⁸⁹⁰

⁸⁸⁵ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11-2.

⁸⁸⁶ The University of Arizona, Native Nations Institute, *Access to Capital and Credit in Native Communities* (2016), 1, http://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf.

⁸⁸⁷ *Ibid.*, 2, 4–6. *See also* Community Development Financial Institutions Fund, *The Report of the Native American Lending Study* (November 2001), 2, https://www.cdfifund.gov/Documents/2001_nacta_lending_study.pdf. (finding that “65 percent of Native American and Native Hawaiian respondents to the Financial Survey report that conventional mortgages are ‘difficult’ or ‘impossible’ to obtain. Home equity loans and construction and property rehabilitation loans are also in short supply on Indian Lands and Hawaiian Home Lands.”).

⁸⁸⁸ GAO, *Block Grant Program*, *supra* note 816, at 32 (observing that the shortage of “home purchase loans to Native Americans on trust lands” [stemmed] from lenders’ “limited understanding of land ownership, jurisdiction, and legal issues pertaining to Native American trust lands.”).

⁸⁸⁹ *Ibid.* *See also infra*, Chapter 5, at notes 892-898 (discussing this issue in further detail).

⁸⁹⁰ Nick Tilsen, Founder and former Executive Director of the Thunder Valley Community Development Corporation and founder of the NDN Collective, Testimony, South Dakota SAC, *July 24 Briefing Transcript*, p. 97.

Mike J. Levsen, Mayor of Aberdeen, added:

My father and my wife who was here, her father both got out of World War II, came to South Dakota, and got loans to buy farms through either federal programs or bank loans. Non-white people at that time, it was my understanding, had virtually zero chance to get one of those loans.

My wife and I, my children, my grandchildren are still benefiting and will continue to benefit from the equity that started with those—that access to capital in 1946.

So your comments about access to capital are just [examples of] the disparity when we talk about white privilege.⁸⁹¹

Bureau of Indian Affairs Lease Approval Process

Pursuant to the Indian Long-Term Leasing Act of 1955, BIA is required to approve all leases on Native American lands that are held in trust by the federal government for tribes or tribal members.⁸⁹² However, GAO found that lease approval decisions by BIA could sometimes “take several years,” resulting in substantial delays in housing development on trust lands.⁸⁹³ In 2012, Congress enacted the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH) to allow tribes to make their own decisions regarding certain trust land leases—without the need for BIA approval.⁸⁹⁴ Under the HEARTH Act, tribes still must develop their own leasing regulations, which must be approved by the Secretary of the Interior, prior to exercising their new authority to approve trust land leases.⁸⁹⁵ In 2013, the BIA began “implementing new policies for several of its land leasing procedures that were intended to expedite approvals—for example, establishing separate, simplified processes for different types of leases and adding time limits by which BIA must issue decisions.”⁸⁹⁶ BIA decisions on residential leases and subleases on trust lands must now be made within 30 days. Despite these changes and BIA’s provision of model leasing regulations and other HEARTH-related technical assistance to tribes, as of April 2018, only 26 tribal sets of trust land leasing regulations had been approved by the Secretary of the Interior.⁸⁹⁷ According to HUD, “one possible explanation for the low [program] adoption rates

⁸⁹¹ Mike J. Levsen, Mayor of Aberdeen, Testimony, South Dakota SAC, *July 24 Briefing Transcript*, p. 102.

⁸⁹² *Obstacles, Solutions, and Self-Determination in Indian Policy*, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787, at 6, 11; *see also* 25 U.S.C. §§ 415, 415a–415d.

⁸⁹³ GAO, *Additional Actions Needed*, *supra* note 52, at 14. BIA delays in approving trust land leases often result from the “fractionated” ownership of such land, where a single parcel of tribal trust land may be fractionally owned by hundreds of descendants of the original owner—each with a differing view on how to use the land.

⁸⁹⁴ 25 U.S.C. § 415; *see also* Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH), Pub. L. No. 112-151, 126 Stat. 1150 (2012).

⁸⁹⁵ 25 U.S.C. § 415(h); *see also* The White House, *Strengthening Tribal Communities Through the HEARTH Act*, July 30, 2012, <https://www.whitehouse.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act>.

⁸⁹⁶ GAO, *Additional Actions Needed*, *supra* note 52, at 15 (noting that “the practicability of these changes and their impact on housing development have not yet been determined.”).

⁸⁹⁷ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “HEARTH Act of 2012,” <http://www.bia.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm> (last accessed July 25, 2018).

may be the complexity of creating leasing regulations and the inability of tribes with limited resources to dedicate the staff necessary to develop compliant leasing regulations.”⁸⁹⁸

Technical Capacity and Training

Many tribal governments lack the administrative capacity to fully maximize the housing development opportunities available under the federal NAHASDA program.⁸⁹⁹ Smaller tribes with fewer staff are especially disadvantaged in administering affordable housing programs in Indian Country.⁹⁰⁰ Accordingly, HUD now provides critical training and technical assistance to tribal housing authorities on topics ranging from environmental review and contract administration to new trends in construction.⁹⁰¹ In FY 2015, HUD provided training to 1,700 tribal housing professionals at 64 events.⁹⁰² According to the NCAI, “the training and technical assistance provided through NAHASDA to address Native American housing needs is an indispensable resource enabling tribes and TDHEs to run their programs more efficiently and in compliance with applicable laws and HUD regulations.”⁹⁰³ HUD also disseminates “best practices” relating to the development of affordable housing, “which [save] tribes tens of thousands of dollars each year by sharing information about successful efforts undertaken by other tribes.”⁹⁰⁴ In recent years, HUD has also expanded its tribal outreach efforts in order to clarify and improve procedures for providing training and technical assistance.⁹⁰⁵

Native Hawaiian Housing Programs and Ongoing Disparities

Homeownership rates among Native Hawaiians tend to be slightly lower than those of the state’s residents overall (55 percent versus 58 percent, respectively).⁹⁰⁶ This disparity is particularly pronounced in Hawaii County, where the homeownership rate of Native Hawaiians is about 10

⁸⁹⁸ HUD, *Obstacles, Solutions, and Self-Determination in Indian Policy*, *supra* note 787, at 12.

⁸⁹⁹ GAO, *Additional Actions Needed*, *supra* note 52, at 24.

⁹⁰⁰ *Ibid.*

⁹⁰¹ HUD, *FY 2017 Congressional Justifications*, *supra* note 795, at 11-7, 11-8. HUD provides training in tribal housing program administration on the following topics: procurement, environmental review, NAHASDA Essentials, contract administration, financial management, human resources, new trends in construction, sustainable housing, self-monitoring, meth prevention and remediation, mixed-income development, project management, board of commissioners training, Indian housing planning, annual performance reporting, and self-sufficiency (for residents).

⁹⁰² *Ibid.*

⁹⁰³ NCAI, *FY 2017 Indian Country Budget Request*, *supra* note 49, at 113.

⁹⁰⁴ *Ibid.* See also U.S. Department of Housing and Urban Development, “ONAP Best Practices,” http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/bp (last accessed July 25, 2018).

⁹⁰⁵ U.S. Government Accountability Office, *HUD Public and Indian Housing Programs* (July 2015), 17–18, <https://www.gao.gov/assets/680/671334.pdf>.

⁹⁰⁶ U.S. Dep’t of Housing and Urban Development, Office of Policy Development and Research, *Housing Needs of Native Hawaiians: A Report from the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs* (May 2017), 26–27, <https://www.huduser.gov/portal/sites/default/files/pdf/HNNH.pdf>.

percentage points lower than that of Hawaiian residents overall.⁹⁰⁷ Research indicates that lack of access to mortgage financing is a common barrier to homeownership for Native Hawaiians, and that lower income and poor credit often block such access.⁹⁰⁸ Native Hawaiians are also more likely to live in older buildings and experience “facilities deficiencies” (inadequate plumbing, kitchens, electrical or heating systems) than those in the general Hawaiian population.⁹⁰⁹ In Hawaii, overcrowding has been consistently more prevalent in Native Hawaiian households than in general households overall.⁹¹⁰

The American Homeownership and Economic Opportunity Act of 2000 authorized the Native Hawaiian Housing Block Grant program, which is administered by HUD.⁹¹¹ Under the program, the Director of the Department of Hawaiian Home Lands submits a housing plan to receive a grant to promote, develop, and operate affordable housing for low-income Native Hawaiian families.⁹¹² The grant may also support housing-related services for low-income families such as counseling for rental or homeownership assistance, energy auditing, loan processing, and inspections.⁹¹³ The 2018 omnibus spending bill, enacted to fund the government through FY 2018 (ending September 30, 2018), allocated \$2 million to the program.⁹¹⁴ For FY 2019, HUD did not request funding for the Native Hawaiian Housing Block Grant Program.⁹¹⁵

The Section 184A Native Hawaiian Housing Loan Guarantee program enables HUD to guarantee 100 percent of the unpaid principal and interest on loans for single-family housing on the Hawaiian home lands.⁹¹⁶ The program is designed to expand access to sources of private financing for Native Hawaiians on the Hawaiian home lands.⁹¹⁷ For FY 2019, HUD did not request funding for Section 184A, and the 2018 omnibus spending bill did not allocate funding for the program.⁹¹⁸ Congress has not appropriated any funding to the program since 2011. See Figure 4.5 for funding trends from 2003–2019 for Native Hawaiian federal housing programs.

⁹⁰⁷ Ibid., 27.

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid., 29, 33, 35–36.

⁹¹⁰ Ibid., 34.

⁹¹¹ U.S. Dep’t of Housing and Urban Development, “Native Hawaiian Housing Block Grant Program,” https://www.hud.gov/program_offices/public_indian_housing/ih/codetalk/onap/nhhbgprogram (last accessed July 25, 2018); *see also* 25 U.S.C. § 4222.

⁹¹² 25 U.S.C. §§ 4222, 4228.

⁹¹³ 25 U.S.C. § 4229.

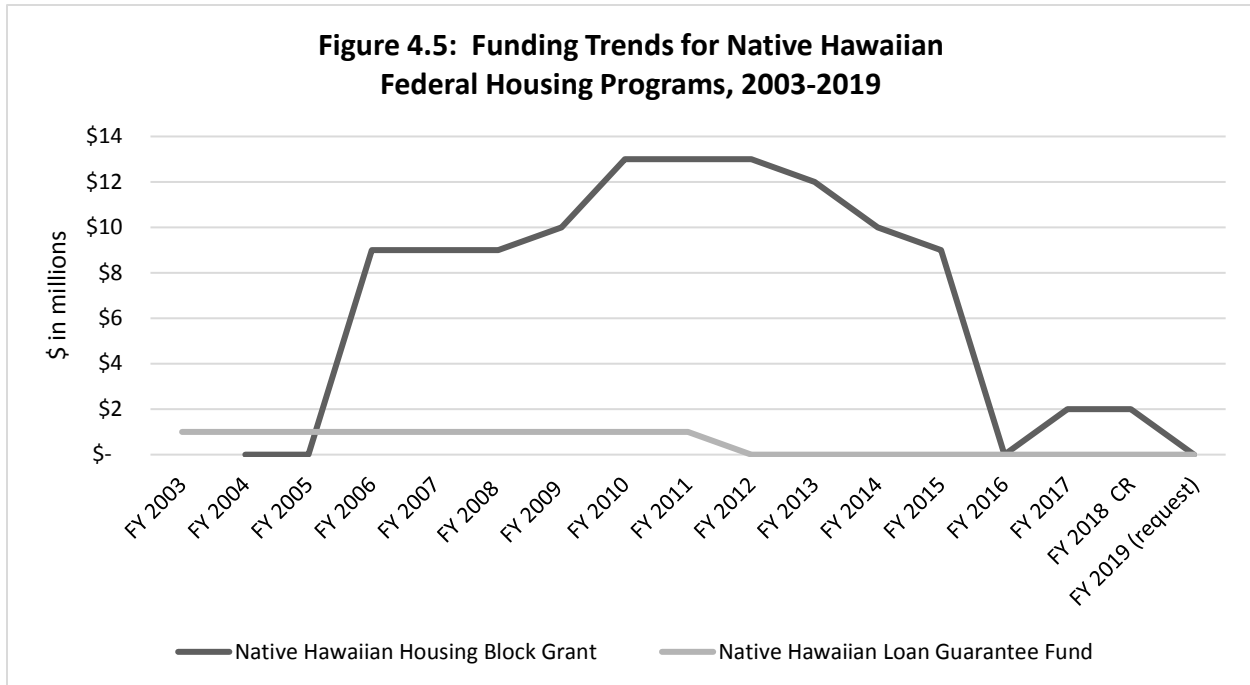
⁹¹⁴ *Consolidated Appropriations Act of 2018*, *supra* note 207, at 670.

⁹¹⁵ NCAI, *Analysis of the FY 2019 President’s Budget*, *supra* note 656, at 16.

⁹¹⁶ 12 U.S.C. § 1715z-13b; *see also* U.S. Dep’t of Housing and Urban Development, “Loan Guarantees for Native Hawaiian Housing (Section 184A),” https://www.hud.gov/program_offices/public_indian_housing/ih/codetalk/onap/program184a (last accessed July 25, 2018) [hereinafter HUD, “Loan Guarantees for Native Hawaiian Housing”]

⁹¹⁷ 12 U.S.C. § 1715z-13b; *see also* HUD, “Loan Guarantees for Native Hawaiian Housing,” *supra* note 916.

⁹¹⁸ NCAI, *Analysis of the FY 2019 President’s Budget*, *supra* note 656, at 16.



SOURCE: <https://www.hud.gov/budget>, Congressional Justifications, 2005–2019

Finally, under the Insured Mortgages on Hawaiian Home Lands (Section 247) program, the Federal Housing Administration (FHA) insures loans for low- and moderate-income Native Hawaiians seeking to purchase one- to four-family residences on the Hawaiian home lands.⁹¹⁹ Other programs designed to support affordable housing for Native Hawaiians include the HOME Investment Partnership program, the Community Development Block Grant Program, the Supportive Housing for Persons with Disabilities Program, and the Supportive Housing for the Elderly Program.⁹²⁰

⁹¹⁹ 12 U.S.C. § 1715z-12; *see also* U.S. Dep’t of Housing and Urban Development, “Insured Mortgages on Hawaiian Home Lands (Section 247),” <https://www.hud.gov/hudprograms/IMHHL> (last accessed July 25, 2018).

⁹²⁰ U.S. Senator Brian Schatz, “Schatz—Federal Funding for Hawaii to Rise,” March 22, 2018, <https://www.schatz.senate.gov/press-releases/schatz-federal-funding-for-hawaii-to-rise>.

CHAPTER 5: ECONOMIC DEVELOPMENT

Self-Determination and the Trust Relationship

Native American self-determination plays an important role in economic prosperity in Indian Country, and tribes that engage in a high degree of self-determination may experience higher employment, income, and poverty reduction.⁹²¹ With regard to policies of self-determination for economic development:

The public policy effect of the federal policy of self-determination for federally recognized American Indian tribes has not only been greater control for tribal citizens and their governments over the management of tribal affairs, but greater control over the institutions of governance—all with the attendant overriding goal of better meeting the federal government’s interest in and obligations to the promotion and ensuring of tribal socio-economic development and well-being. In short, federal policy has been aimed specifically at placing tribal governments in the capacity previously occupied by the federal government, i.e., as the agent by which tribal citizens can choose, design, implement, and enforce those policies and functions deemed necessary to create an environment in which public affairs and private commerce can flourish. As we have seen, while problems remain and legacies of past social and economic stress are prominent, policies of self-determination have spurred development progress in Indian Country.⁹²²

The principle of self-determination entails the promotion of the government-to-government relationship among tribes and federal, state, and local governments, and “the minimization of the historically pervasive presence of the federal government and its trustee agents in the institutions of tribal governance, the provision of public services to Native Americans, and the selection, design and implementation of economic and community development plans and projects.”⁹²³ While self-determination is found in many statutes, tribes have long called for greater self-determination.⁹²⁴ NCAI President Brian Cladoosby sums up self-governance as follows “Tribes

⁹²¹ Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, HUM. RTS., Vol. 33, No. 2 (2006) at 9–12,

https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol33_2006/spring2006/hr_spring06_keohane.html (discussing the Indian Self-Determination and Education Assistance Act of 1975); *see also supra* notes 89-93, 315, 352-358, 557-558, 791-793, and *infra* note 1001 (discussing the same Act).

⁹²² Cornell et. al., *American Indian Self Determination*, *supra* note 42, at 21.

⁹²³ *Ibid.*, 17.

⁹²⁴ Compare Indian Trust Reform: Hearing on the Views of the Administration and Indian Country of How the System of Indian Trust Management of Funds and Natural Resources Might be Reformed, Before the S. Comm. On Indian Affairs, 109th Cong. 17–18, 21 (2005), with Oversight Hearing on “The 30th Anniversary of Tribal Self Governance: Successes in self-governance and an outlook for the next 30 years,” Before the S. Comm. On Indian Affairs, 115th Cong. (2018), <https://www.indian.senate.gov/hearing/oversight-hearing-30th-anniversary-tribal-self-governance-successes-self-governance-and> (collecting testimony and video of tribal leaders discussing self-governance).

need the freedom to spend the money available to them, to create a better quality of life and meet their needs as they define them.”⁹²⁵

The federal trust responsibility supports tribal self-governance and self-determination.⁹²⁶ For example, the Indian Self-Determination and Education Assistance Act provides that:

The Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.⁹²⁷

A lack of federal resources has undermined tribes’ ability to self-govern, and those resources are “an important demonstration of the U.S. government’s commitment to its responsibilities, including the obligation to preserve civil and other rights.”⁹²⁸

Current Economic Conditions in Indian Country

Indian Country faces many economic development challenges. Over 25 percent of Native Americans live in poverty, which is higher than the poverty rate of any other racial group in the

⁹²⁵ Brian Cladoosby, President, NCAI, Remarks to 15th Annual State of Indian Nations Address, Feb. 13, 2017, http://www.ncai.org/NCAI_2017_State_of_Indian_Nations_Address_Final_-2-.pdf (quoting President Ronald Reagan).

⁹²⁶ See 25 U.S.C. § 5332(2) (stating that nothing in the Indian Self-Determination and Education Assistance Act “shall be construed as authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.”); see also, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5321; Leases of Restricted Land, 25 U.S.C. § 415(e), (h); Leases, Business Agreements and Rights-of-Way Involving Energy Development or Transmission, 25 U.S.C. § 3504; Indian Trust Reform Act, 25 U.S.C. §§ 5611–5614.

⁹²⁷ 25 U.S.C. § 5302(b).

⁹²⁸ USCCR, *A Quiet Crisis*, *supra* note 3, at 5.

U.S.⁹²⁹ Approximately 12 percent of Native Americans are unemployed,⁹³⁰ which is more than double the national average.⁹³¹ For Native Americans living on reservations, the unemployment rate is around 50 percent and for certain reservations, the average unemployment rate is much higher, hovering around 80 percent and up.⁹³² Due to the geography of some reservations, some Native Americans might travel far distances to work. For example, 55 percent of Native Americans who live on the Pine Ridge Reservation in South Dakota and commute to work travel more than 50 miles to their employment destinations.⁹³³ There is a distinct wage gap: the median household income for Native Americans is \$39,719, which is approximately one-third less than that of white Americans, and second lowest of any racial group.⁹³⁴ See Figure 5.1.

⁹²⁹ U.S. Census Bureau, Poverty Status in the Past 12 Months, 2016 American Community Survey 5-Year Estimates, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/S1701. See also Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, Pew Research Center, FACT TANK, June 13, 2014, <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>. The poverty rate among the Standing Rock Sioux Tribe in North Dakota is 43.2 percent, which is almost triple the national average.

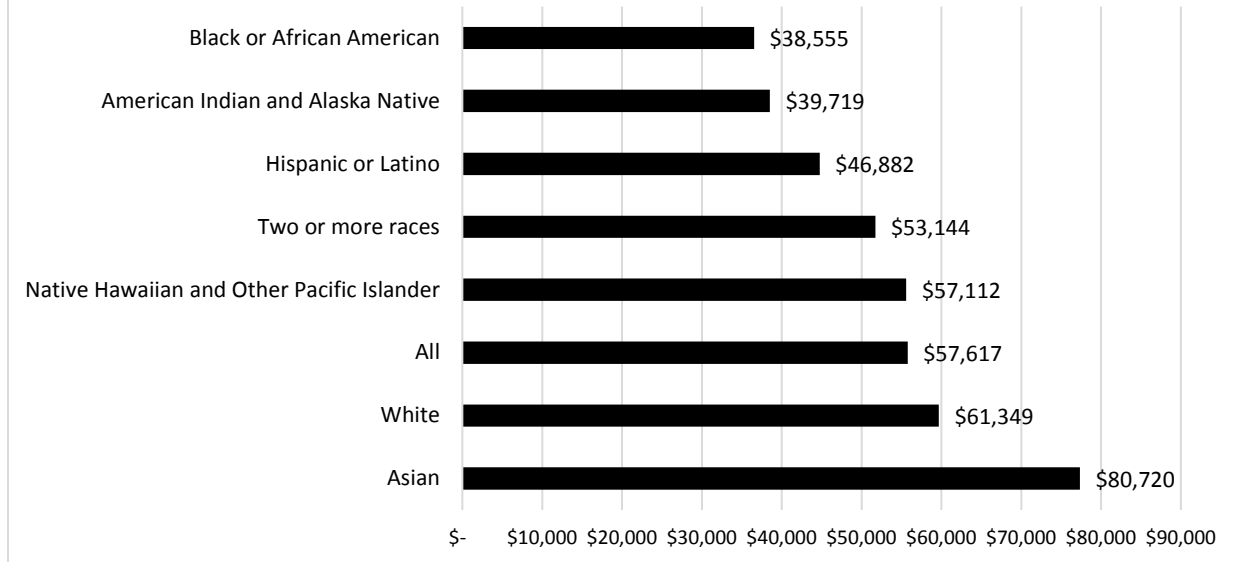
⁹³⁰ Ariana Bustos, “Cronkite News: Unemployment rates in Indian Country outpace the rest of the nation,” CRONKITE NEWS (May 10, 2018), <https://www.indianz.com/News/2018/05/10/-despite-gains-native-american.asp>.

⁹³¹ U.S. Dep’t of Labor, Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” <https://data.bls.gov/timeseries/LNS1400000> (last accessed Sept. 24, 2018).

⁹³² U.S. Senate Committee on Indian Affairs, *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country*, hearing transcript, Jan. 28, 2010, at 3, <https://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf>; Vincent Schilling, *Getting Jobbed: 15 Tribes With Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), https://newsmaven.io/indiancountrytoday/archive/getting-jobbed-15-tribes-with-unemployment-rates-over-80-percent-iAV-3u_770-C6fEcCc3lfA/; Shelly Hagan, *Where U.S. Unemployment Is Still Sky-High: Indian Reservations*, BLOOMBERG (Apr. 5, 2018), <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations>.

⁹³³ David Norris, Christy Rogers, Matt Martin, Jason Reece, & Kalima Rose, *Strengthening the Pine Ridge Economy: A Regional Equity and Opportunity Assessment*, Kirwan Institute Research Report (February 2015), at 15, https://www.policylink.org/sites/default/files/PineRidge_FINAL.pdf [hereinafter, Norris et al., *Strengthening the Pine Ridge Economy*].

⁹³⁴ U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_1YR_S1903&prodType=table (for this statistic, “Native American” refers to American Indians and Alaska Natives, as per the categorization of the U.S. Census Bureau).

Figure 5.1: 2016 Median Household Income, by Race

Compiled by USCCR from the U.S. Census Bureau,

2016 American Community Survey 1-Year Estimates (in 2016 inflation-adjusted dollars),

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_1YR_S1903&prodType=table.

Native American women in particular experienced a 5.8 percent decline in their annual wages from 2004–2014, which is the highest decline of any racial group of women.⁹³⁵ A lack of employment opportunities, underdeveloped physical infrastructure, lack of access to basic utilities and clean drinking water, restrictions in accessing natural resources, regulatory burdens, climate change impacts, restrictions on access to capital, and other economic issues persist in Indian Country.⁹³⁶

⁹³⁵ Institute for Women’s Policy Research, *Native American Women Saw the Largest Declines in Wages over the Last Decade among All Women*, September 2016, <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q055.pdf>.

⁹³⁶ National Congress of American Indians (NCAI), *Tribal Infrastructure: Investing in Indian Country for a Stronger America*, 2017, at 2–4, <http://www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf> [hereinafter NCAI, *Tribal Infrastructure*]; Dante Desiderio, Executive Director of Native American Finance Officers Association, written testimony before the Senate Committee on Indian Affairs Oversight, June 17, 2015, at 6, <https://www.indian.senate.gov/sites/default/files/upload/files/6.17.15%20Desiderio%20Testimony.pdf>; Shawn Regan, *Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development*, PERC Policy Perspective, No. 1 (2014), 3, <https://www.perc.org/wp-content/uploads/old/pdfs/IndianPolicySeries%20HIGH.pdf> [hereinafter Regan, *Unlocking the Wealth of Indian Nations*]; U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment* (2014), 298–307, <https://www.nrc.gov/docs/ML1412/ML14129A233.pdf> [hereinafter U.S. Global Change Research Program, *Climate Change Impacts in the U.S.*]; National Congress of American Indians, “Climate Change,” <http://www.ncai.org/policy-issues/land-natural-resources/climate-change> (last accessed July 25, 2018) [hereinafter NCAI, “Climate Change”]; U.S. Dep’t of Agriculture, *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences*, October 2016, at 1, https://www.fs.fed.us/pnw/pubs/pnw_gtr944.pdf; NCAI, *Natural Resource Conservation Policy: Incorporating Tribal Perspectives* (August 2011), 11, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045669.pdf [hereinafter NCAI, *Natural Resource Conservation Policy*].

Coupled with the discrimination that Native Americans face in many aspects of life⁹³⁷—housing,⁹³⁸ education,⁹³⁹ employment,⁹⁴⁰ and access to voting⁹⁴¹—perpetual underfunding at the federal level presents significant barriers for economic development and for Native American self-determination. All of these factors are connected, and an assessment of equity and opportunity should intentionally focus on this connectedness, as in the following example:

[I]ncreased business opportunities on the reservation mean that more dollars are generated and circulated on the reservation. More income can support more attractive housing choices, which will in turn entice higher-skilled, higher-paid workers to live or remain on the reservation. Living closer to work will free up time and income that previously went to long, expensive commutes. A healthy, educated, well-trained workforce will better start, staff[,] and support new and existing businesses. Investments into the preservation and teaching of tribal knowledge, language, and culture will open up new employment opportunities (language teachers, community health workers, archivists/librarians, counselors, landscape architects, artists, housing developers, and others) and strengthen Native people's ties to the land and to the reservation community.⁹⁴²

⁹³⁷ National Public Radio, Robert Wood Johnson Foundation, Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of Native Americans* (November 2017), <https://www.npr.org/documents/2017/nov/NPR-discrimination-native-americans-final.pdf>.

⁹³⁸ The Urban Institute, *Discrimination in Metropolitan Housing Markets: Phase 3—Native Americans* (September 2003), <https://www.urban.org/sites/default/files/publication/42796/900834-Discrimination-in-Metropolitan-Housing-Markets.PDF>; see also Charles T. Abourezk, Chief Judge for the Oglala Sioux Tribe, Testimony, South Dakota SAC, *July 24 Briefing Transcript*, p. 73.

⁹³⁹ Adrian Jawort, *ACLU Fights Native American Discrimination*, INDIAN COUNTRY TODAY, Feb. 25, 2017,, <https://indiancountrymedianetwork.com/news/native-news/aclu-fights-native-american-discrimination/>; Joe Heim, *Two Native American tribes allege discrimination in Montana schools*, THE WASH. POST, June 28, 2017, https://www.washingtonpost.com/local/education/two-native-american-tribes-allege-discrimination-in-montana-schools/2017/06/28/875172b0-582c-11e7-ba90-f5875b7d1876_story.html?utm_term=.1ce474ba46b1.

⁹⁴⁰ Algernon Austin, *Do Native Americans Face Discrimination in the Labor Market?* HUFFINGTON POST, Feb. 4, 2014, https://www.huffingtonpost.com/algernon-austin/do-native-americans-face- b_4339955.html; Algernon Austin, *Native Americans Are Less Likely to Be Employed Than Whites in Nearly Every State*, Economic Policy Institute, <https://www.epi.org/publication/native-american-white-jobs-gap/> (last accessed July 25, 2018); Graham Lee Brewer, *As Native Americans Face Job Discrimination, A Tribe Works To Employ Its Own*, NPR, Nov. 18, 2017, <https://www.npr.org/2017/11/18/564807229/as-native-americans-face-job-discrimination-a-tribe-works-to-employ-its-own>.

⁹⁴¹ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (September 2018), 95, 178–182, 185, 192–193, 216, 226, 229–230, 234, 278, 281–282, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [hereafter USCCR, *An Assessment of Minority Voting Rights Access*].

⁹⁴² Norris et al., *Strengthening the Pine Ridge Economy*, *supra* note 933, at 3.

Infrastructure and Economic Development

Trust Land

The Indian Reorganization Act (IRA) of 1934 authorized the Secretary of the Interior to acquire trust land for tribes and individual Native Americans.⁹⁴³ Currently, there are 56.2 million acres of land held in trust by the U.S. for Indian tribes and individuals, and there are approximately 326 Indian reservations in the U.S.⁹⁴⁴ Reservations are generally exempt from state jurisdiction, including taxation, unless otherwise authorized by Congress.⁹⁴⁵ Aside from reservations, there are:

- Allotted lands—remnants of reservations broken up during the federal allotment period during the late nineteenth and early twentieth centuries that were conveyed to members of affected tribes and held in trust by the federal government⁹⁴⁶
- Restricted status or restricted fee—when the land title is held by an individual Indian person or tribe and requires the Secretary of the Interior’s approval for habitation or use of land⁹⁴⁷
- State Indian reservations—lands held in trust by a state for Indian tribes, which are not subject to state property tax but are subject to state law⁹⁴⁸

Trust lands are officially owned by the federal government, but held in trust for Native American tribes who have rights to live on and develop the lands.⁹⁴⁹ The BIA Office of Trust Services oversees department activities related to the management and protection of trust and restricted land, including natural resources.⁹⁵⁰ One of the important functions of DOI is trust land acquisition, as it is “essential to tribal self-determination” to provide tribes with the ability to provide housing opportunities along with the ability to develop natural resources and feed tribal citizens.⁹⁵¹ DOI recently described the benefit to tribes from trust acquisitions as follows:

⁹⁴³ INDIAN REORGANIZATION ACT OF 1934 (IRA), Pub. L. No. 73-383, 48 Stat. 984, June 18, 1934, codified at 25 U.S.C. §§ 5101–5108. *See also* James Cason, Acting Deputy Secretary of the U.S. Dep’t of the Interior, testimony before the House Subcommittee on Indian, Insular and Alaska Native Affairs, July 13, 2017, <https://www.doi.gov/ocl/trust-land-acquisition>.

⁹⁴⁴ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Frequently Asked Questions,” <https://www.bia.gov/frequently-asked-questions> (last accessed July 25, 2018). *See also supra* notes 921-928 (discussing history of and ongoing obligations under self-determination and the federal trust relationship).

⁹⁴⁵ *Ibid.*

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*

⁹⁴⁹ *Ibid.*

⁹⁵⁰ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Office of Trust Services,” <https://www.bia.gov/bia/ots> (last accessed July 25, 2018).

⁹⁵¹ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Fee to Trust,” <https://www.bia.gov/bia/ots/fee-to-trust> (last accessed July 25, 2018); *see also* 25 C.F.R. § 151.3(a)(3) (“[L]and may be acquired for a tribe in trust status . . .

First, restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories. Second, the connectivity that occurs when land is placed into trust enables tribes to foster economic potential. From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportunities, and identify the best possible means to use and sell available natural resources.⁹⁵²

The Obama administration made a commitment to provide for Indian Country and placed over 542,000 acres of land into trust for tribes across the nation.⁹⁵³ NCAI has pointed out, however, that:

Of the 90 million acres of tribal land lost through the allotment process, only about eight percent has been reacquired in trust status since the IRA was passed in 1934. Still today, many tribes have no land base, and many tribes have insufficient lands to support housing and self-government. And the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that, for most tribes, far more Indian land passes out of trust than into trust each year.

Most tribal lands will not readily support economic development. Many reservations are located far away from the tribe's historical, cultural, and sacred areas, as well as from traditional hunting, fishing, and gathering areas. NCAI will continue to advocate strongly for the restoration of tribal lands.⁹⁵⁴

There are additional challenges and complexities to trust land acquisitions.⁹⁵⁵ In *Carcieri v. Salazar*, the Supreme Court ruled that the IRA did not apply to the Narragansett Indian Tribe who were not federally acknowledged until 1983, almost 50 years after the Act took effect.⁹⁵⁶ In an opinion written by Justice Thomas, the Court held that although the Secretary of the Interior had asserted authority to take land for trust for Indians under the Indian Reorganization Act of 1934, DOI could not take the lands into trust because the Narragansett Indian Tribe was not a “[member] of any recognized Indian tribe now under Federal jurisdiction” when the Act was originally passed

[w]hen the Secretary [of DOI] determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.”).

⁹⁵² James Cason, Acting Deputy Secretary of the U.S. Department of the Interior, testimony before the House Subcommittee on Indian, Insular and Alaska Native Affairs, July 13, 2017, <https://www.doi.gov/ocl/trust-land-acquisition>.

⁹⁵³ Alysa Landry, *Obama Sets New Standard With Land Into Trust*, INDIAN COUNTRY TODAY, Nov. 24, 2016, <https://indiancountrymedianetwork.com/news/politics/obama-sets-new-standard-with-land-into-trust/>.

⁹⁵⁴ National Congress of American Indians, “Trust Land,” <http://www.ncai.org/policy-issues/land-natural-resources/trust-land> (last accessed July 25, 2018).

⁹⁵⁵ See, e.g., *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), cert. denied sub nom. *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017). See also Heidi McNeil Staudenmaier & Celene Sheppard, *Impact of the Carcieri Decision*, WASH. STATE BAR INDIAN L. SEC. NEWS, <http://apps.americanbar.org/buslaw/committees/CL430000pub/newsletter/200905/staudenmaier.pdf> (last accessed Sept. 11, 2018). See also *supra* notes 788–791 (discussing termination of tribes in the 1950s, followed by later restoration in the 1970s).

⁹⁵⁶ 555 U.S. 379, 382–83 (2009).

in 1934.⁹⁵⁷ Following the Supreme Court’s decision, the Solicitor of the Interior issued an M-Opinion setting out the kinds of evidence DOI would consider in order for a tribe to “under federal jurisdiction” in 1934.⁹⁵⁸ In 2016, the Court of Appeals of the District of Columbia Circuit upheld the Solicitor’s interpretation and understood the *Carciari* decision not to have ruled on the exact meanings of “recognized” and “under federal jurisdiction.”⁹⁵⁹ The Cowlitz Tribe had its lands and rights restored through a process in which the Indian Claims Commission “concluded that the federal government had ‘deprived the Cowlitz Tribe of its aboriginal title as of March 20, 1863, without the payment of any consideration therefore,’ . . . [and] it was not until years later in 2002 that the Tribe gained federal acknowledgement.”⁹⁶⁰ Because the tribe’s rights had been restored, the D.C. Circuit held that DOI could take the land into trust.⁹⁶¹

In addition to these complexities, there has recently been a push by Trump administration advisors to privatize land ownership on Indian reservations.⁹⁶² There are disputes about whether privatization is wise, given the patchwork of tribal land and land ownership considerations.⁹⁶³ Terry Anderson, the William A. Dunn distinguished senior fellow and former president and executive director of the Property and Environmental Research Center, in testimony before the Commission in 2016, argues that the decision whether to privatize land should be left to the tribes:⁹⁶⁴

My point is not that privatization is the answer. My point is that Indian control of the reservation and the lands therein is important. The reservations are not treated like counties. They are not sovereign governments. They are riddled with holes where these private lands exist. And those are taxed by the states or the counties, not by the tribes. They should be put under the jurisdiction of the tribes.

If tribes wish to increase the amount of private lands on their reservation[s], that should be their decision, not the decision of the federal government as it was with the Dawes Act. So, I emphatically am not saying that we should return to the Dawes

⁹⁵⁷ *Id.*

⁹⁵⁸ Solicitor, Hillary Thompkins, to Secretary of the Interior, Sally Jewell, “*The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act*,” M-37029, March 12, 2014.

⁹⁵⁹ *Confederated Tribes of the Grand Ronde Cmty.*, 830 F.3d at 556.

⁹⁶⁰ *Id.* at 557 (internal citations omitted).

⁹⁶¹ *Id.* at 570.

⁹⁶² Valerie Volcovici, *Trump advisors aim to privatize oil-rich Indian reservations*, Reuters, Dec. 5, 2016, <https://www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1>. See also Kelli Mosteller, *For Native Americans, Land Is More Than Just the Ground Beneath Their Feet*, THE ATLANTIC, Sept. 17, 2016, <https://www.theatlantic.com/politics/archive/2016/09/for-native-americans-land-is-more-than-just-the-ground-beneath-their-feet/500462/> [hereinafter Mosteller, *Land Is More Than Just the Ground Beneath Their Feet*].

⁹⁶³ *Ibid.*

⁹⁶⁴ Terry Anderson, William A. Dunn Distinguished Senior Fellow, former President and Executive Director of Property and Environmental Research Center (PERC), and John and Jean De Nault Senior Fellow at the Hoover Institution, Stanford University, Testimony, *Briefing Transcript*, pp. 61–62.

Act. What I am saying is that tribes should have more sovereign authority over the lands within the boundaries of those reservations.⁹⁶⁵

Some believe strongly that the policy of holding Native lands in trust has perpetuated the economic devastation and social inequity throughout Indian Country, and that a redistribution of lands held by tribes to individuals is key.⁹⁶⁶ However, there is concern among advocates that privatization of lands can undermine cultural preservation of tribal lands, and protecting the tribal lands can contribute to greater prosperity in Indian Country.⁹⁶⁷ Dante Desiderio, executive director of the Native American Finance Officers Association, asserted in his 2016 testimony before the Commission:

[W]henver somebody starts talking about breaking the trustee relationship [and] their view of what success would be like in Indian Country, instead of our cultural view of success, and then talking about private ownership, we rightfully get concerned. We've seen this experiment before, and it hasn't played out too well for Indian Country.

[On t]he [subject of] private land ownership, I think we are working on ways to try to have that sort of vested ownership through secure transactions rather than going into the same experiment of private ownership [used in the past].

So, on some of these things when you're looking at separation of government . . . it isn't working [well] in all tribes, but most tribes are going down the path of creating their own governance and own economic systems that work for them. So there isn't one size that fits all, and we have to keep that in mind when we're moving this forward.

One thing that I do want to add finally is that self-determination does work, self-governance does work when you're looking at having our own taxes. And we are sovereigns . . . just as other governments are. So we want to make sure and make that point.⁹⁶⁸

The Land Buy Back program is part of the settlement of *Cobell v. Salazar*, which settled the class-action claims of Native Americans who alleged that the U.S. government had mismanaged and incorrectly accounted for income from Indian trust assets.⁹⁶⁹ After years of litigation, among other provisions, the \$150 billion settlement allocated \$1.9 billion in federal funds to purchase back

⁹⁶⁵ Ibid. See also *supra* note 787 (discussing the Dawes Act of 1887).

⁹⁶⁶ Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC, July 30, 2016, <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>.

⁹⁶⁷ Mosteller, *Land Is More Than Just the Ground Beneath Their Feet*, *supra* note 962.

⁹⁶⁸ Dante Desiderio, Executive Director of Native American Finance Officers Association, Testimony, *Briefing Transcript*, pp. 63–65.

⁹⁶⁹ *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012).

fractional interest in trust land or restricted land at fair market value from willing sellers.⁹⁷⁰ Fractional interests in parcels of land had resulted from Indian trust land passing down through probate to numerous individual heirs according to state laws—instead of permitting Native Americans to provide their own form of inheritance of the land.⁹⁷¹ This resulted in some lands being unusable as there were reportedly up to 1,000 potential ownership claims.⁹⁷² Under the Trump Administration, it has been reported that DOI has devised a “revised strategy” concerning the Land Buy Back Program.⁹⁷³

Michael S. Black, then-Acting Assistant Secretary—Indian Affairs for DOI, testified before the Commission in 2016 that the Land Buy-Back Program had paid more than \$730 million to individual land owners, and had restored approximately 1.5 million acres of land in trust for tribal nations.⁹⁷⁴ The Trump Administration restructuring will reportedly drastically reduce the number of tribes that are able to benefit from the program: although there are some 60 tribes that have not had opportunity to benefit yet, it would extend the program to only 20 tribes, 12 of which had already received offers under the program. “The [Trump-era] move summarily removes more than 50 tribes from having a chance to benefit from the program,” according to the Huffington Post.⁹⁷⁵ There was reportedly no tribal consultation before DOI announced the new policy.⁹⁷⁶

Regarding these and other trust assets from the land originally taken from Native Americans,⁹⁷⁷ BIA has requested a total of \$105.5 million for real estate trust services for FY 2019, which is a \$16.8 million (13.7%) decrease from the FY 2018 CR that allocated \$122.2 million, and a \$17.0

⁹⁷⁰ *Id.* at 914–15; *see also Cobell v. Salazar*, Case No. 1:96-CV-01285-JR (D.C. Cir. 2009), https://naturalresources.house.gov/uploadedfiles/cobellsettlementagreement_120709.pdf (detailing the signed settlement agreement); Claims Resolution Act, Pub. L. No. 111-291, 124 Stat. 3066, Dec. 8, 2010, codified at 25 U.S.C. § 162a, <https://www.gpo.gov/fdsys/pkg/PLAW-111publ291/pdf/PLAW-111publ291.pdf> (which “authorized, ratified, confirmed, and funded” the *Cobell* settlement); U.S. Dep’t of the Interior, “Land Buy-Back Program for Tribal Nations,” <https://www.doi.gov/buybackprogram> (last accessed July 26, 2018); Chris D’Angelo, *A Hard-Fought Victory To Restore Tribal Land Faces New Threat In Trump Era*, HUFFINGTON POST, July 25, 2017, https://www.huffingtonpost.com/entry/ryan-zinke-interior-tribal-land-program_us_5985042ee4b08b75dcc7043a [hereinafter D’Angelo, *A Hard Fought Victory*]; Black Testimony, *Briefing Transcript*, p. 134 (praising Land Buy-Back Program for tribal nations).

⁹⁷¹ *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 237 (1997) (decrying the “extreme fractionation problem attending a century-old allotment policy that yielded multiple ownership of single parcels of Indian land” as “disastrous” for Native Americans (internal citations omitted)); *see also* S. REP. 108-264, 1 (Senate report explaining the proposed intent of the American Indian Probate Reform Act of 2004, at 25 U.S.C. § 2201, “to address the ever-worsening administrative and economic problems associated with the phenomenon of fractionated ownership of Indian lands” by creating “a new, uniform Federal probate code applicable to such lands and to Indian trust funds.”).

⁹⁷² D’Angelo, *A Hard-Fought Victory*, *supra* note 970.

⁹⁷³ U.S. Dep’t of the Interior, “Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands,” July 31, 2017, <https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation>; D’Angelo, *A Hard-Fought Victory*, *supra* note 970.

⁹⁷⁴ Black Testimony, *Briefing Transcript*, p. 134.

⁹⁷⁵ D’Angelo, *A Hard-Fought Victory*, *supra* note 970.

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *See supra* notes 26–61 (regarding the legal origins of the federal trust relationship).

million (13.8%) decrease from the \$123 million allocated in FY 2017.⁹⁷⁸ This amount is separate from the funds allocated for the Land Buy-Back Program. See also Appendix G, “Funding for Native American Economic Development.”

Physical Infrastructure

There is a strong link between physical infrastructure and economic development.⁹⁷⁹ Physical infrastructure refers to the basic physical structures required for an economy to survive, and can include transportation networks, telecommunications, electrical power systems, and water and sewage lines. Underinvestment in physical infrastructure manifests in broken roads and bridges, inadequate public transit, lack of access to broadband internet services, unsafe drinking water, and inefficient energy sources.⁹⁸⁰ The NCAI Policy Research Center found that underinvestment in physical infrastructure not only harms “the social, physical, and mental wellbeing” of tribal communities, but also impairs the ability of tribal communities to thrive.⁹⁸¹

Indian land is predominantly rural, and spans more than 100 million acres, spread across 34 states in America.⁹⁸² Indian Country faces unique infrastructure challenges due to its largely rural location.⁹⁸³ There are severe deficiencies in the physical infrastructure of Indian Country, including in water and sanitation, utilities, telecommunications, and transportation systems.⁹⁸⁴ This can lead to diminished opportunities for financing and development, as addressing inadequate physical infrastructure requires a higher level of developer investment.⁹⁸⁵

Physical infrastructure projects in Indian Country have been consistently underfunded for decades, leaving the physical infrastructure needs unmet as compared with the rest of the nation.⁹⁸⁶ NCAI found that the “chronic underinvestment and the growing backlog of critical infrastructure projects not only negatively impacts the social, physical, and mental wellbeing of Tribal and neighboring communities, it hampers the ability of Tribal Nations to fully leverage their economic potential and the ability of their citizens to fully participate in the American economy.”⁹⁸⁷ The American

⁹⁷⁸ NCAI, *Analysis of the FY 2019 President’s Budget*, *supra* note 656, at 5.

⁹⁷⁹ NCAI Policy Research Center, *Physical Infrastructure and Economic Development*, May 2007, 2, http://www.ncai.org/attachments/PolicyPaper_OAYcOPFdNTxazqxAOZGIImEXOHFGoAnZIOepYZcUnSqRGgoWUTLp_Jojola%20and%20Gover%20FINAL%20FORMATTED%205.8.07.pdf [hereinafter NCAI, *Physical Infrastructure and Economic Development*].

⁹⁸⁰ NCAI, *Tribal Infrastructure*, *supra* note 936, at 4–10.

⁹⁸¹ *Ibid.*, 3–4. See also Governor Mark W. Olson, *Overcoming Challenges and Seizing Opportunities in Indian Country* (remarks delivered at the Federal Reserve Board, Sovereign Lending Conference, Scottsdale, AZ, Nov. 18, 2002), <https://www.federalreserve.gov/boarddocs/speeches/2002/20021118/default.htm> [hereinafter Olson, *Overcoming Challenges*].

⁹⁸² NCAI, *Tribal Infrastructure*, *supra* note 936, at 3.

⁹⁸³ *Ibid.*

⁹⁸⁴ Olson, *Overcoming Challenges*, *supra* note 981.

⁹⁸⁵ *Ibid.*; NCAI, *Tribal Infrastructure*, *supra* note 936, at 4–16.

⁹⁸⁶ NCAI, *Tribal Infrastructure*, *supra* note 936, at 3.

⁹⁸⁷ *Ibid.*, 4.

Recovery and Reinvestment Act (2009)⁹⁸⁸ provided approximately \$3 billion in one-time funding specifically allocated for tribal communities, intended for various infrastructure improvement projects.⁹⁸⁹ However, the significant funding deficit before and since then has hindered the advancement of a number of shovel-ready infrastructure projects in Indian Country, some of which have been shovel-ready for years, if not decades.⁹⁹⁰

⁹⁸⁸ American Recovery and Reinvestment Act (ARRA or Recovery Act), Pub. L. No. 111-5, 123 Stat. 115, Feb. 2009.

⁹⁸⁹ NCAI, *Investing in Tribal Governments: An Analysis of Impact and Remaining Need under the American Recovery and Reinvestment Act* (2010), 9, <http://www.ncai.org/resources/ncai-publications/investingintribalgovernmentsananalysisoffarra.pdf> (setting forth tribal-specific funding and general infrastructure appropriations potentially available to tribes) [hereinafter NCAI, *Investing in Tribal Governments*]. See also Desiderio Testimony, *Briefing Transcript*, pp. 29–31. Regarding the effect of a stimulus, Desiderio reflected:

But when you look at tribal communities, and especially as Chairman Castro pointed out in Wind River, you see unemployment as high as 50 percent. The average of over 23 percent puts us in an unemployment rate that is equal to the Depression, not the recessionary rate.

So, what worked for the federal government in trying to address this? Our rallying cry became, “[W]e can’t afford to have the rest of America recover without Indian country this time.”

So, we really worked hard to try to make sure that Indians were included, or tribal governments were included, in the Recovery Act.

And the reason this is important, [was], we knew that the first Bush administration stimulus of getting money out to individuals would be short-lived, so we really started to work immediately and started to reframe the conversation on includ[ing] tribes as other governments in any kind of stimulus.

And when Congress did that they allocated about \$3 billion in funding. This is twice the actual BIA budget. So what happens when you have funding three times the normal levels in Indian country?

So, a lot happened. We really had a lot of impact from the recession. Timber industries and housing-related industries were down. Construction was down. Gaming went down for the first time with consumer spending. So did tourism and the arts.

When that spending [allocation] came in, projects were being developed, healthcare was being funded, health facilities were being built, schools were being built. But this was all short-lived.

In fact, that stimulus, that direct stimulus actually worked for Indian country, and we saw what would happen if Indian country was funded at not an adequate level, but an increased level.

So, we have the idea here that stimulus works, and we should really start thinking about what a stimulus would look like for Indian country.

And also we keep talking about getting increases in funding. I had a conversation about the budget yesterday with the Indian Affairs Committee.

But we’re not even close to meeting the need for Indian country. So, three times the amount actually gives people hope for the future.

⁹⁹⁰ NCAI, *Investing in Tribal Governments*, *supra* note 989, at 2 (“shovel-ready” is the state in a building project where the planning has advanced sufficiently so that construction can begin within a short period of time).

Role of Planning in Physical Infrastructure

The role of infrastructure planning, as well as the assessment of future needs, are critical for the progression of development in a community.⁹⁹¹ Unlike mainstream communities in America, the planning process in Indian Country has historically been unstructured, and has been the product of a “patchwork” of projects through sporadic and varying federal funding.⁹⁹² Furthermore, these federally-funded projects are not always culturally relevant to the tribal communities at large, possibly because the Tribal Nations are often left out of the planning process of larger-scale federal infrastructure projects near tribal lands.⁹⁹³

As a result of industrialization and rapid urban growth, planning was introduced in the U.S. in the early twentieth century as a way to maintain public health.⁹⁹⁴ Urban land parcels were organized in zones categorized by specific land-use activities, which also matched the infrastructure to the type of land-use activities being developed.⁹⁹⁵ In rural areas, the development of open lands went through a surveying process prior to being divided up into “sections.”⁹⁹⁶ In Indian Country, sections of land were divided and distributed accordingly, and tribal lands acquired basic facilities and infrastructure through federal education and public health initiatives.⁹⁹⁷

In the mid-twentieth century, tribal governments started to become officially involved in the planning process during a time of targeted planning reform geared towards meeting the demands of rapid community growth and development.⁹⁹⁸ Regional planning and coordination across jurisdictions became the method of connecting metropolitan regions to spawn community and economic development.⁹⁹⁹ Because the economic base of many tribal nations was fundamentally linked to natural resources, conventional planning was mixed and uneven. According to a policy report commissioned by the NCAI, many plans “were not grounded in the immediacy of meeting community needs, but were driven by unrealistic assumptions of social behavior modeled after non-native approaches to economic development.”¹⁰⁰⁰

The Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act) allowed tribal governments to take over their own planning efforts and assume or delegate planning authority on par with surrounding local governments.¹⁰⁰¹ As more tribes started operating

⁹⁹¹ NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 4.

⁹⁹² *Ibid.*

⁹⁹³ *Ibid.* See also NCAI, *Tribal Infrastructure*, *supra* note 936, at 4.

⁹⁹⁴ NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 4.

⁹⁹⁵ *Ibid.*, 5.

⁹⁹⁶ *Ibid.*

⁹⁹⁷ *Ibid.*

⁹⁹⁸ *Ibid.*

⁹⁹⁹ *Ibid.*

¹⁰⁰⁰ *Ibid.*, 6; see also Richmond L. Clow and Imre Sutton, *Trusteeship in Change: Toward Tribal Autonomy in Resource Management* (University of Colorado Press, 2001), at 308.

¹⁰⁰¹ 25 U.S.C. § 5321; see also NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 7.

their own health, government, and education services, new local jobs became available and Native Americans were enticed to return back to their communities, triggered by a sharp increase of infrastructure needs in Indian Country.¹⁰⁰² Casino gaming also boosted some tribes' ability to leverage federal trust projects.¹⁰⁰³ In contrast, other tribes continued to depend on federal trust allocations and struggled with meeting basic social needs.¹⁰⁰⁴

NCAI contends that tribal communities should have a greater degree of input in the early planning stages of large-scale federal infrastructure-permitting projects near tribal lands.¹⁰⁰⁵ Tribal governments have consistently requested a greater degree of flexibility and control over the decision-making process and greater self-governance in order to better meet the needs of their citizens.¹⁰⁰⁶ The modernization of the regulations and statutes to allow tribal nations a greater degree of self-governance can ultimately allow tribal nations to better meet the needs of their citizens and foster economic development in Indian Country, while still protecting their natural resources.¹⁰⁰⁷

Transportation

Transportation infrastructure is critically important both to the ability of tribal governments to provide citizens with essential services, and the overall economic development of Indian Country.¹⁰⁰⁸ According to the National Tribal Transportation Facility Inventory (Tribal Facility Inventory), there are approximately 161,000 miles of existing and proposed roads in Indian Country that are eligible for federal funding.¹⁰⁰⁹ There are 13,650 miles of roads and trails that are owned and maintained by Indian tribes (93 percent of which are unpaved), and about 29,400 miles of roads owned and maintained by BIA (75 percent of which are unpaved). These roads are some of the most “underdeveloped, unsafe, and poorly maintained road networks in the nation.”¹⁰¹⁰ Additionally, there is a severe lack of public transportation in Indian Country.¹⁰¹¹ U.S. Senator

¹⁰⁰² NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 7.

¹⁰⁰³ *Ibid.*; see also Theodore S. Jojola and Paul Ong, “Indian Gaming as Community Economic Development,” in *Jobs and Economic Development in Minority Communities*, ed. Paul Ong and Anastasia Loukaitou-Sideris (Philadelphia: Temple University Press, 2006).

¹⁰⁰⁴ NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 7.

¹⁰⁰⁵ NCAI, *Tribal Infrastructure*, *supra* note 936, at 4.

¹⁰⁰⁶ *Ibid.*, 5.

¹⁰⁰⁷ *Ibid.*, 4–5.

¹⁰⁰⁸ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 126.

¹⁰⁰⁹ Government Accountability Office, *Tribal Transportation: Better Data Could Improve Road Management and Inform Indian Student Attendance Strategies*, (May 2017), 8, <https://www.gao.gov/assets/690/684809.pdf> [hereinafter GAO, *Tribal Transportation*].

¹⁰¹⁰ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 126.

¹⁰¹¹ U.S. Senator Byron L. Dorgan, Testimony before the Senate Committee on Indian Affairs, July 12, 2007, <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg37860/html/CHRG-110shrg37860.htm>.

Byron L. Dorgan, Chairman of the U.S. Senate Committee on Indian Affairs, indicated during a hearing on transportation issues in Indian Country in July 2007:

A transportation system is the lifeline for any community, making it possible for your children to go to school, families to travel and receive health care, attend jobs, get us readily to work. So a good transportation system allows the community to grow economically, and something that most communities throughout this Country take routinely for granted.¹⁰¹²

Unfortunately, with dangerous conditions due to impassible roads and a lack of public transportation options, Native Americans encounter issues traveling to and from a job, traveling to school,¹⁰¹³ accessing health care and emergency services,¹⁰¹⁴ and even accessing the ballot box,¹⁰¹⁵ all of which create barriers to economic development and growth in Indian Country.¹⁰¹⁶

The 29,400 miles of BIA roads (which include 900 bridges) are maintained through the Road Maintenance Program, a federal transportation program funded and authorized under DOI.¹⁰¹⁷ This maintenance program is critical to the transportation infrastructure in Indian Country, yet there are major funding shortfalls that ultimately have had consequences for the integrity of these roads in Indian Country.¹⁰¹⁸ Michael S. Black then Acting Assistant Secretary of Indian Affairs for DOI, in his February, 2016 testimony before the Commission, indicated that infrastructure was a “critical component for economic development in Indian Country.”¹⁰¹⁹ He went on to say:

¹⁰¹² Ibid.

¹⁰¹³ Alys Landry, “Navajo Nation Bus Routes Are Dangerous,” INDIAN COUNTRY TODAY, Jan. 17, 2017, <https://indiancountrymedianetwork.com/education/native-education/navajo-nation-bus-routes-dangerous/>.

¹⁰¹⁴ Jerry Gidner, Deputy Bureau Director for Indian Services in the Bureau of Indian Affairs, U.S. Department of the Interior, testimony before the Senate Committee on Indian Affairs, July 12, 2007, <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg37860/html/CHRG-110shrg37860.htm>.

¹⁰¹⁵ Natalie Landreth, senior staff attorney at the Native American Rights Fund, Written Statement for the U.S. Commission on Civil Rights, Feb. 2, 2018, at 5 (discussing voters not registering to vote or not voting because of transportation issues, lack of information, and stark infrequency of voter registration drives on reservations). The U.S. Commission on Civil Rights has also discussed how the lack of access to vehicles or public transportation can create significant impediments to voting in Indian Country. Polling places may be located many miles away from reservations and the socioeconomic disparities in access to transportation result in increased barriers to the ballot in some Native American Communities. See also USCCR, *An Assessment of Minority Voting Rights Access*, supra note 941, at 95, 178–182, 185, 192–193, 216, 226, 229–230, 234, 278, 281–282; Alaska Advisory Committee to the U.S. Commission on Civil Rights, *Advisory Memorandum on Alaska Native Voting Rights*, Mar. 27, 2018, at 7–10, <https://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf>.

¹⁰¹⁶ Jerry Gidner, Deputy Bureau Director for Indian Services in the Bureau of Indian Affairs, U.S. Department of the Interior, testimony before the Senate Committee on Indian Affairs, July 12, 2007, <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg37860/html/CHRG-110shrg37860.htm>.

¹⁰¹⁷ NCAI, *FY 2019 Budget Request*, supra note 218, at 126.

¹⁰¹⁸ Jerry Gidner, Deputy Bureau Director for Indian Services in the Bureau of Indian Affairs, U.S. Department of the Interior, testimony before the Senate Committee on Indian Affairs, <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg37860/html/CHRG-110shrg37860.htm>.

¹⁰¹⁹ Black Testimony, *Briefing Transcript*, pp. 150–151.

Road maintenance, which is the maintenance of the infrastructure out there, shows a significant shortfall in our funding based on our backlog of deficiencies that we have to correct out there. There again, we estimate somewhere around 45 to 50 cents on the dollar of what we actually need in our road maintenance programs.

Separately, the Department of Transportation funds the Tribal Transportation Program (TTP), which is meant to address the transportation needs of the Tribal governments in the U.S.¹⁰²⁰ In 2016, Congress authorized \$465 million in funding for TTP, with \$10 million increases each year to \$505 million in 2020.¹⁰²¹

In FY 2017, the BIA Road Maintenance program received about \$30.3 million in funding and in FY 2018 the program received a \$30.1 million annualized amount;¹⁰²² BIA estimates that the deferred maintenance costs, however, increased to over \$290 million for that same year.¹⁰²³ However, due to insufficient data—including the level of service and the cost of maintenance—BIA’s cost calculations may be unreliable, which could result in inaccurate estimates of maintenance needs.¹⁰²⁴ The President’s Budget for 2019 proposes \$28.3 million in funding for the Roads Maintenance program to support the maintenance of pavement, gravel, and earth roads, bridge maintenance, and snow and ice control.¹⁰²⁵ See Figure 5.2.

¹⁰²⁰ U.S. Department of Transportation, Federal Highway Administration, Office of Federal Lands Highway, *Tribal Transportation Program (TTP)*, <https://flh.fhwa.dot.gov/programs/ttp/> (last accessed July 26, 2018).

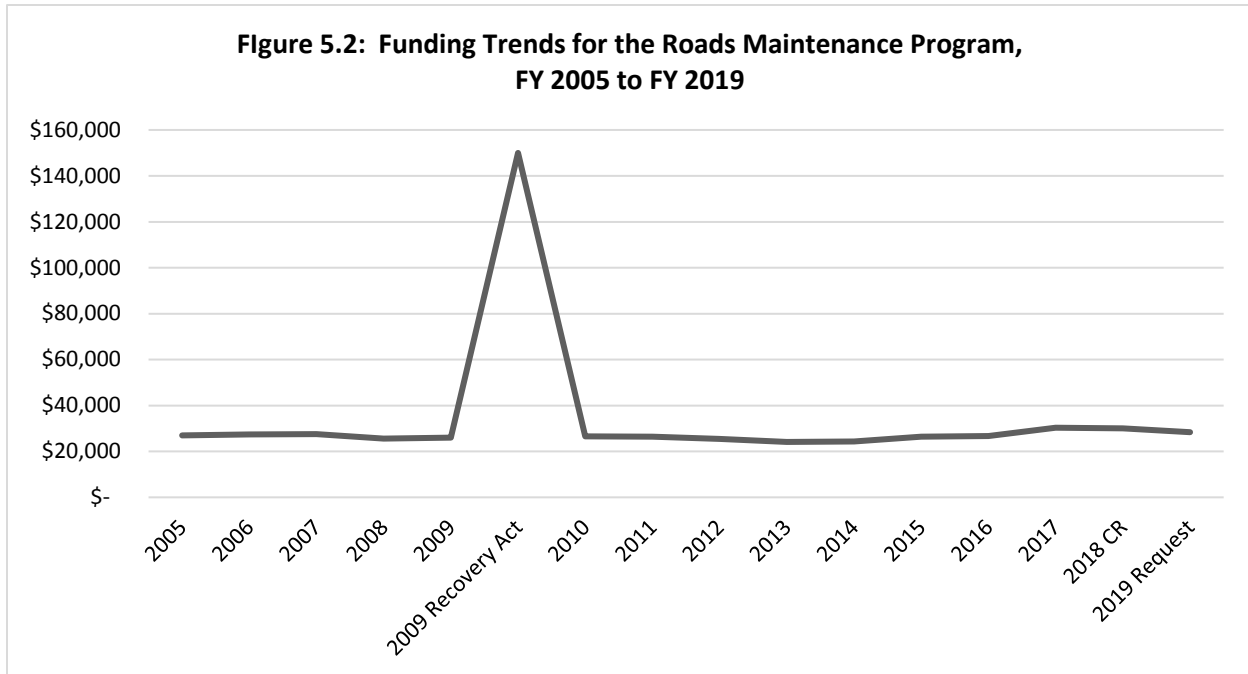
¹⁰²¹ Ibid.

¹⁰²² U.S. Dep’t of the Interior, *Fiscal Year 2019 The Interior Budget in Brief* (February 2018), BH-87, https://edit.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf.

¹⁰²³ NCAI, *FY 2019 Budget Request*, *supra* note 218, at 126.

¹⁰²⁴ GAO, *Tribal Transportation*, *supra* note 1009, at 19.

¹⁰²⁵ Office of the Assistant Secretary for Indian Affairs, “\$2.4 billion FY19 Indian Affairs Budget,” *supra* note 730.



Source: U.S. U.S. Department of the Interior, Bureau of Indian Affairs, Budget in Brief 2006–2019

For the remainder of the 2018 fiscal year, Congress also allocated \$177.4 million (a \$3.5 million increase from the prior year) from the federal Highway Trust Fund for maintaining highways and constructing new bridges, roads, and bike and pedestrian paths in Hawaii.¹⁰²⁶ Public transit systems in Hawaii received approximately \$7.6 million (a \$2.6 million increase from the prior year) for operation and capital costs.¹⁰²⁷

Utilities—Water, Sanitation, and Electricity

There are major disparities in the availability and quality of basic utilities in Indian Country as compared with the U.S. at large.¹⁰²⁸ NCAI reports that drinking water, sanitation, and electricity are all fundamental to the overall health of society, yet these basic needs are sometimes unmet in Indian Country.¹⁰²⁹ Although energy resources are rich in Indian Country, an estimated 14 percent of households in Indian Country have no access to electricity—ten times higher than the national average.¹⁰³⁰ Furthermore, telecommunications infrastructure in Indian Country is severely

¹⁰²⁶ U.S. Senator Brian Schatz, “Schatz—Federal Funding for Hawaii to Rise,” Mar. 22, 2018, <https://www.schatz.senate.gov/press-releases/schatz-federal-funding-for-hawaii-to-rise>.

¹⁰²⁷ Ibid.

¹⁰²⁸ NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 3.

¹⁰²⁹ Ibid.

¹⁰³⁰ Rocky Mountain Institute, “Native Energy: Rural Electrification on Tribal Lands,” June 24, 2014, https://www.rmi.org/news/blog_2014_06_24_native_energy_rural_electrification_on_tribal_lands/ (last accessed July 26, 2018) [hereinafter Rocky Mountain Institute, “Native Energy”]; NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 4.

lacking.¹⁰³¹ There is a problematic utility infrastructure in Indian Country due in part to the locations of many tribal lands, but also from an unmet funding need at the federal level.¹⁰³²

In the past few years, there have been certain initiatives to improve access to utilities and basic services. IHS and several other federal agencies have made a commitment to improving basic sanitation and access to safe drinking water in Indian Country, and have been striving to halve the number of homes without access by 2015.¹⁰³³ The President's FY 2019 budget requested \$102 million for the Sanitation Facilities Construction Program, which is responsible for environmental engineering and sanitation facilities to American Indians and Alaskan Natives, and provides many communities with safe drinking water and sanitation.¹⁰³⁴ It has reduced infant mortality rates and mortality rates for gastroenteritis and other environmentally related diseases by 80 percent since 1973.¹⁰³⁵ This amount is a \$1 million increase from the FY 2018 annualized amount of \$101 million.¹⁰³⁶

Since it is often cost-prohibitive to rely on existing utilities and services due to the lack of established infrastructure in remote Indian Country, many tribes have been beneficially exploring alternative and cost-effective energy options such as solar, wind, and other renewable energy sources.¹⁰³⁷ Because Indian Country is rich in renewable energy resources and infrastructure is lacking, self-reliant systems can thrive, and many have spurred tribally-headed enterprises and utility companies.¹⁰³⁸ Dante Desiderio noted in his testimony before the Commission:

Tribes are really far behind as far as infrastructure development. Telecommunications has the ability to leapfrog tribes in infrastructure by [enabling them to be] participating in the local and national and global economy immediately, regardless of their location[s] and regardless of how rural and remote they are.

¹⁰³¹ NCAI, *Tribal Infrastructure*, *supra* note 936, at 22–23.

¹⁰³² Rocky Mountain Institute, “Native Energy,” *supra* note 1030.

¹⁰³³ U.S. Dep’t of Health and Human Services, Indian Health Service, “IHS Signs Pact for Sanitation Development in Tribal Communities,” Apr. 9, 2013, <https://www.ihs.gov/newsroom/pressreleases/2013pressreleases/ihssignspactforsanitationdevelopmentintribalcommunities/>.

¹⁰³⁴ See U.S. Dep’t of Health and Human Services, Indian Health Service, Division of Sanitation Facilities Construction, <https://www.ihs.gov/dsfc/> (last accessed Sept. 21, 2018).

¹⁰³⁵ IHS, *FY 2019 Budget in Brief*, *supra* note 337, at 29.

¹⁰³⁶ *Ibid.*

¹⁰³⁷ Rocky Mountain Institute, “Native Energy,” *supra* note 1030; NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 13.

¹⁰³⁸ Rocky Mountain Institute, “Native Energy,” *supra* note 1030; NCAI, *Physical Infrastructure and Economic Development*, *supra* note 979, at 13. See also U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Renewable and Distributed Generation,” <https://www.bia.gov/as-ia/ieed/division-energy-and-mineral-development/renewable-energy> (last accessed Sept. 21, 2018).

So, [in considering] telecommunications as an infrastructure, I would suggest that we look at that funding and having that separate tribal funding to really get tribes up to speed. If we're not going to have enough funds to really develop the physical infrastructure, the telecommunications [infrastructure] is really the priority for getting tribes to participate in the global and national economy.¹⁰³⁹

NCAI has noted the “digital divide” in Indian Country, and while strides have been made in recent decades to bridge this divide at the federal level, tribal lands continue to be the most digitally disconnected areas of the U.S.¹⁰⁴⁰ NCAI—responding to a recent GAO report that examined federal efforts to increase broadband access to Indian Country¹⁰⁴¹—also notes residential access has not kept stride with the federal programs that have brought internet access to tribal schools, health care facilities, public safety facilities, and other government buildings.¹⁰⁴² Residential access has remained a challenge, as “the drive of ‘market forces’ have not connected the majority of tribal lands.”¹⁰⁴³ Jacqueline Pata of the National Congress of American Indians (NCAI) noted in her written testimony for the Commission:

Tribal communities still lag behind the rest of the United States in access to radio, wireless, and broadband services. This disparity underscores the critical opportunity to ensure the advancement of telecommunications access throughout Indian Country. According to recent data, only 2 out of 5 Native households on reservations have a computer and broadband compared to 73 percent of all US households. Only 4 out of 10 Native households had a computer and broadband, compared to 7 out of 10 among the total population.¹⁰⁴⁴

The GAO report on broadband access in Indian Country focused on two programs—one at the Federal Communications Commission (FCC), and one at the U.S. Department of Agriculture (USDA)—aiming to expand internet access on tribal lands.¹⁰⁴⁵ USDA’s Rural Utilities Service program focuses on the development of broadband infrastructure in rural communities through grant funding, and FCC’s E-rate program provides subsidies to make broadband access affordable

¹⁰³⁹ Desiderio Testimony, *Briefing Transcript*, pp. 94–95.

¹⁰⁴⁰ NCAI, testimony before the Senate Committee on Indian Affairs, May 11, 2016, http://www.ncai.org/attachments/Testimonial_NnJjwqIqVQtORsqZICOFgkIArWRSrowmgyamZirATFysMdhQIKf_05.11.2016_SCIA_GAO%20Report_Telecom.pdf.

¹⁰⁴¹ U.S. Government Accountability Office, *Telecommunications: Additional Coordination and Performance Measurement Needed for High-Speed Internet Access Programs on Tribal Lands* (Jan. 2016), 1, <https://www.gao.gov/assets/680/674906.pdf> [hereinafter GAO, *Telecommunications*].

¹⁰⁴² NCAI, testimony before the Senate Committee on Indian Affairs, *supra* note 1040, at 2.

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ NCAI Statement, *supra* note 46, at 5.

¹⁰⁴⁵ GAO, *Telecommunications*, *supra* note 1041, at 1. *See also* Jacqueline Pata, Executive Director of the National Congress of American Indians, Testimony, *Briefing Transcript*, p. 55. Ms. Pata noted in her oral testimony before the Commission, “So, for example, I’ll use the FCC and cell tower placements where an industry had a great overlay over Indian Country because of course, unfortunately, some of the highest peaks in America where the best placements for cell towers are, also [are] the most culturally significant places to Indian Country. So we knew that we needed to have a communication where we could understand each other. And we were able to devise a system with the FCC that made sense.”

for education.¹⁰⁴⁶ GAO noted that these programs are important to improving broadband access to tribal lands, but could be better structured to maximize their efforts.¹⁰⁴⁷ The report found a lack of interagency coordination between FCC and USDA on training and outreach to tribes. The FCC, moreover, had not established performance measures on improving internet availability, and without such measures, their ability to track outcomes was impaired.¹⁰⁴⁸ The report also noted that the FCC data quality could be improved, as the E-rate application did not define “tribal.”¹⁰⁴⁹ Because not all Native American recipients self-identify as “tribal,” it is difficult to measure the impact on tribal lands.¹⁰⁵⁰

The President’s FY 2019 Budget requested a total of \$690 million for nationwide USDA telecommunications programs, including Treasury loans and FFB loans.¹⁰⁵¹ The total FY 2019 requested amount for the USDA telecommunications programs equals the total FY 2017 appropriated amount and the total annualized FY 2018 amount of \$690 million.¹⁰⁵²

In 2010, the FCC released the National Broadband Plan, which focused on initiatives to spur economic growth, job creation, and make advances in education, health care, homeland security, and other areas.¹⁰⁵³ Through a recommendation from the National Broadband Plan, the Office of Native Affairs and Policy was established with the goal of helping improve the level of broadband telecommunications service throughout Indian Country.¹⁰⁵⁴ When Office of Native Affairs and Policy was created in 2010, it did not have dedicated funding. This came with the passage of the FY 2014 Omnibus spending bill, which granted it \$300,000 to support tribal consultation and training on broadband.¹⁰⁵⁵ NCAI has recommended that the Office of Native Affairs and Policy receive a permanent fixed annual appropriation of \$500,000 in order to “facilitate meaningful and productive consultations with tribal governments and support the hiring of additional staff.”¹⁰⁵⁶

¹⁰⁴⁶ U.S. Dep’t of Agriculture, “Rural Utilities Service,” <https://www.rd.usda.gov/about-rd/agencies/rural-utilities-service> (last accessed July 26, 2018); Federal Communications Commission, “E-Rate—Schools & Libraries USF Program,” <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program> (last accessed July 26, 2018).

¹⁰⁴⁷ GAO, *Telecommunications*, *supra* note 1041, at 29.

¹⁰⁴⁸ *Ibid.*, 30.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ U.S. Department of Agriculture, *Fiscal Year 2019 Budget Summary*, 35, <https://www.usda.gov/sites/default/files/documents/usda-fy19-budget-summary.pdf>.

¹⁰⁵² *Ibid.*

¹⁰⁵³ Federal Communications Commission, “National Broadband Plan,” <https://www.fcc.gov/general/national-broadband-plan> (last accessed July 26, 2018).

¹⁰⁵⁴ Federal Communications Commission, “Native Nations,” <https://www.fcc.gov/general/native-nations> (last accessed July 26, 2018).

¹⁰⁵⁵ National Congress of American Indians, testimony before the Senate Committee on Indian Affairs, *supra* note 1040, at 6.

¹⁰⁵⁶ *Ibid.*

However, NCAI noted the FCC has “previously failed to fully use the \$300,000 appropriated by Congress for Indian Country in recent years.”¹⁰⁵⁷

There are a number of barriers to expanding broadband access in Indian Country. Most internet infrastructure in the U.S. is privately owned and operated, and companies generally calculate whether or not to invest in extending broadband lines to communities based on their projected ability to cover costs through subscriptions and earn a profit.¹⁰⁵⁸ Extending broadband access in remote tribal areas typically comes at a higher cost, and can be cost prohibitive due to the high level of poverty among Native Americans.¹⁰⁵⁹ These barriers create disparities in internet access across households, which can exacerbate existing income, educational, and health disparities for Native Americans as they have less access to educational, health, and career-related resources as compared to other demographic groups.¹⁰⁶⁰

Several lawmakers have called on the Trump administration to invest in broadband infrastructure to provide high-speed internet to all Americans to bolster economic growth, noting that “high-speed internet is a prerequisite for economic inclusion and those without access are unfairly disadvantaged.”¹⁰⁶¹ Legislation was introduced in December 2017 to improve broadband connectivity in Indian Country. U.S. Senators Martin Heinrich (D-NM) and Dean Heller (R-NV) introduced the Tribal Connect Act of 2017, which aimed at increasing access to the E-rate program, a discount program to provide eligible public schools and libraries with affordable broadband and telecommunications services.¹⁰⁶² Senator Heller highlighted the critical need for connectivity for

¹⁰⁵⁷ Ibid. See also *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 115th Cong. (2017), Response to Written Questions Submitted by Hon. Tom Udall to Hon. Ajit Pai, Mar. 8, 2017, at 111, <https://www.gpo.gov/fdsys/pkg/CHRG-115shrg28380/pdf/CHRG-115shrg28380.pdf>. Regarding the \$300,000 in funding:

Question 11: In 2010, then FCC Chairman Julius Genachowski stood up the Office of Native Affairs and Policy (ONAP). This tribal liaison office is vital for ensuring robust tribal consultation and better input from tribes on important FCC actions that impact them. So I am very disappointed that the FCC did not provide ONAP even the modest \$300,000 in funding that Congress directed for tribal consultation in Fiscal Years 2015 and 2016. Will you assure me that FCC will not repeat this mistake for the current fiscal year?

Answer: As head of the agency, I take my responsibility for Tribal consultation seriously, and I will ensure that the agency allocates the resources it needs to fulfill that engagement responsibility.

¹⁰⁵⁸ U.S. Congress Joint Economic Committee, *America’s Digital Divide* (Sept. 2017), 3, https://www.jec.senate.gov/public/_cache/files/ff7b3d0b-bc00-4498-9f9d-3e56ef95088f/the-digital-divide-.pdf [hereinafter U.S. Congress Joint Economic Committee, *America’s Digital Divide*].

¹⁰⁵⁹ Ibid., 4; GAO, *Telecommunications*, *supra* note 1041, at 1.

¹⁰⁶⁰ U.S. Congress Joint Economic Committee, *America’s Digital Divide*, *supra* note 1058, at 4.

¹⁰⁶¹ U.S. Senator Maria Cantwell, “Cantwell, Murray Call on Trump to Invest in Critical Broadband Infrastructure; Senators: All Americans need access to high-speed internet to spur economic growth,” Feb. 6, 2017, <https://www.cantwell.senate.gov/news/press-releases/cantwell-murray-call-on-trump-to-invest-in-critical-broadband-infrastructure>.

¹⁰⁶² Native News Online, *Legislation Introduced to Increase High-Speed Internet Access in Indian Country*, Dec. 10, 2017, <https://nativenewsonline.net/currents/legislation-introduced-increase-high-speed-internet-access-indian-country/>; see also S. 2205, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2205>.

tribal communities, stating, “our legislation aims to bring broadband into more tribal communities not only because it will empower these communities and their students to thrive in the 21st century, but also because internet access is essential to the economic success of our localities, our state[s], and our country.”¹⁰⁶³ This legislation would invest \$100 million in establishing a tribal E-rate pilot program to expand eligibility to more Tribal libraries, as these libraries are often the only way for Native communities to access free internet. Eighty-five percent of Tribal libraries, however, are not currently eligible to receive E-rate funding because of strict, intricate requirements for eligibility.¹⁰⁶⁴

Natural Resource Development

Energy

Energy resources on tribal lands are largely an untapped resource pertaining to the land under the trust relationship.¹⁰⁶⁵ They have the potential to help the U.S. achieve energy security and independence, while reducing greenhouse gases.¹⁰⁶⁶ Furthermore, these resources also serve as a means to bolster economic development in Indian country by creating jobs and improving the standard of living for many Native Americans.¹⁰⁶⁷ As of 2014, energy production in the United

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid; *see also* The Association of Tribal Archives, Libraries, and Museums, *Statement on E-Rate Program*, at 4, <https://www.ims.gov/assets/1/AssetManager/The%20Association%20of%20Tribal%20Archives.pdf>. The statement indicated the following to explain challenges that prevent Tribal libraries from accessing the E-Rate Program Library Services and Technology Act (LSTA) Eligibility Requirement:

As articulated by the Government Accounting Office (GAO) in its 2006 report, *Telecommunications: Challenges for Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, to be eligible for E-Rate funds, a tribal library must be eligible for state LSTA funds and not just tribal LSTA funds. This places state library administrative agencies in the position of acting on behalf of a sovereign tribe and may also place them in violation of state statutes. It is not a workable solution for state library agencies or tribal libraries. This jurisdictional conflict impedes tribal libraries from being able to utilize E-Rate funding to obtain affordable telecommunications services and Internet access.

Even though the Library Services and Construction Act (LSCA), the precursor to LSTA, recognized that “Indian tribes and reservations are generally considered to be separate nations and seldom are eligible for direct library allocations from states” and recognized tribal needs were not adequately addressed by the conventional approach to library funding, the FCC continues to require that tribal libraries adhere to the LSTA eligibility requirement.

[The Association of Tribal Archives, Libraries, and Museums] contends that when LSCA morphed into LSTA, an oversight resulted in a critical change in the treatment of tribal libraries. [The Association of Tribal Archives, Libraries, and Museums] implores the FCC to remove the requirement that tribal libraries be eligible for LSTA funds under state programs and restore them to being treated as agencies of sovereign Native nations.

¹⁰⁶⁵ NCAI, *Energy and Minerals*, <http://www.ncai.org/policy-issues/land-natural-resources/energy-and-minerals> (last accessed July 26, 2018).

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Ibid.

States was at an all-time high, yet tribes were not reaping the benefits of energy development that could bring economic opportunities to countless tribal communities.¹⁰⁶⁸

Indian lands contain approximately 30 percent of the coal reserves in the Western U.S., 50 percent of potential uranium reserves, and 20 percent of the known oil and gas reserves in the U.S.¹⁰⁶⁹ The U.S. Department of Energy estimates that tribal lands (in the contiguous 48 U.S. states) have the technical potential to produce 3.4 percent of the total amount of electricity for wind energy in the U.S., and 5.1 percent of the U.S. total solar energy generation potential.¹⁰⁷⁰ In 2014, it was estimated that energy resources in Indian Country were worth approximately \$1.5 trillion; however, the majority of these resources remain undeveloped. This is largely due to the trust relationship under which Indian lands are managed by the federal government, and the bureaucracy that complicates the exploration or development of these resources.¹⁰⁷¹ Jacqueline Pata, Executive Director of the National Congress of American Indians (NCAI), testified before the Commission:

We realize that Indian Country has 15 percent of this nation's untapped energy resource. And we thought that was going to be the biggest economic boon to Indian Country. We were all prepared for that to happen. We recognized that we needed to build capacity in Indian Country. And we feel like—so part of that was hopefully a federal partnership to build that capacity, bring that technical assistance into Indian Country. It was really at this point an unrealized dream.

Where we saw success was the tribes that actually were able to partner with the private sector, learned the industry and to be able to develop it. So, like, Southern Ute, for example. Great energy resource, tapped energy. Places where tribes, Morongo, for example, did the alternative energy. But then what we see happening—and so part of that is recognizing that there is a governmental responsibility to encourage those private sector relationships by developing systems that allow us to merge together.¹⁰⁷²

The BIA's Office of Indian Energy and Economic Development, Division of Energy and Mineral Development, works toward the ultimate goal of boosting economic development through assisting tribes with the exploration, development, and management of their energy and mineral resources.¹⁰⁷³ BIA, in conjunction with other federal and tribal agencies, oversees the development

¹⁰⁶⁸ Regan, *Unlocking the Wealth of Indian Nations*, *supra* note 936, at 4.

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ U.S. Dep't of Energy, Office of Indian Energy, National Renewable Energy Laboratory, *Geospatial Analysis of Renewable Energy Technical Potential on Tribal Lands* (February 2013), <https://www.nrel.gov/docs/fy13osti/56641.pdf>; U.S. Dep't of Energy, Office of Indian Energy, *Developing Clean Energy Projects on Tribal Lands: Data and Resources for Tribes* (April 2013), <https://www.nrel.gov/docs/fy13osti/57748.pdf>; U.S. Government Accountability Office, *Indian Energy Development: Poor Management by BIA has Hindered Energy Development on Indian Lands* (June 2015), 1–2, <https://www.gao.gov/assets/680/670701.pdf> [hereinafter GAO, *Indian Energy Development*].

¹⁰⁷¹ Regan, *Unlocking the Wealth of Indian Nations*, *supra* note 936, at 4.

¹⁰⁷² Pata Testimony, *Briefing Transcript*, pp. 54–55.

¹⁰⁷³ U.S. Dep't of the Interior, Bureau of Indian Affairs, *Indian Energy and Economic Development*, <https://www.bia.gov/as-ia/ieed> (last accessed July 26, 2018).

of energy resources in Indian Country, and BIA often has final decision-making authority.¹⁰⁷⁴ GAO issued a report in June 2015 that found the development of energy resources in Indian Country was severely lagging due in part to shortcomings in management by BIA. These shortcomings resulted in missed development opportunities, lost revenue, and jeopardized viability of projects.¹⁰⁷⁵ Furthermore, a 2012 U.S. Inspector General report found deficiencies in the oversight and management of oil and gas resources within BIA offices, where a preference was found in the energy industry to acquire oil and gas leases on non-Indian lands over Indian lands.¹⁰⁷⁶

The GAO report also indicated that there are several factors that deter tribes from entering into Tribal Energy Resource Agreements (TERA).¹⁰⁷⁷ The Indian Tribal Energy Development and Self-Determination Act¹⁰⁷⁸ of 2005, part of the Energy Policy Act of 2005, provided federally recognized tribes the opportunity to have a greater degree of control over the development of their energy resources by entering into TERAs, or agreements between a tribe and the Secretary of the Interior that allows tribes to enter into contracts or agreements for energy resource development on tribal lands without Secretary approval.¹⁰⁷⁹ As of 2015, GAO reported that no tribe had entered into a TERA with DOI, and factors such as uncertainty of TERA regulations, costs, and a complex application process were deterrents.¹⁰⁸⁰

In November 2017, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 were passed in the Senate to alleviate some of the related “red tape” and “provide tribes with greater flexibility to develop energy resources to best meet the needs of their local communities.”¹⁰⁸¹ No further action has been taken on this bill since November 2017.

The U.S. Department of Energy’s Office of Indian Energy Policy and Programs funds a variety of programs to assist Native American tribes and Alaska Native villages with energy development, capacity building, energy cost reduction, electrification, and the promotion of tribal energy initiatives through financial assistance, education and training, capacity building, and technical assistance.¹⁰⁸² The Tribal Indian Energy Loan Guarantee Program, also authorized by the Energy

¹⁰⁷⁴ GAO, *Indian Energy Development*, *supra* note 1070, at 4.

¹⁰⁷⁵ *Ibid.*, 35.

¹⁰⁷⁶ *Ibid.*, 6; *see also* U.S. Dep’t of the Interior, Office of Inspector General, *Oil and Gas Leasing In Indian Country: An Opportunity For Economic Development*, September 2012, <https://www.doi.gov/sites/doi.gov/files/CR-EV-BIA-0001-2011Public.pdf>.

¹⁰⁷⁷ GAO, *Indian Energy Development*, *supra* note 1070, at 4.

¹⁰⁷⁸ Pub. L. No. 109-58, 119 Stat., 763 (Aug. 8, 2005).

¹⁰⁷⁹ GAO, *Indian Energy Development*, *supra* note 1070, at 4. *See also* 25 U.S.C. § 3504 (governing tribal energy resource agreements).

¹⁰⁸⁰ GAO, *Indian Energy Development*, *supra* note 1070, at Introductory Summary.

¹⁰⁸¹ U.S. Senate Committee on Indian Affairs, “Senate Passes Hoeven Bill to Streamline Tribal Energy Development,” Nov. 30, 2017, <https://www.indian.senate.gov/news/press-release/senate-passes-hoeven-bill-streamline-tribal-energy-development-0>; *see also* S.245, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/senate-bill/245>.

¹⁰⁸² U.S. Dep’t of Energy, Office of Indian Energy Policy and Programs, “About Us,” <https://www.energy.gov/indianenergy/about-us> (last accessed July 26, 2018).

Policy Act of 2005, was created to issue partial loan guarantees for tribal energy development in the commercial lending market.¹⁰⁸³

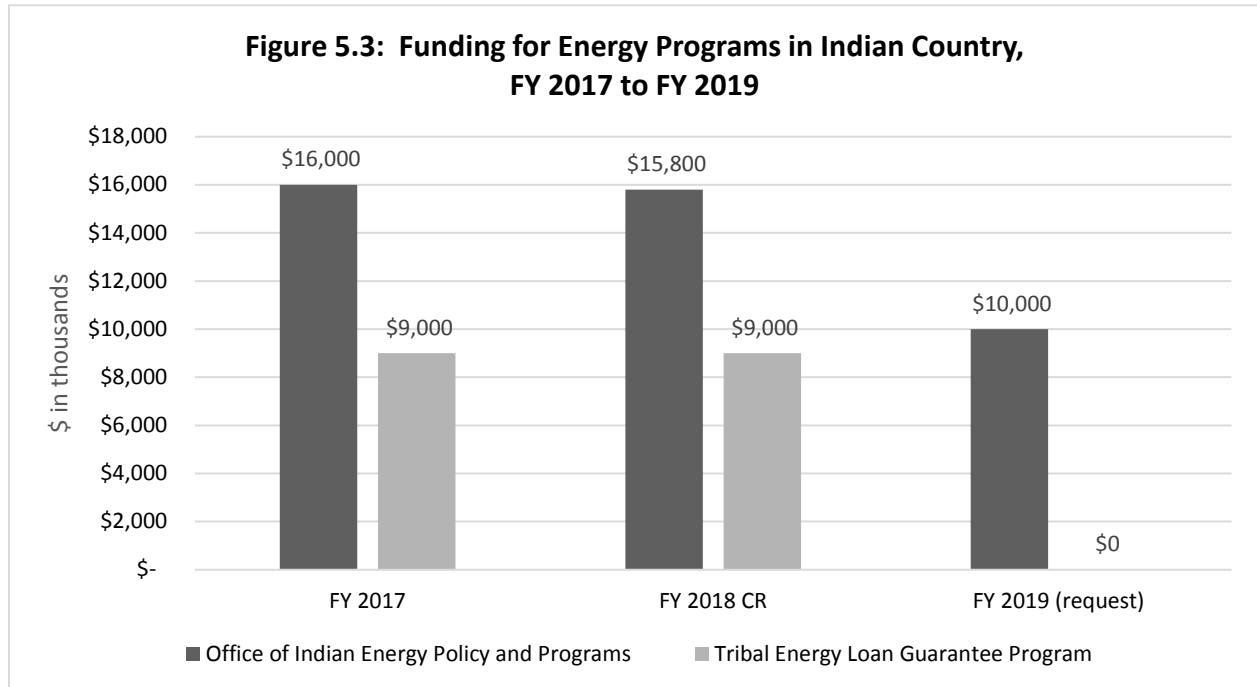
The Office of Indian Energy Policy and Programs received a total of \$16 million in appropriated funds in FY 2017, of which \$9 million was allocated for the Tribal Energy Loan Guarantee Program.¹⁰⁸⁴ In FY 2018, the annualized amount for the Office of Indian Energy Policy and Programs was slightly reduced to \$15.8 million, \$9 million of which allocated for the Tribal Energy Loan Guarantee Program.¹⁰⁸⁵ The FY 2019 budget proposes a significant reduction to the amount of \$10 million for the Office of Indian Energy Policy and Programs, and no funding is requested for the Tribal Energy Loan Guarantee Program.¹⁰⁸⁶ See Figure 5.3, which illustrates this funding pattern.

¹⁰⁸³ See 25 U.S.C. § 3502 (describing government grants for tribal energy resource development). See also U.S. Dep't of Energy, Loan Programs Office, "Loan Programs Office Seeking Input for Tribal Energy Loan Guarantee Program," Mar. 19, 2018, <https://www.energy.gov/lpo/articles/loan-programs-office-seeking-input-tribal-energy-loan-guarantee-program> (last accessed July 27, 2018).

¹⁰⁸⁴ U.S. Dep't of Energy, *Fiscal Year 2019 Congressional Budget Request* (March 2018), 10–11, https://www.energy.gov/sites/prod/files/2018/03/f49/DOE-FY2019-Budget-in-Brief_0.pdf.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Ibid.



Source: U.S. Department of Energy, FY 2019 Congressional Budget Request, March 2018, pp. 10–11, https://www.energy.gov/sites/prod/files/2018/03/f49/DOE-FY2019-Budget-in-Brief_0.pdf.

Water

Native Americans have struggled for centuries to gain legal rights to water resources on tribal lands, and have made advancements through treaty provisions, settlements, and claims over the years.¹⁰⁸⁷ The ongoing disputes have resulted in part because water is often jointly used by other entities such as state or private adjoining lands, which can result in tension as to the allocation and use of the water. Generally, the allocation of water rights is a matter of state law, but the federal government has authority to regulate certain water rights.¹⁰⁸⁸ The 1908 U.S. Supreme Court decision *Winters v. United States*¹⁰⁸⁹ affirmed the reserved water rights of Indian reservations and provided clarification of rights to not have water supplies blocked from flowing into a reservation.¹⁰⁹⁰ Although many tribes have rights to an amount of water, only about two dozen have obtained congressional-enacted, water rights settlements. Additionally, the Water Infrastructure Improvements for the Nation Act, signed into law in December 2016, provided settlements of water rights for the Blackfeet Indian Tribe and the Pechanga Band. The Water Infrastructure Improvements Act authorized \$422 million in funding to the Blackfeet Tribe of

¹⁰⁸⁷ NCAI, “Water,” <http://www.ncai.org/policy-issues/land-natural-resources/water> (last accessed July 27, 2018) [hereinafter NCAI, “Water”].

¹⁰⁸⁸ Congressional Research Service, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, June 8 (2011), 1, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32198.pdf>.

¹⁰⁸⁹ 207 U.S. 564 (1908).

¹⁰⁹⁰ *Id.* at 575–77; Congressional Research Service, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview* (June 8, 2011), 1, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32198.pdf>.

Montana for clean drinking water and water infrastructure projects,¹⁰⁹¹ and \$28 million to the Pechanga Band of Luiseño Mission Indians in California for secure water supplies.¹⁰⁹²

After Congress enacts a water rights settlement, it has to appropriate the funding to implement the terms of the settlement. Like the Blackfeet and Pechanga settlements mentioned above, many water rights settlements call for the building of infrastructure to support the use of water; which may include irrigation systems or the lining of ditches for conveying water. Even those tribes with water rights settlements have experienced “chronic and substantial shortfalls” in appropriations from Congress in implementation of these settlements.¹⁰⁹³ NCAI has pointed out that:

These shortfalls result in the partial construction of water infrastructure that in some instances becomes operationally useless. The lack of development of tribal water infrastructure, exacerbated by federal underfunding, essentially eliminates the possibility of economic, agricultural[,] or energy development on the tribal lands awaiting that needed infrastructure.¹⁰⁹⁴

U.S. Representative Raúl M. Grijalva (D-AZ), ranking member of the House Committee on Natural Resources, who represents four tribal nations in his region,¹⁰⁹⁵ also remarked that Congress had failed to approve and fund Indian water rights settlements, and that such settlements which are crucial to providing tribes the water resources they need to maintain public health and educational quality, and are critical for economic development.¹⁰⁹⁶

Water is a critical resource in Indian Country, and has implications for the physical, cultural, and economic wellbeing of residents.¹⁰⁹⁷ Water is consistently identified by tribes as the highest natural resource priority, stemming largely from the sacred nature of that resource.¹⁰⁹⁸ However, the quality of water infrastructure in Indian Country is lacking due to insufficient funding and

¹⁰⁹¹ Blackfeet Water Rights Settlement, Pub. L. No. 114-322, §§ 3701–3724 (Dec. 16, 2016).

¹⁰⁹² Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act, Pub. L. No. 114-322, §§ 3401–3413 (Dec. 16, 2016).

¹⁰⁹³ NCAI, *Natural Resource Conservation Policy*, *supra* note 936, at 11. *See also* NATIVE NEWS ONLINE, *Tribal Leaders Celebrate Four More Water Right Settlements in Indian Country*, Jan. 16, 2017, <https://nativenewsonline.net/currents/tribal-leaders-celebrate-four-water-right-settlements-indian-country/>. The latter article reported that four additional water rights settlements had been negotiated under the Water Infrastructure Improvements for the Nation Act, in addition to eight other settlements enacted under the Obama Administration. During the Obama Administration, a total of \$3 billion was authorized for Indian water rights settlements.

¹⁰⁹⁴ NCAI, *Natural Resource Conservation Policy*, *supra* note 936, at 11.

¹⁰⁹⁵ Congressman Raúl M. Grijalva, “Native American Rights,” <https://grijalva.house.gov/native-american-rights/> (last accessed Sept. 24, 2018).

¹⁰⁹⁶ Rep. Raúl M. Grijalva, *Raúl Grijalva: Republicans still won't listen to Indian Country*, INDIANZ.COM, Oct. 25, 2016, <https://www.indianz.com/News/2016/10/26/raul-grijalva-republicans-still-wont-lis.asp>; House Committee on Natural Resources Democratic Staff, *Water Delayed Is Water Denied: How Congress has Blocked Access to Water for Native Families*, October 2016, at 3–6, <http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf>.

¹⁰⁹⁷ NCAI, “Water,” *supra* note 1087.

¹⁰⁹⁸ NCAI, *Natural Resource Conservation Policy*, *supra* note 936, at 11.

development of water projects on tribal lands.¹⁰⁹⁹ Research indicates that Native Americans, compared with many other populations, are at a higher risk for health issues due to water contamination.¹¹⁰⁰ Furthermore, water delivery systems have been underdeveloped and many have fallen into disrepair due to chronic underfunding by Congress.¹¹⁰¹ For example, it is estimated that about 40 percent of Navajo Nation members do not have running water in their homes.¹¹⁰² The lack of running water in Navajo Nation has been called “abysmal” and is seen by advocates as unacceptable, as they consider access to water “an essential human right.”¹¹⁰³ Another report estimates that nearly 48 percent of Native homes “do not have access to reliable water sources, clean drinking water, or basic sanitation.”¹¹⁰⁴

Federal efforts have been made to improve water quality and quantity in Indian Country. The Soil and Water Conservation Act of 1977 provides USDA authority for the conservation, protection, and enhancement of soil, water, and other natural resources.¹¹⁰⁵ USDA has made efforts to engage tribal governments and involve them in its assessment and planning processes.¹¹⁰⁶ Tribal governments and lands were not specifically included in the statutory language of the Soil and Water Conservation Act until 2014,¹¹⁰⁷ making USDA’s efforts are in the early stages.

Other applicable laws include the Safe Drinking Water Act that authorizes the U.S. Environmental Protection Agency (EPA) to implement standards for drinking water and maintain the integrity of drinking water in the U.S., and the Clean Water Act (CWA) that regulates the standard of surface and ground waters in the U.S.¹¹⁰⁸ The EPA works with federal, state, and tribal partners to implement water standards and ensure compliance.¹¹⁰⁹

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ Johnnye Lewis, Joseph Hoover, Debra MacKenzie, “Mining and Environmental Health Disparities in Native American Communities,” *Curr. Envir. Health Rpt.*, Vol. 4, No. 2, Apr. 26, 2017, at 130–31, <https://link.springer.com/content/pdf/10.1007%2Fs40572-017-0140-5.pdf>.

¹¹⁰¹ NCAI, “Water,” *supra* note 1087.

¹¹⁰² Ethan Millman, *Water Hole: No Running Water on Navajo Nation Reservation*, INDIAN COUNTRY TODAY, June 6, 2017, <https://indiancountrymedianetwork.com/news/environment/running-water-navajo-nation/>.

¹¹⁰³ Ibid.

¹¹⁰⁴ House Committee on Natural Resources, Democratic staff, *Water Delayed is Water Denied: How Congress Has Blocked Access to Water for Native Families*, Executive Summary (Oct. 10, 2016), 2, http://democrats-naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf.

¹¹⁰⁵ 16 U.S.C. § 2003; Pub. L. No. 95-192, 91 Stat. 1407, Nov. 18, 1977; *see also* U.S. Dep’t of Agriculture, “Soil and Water Resources Conservation Act (RCA),” <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/nra/rca/> (last accessed July 27, 2018).

¹¹⁰⁶ NCAI, *Natural Resource Conservation Policy*, *supra* note 936, at 1.

¹¹⁰⁷ 16 U.S.C. § 2005 (as amended by Pub. L. No. 113-79, 2014).

¹¹⁰⁸ 42 U.S.C. § 300f *et seq.*; 33 U.S.C. § 1251 *et seq.*

¹¹⁰⁹ U.S. Environmental Protection Agency, “Clean Water in Indian Country,” <https://www.epa.gov/tribal/clean-water-indian-country> (last accessed July 27, 2018); U.S. Environmental Protection Agency, “Safe Drinking Water on Tribal Lands,” <https://www.epa.gov/tribaldrinkingwater> (last accessed July 27, 2018); U.S. Environmental Protection Agency, “Clean Water Act (CWA) Compliance Monitoring,” <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (last accessed July 27, 2018).

There are several barriers to achieving a goal to improve water quantity and quality in Indian Country. It has been reported that tribal water systems experienced approximately 57 percent more water-quality violations in the past decade than non-tribal water systems.¹¹¹⁰ Tribal facilities received approximately 44 percent fewer inspections under the CWA from 2010–2015, and EPA was less likely to bring an enforcement action under the Safe Drinking Water Act against tribally run facilities than their non-tribal counterparts.¹¹¹¹ NCAI attributes the lack of reliable data concerning tribal water quality to the fact that only 38 of the 565 federally recognized tribal governments have water quality standards that have been approved by the EPA.¹¹¹²

Scholars have also documented that the absence of clean and reliable water resources has contributed to higher rates of unemployment and poverty for Native Americans living on reservations as compared to non-Indian communities.¹¹¹³ Quality and reliable water resources are essential for agriculture, which provides a high percentage of jobs in rural areas, where many reservations are located.¹¹¹⁴ These water resources are necessary for tribes to farm and develop their land.¹¹¹⁵ In addition, reliable and quality water resources are essential for attracting business and investment in Indian Country.¹¹¹⁶

The BIA Branch of Water Resources runs the BIA water program, which aims to protect Indian water rights, support the management of water development projects, provide litigation support for water rights disputes, and conduct evaluations on program activities.¹¹¹⁷ Funding for the BIA

¹¹¹⁰ Brian Bienkowski, *Drinking water in Indian Country: More violations, less EPA*, ENVIRONMENTAL HEALTH NEWS, Nov. 6, 2016, http://www.ehn.org/drinking_water_in_indian_country_more_violations_less_epa-2497217689.html.

¹¹¹¹ *Ibid.*

¹¹¹² NCAI, *Natural Resource Conservation Policy*, *supra* note 936, at 11. Of note, there is ongoing debate as to which government (federal, tribal, or state) has jurisdiction to regulate water quality in Maine. *See* Matthew D. Manahan & Catherine R. Connors, *Water, Tribal Claims, and Maine's Not-So-Settled Settlement Acts*, NR&E (Fall 2016), http://aquadoc.typepad.com/files/aba_seer_article_manahan_connors_2016.pdf. In December 2016, EPA issued some water quality standards that it has argued apply to Indian Country in Maine. *See* U.S. Environmental Protection Agency, "Promulgation of Certain Water Quality Standards Applicable in Maine," <https://www.epa.gov/wqs-tech/promulgation-certain-federal-water-quality-standards-applicable-maine> (emphasizing that "[a] critical goal of EPA's final rule is to protect the ability of the Indian tribes in Maine to safely consume fish for their own sustenance [as provided in the Maine state and federal settlement acts].") (last accessed Sept. 20, 2018). These standards are currently being litigated. *See* Patrick Whittle, *Maine, EPA, Tribes Spar Over Water Quality Rules*, PORTLAND HERALD, July 8, 2018, <https://www.pressherald.com/2018/07/08/maine-epa-tribes-spar-over-water-quality-rules/>.

¹¹¹³ Western States Water Council and Native American Rights Fund, *The Importance of Indian Water Rights Settlement Funding* (October 2014), 2, http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.

¹¹¹⁴ House Committee on Natural Resources Democratic Staff, *Water Delayed Is Water Denied: How Congress has Blocked Access to Water for Native Families* (October 2016), 6, <http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf>.

¹¹¹⁵ *Ibid.*

¹¹¹⁶ *Ibid.*

¹¹¹⁷ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Branch of Water Resources," <https://www.bia.gov/bia/ots/division-natural-resources/branch-water-resources> (last accessed July 27, 2018).

water program has declined since the FY 2005 level of \$11.7 million.¹¹¹⁸ The President's FY 2019 budget requests \$8.5 million to BIA for water resources, down from the \$10.3 million annualized amount in FY 2018 and \$10.4 million in FY 2017.¹¹¹⁹

The Clean Water State Revolving Fund and the Drinking Water State Revolving Fund are both EPA programs that aim to address disparities in water resources, and each program has tribal set-asides.¹¹²⁰ The President's FY 2019 budget requests an increase of \$9.466 million for the Clean Water State Revolving Fund for a total of nearly \$1.4 billion for the fiscal year.¹¹²¹ The EPA continues to request a \$30 million or a 2 percent set aside for tribes (whichever is greater), which is consistent with appropriation bills in recent years.¹¹²² Additionally, the Office of Management and Budget issued an addendum to the FY 2019 request that includes an additional \$397 million to the State and Tribal Assistance Grants account for both the Clean Water and Drinking Water State Revolving Funds, which would go toward wastewater and storm water infrastructure.¹¹²³ NCAI and other advocates have pressed for at least a 3 percent set aside for tribes to meet their water infrastructure needs.¹¹²⁴

The President's FY 2019 BIA budget requests \$45.6 million to meet both land and water settlement commitments to support infrastructure projects that will spur economic development and growth.¹¹²⁵ See also Appendix G, Funding for Native American Economic Development.

The Dakota Access Pipeline

In accordance with its mission to investigate civil rights, a delegation of the U.S. Commission on Civil Rights visited Standing Rock in December 2016, and the Commission majority expressed concern about the alleged excessive force used by police on protesters and the cultural and environmental impact of the pipeline itself.¹¹²⁶ The Commission delegation met with tribal leaders and public officials to hear concerns about potential civil rights violations on the approval of the pipeline, as well as the law enforcement response to the large-scale protest. Concerns were raised

¹¹¹⁸ See *infra* Appendix G.

¹¹¹⁹ U.S. Department of the Interior, *Fiscal Year 2019: The Interior Budget in Brief* (February 2018), BH-87, https://edit.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf.

¹¹²⁰ See Environmental Protection Agency, "Annual Allocation of Federal Funds for States, Tribes, and Territories," <https://www.epa.gov/drinkingwatersrf/annual-allotment-federal-funds-states-tribes-and-territories> (setting out the appropriations under the Drinking Water State Resolving Fund for States, Tribes, and Territories from FY1997 to FY2018) (last accessed Sept. 20, 2018); see also U.S. Environmental Protection Agency, "State Revolving Fund Allotments of Federal Funds to States [and Tribes]," <https://www.epa.gov/cwsrf/clean-water-state-revolving-fund-cwsrf-allotments-federal-funds-states> (containing links to allocations to States and Tribes from FY2013 to FY2018) (last accessed Sept. 20, 2018).

¹¹²¹ NCAI, *Analysis of the FY 2019 President's Budget*, *supra* note 656, at 10.

¹¹²² *Ibid.*

¹¹²³ *Ibid.*

¹¹²⁴ NCAI, "Water," *supra* note 1087.

¹¹²⁵ Office of the Assistant Secretary for Indian Affairs, "\$2.4 Billion FY19 Indian Affairs Budget," *supra* note 730.

¹¹²⁶ U.S. Commission on Civil Rights, *The U.S. Commission on Civil Rights Concerned with Dakota Access Pipeline*, Nov. 22, 2016, <http://www.usccr.gov/press/2016/PR-11-22-16-Dakota-Pipeline.pdf>.

that tribes were not sufficiently consulted in the approval process, which was also the subject of the environmental litigation discussed below. Additionally, law enforcement tactics such as the use of water hoses were discussed as potentially excessive use of force,¹¹²⁷ an issue also contested in separate litigation.¹¹²⁸ On potentially excessive use of force, litigation about the First, Fourth and Fourteenth Amendment rights of the water protectors is highly contested, and ongoing. Federal courts declined to issue a preliminary injunction,¹¹²⁹ and, most recently, plaintiffs have opposed defendants' second motion to dismiss the case on the merits.¹¹³⁰

Also, upon the delegation's return from the visit, the Commission requested public records regarding a law enforcement road blockade the delegation had observed near the protest site, which could constitute a public safety concern.¹¹³¹ As former Commission chair Martin Castro stated, the issues raised by the pipeline related to "the entire relationship between the United States and sovereign Indian Nations, their rights, traditions[,] and religious beliefs."¹¹³²

In 2014, the Standing Rock Sioux Tribe of North and South Dakota learned that Dakota Access, LLP planned to construct the Dakota Access Pipeline to transport crude oil from North Dakota to Illinois.¹¹³³ The 1,172-mile pipeline would cross the Missouri River under Lake Oahe within a half-mile of the tribe's reservation.¹¹³⁴ The Missouri River not only provides drinking and irrigation water for tribal and downstream communities, but also holds particular spiritual and cultural significance for the Standing Rock Sioux Tribe.¹¹³⁵ The tribe often conducted spiritual ceremonies along the banks of the river, and multiple sacred ancestral burial grounds and artifacts allegedly lay in the path of the proposed pipeline.¹¹³⁶

In July 2016, the Standing Rock Sioux Tribe filed a lawsuit against the U.S. Army Corps of Engineers in federal district court in Washington, D.C. requesting an emergency stop (through a motion for a preliminary injunction) of construction of the Dakota Access Pipeline.¹¹³⁷ The tribe claimed that the U.S. Army Corps of Engineers—the federal agency that issued the permit to

¹¹²⁷ *Ibid.*

¹¹²⁸ *See Dundon v. Kirchmeier*, 701 Fed. Appx. 538 (Mem) (8th Cir. 2017) (affirming denial of preliminary injunction); *see also* Lauren Donovan, *Kirchmeier, Morton County sued for excessive force in protests*, BISMARCK TRIBUNE, Nov. 28, 2016, https://bismarcktribune.com/news/state-and-regional/kirchmeier-morton-county-sued-for-excessive-force-in-protests/article_6df6ca11-4e5f-5b03-985c-ce3a8d5cf3a8.html.

¹¹²⁹ *Id.*

¹¹³⁰ *See, e.g.*, Plaintiff's Memorandum in Opposition to Defendants' Second Motion to Dismiss, *Dundon v. Kirchmeier*, No. 1:16-CV-00406 (D.N.D., April 27, 2018), <http://www.sfbia.com/wp-content/uploads/2017/07/2018.04.27-Opp-2nd-MTD-Filed.pdf>.

¹¹³¹ U.S. Commission on Civil Rights, Transcript of Business Meeting, Jan. 13, 2017, at 21.

¹¹³² *Ibid.*

¹¹³³ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 13 (D.D.C. 2016); *see also* Samantha L. Varsalona, *Pipelines, Protests and General Permits*, GEO. ENVTL. L. REV. ONLINE 1 (2016).

¹¹³⁴ *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 13.

¹¹³⁵ *Id.* at 12–14.

¹¹³⁶ *Id.* at 13, 20–21.

¹¹³⁷ *Id.* at 24.

Dakota Access to build the pipeline—had failed to adequately consult the tribe during the permitting process.¹¹³⁸ Under Section 106 of the National Historic Preservations Act, the head of any federal agency with jurisdiction over a project requiring a federal permit must “take into account the effect” of the project on “historic property.”¹¹³⁹ Such property includes land with “traditional religious and cultural importance to an Indian tribe.”¹¹⁴⁰ The agency must also consult with any tribe attaching such importance to the land and allow the Advisory Council on Historic Preservation “a reasonable opportunity to comment” about the project.¹¹⁴¹ Whether the U.S. Army Corps of Engineers had sufficiently consulted with the tribe formed the crux of the Standing Rock Sioux Tribe’s lawsuit.¹¹⁴²

In August 2016, thousands of supporters traveled to North Dakota to join the Standing Rock Sioux Tribe’s peaceful protest of the pipeline.¹¹⁴³ When Dakota Access commenced construction of the pipeline before the federal district court had ruled on the tribe’s motion for a preliminary injunction, the tribe’s water protectors demanded that the construction crew cease its activity.¹¹⁴⁴ A private security force employed by Dakota Access responded by unleashing attack dogs and tear gas on the protestors.¹¹⁴⁵ After the District Court denied the tribe’s motion,¹¹⁴⁶ thus allowing the pipeline construction to resume, local police allegedly continued to fire rubber bullets and water cannons at the people who remained to protest the pipeline.¹¹⁴⁷

In December 2016, the U.S. Army Corps of Engineers halted work on the pipeline pending further environmental review.¹¹⁴⁸ But after taking office in January 2017, President Trump directed the U.S. Army Corps of Engineers to expedite approval of the pipeline,¹¹⁴⁹ and within one month the Corps of Engineers ended the environmental review and granted an easement to Dakota Access to

¹¹³⁸ *Id.*

¹¹³⁹ 54 U.S.C. §§ 306108, 300320.

¹¹⁴⁰ *Id.* § 302706(a).

¹¹⁴¹ *Id.* §§ 302706(b), 306108.

¹¹⁴² *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 13.

¹¹⁴³ Mary Kathryn Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. FORUM 667, 668 (2018) [hereinafter Nagle, *Environmental Justice and Tribal Sovereignty*].

¹¹⁴⁴ *Id.* at 680–681.

¹¹⁴⁵ *Id.*

¹¹⁴⁶ *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 37.

¹¹⁴⁷ Kate McCormick, *The Dakota Pipeline Protests: Where They Started and Where They Are Going (Hint: No Where)*, GEO. ENVTL. L. REV. ONLINE 1 (2016).

¹¹⁴⁸ Jo-Ellen Darcy, Memorandum for Commander, U.S. Army Corps of Engineers, “Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota,” Dec. 4, 2016, <https://www.army.mil/e2/c/downloads/459011.pdf>; see also Environmental Law at Harvard, “Dakota Access Pipeline,” <http://environment.law.harvard.edu/2017/10/dakota-access-pipeline/> (last accessed July 27, 2018).

¹¹⁴⁹ President Donald J. Trump, Memorandum for the Secretary of the Army, “Construction of the Dakota Access Pipeline,” Jan. 24, 2017, <https://earthjustice.org/sites/default/files/files/Construction-of-the-Dakota-Access-Pipeline.pdf>.

install the pipeline.¹¹⁵⁰ The Standing Rock Sioux Tribe then moved for summary judgment before the federal district court, alleging that the U.S. Army Corps of Engineers violated the National Environmental Protection Act in its failure to adequately consider the environmental impact of the pipeline.¹¹⁵¹ Although the district court partially granted the motion, it allowed the pipeline's operation to continue while the U.S. Army Corps of Engineers addressed errors in its environmental review on remand.¹¹⁵² But in December 2017, the district court granted the tribe's request for three interim conditions during the remand period: 1) Dakota Access and the U.S. Army Corps of Engineers would coordinate with the tribe to finalize and implement oil-spill response plans at Lake Oahe; 2) a third party would complete an independent audit of Dakota Access's compliance with the permit's conditions; and 3) Dakota Access would submit bimonthly reports on repairs or incidents related to the pipeline.¹¹⁵³

In a press release, Standing Rock Sioux Tribe Chairman Mike Faith cautioned that the Dakota Access Pipeline remained an ongoing environmental threat, stating:

While we think that the pipeline should have been shut down, we are gratified that the federal court has put measures in place to reduce risks and provide some independent oversight to reduce the risk of a spill from this project.¹¹⁵⁴

The controversy surrounding the Dakota Access Pipeline continues to fuel debate about the extent to which the federal government has honored the trust relationship with tribal communities.¹¹⁵⁵ Because preservation of natural resources is central to the spiritual beliefs of many Native American tribes, the federal government's approval of the pipeline has caused some to question the government's willingness to honor the tribes' religious and cultural autonomy.¹¹⁵⁶

¹¹⁵⁰ U.S. Army Corps of Engineers, "Corps grants easement to Dakota Access, LLC," Feb. 8, 2017, <http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/>.

¹¹⁵¹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 111–12, 160–161 (D.D.C. 2017); see also Nagle, *Environmental Justice and Tribal Sovereignty*, *supra* note 1143, at 667, 682–683.

¹¹⁵² *Id.*

¹¹⁵³ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 280 F. Supp. 3d 187, 191 (D.D.C. 2017).

¹¹⁵⁴ Earthjustice, "Citing Recent Keystone Spill, Federal Court Orders Additional Measures to Reduce Spill Risks from Dakota Access Pipeline," Dec. 4, 2017, <https://earthjustice.org/news/press/2017/citing-recent-keystone-spill-federal-court-orders-additional-measures-to-reduce-spill-risks-from-dakota-access>; see also Mitch Smith and Julie Bosman, *Keystone Pipeline Leaks 210,000 Gallons of Oil in South Dakota*, N.Y. TIMES, Nov. 16, 2017, <https://www.nytimes.com/2017/11/16/us/keystone-pipeline-leaks-south-dakota.html> ("Opponents of Keystone XL, which is proposed to run about 1,100 miles and would become part of the Keystone system, quickly cited Thursday's spill as evidence of the risks posed by such pipelines, and urged Nebraska regulators to take note.").

¹¹⁵⁵ Nagle, *Environmental Justice and Tribal Sovereignty*, *supra* note 1143, at 667, 670–671, 682–683.

¹¹⁵⁶ *Id.*

Agriculture, Fisheries, and Forestry

“Treaties between the United States and various Tribal Nations clearly show the intent of those executing the treaties to ‘assist’ Tribal Nations in the pursuit of ‘farming.’”¹¹⁵⁷ Agriculture is a critical component to Native economies, and has been increasingly important in recent years.¹¹⁵⁸ Agriculture in Indian Country is historically important, and has been a growing industry that has seen an 88 percent increase in the number of Native American farmers from 2002–2007.¹¹⁵⁹ As of 2012, 39.2 percent of non-white farm operators were Native American or Alaska Native, and another 1.5 percent were Native Hawaiian or other Pacific Islander.¹¹⁶⁰ Native American farmers and producers continue to face barriers to financial resources that would allow them to be autonomous, such as credit, insurance, or loans.¹¹⁶¹

Forestry and fishing are also critical components of many tribal economies. In 2016, former Commission Chair Castro and Commissioner Narasaki joined U.S. Representative Derek Kilmer (D-WA) at the Quinault Indian Nation located in the Pacific Northwest for a listening session on a number of issues facing tribes in the Pacific Northwest. The Quinault Indian Nation places a high degree of importance on its natural resource protection, management, and development.¹¹⁶² Forestry and fishing are important industries to the Quinault economy, but both industries feel the impact of unmet federal funding.¹¹⁶³ During this listening session, the Commission received testimony from the Intertribal Timber Council, which raised the issue of the impact that wildfires have on Indian forestry.¹¹⁶⁴ The Council indicated in its statement that BIA consistently receives about a third of the funding given to the Forest Service, and this has caused a 440,000-acre thinning

¹¹⁵⁷ Janie Simms Hipp and Colby D. Duren, *Regaining Our Future: An Assessment of Risks and Opportunities for Native Communities in the 2018 Farm Bill*, Indigenous Food and Agriculture Initiative (June 2017), 9, http://seedsofnativehealth.org/wp-content/uploads/2017/06/Farm-Bill-Report_WEB.pdf [hereafter Hipp *et al.* *Regaining Our Future*] (citing 1 Fort Laramie Treaty, 1868, Between the U.S. and the different bands of the Sioux Nation of Indians, Article III, VI, XIII, XIV, et al.; Treaty with the Choctaw 1830, September 27, 1830, 7 Stat., 333 (known as the Treaty of Dancing Rabbit Creek); Article XIX). *See also* “Treaty Between the United States of America and the Navajo Tribe of Indians,” June 1, 1868, ratification July 25, 1868, <http://reta.nmsu.edu/modules/longwalk/lesson/document/treaty.htm>; Permanent General Law Relating to Indian Affairs, Section 2071, Title XXII, 25 U.S.C. § 5123; Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, ratification July 25, 1868, Article VII, <https://catalog.archives.gov/id/6173067>; Treaty with the Menominee, 1831 (February 8, 1831), “Fourth,” <https://www.firstpeople.us/FP-HTML-Treaties/TreatyWithTheMenominee1831.html>).

¹¹⁵⁸ National Congress of American Indians, “Agriculture,” <http://www.ncai.org/policy-issues/land-natural-resources/agriculture> (last accessed July 27, 2018).

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ Hipp *et al.*, *Regaining Our Future*, *supra* note 1157, at 17.

¹¹⁶¹ Kim Baca, *Native Communities are Fighting for a More Inclusive Farm Bill*, CIVIL EATS (Feb. 26, 2018), <https://civileats.com/2018/02/26/native-communities-are-fighting-for-a-more-inclusive-farm-bill/> [hereinafter Baca, *Native Communities are Fighting for a More Inclusive Farm Bill*].

¹¹⁶² Quinault Indian Nation, “Welcome to Quinault Country,” (handout) (on file), at 1–2.

¹¹⁶³ Quinault Indian Nation, “Fisheries,” (handout) (on file) [hereinafter Quinault “Fisheries”]; Quinault Indian Nation, “Forestry,” (handout), at 1–2.

¹¹⁶⁴ Intertribal Timber Council, statement before the U.S. Commission on Civil Rights, listening session, Taholah, WA, Aug. 26, 2016, at 1 [hereinafter *Intertribal Timber Taholah Statement*].

backlog, which will exacerbate the costs of future wildfire suppression.¹¹⁶⁵ A 2015 wildfire report released from the Indian Forest Management Assessment Team estimated the cost of fire suppression and rehabilitation following five wildfires on reservations in 2015 to exceed \$200 million, which is more than three times the national budget for management of all Indian forests in the country.¹¹⁶⁶ Furthermore, these fires destroyed over 338,000 acres of forest and 1.2 billion board feet of tribal trust timber valued at over \$143 million, with an estimated \$377 million in lost wages and services.¹¹⁶⁷

The Commission also received testimony and information about threats to fisheries in Indian Country due to the fishes' disappearing habitat.¹¹⁶⁸ These sources state that the federal government is failing to uphold its trust responsibility through its lack of investment in restoring essential habitat and salmon recovery.¹¹⁶⁹ The Quinault Indian Nation indicated that their annual budget has failed to keep pace with inflation, and their funding is no longer sufficient to carry out the duties of the fisheries' management and science programs.¹¹⁷⁰

The BIA Branch of Agriculture and Rangeland Development assists Native Americans and Alaska Natives in protecting and preserving their natural resources.¹¹⁷¹ Also, the USDA's Office of Tribal Relations has a number of tribal programs and services available to tribal governments, organizations, communities, and individuals.¹¹⁷² USDA also has its Council for Native American Farming and Ranching, which aims to eliminate barriers to Native American farmers' and ranchers' participation in USDA programs.¹¹⁷³

Over the past year, a coalition of Native American groups worked to craft proposed policy for a Farm Bill scheduled to be enacted in FY 2018.¹¹⁷⁴ This is an estimated \$867 billion bill that would

¹¹⁶⁵ Ibid., 2.

¹¹⁶⁶ Ibid., 3.

¹¹⁶⁷ Ibid.

¹¹⁶⁸ Quinault, "Fisheries," *supra* note 1163, at 1–2; Northwest Indian Fisheries Commission, "Understanding Tribal Treaty Rights in Western Washington," (handout) (on file), at 1–4.

¹¹⁶⁹ Treaty Indian Tribes in Western Washington, *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resources, and Recommendations for Change* (July 14, 2011), 20, <http://nwifc.org/w/wp-content/uploads/downloads/2011/08/whitepaper628finalpdf.pdf>.

¹¹⁷⁰ Quinault, "Fisheries," *supra* note 1163, at 2.

¹¹⁷¹ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Branch of Agriculture and Rangeland Development," <https://www.bia.gov/bia/ots/division-natural-resources/branch-agriculture-and-rangeland-development> (last accessed July 27, 2018).

¹¹⁷² U.S. Dep't of Agriculture, "Tribal Programs and Services," <https://www.usda.gov/our-agency/staff-offices/office-tribal-relations-otr/tribal-programs-and-services> (last accessed July 27, 2018).

¹¹⁷³ U.S. Dep't of Agriculture, "Council for Native American Farming and Ranching," <https://www.usda.gov/our-agency/staff-offices/office-tribal-relations-otr/council-native-american-farming-and-ranching> (last accessed July 27, 2018).

¹¹⁷⁴ Baca, *Native Communities are Fighting for a More Inclusive Farm Bill*, *supra* note 1161; Alan Bjerga, *Senate Passes Farm Bill, Setting Up Food-Stamp Fight With House*, BLOOMBERG NEWS, June 28, 2018, <https://www.bloomberg.com/news/articles/2018-06-28/senate-passes-farm-bill-opening-fight-with-house-on-food-stamps>.

replace the Agricultural Act of 2014¹¹⁷⁵, which expires on Sept. 30, 2018.¹¹⁷⁶ The Native Farm Bill Coalition, which is comprised of 22 tribes, tribal organizations, and nonprofits around the country, endorses greater inclusion and greater funding to spur economic development in Indian Country.¹¹⁷⁷ The Farm Bill, which is scheduled to be enacted by Congress every five years, is one of the largest pieces of domestic legislation in the U.S., and broadly addresses U.S. food policy as it impacts land, food, water, natural resources, and economic development opportunities.¹¹⁷⁸

Native Americans have historically faced disadvantages concerning access to land and food.¹¹⁷⁹ A recent report describes the bases and nature of former U.S. policies as follows:

Treaties, federal removal, and reservation policies led not only to the loss of our rights to be at home on our own traditional lands, but to feeding our people in food systems which had supported us for centuries. These new federal policies led to significant disconnections between us and our existing food systems, and the sheer act of feeding ourselves, which was the embodiment of self-determination and self-governance in food we had exercised for so long, was lost.¹¹⁸⁰

Coalition members therefore aimed to amplify the voices of Indian Country during the Farm Bill debate and advocated sovereignty through the development of food systems.¹¹⁸¹ After the House passed its version of the bill on June 21, 2018,¹¹⁸² the Senate passed its own version on June 28, 2018.¹¹⁸³ The Native Farm Bill Coalition released a statement applauding many of the provisions in the Senate plan, including its authorization of a new \$5 million demonstration project to allow some tribes to purchase food from the Food Distribution Program on Indian Reservations under self-determination contracts.¹¹⁸⁴ The most important difference between versions of the bill was that the House version imposed stricter work requirements on beneficiaries of the Supplemental Nutrition Assistance Program (SNAP), whereas the Senate plan did not.¹¹⁸⁵ As of the time the

¹¹⁷⁵ Pub. L. No. 113–79 128 Stat. 649 (Feb. 7, 2013).

¹¹⁷⁶ Baca, *Native Communities are Fighting for a More Inclusive Farm Bill*, *supra* note 1161; Alan Bjerga, “Senate Passes Farm Bill, Setting Up Food-Stamp Fight With House,” BLOOMBERG NEWS (June 28, 2018), <https://www.bloomberg.com/news/articles/2018-06-28/senate-passes-farm-bill-opening-fight-with-house-on-food-stamps>. The Commission voted to approve the text of this report on Oct. 3, 2018, prior to the September 30, 2018 expiration date of the Farm Bill.

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ Hipp *et al.*, *Regaining Our Future*, *supra* note 1157, at 9.

¹¹⁷⁹ *Ibid.*; *see also* Baca, *Native Communities are Fighting for a More Inclusive Farm Bill*, *supra* note 1161.

¹¹⁸⁰ Hipp *et al.*, *Regaining Our Future*, *supra* note 1157, at 9.

¹¹⁸¹ *Ibid.*, 134.

¹¹⁸² H.R. 2, June 21, 2018; *see also* Alan Bjerga, *Senate Passes Farm Bill, Setting Up Food-Stamp Fight With House*, BLOOMBERG NEWS, June 28, 2018, <https://www.bloomberg.com/news/articles/2018-06-28/senate-passes-farm-bill-opening-fight-with-house-on-food-stamps> [hereinafter Bjerga, *Senate Passes Farm Bill*].

¹¹⁸³ *Ibid.*

¹¹⁸⁴ Seeds of Native Health, Press Release, *Native Farm Bill Coalition praises Senate’s bipartisan Farm Bill*, June 28, 2018, <https://seedsofnativehealth.org/native-farm-bill-coalition-praises-senates-bipartisan-farm-bill/>.

¹¹⁸⁵ Bjerga, *Senate Passes Farm Bill*, *supra* note 1182.

Commission voted to approve the text of this report, the House and Senate versions of the Farm Bill had not been reconciled in conference committee, and congressional leaders were considering an extension into FY 2019.¹¹⁸⁶

In February 2018, President Trump’s FY 19 proposed budget was released and included a 16 percent cut in funding in addition to a \$260 billion cut in farm bill investments.¹¹⁸⁷ The budget included a \$213 billion cut in spending for the Supplemental Nutrition Assistance Program over the course of 10 years, an issue of concern for the Native American community.¹¹⁸⁸

The sustainability of other natural resources is integral to the “health of American Indian and Alaska Native peoples, communities, cultures, and economies, as well as to their surrounding communities.”¹¹⁸⁹ The fishing and forest industries are of particular importance to tribes and tribal organizations as means of economic development and, more importantly, of working towards the sustainability of tribal lands and waters.¹¹⁹⁰ Native advocates have argued that the federal government is not upholding its trust and fiduciary responsibilities, in that it underfunds and mismanages these important natural resources.¹¹⁹¹

In order to help carry out its trust responsibilities, BIA’s Office of Trust Services oversees a number of divisions under which the fishing and forestry industries are managed.¹¹⁹² The BIA Branch of Fish, Wildlife, and Recreation strives to fulfill Indian trust responsibilities by enabling tribes “the meaningful exercise of their treaty fishing, hunting, and gathering rights;”¹¹⁹³ and the BIA Division of Forestry and Wildland Fire Management coordinates, manages, plans, and provides oversight and monitoring of trust forest resources.¹¹⁹⁴

¹¹⁸⁶ Ibid.; see also Gary Truitt, *Time Running Out for Farm Bill Passage, Lawmakers Talking Extension*, HOOSIER AG TODAY, Sept. 12, 2018, <https://www.hoosieragtoday.com/time-running-farm-bill-passage-lawmakers-talking-extension/>; Tom Philpott, *The House is Trying to Sneak These Dangerous Changes into the Farm Bill*, MOTHER JONES, Sept. 13, 2018, <https://www.motherjones.com/food/2018/09/the-house-is-trying-to-sneak-these-dangerous-changes-into-the-farm-bill/>.

¹¹⁸⁷ Farm Futures, *Trump budget unveiled; lawmakers pledge support for Farm Bill*, Feb. 13, 2018, <http://www.farmfutures.com/farm-policy/trump-budget-unveiled-lawmakers-pledge-support-farm-bill>.

¹¹⁸⁸ Philip Brasher, *Trump budget slashes farm programs, food assistance*, AGRIPULSE, Feb. 12, 2018, <https://www.agri-pulse.com/articles/10596-trump-budget-slashes-farm-programs-food-assistance>; Hipp *et al.*, *Regaining Our Future*, *supra* note 1157, at 50–63.

¹¹⁸⁹ NCAI, “Native Resources,” <http://www.ncai.org/policy-issues/land-natural-resources/native-resources> (last accessed July 27, 2018).

¹¹⁹⁰ Ibid.

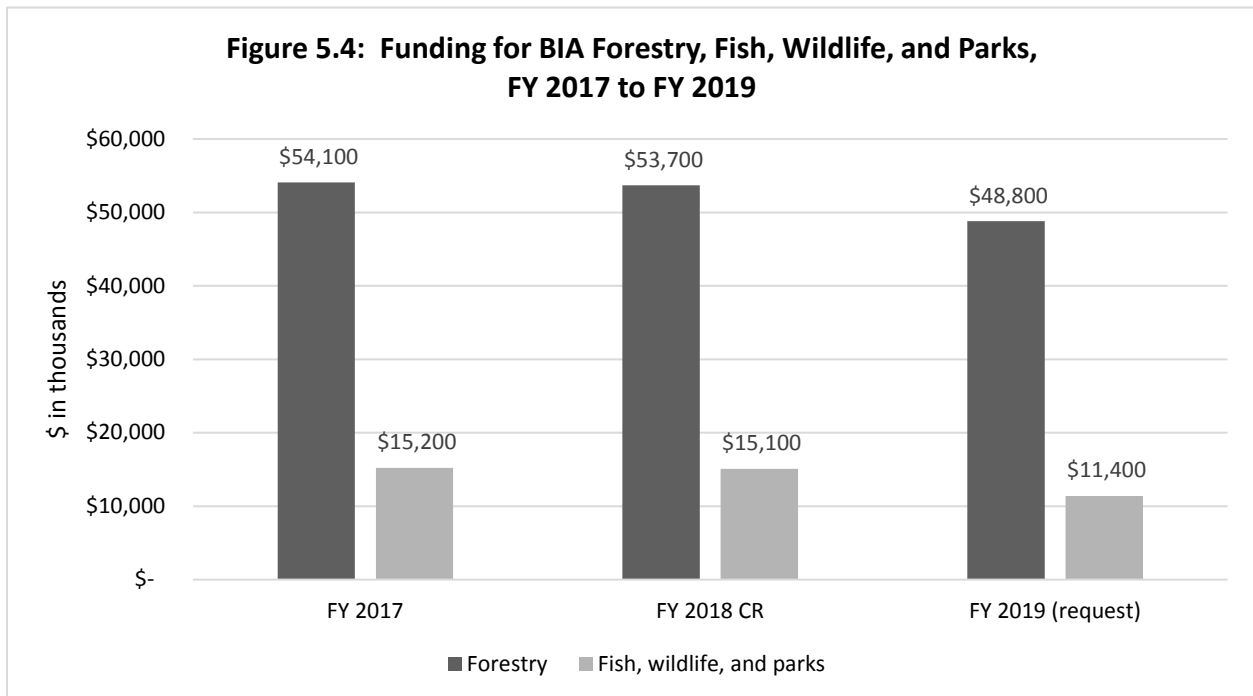
¹¹⁹¹ *Intertribal Timber Taholah Statement*, *supra* note 1164, at 1, 3–4; Treaty Indian Tribes in Western Washington, *Treaty Rights At Risk: Ongoing Habitat Loss, the Decline of the Salmon Resources, and Recommendations for Change*, July 14, 2011, at 15, <http://nwifc.org/w/wp-content/uploads/downloads/2011/08/whitepaper628finalpdf.pdf>.

¹¹⁹² U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Office of Trust Services—Overview,” <https://www.bia.gov/bia/ots> (last accessed July 27, 2018).

¹¹⁹³ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Branch of Fish, Wildlife, and Recreation,” <https://www.bia.gov/bia/ots/division-natural-resources/branch-fish-wildlife-recreation> (last accessed July 27, 2018).

¹¹⁹⁴ Ibid. See also U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Division of Forestry and Wildland Fire Management,” <https://www.bia.gov/bia/ots/dfwfm> (last accessed Sept. 13, 2018).

See Figure 5.4. Funding levels for fish, wildlife, and parks steadily increased from the FY 2005 level of \$6.2 million.¹¹⁹⁵ Similarly, funding levels for forestry steadily increased from the FY 2005 level of \$42.3 million.¹¹⁹⁶ In FY 2017, BIA allocated \$54.1 million to forestry and \$15.2 million to fish, wildlife, and parks.¹¹⁹⁷ That is more than the FY 2019 request of only \$48.8 million for forestry and \$11.4 million for fish, wildlife, and parks, which request is also lower than the FY 2018 annualized amount of \$53.7 million for forestry and \$15.1 million for fish, wildlife, and parks.¹¹⁹⁸ See also Appendix G, Funding for Native American Economic Development, for more information on funding details.



Source: U.S. Department of the Interior, *Fiscal Year 2019: The Interior Budget in Brief*, February 2018, p. BH-87, https://edit.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf.

Native Hawaiian fishing rights are protected by the National Park Service. Within DOI, the National Park Service preserves and protects Native Hawaiian parks and historic sites.¹¹⁹⁹ For FY 2019, NPS proposed about \$5 million in funding (a decrease of about \$630,000 from FY 2018) for maintaining the Haleakalā National Park on the island of Maui.¹²⁰⁰ The Fish and Wildlife Service, also a division of DOI, proposed \$312,860 in FY 2019 state wildlife grants for Hawaii (a

¹¹⁹⁵ See *infra* Appendix G.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ U.S. Dep't of the Interior, *Fiscal Year 2019: The Interior Budget in Brief* (February 2018), BH-87, https://edit.doi.gov/sites/doi.gov/files/uploads/2019_highlights_book.pdf.

¹¹⁹⁸ *Ibid.*

¹¹⁹⁹ National Park Service, "Hawaii," <https://www.nps.gov/state/hi/index.htm> (last accessed July 27, 2018).

¹²⁰⁰ U.S. Dep't of the Interior, National Park Service, *Budget Justifications and Performance Information, Fiscal Year 2019*, 110, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_nps_budget_justification.pdf.

decrease of \$203,610 from FY 2018).¹²⁰¹ In the 2018 omnibus spending bill, Congress reportedly authorized \$6 million for Haleakalā National Park.¹²⁰²

Climate Change and Resilience in Indian Country

Native Americans are particularly vulnerable to the effects of climate change.¹²⁰³ Many Native American tribes and Alaska Natives have settlements and industries that are located in coastal and river flood plains and/or are in areas that are prone to extreme weather events.¹²⁰⁴ Additionally, many tribal economies heavily rely on the development of natural resources, which are often sensitive to climate change.¹²⁰⁵ Alaska Natives are particularly vulnerable, as they face multiple climate impacts.¹²⁰⁶ The effects of climate change can exacerbate poor housing conditions, health care, infrastructure, economy, and underdeveloped natural resources in Indian Country.¹²⁰⁷ The impacts of climate change have the potential of significantly undermining the way of life for many Native communities.¹²⁰⁸

The impacts of climate change in Indian Country include decreased access to fish, game, and cultivated crops, which provide food and affect the cultural, economic, medicinal, and community health and wellbeing.¹²⁰⁹ Climate change can also affect the quality and quantity of water on tribal lands.¹²¹⁰ Increasing temperatures can affect sea levels, which can impact tribal settlements, crops, and wildlife.¹²¹¹ Climate changes can also have negative health consequences, damage infrastructure, force relocation, and hinder economic development.¹²¹²

¹²⁰¹ U.S. Dep't of the Interior, Fish and Wildlife Service, *Budget Justifications and Performance Information, Fiscal Year 2019*, 213, 215, https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_fws_budget_justification.pdf.

¹²⁰² U.S. Senator Brian Schatz, "Schatz—Federal Funding for Hawaii to Rise," Mar. 22, 2018, <https://www.schatz.senate.gov/press-releases/schatz-federal-funding-for-hawaii-to-rise>.

¹²⁰³ U.S. Environmental Protection Agency, "International Climate Impacts," Jan. 19, 2017, https://19january2017snapshot.epa.gov/climate-impacts/international-climate-impacts_.html#Vulnerable. This page indicates it is a historical "snapshot" that reflects the EPA website "as it existed on January 19, 2017"; U.S. Global Change Research Program, *Climate Change Impacts in the U. S.*, *supra* note 936, at Ch. 12; NCAI, "Climate Change," *supra* note 936; U.S. Department of Agriculture, *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences* (October 2016), 1, https://www.fs.fed.us/pnw/pubs/pnw_gtr944.pdf.

¹²⁰⁴ U.S. Global Change Research Program, *Climate Change Impacts in the U. S.*, *supra* note 936; NCAI, "Climate Change," *supra* note 936.

¹²⁰⁵ NCAI, "Climate Change," *supra* note 936; U.S. Global Change Research Program, *Climate Change Impacts in the U. S.*, *supra* note 936, at 298.

¹²⁰⁶ U.S. Global Change Research Program, *Climate Change Impacts in the U.S.*, *supra* note 936, at 49.

¹²⁰⁷ *Ibid.*, 13.

¹²⁰⁸ *Ibid.*, 48.

¹²⁰⁹ *Ibid.*

¹²¹⁰ *Ibid.*

¹²¹¹ *Ibid.*

¹²¹² *Ibid.*

Researchers have found that displacement due to the effects of climate change is a grim reality for a growing number of Native tribes and communities.¹²¹³ This is especially true in Alaska, where several Native communities are already faced with relocation as their only adaptation strategy.¹²¹⁴ For instance, the villages of Newtok, Shishmaref, and Kivalina are facing relocation due to rising sea levels and coastal erosion from storm surges; they were formerly buffered from such effects by ice that is rapidly thawing today.¹²¹⁵

Previously, federal legislation barred federal agencies to assist in relocation or provide funding for repairs.¹²¹⁶ At least one community, however, was successfully resettled with federal assistance—the Isle de Jean Charles in coastal Louisiana.¹²¹⁷ The Biloxi-Chitimacha-Choctaw band of Indians has lost 98 percent of their coastal land since 1955, shrinking from close to 15,000 acres to just a small strip about a quarter-mile wide and a half-mile long.¹²¹⁸ Following coastal erosion and damage from hurricanes, the majority of residents had left, leaving just 99 residents who are being dubbed “climate refugees.”¹²¹⁹ The resettlement, which is still in process, was enabled through winning the Obama administration’s National Disaster Resilience Competition, administered by HUD, and it will cost a total of \$48 million to complete over the next several years.¹²²⁰

During the Obama administration, BIA and other executive branch agencies were directed to consider climate change in programmatic activities through Executive Order No. 13,653.¹²²¹ This Executive Order was subsequently revoked during the Trump administration, however, through the March, 2017 Executive Order No. 13,783.¹²²² The BIA Tribal Resilience Program has provided federal resources to tribes and tribal organizations to build their capacity in order to increase resilience.¹²²³ This program has awarded grant funding for resilience training, adaptation planning,

¹²¹³ Ibid.

¹²¹⁴ Ibid.

¹²¹⁵ Ibid., 83.

¹²¹⁶ Ibid.

¹²¹⁷ Sebastien Malo, *Native American tribe to relocate from Louisiana coast as sea levels rise*, REUTERS, Mar. 17, 2016, <https://www.reuters.com/article/us-climatechange-usa-displacement/native-american-tribe-to-relocate-from-louisiana-coast-as-sea-levels-rise-idUSKCN0WJ34D>; Michael Isaac Stein, *How to Save a Town From Rising Waters*, CITYLAB, Jan. 24, 2018, <https://www.citylab.com/environment/2018/01/how-to-save-a-town-from-rising-waters/547646/> [hereinafter Stein, *How to Save a Town From Rising Waters*].

¹²¹⁸ Ibid.

¹²¹⁹ Stein, *How to Save a Town From Rising Waters*, *supra* note 1217.

¹²²⁰ Ibid.

¹²²¹ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Climate Change,” <https://www.bia.gov/regional-offices/pacific/climate-change> (last accessed July 27, 2018); Exec. Order No. 13,653 (Nov. 1, 2013), 78 FED. REG. 66,817 (Nov. 6, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/11/01/executive-order-preparing-united-states-impacts-climate-change>, *revoked* by Exec. Order No. 13,783 (Mar. 28, 2017), 82 FED. REG. 16,093 (A, 2017).

¹²²² Exec. Order No. 13,783, 82 FED. REG. 16,093 (Mar. 31, 2017), <https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth> (last accessed Sept. 13, 2018).

¹²²³ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Tribal Resilience Program,” <https://www.indianaffairs.gov/bia/ots/tribal-resilience-program> (last accessed July 27, 2018). *See also* “Glossary,”

vulnerability assessments, and other activities with the aim of building resilience in Indian Country.¹²²⁴ In 2015, the program awarded a total of 104 grants, totaling \$11.8 million.¹²²⁵ The President's FY 2019 budget did not request any funds for the Tribal Resilience Program, as compared to the \$9.9 million in funding the program received in FY 2017 and the \$9.8 million in funding in FY2018.¹²²⁶

At the Commission's listening session with the Quinault Indian Nation in August 2016, climate change was also raised as an issue of great tribal concern.¹²²⁷ The effects of climate change are impacting the Quinault's resources and industries.¹²²⁸ President Fawn Sharp of the Quinault Indian Nation told the Commission:

And now we are facing the impacts of climate change. Right here in our village of Taholah, we are facing very real dangers from sea level rise, intensified storms, floods, warming oceans, acidified waters, and the very real danger of tsunamis. This entire village has to relocate. Our people didn't cause any of these problems, but they're the first ones to be impacted by them. These things all cost, big time, and they're things that simply can't be ignored.¹²²⁹

Due to the Taholah, Washington village's susceptibility to storm surges and flooding, the Quinault conducted a vulnerability assessment with federal assistance and came up with a relocation plan.¹²³⁰ If implemented, the relocation plan would enable the village to be much more resilient to potential impacts of climate change, including storm surges, sea level rises, and tsunamis.¹²³¹

U.S. Climate Resilience Toolkit, <https://toolkit.climate.gov/content/glossary>, which defines "resilience" as "[t]he capacity of a community, business, or natural environment to prevent, withstand, respond to, and recover from a disruption."

¹²²⁴ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Tribal Resilience Program," <https://www.indianaffairs.gov/bia/ots/tribal-resilience-program> (last accessed July 27, 2018).

¹²²⁵ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Interior Department Announces \$11.8 Million to Support Tribal Climate Change Adaptation and Planning Projects," July 9, 2015, <https://www.doi.gov/pressreleases/interior-department-announces-118-million-support-tribal-climate-change-adaptation-and-planning>.

¹²²⁶ NCAI, *Analysis of the FY 2019 President's Budget*, *supra* note 656, at 5; *see also* FY2018 Omnibus Spending Bill, Pub. L. No. 115-141, 132 Stat. 348, <https://budgetcounsel.files.wordpress.com/2018/04/consolidated-appropriations-act-2018-pub-l-115-141-132-stat-348-march-23-2018-h-r-1625-115th-congress-enrolled-bill.pdf>.

¹²²⁷ Quinault Indian Nation, "Climate Change," (handout) (on file), at 1–2.

¹²²⁸ *Ibid.*

¹²²⁹ NATIVE NEWS ONLINE, *Tribes to U.S. Commission on Civil Rights: It's Time to Speak Up*, Aug. 27, 2016, <https://nativenewsonline.net/currents/tribes-u-s-commission-civil-rights-time-speak/>.

¹²³⁰ U.S. Environmental Protection Agency, "Quinault Indian Nation Plans for Relocation," <https://www.epa.gov/arc-x/quinault-indian-nation-plans-relocation> (last accessed July 27, 2018) [hereinafter EPA, "Quinault Indian Nation Plans for Relocation"]; U.S. Dep't of Energy, Office of Indian Energy Policy and Programs, "DOE Assists Quinault Indian Nation with Plans for a Climate-Resilient Community," June 15, 2016, <https://www.energy.gov/indianenergy/articles/doe-assists-quinault-indian-nation-plans-climate-resilient-community> [hereinafter DOE, "DOE Assists Quinault"].

¹²³¹ EPA, "Quinault Indian Nation Plans for Relocation," *supra* note 1230; DOE, "DOE Assists Quinault," *supra* note 1230.

The Federal Role in Indian Enterprises

Gaming

Some tribal governments have chosen the gaming industry as a means of fostering economic development in tribal communities and reducing dependence on federal assistance.¹²³² Tribal gaming has created jobs and generated revenue for tribes to pay for infrastructure, housing, education, health care, child care, and tribal government positions and services.¹²³³

Tribal governments had historically been at odds with state governments regarding whether tribal governments had the autonomy to conduct and regulate gaming without state control.¹²³⁴ The 1987 U.S. Supreme Court decision, *California v. Cabazon Band of Mission Indians*, affirmed that state laws do not contravene the authority of tribal governments to establish and regulate their own gaming on reservations when surrounding states regulate gaming operations, where federal law and policy generally pre-empt state law and where the state lacks sufficiently exceptional interests to justify state action.¹²³⁵ Shortly thereafter, Congress passed the Indian Gaming Regulatory Act of 1988, which established the jurisdictional framework for the regulation of gaming in Indian Country, and established three classes of gaming where each class had its own regulatory structure.¹²³⁶ BIA holds an Office of Indian Gaming, which serves in an advisory role to review and analyze the statutory requirements of the Indian Gaming Regulatory Act, develop policies, and provide technical assistance to tribal governments and states.¹²³⁷

In June 2018, the National Indian Gaming Commission reported that the Indian gaming industry grossed approximately \$32.4 billion in FY 2017, an overall increase of 3.9 percent over FY 2016.¹²³⁸ Although the gaming industry has unquestionably spurred critical economic development, critics suggest that diversification of revenue sources and investments will likely be key to sustaining long-term economic growth in Indian Country.¹²³⁹ Like all U.S. industries, the

¹²³² National Indian Gaming Commission, “History,” <https://www.nigc.gov/commission/history> (last accessed July 27, 2018).

¹²³³ Alan P. Meister *et al.*, *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 389–90 (2009); *see also* NCAI, “Gaming,” <http://www.ncai.org/policy-issues/economic-development-commerce/gaming> (last accessed July 27, 2018).

¹²³⁴ National Indian Gaming Commission, “History,” <https://www.nigc.gov/commission/history> (last accessed July 27, 2018).

¹²³⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 221–22 (1987).

¹²³⁶ Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21, 18 U.S.C. §§ 1166–68.

¹²³⁷ U.S. Dep’t of the Interior, Bureau of Indian Affairs, “Office of Indian Gaming,” <https://www.bia.gov/as-ia/oig> (last accessed July 27, 2018).

¹²³⁸ National Indian Gaming Commission, “2016 Indian Gaming Revenues Increased 4.4%,” July 12, 2017, <https://www.nigc.gov/news/detail/2016-indian-gaming-revenues-increased-4.4>.

¹²³⁹ *See* Ryan David Dreveskracht, *Native Nation Economic Development Via the Implementation of Solar Projects: How to Make It Work*, 68 WASH. & LEE L. REV. 27, 34–36 (2011) (arguing that tribes’ “total dependency on gaming is not sustainable”); *see also* Alan P. Meister *et al.*, *supra* note 1233, at 389–90 (pointing out that “gaming revenue by itself cannot eradicate the dire socioeconomic conditions that persist” in tribal communities).

gaming industry may generate far less revenue during economic downturns.¹²⁴⁰ For instance, the 2008 recession led to reduced revenues and layoffs among gaming businesses in tribal communities.¹²⁴¹ While research has shown that the gaming industry in Indian Country can help the economic development of tribes in rural areas and their surroundings, including non-reservation communities,¹²⁴² casinos in very remote locations do not always justify greater capital investment “simply because they cannot expect to draw [non-Indian visitors] from beyond their core catchment areas.”¹²⁴³ Congress maintains the power to amend laws and regulations that could potentially curtail the extent of tribal governments’ control over the gaming industry in Indian country.¹²⁴⁴ Consequently, some tribal community leaders have cautioned against relying exclusively on the gaming industry for economic development.¹²⁴⁵ Others also caution that “[t]he most persistent and toxic negative narrative [about Native Americans] is the myth that many Native Americans receive government benefits and are getting rich off casinos,” which may seed divisions with other communities of color, and cement negative stereotypes about Native Americans.¹²⁴⁶

Federal Contracting

The “Native 8(a) program” was created by Congress as a provision in the Small Business Act,¹²⁴⁷ which allows tribal corporations to enter sole-source federal contracts without the traditional competitive requirements for individual small businesses,¹²⁴⁸ and allows tribal corporations to operate multiple such “8(a)” firms.¹²⁴⁹ This program benefits enterprises owned by federally recognized Indian tribes, Alaska Native corporations, and Native Hawaiian Organizations, on or off Native property.¹²⁵⁰ The program was created as a means of extending economic opportunities

¹²⁴⁰ See Dreveskracht, *supra* note 1239, at 33.

¹²⁴¹ *Ibid.*

¹²⁴² Jonathan B. Taylor, *The Economic Impact of Tribal Government Gaming in Arizona*, Arizona Indian Gaming Association (2012), 5, <http://www.azindiangaming.org/wp-content/uploads/2015/05/economic-impact.pdf>.

¹²⁴³ Spectrum Gaming Group, *Economic Market Study: Casinos, Cardrooms and Other Forms of Gambling in Washington State* (Sept. 28, 2016), 9, https://www.wsgc.wa.gov/sites/default/files/public/reports-publications/spectrum-report-09-28-16_0.pdf.

¹²⁴⁴ Dreveskracht, *supra* note 1239, at 34.

¹²⁴⁵ *Ibid.*

¹²⁴⁶ Reclaiming Native Truth: A Project to Dispel America’s Myths and Misconceptions, *Research Findings: Compilation of All Research* (June 2018), 9, <https://www.reclaimingnativetruth.com/wp-content/uploads/2018/06/FullFindingsReport-screen.pdf>.

¹²⁴⁷ 15 U.S.C. §§ 631–657s, Small Business Act, as amended.

¹²⁴⁸ 13 C.F.R. 124.506(b).

¹²⁴⁹ See generally Native American Contractors Association, “Basics of Native 8(a),” <http://nativecontractors.org/member-services/archive/advocacy-archive/basics-of-native-8a> (last accessed July 27, 2018); National Congress of American Indians, “Government Contracting,” <http://www.ncai.org/policy-issues/tribal-governance/government-contracting> (last accessed July 27, 2018).

¹²⁵⁰ See Native American Contractors Association, “What is the Native 8(a) Contracting Program?” [https://www.chenega.com/Media/Default/Native%208\(a\)/NACA%20brochure%20re%208\(a\)%20program.pdf](https://www.chenega.com/Media/Default/Native%208(a)/NACA%20brochure%20re%208(a)%20program.pdf) [hereinafter NACA, “What is the Native 8(a) Contracting Program?”].

to Native enterprises, and helps fulfill the federal government's trust obligation by promoting economic development, employment, construction of enterprise sites, and supplementing federal funding for a variety of tribal government services. The Small Business Administration has programs to help such enterprises develop, thus providing economic benefits in Native communities and increasing the number of Native enterprises in the federal contracting industry.¹²⁵¹ Native enterprises receive approximately 1.3 percent of total U.S. procurement; even this small share is beneficial and brings much-needed economic opportunities to Indian Country.¹²⁵² The Native American Contractors Association believes that it is necessary means of supplementing federal programs that are often underfunded.¹²⁵³

The 8(a) program has undergone many amendments since the Small Business Act was originally passed in 1958. In fact, Native Americans, Alaska Natives, and Native Hawaiians were not originally covered by the Act.¹²⁵⁴ In 2009 (effective for FY 2010), the National Defense Authorization Act added a requirement, in Section 811, that written justifications be provided for any sole source 8(a) contract valued over \$20 million.¹²⁵⁵ GAO studied how this requirement impacted Indian communities in 2012, and found that it ultimately reduced the number of sole-source contracts awarded to Native American and Alaska Native enterprises by 60 percent.¹²⁵⁶ Furthermore, some Native companies reported their perception that the provision was used “to avoid working with [Native enterprises] all together [*sic.*] out of fear of political scrutiny.”¹²⁵⁷ In a letter to the U.S. Commission on Civil Rights, the Native American Contractors Association (or NACA) argued that because “only Native 8(a) firms are able to receive direct awards in excess of \$4M for services and \$6.5M for manufacturing, ‘Section 811’ . . . was written to apply only to Native contractors with the intent to negate direct awards to [them].”¹²⁵⁸ Agreeing with NACA’s position, U.S. Senator Jon Tester (D-MT) commented, “[w]e’re creating jobs in tribal communities and the federal government is receiving essential goods and services it needs to support our troops . . . [b]ut folks in Indian Country are being negatively impacted by unnecessary hurdles” through Section 811.¹²⁵⁹

¹²⁵¹ Ibid. See also NCAI, “Government Contracting,” <http://www.ncai.org/policy-issues/tribal-governance/government-contracting> (last accessed July 27, 2018).

¹²⁵² NACA, “What is the Native 8(a) Contracting Program?” *supra* note 1250.

¹²⁵³ Ibid.

¹²⁵⁴ See, e.g., Tex Hall, Inter Tribal Economic Alliance, *SBA Native 8(a) Program—Priorities of ITEA*, undated, <http://nativecontractors.org/wp-content/uploads/media/pdf/100110%20ITEA%20ITC%20Native%208a.pdf> (last visited Sept. 14, 2018).

¹²⁵⁵ National Defense Authorization Act, Pub. L. No. 111-84, 123 Stat. 2190, Oct. 28, 2009.

¹²⁵⁶ U.S. Government Accountability Office, *Slow Start to Implementation of Justifications for 8(a) Sole Source Contracts* (Dec. 2012), 1, <https://www.gao.gov/assets/660/650840.pdf>.

¹²⁵⁷ Ibid., 16.

¹²⁵⁸ Native American Contractors Association, letter to U.S. Commission on Civil Rights, Mar. 18, 2016 (on file).

¹²⁵⁹ U.S. Senator Jon Tester, “Tester Pushes to Eliminate Unnecessary Hurdles for Native American Companies,” Mar. 16, 2015, https://www.testersenate.gov/?p=press_release&id=3834 (arguing that Section 811 unfairly penalizes native enterprises).

A 2016 GAO report, however, noted that a growing number of tribal 8(a) enterprises that were eligible for sole-source contracts over \$20 million had won competitive 8(a) contracts in recent years, despite Section 811.¹²⁶⁰

Buy Indian Act

Congress passed the Buy Indian Act in 1910 as a statute authorizing a special federal contracting program for Indian-owned businesses without using the standard competitive process.¹²⁶¹ The Act provides that “so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.”¹²⁶² Contract funds awarded through the Act are considered set asides for vendors, and new awards typically range from \$20 million to \$60 million.¹²⁶³ The Act is applicable to DOI, including BIA, BIE, and the offices of the Assistant Secretary for Indian Affairs.¹²⁶⁴ In addition, IHS is required to “utilize the negotiation authority of the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and practicable.”¹²⁶⁵ DOI indicates that the Act benefits Native contractors, as it may aid in growth and development of Indian enterprises and can create job opportunities for Native Americans.¹²⁶⁶

In July 2015, GAO reported that BIA and IHS were not effectively implementing the Act.¹²⁶⁷ This was related to a lack of clear written policy guidance, inconsistent implementation within and across agencies, a problematic business certification process, and ineffective understanding of implementation processes at regional offices.¹²⁶⁸ In 2013, 2014, and 2015, Buy Indian Act contracting accounted for 7 percent, 12 percent, and 19 percent of BIA’s total contracting; and only 0.4 percent, 0.3 percent, and 0.5 percent of IHS’s contracting.¹²⁶⁹

¹²⁶⁰ U.S. Government Accountability Office, *DOD SMALL BUSINESS CONTRACTING: Use of Sole-Source 8(a) Contracts over \$20 Million Continues to Decline* (June 2016), 19, <https://www.gao.gov/assets/680/677750.pdf>.

¹²⁶¹ 25 U.S.C. § 47.

¹²⁶² *Id.*

¹²⁶³ U.S. Dep’t of the Interior, Office of Indian Energy and Economic Development, *Tribal Economic Development Principles-at-a-Glance Series: The Buy Indian Opportunity* (undated), 1, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/Primer%20on%20Buy%20Indian%20Act%20508%20Compliant%202.6.18%28Reload%29.pdf>.

¹²⁶⁴ *Ibid.*

¹²⁶⁵ 48 C.F.R. § 370.501500–505 (2010).

¹²⁶⁶ *Id.*

¹²⁶⁷ U.S. Government Accountability Office, *Bureau of Indian Affairs and Indian Health Service Need Great Insight into Implementation at Regional Offices* (July 2015), 19, <https://www.gao.gov/assets/680/671291.pdf>.

¹²⁶⁸ *Ibid.*

¹²⁶⁹ Kevin Plexico, Vice President, Deltek, “Looking Toward the Future—what do the metrics say” presented at the Native American Contractors Association annual membership meeting, November 2015.

Access to Capital

The BIA Division of Capital Investment manages the Indian Loan Guaranty, Insurance, and Interest Subsidy Program, which helps facilitate loans to Indian businesses through conventional financing when they would otherwise be ineligible.¹²⁷⁰ DOI states that the program is designed to expand economic opportunities to Native American and Alaska Native-owned businesses, and to encourage self-sufficiency.¹²⁷¹ The program provides up to a 90 percent loan guarantee or loan insurance, and over \$1 billion has been provided in loan guarantees and insurance.¹²⁷² Dante Desiderio, executive director of the Native American Finance Officers Association, testified before the U.S. Senate that this program might be helpful for the growth of Indian enterprises and tribal governments in their initial development stages; however, as of 2015, it had only allocated \$8 million for lending, and only \$80 million in lending authority for all of Indian Country.¹²⁷³

The President's FY 2019 budget only requested \$6.7 million in funding to guarantee or insure \$108.6 million in loans.¹²⁷⁴ See also Appendix G, Funding for Native American Economic Development.

The U.S. Department of the Treasury runs the Native American Community Development Financial Institutions (CDFI) Assistance Program, which encourages financial opportunities for economically distressed communities. It provides financial awards to Native CDFIs for providing community access to credit, capital, and financial services through direct services, technical assistance, and training.¹²⁷⁵ As of 2016, Treasury allocated \$15 million for this program,¹²⁷⁶ to be shared among 73 Native CDFIs.¹²⁷⁷ In his 2016 testimony before the Commission, Mr. Desiderio said:

[The] Department of Treasury sits on a lot of money that Indian Country doesn't have access to, like the new market tax credits, or this new CDFI bond guarantee

¹²⁷⁰ U.S. Dep't of the Interior, Bureau of Indian Affairs, "Division of Capital Investment," <https://www.bia.gov/as-ia/ieed/division-capital-investment> (last accessed July 30, 2018).

¹²⁷¹ U.S. Dep't of the Interior, Office of Indian Energy and Economic Development, *Division of Capital Investment: Helping Guarantee the Future of Indian Country* (undated), 2, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-033986.pdf>.

¹²⁷² *Ibid.*

¹²⁷³ Dante Desiderio, testimony before the Senate Committee on Indian Affairs Oversight Hearing, June 17, 2015, at 6, <https://www.indian.senate.gov/sites/default/files/upload/files/6.17.15%20Desiderio%20Testimony.pdf> [hereinafter Desiderio, testimony before the Senate Committee on Indian Affairs Oversight Hearing].

¹²⁷⁴ Office of the Assistant Secretary of Indian Affairs, "\$2.4 Billion FY 19 Indian Affairs Budget," *supra* note 730.

¹²⁷⁵ U.S. Dep't of the Treasury, Community Development Financial Institutions Fund, <https://www.cdfifund.gov/Pages/default.aspx> (last accessed July 30, 2018).

¹²⁷⁶ Desiderio, testimony before the Senate Committee on Indian Affairs Oversight Hearing, *supra* note 1273.

¹²⁷⁷ Michou Kokodoko, *Findings from the 2017 Native CDFI Survey: Industry Opportunities and Limitations*, Center for Indian Country Development (November 2017), 1, <https://www.minneapolisfed.org/~media/files/community/indiancountry/resources-education/working-papers/cicd-wp-2017-04.pdf> [hereinafter, Kokodoko, *Findings from the 2017 Native CDFI Survey*]. The report defines Native CDFIs (or NCDFIs) as "[o]rganizations with at least 50 percent of their activities in Native American, Alaska Native, and/or Native Hawaiian communities."

program. . . . When you look at the inequity in funding[,] the Bureau of Indian Affairs has a \$7 million loan fund. We have CDFI money that's about \$15 million. And you look at the new market tax credits, and low-income housing tax credits, new markets is at \$5 billion. And we're just not accessing the big money, and everybody's okay with us playing in that small pool. We can't develop our economies without access to that sort of capital that will make those [public-private] partnerships work.¹²⁷⁸

Furthermore, as the demand for lending services is very high in Indian Country, there is a growing need to expand lending services.¹²⁷⁹ In a 2016 survey of Native CDFIs, nearly half expressed that they were unable to fully fund loans approved by lending committees, with a shortfall of at least 10 percent of the approved loan amount.¹²⁸⁰

The 2018 omnibus spending bill, enacted to fund the government through FY 2018, in its Community Development Financial Institutions provision allocated \$16 million through FY 2018 to support

financial assistance, technical assistance, training, and outreach programs designed to benefit Native American, Native Hawaiian, and Alaska Native communities and provided primarily through qualified community development lender organizations with experience and expertise in community development banking and lending in Indian country, Native American organizations, tribes and tribal organizations, and other suitable providers.¹²⁸¹

One example of this is Lakota Funds, a Native CDFI that has financed over 660 tribal-owned businesses, which in turn has created more than 1,100 jobs.¹²⁸² However, the current funding level is reportedly insufficient, as it is estimated that \$48 million was needed to meet funding needs in 2017.¹²⁸³

Aside from these two programs, there are additional federal programs that provide access to capital for Indian enterprises, such as USDA, HUD, Commerce, and the Small Business Administration.¹²⁸⁴ However, Mr. Desiderio stated that each program had its own terms and conditions, and that navigating the programs can be a difficult task.¹²⁸⁵ Furthermore, according to Native CDFIs, federal funding for these types of programs is “extremely limited,” yet capital is

¹²⁷⁸ Desiderio Testimony, *Briefing Transcript*, pp. 47–49.

¹²⁷⁹ Kokodoko, *Findings from the 2017 Native CDFI Survey*, *supra* note 1277, at 7.

¹²⁸⁰ *Ibid.*

¹²⁸¹ *Consolidated Appropriations Act of 2018*, *supra* note 207, at 192.

¹²⁸² Norris et al., *Strengthening the Pine Ridge Economy*, *supra* note 933, at 4.

¹²⁸³ Kokodoko, *Findings from the 2017 Native CDFI Survey*, *supra* note 1277, at 9.

¹²⁸⁴ *Ibid.*, 5.

¹²⁸⁵ *Ibid.*

critically important in “developing tribal economies and fostering long term[,] sustainable access to capital.”¹²⁸⁶

An example of the limitations in federal funding involves the Economic Development Administration, a division of the U.S. Department of Commerce.¹²⁸⁷ It promotes job growth and locally driven economic development through financial assistance to distressed communities.¹²⁸⁸ The Commerce Department proposed eliminating its funding in FY 2019,¹²⁸⁹ even though the 2018 omnibus spending bill, enacted to fund the government through FY 2018, had allocated \$262.5 million to the Economic Development Administration.¹²⁹⁰

Additionally, these programs themselves cannot sustain larger-scale development projects; tribes do not have the ability to leverage federal funds like state governments because their funding is discretionary.¹²⁹¹ This often restricts Indians from the private market.¹²⁹² Thus, programs such as the New Market Tax Credit program, the CDFI Bond Guarantee Program, and the Low-Income Tax Credit Program, which are designed to leverage and attract capital to public projects and represent billions of dollars in potential investment, are typically unavailable to tribes.¹²⁹³

See also Appendix H for the Bureau of Indian Affairs Loan Matrix.

¹²⁸⁶ *Ibid.*, 6.

¹²⁸⁷ U.S. Dep’t of Commerce, “Economic Development Administration,” <https://www.eda.gov/about/> (last accessed July 30, 2018).

¹²⁸⁸ *Ibid.*

¹²⁸⁹ U. S. Dep’t of Commerce, Economic Development Administration, *Fiscal Year 2019 Congressional Budget Request*, 7, http://www.osec.doc.gov/bmi/budget/FY19CBJ/EDA_FY2019_President's_Budget_FINAL.pdf.

¹²⁹⁰ *Consolidated Appropriations Act of 2018*, *supra* note 207, at 54.

¹²⁹¹ Desiderio, testimony before the Senate Committee on Indian Affairs Oversight Hearing, *supra* note 1273.

¹²⁹² *Ibid.*

¹²⁹³ *Ibid.*, 7–8.

FINDINGS AND RECOMMENDATIONS

Findings

I. The Trust Relationship

- A. The special government-to-government relationship between the federal government and Indian tribes is based on Article I, Section 8 of the Constitution, and has been shaped and defined by 375 treaties between the federal government and Indian tribes, Supreme Court decisions, laws, regulations, Executive Orders, and the customary practices of foreign relations.
- B. Since our nation's founding, the United States and Native Americans have committed to and sustained this special trust relationship, which obligates the federal government to promote tribal self-government, support the general welfare of Native American tribes and villages, and to protect their lands and resources. With great resilience, Native Americans have endured centuries of discrimination, injustice, and broken promises, and these harms continue to this day. In exchange for and recognition of the forced dispossession and relinquishment of Native peoples' land and natural resources, the U.S. government promised services and support to Native Americans.
- C. The trust relationship authorizes the federal government to provide support and services to Native Americans. Congress's trust obligations originate from treaty obligations and now take their form in the laws Congress has passed that authorize the provision of services to Native Americans. It is up to Congress to appropriate funds for those services.
- D. In the Commission's 2003 *A Quiet Crisis* report, the Commission documented the federal government's historic failure to carry out its promises and trust obligations. These failures included longstanding and continuing disregard for tribes' infrastructure, self-governance, housing, education, health, and economic development. The Commission found these failures created a civil rights crisis in our nation. Despite some progress, the crisis remains and the federal government continues to fail to adequately support the social and economic welfare of Native Americans.
- E. Native Americans bring a rich history and vibrant contributions to America's culture, values, and lands. The U.S. government removed approximately one-fifth of Native American tribes from their homelands to live in remote reservations, reduced the overall footprint of lands owned by tribes, promoted the abolishment of communal tribal ownership of land through allotment, and forced many Native Americans to give up their culture. The federal government did not provide adequate assistance to support the interconnected needs of Native Americans such as local infrastructure, self-governance, housing, education, health, and economic development. Coupled with the federal government's continuing failure to live up to its trust obligations, the end result is that Native Americans face significant inequities among major criminal and public safety, health, education, housing, and economic measures compared to the rest of the nation and non-Native people.
- F. The U.S. government's conduct and its failure to adhere to its promises pursuant to treaties it signed have severely curtailed the social and economic development of Native Americans. These failures have resulted in the degradation of the individual lives of Native

Americans and the creation of barriers regarding access to opportunity in the areas of public safety, health, education, housing, life expectancy, and economic measures.

- G. The federal government does not have an official government-to-government relationship with the Native Hawaiian community. However, Congress has acknowledged the role of the United States in the overthrow of the Kingdom of Hawaii and the annexation of Hawaii without the consent or compensation of Native Hawaiians. Congress has passed over 150 laws that promote the welfare of Native Hawaiians and establish a special political and legal relationship with the Native Hawaiian community similar to the trust relationship between the United States and Native Americans. In 2016, the federal government finalized an administrative rule that allows a unified Native Hawaiian government (if established) to enter into a formal government-to-government relationship with the U.S. government.

II. Data

- A. In 2003 the Commission referred to Native Americans as an invisible minority, because of their small population numbers that are not always sufficiently tracked by the federal government. The Native American population makes up approximately 1.7 percent of the U.S. population and is growing more than twice as fast as the total U.S. population. Native Americans are mainly concentrated in 187 (5.9 percent) out of 2,237 U.S. counties. In 2016, there were 21 states with 100,000 or more Native American residents and the top five states with the largest American Indian and Alaska Native alone populations by percentage were Alaska (14.1 percent), New Mexico (9.3 percent), South Dakota (8.9 percent), Oklahoma (7.6 percent), and Montana (6.4 percent).
- B. Data on Native American and Native Hawaiians and Other Pacific Islander racial groups are often incomplete, inaccurate, old, or not tracked by the federal government. Although data on these communities have limitations and could be improved, the best available data suggest sometimes extreme social and economic disparities between these communities and national averages, which were confirmed by testimony the Commission received. There is a critical need for more accurate and current data collection for these communities, including disaggregated data on American Indian, Alaska Native, and Native Hawaiian and Other Pacific Islander subpopulations.
- C. Because of the federal government's failure to invest in sufficient sample sizes, the data collected can have large margins of error, and other statistical issues related to their relative population size. In the 2010 census, American Indians and Alaska Natives living on reservations were undercounted by 4.9 percent. The federal government has failed to provide adequate resources and make sufficient efforts to overcome the challenges in surveying, such as populations living in remote rural areas, limited English proficiency, and mistrust of the federal government. The lack of accurate data on Native Americans impedes federal, state, local, and tribal governments from monitoring conditions and making informed policy and spending decisions.
- D. Inaccurate and undercounted data gathered by the Census and American Community Survey can negatively impact federal funds and services received by Native American tribes. For example, some tribes have complained that grants made under the Indian Housing Block Grant (Block Grant) program are incorrect because allocation formulas are based on inaccurate tribal census data. Some tribal justice grants are also based on crime statistics.

- E. Defining Native Americans includes closely intertwined identities of race and political entity status. Courts have acknowledged the legal status of Native Americans as both a sovereign political entity and as a racial group with constitutionally guaranteed rights to equal protection. The categorization of Native Americans as a racial group does not preclude Native Americans' government-to-government relationship with the federal government or federal programs specifically targeted for Native Americans. As the Supreme Court held in *U.S. v. Antelope*, 430 U.S. 641, 645 (1977), the Court's decisions "leave no doubt" that federal laws dealing with Native Americans are not based upon impermissible racial classifications and "are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians."

III. Federal Expenditures

- A. Health, education, public safety, environmental quality, and business development are interconnected, and investment in these areas in Indian Country promotes a cycle of social and economic prosperity. Historically, after the passage of the Indian Self-Determination and Education Assistance Act of 1975, increased tribal operation of their health, government, and education services and increased infrastructure needs in Indian Country spurred new local jobs for Native Americans in Indian Country. Investment in clean water and sanitation has reduced infant mortality rates and mortality rates for environmentally related diseases by 80 percent since 1973. More recently, recipients of Block Grant program funding from 2012 to 2014 reported the creation of 835 jobs and 123 community buildings. Increased housing options removes obstacles in recruiting and retaining qualified healthcare staff and effective teachers, who have positive effects on the Native community.
- B. In 2003 the Commission reviewed funding for the six primary agencies that are primarily responsible for Native American programs: the U.S. Departments of the Interior (DOI), Justice (DOJ), Health and Human Services (HHS), Education (ED), Housing and Urban Development (HUD), and Agriculture (USDA). The Commission found that funding for Native American programs and services were disproportionately lower than funding for programs and services to other non-Native populations.
- C. Federal programs designed to support the social and economic well-being of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities. For example, the lack of coordination between DOJ and the Bureau of Indian Affairs (BIA) has led to the provision of public safety services with insufficient or duplicitous funding and training to operate those services. Overlapping DOJ and BIA public safety functions have also led to costly duplication, confusion regarding accountability, and wasteful outcomes.
- D. More than 20 federal agencies provide targeted services to Native Americans. Major programs that are underfunded include:
1. DOJ and BIA public safety and justice programs;
 2. Indian Health Service (IHS) health care, behavioral health, urban Indian health, and water sanitation programs;
 3. DOI programs such as Bureau of Indian Education programs and BIA real estate services and forest, wildlife, and road maintenance programs; and

4. HUD programs that help meet the housing needs of Native Americans and Native Hawaiians.
- E. Even when federal funding for Native American programs has increased, these funding levels have not kept pace with declines in real spending power, let alone fulfilled the trust obligations to which the federal government has committed itself for Native Americans. Examples of the effects of inadequate funding include:
1. Development of new affordable housing development has slowed.
 2. School facilities on reservations are deteriorating and more likely to be in poor condition compared to off-reservation public schools.
 3. Vast health disparities exist today between Native Americans and other population groups. Native Americans have 1.6 times the infant mortality rate of non-Hispanic whites and the life expectancy for Native peoples is 5.5 years less than the national average. These poor health conditions are compounded by poor levels of access to quality health care in Indian Country.
- F. Funding for Native American programs often comes with restrictions that hamper tribal access to funds. In most instances Native American programs receive funding that is subject to sequestration (automatic across-the-board spending cuts), which has had devastating impacts on Native American programs. In comparison, vital federal programs such as Medicaid and Social Security are not subject to sequestration, and state and local programs typically do not rely on short-term grant programs and are able to rely on a broader tax base.
- G. Congress often provides funding for Native American programs in a manner that makes long-term planning and budgeting difficult for tribal governments. For example, federal funding may be only available in a manner that is unpredictable and inconsistent from year to year, or requires tribal governments to receive or apply for federal money that was initially given to state governments. Funding may also be in the form of competitive grants or temporary pilot programs that expire and are not brought to scale.
- H. The federal government continues to fail to keep accurate, consistent, and comprehensive records of federal spending on Native American programs, either for a given fiscal year or for longer time periods, making monitoring of federal spending to meet its trust responsibility difficult.

IV. Tribal Sovereignty

- A. Tribal nations are distinctive sovereigns that have a special government-to-government relationship with the United States. Unequal treatment of tribal governments and lack of full recognition of the sovereign status of tribal governments by state and federal governments, laws, and policies diminish tribal self-determination and negatively impact criminal justice, health, education, housing and economic outcomes for Native Americans.
- B. Although promoting self-determination and self-reliance is a shared objective of federal and tribal governments, federal legislation and policies must clearly define trust responsibilities for the federal government to support the wellbeing of Native Americans and protect their resources.

V. *Criminal Justice*

- A. Native Americans collectively suffer from one of the nation's highest rates of crime and victimization. For example, Native American women are ten times more likely to be murdered and four times more likely to be sexually assaulted than the national average. The best available data suggest Native Americans are being killed in police encounters at a higher rate than other racial groups, and that these killings may be undercounted by federal agencies.
- B. Tribal nations need accurate data in order to plan and evaluate their law enforcement and judicial programs. The Tribal Law and Order Act of 2010 encourages the sharing of crime and law enforcement data among federal, state, and tribal agencies. Accordingly, DOJ launched the Tribal Access Program for National Crime Information (TAP) to provide tribes with access to national crime information databases.
- C. Tribal jurisdiction authority over criminal justice matters occurring on Indian lands is critical for tribal self-determination. However, Native American tribes often lack tribal jurisdictional authority over non-Native offenders in Indian Country. In addition, overlapping federal, state, and tribal jurisdictions and chronic underfunding of tribal courts and law enforcement undermine the efficient administration of justice and contribute to higher rates of crimes in Indian Country. The failure of the federal government to prosecute serious crimes in Indian Country exacerbates this situation. Some state and tribal governments have also developed cross-jurisdictional agreements on shared jurisdiction, which helps address public safety issues related to overlapping jurisdictions.
- D. The history of dual sovereignty negatively affects access to the right to counsel in criminal proceedings in tribal courts, because tribal courts are not bound by Fifth Amendment due process guarantees and the Sixth Amendment right to counsel. Under the Indian Civil Rights Act of 1968, Native Americans have a right to counsel in criminal proceedings in tribal courts, but only at their own expense.
- E. The Tribal Law and Order Act of 2010 enhanced tribes' authority for prosecution of some crimes and for sentencing up to specific limits. In addition, the Violence Against Women Act of 2013 expanded tribal authorities' jurisdiction over Native and non-Native offenders who engage in acts of domestic or dating violence. Tribal authority to prosecute other crimes committed on tribal lands such as sexual violence, child abuse, and human trafficking remain limited by federal law.
- F. The federal government has a trust responsibility to provide for public safety in Indian Country. Although overall funding for public safety in Indian Country has increased, it does not come close to meeting the public safety needs in Indian Country or the needs to police and protect natural resources. In 2017, the BIA estimated it funded only 21 percent of law enforcement, 49 percent of detention center, and 3 percent of tribal court needs.
- G. The Tribal Law and Order Act of 2010 gives tribal governments new authority to issue longer prison sentences. The Act requires tribal governments that choose to exercise that new authority to implement due process protections for criminal defendants, such as

providing defense attorneys for indigent defendants at the expense of the tribal government. However, Congress has not appropriated sufficient funding for most tribes to implement this new authority. Indian Country law enforcement agencies have less officers per capita than law enforcement agencies nationwide, leaving residents of Indian Country less safe and subject to higher rates of crime. In 2016, the BIA estimated an additional \$337 million was needed to bring Indian Country law enforcement staffing levels to par with county government law enforcement levels.

- H. The Department of Justice provides mostly short-term, competitive grants to fund public safety initiatives in Indian Country, which forces tribes to compete with one another. This disadvantages tribes with less financial resources as they are unable to write and administer grants, which contain many complicated and overlapping federal requirements. It also hampers long-term planning of programs, effective policing, and the administration of justice.
- I. One successful program is the Tiwahe Initiative, which aims to provide a comprehensive approach to address the interconnected problems of poverty, violence, and substance abuse in Native American communities. After three years of running the initiative in four communities, violent crime reduced 56 percent in those communities. The Trump Administration's FY 2019 budget eliminated funding for the Tiwahe Initiative.
- J. The creation of a set aside in the Crime Victims Fund (CVF) for Native American victims of crime is a positive development in recognition of tribal sovereignty. Prior to the creation of this set aside, tribes could only access CVF funds by applying to states who received annual funding determined by formula, or by applying to competitive DOJ grants. CVF funds help support services such as emergency housing, transportation, child care, food, and basic provisions for victims of crime.

VI. Health Care

- A. The federal trust relationship establishes a responsibility to provide health care to Native Americans. Resulting in part from the failure of the federal government to honor its trust responsibilities, vast health disparities exist between Native Americans and other populations. Native Americans:
 - 1. have life expectancies 5.5 years shorter than the national average;
 - 2. experience infant mortality rates 1.6 times higher than non-Hispanic whites and 1.3 times the national average;
 - 3. experience suicide rates 1.6 times the national average and for Native male youth 2.5 times higher than the national average;
 - 4. require treatment for alcohol and drug abuse at nearly twice the national average (18.0 percent versus 9.6 percent) and have a drug related death rate that is 1.8 times the national average (22.7 deaths per 100,000 versus 12.6 deaths per 100,000); and
 - 5. have a diabetes diagnosis rate over twice the national average (15.1 percent versus 7.2 percent).

- B. The Supreme Court has held that the federal government’s contractual obligations to provide for the health care needs of Native Americans remain in effect even when the government lacks sufficient funds. Since 2016, Congress has begun providing indefinitely a separate discretionary annual appropriation for the Indian Health Service contract support costs of tribal contractors under the Indian Self-Determination and Education Assistance Act of 1975.
- C. Funding for the Indian Health Service (IHS) and Native American health care is inequitable and unequal.
 - 1. IHS expenditures per capita remain well below other federal health care programs, and overall IHS funding covers only a fraction of Native American health care needs, including behavioral health needs to address the suicide epidemic in Indian Country.
 - 2. IHS funding was subject to the across-the-board full sequestration in 2013, although other federal health care programs such as Medicaid and Veterans Affairs programs were not.
 - 3. IHS budgets do not receive advance appropriations (funding for future fiscal years), making it difficult for IHS and tribal health care providers to engage in long-term planning and budgeting. Other federal health care programs such as the Veterans Health Administration receive advance appropriations.
 - 4. The budget for urban Indian health care has not kept pace with inflation and the growing urban Indian population, and meets only a fraction of this population’s needs.
 - 5. Federal funding for the construction and maintenance of healthcare facilities has increased recently, but is still insufficient to cover the backlog of required maintenance of facilities.
 - 6. The Affordable Care Act permanently reauthorized the Indian Health Care Improvement Act, which has great potential to reduce health disparities between Native Americans and other groups; however, many provisions of the law remain unfunded.
- D. The Native Hawaiian Health Care Act of 1988 recognizes the special responsibilities and legal obligations to Native Hawaiians resulting from the unique history between the United States and Native Hawaiians. Accordingly, the federal government is committed to raising the health conditions of Native Hawaiians and providing resources for Hawaiian health programs.

VII. Education

- A. Today, the vast majority of Native American students attend public schools operated by state and local authorities.
- B. In the early decades of the 20th Century, nearly 83 percent of Native American children attended off-reservation boarding schools. On- and off-reservation boarding schools were often far from children’s homes and families, and children’s attendance was involuntary. The effects of that widespread experience resonate among Native American families today.
- C. In addition, for Native American students learning in schools without historically accurate representation or discussion of Native American people in curriculum, the educational experience can be isolating and limiting. The lack of accurate and culturally inclusive

curriculum on Native Americans also limits the ability of all students to understand and be aware of the history and contributions of Native Americans.

- D. The most recent available data reflect that Native American students comprise 1.1 percent (0.5 million) of the total 50.6 million public school students in the U.S., but Native American students experience discernable disparities in access to educational opportunity compared to their non-Native peers. These disparities in educational opportunities have a profound impact on the social and economic opportunities and well-being of Native students and of Native communities.
- E. Native American students have the lowest high school graduation rates in the nation. Native American students, as a category, have the lowest reading and math scores in the country. In the aggregate, Bureau of Indian Education (BIE) students have even lower scores than Native Americans attending public school. The best available data indicate there was no measurable difference in Native American associate's and bachelor's degree attainment levels from 2000 to 2017 despite increases observed nationally: 27 percent of Native Americans aged 25- to 29-years old obtained an associate's degree or higher compared to 46 percent for all groups, and only 16 percent of Native Americans obtained a bachelor's degree or higher, compared to 36 percent for all groups.
- F. The federal government has failed in its trust obligation to provide educational services that address the unique situation of Native American students.
- G. The Every Student Succeeds Act (ESSA) has strengthened tribal self-determination by requiring state and local education agencies to consult with tribes on policies affecting Native American students. BIE has recently begun reorganizing itself with a stated goal to support tribal education authorities that have assumed direct operation of tribal schools.
- H. Funding for BIE schools comes almost exclusively from the federal government. It has almost kept pace with inflation. The federal government finally began providing full funding of tribal grant support costs for tribally operated BIE schools to meet their administrative costs beginning in FY2017. ESSA also provides funding for Native American English Language Learner (ELL) programs, but researchers have found these programs are ineffectively structured to accommodate the needs of some Native students who do not speak Native languages but learned English from family members who were ELLs.
- I. BIE schools continue to fail to recruit and retain effective teachers in sufficient numbers due to uncompetitive salaries, isolated rural settings, difficult work environments, lack of job opportunities for spouses/partners, and marginal housing opportunities, among other factors. Because of these difficulties professional development programs to support and enhance the skills of current teachers are critical.
- J. Educational disparities in access to educational opportunity exist between Native Hawaiian and non-Hawaiian students. The Native Hawaiian Education Act authorizes funding to

assist, support, and improve Native Hawaiian education programs and services. The Trump Administration has proposed outright elimination of Native Hawaiian education programs.

VIII. *Housing*

- A. Since the Commission's 2003 report, the housing crisis in Indian Country has worsened. In addition to the continuing lack of affordable housing in Indian Country, since 2003, the number of Native Americans living in overcrowded households or households without adequate kitchens or plumbing has grown. Development of housing in Indian Country would not only help address these concerns, but could also expand economic opportunity.
- B. The federal government's trust obligations include providing housing opportunities for Native Americans. The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) connects housing development in Indian Country with strengthening tribal self-determination by providing direct funding to tribes via the Block Grant program and federal guarantees for private market funding via the Title VI Loan Guarantee program.
- C. The Block Grant program is the largest source of federal funding for housing development and assistance in Indian Country. Before Congress passed a \$100M increase for the program for FY 2018, the program had not had a meaningful budget increase since its inception in FY 1998. Despite the recent increase, the Block Grant program's funding has not kept up with inflation and even faster growing construction costs, nor has it kept up with the demand for housing in Indian Country. The federal government's ongoing failure to increase funding for the Block Grant program has (1) been a major obstacle to maintaining aging housing stock and increasing total housing in Indian Country and (2) steadily eroded the number of new affordable housing units developed in Indian Country each year. The Trump Administration's FY 2019 budget proposes to eliminate funding for the Indian Housing Loan Guarantee Fund, which allows tribes to borrow money against their Block Grant program funds to obtain loans from private financial institutions for the development of affordable housing.
- D. The federal government's removal of some Native Americans to remote locations, and its historic and ongoing failure to support fully the development of infrastructure such as adequate water, sewer, roads, and other basic utilities, also serve as impediments to meeting the housing needs of Native Americans.
- E. Many tribes lack the capacity and technical expertise to maximize housing development opportunities under NAHASDA. HUD has done a commendable job in providing critical training, and assistance to tribal housing professionals. HUD outreach has saved tribes tens of thousands of dollars each year by sharing best practices undertaken by other tribes.
- F. Native Hawaiians experience similar housing issues such as lower home ownership rates, housing with inadequate plumbing, kitchens, and electric/heating systems, and overcrowded housing. Similar housing grant and loan guarantee programs administered by the Department of Housing and Urban Development exist for Native Hawaiians. The agency has failed to request funding for these programs for FY2019 and loan guarantees since 2011.

IX. *Economic Development*

- A. While many Native Americans are succeeding as teachers, doctors, lawyers, artists, writers, scientists, and entrepreneurs, the poverty rate of Native Americans is approximately twice

the national average. They experience higher rates of unemployment than any other racial group. The unemployment rate for Native Americans approaches 80 percent or higher on some reservations. Native Americans have the second lowest median household income among all racial groups. Due to the geography of some reservations, some Native Americans might travel far distances to work. For example, 55 percent of Native Americans who live on the Pine Ridge Reservation in South Dakota and commute to work travel more than 50 miles to their work.

- B. Economic development on tribal lands is an essential component of the federal government's trust responsibility to promote tribal self-determination and to support Native American economic and social prosperity.
- C. There are many barriers to positive social, physical, mental, and economic prosperity in Indian Country. Barriers include lack of employment opportunities, historic underfunding and underdevelopment of physical infrastructure such as roads, and lack of access to basic utilities including, but not limited to, electricity, broadband, and clean drinking water. Additional barriers include restrictions in accessing natural resources, regulatory burdens, climate change impacts, and limited access to capital.
- D. In addition to the forced removal of some Native Americans from their native lands, prior to the passage of the Indian Reorganization Act (IRA) in 1934, the U.S. government allowed the sale of 90 million acres of tribal lands to non-Indians, which created various ownership structures of tribal lands. Different rules governing each of the different ownership structures complicates and hinders development of Indian Country. At the request of tribes, the federal government takes land into trust for Native American tribes who have rights to live and develop their lands and is viewed by some as essential to tribal self-determination. Many tribes have no land base or have insufficient lands to support housing and self-government, and tribes have reclaimed only a small fraction of tribal lands since 1934. The Trump Administration recently restructured the Land Buy-back Program, which purchases back fractional interest in trust land or restricted land at fair market value from willing sellers, and drastically reduced the number of tribes that are able to benefit from the program.
- E. The federal government has failed to honor its trust responsibility to promote Native American self-determination via its support of economic development in Indian country. Each tribe's relationship to economic development differs. The federal government has failed to assist the tribes with the individualized economic development necessary for tribes to exercise self-determination and make a knowledgeable decision as to how to best develop and manage their nation's resources for the tribe's benefit. Most tribal lands are in locations requiring major infrastructure to support development. Many reservations are also far away from a tribe's original native home lands which include historic, cultural, religious, and agricultural areas.
- F. Although the gaming industry has unquestionably spurred critical economic development, the gaming industry in Indian Country is not viable for all tribes given their locations and lack of infrastructure. Others caution gaming perpetuates the harmful myth that Native Americans collect government benefits while getting rich off of casinos, which reinforces negative Native American stereotypes. Efforts to pursue gaming sometimes involve complexities associated with the acknowledgment of tribes that were historically not acknowledged and the passing of Indian land back into trust.

- G. Telecommunications infrastructure, including wireless and broadband internet services, is especially important to connect Indian Country to the global economy as well as for providing public safety services, opportunities for remote healthcare, and modernizing schools. Individuals on tribal land are more likely to lack access to broadband internet compared to the overall population and to individuals who live in rural areas. Current data collected by the Federal Communications Commission (FCC) does not accurately capture tribal broadband penetration, and the FCC has not consistently used appropriations to fund its Office of Native Affairs and Policy to help promote broadband deployment in Indian Country.
- H. Energy resources on tribal lands also present a significant opportunity for economic development in many tribal communities. However, a majority of these resources remain undeveloped due to the mismanagement of the development of trust lands by the federal government and the bureaucracy that complicates development. Native American partnership with the federal government to build technical capacity in Indian Country will also promote energy development. The Trump Administration's FY 2019 budget proposes a significant budget reduction to the BIA Office of Indian Energy Policy and Programs, and zero funding for the Tribal Energy Loan Guarantee Program.
- I. The development of the Dakota Access Pipeline and its impact on the Standing Rock Sioux is an example of the federal government's insensitivity to tribal concerns and lack of protection of Native American lands, by not sufficiently consulting the tribe prior to drafting its final plan. This resulted in a failure of the federal government to consider adequately tribal health, spiritual, and cultural concerns. It is well known that although tribal lands have physical boundaries, Native American holy sites are scattered beyond those boundaries. As a result, the federal government's obligations to protect tribal lands should extend to these spiritual areas.
- J. Agriculture is an increasingly important component of Native economies, the development of food systems, and self-reliance, yet many Native farmers face barriers to accessing loans, insurance, and credit. The pending 2018 Farm Bill provides many opportunities for Congress to pass policies that promote food security, and spur economic development and investment in critical infrastructure for Native Americans.
- K. Federal funding does not come close to meeting tribal fire suppression and forest rehabilitation needs. Funding for the BIA Branch of Fish, Wildlife, and Recreation does not meet the needs of tribes, causing some to cease fishery management and science programs. The Trump Administration's FY 2019 budget proposes to eliminate funding for the BIA Tribal Resilience Program, which helps increase tribal capacity to address the effects of climate change.
- L. The failure of federal and state governments, laws, and policies to recognize tribal sovereignty also limits funding opportunities, access to capital, and economic development in Indian Country. For example, while state governments are able to use future tax and program revenues to borrow money to make investments, tribal governments do not have the same ability to borrow money against future federal program revenue because tribal appropriations are considered discretionary federal funding. Tribal governments also generally lack parity with federal, state, and local governments in exercising taxing authority.
- M. Numerous other programs, such as the Native American Community Development Financial Institutions (CDFI) Assistance Program, intended to leverage and attract capital

for investments are also unavailable to tribes, or underfunded. Financial institutions are often hesitant to do business with tribes due to a poor understanding of tribal sovereignty, the absence of a politically independent judiciary, and the uncertainty of tribal commercial laws. The lack of financial institutions on or near reservations, the inadmissibility of trust land as collateral, limited experience with traditional financial institutions, and, at times, outright discrimination against Native Americans and Native Hawaiians, have also been barriers to accessing capital.

Recommendations

I. Keeping Promises

- A. The United States expects all nations to live up to their treaty obligations and it should live up to its own.
- B. The federal government should invest in Native American communities because such investment strengthens America. Recognizing the federal government's ongoing and historic failure to honor its trust obligations to protect and support Native Americans, the federal government should do the following:
 1. Congress should study and determine the funding necessary for the buildout of unmet essential utilities and core infrastructure needs in Indian Country such as electricity, water, telecommunications, and roads. The determined funding level should ensure the core infrastructure of Native American communities is raised to a level that equitably provides the same meaningful opportunities available to non-Native communities to succeed and prosper.
 2. Congress should honor the federal government's trust obligations and pass a spending package dedicated to address fully these unmet needs, targeting the most critical needs for immediate investment. The spending package should be consistently evaluated and funded over a time period sufficient to ensure these needs are met and adjusted for inflation.
 3. Congress should ensure funds are available and accessible on an equitable need basis to all tribal governments. Federal agencies should make available appropriate technical assistance that meets the various levels of tribal expertise in evaluating their critical infrastructure needs, implementing this investment, and providing appropriate spending oversight.
 4. Congress should require an annual report from appropriate federal agencies on unmet essential utility and core infrastructure needs, and the reach of funds appropriated to meet them.
- C. The federal government should provide steady, equitable, and non-discretionary funding directly to tribal nations to support the public safety, health care, education, housing, and economic development of Native tribes and people. Federal agencies should monitor, ensure, and make transparent to the American public that the proportion of their overall budgets devoted to Native Americans is commensurate with the needs of Native Americans and in furtherance of the federal trust obligation. These commitments should include:

1. Increased funding for Department of Justice public safety initiatives and BIA public safety and justice programs in Indian Country, including funding to implement fully the due process mandates of the Tribal Law and Order Act of 2010 and Violence Against Women Act of 2013, including but not limited to funding for indigent defense, sufficiently trained and credentialed judges, mandated jury trials, recordkeeping, and compliance with criminal law and procedural notice requirements. Congress should also increase funding for the Tribal Access Program for National Crime Information and the Tiwahe Initiative to expand the program to more communities.
 2. Increased, non-discretionary, and advance appropriations for IHS to bring it to parity with other federal health programs, such as the Veterans Health Administration, including for facilities and urban Indian health. Congress should also provide funding to implement the Indian Health Care Improvement Act, including job training programs to address chronic shortages of health professionals in Indian Country and a mental health technician training program to address the suicide crisis in Indian Country.
 3. Full funding for the operation of BIE schools, increased funding for Native American English Language Learner programs and Native Hawaiian education programs, and grant funding to develop curricula and lesson guides that state and local school districts may then choose to adopt to maximize instruction that includes non-derogatory, culturally inclusive discussion of Native American history and student experience. Congress should also provide funding for professional development programs to enhance the skills of current BIE teachers.
 4. Reauthorization of NAHASDA, increased appropriations to the Block Grant program and Indian Housing Loan Guarantee Fund to meet fully the housing needs of Indian Country, and increased funding for similar Native Hawaiian housing programs.
 5. Increased funding for BIA programs such as real estate trust services, forestry and wildlife programs, tribal resilience, and road maintenance programs. DOI should also increase availability of the Land Buy-Back Program to more tribes.
 6. Increased funding for the Federal Communications Commission, Office of Native Affairs and Policy to help increase broadband and telecommunications penetration in Indian Country.
 7. Increased funding for the Department of Energy, Office of Indian Energy Policy and Programs and Tribal Energy Loan Guarantee Program.
- D. As the Commission recommended in 2003, Congress should require, and provide sufficient funding for, the federal government to regularly assess unmet needs both in Indian Country and Native Americans in urban settings, including gaps in service delivery and Native American participation rates.
- E. To better understand whether the federal government is meeting its trust and statutory obligations, the Office of Management and Budget should develop more detailed standards for tracking and reporting spending on Native American programs across the federal government, including classification of spending by base funding, grants, and state pass-throughs, and how many Native tribes and people are served.

II. Tribal Sovereignty

- A. The federal government should adopt policies for Native American programs and programs that affect Native Americans that promote equal treatment of tribal governments as

compared to other governments. The federal government should provide sufficient funding, training, tools, and resources to tribal nations to provide their citizens the opportunity to exercise self-government and self-determination.

1. Congress should provide sufficient funds to tribal law enforcement agencies, tribal courts, and tribal detention facilities to allow those criminal justice components to fulfill their responsibilities to their citizens. Congress should also ensure funds from the Crime Victims Fund are set aside annually to meet sufficiently the needs of Native American victims of crime.
 2. Congress should appropriate sufficient funding for BIE schools to allow the BIE to bring all BIE schools up to minimum standards of habitability for their students and to attract, recruit, and retain teachers to come to and continue teaching in BIE schools. In addition, Congress should condition ongoing funding on BIE development of policies and programs accountable for provision of equitable and culturally responsive educational opportunity as well as for student performance results.
 3. Congress should appropriate sufficient funding to BIA, USDA, and Department of Energy programs to provide tribes with sufficient funding and technical assistance to allow tribes to exercise self-reliance and self-determination in the protection, management, and development of their natural, agricultural, and energy resources.
 4. Congress should provide consistent, non-discretionary funding to tribal governments to create parity between tribal governments and other governments by allowing tribal governments to leverage federal funding. Congress should make available to tribes programs such as the New Market Tax Credit program, the CDFI Bond Guarantee Program, and the Low-Income Tax Credit Program, which are designed for the purpose of leveraging and attracting capital to public projects and represent billions in potential investment.
 5. The federal government should provide more consistent, transparent, and deferential consultation with tribal governments and strive to reach mutually agreed solutions when working with tribes on infrastructure planning and the use and development of natural resource that occurs on or affects tribal lands and communities. For example, during the development of the Dakota Access Pipeline the federal government should take in the health, spiritual, and cultural concerns of Native Americans and issue a decision that is consistent with those concerns.
 6. Congress should provide direct, long-term funding to tribes, analogous to the mandatory funding Congress provides to support Medicare, Social Security, and Medicaid, avoiding pass-through of funds via states. Competitive grant programs such as for Department of Justice criminal justice initiatives should be available in addition to sufficient baseline funding.
- B. Congress can acknowledge a government-to-government relationship with Native Hawaiians to confirm its intent to provide Native Hawaiians at least all the same federal benefits that Native Americans have. Congress should pass legislation to provide a process for the reorganization of a Native Hawaiian governing entity and to confirm the special political and legal relationship between the United States and such Native Hawaiian governing entity.

III. Data Collection

- A. Accurate data on Native Americans are necessary for federal, state, local, and tribal governments to monitor conditions and make informed policy and spending decisions. Congress should provide funding to establish an interagency working group to share expertise and develop and improve systems and methodologies that federal government agencies could replicate for the collection of accurate and disaggregated data on small and hard to count populations such as the Native American and Native Hawaiian or Other Pacific Islander racial groups.

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COMMISSIONERS' STATEMENTS

Statement of Commissioner Gail Heriot

This report should not be viewed as any sort of legal or policy analysis. It is more in the nature of a command political performance. A number of Members of Congress were familiar with a report the Commission did in 2003 when Mary Frances Berry was Chair of the Commission. With great dramatic flair, that report—entitled *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*—charged the federal government with spending too little on benefits for Native American tribes. Several members, led by Derek Kilmer, who is Vice Ranking Member of the Committee on Appropriations, essentially asked for an encore performance of that report. With this one, the Commission is complying with that request, updating some of its statistics.

But here's the one problem: The Commission and its staff, as currently constituted, have precious little expertise in Indian law (which is the name ordinarily given to the body of law governing relations among the federal government, the fifty state governments and the various tribal governments).¹ That body of law requires a thorough knowledge of the constitutional law of federalism. It bears little resemblance to equal protection law and to the anti-discrimination statutes that are the core areas of our expertise.²

The report quotes a number of sentences from well-known Court decisions in an effort to sort out (or at least appear to be sorting out) the law in this area. But to my ear at least, it comes off like an occasional churchgoer reciting the Nicene Creed—oblivious to the degree of controversy and ambiguity, both historic and contemporary, that is packed into its phrases.

I tend to agree with Justice Clarence Thomas about Indian law: *It is in need of a careful re-examination*. As he stated in *United States v. Lara*, 541 U.S. 193, 214 (2004), “the time has come to reexamine the premises and logic of our tribal sovereignty cases.” It is riddled with logical

¹ By contrast, “tribal law” is a name that is sometimes given to the internal laws of a particular Native American tribal government. See, e.g., Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (2009)(discussing the laws of the Navajo Nation). The Commission has no expertise in any tribal law either.

² In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court made clear how different these areas of the law are. That case involved a strong hiring preference for tribal members for certain jobs at the Department of Interior's Bureau of Indian Affairs. The Court held that this was not “race” or “national origin” discrimination within the meaning of the Court's precedents dealing with the equal protection requirements of the 14th and 5th Amendments. Nor was it covered by any of the various anti-discrimination statutes that prohibit discrimination on the basis of race or national origin. This was permissible discrimination based on the employees' affiliation with a sovereign entity.

Note, however, that the *Mancari* decision may be a double-edged sword. If discrimination by the Bureau of Indian Affairs in favor of tribal members is not race discrimination, then presumably discrimination against tribal members by a state government is not race discrimination.

contradictions and misleading metaphors.³ But I can't sort it out in this report, and neither can the Commission or its staff.

Alas, because this report has been pushed through on an accelerated schedule with Commissioner Statement deadlines running concurrently with other reports, I have time only to address only one aspect of it: Its endorsement of the proposed Native Hawaiian Government Reorganization Act, which would authorize the federal government to facilitate and fund the formation of a Native Hawaiian tribal entity. Unlike most of the other issues addressed in this report, this one really is up the Commission's alley, since it is an effort to use Indian law to circumvent the requirements of the Fourteenth and Fifth Amendments' equal protection provisions by attempting to transform a racial/ethnic group into a tribe.

Before I do that, however, let me comment very briefly on the report more generally. I am mostly in agreement with Commissioner Kirsanow about the source of the problem here: Since the days of Franklin Delano Roosevelt, American policy has been to facilitate communal ownership of property and to deal with Native American individuals through tribal governments rather than as individual American citizens. For the most part this has worked poorly.⁴ Commissioner Kirsanow calls it socialism and expresses concern over the many limitations on the ability of tribal members to control their own destinies. I can't say that I disagree. In some parts of Indian Country (though certainly not all), it has evolved into a culture of dependency where it is assumed that the answer to every problem is more assistance from the Federal government. However much one might believe this approach *should* work, it *won't*.⁵

* * * * *

³ Perhaps because it was widely assumed throughout much of American history that tribes would decline in significance, relatively little thought has been given to figuring out how to construct a coherent framework of Indian law. At certain points in history, federal policy was to encourage that decline by encouraging assimilation. At other points, federal policy was to resist that decline by protecting the tribal way of life. But in both cases, observers historically expected the decline would nevertheless continue.

⁴ For reasons that smaller tribes may be more problematic than larger ones, see Federalist No. 10 (Madison).

⁵ It is not that Native Americans, including Native Americans working within the tribal framework, have not had business successes. They have had many, and those successes are not limited to the Indian Gaming (a \$32 billion industry in 2017). The Cherokee Nation Businesses LLC is wholly owned by the Cherokee Nation, with Divisions for Hospitality, Manufacturing and Distribution, Healthcare, Real Estate, Security and Defense, Environmental and Construction, and Technology. The Hard Rock Café, Inc. is wholly owned by the Seminole Tribe of Florida. As of this past July, it had 185 cafes, 25 hotels, and 12 casinos. See https://en.wikipedia.org/wiki/Hard_Rock_Cafe. The Chickasaw Nation's Bank2's assets have grown from \$7.5 million in 2002 to \$140 million in 2017.

Many more enterprises—large and small—are the work of private tribal members. Famous Dave's barbecue restaurants with 152 locations in 33 states is just one example. Its founder—Dave Anderson—is an Ojibwe tribal member who served as Assistant Secretary of the Interior for Indian Affairs during the George W. Bush Administration.

In 2006, the Commission (whose membership was different then) issued a report *opposing* the proposed Native Hawaiian Government Reorganization Act. The current Commission evidently hopes to send that report down the memory hole.

In the original report, the Commission wrote: ***“The Commission recommends against the passage of the Native American Government Reorganization Act ... or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege.”***⁶

With this report, the Commission comes to the opposite conclusion. Unlike the previous Commission, however, this one took no evidence on the issue. Knock me over with a feather if the Commissioners and staff put one-tenth of the effort into Hawaiian issues that was put into the earlier report.

The first question that should come to mind after reading the current report is this: Why is the Native Hawaiian Government Reorganization Act (which usually goes by the name “Akaka Bill” in recognition that it was first put forth by the late Sen. Daniel Akaka) coming up again almost a decade after it was thought to be a dead issue?

One answer to that is that nothing is ever dead in Washington, D.C. Everything always comes back. The red tide that turned the U.S. House of Representatives Republican in 2010 was replaced on Election Day this year by a blue wave in the House of Representatives (though not in the Senate). It may well be that the Akaka Bill will begin to receive more attention on Capitol Hill than it has in recent years. President Trump has not yet taken a position on this bill, but even if he opposes it (as President Bush did), there is always the possibility of a different President being elected in 2020. In a sense, with this Report, the Commission is laying the groundwork for that possibility.

Another part of the answer is that the Obama Administration’s strategy proceeding without the cooperation of Congress simply hasn’t worked. President Obama famously declared to his Cabinet in 2014, when facing a Republican House of Representatives, “We’re not just going to be waiting for legislation.” “I’ve got a pen and I’ve got a phone...and I can use that pen to sign executive orders and take executive actions and administrative actions.”⁷ During his administration, the Department of Interior went ahead and fashioned regulations without a Congressional blessing that would assist in creating a Native Hawaiian governing entity and ultimately a Native Hawaiian tribe. But these efforts have not succeeded.⁸

⁶ U.S. Commission on Civil Rights, *The Native Hawaiian Government Reorganization Act of 2005* (2006), available at <https://www.usccr.gov/pubs/docs/060531NatHawBriefReport.pdf>. Ironically, Commissioner Yaki in dissent objected to that report’s lack of thoroughness. *Id.* at 42.

⁷ “Obama on Executive Actions: I’ve Got a Pen and I’ve Got a Phone,” January 14, 2014, available at <https://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone/>.

⁸ See 81 F.R. 71278, 43 CFR 50, Office of the Secretary: Department of the Interior, Procedures for Establishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, October 14, 2016, available at <https://www.federalregister.gov/documents/2016/10/14/2016-23720/procedures-for-reestablishing-a-formal-government-to-government-relationship-with-the-native>.

In this Statement, I will try to address why I oppose the Akaka Bill. But here is a brief summary:

Congress does not have the power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor can it do so by purporting to “merely” reconstitute a tribe or other sovereign entity that has ceased to exist. Tribes are “recognized;” they are not created or reconstituted. The federal government may, on occasion, assist already-existing tribes in reforming their internal political structures, but they cannot bring into existence a tribe or other sovereign entity that has never existed or has long ago ceased to exist as a separate polity.

The federal government *especially* cannot take a racial or ethnic group and transform it into a tribe as a means of circumventing the equal protection requirements of the Fifth and Fourteenth Amendments. Yet that is exactly what is being attempted here.⁹

WHAT THE AKAKA BILL WOULD DO: Put as simply as possible, the proposed law would require the federal government to assist the nation’s approximately 400,000 Native Hawaiians to organize themselves into a vast indigenous tribe. Ultimately, this purported tribe would almost certainly have powers like those of mainland Indian tribes—including the power to make and enforce laws, promulgate a criminal code, punish offenders, impose and collect taxes, and exercise eminent domain—as well as police powers and the privilege of sovereign immunity. If all 400,000 join (and this may be unlikely), it would be by far the largest tribe in the nation and almost as large as some states, with about half its members residing in Hawaii and half scattered across the mainland. Even with far fewer than all Native Hawaiians participating, this reorganization of the Hawaiian political landscape would be a massive undertaking.

The effort has stalled out for several reasons. First, it turned out that many Native Hawaiian activists who favor Hawaiian independence opposed the measure.

Second, Keli’i Akina, president of the Grassroot Institute, sued in August 2015, claiming that the delegate election violated federal law banning state-conducted race-based elections. On November 27 of that year, Justice Kennedy enjoined the counting of ballots. On December 21, five members of the Court enjoined the counting of ballots and certification of winners. Two weeks later, N’ai Aupuni (the entity holding the election) cancelled the election and offered all 196 of the original delegate candidates seats at a convention to discuss a process for Native Hawaiians to achieve self-governance. Akina filed a motion for contempt of court, claiming that the convention was an unlawful end-run around the Supreme Court’s injunction, but lost. A Native Hawaiian constitutional convention was held in February 2016, but the organizers decided not to fund a vote to ratify the proposed constitution. N’ai Aupuni was accordingly dissolved in February 2016.

There are still some efforts underway to try to ratify a constitution, but they appear unlikely to bear fruit anytime soon. According to the ABA Journal, as of December 2016, the organizers had only about one-eighth of the total funds needed to hold a ratification election. The same article stated that any such effort would likely face another costly court challenge. Robert Popper of the Election Integrity Project, who represented Akina in the earlier litigation, told the ABA Journal that “We are actively involved in making sure that we’re ready to go if this rears its head again,” says Robert Popper, director of Judicial Watch’s Election Integrity Project. “There is going to be a serious ... problem no matter how they structure this, and we are dedicated to making that argument.” Lorelei Laird, “Native Hawaiians wage an ongoing battle to organize into a sovereign nation,” ABA Journal, November 2017, available at http://www.abajournal.com/magazine/article/native_hawaiians_wage_an_ongoing_battle_to_organize_into_a_sovereign_nation.

⁹ These reasons (as well as other reasons) would apply to the Obama Administration’s efforts too.

The first step under the bill would be the creation of an Office for Native Hawaiian Affairs (“ONHA”) at the U.S. Department of the Interior. (See Section 5.)¹⁰ That office would assist “adult [Native Hawaiians] who wish to participate in the reorganization of the Native Hawaiian government.” (See Section 7(b).)

The specific task of determining who is and who is not a true “Native Hawaiian” as defined in the bill would fall to a nine-member Commission appointed by the Secretary of the Interior. These nine government appointees would be required to have “not less than 10 years of experience in the study and determination of Native Hawaiian genealogy” and “the ability to read and translate into English documents written in the Hawaiian language.” (see Section 7(b)(2)(B).) This replaces an earlier version of the bill requiring that members be Native Hawaiians themselves—a clear violation of the Constitution—although the substitute language might still be challenged as intending to have the racially discriminatory effect. Once appointed, these commission members would ensure that only those who can demonstrate their true Native Hawaiian bloodline are permitted to join. The one-drop rule—notorious in other contexts—would apply.

Once the tribal roll is certified and published, the members, with ONHA’s assistance, would establish an interim government, which would then draft governing documents and hold elections to establish the permanent government. Federal recognition would then be “extended to the Native Hawaiian government as representative governing body of the Native Hawaiian people” once these documents have been presented to the Secretary of the Interior and properly certified. (See Section 7.)¹¹

Only after this new political behemoth is created will the federal government “enter into negotiations” with it over such matters as “the exercise of civil and criminal jurisdiction,” “the delegation of government powers and authorities ... by the United States or by the State of Hawaii,” “any residual responsibilities of the United States and the State of Hawaii,” and “grievances regarding assertions of historic wrongs committed against Native Hawaiians by the United States or by the State of Hawaii.” By then, of course, the balance of political power would have shifted decidedly in favor of the new government. It would be in a position to assert that it

¹⁰ I am using the 2009 version of the Akaka Bill here—H.R. 2314 (111th Congress). There are other versions, but the 2009 version was the last to receive serious consideration.

¹¹ Note that the Guaranty Clause of the U.S. Constitution, which guarantees all states a republican form of government, will not apply to the new Native Hawaiian government (since it does not apply to any Indian tribe). See U.S. Const. art. IV, sec. 4. Similarly, the Titles of Nobility Clauses will not apply unless the Native Hawaiian government is interpreted by the courts to be a government that derives its powers solely from federal delegation. See U.S. Const. art. I, sec. 9, cl. 8 (limitation on federal power to confer titles of nobility); U.S. Const. art. I, sec. 10, cl. 2 (similar limitation on state power). As the Akaka Bill asserts that “the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands,” it is clear that many will not regard that new government as deriving its powers solely from federal delegation. Rather, they will view its powers as deriving from the group’s inherent sovereignty. If so, it will thus not be subject to any of the limitations found in the U.S. Constitution, including the Bill of Rights (though the more limited Indian Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, 24 U.S.C. § 1301 et seq., could presumably be made to apply).

This is what I mean (and what I believe Justice Thomas meant in *Lara*) when I suggest that Indian law is complicated. If tribal authority arises out of inherent sovereignty, that creates one set of logical conclusions and expectations. If it is instead delegated by the federal government, that creates a different set of conclusions and expectations. If it is a little of both, the issues become exponentially more difficult.

possesses inherent sovereignty and hence has powers quite apart from those delegated to it by the federal and state governments. Moreover, even if the courts were ultimately determine that its powers derive solely from federal delegation, it will likely have the political clout to ensure that those powers are extensive.

Among the issues left for negotiation is the status of the immense property holdings of the State of Hawaii. As the bill puts it: “[T]he United States and the State of Hawaii may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement addressing ... the transfer of lands, resources and other assets and the protection of existing rights related to such land or resources.” (See Section 8.) The bill does not specify whether the tribe will purchase these assets or receive them as a gift, but some Native Hawaiian activists have said that they expect the latter. Indeed as I will discuss below, it is the anticipated transfer of those assets that inspired the Akaka bill in the first place.

THE INSPIRATION FOR THE AKAKA BILL: Both supporters and opponents of the Akaka Bill agree that the bill must be understood in the context of history, but they differ over which aspects of history have the greater importance.

I believe that to understand the motivations behind the Akaka Bill, one must look at some recent history—especially the decision of the U.S. Supreme Court in *Rice v. Cayetano* (2000).¹² The first version of the bill was introduced shortly after that case was decided. That was no coincidence.

In *Rice*, the Supreme Court ruled that the Constitution’s Fifteenth Amendment, which prohibits both the United States and the individual States from discriminating by race in voting rights, prohibited the State of Hawaii from holding elections in which only Native Hawaiians could vote.

To understand how these racially-exclusive elections came to be, one needs to know a little about the state of contemporary racial politics in Hawaii. The election was for trustees of the Office of Hawaiian Affairs (“OHA”), a department of the State of Hawaii that receives and administers 20% of the gross revenues from much of the State’s Ceded Lands Trust. In theory, these funds should be administered for the benefit of all Hawaiians, especially those in need. But for reasons that are both historical and political, it is actually operated for the benefit of Native Hawaiians only (as well as for the benefit of the OHA bureaucracy itself). Among other things, Native Hawaiians are eligible for special home loans, business loans, housing and education programs. It is the protection of these racially-exclusive benefits that motivates many of the supporters of the Akaka bill.

Supporters of the bill argue that these benefits are a legitimate continuation of federal policy toward Native Hawaiians that began in the 1920s with policies like the Hawaiian Homes Commission Act. Note that this was a time when many other racially-discriminatory laws were tolerated. The fact that Congress passed a racially discriminatory law in the 1920s—the era of Jim Crow, African American disfranchisement, and Jewish quotas in the Ivy League—is hardly proof of its constitutionality.

The primary asset of the OHA public trust is the accumulated revenues from some 1.8 million acres of land that were once owned by the Kingdom of Hawaii and became public lands of the

¹² 528 U.S. 495 (2000).

Republic of Hawaii after the overthrow of Queen Liliuokalani in 1893. Upon Hawaii's annexation by the United States in 1898, all of these lands were ceded to the United States to be held "solely for the benefit of the *inhabitants* of the Hawaiian Islands for educational and other purposes." (Emphasis supplied). Upon statehood in 1959, some 1.4 million acres were returned to the State of Hawaii to be held in a public trust for one or more of five purposes. One of those five purposes was "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended." The other purposes were (1) "for the support of the public schools and other public educational institutions;" (2) "for the development of far and home ownership on as widespread a basis as possible;" (3) "for the making of public improvements;" and (4) "for the provision of lands for public use." Act of March 18, 1959, § 5(f), Pub. L. 86-3, 73 Stat. 4.

Activists in Hawaii have argued that revenue from the ceded lands should be used exclusively for the benefit of Native Hawaiians and reject the four other purposes. There is, however, no requirement that the State of Hawaii use the property for any particular reason among the five—especially not for the one reason that is constitutionally suspect since it involves a preference for a particular race.¹³

But *Rice v. Cayetano* put these programs in jeopardy. Opponents of the benefits argue that since the Supreme Court held that racially-exclusive OHA elections violated the 15th Amendment, the Court would almost certainly hold that OHA's racially-exclusive benefits violate the 14th Amendment's Equal Protection Clause. By legislatively transforming Native Hawaiians for a racial group to a semi-sovereign tribal group, Akaka Bill supporters hope that prohibitions on race discrimination will no longer apply. The case they rely on is *Morton v. Mancari*. That case held that the Bureau of Indian Affairs' preference for tribal members in hiring did not constitute race discrimination under the Fifth Amendment.¹⁴ Rather, it was a permissible discrimination on the basis of citizenship in a sovereign (or semi-sovereign) entity.

For reasons I will describe in the next section, the Constitution's ban on race discrimination cannot be avoided so easily.

First, however, let me describe the part of history that Akaka Bill supporters point to in support of their cause: They argue that the American government was complicit in the 1893 overthrow of Queen Liliuokalani, which illegally denied not just the Queen's individual right of sovereignty, but also the Native Hawaiians' collective right. The Akaka Bill will help remedy this wrong, they argue, by restoring self-governance to Native Hawaiians.

The claim of American complicity has always been hotly disputed. As far as I know, everyone agrees that the overthrow of Queen Liliuokalani was accomplished mainly by white residents of the Kingdom, who were subjects of the Queen, not by the United States. (Yes, at the time of the

¹³ Curiously, the Hawaiian Homes Commission Act, to which the legislation refers, applies only to individuals who are at least half-Native Hawaiian. Nevertheless, as things have evolved, OHA has operated its part of the public trust for the benefit of anyone with Native Hawaiian ancestry. For quite some time on the OHA web site, the caption proudly proclaimed its racial loyalty: "Office of Hawaiian Affairs: For the Betterment of Native Hawaiians." Only in recent years has this been taken down.

¹⁴ 417 U.S. 535 (1974).

overthrow, many whites from Europe and the Americas as well as many Asians had immigrated to the Kingdom; indeed, by that time immigrants and their descendants were a *majority* of the population).¹⁵ Some say that a small force from the American crew of the U.S.S. Boston came ashore to assist in the overthrow at the behest of the American ambassador; others say they came ashore only to protect American property. President Grover Cleveland was among those who believed that the Boston crew was complicit in the overthrow—and he strongly disapproved of its actions. He appointed James Blount, a former member of the U.S. House of Representatives, to travel to Hawaii and investigate the situation. The Blount Report supported Cleveland's suspicions. Meanwhile, the Senate conducted its own investigation. The report it issued—called the Morgan Report for Foreign Relations Committee Chairman John Tyler Morgan—came to the opposite conclusion. See Senate Report 227, 53rd Congress, 2nd Session (February 26, 1894).

I do not claim to have the ability to sort out the dispute and will not try. It happened much too long ago to be able to resolve what was then strongly disputed.¹⁶

¹⁵ Thomas G. Thrum, *Hawaiian Almanac and Annual for 1893* 11, 14 (1892); W.D. Alexander, *A Brief History of the Hawaiian People* 313 (1891); U.S. Parker, *The Economic History of the Hawaiian Islands* 81 (1907). See Stuart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *Yale L.J.* 537, 550 (1996) (“By 1890, those descended from pre-1778 inhabitants constituted less than half of the population”).

¹⁶ I note that in 1993 Congress was not nearly so careful to acknowledge its limitations. One hundred years after the fact and after only one hour of debate in the Senate and even less in the House, it issued a Joint Resolution coming down on the side of the Blount Report. This resolution, informally known as the Apology Resolution, is sometimes cited as support for the Akaka Bill.

Interestingly, in order to help secure passage of the Apology Resolution, Daniel Inouye, then the senior Senator from Hawaii, made a representation that would later come back to haunt those who see it as support for the Akaka Bill. In 2005, then-former Senators Hank Brown and Slade Gorton, wrote in an op-ed in the *Wall Street Journal*:

We specifically inquired of its proponents whether the Apology would be employed to seek "special status under which persons of Native Hawaiian descent will be given rights or privileges or reparations or land or money communally that are unavailable to other citizens of Hawaii." We were promised on the floor of the Senate by Daniel Inouye, the senior senator from Hawaii and a personage of impeccable integrity, that, "**As to the matter of the status of Native Hawaiians . . . [t]his resolution has nothing to do with that. . . . I can assure my colleague of that.**"

Hank Brown and Slade Gorton, *E Pluribus Unum? Not in Hawaii*, *The Wall Street Journal* (August 16, 2005). They also stated:

The Apology falsely declared that Native Hawaiians enjoyed inherent sovereignty over Hawaii to the exclusion of non-Native Hawaiians. To the extent sovereignty existed outside the monarch, it reposed equally with all Hawaiians irrespective of ancestry. The Apology falsely maintained that Native Hawaiians never by plebiscite relinquished sovereignty to the U.S. In 1959, Native Hawaiians voted by at least a 2-1 margin for statehood in a plebiscite. Finally, the Apology Resolution and its misbegotten offspring, the Akaka Bill, betray this nation's sacred motto: *E Pluribus Unum*. They would begin a process of splintering sovereignties in the U.S. for every racial, ethnic, or religious group traumatized by an identity crisis. Movement is already afoot among a few Hispanic Americans to carve out race-based sovereignty from eight western states because the U.S. "wrongfully" defeated Mexico in the Mexican-American war.

Id.

I note, however, that even if the crew of the U.S.S. Boston was complicit in the overthrow, it would not give rise to a claim that Native Hawaiians have been robbed of their sovereignty.¹⁷ There are several reasons for this. First, the Kingdom of Hawaii was not a kinship-based tribe, operated for the benefit of a particular racial or ethnic group. From its inception in 1810, the time King Kamehameha I completed his conquest of the Hawaiian Islands, the Kingdom of Hawaii was a multi-racial society.¹⁸ In the true spirit of Aloha for which Hawaii is famous, its rulers were welcoming of immigrants, who came from all over the world, particularly from Portugal, China, Japan, Polynesia, the United States, Great Britain and Germany. Assuming the people of the Kingdom of Hawaii had a collective right of sovereignty that was illegally taken from them, the people of the Kingdom were not simply Native Hawaiians. Second, even if the population of the Kingdom of Hawaii had been mainly Native Hawaiian at the time of the overthrow, at the time Hawaii was made a State in 1959, Native Hawaiian voted overwhelmingly in favor of Statehood. In other words, they made the decision to join the United States as our 50th State.¹⁹

Let me address the first reason first: At least beginning in the mid-century, immigrants didn't just wash up on the shores of Hawaii with the monarchy passively accepting their presence. They were wanted. One could even say that Hawaiian monarchs were obsessed with increasing immigration.

Perhaps if Members of Congress had known that this resolution would be cited as evidence for the creation of a Native Hawaiian tribe, they would have given the matter more attention.

¹⁷ In addition, the Kingdom of Hawaii was a monarchy. Perhaps Queen Liliuokalani's right of sovereignty was violated by the overthrow (although, given how few monarchists there are left in the world today, it is not clear how many would regard her right to the throne as inviolable). See *Rex v. Booth*, 2 Haw. 616 (1863)(stating that "[t]he Hawaiian Government was not established by the people" and that instead "King Kamehameha III originally possessed, in his own person, all the attributes of sovereignty").

¹⁸ Until the time of Kamehameha I, the Hawaiian peoples were not united under a single king. Instead, there were small kingdoms on the different islands, some embracing two or islands, some only one island or part of an island. Kuykendall, Vol. 1 at 9. There were four such kingdoms when Cook first visited the Hawaiian Islands. *Id.* at 30. Until 1796, chieftains fought for supremacy. *Id.* at 22. Kamehameha also took as confidential advisers the English sailors Isaac Davis, who survived an attack on his ship by a different group of Native Hawaiians, and John Young. *Id.* at 25.

Starting in about 1790, the foreign population of Hawaii slowly started to grow. It was largely comprised of sailors who left their ships – some left with the permission of their officers, but others simply deserted. Young and Davis were among the best known of this group. In the early part of 1794, there were eleven foreigners with Kamehameha at Kealakekua; they were of several nationalities, including Chinese. A dozen or more foreigners aided Kamehameha in conquering Oahu in 1795. *Id.* at 26-7.

From 1802 until 1812, during which time Kamehameha was away from Hawaii, the English immigrant John Young was governor of that island. Oliver Holmes served for a time as governor of Oahu. *Id.* at 54.

In the history of the Hawaiian Islands, the consolidation of the entire group into one kingdom was the political development of greatest significance during the forty years after the visits of Captain Cook. *Id.* at 29.

During the 1820s, foreigners who became permanent residents of Hawaii, or essentially naturalized citizens, did so with the express or tacit permission of Kamehameha II. If they received land, they held it by the same precarious tenure as native subjects, simply at the pleasure of the king. *Id.* at 73. Kamehameha II also at this time amended the laws to make them more pro-merchant. *Id.* at 121.

¹⁹ At that point, inquiries were made about whether Native Hawaiians would require special accommodations along the lines of Alaska Natives. Congress was informed—correctly—that Native Hawaiians were part of Hawaii's political mainstream, not a separate society with separate political institutions.

In 1855, King Kamehameha IV addressed the legislature on various legislative issues. One issue, however, he identified as the “subject, in comparison with which all others sink into insignificance.” That issue was the size of the Kingdom’s population.

What was the King so concerned over the Kingdom’s population? It had been decreasing for decades—largely due to the susceptibility of Hawaiians to diseases introduced from the outside.²⁰ Between 1850 and 1853, for example, the Kingdom’s population decreased by 11,000.²¹ It reached a low of 56,897 at the time of the 1872 census.²² A large part of Kamehameha IV’s plan was to increase immigration.

Why would immigrants want to come to such a remote place? Well ... uh ... besides the fact that its islands are a tropical paradise. The Kingdom had a lot to offer, not least of which was its modern political institutions. For the greater part of the 19th century, the Kingdom was a constitutional monarchy. Its Constitution of 1840 was signed by two hands—that of King Kamehameha III and that of the holder of the second highest office in the nation, Keoni Ana, the son of John Young (a British advisor to Kamehameha I and his Native Hawaiian wife). Its opening sentence, the substance of which was suggested by an American missionary, was based loosely on a Biblical verse: “*Ua hana mai ke Akua i na lahuikanaka a pau i ke koko hookah e noho like lakou ma ka homua nei me ke kuikahi, a me ka pomaikai.*” Translated, the passage might read: “God has made of one blood all races or people to dwell upon this Earth in unity and blessedness.”

It is hard to imagine an opening sentence to a Constitution that would be more appealing to potential immigrants. And it is worth noting that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution was still decades in the future.²³

The Kingdom’s immigration policy was closely supervised and regulated by the Hawaiian government with an eye toward encouraging population growth and prosperity. According to Ralph S. Kuykendall, in his three-volume history of the Kingdom:

A law was passed December 30, 1864, creating a Bureau of Immigration, to consist of the minister of the interior and five other members of the privy council. The function of this Bureau or Board as it was more commonly called, were to superintend the importation of foreign laborers, to regulate the contracts to be made with such laborers, and to promote and encourage the introduction of free immigrants from abroad. Supplementing the law were several ordinances of the king in privy council. The first such ordinance prohibited all persons from bringing contract laborers into the kingdom without the express license of the board. The policy of exclusive government control of importation of contract laborers was sharply criticized at a meeting of the Planters’ Society in April, 1865, but one of

²⁰ It is tempting for some to want to blame Captain James Cook, the English explorer and navigator who captained the first ship to visit Hawaii from the West. But that would require him to understand both the germ theory of disease and population-level acquired immunity, which, of course, he didn’t and couldn’t.

²¹ Kuykendall II at 37.

²² Thomas G. Thrum, *Hawaiian Almanac and Annual for 1893* 11 (1892).

²³ No one claims that the Kingdom of Hawaii always lived up to its aspirations. No community ever does. For example, Asians could not vote. But one did not have to be born in the Kingdom to vote and thousands of immigrants were registered, including Polynesians, Portuguese, British and French. *Id* at 14. And the Kingdom came as close to realizing its aspirations as any 19th century polity of which I am aware.

the king's ministers, Varigny, warmly defended it because the "question was of such an importance and so intimately connected with the future prosperity, the very life of the people." A second ordinance authorized the board to promote the introduction into the kingdom of free immigrants, male and female, for the Portuguese islands, but nothing was accomplished along this line until many years later.²⁴

The need was for both contract laborers (which could be temporary) and for permanent settlers.²⁵ As foreign minister R.C. Wylie put it in 1883, "Unless we get more population, we are a doomed nation."²⁶ Nevertheless, the efforts of the 1860s did not produce nearly the number of immigrants the monarchy desired. In 1876, the islands were still 89.2% Hawaiian or part-Hawaiian, 6.3% Caucasian, and 4.5% Oriental (what we would call Asian today).²⁷

But things were about to change radically. David Kalākaua became king in 1874. He took an 1881 around-the-world tour, intended primarily to increase the number of immigrants to the Kingdom, took him to Japan, China, Hong Kong, Siam, Singapore, Malaysia, Burma, India, Egypt, Italy, Great Britain, Belgium, Germany, Austria, Portugal, Spain, and the United States. And it served his purpose well. For example, a treaty was arranged between the Kingdom and Portugal by the end of the year. The steamship *Monarch* arrived in Honolulu in mid-1882, carrying 859 Portuguese immigrants, over half of them women and children.²⁸

That was just the beginning. Immigrants poured in from many directions. The United States enacted the Chinese Exclusion Act of 1882, Pub. L. 47-126, 22 Stat. 58, which was a boon to Hawaii. Many Chinese immigrants left the United States for Hawaii; others, who had initially intended to come the United States, came to Hawaii instead. Hawaii's population boomed as it had never done before with immigrants from many countries. By 1890, less than half the Kingdom's population had Native Hawaiian ancestry.

According to the Kingdom's census of 1877, there were 49,044 Native Hawaiians (with 1,487 of what were referred to as "half-caste") for a total of 50,531 whole or half Native Hawaiians. By the 1890 census, there were 34,436 Native Hawaiians and 6,186 "half-castes" for a total of 40,622

²⁴ Ralph S. Kuykenall, II *The Hawaiian Kingdom: Twenty Critical Years: 1854-1874* 180 (1966).

²⁵ Kuykendall reports that "[i]t was, of course, recognized that some of those who were brought primarily for labor would remain and become part of the permanent population; and, on the other hand, those brought in primarily to replenish the population were expected to fill part of the need for laborers. But in the running discussion that was constantly going on, a distinction seemed to be made between immigration for labor supply and immigration for population upbuilding. ... Much stress was laid on the importance of bringing in people who were of the same racial stock of the Hawaiians or people who would readily amalgamate with the Hawaiian; "cognate races" were much talked about. This meant, in the first place, Polynesians; but. Since concepts of racial classification were rather vague in popular mind of the day, nearly all Pacific islanders, including Malaysians and even Japanese, were thought cognate to the Hawaiians." Kuykendall II at 181-82.

²⁶ Kuykendall II at 177.

²⁷ Kuykendall, III at 116.

²⁸ Yes, in case you were wondering the Portuguese brought the guitar with them. The Hawaiian ukulele was adapted from the guitar. It was a case of cultural appropriation by Native Hawaiians. But that is a good thing. What gets derisively called "cultural appropriation" in our crazy times has in fact often enriched cultures around the world.

whole or half Native Hawaiians. This was out of a total population of 89,990, making it only 45% of the population.²⁹

Why does this matter? It matters because even if we assume *arguendo* that the overthrow of Queen Liliuokalani was a wrong, the victims of that wrong were not Native Hawaiians specifically. The Native Hawaiian people, through their kings and elected officials, had reached out to the peoples of the world, inviting them to become Hawaiians. The Kingdom of Hawaii was an extremely impressive, cosmopolitan multi-racial, multi-ethnic society. To pretend otherwise sells it short. If some group was denied its right to sovereignty, it was that multi-racial, multi-ethnic group.

Moreover, even if the Kingdom had been essentially a kinship-based tribe consisting overwhelmingly of Native Hawaiians, all of this has been water under the bridge at least since 1959 when Hawaii was made a State. Contemporary accounts describe the inhabitants of the Islands dancing in the street on that occasion. On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of Statehood. Given Hawaii's population at the time, that means Native Hawaiians voted at least 2 to 1 in favor. At that point, any wrongs that might have occurred in the past were waived.³⁰

Statehood made Hawaiians of all races full and equal members of the greatest nation on Earth, fully entitled to the protection of its laws and right to participate in its political process. All they had to do was agree to live under its laws, including its Constitution. Hawaiians of all races thought that was a bargain. I agree with them, and so did a majority of the U.S. Commission on Civil Rights when it issued its earlier report in 2006 opposing the Akaka Bill.

Interestingly, part of the reason Congress was so receptive to the idea of admitting Hawaii to the union was that Hawaii had a reputation for being a successful multi-racial polity. In 1959, the United States was in the thick of the Cold War. Much of it was a war for the hearts and minds of people around the world. There was no question that Americans had greater freedom than Soviet citizens and that their greater freedom had given them greater prosperity. But it was also a fact that Jim Crow tarnished the country's record. Adding a star to the flag for Hawaii's successful multi-racial, multi-ethnic society would help make it clear what the United States aspired to be and was working its way to becoming.³¹

²⁹ Thomas G. Thrum, *Hawaiian Almanac and Annual for 1893* 11 (1892).

³⁰ Erica Little and Todd F. Gaziano, *Abusing Hawaiian History: Hawaiians Knew Their History in 1959*, The Heritage Foundation, June 8, 2006, http://www.heritage.org/research/reports/2006/06/abusing-hawaiian-history-hawaiians-knew-their-history-in-1959#_ftn4.

³¹ See *The Problem of Race*, *Worldview Magazine* (August 1959), available at https://www.carnegiecouncil.org/publications/100_for_100/the-problem-of-race. “[T]he population of the Hawaiian Islands is only twenty-five percent ‘white.’ The majority of the population is native Hawaiian, Chinese and Japanese. But in these islands some measure of the racially ‘good society’ has been achieved—a much greater measure than has been known anywhere else in the United States. Racial discrimination is almost unknown in Hawaii; relations between the various races are as good, probably, as they can ever be in a world where the hearts of men are still corroded by hatred and fear. This new state can set an example for the rest of the nation.”

See also, *Hawaii—Beauty, Wealth, Amiable People: After Long Years of Trying, the Idyllic Islands at Last Stand on the Brink of Statehood*, 46 *Life Magazine* 58 (March 23, 1959) (“... Hawaiian statehood ... would also indicate to all the peoples of the Pacific and of Asia that the U.S. can still be the tolerant, hospitable melting pot of old”).

The Akaka Bill Is Unconstitutional: The Constitution confers upon Congress the power to regulate commerce with Indian tribes. Specifically, it provides, “The Congress shall have the power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian tribes.”³² This is the sole mention of Indian tribes in Article I, which gives Congress its powers. This is a thin reed upon which to predicate a power to *create* a tribal government. It has already been established that the Commerce Clause does not confer on Congress the power to create commerce. Why would the Indian Commerce Clause confer on Congress the power to create a tribe?³³

On the other hand, recognizing an existing tribe—specifically recognizing its sovereign or quasi-sovereign status—is a plausible extension of the power to regulate commerce with those tribes. The United States does so, however, only with groups that have a long, continuous history of self-governance. To do otherwise would be to create tribes, not to recognize them.

The reason the United States treated tribes as semi-autonomous entities, because they were and they continue to be such. They had never been brought under the full control of both federal and

³² U.S. Const. art. I, § 8, cl. 3. One commentator has claimed that the Framers rejected a clause proposed by James Madison that would have granted Congress plenary authority “to regulate affairs with the Indians” and instead chose the language of the Indian Commerce Clause in order to give Congress narrower powers. See Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Indian L. Rev. 57, 73 (1991) (quoting 2 The Records of the Federal Convention of 1787, at 325 (M. Farrand ed., rev. ed. 1937) (Aug. 18, 1787) (motion of James Madison, Virginia); cited in Stuart Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996).

³³ Some 20th century scholars have suggested that the Commerce Clause gives Congress the power to do just about anything that relates to commerce. But in the case of *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court dispelled those suggestions by finding that creating commerce that did not otherwise exist is beyond Congress’s powers:

The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to ‘regulate’ something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to “coin Money,” in addition to the power to “regulate the Value thereof.” *Id.*, cl. 5. And it gives Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” in addition to the power to “make Rules for the Government and Regulation of the land and naval Forces.” *Id.*, cls. 12–14. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See Gibbons, 9 Wheat., at 188 (“[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said”).

If the Commerce Clause does not give Congress the power to *create* interstate commerce where none previously existed, then it makes little sense to claim that the Indian Commerce Clause gives Congress power to *create Indian commerce* where none previously existed. And, if the Indian Commerce Clause gives Congress no power to create commerce with Indians where none previously existed, it is even more dubious to suggest that it gives Congress power to *create the tribe* with which commerce is transacted.

state authority. Federal policy toward them was simply an appropriate bow to reality. To withdraw recognition to any such group without very good reason would be an injustice.

By retroactively creating a tribe out of individuals who are already full, mainstream citizens of both the United States and the State of Hawaii, and who do not have a long and continuous history of separate self-governance, the Akaka Bill would be breaking new ground. Supporters of the bill have argued that the recognition of the Menominee tribe by Congress in 1973 is a counter example. But their argument falls short. In the middle of the 20th century, it became briefly fashionable to advocate the termination of the special status of Indian tribes under the law. In 1961, the Menominee tribe in Wisconsin became the first to have its trust relationship with the United States and its semi-sovereign status terminated. The Menominees, however, did not simply melt into the population of the State of Wisconsin. The tribe *incorporated* under the laws of Wisconsin and continued to function as a corporate entity. By the 1970s, the termination option was no longer fashionable and the Menominee tribe requested and received re-recognition by Act of Congress.

Unlike Native Hawaiians, the Menominees never lacked organization. Even during the brief period they lacked federal recognition, the tribe maintained a corporate existence under the laws of the State of Wisconsin. They did not need Congress to help them identify who was a Menominee and who was not. They knew. It had clear and identifiable leaders. All they wanted or needed was renewal of federal recognition and of the federal trust relationship. By contrast, the Akaka Bill requires the Secretary of the Interior to appoint and assist a Commission to determine the initial membership on the Native Hawaiian tribe. This would be unprecedented. See *United States v. Sandoval*, 231 U.S. 28 (1913) (“it is not meant by this [decision] that congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe”

If Native Hawaiians can be accorded tribal status, why not Chicanos in the Southwest? As former Senators Hank Brown and Slade Gorton have pointed out, some are already arguing for this.³⁴ Or Cajuns in Louisiana?

Moreover, it is implausible to say that Congress has the power to confer this benefit only upon racial or ethnic groups, since ordinarily Congressional power is at its lowest ebb with issues that touch on race or ethnicity. Religious groups—like Orthodox Jews in New York or the Amish in Pennsylvania or the Mormons in Utah—may be particularly interested in gaining tribal status. It would enable them to exercise governmental powers without concern over the Establishment Clause, since that clause does not apply to tribes. Becoming a tribe will thus arguably allow them to surmount the difficulties discussed by the Supreme Court in *Board of Education of Kiryas Joel School District v. Grumit*, 512 U.S. 687 (1994) (holding that the creation of a school district designed to coincide with the neighborhood boundaries of a religious group and hence facilitate that group’s control of school policy constitutes an unconstitutional aid to religion).

Some legal scholars are already arguing that special status ought to be broadly available to what have been called “dissident” communities of many types. See, e.g., Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian*

³⁴ Hank Brown and Slade Gorton, *E Pluribus Unum? Not in Hawaii*, *The Wall Street Journal* (August 16, 2005) (for more information see supra at n. 14).

Country: A Liberal Theory, 84 Va. L. Rev. 1053 (1998); Mark D. Rosen, "Illiberal" Societal Cultures, Liberalism and American Constitutionalism, 12 J. Contemp. Legal Issues 803(2002). Who will say no to these (and other) groups?

Even if Congress does have the power to create a sovereign or quasi-sovereign tribe where none currently exists, it cannot do so in this case, since the reason for doing so is to confer benefits on a *racial group*. Such a scheme violates the Fifth Amendment's Due Process Clause. Insofar as the State of Hawaii is complicit in the scheme by transferring the Ceded Lands to the new Native Hawaiian government, it will be violating the Fourteenth Amendment's Equal Protection Clause. The United States government cannot achieve by indirection what it very likely could not have achieved directly.

That is not because *Morton v. Mancari* is not good law. It is. But *Morton v. Mancari* was decided the way it was because such a benefit is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." In other words, it's not race discrimination, it's discrimination on the basis of tribal membership.

This case would be different. The very act of transforming Native Hawaiians into a tribe would be an act performed on a racial group, not a tribal group. When, as here, it is done for the purpose of conferring massive benefits on that group, it is an act of race discrimination subject to strict scrutiny—scrutiny that it likely cannot survive.³⁵

The proof of all this is apparent if one simply alters the facts slightly. If the State of Hawaii were operating its special benefits programs for Whites only or for Asians only, no one would dream that the United States could assist them in this scheme by providing a procedure under which Whites or Asians could be declared a tribe.

³⁵ Two of the leading Supreme Court cases that make plain that racial classifications are subject to strict scrutiny—*Adarand v. Peña*, 515 U.S. 200, 1995, and *City of Richmond v. J.A. Croson & Co.*, 488 U.S. 469, 1989—both dealt with racial classifications that accorded preferential treatment to Native Americans, as well as to members of other historically disadvantaged groups. The disadvantaged groups receiving preferential treatment in *Adarand* were "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" (*Adarand* at 205, quoting Small Business Act, 15 U.S.C. 637(d)(2)-(3) (1994)). In *Croson*, the preference struck down was "unconstitutional was intended to benefit "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Croson*, 488 U.S. at 478 (quoting Richmond, Va., Code 12-23 (1985)) (emphasis added).

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Statement of Commissioner Peter Kirsanow

Introduction

There is one overriding lesson that readers can take away from this report: Socialism doesn't work.¹

Indian reservations are an experiment in socialism in the American context—education, housing, food, and healthcare are theoretically all provided. Program mismanagement by both the federal government and tribes is endemic.² Programs are organized to benefit the tribes rather than

¹ This is not an accident of history or due to Native American culture. The tribes became victims of an 85-year experiment in socialism. See William J. Lawrence, "In Defense of Indian Rights," in *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY*, Abigail Thernstrom and Stephan Thernstrom, ed., 2002, at 395 [hereinafter Lawrence, *Indian Rights*], https://www.hoover.org/sites/default/files/uploads/documents/0817998721_391.pdf.

In 1993, John Collier became commissioner of the BIA under President Franklin D. Roosevelt. Collier initiated a new federal Indian policy called the "Indian New Deal," which became law as the 1934 Wheeler-Howard Act, also known as the Indian Reorganization Act. Collier admired Chinese communism, which he saw as a model for society. He wanted to implement these communist ideals on American Indian reservations, including communal ownership of property and central control of economic, political, and cultural activities. Many of these key aspects of the Indian Reorganization Act are still in effect on reservations today.

² See, e.g., "Final Evaluation Report—Indian Affairs Offices' Poor Recordkeeping and Coordination Threaten Impact of Tiwahe Initiative," Report No. 2017-ER-018, Office of the Inspector General, Dep't of the Interior, September 28, 2018 (finding that Tiwahe Initiative funds were incorrectly distributed. Some tribes were underfunded by tens of thousands of dollars, and others were overfunded, due to "inaccurate recordkeeping," inconsistent application of the formula used to calculate funding amounts for the distribution," "offices failure to communicate with each other," and "absence of policy at either office to manage major distributions like Tiwahe"), https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_OSG_092818.pdf.

See also "Audit of Contract Nos. R11AV60120 and R12AV60002 Between the Bureau of Reclamation and the Crow Tribe," Report No. 2017-FIN-040, Office of the Inspector General, Dep't of the Interior, September 28, 2018, at 1, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_USBRCrowTribe_Public_0.pdf.

We tested \$13,835,511 of the \$20,999,510 in interim costs the Tribe claimed under the contracts between October 1, 2014, and March 31, 2017, and determined that they Tribe did not track and report its use of Federal funds in accordance with contract terms, applicable Federal laws and regulations, and USBR guidelines.

Id. at 6.

[T]he Tribe's inventory of equipment it purchased under the contracts was incomplete. The Tribe's inventory listed 28 pieces of equipment, including a semi-trailer truck, pickup trucks, SUVs, dump trucks, trailers, and ATVs. While onsite during our fieldwork, we did our own inventory and could not locate five pickup trucks, two trailers, and one SUV. Tribal employees stated that they did not know where the equipment was. We are therefore questioning the \$246,000 the Tribe claimed for the purchase of this equipment.

Id. at 9.

During our audit, the USBR informed us that the Treasury had sent the Tribe its 2017 annual funding for the contracts—\$12,772,000—but the Tribe transferred only \$8,000,000 from its operations

individuals who happen to be tribal members. Individual initiative is squelched by bureaucratic red tape. The result is the pockets of poverty and despair that dot the American landscape.

The report and its findings and recommendations discuss at great length the poverty on reservations, the lack of infrastructure on reservations, the lack of funding for the Indian Health Service, and on and on. These are all serious needs. But the fact is there simply is not enough money and competent management to solve these problems. What the Commission majority wants is for the federal government to pump enough money into Indian Country to maintain a middle-class standard of living—but with the government paying for housing, food, health care, infrastructure, education, and everything else. This is impossible.

For Americans who do not live on reservations, including the many individuals of Native American descent who live off the reservations and do not rely on government benefits, maintaining a middle-class life with housing, food, roads, education, and healthcare is the result of their own employment and taxes from multiple levels of government.³ Food, housing, and healthcare are the result of a decent job, and education and roads are primarily paid for by state and local taxes (and therefore by the job). It is simply impossible for the federal government alone to take the place of an employer and state and local government. This isn't because the federal government is (today) acting in bad faith. When the treaties were signed in the 19th century, standards of living (for everyone) were much lower. The government could promise to provide food and perhaps some education and medical care, and doing so was feasible, even if those

account to the special tribal bank accounts. It kept the remaining \$4,772,000 in the operations account and used it to pay business expenses unrelated to the contracts.

See also “The Wind River Tribes Misapplied Federal Funds for the Tribal Transportation Program,” Report No. 2017-FIN-042, Office of the Inspector General, U.S. Dep’t of the Interior, July 12, 2018, at 4, https://www.doi.gov/sites/doi.gov/files/FinalAudit_JBCWindRiver_Public_0.pdf.

For example, in 2014, the Wind River Tribes submitted, and BIA’s Department Transportation approved, a request for \$4,063,533 to construct the Lenore Bridge. A temporary bridge, designed for 2 years of use, was put in place in December 2014. The Wind River Tribes awarded the Reiman Corporation a \$2,568,757 contract to build the Lenore Bridge, and the BIA allocated \$1,007,996 in the 2015 Tribal Transportation Program funds to complete approaches to the bridge. In August 2016, prior to constructing the approaches, the Wind River Tribes ran out of funding and did not have a new tribal transportation plan to continue transportation projects.

³ For example, the average total healthcare cost (which includes both health care costs and health insurance) for a family of four in 2018 is \$28,166. *See* Guy Boulton, *You’ll be shocked at how much health insurance costs for a family of four*, USA TODAY, June 6, 2018, <https://www.usatoday.com/story/money/business/2018/06/06/health-care-costs-price-family-four/676046002/>. On the other hand, the Indian Health Service serves approximately 2.2 million people. In fiscal year 2017, the IHS received \$4.7 billion. *See* “Indian Health Service, FY 2018 President’s Budget to Congress,” Department of Health and Human Services, at CJ-1, https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2018CongressionalJustification.pdf.

This works out to approximately \$2136 per person per year. The government would have to more than triple the funding for the IHS to even begin to approach the levels of funding in the private market. This is unlikely to happen. Again, I am not saying it is fair that the government promised in treaties 150 years ago to provide health care to Indians and is doing an abysmal job today. But this situation will be solved by the government, particularly with Medicare rapidly heading toward insolvency. The best thing Native Americans can do is to conclude that the government is not going to fix this problem, get a job with health insurance, or get Medicaid.

promises were often broken. But expecting the federal government to turn Black Mesa, Arizona into Peoria, Arizona is a task of an entirely different magnitude.

Furthermore, expecting the federal government (or, for that matter, the tribe) to provide everything necessary for subsistence saps the spirit. Panelist Terry Anderson wrote in his testimony:

[T]he federal government can help tribes most by unshackling them from the trustee-ward relationship. As Crow tribal member, Bill Yellowtail, cautions, this relationship has allowed American Indians to fall into the “victimhood” trap. In Yellowtail’s words: “Dependency has become the reality of our daily existence. Worst of all, generation by generation it becomes what sociologists term learned helplessness—an internalized sense of no personal possibility, transmitted hereditarily and reinforced by recurring circumstances of hopelessness. The manifestations are epidemic: substance abuse, violence, depression, crime, trash.”⁴

I. Reduce Fractionation and Convert Property to Fee Simple

One of the biggest problems facing Native Americans on reservations is that many do not have meaningful property rights. Much reservation land that was held in trust for individuals was inherited by all the heirs of the owner. This phenomenon is known as “fractionation,” and often results in hundreds of individuals owning indivisible parcels of land. This causes coordination problems that makes it extremely difficult and time-consuming to put the land to productive use.⁵ And when land is in trust, it is very difficult to obtain financing from a bank, because it is difficult for the bank to foreclose on land if the borrower defaults.⁶

⁴ Terry L. Anderson, Written Statement for the Quiet Crisis: Federal Funding and Unmet Needs In Indian Country, 2016 Update Briefing before the U.S. Commission on Civil Rights, at 6, https://static1.squarespace.com/static/58d583e717bffcff8f786cc/t/59e0cbf137c58166361d8196/1507904497896/Anderson_Testimony-USCCR_2-12-16.pdf.

⁵ “Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands,” Dep’t of the Interior, July 31, 2017, <https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation>.

Fractionation affects nearly 11 million acres of land across Indian Country, preventing beneficial uses of significant resources and creating an overly complicated land tenure status where single tracts of land, like those at Navajo Nation, have more than 1,200 landowners. When tracts have multiple owners, it is difficult to obtain the required approvals for leases or other uses of these lands. As a result, many tracts are unoccupied and unavailable for any purpose.

⁶ Terry L. Anderson and Dean Luek, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J. OF L. AND ECON., Vol. 2, 427, at 436 (1992) [hereinafter Anderson and Luek, *Land Tenure*], <https://www.jstor.org/stable/725547>.

While individual-trust lands can be mortgaged, encumbrance restrictions limit the use of land as collateral. A mortgagee of individual-trust land receives an “assignment of income” rather than a claim against a deed. This means that, if an Indian borrower defaults, the mortgagee has a claim on the income from the property and therefore may be able to say how the property is used, but obtaining title to the land is very difficult. Since foreclosure proceedings typically go through tribal courts, uncertainty for the mortgage holder is increased. This effectively raises the costs of capital on individual Indian trust land.

The report discusses federal efforts to take land into trust for tribes.⁷ This is unlikely to improve the lives of Native Americans. Some research indicates that holding lands in trust—whether individual or tribal—dramatically reduces the productivity of the land.⁸ Terry Anderson and Dean Lueck estimated that “the per-acre value of agricultural output is 85–90 percent lower on tribal-trust land than on fee-simple land and 30–40 percent lower on individual trust-land than on fee-simple land.”⁹

Perhaps a better alternative is for the government to buy back fractionated land, convert it to fee simple land, and allow individuals to purchase it. This would allow Native Americans (and others) to own the land outright, and also make it easier for individuals who already own reservation land and use it for farming or ranching to extend and consolidate their holdings.¹⁰

See also Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 338 (2008).

Even the courts below recognized that the Longs' discrimination claim was a “novel” one. It arose “directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,” including the Lakota “sense of justice, fair play and decency to others.” The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. (citations omitted)

⁷ Report at n. 974–976.

⁸ See Terry L. Anderson and Dominic P. Parker, *Economic development lessons from and for North American Indian economies*, 53 THE AUSTRALIAN JOURNAL OF AGRICULTURAL AND RESOURCE ECONOMICS, 105, 121 (2009) [hereinafter Anderson and Parker, *American Indian economies*], <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8489.2007.00426.x>.

Considering these BIA constraints on land use, Trosper argues that the lower output chosen by Indian ranchers on the Northern Cheyenne is actually profit-maximising. According to his estimates, Indian ranchers are as productive as non-Indians operating nearby ranches when accounting for the different—in a sense exogenously determined—input ratios used. Because the implication is that Indian ranch managers are at least as technically competent as non-Indians, Trosper concludes by noting that the effects of land tenure should be examined further.

Anderson and Lueck (1992) take up this challenge by estimating the impact of land tenure on the productivity of agricultural land using a cross-section of large reservations. They benchmark the productivity of tribal and individual trust lands against those of fee-simple lands on reservations. When controlling for factors such as the percentage of trust lands managed by Indian operators and whether the tribe was indigenous to the reservation area, Anderson and Lueck estimate the per-acre value of agriculture to be 85–90 per cent lower on tribal trust land and 30–40 per cent lower on individual trust land. They attribute the larger negative effect of tribal trust land to collective action problems related to communally managed land. In addition to having to overcome BIA trust constraints, agricultural land held by the tribe is subject to common-pool resource management incentives that can lead to exploitation and neglect.

⁹ Anderson and Lueck, *Land Tenure*, at 436.

¹⁰ Anderson and Lueck, *Land Tenure* note 6, at 436.

Higher contracting costs also reduce agricultural productivity by keeping leases of Indian land smaller than optimal. This “scale effect” results because allotments under the Dawes Act were generally smaller than today’s optimal size of agricultural organization. . . . If the costs of contracting were zero, initial allotment size would make no difference because leasing could be used to achieve the optimal farm size. The BIA’s supervision and approval of leasing and land-use plans combined

The report quotes Dante Desiderio, who expressed his opposition to private ownership because “it hasn’t played out too well for Indian Country.”¹¹ Desiderio did not elaborate upon his statement. Perhaps he fears that if lands are privatized, individuals who own land will sell it to non-Indian buyers, thus diluting the power of the tribe.¹² Perhaps. But everyone else in America has the right to alienate property that belongs to them. Land may be a Native American’s only asset, as it sometimes is for other Americans. If that person wants to sell that land so he can buy a house, or send his daughter to college, or finance a move off the reservation, that should be his choice. Many Native Americans would doubtless decide to continue to live in the reservation area, but they would be able to sell or lease their land far more efficiently than they can now. There is no reason tribes could not maintain their culture while members own their land in fee simple. The Midwestern and Eastern United States are dotted with Amish and Mennonite communities that maintain a traditional way of life without government support or interference. The federal government has no free-standing interest in preserving tribal lands in perpetuity, but rather in the welfare of Native Americans. No one will *force* these individuals to sell their land. The federal government should not treat Native Americans as if they are eternally minors, and neither should the tribes.

II. The Interests of Tribes and the Interests of Individual Native Americans are Not Identical Nor Coextensive

The report assumes that the interests of tribes and the interests of individual Native Americans are identical. This is unlikely to be true. For one thing, the interests of Indian and non-Indian peoples are far more commingled than is popularly portrayed. According to the 2010 Census, 77 percent of people who live in American Indian areas¹³ and 68 percent of people who live in Alaska native village statistical areas did not identify as American Indian or Alaska Native either alone or in combination.¹⁴ On the other hand, the majority of people who identified as American Indian or Alaska Native did not live in American Indian or Alaska native village statistical areas.¹⁵ Furthermore, almost half of those who reported having Native American/Alaska Native ancestry also reported having ancestry of another race—predominantly white.¹⁶ And “the multiple race-American Indian and Alaska Native population grew at a considerably faster rate (39 percent) than

with the fractionation problem, however, make the costs of such contracting systematically higher for trust lands. Thus, a corollary is that trust farms will be smaller than fee-simple farms.

¹¹ Report at n. 991.

¹² Report at n. 990. “[T]here is concern among advocates that privatization of lands can undermine cultural preservation of tribal lands, and protecting the tribal lands can contribute to greater prosperity in Indian Country.”

¹³ Defined as “federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.” See Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, “The American Indian and Alaska Native Population: 2010”, January 2012, at Table 5, <https://www.census.gov/history/pdf/c2010br-10.pdf>.

¹⁴ *Id.* at 13–14.

¹⁵ *Id.* at 12–13.

¹⁶ *Id.* at 4 (“Of the given OMB race groups, the American Indian and Alaska Native population had the second-largest percentage (44 percent) reporting more than one race. The Native Hawaiian and Other Pacific Islander population had the largest percentage (56 percent) reporting more than one race.”)

the American Indian and Alaska Native alone population (18 percent) from 2000 to 2010.”¹⁷ All of this is to say that the interests of Native and non-Native Americans are inextricably intertwined. Millions of us are related to each other by blood or marriage, and we live amongst each other on and off Indian land.

Second, the interests of individual Native Americans can be subordinated to the interests of the tribe. This problem is encapsulated in a 1976 Supreme Court opinion:

Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. ***Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.*** [emphasis added]¹⁸

There are several problems with the federal government’s decision to treat Native Americans as a people apart. The first problem, aptly illustrated by the above quote, is that by depriving Indians of access to forums that are available to non-Indians, the government treats Indians differently than it treats other Americans. Denying an American access to a forum on the basis of race because it may benefit some other person of the same race or the racial group to which he belongs is wrong.

Another problem is that both Indians and non-Indians can find themselves deprived of rights in order to further tribal interests. An example of this is when a mother wishes to place her child (who has Indian ancestry) for adoption with a non-Indian family, and the government allows the father or the tribe to interfere with the adoption, when a non-Indian father would not have such a right.¹⁹ For that matter, even Native American parents or other relatives who wish their child to be adopted by a non-Native American family can find themselves thwarted by the tribe.²⁰

¹⁷ *Id.* at 4.

¹⁸ *Fisher v. District Court of Sixteenth Judicial District of Montana*, in and for Rosebud County, 424 U.S. 382, 390–91 (1976).

¹⁹ See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 646 (2013) (“It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”).

²⁰ Timothy Sandefur, *Escaping the ICWA Penalty Box*, Goldwater Institute, August 9, 2017, <https://goldwaterinstitute.org/article/escaping-the-icwa-penalty-box-in-defense-of-equal-protection-for-indian-children/>.

Once a child qualifies as “an Indian child” under ICWA, the tribe’s authority with regard to that child is in many ways equal or even superior to the rights of the parents. Thus, even if parents wish to block application of ICWA, they are often unable to do so, and tribes can override the expressed wishes of parents. In *Mississippi Band of Choctaw Indians v. Holyfield*, Indian parents chose to leave the reservation before giving birth, and signed voluntary consent forms agreeing to have their child adopted by a non-Indian couple. Nevertheless, the tribe successfully moved to have the adoption order vacated for noncompliance with ICWA. The Supreme Court concluded that ICWA “was not meant to be defeated by the actions of individual members,” because the statute protects “not solely

Another problem with assuming that the interests of tribes and the interests of Native Americans are identical is that the tribes are sometimes run for the benefit of prominent people in the tribe and not for the benefit of the average tribal member. Tribal mismanagement of funds is not uncommon. In 2018, the Department of the Interior's Inspector General found that the Crow Tribe did not properly manage its use of Federal funds and that its use of Federal funds was not properly overseen by the Bureau of Reclamation. The problems included missing equipment that had been purchased with federal funds. "While onsite during our fieldwork, we did our own inventory and could not locate five pickup trucks, two trailers, and one SUV. Tribal employees stated that they did not know where the equipment was."²¹ Additionally:

Instead of setting up the Treasury's electronic payment system so that funds would be transferred directly into the special tribal bank accounts as required, the Tribe set up the transfers to go into its operations account. From that account it could transfer money into the special tribal bank accounts without USBR approval. The funds had been transferred in this way since the Tribe set up the transfers in 2011 and 2012, but the USBR never discovered the error because it never reviewed the transfers to verify that they were set up correctly.

During our audit, the USBR informed us that the Treasury had sent the Tribe its 2017 annual funding for the contracts—\$12,772,000—but the Tribe transferred only \$8,000,000 from its operations account to the special tribal bank accounts. It kept the remaining \$4,772,000 in the operations account and used it to pay business expenses unrelated to the contracts. This was a misuse of the funds, as the Tribe spent them without first modifying the contracts to include the business expenses. Therefore, we are questioning this \$4,772,000 as unallowable.²²

Next door in Wyoming, on the Wind River Indian Reservation, there was similarly severe financial mismanagement by the Northern Arapaho and Eastern Shoshone tribes. And yet again, BIA failed in its duty to oversee the use of federal funds.

For example, in 2014, the Wind River Tribes submitted, and BIA's Department of Transportation approved, a request for \$4,063,533 to construct the Lenore Bridge. A temporary bridge, designed for 2 years of use, was put in place in December 2014. The Wind River Tribes awarded the Reiman Corporation a \$2,568,757 contract to build the Lenore Bridge, and the BIA allocated \$1,007,996 in the 2015 Tribal Transportation Program funds to complete approaches to the bridge. In August 2016, prior to constructing the approaches for the Lenore Bridge, the Wind

. . . Indian children and families, but also . . . tribes themselves." In short, ICWA empowers tribal governments in ways that supersede the judgment of parents when the two come into conflict. As one Indian law expert says, "The purpose of ICWA . . . is ultimately to maintain the survival of the tribe through the retention of its members."

²¹ "Audit of Contract Nos. R11AV60120 and R12AV60002 Between the Bureau of Reclamation and the Crow Tribe," Report No. 2017-FIN-040, Office of the Inspector General, Dep't of the Interior, September 28, 2018, 1, 6, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_USBRCrowTribe_Public_0.pdf.

²² *Id.* at 9.

River Tribes ran out of funding and did not have a new tribal transportation plan to continue transportation projects.

In February 2017, the Reiman Corporation contacted BIA regarding \$863,034 in unpaid invoices related to the construction of the Lenore Bridge. The Tribes did not allocate expenses for Lenore Bridge in their accounting system; the bridge cost over \$4 million but the Tribes' accounting system only reflected \$864,964 in costs.²³

As William J. Lawrence, who was the owner and publisher of the Native American Press/Ojibwe News, wrote:

Today, the biggest exploiters and abusers of Indian people are tribal governments, in part because there is no guaranteed or enforceable separation of powers in tribal governments. Many of the largest and best-known American Indian tribes have rampant, continuous, and on-going problems with corruption, abuse, violence, or discord. There is a lack of oversight and controls in tribal governments. Most tribes do not give their members audited financial statements of tribal funds or casino funds, which on many reservations may represent tens or even hundreds of thousands of dollars per tribal member. It is literally impossible for tribal members to find out where all the money is going.

The underlying problem is that true democracy does not exist on Indian reservations. Tribal elections are often not free and fair elections, and typically they are not monitored by any third party. And true democracy includes more than just the presence of an election process. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, due process, and protection of the basic liberties of speech, assembly, press, and property. None of these exist on most Indian reservations.

Tribal chief executives and tribal councils possess near-dictatorial control over tribal members. Not only do they control the tribal court, police, and flow of money, but they also control which tribal members get homes, jobs, and health care services, and under the Indian Child Welfare Act, they can claim more control over children who are enrolled members than the children's own family, especially non-Indian family members. If they live on a reservation, Indian people who speak up run the risk of losing their homes, jobs, health care, and other services, making internal government reform even more difficult.²⁴

And as Naomi Schaefer Riley wrote, in addition to the numerous patronage jobs that serve to dampen any internal political opposition by tribal members, "[T]he machinations of tribal government, unlike most federal and state governing institutions, often take place behind closed

²³ "The Wind River Tribes Misapplied Federal Funds for the Tribal Transportation Program," Report No. 2017-FIN-042, Office of the Inspector General, U.S. Dep't of the Interior, July 12, 2018, at 4, https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_JBCWindRiver_Public_0.pdf.

²⁴ Lawrence, *Indian Rights*, *supra* note 1, at 397–98.

doors, with little transparency. Many newspapers on reservations are funded by the tribal government and, as such, are subject to tribal leaders' whims."²⁵

The Commission encountered a problem with this report that it did not even know it encountered—namely, lack of everyday familiarity with reservations and ordinary Native Americans. The people who testified before the Commission and who meet with Commission members when they visit reservations are those who are most invested in the current system. This is not to say they are ill-intentioned, or that they have nothing to contribute to the conversation. That is not the case. But people who are not tribal leaders and would like to sell their land and move, or who drive for hours to take their elderly relative to a community hospital rather than an IHS hospital, or who have moved off the reservation (or never lived on it) may have different views and perspectives.

The federal government should be trying to further the interests of individual Native Americans, not tribes.

III. Economic and Educational Struggles are Not Primarily Due to Lack of Funding

a. Many Native Americans Would Likely Benefit From Leaving Reservations

Observers have commented that many reservations are like Third World nations. One of the quickest ways for a person in a Third World nation to improve his standard of living is to move to the United States. If you are a poor person in Honduras, you may still be a poor person in the United States, but being a poor person in the United States is vastly better than being a poor person in Honduras. This is so self-evident that we are constantly intercepting and deporting people from Third World countries who are in the United States illegally. Native Americans who live on reservations literally live in the middle of the United States. Because they are U.S. citizens, they can work legally and are eligible for various government benefits. In short, in most cases, being poor off the reservation is better than being poor on the reservation. And once you have a job, you don't have to remain poor forever.

Several studies from the United States and Canada (which has a reserve system that is similar to our reservation system) support the proposition that living on the reservation has a deleterious effect on an individual's economic prospects.

Leaving the reservation may weaken an individual's ties to his tribe, and if many individuals leave the reservation, the tribe as an entity may decline. But the welfare of individuals is more important than the welfare of the tribe. For example, Robert Gitter and Patricia Reagan studied the wages and employment of American Indian men using data from the National Longitudinal Surveys of Youth 1979. They write:

Our most striking finding is that proximity to a reservation, either as an older child or as an adult, deters employment only among Indians. The effect is large and statistically significant. . . . Our data show that Indians are almost 10 percentage points less likely to be employed than the representative cross-section sample. Further, we find that the problems are even more acute for American Indians who

²⁵ Naomi Schaefer Riley, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* (2016), at 65.

currently reside in a county with a reservation or who resided in such a county at age 14. Controlling for other factors, American Indian males who currently reside in a county with a reservation are between 11 and 14 percentage points less likely to be employed than those who resided elsewhere. . . . We also present results suggesting that the effect of having resided in a county with a reservation at age 14 reduces employment rates of Indian adults by 5–10 percentage points.²⁶

Residing near a reservation or having done so in the past did not reduce the likelihood that non-Indian men would be employed. In fact, non-Indian men who lived near reservations were slightly more likely to be employed than were non-Indian men who lived elsewhere.²⁷

Similarly, two studies of Aboriginal peoples in Canada found that both Aboriginal heritage and living on a reserve were negatively correlated with earnings. George and Kuhn found that a large wage gap between off-reserve Aboriginal individuals and whites persisted even after controlling for important observable factors such as education.²⁸ Interestingly, “George and Kuhn also find evidence that higher levels of education did not improve the wage earnings of full-time employees living on reservations.”²⁹ A study by Kuhn and Sweetman analogized Aboriginals to immigrants “in order to study the role of assimilation into mainstream culture.” Their research yielded interesting results:

Kuhn and Sweetman generate three key findings with their cross-section data. These findings provide compelling support for the assimilation hypothesis when evaluated in unison. First, the employment rates and wages of multiple-origin Aboriginals [individuals of more than one ethnicity] living off reserves and not in territories are higher than those of single-origin Aboriginals living in comparable areas. Especially for males, these gaps are large and persist after controlling for geographical location, age, and education and training. Second, employment rates and wages for single-origin Aboriginals on reserves are significantly lower than those of single-origin Aboriginals living off reserves and these gaps are also robust to all controls. Third, non-Aboriginal males in the remote northern territories are paid wage premiums that far exceed those earned by male Aboriginals living in the territories such that the wage differential between Aboriginals and non-Aboriginals is highest in the remote North-west. Considered together, these results imply the cultural autonomy maintained by some indigenous people helps to explain why this ethnic group as a whole fails to perform better economically.³⁰

b. Education Disparities Are Not Due to Lack of Funding

²⁶ Robert J. Gitter and Patricia B. Reagan, *Reservation Wages: An Analysis of the Effects of Reservations on the Employment of American Indian Men*, 92 AM. ECON. REV. 1160, 1167–68 (2002), <https://go.owu.edu/~rjgitter/Reservation%20Wages.pdf>.

²⁷ *Id.* at 1162.

²⁸ Anderson and Parker, *American Indian economies*, at 117.

²⁹ *Id.* at 117–18.

³⁰ *Id.* at 117–18.

Report Finding III.D states that the Bureau of Indian Education is underfunded. Finding VIII discusses the poor educational performance of Native American students. It is interesting, given our recent report on school funding, that the Findings do not provide a per-pupil breakdown of expenditures. I am happy to provide this information.

Look at Appendix E of the report, which tabulates education spending. In 2018, the BIE spent \$885,461,000 on tribal education, and \$132,353,000 on education construction.³¹ That is more than *one billion dollars* spent on education for children on reservations in *one year*. The Department of Education spent an additional \$163,818,000 in 2018 on “Indian Student Education,” which includes “Grants to local educational agencies,” “Special programs for Indian children,” and “National activities.”³² In short, in one year the federal government alone spent almost \$1.2 billion on educating Native American children.

You can only get a sense of the scale of the funding if you examine the number of students in BIE schools. The BIE “serves” approximately 48,800 students and has approximately 4,500 employees.³³ If we look at the amount of money spent by BIE, not counting any money spent by the Department of Education on BIE schools in 2018, we see that the government spent \$1.01 billion on BIE schools in 2018.³⁴ This means that the government spent almost \$21,000 per BIE student in 2018 (not counting Department of Education funds) in contrast to the average of \$11,066 (which includes federal, state, and local funding) spent on an average American student who does not attend a BIE school.³⁵

BIE schools likely cost somewhat more to operate because many reservations are isolated, which may require spending more on infrastructure and staff than a suburban school district would. But when the government is annually spending \$10,000 more per pupil than is spent on non-BIE pupils, it is highly unlikely lack of money is the reason Native American student performance is lackluster.

BIE does not even competently perform basic administrative duties. Earlier this year, the Inspector General for the Department of the Interior issued a report determining that BIE has not been completing required background checks on “employees, contractors, and volunteers who have regular contact with children at Indian education facilities.”³⁶ “In response to an inquiry of this review, in March 2017, the Security Office made a data call outside of its information system and found that nearly 20 percent of contractors and volunteers (77 of 415) had no background check

³¹ Report Appendix E: Funding for Native American Education.

³² Id.

³³ “Work at the New Bureau of Indian Education: Inspire the Next Generation,” Bureau of Indian Education, <https://bie.edu/Jobs/index.htm>.

³⁴ “Indian Education, Fiscal Year 2019 Budget Request,” Dep’t of Education, at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

³⁵ *Public Education Funding In An Era of Increasing Concentration of Poverty and Resegregation*, U.S. Commission on Civil Rights, 2018, at 6, <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>.

³⁶ “The Bureau of Indian Education Is Not Ensuring That Background Checks At Indian Education Facilities Are Complete,” Office of the Inspector General, Dep’t of the Interior, February 2018, https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_BIEBackgroundChecks_Public.pdf.

on file.”³⁷ Many tribally-controlled schools also had not completed required background checks, and this was a recurring problem for a number of schools.³⁸

Despite this funding disparity, the NAEP scores of Native American students are lower than those of non-Native American students.³⁹ The Department of Education gives grants to schools to try to improve the educational outcomes of American Indian and Alaska Native students. Most of the awards go to local education agencies that have significant numbers of AI/AN students, rather than tribes or BIE schools.⁴⁰ As the report notes, AI/AN students who are in local schools perform better than students who are in BIE schools.⁴¹ So the educational outcomes from LEA grants are likely to be on the high end of Native American student achievement. Even so, the grants seem to barely move the needle. In this 2019 budget justification, the Department of Education reported the following outcomes⁴²:

Measure: The percentage of American Indian and Alaska Native students in grade 4 who score at or above the basic level in reading on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	54%	49%	67%
2013	56	51	68
2015	58	52	69
2017	60		
2019	62		

Measure: The percentage of American Indian and Alaska Native students in grade 8 who score at or above the basic level in reading on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	65%	65%	76%
2013	67	62	78
2015	69	63	76
2017	71		
2019	73		

³⁷ *Id.* at 11.

³⁸ *Id.* at 8–9.

³⁹ GAO, *Indian Affairs: Better Management and Accountability Needed*, *supra* note 592, at 6–7.f

⁴⁰ “Indian Education: Fiscal Year 2019 Budget Request,” Dep’t of Ed., at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

⁴¹ Report at Figure 3.1.

⁴² All data taken from “Indian Education: Fiscal Year 2019 Budget Request,” Dep’t of Ed., at E-11, <https://www2.ed.gov/about/overview/budget/budget19/justifications/e-indianed.pdf>.

Measure: The percentage of American Indian and Alaska Native students in grade 4 who score at or above the basic level in math on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	74%	68%	82%
2013	76	68	83
2015	78	69	82
2017	80		
2019	82		

Measure: The percentage of American Indian and Alaska Native students in grade 8 who score at or above the basic level in math on NAEP.

Year	Target	Actual–AI/AN	Actual–All Students
2011	59%	55%	73%
2013	61	59	74
2015	63	57	71
2017	65		
2019	67		

As evidenced by the scores above, American students generally are not performing well, but the scores of Native American students are significantly lower in every category and in every year. The grant program appears to have almost no effect, as scores remain essentially flat. 2017 NAEP scores are now available (they were not available when ED submitted its budget request) and the mathematics scores of AI/AN students in fourth and eighth grade are unchanged from 2015.⁴³ The average score for fourth-graders in 2015 was 227, and it remains 227 in 2017. The average score for eighth-graders in 2015 was 267 and remains 267 in 2017. Reading scores for fourth-graders were essentially unchanged, dropping 3 points from 205 to 202⁴⁴, and reading scores for eighth-graders were also essentially unchanged, ticking up a point from 252 to 253.⁴⁵ Unless there is a dramatic improvement in the 2019 NAEP scores of AI/AN students, the LEA grant program will have to be pronounced a failure.

The report parrots the talking points of advocacy groups such as the National Indian Education Association and the National Congress of American Indians (NCAI) in regard to tribal education

⁴³ “National Student Group Scores and Score Gaps,” NAEP Mathematics Report Card, Grade 4, https://www.nationsreportcard.gov/math_2017/#nation/gaps?grade=4; “National Student Group Scores and Score Gaps,” NAEP Mathematics Report Card, Grade 8, https://www.nationsreportcard.gov/math_2017/#nation/gaps?grade=8.

⁴⁴ “National Student Group Scores and Score Gaps,” NAEP Reading Report Card, Grade 4, https://www.nationsreportcard.gov/reading_2017/#nation/gaps?grade=4

⁴⁵ “National Student Group Scores and Score Gaps,” NAEP Reading Report Card, Grade 8, https://www.nationsreportcard.gov/reading_2017/#nation/gaps?grade=8

departments (TED).⁴⁶ Tribal education departments may be a worthwhile initiative, but some of the supposed benefits, such as “Movement to incorporate Native American language and culture into schools and curricula” seem questionable at best. Finding VII.H. states in part, “ESSA also provides funding for Native American English Language Learner (ELL) programs, but researchers have found these programs are ineffectively structured to accommodate the needs of some Native students who do not speak Native languages but learned English from family members who were ELLs.” If there are enough Native American students to justify having ELL programs specifically for them, and if there are significant numbers of students who struggle with English because they learned English from relatives who were ELLs, the last thing the government should be encouraging is additional incorporation of native languages at school. Students need to be fluent in standard American English if they are to have any hope of being able to pursue higher education or a career. Speaking Navajo or Mohawk has intrinsic value, but it does not prepare someone to succeed off the reservation, or even in positions that require interaction with people who are not members of the same tribe. A lack of fluency in English isolates individuals on the reservation and makes them more dependent upon tribal leaders.

⁴⁶ Report at n. 608–614.

IV. Criminal Justice⁴⁷

Crime in Indian country is a serious problem. It is worth noting, however, that the report only includes statements from tribal officials about crimes committed by non-Indians that harm Indians. Maybe everything is as one-sided as Barry Thompson and Harold Frazier say.⁴⁸ But it is possible that non-Indians who live in border communities have complaints of their own.⁴⁹ It is also very likely that relations between Indians, tribal governments, non-Indians, and state governments vary widely from place to place.⁵⁰

⁴⁷ Report at n. 76.

⁴⁸ Report at n. 144–47.

⁴⁹ See Paul Hammel, *Dry for a year, Whiteclay has cleaned up. But some alcohol problems have moved elsewhere*, OMAHA WORLD-HERALD, May 1, 2018, https://www.omaha.com/news/nebraska/dry-for-a-year-whiteclay-has-cleaned-up-but-some/article_ccf057c7-d9f1-5661-aaad-23b8ccd15b74.html.

Monday marks the one-year anniversary of the closing of the four beer-only liquor stores in Whiteclay. The one or two dozen street people who used to openly drink, urinate, and pass out along the road are gone, and traffic from the Pine Ridge Indian Reservation, just across the border in South Dakota, has been reduced from a stream to a trickle.

See also Michelle McManimon, *Alcohol drives Flagstaff's high Native American arrest rate, but recovery possible*, ARIZONA DAILY SUN, November 13, 2016, https://azdailysun.com/news/local/crime-and-courts/alcohol-drives-flagstaff-s-high-native-american-arrest-rate-but/article_65b08bcf-d0ad-5050-894d-1599518bc345.html.

Flagstaff Police Chief Kevin Treadway attributes the high arrest rate to what he calls the city's "vulnerable population," which essentially means chronic street alcoholics.

"The serial inebriate and homeless issue is not unique to Flagstaff but it's common in many border towns and that population here is over-represented by the Native American race," Treadway said. "It's uncomfortable for me to say that. . . ."

Navajo Nation Human Rights Commission Policy Analyst Rodney L. Tahe said other border towns report a similar trend in part because rural reservation residents tend to gather in the nearby cities to shop, work, and access services. . . .

FPD and the Navajo Nation Human Rights Commission have each received a small number of formal complaints alleging racial profiling or bias by FPD against Native Americans and neither agency has found them to be substantiated. . . .

Between 2011 and 2015, FPD officers gave 15 percent of the department's traffic citations to Native Americans and 79 percent to Caucasians. In contrast, Native American suspects accounted for half the shoplifting arrests, almost half the public consumption and disorderly conduct arrests, and more than half of the assault and aggravated assault arrests. In most cases, Treadway said, the police are responding to calls for help.

"We do not get to choose the race of the people we come into contact with," he said.

See also Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, THE ATLANTIC, July 19, 2017 ("Some of the suspects in last year's killings [on the Pine Ridge Reservation] had evaded outstanding county or city warrants by staying on Pine Ridge."), <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/>.

⁵⁰ McManimon, *supra* note 49.

"I tell everyone that, for me, Flagstaff (Police Department) is the bar that everyone needs to meet because of the amount of effort they have put into all the programs they have done," said [Navajo Nation Human Rights Commission Policy Analyst Rodney L. Tahe], who praised FPD's cultural

The report notes that Public Law 280 transferred criminal jurisdiction from some crimes to states from the federal government.⁵¹ According to the report, “this transfer of criminal jurisdiction over Indian Country from the federal government to various state governments occurred without the consent of tribal governments and national Indian organizations”.⁵² Despite the report’s disapproval, the transfer of jurisdiction and resulting stability in the legal system may have actually benefited the tribes. Terry Anderson and Dominic Parker write:

[Public Law 280] was passed by Congress in 1953 and implemented during the 1950s and 1960s, requiring some tribes to turn judicial jurisdiction over to the states in which they reside. This Act left approximately one-third of the 81 largest Indian reservations in the United States under the judicial jurisdiction of state courts, which the other tribes retained their judicial sovereignty. Anderson and Parker argue that P.L. 280 created a natural experiment to examine the effect of a stable contracting environment because it was not imposed on those reservations best suited for future growth but rather for their ‘lawlessness,’ to use the description of the U.S. Congress. Using data for 1969 to 1999, they find that per capita income for American Indians on reservations subjected to state jurisdiction grew about 30 percent more than on reservations not subjected to such jurisdiction. This finding is robust to controls for resource endowments, geographical isolation, education levels, acculturation, land tenure, and economic conditions in surrounding regions. More generally, their finding is consistent with the hypothesis advanced in the development literature that stable contracting over time and space is a necessary condition for economic growth[.]⁵³

Everyone agrees that jurisdictional confusion in Indian country is one reason it is difficult to enforce the law in those areas.⁵⁴ Some commentators argue that tribes should therefore be given greater jurisdiction and enforcement authority over individuals on tribal land, both tribal members and non-members.⁵⁵ For reasons discussed below, this is constitutionally suspect.

The report notes that some tribes would like the power to try non-Indians for offenses committed on tribal land.⁵⁶ There are several reasons I do not support such a change. First, the United States and the states are the ultimate sovereigns. Everyone within the borders of the United States is subject to the laws of the nation and of the states. Tribes are different. For one thing, membership

awareness training, Citizen Liaison Committee and transparency in producing records so the commission can investigate complaints.

⁵¹ Report at n.151–152.

⁵² Report at n. 154.

⁵³ Anderson and Parker, *American Indian economies*, at 123.

⁵⁴ Report at n. 157–161.

⁵⁵ Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. IND. L. REV. 253 (2017), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1077&context=ailr>

⁵⁶ Report at n. 142.

in a tribe is by definition a matter of descent.⁵⁷ A person who is not descended from a tribe cannot become a member of that tribe. In short, non-Indian individuals can find themselves being tried by an entirely different political and judicial system to which they do not and cannot belong, whereas Indians are citizens of both the tribe and the United States. Even if tribes attempt to include non-Indians on tribal court juries, the problem remains that non-Indians cannot vote for laws or representatives.

Conclusion

Congress has long been concerned about the welfare of Native Americans, particularly those on reservations. Unfortunately, over the past several decades, Congress has tended to pursue policies that, at best, enhance the power of tribes at the expense of individual Indians.

The Commission majority is convinced that the most important thing Congress can do for Native Americans is to give the tribes more money. This has been tried for decades with little success. The best thing Congress can do for Indians and non-Indians is to reform the laws to treat Indians the same as non-Indians—no better and no worse.

⁵⁷ “Genealogy,” Division of Tribal Government Services, Dep’t of the Interior, <https://www.bia.gov/bia/ois/tgs/genealogy>.

Once you’ve determined what tribe you are claiming heritage from contact the tribe, using the Tribal Leaders Director to locate a phone number and address, to ascertain if you are eligible for enrollment in the tribe. Each tribe establishes their own requirements for enrollment in the tribe. The Bureau of Indian Affairs will issue a Certificate [D]egree of Indian Blood (CDIB) that shows your blood quantum and tribal affiliation.

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PANELISTS' BIOGRAPHIES AND WRITTEN STATEMENTS

Panelists' biographies and written statements can be accessed via the link below:

https://securisync.intermedia.net/us2/s/folder?public_share=kYWfwhhUK2KP_ip316zAab&id=LzE2LTItMTkgUXVpZXQgQ3Jpc2lzIEJyaWVmaW5nIDIwMTYvUXVpZXQgQ3Jpc2lzIFBhbmVsaXN0cyBTdGF0ZW1lbnRz

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APPENDIX A: LETTER FROM U.S. HOUSE OF REPRESENTATIVES REQUESTING UPDATE TO A *QUIET CRISIS*

See page 257, following

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Congress of the United States
Washington, DC 20515

May 14, 2015

Martin R. Castro, Chairman
Patricia Timmons-Goodson, Vice Chair
Commissioners
U.S. Commission on Civil Rights
1331 Pennsylvania Ave., NW, Suite 1150
Washington, DC 20425

Dear Chairman Castro, Vice Chair Timmons-Goodson, and Commissioners,

Over a decade ago, the Commission completed a comprehensive report reviewing the federal government's efforts to address priority needs of indigenous peoples. The 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (Quiet Crisis Report), found "evidence of a crisis in the persistence and growth of unmet needs," including the "cross-cutting and universal [...] absence of basic infrastructure in Native communities." We have heard concern that this lack of basic infrastructure has only grown over the past decade. Native communities nationwide lack adequate housing, health facilities, schools, justice centers, roads, telecommunications, water, and other basic infrastructure that makes it difficult to deliver needed support services and programs to reservation residents.

In order to help ensure that the federal government is making progress in fulfilling its trust and treaty responsibilities, we respectfully request the Commission produce an update to this report as soon as possible.

Throughout the course of American history, the United States government has signed treaties, passed laws, and made pledges to support and protect the Native American population. For years the federal government has failed to live up to these promises. The Quiet Crisis Report found that federal funding in the areas of health care, education, public safety, housing, and rural development failed to meet the basic needs of the Native American population. Since the Quiet Crisis Report was issued, tribes have faced significant budget cuts due to sequestration, increasing threats from natural disasters, and a continued lack of quality housing, educational support, and economic development opportunity.

An update to the report should include an assessment of whether the federal government is now better meeting its responsibilities to tribal members; what efforts the federal government has taken to implement the Commission's 2003 recommendations – specifically with regard to infrastructure development; and what actions, if any, are needed to best address the unmet needs

in Indian Country to uphold the federal trust responsibility and achieve self-governance for Indian nations.

Thank you for your attention to this request.

Sincerely,



Derek Kilmer
U.S. Representative



Tom Cole
U.S. Representative



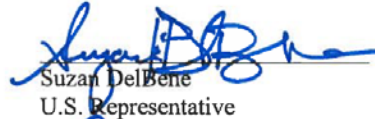
Gwen Moore
U.S. Representative



Tony Cárdenas
U.S. Representative



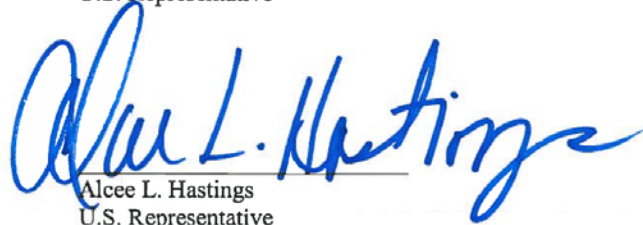
Paul Cook
U.S. Representative



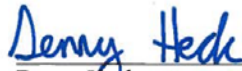
Suzan DelBene
U.S. Representative



Tulsi Gabbard
U.S. Representative



Alcee L. Hastings
U.S. Representative



Denny Heck
U.S. Representative



Jared Huffman
U.S. Representative



Ann Kirkpatrick
U.S. Representative



Ben Ray Lujan
U.S. Representative



Michelle Lujan Grisham
U.S. Representative



Betty McCollum
U.S. Representative



Jim McDermott
U.S. Representative



Frank Pallone, Jr.
U.S. Representative



Mark Pocan
U.S. Representative



Raul Ruiz
U.S. Representative



Mike Simpson
U.S. Representative



Don Young
U.S. Representative

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APPENDIX B: TOTAL AMERICAN INDIAN AND ALASKA NATIVE ALONE OR IN ANY COMBINATION BY SELECTED TRIBAL GROUPINGS

Total American Indian and Alaska Native Alone or in Any Combination by Selected Tribal Groupings¹		5,812,033
American Indian tribes, specified:		4,429,423
Apache		145,878
Arapaho		11,543
Blackfeet		170,605
Canadian and French American Indian		19,000
Central American Indian		29,559
Cherokee		1,151,638
Cheyenne		20,768
Chickasaw		72,466
Chippewa		221,093
Choctaw		252,829
Colville		12,517
Comanche		28,389
Cree		12,482
Creek		104,986
Crow		17,504
Delaware		25,331
Hopi		29,590
Houma		18,154
Iroquois		124,289
Kiowa		15,729
Lumbee		90,485
Menominee		12,174
Mexican American Indian		209,911
Navajo		375,804
Osage		23,523
Ottawa		16,206
Paiute		20,349
Pima		23,880
Potawatomi		42,403
Pueblo		82,190
Puget Sound Salish		23,723
Seminole		40,727
Shoshone		20,536
Sioux		216,123
South American Indian		87,217
Spanish American Indian		13,133
Tohono O'Odham		33,906
Ute		14,348
Yakama		12,194
Yaqui		51,235

¹ 2016 American Community Survey 1-Year Estimates

Total American Indian and Alaska Native Alone or in Any Combination by Selected Tribal Groupings¹		5,812,033
Yuman		15,635
All other American Indian tribes (with only one tribe reported)		519,371
American Indian tribes, not specified		192,296
Alaska Native tribes, specified:		171,848
Alaskan Athabascan		24,693
Aleut		24,556
Inupiat		39,525
Tlingit-Haida		31,334
Tsimshian		3,910
Yup'ik		47,830
Alaska Native tribes, not specified		16,972
American Indian or Alaska Native tribes, not specified		1,001,494

APPENDIX C: FUNDING FOR NATIVE AMERICAN PUBLIC SAFETY

Department of Justice									
<i>(Amounts in \$000s)</i>									
Public Safety in Indian Country									
<i>Component</i>	FY 2003 Enacted	FY 2004 Enacted	FY 2005 Enacted	FY 2006 Enacted	FY 2007 Enacted	FY 2008 Enacted	FY 2009 Enacted	FY 2010 Enacted	
Bureau of Prisons							123,000	125,778	
Civil Division							1,000	777	
Community Oriented Policing Services							20,000	45,000	
Community Relations Service								0	
Criminal Division								483	
Environment and Natural Resources Division							6,000	6,077	
Federal Bureau of Investigation							22,000	25,631	
Office of Justice Programs							56,000	75,000	
Office of Justice Programs, Crime Victims Fund									
Office of Tribal Justice								0*	
Office on Violence Against Women							43,000	45,745	
United States Attorneys							21,000	27,637	
Total Resources (Discretionary)							293,000	352,128	
Department of Interior, Bureau of Indian Affairs -- Public Safety and Justice									
Public Safety and Justice									
<i>Component</i>									
Law Enforcement		170,148	177,735	193,377	204,454	228,137	255,077	303,152	
Criminal Investigations and Police Services				34,294	36,969	41,723	163,148	185,053	
Detentions/Corrections				55,789	58,678	64,023	64,648	75,433	
Inspections/Internal Affairs				2,486	2,540	2,819	3,187	3,212	
Law Enforcement Special Initiatives				91,126	95,080	108,262	15,022	18,051	
Indian Police Academy		2,347	2,328	3,540	3,547	4,062	4,089	5,162	
Tribal Justice Support					1,480	1,456	1,462	5,697	
Law Enforcement Program Management				6,142	6,160	5,789	3,521	10,544	
Facilities Operations and Management									
Tribal Courts (TPA)				12,291	12,013	14,337	14,508	24,704	
Fire Protections (TPA)		1,229	1,222	1,144	1,144	1,181	1,200	999	
Total Requirements		178,707	188,666	212,142	217,611	243,656	270,785	328,855	
*In FY 2010 and prior years, OTJ was funded with reimbursable resources.									
SOURCE: Department of The Interior, Bureau of Indian Affairs									

APPENDIX C: FUNDING FOR NATIVE AMERICAN PUBLIC SAFETY

		(Amounts in \$000s)								
Department of Justice										
Public Safety in Indian Country										
Component	FY 2011 Enacted	FY 2012 Enacted	FY 2013 Enacted	FY 2014 Enacted	FY 2015 Enacted	FY 2016 Enacted	FY 2017 Enacted	FY 2018 CR	FY 2019 Request	
Bureau of Prisons	107,000	113,617	112,000	117,662	118,839	121,439	123,017			
Civil Division	0	383		271	274	284	295			
Community Oriented Policing Services	67,000	35,000	35,000	33,000	33,000	35,000	38,000	30,000		
Community Relations Service		125		25	75	92	285			
Criminal Division		564		699	679	724	731			
Environment and Natural Resources Division	6,000	5,761		6,994	11,042	15,288	13,010			
Federal Bureau of Investigation	24,000	26,707	29,000	27,445	34,028	34,813	30,943			
Office of Justice Programs	0	56,423	48,000	35,000	47,500	114,352	111,034			
Office of Justice Programs, Crime Victims Fund				6,300	0	20,000	25,000			
Office of Tribal Justice	0	0	1,000	1,100	1,390	1,630	1,630			
Office on Violence Against Women	41,000	42,675	43,000	45,881	46,757	51,791	56,034	3,500		
United States Attorneys	28,000	34,608	32,000	33,361	21,775	21,964	20,342			
Total Resources (Discretionary)	312,000	315,863	310,000	307,748	315,359	417,377	420,321		486,000	
Department of Interior, Bureau of Indian Affairs -- Public Safety and Justice										
Public Safety and Justice										
Component	FY 2011 Enacted	FY 2012 Enacted	FY 2013 Enacted	FY 2014 Enacted	FY 2015 Enacted	FY 2016 Enacted	FY 2017 Enacted	FY 2018 CR	FY 2019 Request	
Law Enforcement	305,893	321,944	320,734	325,696	328,296	334,976	354,556	361,156	326,639	
Criminal Investigations and Police Services	185,315	185,018	187,513	191,145	192,824	194,504	202,000	200,629	190,753	
Detentions/Corrections	74,492	81,810	82,293	94,038	94,483	95,305	97,507	95,852	94,027	
Inspections/Internal Affairs	3,194	3,100	2,959	3,415	3,433	3,462	3,475	3,451	3,335	
Law Enforcement Special Initiatives	17,752	17,400	14,811	7,211	8,255	11,305	10,319	20,249	8,659	
Indian Police Academy	5,133	5,073	4,986	4,704	4,716	4,853	4,862	4,829	4,665	
Tribal Justice Support	3,288	5,641	5,553	5,232	5,237	6,245	17,250	17,133	7,223	
Law Enforcement Program Management	10,476	10,145	8,761	6,882	6,250	6,161	5,978	5,937	5,381	
Facilities Operations and Management	6,243	13,757	13,858	13,069	13,098	13,141	13,165	13,076	12,596	
Tribal Courts (TPA)	27,088	23,407	24,876	23,241	23,281	28,173	30,753	30,544	22,110	
Fire Protections (TPA)	1,109	872	890	1,077	1,274	1,274	1,426	1,416	1,372	
Total Requirements	334,090	346,223	346,500	350,014	352,850	364,423	385,735	383,116	350,131	
*In FY 2010 and prior years, OTJ was funded with reimbursable resources.										
SOURCE: Department of The Interior, Bureau of Indian Affairs										

APPENDIX D: FUNDING FOR NATIVE AMERICAN HEALTH

Trend in Indian Health Service Budget																
<i>(Amounts in thousands)</i>																
Category	FY 2007	FY 2008	FY 2009	FY 2009 Recovery Act	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018 CR	FY 2019 Request		
<i>Clinical Services</i>	2,288,939	2,433,762	2,625,707	85,000	2,953,559	2,962,621	3,083,867	2,966,268	3,082,124	3,197,036	3,237,055	3,359,038	3,336,226	3,688,883		
<i>Preventive Health Services</i>	123,304	127,587	135,227		144,315	144,027	147,023	142,963	147,476	153,961	155,734	159,730	158,645	89,058		
<i>Facilities</i>	361,226	374,646	390,168	415,000	394,757	403,947	440,346	418,570	451,673	460,234	523,232	545,424	541,721	505,821		
<i>Other Services</i>	406,628	410,184	430,022		559,744	558,625	635,291	603,047	753,242	831,150	173,598	175,694	174,501	168,034		
Contract Support Costs*											717,970	800,000	800,000	822,227		
Special Diabetes Program for Indians (SDPI)	-	-	-		-	-	-	-	-	-	-	-	-	150,000		
TOTAL, BUDGET AUTHORITY	3,180,097	3,346,179	3,581,124		4,052,375	4,069,220	4,306,527	4,130,847	4,434,515	4,642,381	4,807,589	5,039,886	5,011,093	5,424,023		
Medicare/Medicaid Collections	676,797	700,538	719,586		809,987	833,720	868,682	935,439	962,909	1,038,893	1,056,243	1,056,243	1,056,243	1,056,243		
Private Insurance Collections	90,151	94,042	94,042		81,006	81,006	85,370	85,303	90,246	104,272	109,272	109,272	109,272	109,272		
VA Reimbursement	0	0	0		0	0	0	341	6,622	7,530	28,062	28,062	28,062	28,062		
Quarters Collections	6,288	6,288	6,288		6,288	6,288	7,500	8,000	8,000	8,000	8,500	8,500	8,500	8,500		
Special Diabetes Program for Indians (SDPI)					150,000	150,000	150,000	147,000	147,000	150,000	150,000	147,000	150,000	-		
Opioid Prevention, Treatment, and Recovery Support					-	-	-	-	-	-	-	-	-	150,000		
TOTAL IHS -- CURRENT \$s	4,103,333	4,297,047	4,551,040	500,000	5,099,656	5,140,234	5,418,079	5,306,930	5,649,292	5,951,076	6,159,666	6,388,963	6,363,170	6,776,100		
*Contract support costs are included in the "other services" total unless otherwise noted																
SOURCE: IHS HQ/OFA/Division of Budget Formulation																
http://www.ncai.org/2017.05.23_FY_2018_NCAI_Pres_Budget_Analysis.pdf																

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APPENDIX E: FUNDING FOR NATIVE AMERICAN EDUCATION

		(Amounts in \$000s)									
Department of the Interior											
Bureau of Indian Education											
<i>Subactivity and Program Element</i>			2003	2004	2005	2006	2007	2008	2009	2010	
Elementary and Secondary (forward funded)			512,562	522,004	517,647	457,750	458,310	479,895	499,470	518,702	
	ISEP Formula Funds		347,204	349,919	348,073	350,062	351,817	358,341	375,000	391,699	
	ISEP Program Adjustments		670	659	1,145	5,116	7,533	3,206	3,266	3,338	
	Education Program Enhancements							12,108	12,108	12,110	
	Tribal Education Departments (TEDs)										
	Student Transportation		37,262	38,116	39,444	42,738	42,833	47,843	50,500	52,808	
	Early Child and Family Development		15,164	15,604	15,355	15,281	12,067	15,023	15,223	15,374	
	Tribal Grant Support Costs										
Elementary/Secondary Programs						75,887	72,390	74,620	75,126	77,379	
	Facilities Operations		55,423	57,105	55,976	55,812	56,047	56,503	56,972	59,410	
	Facilities Maintenance										
	Johnson-O'Malley Assistance Grants		16,908	16,666	16,510	16,371	12,000	13,781	13,797	13,589	
	Residential Education Placement Programs						3,713	3,715	3,737	3,760	
	Juvenile Detention Education					0	630	620	620	620	
Post Secondary Programs (forward funded)						104,010	108,619	111,749	115,272	50,000	
	Tribal Colleges and Universities (forward funded)		42,838	48,599	53,141	55,545	54,721	56,820	59,321	50,000	
Post Secondary Programs			14,848	14,743	14,605					126,761	
Education Management						8,783	18,593	23,347	26,285	26,528	
	Education Program Management					8,783	13,595	17,292	18,928	19,164	
	Education IT					0	4,998	6,054	7,357	7,364	
Total			555,400	570,603	570,788	646,430	657,912	689,611	716,153	799,400	
Department of the Interior											
Education Construction											
Replacement School Construction			124,409	139,612	105,550	64,530	83,891	14,538	22,405	5,964	
Replacement Facility Construction							26,873	22,225	17,013	17,013	
Employee Housing Repair			3,100	3,081	3,038	1,971	1,973	1,942	4,445	4,451	
Facilities Improvement and Repair			163,306	146,335	142,531	140,286	92,219	104,182	84,974	85,566	
Total -- Education Construction			293,795	294,954	263,372	206,787	204,956	142,934	128,837	112,994	
Source: Department of the Interior, Bureau of Indian Affairs											

APPENDIX E: FUNDING FOR NATIVE AMERICAN EDUCATION

Department of the Interior		<i>(Amounts in \$000s)</i>									
Bureau of Indian Education											
<i>Subactivity and Program Element</i>		2011	2012	2013	2014	2015	2016	2017	2018 CR	2019 Request	
Elementary and Secondary (forward funded)		520,048	522,247	524,205	518,318	536,897	553,458	575,155	571,250	511,788	
	ISEP Formula Funds	390,361	390,707	391,749	384,404	386,565	391,837	400,223	397,506	378,055	
	ISEP Program Adjustments	33,331	5,278	5,332	5,234	5,353	5,401	5,412	5,375	2,617	
	Education Program Enhancements	12,043	12,032	12,134	12,090	12,119	12,182	12,201	12,118	6,341	
	Tribal Education Departments (TEDs)					2,000	2,000	2,500	2,483		
	Student Transportation	52,692	52,632	52,977	52,796	52,945	53,142	55,995	55,615	50,802	
	Early Child and Family Development	15,341	15,345	15,477	15,451	15,540	15,620	18,659	18,532		
	Tribal Grant Support Costs	46,280	46,253	46,536	48,253	62,395	73,276	80,165	79,621	73,973	
Elementary/Secondary Programs		76,939	122,534	123,591	118,402	119,195	134,263	140,540	139,586	114,128	
	Facilities Operations	59,149	58,565	58,982	55,668	55,865	63,098	66,219	65,769	60,405	
	Facilities Maintenance		50,665	51,213	48,396	48,591	55,887	59,043	58,642	53,723	
	Johnson-O'Malley Assistance Grants	13,416	13,304	13,396	14,338	14,739	14,778	14,778	14,678		
	Residential Education Placement Programs	3,755									
	Juvenile Detention Education	619					500	500	497		
Post Secondary Programs (forward funded)		64,192	67,293	68,943	69,793	69,793	74,893	77,207	76,683	72,128	
	Tribal Colleges and Universities (forward funded)	64,192	67,293	68,943	69,793	69,793	69,793	69,793	69,319	65,664	
Post Secondary Programs		61,603	61,435	62,506	61,887	64,182	64,602	63,561	63,130	20,524	
Education Management		29,916	21,971	21,539	20,354	20,464	25,151	35,050	34,812	23,282	
	Education Program Management	22,758	15,288	14,881	14,080	14,186	16,868	24,763	24,595	15,575	
	Education IT	7,158	6,683	6,658	6,274	6,278	8,283	10,287	10,217	7,707	
Total		752,698	795,480	800,784	788,754	810,531	852,367	891,513	885,461	741,850	
Department of the Interior											
Education Construction											
	Replacement School Construction	21,463	17,807	17,807	954	20,165	45,504	45,504	45,195		
	Replacement Facility Construction	29,466					11,935	11,935	11,854		
	Employee Housing Repair	4,438	4,428	4,442	3,818	3,823	7,565	7,567	7,516	5,060	
	Facilities Improvement and Repair	85,142	48,591	48,777	50,513	50,513	73,241	68,251	67,788	67,791	
Total -- Education Construction		140,509	70,826	71,026	55,285	74,501	138,245	133,257	132,353	72,851	
Source: Department of the Interior, Bureau of Indian Affairs											

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APPENDIX F: FUNDING FOR NATIVE AMERICAN HOUSING

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Department of Housing & Urban Development (HUD)									
(Amounts in millions)									
Native American Housing Block Grant	645	650	622	624	624	624	1,155	700	649
<i>Loan Level [Non-Add]</i>						[17]	[17]	[18]	[18]
Indian Housing Loan Guarantee	5	5	5	4	6	7	9	7	7
<i>Loan Level [Non-Add]</i>	[197]	[197]	[145]	[116]	[251]	[367]	[420]	[919]	[919]
Indian Community Development Block Grant	[71]	[72]	[68]	[59]	[59]	62	65	65	64
Native Hawaiian Housing Block Grant		[9]	[9]	9	9	9	10	13	13
Native Hawaiian Loan Guarantee Fund	1	1	1	1	1	1	1	1	1
<i>Loan Level [Non-Add]</i>	[40]	[40]	[37]	[36]	[36]	[42]	[42]	[42]	[42]
FY 2010, the amount includes \$650,000 for the Department's Transformation Initiative.									
SOURCE: https://www.hud.gov/budget Congressional Justifications, 2005-2019									

APPENDIX F: FUNDING FOR NATIVE AMERICAN HOUSING

Department of Housing & Urban Development (HUD)		FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018 C	FY 2019 (request)
(Amounts in millions)									
Native American Housing Block Grant		650	616	650	650	644	654	650	600
	<i>Loan Level [Non-Add]</i>	<i>[20]</i>	<i>[18]</i>	<i>[18]</i>	<i>[17]</i>	<i>[18]</i>	<i>[18]</i>	<i>[18]</i>	<i>[18]</i>
Indian Housing Loan Guarantee		6	12	6	7	8	7	7	-
	<i>Loan Level [Non-Add]</i>	<i>[360]</i>	<i>[976]</i>	<i>[1818]</i>	<i>[772]</i>	<i>[1190]</i>	<i>[1190]</i>	<i>[1190]</i>	-
Indian Community Development Block Grant		60	57	70	66	60	60	60	-
Native Hawaiian Housing Block Grant		13	12	10	9	-	2	2	-
Native Hawaiian Loan Guarantee Fund		-	-	-	-	-	-	-	-
	<i>Loan Level [Non-Add]</i>	<i>[42]</i>	<i>[42]</i>	<i>[42]</i>	<i>[42]</i>	<i>[16]</i>	<i>[16]</i>	-	-
FY 2010, the amount includes \$650,000 for the Department's Transformation Initiative.									
SOURCE: https://www.hud.gov/budget Congressional Justifications, 2005-2019									

APPENDIX G: FUNDING FOR NATIVE AMERICAN ECONOMIC DEVELOPMENT

Department of the Interior																		
Bureau of Indian Affairs																		
(Amounts in \$000s)																		
Subactivity and Program Element	2005	2006	2007	2008	2009	2009 Recovery Act	2010	2011	2012	2013	2014	2015	2016	2017	2018 CR	2019 Request		
TRUST - NATURAL RESOURCES MANAGEMENT																		
Natural Resources (TPA)	4,819	4,925	8,104	4,267	4,454		4,641	4,547	5,116	4,939	5,165	5,089	5,168	4,953	4,919	4,866		
Irrigation Operations & Maintenance	9,111	13,042	12,074	11,874	11,922		11,970	11,910	11,920	11,322	11,342	11,359	11,398	12,905	12,817	9,134		
Rights Protection Implementation	22,065	21,262	18,076	19,841	18,250		30,451	28,442	28,976	29,437	35,297	35,420	37,638	39,661	39,392	24,737		
Tribal Management/Development Program	9,367	10,146	4,278	6,534	5,679		5,636	6,782	7,705	9,220	9,230	9,244	9,263	11,266	11,189	8,660		
Endangered Species	2,157	1,192	219	1,228	1,234		1,249	1,248	1,245	1,170	2,673	2,675	2,684	2,685	2,667	1,306		
Tribal Climate Resilience/Cooperative Landscape Conservation/Climate Change								419	200	946	9,947	9,948	9,955	9,956	9,888	0		
Integrated Resource Info Program	1,269	1,250	1,250	1,230	2,130		2,130	2,105	2,106	1,996	1,996	2,996	2,996	2,996	2,976	2,576		
Agriculture & Range	24,221	24,272	23,236	24,015	24,363		28,912	28,863	28,836	27,494	30,558	30,494	30,751	30,769	30,560	27,977		
Forestry	42,357	42,137	42,459	42,728	43,203		43,854	43,644	43,574	41,742	47,735	47,735	51,914	54,155	53,787	48,872		
Water Resources	11,739	11,502	11,159	9,759	10,018		10,084	10,150	10,134	9,589	10,543	10,297	10,367	10,450	10,379	8,567		
Fish, Wildlife & Parks	6,281	6,525	6,669	6,488	7,429		11,410	11,340	11,322	10,782	13,823	13,577	13,646	15,203	15,100	11,436		
Minerals & Mining	8,162	8,179	10,207	11,496	12,474		18,622											
Resource Management Program Oversight	8,735	8,322	7,507	7,698	6,554		6,659	6,632	6,111	5,700	5,986	6,018	6,066	5,993	5,952	5,293		
Total, Trust-Natural Resources Management	150,359	152,754	145,238	147,158	147,710		175,618	156,082	157,245	154,337	184,295	184,852	191,846	200,992	199,626	153,424		
TRIBAL GOVERNMENT																		
Road Maintenance (TPA)								26,390	25,390	24,123	24,303	26,461	26,693	30,307	30,101	28,318		
Source: U.S. Department of the Interior, Bureau of Indian Affairs; National Congress of American Indians, Analysis of the FY 2019 President's Budget, http://www.ncai.org/FY2019_Presidents_Budget_Analysis7.pdf																		

APPENDIX G: FUNDING FOR NATIVE AMERICAN ECONOMIC DEVELOPMENT

Department of the Interior																	
Bureau of Indian Affairs																	
(Amounts in \$000s)																	
Subactivity and Program Element	2005	2006	2007	2008	2009	2009 Recovery Act	2010	2011	2012	2013	2014	2015	2016	2017	2018 CR	2019 Request	
TRUST - REAL ESTATE SERVICES																	
Trust Services (TPA)	9,014	11,069	9,724	10,476	11,082		9,672	9,640	10,982	15,235	15,303	15,150	15,043	8,185	8,129	6,368	
Navajo-Hopi Settlement Program	1,127	1,139	1,148	1,177	1,203		1,230	1,224	1,204	1,128	1,135	1,147	1,160	1,166	1,158	1,167	
Probate (TPA)	11,438	7,826	8,002	8,861	12,952		13,121	13,058	12,728	11,966	11,989	12,043	11,928	12,039	11,957	10,995	
Probate Backlog (UTB)		7,882	7,882	10,712	7,382		7,452										
Land Title & Records Offices	11,896	13,436	13,552	14,425	14,747		14,556	14,496	14,413	13,588	13,732	13,891	13,905	13,981	13,886	12,610	
Real Estate Services	40,983	40,578	43,510	47,216	48,140		48,398	48,056	37,692	35,449	36,460	36,435	36,837	37,070	36,818	34,913	
Land Records Improvement	7,986	7,891	7,897	15,814	15,659		15,454	15,241	6,782	6,416	6,423	6,436	6,439	6,441	6,397	6,113	
Environmental Quality	11,936	11,988	11,923	11,054	11,601		14,714	14,668	16,507	15,522	15,623	15,644	15,792	15,904	15,796	13,263	
Alaskan Native Programs	1,350	1,391	995	1,006	1,022		1,033	1,031	1,032	971	1,002	1,010	1,017	1,420	1,410	0	
Rights Protection	16,740	14,274	14,291	12,274	11,137		12,036	12,002	10,883	10,252	11,781	11,803	11,845	13,365	13,274	9,145	
Trust - Real Estate Services Oversight	23,073	24,368	25,149	15,355	15,162		14,827	16,405	14,536	13,235	13,310	13,443	13,520	13,521	13,429	10,910	
Total, Trust-Real Estate Services	135,543	141,842	144,073	148,370	150,087		152,493	145,821	126,759	123,762	126,758	127,002	127,486	123,092	122,254	105,484	
COMMUNITY & ECONOMIC DEVELOPMENT																	
Job Placement & Training (TPA)	8,566	8,396	8,444	7,925	11,864		11,654	11,552	11,502	10,922	10,920	11,463	11,445	12,504	12,419	8,028	
Economic Development (TPA)	4,879	4,407	4,733	4,531	3,493		2,241	2,371	2,342	2,247	1,713	1,706	1,794	1,801	1,789	1,737	
Minerals & Mining								18,461	18,660	17,610	20,464	20,612	25,153	25,304	25,132	24,119	
Road Maintenance (TPA)	26,967	27,386	27,565	25,576	26,046	150,000	26,490										
Community Development	11,554	10,148			400	6,000	1,400										
Community Development Oversight	778	1,445	1,492	1,404	1,786			3,075	2,306	2,193	2,193	2,215	2,227	2,235	2,220	1,942	
Total, Community & Economic Development	52,744	51,782	42,234	39,436	43,589	156,000	44,910	36,856	34,810	32,972	35,300	35,996	40,619	41,844	41,560	35,826	
RESOURCES MANAGEMENT CONSTRUCTION																	
Total, Resources Management Construction	40,289	45,099	45,125	38,309	40,306		38,385	42,075	32,959	32,657	32,759	34,427	34,488	34,422			
OTHER PROGRAM CONSTRUCTION																	
Telecommunications Improvement & Repair	894	887	2,889	881	881		883	861	861	854	856	856	856	854			
INDIAN LAND & WATER CLAIM SETTLEMENTS & MISCELLANEOUS PAYMENTS TO INDIANS																	
TOTAL, SETTLEMENTS/MISC. PAYMENTS	44,150	34,243	42,000	33,538	21,627		47,380	46,387	32,802	32,737	35,655	35,655	49,475	49,381			
INDIAN GUARANTEED LOAN PROGRAM																	
TOTAL, INDIAN GUARANTEED LOAN PROGRAM	6,332	6,255	6,258	6,178	8,186		8,215	8,199	7,103	6,731	6,731	7,731	7,748	7,733			

Source: U.S. Department of the Interior, Bureau of Indian Affairs; National Congress of American Indians, Analysis of the FY 2019 President's Budget, http://www.ncai.org/FY2019_Presidents_Budget_Analysis7.pdf

APPENDIX H: ECONOMIC DEVELOPMENT: BUREAU OF INDIAN AFFAIRS LOAN MATRIX

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012											
Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
DOI—Office of Indian Energy and Economic Development	Indian Affairs Loan Guaranty Program	Business entities which are at least 51% Indian-owned and contributes to the local economy of a reservation or BIA Service Area.	A for-profit entity, a Section-17 corporation, or a not-for-profit commercial venture.	20%	1st lien on available adequate collateral	90%	\$500,000 individual limit by regulation; higher limits for tribes, tribal enterprises and Indian-owned business entities based upon Program resources. Guarantees last fiscal year averaged \$3 million *	2% one-time fee	30 years	http://www.bia.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm	25 CFR 103
Small Business Administration	7(a) Loan Guaranty Program Business Loans made by Banks and other Licensed Lenders and guaranteed by SBA	For-Profit businesses that meet SBA’s Size Standards, Nature of Business, Use of Proceeds, Credit Elsewhere, and other Eligibility Factors	Allowed purpose of loans: Acquire land; Purchase existing building; Convert, expand or renovate buildings; Construct new buildings; Acquire and install fixed assets; Acquire Inventory; Purchase supplies and raw materials; Purchase a Business, Leasehold improvements, Term working capital; Under certain conditions to Refinance certain outstanding debts; Revolving lines of credit and programs for Seasonal and Contract financing. Some 7(a) loans also help small businesses who export.	SBA requires that the applicant have “Reasonable” investment in the business	Loan will not be declined for lack of collateral but all worthwhile assets (business & personal) must be pledged until either collateral value equals loan amount or no more worthwhile assets are available. Personal guarantees are required of 20% or more owners of the business	Loans up to \$150,000 are guaranteed up to 85 percent. Loans over \$150,000 are guaranteed up to 75 percent. Business with multiple SBA loans may receive some percentage variations. Up to 90 percent when loan proceeds promote exporting.	Loan limit is \$5.0 million. SBA’s limit to any one business is \$3.75 million. One business can have multiple loans guaranteed by SBA but SBA portion cannot exceed \$3.75 million.	Guaranty Fee Based on Loan Amount and Percentage of Guaranty. Range between 2 and 3 percent of guaranteed amount. The lender or a third party may charge the Small Business Applicant certain fees for packaging and other services in connection with the loan.	Based on the Use of Proceeds and borrower’s ability to repay. Not based on collateral. Maximum maturity: 10 years for Working Capital (7 years is common), 10 years for fixed assets, 25 years for real estate	www.sba.gov From this Webpage, learn about the variety of 7(a) programs that have general and specialized uses for loan proceeds.	13 CFR §120

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
Small Business Administration	SBA Express	Operating businesses as defined by SBA size standards with certain restrictions	For-profit entities only with certain restrictions	Reasonable amount determined by lender and SBA	Adequate collateral	50%	\$350,000	2% for loans under \$150,000. 3% for loans greater than \$150,000. Annual fee of 0.494% of outstanding balance. The lender or a third party may charge the Small Business Applicant certain fees for packaging and other services in connection with the loan.	Up to 7 years for Lines of Credit, up to 7 to 20 years for other loan purposes	http://www.sba.gov/services/financialassistance/7alenderprograms/sbaexpress/index.html	13 CFR 120
Small Business Administration	Microloan Program	For agency loans to Intermediary: Private Non-Profit, quasi-governmental, or tribally-owned entity. For microloans from Intermediary: Operating businesses as defined by SBA size standards with certain restrictions and non-profit child care businesses.	For agency loans to Intermediary: At least one year experience making and servicing microloans (loans of up to \$50,000) and experience providing business-based training to micro borrowers. For microloans from Intermediary: For-profit entities and non-profit child care businesses with certain restrictions.	For Microloans from Intermediary : Determined by Intermediary	For agency loans to Intermediary: 15% non-Federal match requirement and security interests in the microloan notes and microloan program bank accounts. For microloans from Intermediary: Determined by Intermediary.	N/A	For agency loans to Intermediary: No more than \$750,000 in the first year of participation in the Microloan Program. After the first year, the maximum loan amount is \$1,250,000. An Intermediary's total outstanding Microloan Program debt must not exceed \$5 million. For microloans from Intermediary: No more than \$50,000.	For agency loans to Intermediary: None. For microloans from Intermediary: Up to \$100 per year.	For agency loans to Intermediary: 10 year maturity. For microloans from Intermediary: 6 year maturity.	http://www.sba.gov/content/microloan-program	12 CFR 120.700 et seq.

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
Small Business Administration	Export Express	Operating businesses as defined by SBA size standards with certain restrictions.	N/A	Reasonable amount determined by lender and SBA	Available collateral (liquidation value) up to loan amount.	N/A	Limited To \$500,000 (including any outstanding SBA Express, Community Express, Patriot Express, and Export Express loans.)	N/A	Revolving L/C: Maximum 7 years: including term out period.	http://www.sba.gov/content/export-loan-programs#Export%20Express%20Program	N/A
Small Business Administration	Community Advantage	Lender cannot be an existing 7(a) lender and must be either a CDFI, an SBA CDC or an SBA Micro lender.	N/A	Reasonable amount determined by lender and SBA	Available collateral (liquidation value) up to loan amount.	N/A	Limited to \$350,000. Guaranty: 85% for loans of \$150,000 or less. 75% for loans over \$150,000	N/A	20 years for real estate and equipment, up to 10 years for other purposes	http://www.sba.gov/content/community-advantage	N/A
USDA—Rural Development	Business and Industry (B&I) Guaranteed Loan Program	A cooperative organization, a corporation, a partnership, or other legal entity organized and operated on a profit or nonprofit basis; an Indian tribe on a Federal or State reservation or other Federally recognized tribal group; a public body; or an individual. Eligible Areas are outside the boundaries of a city or town of more than 50,000 population and urbanized area contiguous and adjacent to such city or town	For-profit and non-profit entities	10% existing businesses 20% new businesses	Adequate collateral	Up to 80% for loans of \$5MM or less, 70% for loans between \$5MM and \$10MM, and 60% for loans exceeding \$10MM.	\$10MM; exception may be granted by Administrator for up to \$25MM. For rural cooperative organizations that process value-added agricultural commodities only, the Secretary may make an exception up to \$40MM. Due to funding constraints in any given Fiscal Year, absolute maximum loan limits may be capped at \$10 MM.	3% upfront fee on Guaranteed amount plus an Annual renewal fee calculated each year, typically a .25% on unpaid guaranteed amount by end of calendar year.	30 years for real estate; 15 years or useful life for machinery or equipment; 7 years working capital	http://www.rurdev.usda.gov/rbs/busp/b&i_gar.htm (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 4279

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Intermediary Relending Program (IRP)	Private non-profit corporations, public agencies, Indian groups, and cooperatives	Have legal authority to carry out proposed loan purposes; have a record of success assisting rural business; provide adequate assurance of payment	Loans from intermediaries to ultimate recipients/businesses must not exceed the lesser of: (1) \$250,000; or (2) Seventy five percent of the total cost of the ultimate recipient's project.	Adequate collateral determined between the intermediary and the ultimate recipient/business.	N/A	\$2 MM loan limit from RD to the intermediary. Fiscal Year program budgets may require lower loan limits.	1% interest per annum over the term of the loan	Up to 30 years.	http://www.rurdev.usda.gov/BCP_irp.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 4274D
USDA—Rural Development	Rural Energy for America Program (REAP)	Rural small businesses and agricultural producers.	Purchase, installation, and construction of renewable energy systems or energy efficiency improvements to buildings and facilities. Projects cannot benefit residential property under REAP.	Loans greater than \$600,000 require not less than 25 percent cash equity injection based on eligible project cost, and loans of \$600,000 or less require not less than 15 percent cash equity injection based on eligible project cost.	Adequate collateral	up to 85% for \$600,000 or less, 80% for loans between \$600,000 and up to \$5MM, 70% for loans between \$5MM and up to \$10MM, and 60% for loans exceeding \$10MM	\$25,000,000; cannot exceed 75 percent of total eligible project costs	Maximum Guarantee Fee is 1%, maximum Annual Renewal Fee is 0.50%. Fees established each FY. FY12 Guarantee Fee is 1%, FY12 Annual Renewal Fee is 0.25%	30 years for real estate; 20 years or useful life for machinery or equipment; 7 years working capital; blended terms must not exceed 30 years	Energy Coordinators, by State Office: http://www.rurdev.usda.gov/BCP_EnergyCoordinatorList.html	7 CFR 4280-B

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Rural Business Enterprise Grants (RBEG)	RBEG grants may be made to Public bodies, non-profit corporations, institutions of higher education, Indian Tribes, and rural cooperatives serving rural areas to finance or develop a small and emerging private business enterprise.	Examples of eligible fund use include: Acquisition or development of land, easements, or rights of way; construction, conversion, renovation, of buildings, plants, machinery, equipment, access streets and roads, parking areas, utilities; pollution control and abatement; capitalization of revolving loan funds including funds that will make loans for startups and working capital; training and technical assistance; distance adult learning for job training and advancement; rural transportation improvement; and project planning.	N/A	N/A	N/A	Up to \$500,000	N/A	N/A	http://www.rurdev.usda.gov/BCP_rbeg.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 1942-G

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Rural Business Opportunity Grants (RBOG)	Public bodies, non-profit corporations, institutions of higher education, Indian Tribes, and rural cooperatives.	The RBOG program is primarily a training and technical assistance program. Funds may be provided for development of export markets; feasibility studies; development of long term trade strategies; community economic development planning; business training and business based technical assistance for rural entrepreneurs and business managers; establishment of rural business incubators; and assistance with technology based economic development.	N/A	N/A	N/A	N/A	N/A	N/A	www.rurdev.usda.gov/BCP/RBOG.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR Part 4284 subparts A and G

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Community Facilities Program Direct and Guaranteed Loans (CF)	Public bodies such as municipalities, cities, towns and special purpose districts, non-profit corporations and tribal governments	<p>1) In rural area of city, town or unincorporated area that does not exceed 20,000 inhabitants per 2000 US Census.</p> <p>2) An essential community facility normally provided by the local unit of govt.</p> <p>3) Be a public improvement needed for the orderly development of a community.</p>	N/A	Bonds or notes pledging taxes, assessments, or revenues will be accepted as security if they meet statutory requirements. Where laws permit, a mortgage may be taken on real and personal property. Tax-exempt notes or bonds may be issued to secure direct loans, but cannot be used for guaranteed loans.	Up to 90%	No maximum. However, loan amounts will depend on what the borrower can afford and the availability of funds in any given fiscal year.	1% Gay fee on guaranteed loans.	Up to 40 years. For the direct and guaranteed loan programs. There are three levels of interest rates available for direct loans (poverty, intermediate, and market) each on a fixed basis. The poverty rate is set at 4.5%. The market rate is indexed to the eleventh bond buyer's rate as determined by the U. S. Treasury Department. The intermediate rate is set halfway between the market and the poverty rates. The guaranteed interest rate is the lender's customary rate and negotiated between lender and borrower	<p>www.rurdev.usda.gov/HAD-CF_Loans.html</p> <p>(Program Website)</p> <p>Or</p> <p>www.rurdev.usda.gov/StateOfficeAddresses.html</p> <p>(RD Office Contact Info)</p>	Direct Loan 7 CFR 1942-A and RD Instruction 1942-A; Direct Loan Servicing 7 CFR 1951-E and RD Instruction 1951-E; Gtd. Loan 7CFR 3575-A and RD Instruction 3575-A.

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Section 515 Rural Rental Housing	Individuals/Non-Profit and For or-Profit Organizations/Public Agencies/Tribes	New construction of multifamily rental housing for very-low, low, and moderate income families, the elderly, and persons with disabilities. Funds may also be used for rehabilitation of existing Section 515 units	N/A	Mortgage/Leasehold mortgage interest on trust land	Up to 90%	\$1 MM	N/A	30 years. Loans bear a 1 percent interest rate	www.rurdev.usda.gov/HAD-Direct_Rental_Loans.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 3560

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Section 538 Rental Housing Loans	Individuals/Non-Profit and For or-Profit Organizations/Public Agencies/Tribes	New construction of affordable rental housing for very low to moderate-income households with incomes up to 115 percent of the area median income. Funds can also be used to rehabilitate other affordable rental properties.	Loan to Value limited to 90% for for-profit applicants and 97% for non-profit applicants	Mortgage/leasehold mortgage interest on trust land.		The loan amount must not exceed the applicable maximum per dwelling unit limitations pushed by HUD, but the lender should contact the HUD state office as adjustments to the limits are made for different locals. The Secretary of HUD may increase these limits up to 110 percent in any geographical area where the Secretary finds the cost levels so require and up to 140 percent on a project-by- project basis where the Secretary determines it is necessary. The amount also may be increased by up to 20 percent, if necessary, to account for the cost of installation of certain energy improvements.	Initial guarantee fee of 1% and an annual guarantee renewal fee of 0.50%	25–40 year market rate loan.	www.rurdev.usda.gov/HAD-Guaranteed_Rental_Loans.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 3565

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Rural Development	Section 502 Direct Loan Program (Housing)	Very-low or Low-income individuals and households	To purchase, construct or repair a modest home that is decent, safe, sanitary, and affordable. Refinancing on Agency and non-Agency debt is permitted in certain circumstances.	No down payment required	Mortgage/leasehold mortgage interest on trust land	N/A	Loan limits based on local (county based) criteria. Contact local USDA RD staff for applicable limits. The housing must be modest in size, design, and cost. Modest housing is property that is considered modest for the area	There are no fees charged by the agency to obtain these loans. However, the agency does require a reimbursement from applicants for the approximate amount it pays to obtain a real estate appraisal and a credit report for the applicant(s). The appraisal fee charge is \$425; the credit report is \$32.	33 years (38 for those with incomes below 60 percent of AMI and who cannot afford 33-year terms). Interest rate can be subsidized down to 1%.	www.rurdev.usda.gov/HAD-Direct_Housing_Loans.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR Part 3550
USDA—Rural Development	Section 502 Guaranteed Loan Program (Housing)	Individuals and households who have an income of up to 115% of the median income for the area.	To purchase or construct a modest home that is decent, safe, sanitary, and affordable. Section 502 loans already made or guaranteed may also be refinanced.	No down payment required	Mortgage/leasehold mortgage interest on trust land	Up to 90% of the original principal loan amount.	Based on the affordability and eligibility of low and moderate income households.	2% upfront fee for purchase loans, 1.5% upfront fee for refinance loans, and both purchase and refinance loans carry a 0.3% recurring annual fee.	30 year market rate loan.	www.rurdev.usda.gov/HAD-Direct_Housing_Loans.html (Program Website) Or www.rurdev.usda.gov/StateOfficeAddresses.html (RD Office Contact Info)	7 CFR 1980-D

<p>USDA—Rural Development</p>	<p>Water and Waste Disposal Direct Loans, Grants and Loan guarantees.</p>	<p>Funds are available to public bodies, non-profit corporations and Indian tribes.</p>	<p>Funds can be used for construction, land acquisition, legal fees, engineering fees, capitalized interest, equipment, initial operation and maintenance costs, project contingencies, and any other cost that is determined by the Rural Development to be necessary for the completion of the project.</p> <p>Projects must be primarily for the benefit of rural users.</p>	<p>N/A</p>	<p>For public bodies loans are secured by the best security position practicable in a manner which will adequately protect the interest of RUS during the repayment period of the loan. Specific security requirements for each loan will be included in a letter of conditions.</p> <p>Loans , including loans to Federally recognized Indian tribes, will be evidenced by notes, bonds, warrants, or other contractual obligations as may be authorized by relevant laws and by borrower's documents, resolutions, and ordinances.</p> <p>Security, in the following order of preference can consist of: The full faith and credit of the borrower when the debt is evidenced by general obligation bonds; and/or Pledges of taxes or assessments; and/or Pledges of facility revenue and, when it is the customary financial practice in the State</p>	<p>Normally, guarantees do not exceed 80 percent of the loan.</p>	<p>No maximum. However, loan amounts will depend on what the borrower can afford and the availability of funds in any given fiscal year. Grants are statutorily limited to a maximum of 75% of the project cost. That maximum percentage may be lower based on the economic demographics of the community to be served.</p>	<p>The guarantee fee rates are available in any Agency office.</p>	<p>The maximum term for all loans is 40 years; however, no repayment period will exceed State statutes or the useful life of the facility. Interest rates are adjusted quarterly and may be obtained from any Rural Development office.</p>	<p>www.rurdev.usda.gov/UWP-dispdirectloans/grants.htm</p> <p>Or</p> <p>www.rurdev.usda.gov/StateOfficeAddresses.html</p> <p>(RD Office Contact Info)</p>	<p>7 CFR 1980 and 7 CFR 1779 for Loan Guarantees</p>
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Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
USDA—Farm Service Agency	Guaranteed Loan Program***	Farmers or ranchers****	For-profit entities only with certain restrictions	Reasonable amount determined by lender and FSA	Adequate collateral	90%; FSA can assess risk and guarantee up to 95% 75% for conservation (CL) loans	\$1,214,000	1.5% one-time fee	7 years for operating loans; 40 years for ownership loans	http://www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=bfl	7 CFR 762
USDA—Farm Service Agency	Direct Loan Program*****	Farmers or ranchers****	For-profit entities only with certain restrictions	No specific equity requirement	Adequate collateral	Direct loan from agency	\$300,000 for EM loans only, the amount of the actual loss not to exceed \$500,000	credit report fee of \$13.50–\$75 depending on form of applicant, no other agency fees	7 years for operating loans; 40 years for ownership loans	http://www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=bfl	7 CFR 763
Community Development Financial Institution	Financial Assistance	Certified Native CDFIs	Non-profit or for-profit entities; primary mission of community development; financing entity; serve one or more eligible target markets; provide development services; maintain accountability to target market(s); non-government entity	N/A; Must demonstrate adequate lending history	N/A	N/A	\$750,000	None	Rates and Terms are based on Matching Funds^	www.cdfifund.gov	12 CFR 1805
Community Development Financial Institution	New Markets Tax Credit Program	Certified CDEs, Certified Native CDFIs	For-profit entities; primary mission of serving low-income communities; demonstrate accountability to low-income communities; serve a defined service area	N/A; Must demonstrate adequate lending history	N/A	N/A	\$125,000,000^^	None	N/A; 7-year Compliance period	www.cdfifund.gov	26 CFR 1.45D-1

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
DOC— Economic Development Administration	Revolving Loan Fund Program	Local and State Gov'ts, Higher Ed Institutions, Public and private non-profits and Indian Tribes	For profit, business start-up, working capital, equipment, real property	Reasonable amount determined by lender	Adequate collateral. Typically subordinate to private bank financing. Personal guarantees may be required	Set by Lender	Limits set by Lender—Generally not to exceed \$1,000,000. Typical loans range \$5,000 to \$175,000	Market competitive and Set by Lender. Rates set by lender; no less than lesser of 4% or 75% of Prime	Generally not to exceed: Land and Building = 15–20 yrs, Equipment = 3–10 yrs, Inventory and Working Capital = 5–7 yrs	http://www.eda.gov/PDF/RLFStaffContacts.pdf	13 CFR 307
Housing and Urban Development	Section 184 Loan Guarantee Program	Members of federally recognized tribes, Tribes, and Tribal Entities	Tribes, TDHEs, Tribal Housing Authorities and Individuals who are creditworthy and meet other qualifications set out in statute Section 184 of the Housing and Community Development Act of 1992, P.L. 102-550, enacted October 28, 1992, as amended	N/A	1st lien on home to be financed	100	By locality. The limits are based on the Single Family Limits used by FHA with adjustments for regional factors that result in higher construction costs due to material and transportation costs	One time upfront fee of 1% of loan amount	Typically 30 years, but the borrower can select less than 30 year loan term	Thomas.C.Wright@hud.gov	24 CFR part 1005.
Housing and Urban Development	Section 184A Loan Guarantee Program	Native Hawaiians	Individuals who are creditworthy and meet other qualifications set out in statute Section 514 of the American Homeownership and Economic Opportunity Act of 2000 (P.L. 106-569, approved December 27, 2000), which amended the Housing and Community Development Act of 1992 (12 U.S.C. 1715z-13b)	N/A	1st lien on home to be financed	100	Based on Locality. The limits are similar in nature to Single Family Limits used by FHA	One time upfront fee of 1% of loan amount	Typically 30 years, but the borrower can select less than 30 year loan term	Thomas.C.Wright@hud.gov	N/A

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
Housing and Urban Development	Title VI Loan Guarantee Program	Federally Recognized Tribes, Native Alaskan Villages, and Tribal Entities	Affordable housing related activity or model activity per statute Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.)(NAHASDA)	N/A	Pledge of Need Portion of annual Indian Housing Block Grant	95	5 times the Need portion of annual Indian Housing Block Grant	0	Generally, not more than 20 years for both construction and permanent financing lending	Thomas.C.Wright@hud.gov	24 CFR PART 1000
Veterans Affairs	Native American Direct Loan Program (Direct Housing Loans for Native American Veterans in statute)	Certain Native American veterans (as defined in statute: Indian, native Hawaiian, Alaska Native, Pacific Islander, and certain spouses of Native Americans)	Individuals who are creditworthy and meet other qualifications set out in chapter 37 of title 38, United States Code	N/A	1st lien on home to be financed	Direct loan for full amount. Not a guaranteed loan program	Either \$80,000 or, in areas where the Secretary of Veterans Affairs has determined higher construction costs, not to exceed the Freddie Mac loan limits determined under 12 U.S.C. § 1454(a)(2) by FHFA	One-time fee of 1.25 percent of loan amount. 38 USC 3729(b)(2)(H). Certain veterans exempt	Generally no longer than 30 years and 32 days	www.va.gov	38 C.F.R. §§ 36.4501, 36.4512, and 36.4527.
Veterans Affairs	VA-Guaranteed Loans to Purchase Manufactured Homes	Individuals	Individuals who are creditworthy and meet other qualifications set out in chapter 37 of title 38, United States Code	N/A	1st lien on home to be financed	Varies; usually the lesser of \$20,000 or 40% of the loan amount. 38 U.S.C. § 3712(b)(3)	May not exceed 95 % of purchase price of property securing loan. 38 USC 37129(c)(5)	One-time fee of 1.00 percent of loan amount. 38 USC 3729(b)(2)(G). Certain veterans exempt	Generally b/w 15 and 25 years, depending on size of home and whether purchase of lot involved	www.va.gov	38 CFR 36.4200 et seq.

Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska, Final—August 2012

Agency	Program Name	Who is Eligible	What is Eligibility for Loan	Minimum Equity in Business	Collateral	Guaranty Percentage Maximum	Maximum Loan Amount	Fees	Maximum Term	Contact Info	Regulation
Veterans Affairs	Veteran's Guaranteed Home Loan	Certain veterans and service members	Individuals who are creditworthy and meet other qualifications set out in chapter 37 of title 38, United States Code	N/A	1st lien on home to be financed	Varies. For most loans of \$144,000 or less, generally 40 to 50 percent of the loan; for most loans exceeding \$144,000, generally 25	Generally not to exceed reasonable value of property	Varies depending upon service in the military and amount of down payment (if any). See 38 U.S.C. § 3729. Certain veterans exempt	Generally no longer than 30 years and 32 days	www.va.gov	38 CFR 36.4300 et seq.

Source: U.S. Department of Agriculture, Office of Tribal Relations, *Federal Loan Programs for Economic and Community Development throughout Indian Country and Alaska*, August 2012, <http://conferences.asucollegeoflaw.com/triberecognition/files/2014/01/Federal-Loan-Opps.pdf>.

Note: Although there are other Federal loan guaranty programs, they are not necessarily similar to the Indian Affairs Program and may not be relevant to lenders obtaining this sheet. For example,

DOE has a loan guaranty program for new alternative energy usage

DOT has a loan guaranty program for loans \$50MM and up

* Maximums can be exceeded by approval from Central Office Committee depends on program resources, typically \$90 million annual ceiling

**Eligible Areas are outside the boundaries of a city or town of more than 50,000 population and urbanized area contiguous and adjacent to such city or town

*** Program consists of Ownership loans (FO), Operating loans (OL) and Conservation (CL) loans

****With specific qualifications

***** Program consists of Ownership loans (FO), Operating loans (OL) and Emergency (EM) loans

^ Matching Funds requirements are subject to most recently published NOFA

^^ Allocations are tax credits against federal income tax in exchange for equity investments made in CDEs

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APPENDIX I: GLOSSARY OF ACRONYMS

Acronyms Used in This Report¹

ACA † ²	(Patient Protection and) Affordable Care Act (2010)
ACS.....	American Community Survey (of U.S. Census Bureau, in Commerce)
AI / AN	American Indian / Alaska Native
ARRA †	American Recovery and Reinvestment Act (2009)
ASCE * ³	American Society of Civil Engineers
ATALM *	Association of Tribal Archives, Libraries, and Museums
BH2I	Behavioral Health Integration Institute (intergovernmental)
BIA.....	Bureau of Indian Affairs (in DOI)
BIE	Bureau of Indian Education (in BIA / DOI)
Block Grant.....	Indian Housing Block Grant (PIH, in HUD)
BOP.....	Federal Bureau of Prisons
CDC	Centers for Disease Control and Prevention
CDFI	Community Development Financial Institutions fund (Treasury)
CHIP	Children’s Health Insurance Program (CMS, in HHS)
CMS	Centers for Medicare and Medicaid Services (HHS)
COPS.....	(Off. of) Community Oriented Policing Service (in OJP within DOJ)
CPD.....	(Off. of) Community Planning and Development (in HUD)
CRDC.....	Civil Rights Data Collection (in OCR/ED)
CSC.....	Contract Support Cost (IHS, in HHS)

¹ All government offices and programs are part of the United States federal government, unless otherwise stated.

² Statutes are marked by the dagger symbol (†).

³ Entries marked with the asterisk symbol (*) are private or Tribal, without U.S. federal government participation.

CTAS	Coordinated Tribal Assistance Solicitation program (in DOJ)
CWA †	Clean Water Act
DHS.....	U.S. Department of Homeland Security
DOD.....	U.S. Department of Defense
DoDEA	U.S. Department of Defense Education Activity
DOI	U.S. Department of the Interior
DOJ.....	U.S. Department of Justice
DOL	U.S. Department of Labor
DVA.....	U.S. Department of Veterans Affairs
ED	(U.S. Department of) Education
EPA.....	U.S. Environmental Protection Agency
ESSA †.....	Every Student Succeeds Act (2015)
ESEA †.....	Elementary and Secondary Education Act
FASD *	Fetal Alcohol Syndrome Disorders
FBI	Federal Bureau of Investigation
FCC.....	Federal Communication Commission
FEMA	Federal Emergency Management Agency (in DHS)
FFB	Federally Financed Bank loans (electric infrastructure) (via USDA)
FHA.....	Federal Housing Administration (HUD)
FY	Fiscal Year (of the federal government) (runs Oct. 1 to Sept. 30)
GAO.....	U.S. Government Accountability Office
HEARTH †	Helping Expedite and Advance Responsible Tribal Homeownership (2012)
HHS.....	(U.S. Department of) Health and Human Services
HOME.....	Home Investment Partnership Program (for Hawaii) (OPD/HUD)
HPPG	High Priority Performance Goals (in OJS/BIA/DOI)

HRSA	Health Resources and Services Administration (Hawaiian health) (in HHS)
HUD	(U.S. Department of) Housing and Urban Development
ICDBG	Indian Community Development Block Grant (PIH, in HUD)
ICP	Indian Children's Program (IHS, in HHS)
IHCIA †	Indian Health Care Improvement Act (1976)
IHS	Indian Health Service (in HHS)
ILOC	Indian Law and Order Commission
IRA †	Indian Reorganization Act (1934)
ITESDA †	Indian Tribal Energy Development and Self-Determination Act (2005)
JAG	(Edward Byrne Memorial) Justice Assistance Grant program (in DOJ)
LSTA †	Library Services and Technology Act (E-rate funds for telecom. and Internet)
NACIE	National Advisory Council on Indian Education (intergovernmental, advises DOI and ED)
NAEP	National Assessment of Educational Progress (nationwide exams)
NAFOA *	Native American Finance Officers Association
NAHASDA †	Native American Housing Assistance and Self-Determination Act (1996)
NAIHC *	National American Indian Housing Council
NCAI *	National Congress of American Indians
NIEA *	National Indian Education Association
NTTFI	National Tribal Transportation Facility Inventory (via DOT)
OCR	(U.S. Department of Education's) Office for Civil Rights
OHA *	Office of Hawaiian Affairs (state government entity)
OJP	Office of Justice Programs (in DOJ)
OJS	Office of Justice Services (in BIA, within DOI)

OMB	Office of Management and Budget
ONAP	Office of Native American Programs (HUD)
- or -	
	Office of Native Affairs and Policy (broadband training / consultation) (FCC)
OTJ.....	Office of Tribal Justice (in DOJ)
PAIMI.....	Protection and Advocacy for Individuals with Mental Illness (via SAMHSA)
PIH.....	Public and Indian Housing (HUD)
PRC.....	Purchased/Referred Care program (IHS, in HHS)
PTSD *.....	Post-Traumatic Stress Disorder
SAMHSA.....	Substance Abuse and Mental Health Services Administration (in HHS)
SASP.....	Substance Abuse and Suicide Prevention (IHS, in HHS)
SBA.....	Small Business Administration
SDPI.....	Special Diabetes Program for Indians grants (via IHS, in HHS)
Self-Determination Act †	
.....	Indian Self-Determination and Education Assistance Act (1975)
SGCE *	Tribal Self-Governance Communication and Education Consortium
STEP *	State-Tribal Education Partnership (via ED)
SWDA †.....	Safe Water Drinking Act
SWRCA †	Soil and Water Conservation Act (1977) (USDA)
TAP.....	Tribal Access Program for National Crime Information (in DOJ)
TBHCE	Tele-Behavioral Health Center of Excellence (via IHS, in HHS)
TDHE.....	Tribally Designated Housing Entity (via HUD)
TEDs *	Tribal Education Departments (recognized by ED)

TERA	Tribal Energy Resource Agreements (intergovernmental, between Tribes and DOI)
TIBC	Tribal-Interior Budget Council (intergovernmental: Tribes and DOI)
TLOA †	Tribal Law and Order Act
UCR	Uniform Crime Reporting (FBI)
USAO.....	United States Attorneys' Office(s) (DOJ)
USCCR	United States Commission on Civil Rights
USDA.....	United States Department of Agriculture
VA.....	Veterans Administration
VAWA †	Violence Against Women Act
VAWA 2013 †	Violence Against Women Reauthorization Act of 2013
YRTCs	Youth Regional Treatment Centers (via IHS)

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APPENDIX J: HISTORY OF THE COMMISSION'S RESEARCH AND REPORTS ON TOPICS RELATING TO NATIVE AMERICANS

The Commission has a longstanding history of examining and reporting on issues that affect Native Americans and Native Hawaiians.¹ Reports that the Commission has published include:

- *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (2003)²—This Commission statutory/interim report examined Native American access to federally funded programs in areas of housing, education, law enforcement, and other areas.
- *Health Care Disparities* (2010)³—This Commission briefing report examined health care disparities, including those that affect Native Americans.
- *Broken Promises: Evaluating the Native American Health Care System* (2004)⁴—This Commission statutory/interim report examined whether the federal government provided the resources necessary to create and maintain an effective health care system for Native Americans.
- *Discrimination Against Native Americans in Border Towns* (2011)⁵—This Commission briefing report examined recent changes for Native American communities on or off reservations, and policies, procedures, or events that have improved relationships between Native Americans and residents in border towns.

The State Advisory Committees of the Commission have also done extensive research and have produced a number of reports on topics that concern Native Americans and Native Hawaiians in particular states:

- *Selected Administration of Justice Issues Affecting American Indians in Oklahoma* (Oklahoma State Advisory Committee, 1989)⁶
- *Discrimination Against Chippewa Indians in Northern Wisconsin* (Wisconsin State Advisory Committee, 1989)⁷

¹ For information on terminology and communities examined in this report, see Discussion and Sources cited at notes 36–38, *supra*.

² USCCR, *A Quiet Crisis*, *supra* note 3.

³ U.S. Commission on Civil Rights, *Health Care Disparities*, 2010, <https://www.usccr.gov/pubs/docs/Healthcare-Disparities.pdf>.

⁴ U.S. Commission on Civil Rights, *Broken Promises: Evaluating the Native American Health Care System*, 2004, <https://www.usccr.gov/pubs/docs/nabroken.pdf>.

⁵ U.S. Commission on Civil Rights, *Discrimination Against Native Americans in Border Towns*, 2011, https://www.usccr.gov/pubs/docs/BorderTowns_03-22-11.pdf.

⁶ Oklahoma State Advisory Committee, U.S. Commission on Civil Rights, *Selected Administration of Justice Issues Affecting American Indians in Oklahoma*, 1989.

⁷ Wisconsin State Advisory Committee, U.S. Commission on Civil Rights, *Discrimination Against Chippewa Indians in Northern Wisconsin*, 1989.

- *Housing and Utility Rate Issues on Reservations in North Dakota* (North Dakota State Advisory Committee, 1990)⁸
- *A Broken Trust. The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians* (Hawaii State Advisory Committee, 1991)⁹
- *Native American Students in North Dakota Special Education Programs* (North Dakota State Advisory Committee, 1993)¹⁰
- *Alaskan Natives and Other Minorities in Special Education Programs of Four Alaskan School Districts* (Alaska State Advisory Committee, 1999)¹¹
- *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* (South Dakota State Advisory Committee, 2000)¹²
- *Native Americans and the Administration of Justice in South Dakota* (South Dakota State Advisory Committee, 2000)¹³
- *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefitting Native Hawaiians* (Hawaii State Advisory Committee, 2001)¹⁴
- *Equal Educational Opportunity for Native American Students in Montana Public Schools* (Montana State Advisory Committee, 2001)¹⁵
- *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (New Mexico State Advisory Committee, 2005)¹⁶

⁸ North Dakota State Advisory Committee, U.S. Commission on Civil Rights, *Housing and Utility Rate Issues on Reservations in North Dakota*, 1990.

⁹ Hawaii State Advisory Committee, U.S. Commission on Civil Rights, *A Broken Trust. The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, 1991, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015029847376;view=1up;seq=4>.

¹⁰ North Dakota State Advisory Committee, U.S. Commission on Civil Rights, *Native American Students in North Dakota Special Education Programs*, 1993, <https://files.eric.ed.gov/fulltext/ED411109.pdf>.

¹¹ Alaska State Advisory Committee, U.S. Commission on Civil Rights, *Alaskan Natives and Other Minorities in Special Education Programs of Four Alaskan School Districts*, 1999, <https://files.eric.ed.gov/fulltext/ED449957.pdf>.

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- *Alaska Native Voting Rights* (Alaska State Advisory Committee, Advisory Memorandum, 2018)¹⁸
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