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**Tribal Self-Governance
Health Care and Social Services Delivery Effectiveness
Evaluation Feasibility Study**

**Legislative History and Development of
Tribal Self-Governance and Contracting
Revised Report**

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**Delivery Order 27
Under Contract No. HHS-100-97-0017**

January 24, 2003

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FOREWORD

This Draft Report is intended to provide a legislative background and history of Tribal Self-Governance for the DHHS/ASPE Tribal Self-Governance Evaluation Feasibility Study. Staff from the Department of Health and Human Services have reviewed and commented extensively on earlier drafts of the Report. The Draft Report will be further revised following the first meeting of the project's Technical Working Group. Therefore, this version should not be disseminated or quoted without approval from the DHHS/ASPE Task Order Managers.

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1. OVERVIEW

The Tribal Self-Governance Evaluation Feasibility Study will provide the Office of the Assistant Secretary for Planning and Evaluation (OASPE) with background information and a detailed review of issues, data availability, and data systems that may affect the extent to which a rigorous and defensible evaluation of Tribal Self-Governance of Indian Health Service, and of other Tribally-managed non-IHS programs within DHHS, can be conducted. While a number of assessments of Tribal self-governance programs have been conducted, these have been primarily qualitative in nature. OASPE is interested in determining the feasibility of conducting an evaluation that examines processes and program changes associated with successful self-governance programs, as well as impacts of Tribal self-governance on outcomes, including access to care, services, quality, costs, financial performance and resources, customer satisfaction, and program stability.

This Draft Report on Legislative History and Development of Tribal Self-Governance and Contracting is one component of the background information that is being assembled to provide a foundation for understanding the legislative stages and implementation steps that have guided the evolution of Tribal Self-Governance that is the focus of the feasibility study. The Draft Report reviews the history of Indian Tribal Self-Government and the legislative activities affecting Indian Tribes, tribal self-determination, and tribal self-governance. It details the impact of past Congressional legislative activities on tribal governments and recent legislation since 1975. The report also integrates Indian health into this history. In this section, a brief overview is provided of Tribal-Federal relations, the Indian Self-Determination and Education Assistance Act (ISDEA) that has been the foundation of current policies that support Tribal Self-Governance, and the central themes that have been important to the evolution of Self-Governance over the past several decades.

1.1 EARLY TRIBAL-FEDERAL RELATIONS

The United States has recognized Indian Tribes as distinct governments since the adoption of the Federal Constitution in 1789. Congress has enacted statutes dealing with Indian Tribes based upon the Commerce Clause as well as the powers granted by the Treaty clause. The Constitution's Commerce clause, in particular, makes specific reference to Indian Tribes. For the last 200 years, Congress has enacted statutes dealing with Indian Tribes, based upon the Supreme Court's interpretations of these Constitutional authorities. Indian Tribes are not foreign nations and they are not States. As asserted by Marshall's Court, they are considered domestic dependent

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nations with inherent attributes of sovereignty. One of these attributes is their right to self-government. Additionally, however, the United States Congress has asserted, and the Supreme Court has upheld, the plenary power of Congress over tribal governments.

The Indian Appropriation Act, 1871, ended the period of treaty making. The policy of making compulsory land allotments to the Indians ended by 1934. By the 1950's, Congress began a legislative policy of tribal termination. Congress terminated the legal existence of at least 109 Indian Tribes through various legislative acts. By 1955, the Bureau of Indian Affairs estimated that there were only 280,000 Indians left living on reservations. Treaty making, discretionary Federal administration, wars, depredations, deprivation, termination acts, and disease had taken their toll on Indian and tribal governments, land rights, way of life and their health.

Health services to Indians had begun through the War Department. At first, Army physicians acted to curb smallpox in the vicinity of military posts in order to protect soldiers from infection. In 1819, Congress appropriated funds to the Civilization Fund to be used for health care among many other purposes. By 1832 large-scale smallpox vaccinations of Indians commenced, but the program reached only a small percentage of the Indian population. The program did not prevent an epidemic in 1838 from killing an estimated 17,200 Indians in the Northwest alone. While nearly two-dozen treaties contained provisions for health care, most of the Treaty funds had been expended by 1871. The Interior Department (DOI) adopted a policy of continuing health services. By 1900 the Indian Medical Service at the DOI employed 83 physicians and 25 nurses. In 1921 the Snyder Act was passed, making the relief of distress and conservation of Indian health an appropriated purpose.

On July 1, 1955, the Indian Health Service was transferred to the Department of Health, Education and Welfare (DHEW). Congress believed that the Public Health Service would not only be better able to provide health care services to Indians, it would also be better able to integrate Indian health into public and private health care systems at the State level.

1.2 INDIAN SELF DETERMINATION AND EDUCATION ACT

Assimilation, as a goal of Federal policy, came to an end in 1968. In 1970, President Nixon sent his Indian policy to Congress, recommending that it change its policy, from Termination, to Self-Determination Without Termination. In 1973, Senator Henry Jackson introduced an Indian self-determination bill. In 1975, Congress enacted the Indian Self Determination and Education Assistance Act P.L.93-638 (ISDEA).

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In a seven year period, 1968-1975, a bi-partisan sea change occurred. Congress moved away from assimilation and termination of tribal governments towards promoting a new era in Federal-Indian relations, one marked by Indian Self-Determination. Section 2 of ISDEA Congress states that “the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.” Congress declared that it intended to establish a meaningful Indian self-determination policy in order to permit an orderly transition from Federal domination of programs to one where Indians could effectively and meaningfully participate in the planning, conduct, and administration of programs and services.

The ISDEA focused on the two Departments that received Snyder Act appropriations for Indians, Interior and HEW. The Secretaries of these Departments were directed to use contracts, or grants and cooperative agreements, to Tribes and tribal organizations to carry out the programs, services, functions, activities, and responsibilities that the Federal government was providing. Capacity building grants could also be made to facilitate and implement contracting. While the Act made Federal contracting laws and regulations applicable to ISDEA contracts, it also gave the Secretaries authority to waive them. The Act also authorized rulemaking. Federal personnel could be assigned from throughout the government to contracting Tribes without interruption of their service or military benefits or status. The Act preserves Tribal Sovereign Immunity and the Federal Trust Responsibility.

The Senate Select Committee on Indian Affairs reported that from 1975 to 1980, 370 ISDEA contracts worth \$200 million were made. While implementation of the ISDEA began well, conflicts soon developed between Tribes and the Federal agencies responsible for implementation of the Act over different interpretations of program redesign, contracting, and regulations according to the General Accounting Office. “Indian contractors perceive the law as giving them the opportunity to determine for themselves the manner in which health care services should be delivered, and they see IHS restricting this freedom by various contract regulations. IHS views self-determination as Indian Tribes being able to operate IHS activities through contracts as stated in the law.”

From 1984-1994, the ISDEA was amended eight times. The direction of these amendments was toward more liberal contracting requirements, more participation by tribal governments in Federal rulemaking, and the opportunity to demonstrate more autonomy through tribal self-governance. The initial enactment of a new Title III Tribal Self-Governance

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Demonstration Project for programs of the Bureau of Indian Affairs, DOI, and its later expansion to include programs of the IHS, were direct responses to what many Tribes wanted. This direction was clearly away from the limitations resulting from application of procurement laws and regulations in contracting, toward compacting and self-governance. The 1994 amendments in particular, streamlined the contracting process; imposed negotiated rulemaking procedures on the Departments in order to involve tribal governments; and replicated the Title III Tribal Self-Governance Demonstration Project in a new, expanded, and permanent Title IV Tribal Self-Governance Act, which applied to the DOI.

In 2000, Congress again amended the ISDEA. It declared its policy to permanently establish and implement tribal self-governance within the Department of Health and Human Services. The new Title V largely extended Title IV Self-Governance compacting at Interior to the Department of Health and Human Services. It directed the Secretary to establish the Tribal Self-Governance program within the Indian Health Service and to select up to 50 additional Tribes per year. Tribal governments were authorized to redesign or consolidate programs and to reallocate and redirect funds in any manner, provided those eligible for services were not otherwise denied. Federal procurement laws and regulations could only be incorporated into compacts and funding agreements by mutual consent. Title V also directed the Secretary to undertake negotiated rulemaking. A joint rulemaking committee made up of a majority of tribal self-governance Tribes and representatives drafted regulations based upon committee consensus and submitted them to the Department to be published. The proposed regulations were published on February 14, 2002 and tribal regulations were issued May 17, 2002.

The 2000 Amendments also included a new Title VI, directing the Secretary to conduct a study to determine the feasibility of a tribal self-governance demonstration project for non-IHS programs, services, functions and activities that exist within DHHS. Title VI also required the Secretary was also required to consult with Indian Tribes in order to develop a consultation protocol, prior to engaging in consultation with other specified entities.

While often contentious, and periodically involving court intervention, miscommunication and mistrust, Indian Self-Determination and Self-Governance have been expressions of a continuing evolution of a government-to-government relationship between the United States and tribal governments. The devolution of control over Federal programs, services, functions, and activities to Tribes appears, in retrospect, to have been central to that relationship. Through Title VI, Congress has expressed its initial interest in extending a Tribal Self Governance demonstration project to other programs within the Department of Health and Human Services.

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The Office of the Assistant Secretary for Planning and Evaluation conducted the Tribal Self-Governance Demonstration Feasibility Study in 2001-2002. The Final Report on the Study, released November 5, 2002, identified 11 DHHS programs as “feasible for inclusion in a Tribal self-governance demonstration project” (p. 15). The Self-Governance Demonstration program, as detailed in the Report, would permit a simpler, multiple-program application process and simpler and consolidated reporting requirements. Most importantly, the Demonstration program would provide “Tribes with the flexibility to change programs and reallocate funds among programs” (p.19) to better address specific Tribal community priorities.

1.3 THE EVOLUTION OF TRIBAL SELF-GOVERNANCE

From 1975 to the present, Congress has expanded the opportunities for Tribes to manage their own programs and has increased the degree of Tribal authority and discretion in management. Beginning with demonstration programs of Tribal Self-Governance within BIA and, subsequently, with Indian Health Service programs, Congress has progressively moved to expand the scope of Tribal Self-Governance and Tribal management of federal programs. The key elements of this expansion have included:

- Expansion of the Scope of Programs That Tribes Manage: BIA and IHS self-governance demonstration programs have become permanent on-going programs expanded to all Tribes that are interested in self-governance. In addition, Congress and the relevant Departments have implemented opportunities for Tribal management of a variety of other programs. This shift to Tribal Self-Governance and Tribal management of programs permits Tribes to choose whether to take on responsibility for specific programs and to decide on what basis – compact or contract – that Tribal management should be undertaken.
- Flexibility in Program Design: The evolution of self-governance has occurred with recognition that the specific needs and preferences of Tribes may be better addressed if Tribes have the authority and autonomy to re-design and re-allocate funds that are available for specific program. As a result, Tribes that choose self-governance have the opportunity to re-design programs to better meet local community needs and priorities.
- Management Practices: As Tribal Self-Governance policy has developed, there has been an evolution also of the nature and degree of federal oversight and requirements,

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including changes in program standards, changes in contracting and procurement rules affecting Tribes, and in funding options. These changes have reduced the ‘red tape’ that was a barrier to Tribal Self-Governance and have been designed to facilitate Tribal Self-Governance and Tribal management of programs.

- Government-to-Government Relations: The process that has occurred has increasingly included formalization of government-to-government relations and consultation protocols that have increased the ability of Tribes to have a formal and joint role in developing program standards and reporting requirements, and to appeal and challenge decisions of federal program managers. Similarly, the consultation process has included Tribes in a collaborative process for developing regulations and in joint rulemaking on issues that affect Tribes.

The shift to Tribal management of federal programs is an ongoing one that is continuing to expand opportunities for Tribes. The potential expansion of Self-Governance to offer Tribes to manage a number of non-IHS programs within the Department of Health and Human Services that was the focus of P.L. 100-260, is based on the experience and commitment to Self-Governance by Congress, Tribes, and Federal agencies that has emerged over the past decades.

The following sections of this paper trace the steps through which Congress, the Federal agencies (DOI and DHHS), and the Tribes have gradually moved, providing (along with some reversals and side-steps) ever more tribal autonomy and control in relation to key dimensions of their Tribal programs and operations.

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2. TRIBAL SELF-GOVERNMENT

In an 1823 dispute over land titles, Supreme Court Chief Justice John Marshall clarified that the United States had gained title to all Indian lands when it stepped into the shoes of Great Britain. According to Marshall, “Discovery” gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest, and also gave a right to such a degree of sovereignty, as the circumstances of the people would allow them to hold.¹ When Marshall asserted exclusive Federal power over all Indian lands, he put the United States in conflict with many of its States, since Indian nations still resided and held lands within State borders. If the United States were possessed of an exclusive right to acquire land and to manage all trade with Indian nations, then States would be dependent upon the exercise of Federal power to remove or break up Indian land holdings within their borders. Failure to remove Indian nations would surely lead to Federal, State, and Tribal conflicts.

In 1831 a conflict over tribal sovereignty arose when the State of Georgia asserted its laws over Cherokee lands. In excluding the State of Georgia, Chief Justice Marshall upheld the Cherokee Nation’s right of inherent sovereignty.² In *Worcester v. Georgia* (1832), Marshall articulated the judicial view that the United States had treated Indian Tribes as nations from the very beginning.³ The power of Congress to regulate trade and manage all the affairs with Indians was not viewed as “a surrender of self-government” by Tribes.⁴

Other opinions contrary to Marshall’s had also been expressed in *Worcester*, by concurring and dissenting Justices whose views of tribal sovereignty were much more restrictive. Justice McLean believed that the exercise of the power of self-government by Indians, within a State, is undoubtedly contemplated to be temporary. In McLean’s view, because Congress held plenary power over Indian nations it could enact legislation to assimilate Indians, making the concept of tribal self-government an historical artifact.⁵ The conflict between Marshall’s and McLean’s views has never been resolved. Both Justices, however, viewed the Constitution’s Treaty and Commerce clauses as the basis for Federal supremacy in Indian affairs. Congressional policy in the last 200 years has swung in the direction of both Justices, sometimes favoring tribal self-government and at other times favoring assimilation and the break-up of Indian Tribes.

¹ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1(1831).

³ *Worcester v. Georgia*, 31 U.S. (5 Pet.) 1(1831). “...congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.”

⁴ *Worcester*, *ibid*; “...the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right of self-government, by associating with a stronger, and taking its protection.”

⁵ “Promotion of Civilization” was one of the enacted purposes of the trade and intercourse acts at issue in *Worcester*.

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Since the power of Congress is plenary,⁶ tribal self-government is necessarily limited by express acts of Congress.^{7 8} For the 100 years following *Worcester*, Congress assumed a self-imposed burden of “civilizing” Indians by treating them as “wards of the nation.”⁹ Along the way, Congress attempted to end Treaty making¹⁰ and passed numerous allotment acts designed to break up Indian lands and to assimilate tribal members.¹¹ In the process, the United States came to see itself as a trustee whose duty it was to act on behalf of the Indian “communities dependent on the United States.”¹² The duty of trust responsibility was self-imposed and self-defined. Not even Federal citizenship for individual Indians, a hallmark of assimilation, could put them beyond the reach of Federal regulations “adopted for their benefit.”¹³

In 1934, a piece of *New Deal* legislation encouraged strengthening tribal government. The pendulum appeared to swing toward self-governance with enactment of the Indian Reorganization Act.¹⁴ The Indian Reorganization Act (IRA) ended the policy of compulsory allotment¹⁵ and offered Tribes the opportunity to draft their own constitutions, enact their own laws and court systems, and obtain Federal corporate charters. In theory, reorganizing under the IRA would have freed tribal governments from the Secretary of Interior’s immense discretionary and regulatory authorities.¹⁶ A major objective of the legislation was to free tribal self-government from the executive direction of the Federal government.¹⁷ The drafters of IRA intended to end regulatory control of Indian Tribes by the Bureau of Indian Affairs. It was intended to empower tribal governments and to enable them through Federal corporation charters to develop and manage their own resources. Unfortunately, many Indian Tribes adopted a

⁶ *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

⁷ *Handbook of Federal-Indian Law*, Felix Cohen, (1941 ed.): “The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or positive content. What is not expressly limited remains within the domain of tribal sovereignty.” p. 122. See also, *Talton v. Mayes*, 163 U.S. 376 (1896). Tribal sovereign powers pre-existing the U.S. Constitution are not affected by Federal laws unless Congress expressly acts to limit those powers. cf., *Indian Civil Rights Act of 1968*, 25 USC 1301-1303.

⁸ in *Talton v. Mayes*, the Supreme Court declined to apply the Fifth Amendment grand jury clause to the Cherokee Nation, holding that the plenary powers did not displace local powers in the absence of federal legislation

⁹ *United States v. Kagama*, 118 U.S. 375 (1886).

¹⁰ See e.g., *Antoine v. Washington*, 420 U.S. 194, 202-203 (1975) holding that a post 1871 agreement had the same legal effect as a treaty.

¹¹ 25 U.S.C. 331 et seq.; See also, *Curtis Act of June 28, 1898*, compulsory allotments, abolishing tribal laws and courts, establishing municipal governments under State law.

¹² *United States v. Sandoval*, 231 U.S. 28 (1913).

¹³ *United States v. Nice*, 241 U.S. 591 (1916).

¹⁴ See especially 25 U.S.C. 476, 477.

¹⁵ 25 U.S.C. 461

¹⁶ Title 25 United States Code; Title 25 Code of Federal Regulations; Bureau of Indian Affairs Manual.

¹⁷ Comment, “Tribal Self-Government and the Indian Reorganization Act, 70 Michigan Law Review 955 (1972).

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boilerplate constitution. Many of these hastily adopted constitutions contained terms requiring Secretarial approval over all tribal ordinances.¹⁸ Notwithstanding Federal agencies discretionary authority to permit greater tribal autonomy, to a great extent, the IRA continued to manage the internal affairs of Indian Tribes.¹⁹

In 1953, The House and Senate adopted House Concurrent Resolution (HCR) 108 to “free” Indian Tribes and individuals from Federal supervision and control.²⁰ The policy pendulum had swung back towards Justice McLean. With the view that tribal governments were temporary, the sentiment was that there was no harm in dissolving Tribes and emancipating individual Indians, especially if they were given the same privileges and responsibilities as other citizens of the United States. Pursuant to this new policy, Congress used its plenary power to enact termination acts dissolving 109 Tribes.²¹

The Indian Reorganization Act had also foreseen an end to Federal supervision and control. But under the IRA there would have been little need for Federal supervision if strong tribal governments were in place. For the IRA, terminating the supervisors rather than the objects of their supervision would eventually solve the problem of Indian administration. HCR 108 unanimously passed both Houses of Congress. Similar to the IRA, HCR 108’s termination policy also provided for terminating the supervisors. Unlike the IRA, however, HCR 108’s termination policy foresaw an end to tribal self-government. To Congress, termination meant that Indians could assume their role as free citizens in their respective States without further need of Federal supervision. Congress also enacted *PL 83-280* providing State governments with concurrent jurisdiction over Indian reservations.²²

By 1968, Federal support for termination was ended.²³ In the courts, Tribes continued to make arguments that Federal preemption²⁴ and tribal sovereignty barred the exercise of State power.²⁵ But Tribes also realized the importance of actively and collectively petitioning

¹⁸ See e.g., “Revised Constitution and Bylaws of the Devils Lake Sioux Tribe Fort Totten, North Dakota, Article VI-Governmental Authorities, Section 3: “To enact ordinances to regulate the conduct and domestic relations of the members of the Tribe, or Indians from other Tribes on the reservation, subject to the review of the Secretary of Interior, or his duly authorized representative.” (1988).

¹⁹ 25 U.S.C. 2. This section is also a source of broad rulemaking authority.

²⁰ Wilkinson, Charles F., “Evolution of the Termination Policy” 5 *American Indian Law Review* 139 (1977). More than 100 Tribes, bands and rancherias were subsequently terminated.

²¹ Wilkinson, *Ibidem*, pp. 151-154.

²² Codified 25 U.S.C. 1321(a) criminal jurisdiction; 25 U.S.C. 1322(a) civil jurisdiction.

²³ 25 U.S.C. 1326 “amending P.L. 86-280 to provide that assumption of jurisdiction by a State requires a majority vote of adult Indians.”

²⁴ *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). State holding for *McClanahan*.

²⁵ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). “Congressional authority and the ‘semi-independent position’ of Indian Tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such

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Congress and the Executive to push the pendulum back, in the direction of tribal self-government and self-determination.

In 1970 President Nixon sent his recommendations for Indian policy to the Congress²⁶ calling for a new era in Indian policy based upon “Self-Determination Without Termination.” Nixon called upon the Congress to pass a new Concurrent Resolution to renounce, repudiate and repeal the termination policy previously expressed in House Concurrent Resolution 108. Nixon asserted the right of Indian Tribes to control and operate their own programs.²⁷ President Nixon’s Indian Self Determination Policy eventually led to enactment of the Indian Self-Determination and Education Assistance Act (ISDEA) in 1975.

authority may be pre-empted by Federal law. Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them’.

²⁶ *“Message from the President of the United States Transmitting Recommendations for Indian Policy” H.R. Doc. No. 91-363, 91st Cong., 2d. Sess. (July 8, 1970).*

²⁷ *Message, Ibid., Section 2. “Federal support programs for non-Indian communities—hospitals and schools are two ready examples—are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.”*

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3. FEDERAL-INDIAN HEALTH CARE

In 1957, the Secretary of DHEW submitted his “Health Services for the American Indian” survey report to Congress.²⁸ It reported that health services for the American Indian began in the War Department. At first, Army physicians acted to curb smallpox in the vicinity of military posts in order to protect soldiers from infection. In 1819, Congress appropriated \$10,000 to the Civilization Fund to be used for health care among many other purposes. By 1832 large-scale smallpox vaccinations of Indians had commenced, but the program only reached a small percentage of the population. The program did not prevent an epidemic in 1838 from killing an estimated 17,200 Indians in the Northwest, alone.

In 1849, the Bureau of Indian Affairs was relocated from the War Department to the Department of the Interior. From 1849 to 1871, most of the funds that had been appropriated for Indian health care in nearly two-dozen treaties had been expended.²⁹ Notwithstanding the exhaustion of treaties, the Interior Department adopted a policy of continuing health services. By 1900 the Indian Medical Service employed 83 physicians and 25 nurses. By 1911, appropriations earmarked for general health services to Indians were \$40,000.³⁰

Until 1921, the House Committee on Indian Affairs had made appropriations for Indian health into the Bureau’s miscellaneous fund. In 1921, Congress enacted the Snyder Act, which authorized appropriations for nine purposes, one of which is Indian health.³¹

Using appropriations authorized by the Snyder Act and the discretion of the Act for rulemaking, the Bureau of Indian Affairs created a Federalized Indian health program that either provided direct care by the Indian Bureau, or relied upon standard Public Contract or Cooperative Agreement Act authorities to purchase health care services from physicians and public hospitals for the benefit of Indians.³²

In 1954 the Indian Health Transfer Act³³ authorized the transfer of all functions, responsibilities, duties and authorities of the Interior Department relating to the maintenance and operation of hospital and health facilities, and the conservation of health for Indians, to the Public

²⁸ “Health Services for American Indians” DHEW, February 11, 1957. See especially, Section VI History of the Indian Health Program, pp.86-97.

²⁹ “Health Services for the American Indian” *Ibid.* “History of the Indian Health Program” pp. 86-87.

³⁰ “Health Services for the American Indian” *Ibid.*, Section 6.

³¹ 25 U.S.C.13. Expenditure of appropriations by Bureau of Indian Affairs...For relief of distress and conservation of health.

³² Most procurement, grant, and cooperative agreement authorities are now located in Title 41 Public Contracts or Title 31 chapter 63. 25 U.S.C. 91, 92, and 93 have been repealed.

³³ P.L. 83-568, August 5, 1954.

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Health Service.³⁴ The Senate report stated that the proposed legislation was in line with the policy of Congress to enact legislation “having as its purpose to repeal laws, which set Indians apart from other citizens.”³⁵ The House report noted that the Public Health Service was in a better position to know what services were available to Indians as citizens than the Indian Bureau.³⁶ The Indian Health Service was transferred effective July 1, 1955.

In 1954, Congress had also directed the Department of Health, Education and Welfare to make a careful and comprehensive evaluation of the Indian health problem and to submit a survey report on Indian health deficiencies, with recommendations.³⁷ The report submitted by Secretary M.B. Folsom, known as the “Gold Book,” provided a factual basis for making numerous concrete recommendations.³⁸ In order to achieve the government’s goal of achieving economic self-sufficiency for its Indian citizens on the basis of equality in the life of the country and the community, the Administration sought to overcome long-standing health deficiencies while simultaneously advancing the integration of Indian and non-Indian health programs and services. The Secretary’s Gold Book report and recommendations requested substantial additional appropriations for Indian health and sanitation facilities and for a considerable increase in operating costs.³⁹ The report requested that future appropriations be raised from the then current \$18 million to as much as \$65 million. The report also outlined a strategy for integrating the 280,000 Indians still living on reservations into mainstream America. This could be done by providing substantial additional appropriations to overcome long-standing health deficiencies, and by using public contract and cooperative agreement authorities to obtain physician and public hospital services.⁴⁰ In this manner, Indian and non-Indian health programs and services could be integrated. Secretary Folsom’s report was fully consistent with the “Administration’s objective of an orderly termination of the Federal trusteeship over the affairs of the American Indian...”⁴¹

The Indian Health Service (IHS), like the Bureau of Indian Affairs before it, received its appropriations through the Snyder Act and continued to use the same Public Contract and Cooperative Agreement authorities to continue BIA contracting with the same State and local hospitals and facilities.⁴² Notwithstanding the Administration’s objective of integrating Indian and non-Indian health care systems, this objective was subject to a restriction. Section 2 of the

³⁴ *P.L. 83-568, August 5, 1954; 42 U.S.C. 2001, 2002.*

³⁵ *Senate Report No. 1530, June 8, 1954, p. 2919.*

³⁶ *House Report No. 870, July 17, 1953; printed in Senate Report No. 1530 supra, at p. 2927*

³⁷ *Memorandum: Surgeon General, Public Health Service, “Health Services for the American Indian”. p.1.*

³⁸ *Memorandum: Secretary DHEW, February 11, 1957.*

³⁹ *Memorandum, Secretary DHEW, ibid.*

⁴⁰ *“Health Services for American Indians” Ibid. “Summary of Findings and Conclusions”. p. 2.*

⁴¹ *Memorandum, Secretary DHEW, ibid.*

⁴² *“Health Services for American Indians” Ibid. “Medical Facilities” pp. 103-105.*

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Indian Health Transfer Act had encouraged Secretarial discretion in contracting to State, local, and nonprofit entities only: “Whenever the health needs of the Indians can be better met.”⁴³ This was a clear challenge to the new Indian Health Service to provide health care services more effectively than what could be obtained through contracting. Secretary Folsom’s Gold Book had been clear that cost savings and effectiveness were important objectives to be achieved by the Transfer.

Consistent with movement toward assimilation of Tribal citizens, Congress made financial assistance available to assist public and private nonprofit health care agencies and organizations, when Indians would benefit.⁴⁴ As a result, DHEW provided financial assistance for the construction of community hospitals, if the Surgeon General determined that doing so would make needed facilities available to Indians. Congress apparently believed that by adding appropriations support for health facility construction funded by State, local, and nonprofit organizations, Indian health care services could be acquired more effectively.⁴⁵

⁴³ *Section 2 provides in part: “...the Secretary of Health, Education, and Welfare is authorized in his discretion to enter into contracts with any State, Territory, or political subdivision thereof, or any private nonprofit corporation, agency or institution providing for the transfer by the United States Public Health Service of Indian hospitals or health facilities, including initial operating equipment and supplies.”*

⁴⁴ *Act of August 16, 1957, P.L. 85-151, 42 U.S.C. 2005.*

⁴⁵ *Senate Report No. 769, July 30, 1957, p. 1545; See also, P.L. 86-121 (1959) sanitation facilities.*

4. INDIAN SELF-DETERMINATION

4.1 Precursors to Self-Determination

Prior to enactment of the Indian Self Determination and Education Act (ISDEA), the Departments of Interior and Health and Human Services utilized public contract and cooperative agreement laws and regulations to procure goods and services, including health care services, for the benefit of Indians. Two limited opportunities existed for contracting directly with Indian Tribes or with others on their behalf. These authorities are: Buy Indian Act and Indian Health Transfer Act Amendment.

4.1.1 Buy Indian Contracting

Similar to other Departments and agencies, the Interior Department was required to follow Public Contract law and to advertise its procurements for goods and services. Under the Revised Statutes, the Secretary was required to advertise for proposals:

“Sec. 3709. All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service.”⁴⁶

In order to noncompetitively purchase the product of Indian labor, it was necessary to find a way to suspend the public advertising requirement.

Buy Indian contracting had its genesis in an appropriation act:

“An act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes.”⁴⁷

One of the “other purposes” was identified in a *Proviso* that provided “so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market under the direction of the Secretary of the Interior.” This proviso

⁴⁶ *Revised Statutes, Title XLIII – Public contracts, Section 3709 Advertisements for proposals.*

⁴⁷ *Act of April 30, 1908, c.153, 35 Stat.71.*

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authorized the Secretary of DOI to procure goods and services that could be produced with Indian labor, in the open market, without having to advertise for proposals.

Congress wanted the Indian Bureau's procurement activities to be brought within the general procurement laws and regulations, but it also wanted to provide an opportunity for Indians to benefit from appropriation-based procurements to the extent that their labor could be employed in the products or services purchased. Congress had sought to rectify the problem of making competitive procurement awards to non-Indians, when the Indians themselves could produce the products or services. The Buy Indian contracting required competition among non-Indian vendors, but permitted noncompetitive awards to Indians.

In order to insure that the Secretary could exempt Indian procurements from the Revised Statutes, Congress subsequently added another *Proviso*, which repealed earlier language "under the direction of" and substituted the language "in the discretion of" the Secretary.⁴⁸ The Buy Indian Act was codified in 25 USC 47 *Employment of Indian labor and purchase of products of Indian Industry*. Administrative practice has been to waive the advertising requirements,⁴⁹ in order to make noncompetitive contract awards. Although noncompetitive awards may be made, these awards are still subject to public contracting laws and regulations.⁵⁰

Using public contracting law and regulations to procure medical and health care services posed problems for the government. First, Indian Tribes were not open market vendors of medical services. Second, even if Tribes subcontracted for medical services, as contractors they generally lacked the financial and management capability as well as the funds to initiate contract performance. Third, writing contract specifications for unknown "redesigned" programs would be difficult under public contracting law. Essentially, Buy Indian Act contracting and public contracting are the same, with the only exception being waiver of the advertising requirement.

The inadequacy of the Buy Indian Act as a vehicle for tribal contracting was cited as one of the reasons for later enacting the Indian Self-Determination and Education Assistance Act (ISDEA).⁵¹ It is noteworthy, however, that subsequent to the original ISDEA, Congress made specific reference to using the Buy Indian Act in Title III of the Indian Health Care Improvement Act.⁵² Section 303 stated that the Secretary "may utilize the negotiating authority of" the Buy

⁴⁸ *Act of June 25, 1910.*

⁴⁹ "Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under existing conditions and circumstances."

⁵⁰ See e.g. 48 CFR 301.103.

⁵¹ *House Report* No. 93-1600, December 19, 1974, "...the inability of the Federal government to exempt tribal contracts from Federal procurement regulations and to authorize payments in advance of tribal performance on such contracts." p. 7782.

⁵² P.L. 94-437, 90 Stat. 1406, 25 USC 1601 et seq., 1651 et seq., 42 USC 1395-1396, 2004.

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Indian Act, without advertising, for the construction and renovation of service facilities pursuant to Section 301; and the construction of safe water and sanitary waste disposal facilities pursuant to Section 302. Since the mid-1960's many Tribes had constructed facilities on their reservations by using "force accounts."⁵³ Therefore, utilizing Buy Indian contracting authority for construction of service, safe water, and sanitary waste disposal facilities was consistent with previous tribal contracting experience. The ISDEA offered a more efficient contracting method for assuming management control over medical and health care services programs. Therefore, it is not surprising that a 1987 study conducted by IHS found that contracts for health care programs under the Buy Indian Act were not extensively used.⁵⁴

4.1.2 Indian Health Transfer Act Amendment

In 1973, the Health Maintenance Organization Act (P.L. 93-222) was enacted.⁵⁵ Section 6(a) of the HMO Act amended Section 1 of the Indian Transfer Act to provide:

In carrying out his functions, responsibilities, authorities, and duties under this subchapter, the Secretary of HHS is authorized, with the consent of the Indian people served, to contract with private or other non-Federal health agencies or organizations for the provision of health services to such people on a fee-for-service basis or on a prepayment or other basis.⁵⁶

DHHS General Counsel advised that PL 93-222 offered the widest possible discretion to the Secretary in the selection of a health care service provider.⁵⁷ Shortly after the amendment passed permitting contracting on an *or other basis*, the Colville Tribe proposed a contract to Blue Cross Blue Shield for health insurance coverage. The General Counsel clarified that Section 6(a) only applied to *providers* of health services and not to providers of insurance, thereby advising against the use of fiscal mechanisms.⁵⁸

⁵³ Need to define Force Accounts

⁵⁴ *Final Report: Descriptive Analysis of Tribal Health Systems, Indian Health Service, May, 1987. Only 10 out of 232 contract awards by IHS were made under Buy Indian authority.*

⁵⁵ *Act of December 29, 1973, P.L. 93-222, 87 Stat. 935.*

⁵⁶ *42 U.S.C. 2001(b).*

⁵⁷ *General Counsel Memorandum: "Health Maintenance Organizations – Section 6(a) of Public Law 93-222 – Authority to Contract for Health Services to Indians on a Prepayment basis," April 11, 1974. "Thus, not only is the term 'health maintenance organization' not employed in the amendment, but it also offers the widest possible discretion in the selection of mode for the provision of service on 'a prepayment or other similar basis.'"*

⁵⁸ *General Counsel Memorandum: "Indian Health – Proposal of Colville Confederated Tribes – Prepayment Authority – Insurance," September 13, 1974. The memorandum was prepared and signed by staff of the Office of General Counsel not the General Counsel.) Also, all references in the text of the paper, unless there is a specific citation to a person, in which General Counsel is mentioned should be changed to read Office of General Counsel.*

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In 1988 the Indian Health Service utilized PL 93-222 authority to execute a contract with Southwest Catholic Hospital Network (SCHN) in Arizona for the benefit of the Pascua Yaqui Tribe. SCHN was a Health Maintenance Organization that provided medical and health care services. Because of the changes offered to Tribes in the Indian Self Determination and Education Assistance Act, utilization of PL 93-222 authority has not been a fertile source of contracting.

4.2 Indian Self-Determination and Education Assistance Act⁵⁹

The legislative history of the Indian Self-Determination and Education Assistance Act shows that Congress intended to provide a mechanism for facilitating the assumption of control by Tribes over Federal programs and services, without fear of termination. The purpose of Senate Bill 1017 (1974) was to “implement a policy of self-determination whereby Indian Tribes are given a greater measure of control over programs and services provided to them by the Federal government”.⁶⁰ Senator Abourezk stated, “Central to the theme of this mechanism is the possibility for the Indian Tribe to bring about changes without fear of termination.”⁶¹ The idea of giving Tribes greater control over programs and services with the freedom to make changes seemed to contemplate a reality different from one in which tribal contractors would be required to operate programs in the same way as the Federal government. The House of Representatives also seemed to view the Act as providing flexibility to overcome existing statutory restrictions.⁶²

Illustrative of these problems is the inability of the Federal government to exempt tribal contracts from Federal Procurement Regulations and to authorize payments in advance of tribal performance on such contracts... a more flexible authority is needed in order to give substance and credibility to the concept of Indian self-determination. Title I of S.1017 provides this flexible authority to efficiently and realistically permit contracting of... Indian Health Service programs... The rigid procurement and contracting laws and regulations of the Federal government are either made inapplicable to such contracting or can be waived in the discretion of the respective Secretary.^{63 64}

The Indian Self-Determination and Education Assistance Act (ISDEA) became law on January 4, 1975.⁶⁵ ISDEA Section 103 directed the Secretary of DHEW to enter into a contract or

⁵⁹ *The Act has been amended many times in the last 27 years. Section numbers refer to the original Act.*

⁶⁰ *120 Cong. Rec. p. 8967, April 1, 1974. Senator Henry Jackson introduced S. 1017 on Feb. 26, 1973.*

⁶¹ *120 Cong. Rec. p. 8966, April 1, 1974.*

⁶² *House Report No. 93-1600, December 16, 1974.*

⁶³ *120 Cong. Rec. p. 7782, April 1, 1974.*

⁶⁴ *The final disposition of S.1017 is*

⁶⁵ *Indian Self-Determination and Education Assistance Act, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. 450.*

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contracts with any tribal organization or any such Indian Tribe to carry out any or all of his functions, authorities, and responsibilities.⁶⁶ ISDEA Section 104(a) authorized the Secretary to make contracts or grants to strengthen tribal government; improve tribal capacity to contract; to acquire land to support the grant; and to plan, *design*, monitor, and evaluate Federal programs that serve the Tribe. Section 104(b) authorized the Secretary to make grants for development, construction, operation, provision, or maintenance of adequate health facilities or services, and for planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract under Section 103.

Essentially, Section 103 authorized contracts to perform any of the Secretary's functions, authorities and responsibilities, although a Federal grant or cooperative agreement could be used in lieu of a contract. ISDEA Section 104 authorized contracts or grants to strengthen and improve the contracting capacity of tribal governments as well as to assist them in planning and designing their own programs and grants to construct or operate health facilities, and tribal capacity building activities related to future performance on a Section 103 contract.

Section 106, Administrative Provisions, required that Section 103 contracts be in accordance with all Federal contract laws and regulations.⁶⁷ Section 106 also provided for a waiver of contracting laws and regulations as they might apply to a Section 103 contract, in the discretion of the Secretary, if the Secretary determined that the law or regulation was not appropriate for the purposes of the contract or was inconsistent with the ISDEA.⁶⁸ The administrative provisions of ISDEA Section 106(g) also provided that rulemaking under Section 107 should include provisions to assure the fair and uniform provision of services and assistance provided under ISDEA grants and contracts.

Section 5, Reporting and Audit Requirements, imposed minimal reporting requirements for contracts and grants. Section 5 did not require that reporting conform to any particular standard or format. The only requirement was that sufficient financial records be kept to make auditing of the Federal financial assistance possible. Minimal reporting under Section 5 is consistent with the intent of Congress to either eliminate rigid procurement and contracting laws and regulations or to provide for their waiver, since procurement laws generally require more extensive reporting.⁶⁹ Reporting and auditing requirements based in procurement law and

⁶⁶ ISDEA §103 functions, authorities and responsibilities of the Indian Transfer Act, as amended.

⁶⁷ Implementing regulations 42 CFR 36.215 applied Title 41 Chapters 1 & 3.

⁶⁸ ISDEA §106 also provided, "that the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act."

⁶⁹ 120 Cong.Rec. p. 7782, April 1, 1974 "...The rigid procurement and contracting laws and regulations...are either made inapplicable to such contracting or can be waived in the discretion of the respective Secretary."

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regulations are much more stringent than are program auditing standards which report on object-level financing.

Section 107, Promulgation of Rules and Regulations, applied to the entire Act. While the ISDEA did not make Section 104(a) or Section 104(b) subject to the application of Federal contract laws and regulations, it is noteworthy that the published regulations implementing Section 104 selectively incorporated procurement standards, uniform administrative requirements, cost principles, and construction and equipment standards into the regulations and applied them to Section 104(a) contracts and to Section 104(a) and (b) grants.⁷⁰ ISDEA Section 3 declaration of policy had called for meaningful participation by Tribes to plan, conduct, and administer programs and services that were responsive to their needs, not to the needs of the government to have programs operated in the same way. Section 104(a)(4) had even offered contract assistance to “design” programs that would be responsive to local needs. At the time, however, published grant regulations required that services be provided according to IHS regulations⁷¹ and be compatible with IHS goals and responsibilities.⁷² Neither the contract and grant requirements of Section 104 nor the reporting and audit requirements of Section 5 required that tribal contractors provide services according to IHS regulations. Similarly, the administrative provisions did not require Tribes to provide substantial justification for their Section 103 requests to waive Federal contracting laws and regulations.⁷³

Section 103, Contracts, also provided for appeals of declinations made by the Secretary. Under Section 103, the Secretary could decline to contract if he found that contracting of a service or function would not be satisfactory, or that protection of trust resources would not be assured, or that the contracted project or function would not be completed or maintained. A number of factors were to be used to assess potential deficiencies. The Secretary was required to state his objections in writing, provide technical assistance to the Tribe to overcome his objections, and provide for a hearing and appeal under rules he would prescribe.

For contracts under Section 104(a), and for grants under Section 104(a) and Section 104(b), no declination criteria were provided. Since there were no declination criteria under Section 104 for contracts or grants, a decision to avoid contracting or to deny a grant could be made under the Secretary’s discretionary authority. Since the Secretary did not have to make the contract or grant, the only practical alternative afforded to Tribes was to accept government guidance on how to develop and operate their tribal health programs. Only its rescission could be

⁷⁰ *Facilities Construction, 42 CFR 36.110 (1988). See also, 42 CFR 36.114 applying 45 CFR Part 74.*

⁷¹ *42 CFR 36.104(d)(3) (1988). This regulation no longer exists.*

⁷² *42 CFR 36.106(5) (1988).*

⁷³ *Request for Waiver, 42 CFR 36.216 (1988)*

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appealed after a grant had been made. Under Section 109, reassumption of Programs, the Secretary could rescind a grant or contract if performance violated any person's rights; or endangered the health, safety, or welfare of any person; or if there were gross negligence or mismanagement in the handling or use of funds.

There are also a number of other important provisions that were enacted by ISDEA. Section 5(c) provided that Tribes make reports and information available to the Indian people served or represented by the Tribe. Section 7(a) authorized the application of Davis-Bacon wage and labor standards to ISDEA construction activity, and Section 7(b) authorized Indian preference in employment, training, and subcontracting. Section 105 provided for employment of Federal employees as well as their assignment to tribal organizations. Section 107 required consultation with Tribes on rulemaking, and presentation of any future revisions or amendments to appropriate Congressional committees, prior to publication.

ISDEA appeared to contemplate wide authority for contracting functions, authorities, and responsibilities without the limitation of procurement laws, if a Tribe requested a waiver. The Act also provided declination criteria for contracts. The Secretary was required to provide notice in writing and the opportunity to appeal his decision.

In 1986, the General Accounting Office (GAO) found that Tribes and the Indian Health Service had different perceptions of what the ISDEA meant. "Indian self-determination has not been achieved, according to the majority of Indian contractors GAO visited and the majority responding to GAO's questionnaire."⁷⁴ The GAO found that disagreements existed over subject matter, contract requirements, funding amounts, and delays. The GAO stated:

Indian contractors perceive the law as giving them the opportunity to determine for themselves the manner in which health care services should be delivered, and they see IHS restricting this freedom by various contract regulations. IHS views self-determination as Indian Tribes being able to operate IHS activities through contracts as stated in the law.⁷⁵

Congressional intent, statutory law, published regulations, administrative practice, tribal aspirations, and orderly transition to self-determination were not well coordinated. In a special investigation conducted by the Senate Committee on Indian Affairs during 1987-1988, the Committee reported, "Indian politicians, commentators and community leaders have charged that the self determination legislation of the 1970's was an empty promise. Red tape and the perpetuation of Federal bureaucracies, inadequate authority, and condescending attitudes have

⁷⁴ *General Accounting Office, Ibid. p.3.*

⁷⁵ *General Accounting Office, Ibid. p.3*

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restricted Native American efforts to take control of their communities.”⁷⁶ The tug-o-war between tribal governments and the Indian Health Service was a by-product of Congressional ambivalence that provided for contract regulation, and waivers of contract regulation, but without sufficient guidance or clarity. There was no legislative roadmap to achieve the vision of self-determination.

4.3 Indian Self Determination Act Amendments

In 1984 the ISDEA was amended.⁷⁷ Section 9 was updated to delete reference to the Federal Grant and Cooperative Agreement Act and to refer to chapter 63 of Title 31 United States Code. In 1987, in another amendment to ISDEA,⁷⁸ language was added respecting personal injury claims resulting from performance of medical and dental functions or studies. In 1988, three amendments to the ISDEA made a great number of changes including amending⁷⁹ its policy statement to emphasize that Congress was committed to supporting and assisting Indian Tribes to develop strong and stable tribal governments. A number of definitions were added and clarified. More specific language was added to clarify record-keeping requirements, etc. Some of the more important changes are discussed below.

A “self-determination contract” was better defined. The declination process was revised to make it much more difficult for the Secretary to decline to contract. The process was formalized to require the Secretary to approve of proposals for self-determination contracts within 90 days of receipt. In order to decline a proposal, the Secretary had to make a specific finding within 60 days of receipt, make his objections known in writing, and provide technical assistance to the Tribe to overcome his objections. The application of Federal procurement laws was limited.

The Administrative Provisions were revised to limit the application of Federal procurement laws to construction contracts executed under new section 102. Federal procurement laws would no longer apply to contracts. Reasonable contract support costs to comply with the terms of the contract and to support prudent management were also added. The Secretary was prohibited from reducing contract-funding amounts due to accrued savings, contract monitoring, or to pay for Federal functions or Federal personnel costs. Contract support costs could be increased. The Secretary was required to provide an annual report to Congress

⁷⁶ “*The Beginnings of Self Determination*” *Final Report and Legislative Recommendations, Special Committee on Investigations, Select Committee on Indian Affairs, United States Senate, 1989, page 60.*

⁷⁷ P.L. 98-250, 98 Stat. 118, April 3, 1984.

⁷⁸ P.L. 100-202, 101 Stat. 1329-213, 1329-246, December 22, 1987.

⁷⁹ P.L. 100-446, 102 Stat. 1817, September 27, 1988; P.L. 100-472, 102 Stat. 2285, October 5, 1988; and P.L. 100-581, 102 Stat. 2941, November 1, 1988.

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accounting for: contract funding amounts and budget; direct and indirect cost bases, rates, and pools; and deficiencies of funds. Indirect cost shortfalls were prohibited from being used to make adverse adjustments to future year cost rates or funding amounts.

Congress revised Section 107, Promulgation of Rules and Regulations, to require negotiated rulemaking procedures under the Administrative Procedures Act. The Secretary was directed to engage in rulemaking with Indian Tribes within three months and to publish final rules within 10 months of the date of the amendments' enactment. Under Reassumption of grants, grant rescission required that a hearing on the record be held on a date subject to approval by the tribal organization, not the Secretary. United States district court jurisdiction for civil actions and claims against the Secretary was granted. Other changes were made applying: The Federal Tort Claims Liability Act to self-determination contracts; The Equal Access to Justice Act to administrative appeals; and the Contract Disputes Act to contract disputes. Finally, a new Title III was added for a Tribal Self-Governance Demonstration Project with the Department of Interior and Bureau of Indian Affairs that applied to land, services, etc. administered by that department.

Unlike the original Act, the decision to contract was no longer discretionary. A Self-Determination contract was redefined to mean “an intergovernmental contract that is not a procurement contract.”⁸⁰ Existing procurement laws and regulations no longer applied to intergovernmental contracts that were not construction contracts.⁸¹ Senate Report 100-274 stated:

A fundamental objective of the Federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members. Consequently, the Indian Self-Determination Act provides Tribes with the *flexibility to redesign Federal programs and services* to meet the needs of Indian people.⁸² [Emphasis supplied].

4.4 Title III - Tribal Self-Governance Demonstration Project

As introduced above, P.L. 100-472 Title III had directed the Secretary of the Interior to conduct a research and demonstration project, not to exceed five years.⁸³ In 1992, Title III was amended to also apply to the Secretary of Health and Human Services.⁸⁴ The Secretary of HHS was to select 20 Tribes to participate in the Tribal Self-Governance Demonstration Project⁸⁵

⁸⁰ *Senate Report 100-274, “Indian Self-Determination and Education Assistance Act Amendments of 1987,” December 22, 1987, p.18.*

⁸¹ *Senate Report 100-274, Ibid. p.20.*

⁸² *Senate Report 100-274, Ibid. p.5.*

⁸³ *Title III §301.*

⁸⁴ *The Indian Health Service was added as part of the Indian Re-authorization Act, P.L.102-573.*

⁸⁵ *The number of Tribes was later increased to 50 (1996).*

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covering health services. The selection of Tribes was to achieve a diverse geographic representation. A Tribe that had successfully completed a planning grant and operated two or more mature contracts could request to participate. The applicant Tribe also needed to demonstrate financial stability and financial management capability over three fiscal years. The absence of any significant or material exceptions in required annual audits of tribal self-determination contracts was considered evidence of financial stability and capability⁸⁶ for the purpose of contract appeals.

The Tribal Self-Governance Demonstration Project directed the Secretaries to negotiate and enter into written annual funding agreements with each of the participating tribal governments. Annual funding agreements were to:

1. Authorize Tribes to plan, conduct, consolidate, and administer programs, services and functions authorized under the Johnson O'Malley and Snyder Acts;
2. Authorize Tribes to redesign programs, activities, functions or services and to reallocate funds their funds;
3. Exclude funds under the Tribally Controlled Community College Assistance Act and the Flathead Agency Power Division;
4. Specify the services to be provided, the functions to be performed, and the responsibilities of the Tribe and the Secretary under the Agreement;
5. Specify the authority of the Tribe and the Secretary, and the procedures to be used to reallocate funds or modify budget allocations within any project year;
6. Provide for payment to the Tribe of funds from one or more programs, services, functions or activities in an amount equal to that which the Tribe would have been eligible to receive under contracts and grants under the Act, including direct program costs and indirect costs, and specifically related funds; provided that funds for trust services to individual Indians were available under the written agreement only to the same extent that the same services which would have been provided are provided to individual Indians by the Tribe;
7. Prohibit the Secretary from waiving, modifying or diminishing the trust responsibility;
8. Authorize retrocession of programs or portions of programs; and
9. Provide that the Secretary submit the Agreement to each Tribe and Congressional committees.

Tribes that were selected to participate in the Demonstration Project could not enter into a Section 102 contract with the Secretary for the same programs and funds that were a part of the project. Tribes were responsible for administration of the demonstration projects. The Secretary was obligated to provide funding for the Annual Funding Agreements entered into by him. The

⁸⁶ *Title III §302.*

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term “contract” was to apply to Annual Funding Agreements for the purpose of contract appeals. Federal laws were to be interpreted in a manner that would facilitate the agreements.⁸⁷

Funds for demonstration projects were to be separately identified in the President’s budget request. Demonstration projects were also subject to directives contained in appropriation acts.⁸⁸ The Secretary was required to submit semi-annual reports to Congress on the costs and benefits of the Tribal Self-Governance Project. Mutually determined baseline measures were to be used and tribal views included in the report.⁸⁹ Finally, although Title III demonstration was added for the Department of the Interior, nothing in Title III was to limit or reduce services, contracts, or funds that other Tribes would otherwise receive or be available to them.⁹⁰ Title III did not affect tribal sovereign immunity to suit, nor terminate any existing trust responsibility. “Severability” language was also added.⁹¹

4.5 The 1994 Amendments to Title I

In 1994 Congress again amended ISDEA, and, according to Congressman George Miller of California, it was amended “in response to the 6-year refusal of the Departments of the Interior and Health and Human Services to promulgate rules to carry out certain provisions in the [1988] act.”⁹² The 1994 amendments provided changes to streamline the contracting process, limit the Departments’ rulemaking authorities, and require the Departments of Interior and IHS to negotiate new regulations with Indian Tribes.⁹³ Title I of the amendments became the Indian Self-Determination Contract Reform Act.⁹⁴ Title II enacted Part D, the Tribal Self-Governance Act of 1994⁹⁵ making Self-Governance in the Bureau of Indian Affairs and DOI programs permanent.

⁸⁷ Title III §303

⁸⁸ Title III §304

⁸⁹ Title III §305

⁹⁰ Title III §306

⁹¹ *In 1990, two years prior to IHS being included under the Self-Government provision, two additional amendments were made to the Indian Self-Determination and Education Assistance Act. Mature contract records were to include quarterly financial statements and annual Single Agency Audits under Title 31 USC chapter 75. Self-Determination contracts could have indefinite terms of duration. The calendar year was selected as the contract year (after considerable litigation), unless there was agreement on a different term. Federal excess or surplus real or personal property could be donated to Tribes, when it was appropriate to the purposes of a self-determination contract. Theoretical or actual over- or under-recoveries of indirect costs under OMB Circular A 87 were prohibited. Finally, rulemaking authority to carry out Title III was authorized.*

⁹² *Congressional Record*, March 6, 1996, pp. E288-E289.

⁹³ P.L. 103-413, 108 Stat. 4250, October 25, 1994.

⁹⁴ Title I enacted §450l; amended §450(b)(c)(e)(f)(j)(k)(m) and (m-1).

⁹⁵ Title II enacted Part D (25 USC 458aa et seq.). Congress found success in the Demonstration project.

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Congressman Miller further stated, “In order to prevent any further agency intransigence in promulgating regulations the 1994 amendments contained a sunset provision to terminate the Departments’ ability to issue regulations if regulations were not passed by June 1996.”⁹⁶ Joint responsibility for consulting, negotiating, preparing, and publishing final regulations was given to both Departments of the Interior and Health and Human Services under ISDEA Section 107. Final regulations implementing Indian Self Determination contracts were passed.⁹⁷

4.6 Title IV - Tribal Self-Governance Regulations – Department of the Interior

In 1994, Congress added Title IV, making permanent the Tribal self-governance authority for the Bureau of Indian Affairs, Department of the Interior.⁹⁸ The Secretary was also directed to negotiate funding agreements for programs administered by Interior agencies other than BIA. In the Amendments, the Congressional statement of findings provided: “The right of self-government flows from the inherent sovereignty of Indians Tribes and nations.”⁹⁹ ¹⁰⁰ The Amendments provided for negotiated rulemaking.

A Joint Tribal/Federal Self-Governance Negotiated Rule Making Committee was formed in 1995. A majority of the Committee’s membership was made up of tribal representatives drawn from Tribes that had tribal self-governance agreements. The final regulations were published on December 15, 2000.

The regulations provided authorization for selecting up to 50 Tribes per year to participate in self-governance agreements. In order to qualify as an applicant, a Tribe would have to complete a planning grant, have submitted a resolution requesting participation, and have demonstrated financial stability and financial management capability. The Secretary of the Interior was directed to negotiate and enter into written funding agreements with Tribes. The regulations provided for retrocession from all or a portion of a contracted program. Construction contracts could be made subject to Federal procurement laws and regulations by incorporating their terms into funding agreements.

Under the regulations, Agreements are to be sent to Congress and to potentially affected Tribes 90 days before they are executed. Funding for direct and contract support costs is to be included in funding agreements and advance payments can be made. The Secretary is required to interpret laws and regulations in a manner that will facilitate implementation of agreements.

⁹⁶ *Congressional Record*, March 6, 1996, pp. E288. [The 1994 Amendments’ original publication date was April 25, 1996. Congress subsequently extended the deadline by two months]

⁹⁸ P.L. 103-413, Title II, Section 204, October 25, 1994, 108 Stat. 4271.

⁹⁹ See e.g., 25 U.S.C. 458aa – Notes.

¹⁰⁰ 25 U.S.C. 458aa. Establishment.

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After receiving a request for a waiver, the Secretary has 60 days to either approve or deny the request. Denials are subject to administrative due process hearing and appeal. The Secretary is required to submit an annual report to Congress that provides information on costs and benefits. The report is to be shared with the Tribes and their independent views obtained. The report must include their comments.¹⁰¹

4.7 Indian Self-Determination Act – Title I Regulations

In 1996, the Departments of Interior and Health and Human Services promulgated joint regulations implementing Title I of the Indian Self Determination Act. Generally, the Indian Self Determination Contract Regulations provide that contracts are governmental contracts that are not procurement-type contracts. The regulations distinguish between ISD contracts and ISD construction contracts providing for limited application of Federal procurement laws and regulations.¹⁰² Tribes may elect to use a grant instead of an ISD construction contract. Grants are not subject to Federal grant and cooperative agreement requirements.

Modified arrangements between Federal agencies and Tribes allow payments to Tribes in advance, or, alternatively, Tribal expenditures can be reimbursed after tribal outlays. Funds are transferred according to work schedule requirements. Accrued interest on government funds held by a Tribe belongs to the Tribe. Mature contracts can have an indefinite term. Funding to other Tribes cannot be reduced because of a contract with a given Tribe. Non-construction contracts can be redesigned. Funds for a contract cannot be less than what was otherwise provided. Funding includes start-up costs, reasonable and allowable direct, and indirect costs. Funds may not be held back for by the government for monitoring or administration of contracts, or for related Federal functions or personnel costs.

Additionally, indirect cost recovery shortfalls are to have no impact on the calculation of overhead rates or rate adjustment, although under-recovery does affect Tribes indirect cost rate. The government's right of recovery for disallowed costs is subject to its giving prior notice, within one year after the required Single Agency Audit Report. Tribes must comply with the

¹⁰¹ *The Tribal Self-Governance regulations for Title IV are organized into Subparts A-S. The Annual Funding Agreements under the Tribal Self-Governance Act (1994 Amendments) are located in Part 1000 Chapter VI of Title 25 Code of Federal Regulations. The Self-Governance Program regulations are located in Part 1001 Chapter VI of Title 25 Code of Federal Regulations. The Secretary of the Interior is responsible for administration of Title IV Tribal Self-Governance Act.*

¹⁰² *See e.g., 25 CFR 900.115; and 25 U.S.C. 450j(3).*

Single Agency Audit Act.¹⁰³ The effects of pass-through direct costs are not considered in calculating construction contract indirect costs.

Further, executive agencies must conduct annual consultation on with Tribes regarding tribal budgets that are included in annual submission to Congress.¹⁰⁴ Tribes have significant reprogram authority to funds without need of Secretarial approval. Actions that can be taken to stop payment or suspend payment to Tribes invoke significant administrative due process. The Federal government may not promulgate regulations to change the Final regulations negotiated under the Administrative Procedures Act.¹⁰⁵ The Federal Tort Claims Act and Contract Disputes Act apply to contracts. The Secretaries have authority to waive published regulations in the best interests of Indians served.

Self-Determination contracts incorporate *Model Agreements* which include: Authority, purpose, terms, effective date, program standards, funding amount, limitation on costs, payment, records and monitoring, property terms, availability of funds, transportation, Federal program guidelines, disputes, administrative procedures, terms for successor annual funding agreements, and contract requirements. Contract records are not Federal records. The regulations also provide that *Annual funding agreements* contain terms to identify the programs, services, functions, or activities to be performed; the general budget category assigned; the funds to be provided; the time and method of payment. Annual funding agreements are incorporated into the contract. The regulations provide extensively for rescission of contracts and grants, assumption of control, and the due process procedures for hearings and appeals. The burden of proof is on the Secretary who seeks to rescind a contract or grant. If an appeal isn't taken to the Federal district court, a Tribe may file an appeal to the Interior Board of Contract Appeals.

4.8 Tribal Self-Governance Amendments of 2000

Congress declared its policy “to permanently establish and implement tribal self-governance within the Department of Health and Human Services.”¹⁰⁶ Through the 2000 Amendments Congress sought to “ensure the continuation of the trust responsibility of the United States to Tribes and Indian individuals.” In the Act’s preamble, the Secretary is encouraged to identify all DHHS programs, services, functions and activities that may be managed by an Indian Tribe under the Indian Self-Determination Act, as amended, and to assist Tribes to assume responsibility for them. Titles V and VI are discussed below.

¹⁰³ 31 U.S.C. chapter 75.

¹⁰⁴ 31 U.S.C. 1105.

¹⁰⁵ 5 U.S.C. 552, 553

¹⁰⁶ Section 3(1) Declaration of Policy

4.8.1 Title V – Tribal Self-Governance

The Tribal Self-Governance Amendments of 2000 added Title V, Tribal Self-Governance, to the Indian Self-Determination Act¹⁰⁷ establishing the Tribal Self-Governance program of the Indian Health Service, a permanent authority (the Act repealed Title III, the demonstration authority for IHS health service). Program requirements, related provisions, and appropriations were authorized. Some definitions concerning construction projects, Federal functions, consortium, self-governance, tribal shares, and Indian Tribe were added to provide greater clarity.

In addition to those Tribes already participating in IHS health self-governance programs, the Act authorized participation of up to 50 additional Tribes per year. The Amendments also clarifies certain processes and characteristics of “Compacts”¹⁰⁸ and “Funding Agreements.”¹⁰⁹ The Single Agency Audit Act applies to funding agreements by the Amendments.¹¹⁰ Moreover, Cost Principles under the appropriate Office of Management and Budget circulars are required.¹¹¹ With this exception, no other auditing or accounting standards may be required. Tribal contractors are “authorized to redesign or consolidate programs and to reallocate or redirect funds in any manner” provided that those eligible for services were not otherwise denied.¹¹²

Tribes are to be permitted to make final offers to the government when there is no agreement on terms or on amount, in contrast to an earlier statutory provision. If the Secretary fails to make a timely review and determination, the Tribe’s final offer is deemed accepted.¹¹³ Administrative due process is also provided to Tribes if the Secretary rejects their final offers.

The Prompt Payment Act is applied to fund transfers.¹¹⁴ Program income received by Tribes from Medicare and Medicaid reimbursements is treated as supplemental and not subject to offset or reduction in the funding agreement. Reimbursements are still subject to the Indian Health Care Improvement Act.¹¹⁵ Section 509 incorporates building codes and standards

¹⁰⁷ P.L. 106-260, 114 Stat. 711, August 18, 2000.

¹⁰⁸ *Compacts, Section 504(a) agreement required between the Secretary and the Tribe; (b) contents; (c) existing compacts; (d) term and effective date.*

¹⁰⁹ *Funding Agreements Section 505(a) agreement required between the Secretary and the Tribe; (b) contents; (b)(2) inclusion of other programs; (c) inclusion in compact or funding agreement; (d) funding agreement terms; (e) subsequent funding agreements; (f) existing funding agreements; and (g) stable base funding.*

¹¹⁰ *Section 506(c) Audits.*

¹¹¹ *Section 506 (c)(2) Cost Principles – with the exception of Section 106.*

¹¹² *Section 506 (e) Redesign and Consolidation.*

¹¹³ *Section 507(b) Final Offer.*

¹¹⁴ *Section 508(g) Prompt Payment Act.*

¹¹⁵ *Section 508(j) Program Income.*

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applicable to construction projects as well as Davis Bacon Act wages and standards,¹¹⁶ but Federal procurement law and regulations are not.¹¹⁷ Procurement law and regulations, however, may be selectively incorporated into annual funding agreements when there is mutual agreement.¹¹⁸ The Secretary must approve or deny a request for waiver of regulations within 90 days, or the subject of the request is deemed waived.¹¹⁹ Significant provisions are made for the acquisition, management, replacement, and donation of Federal excess and surplus property.¹²⁰ The President's budget request to Congress cannot be for less than the tribal base budgets. The Secretary cannot impose reporting requirements upon Tribes, yet he is required to provide a detailed level of need funded (LNF) and unfunded for each Tribe, according to ISD contracts and TSG compacts.¹²¹ Moreover, the report must disclose the funding formula and calculation methods used to determine each Tribe's share of funds for administrative and support costs. The report must be submitted to Tribes before it is submitted to Congress, and it must contain their views. Individual Indians are also provided a statutory entitlement for health services due to them in respect of their status as Indians, irrespective of economic means testing.¹²²

The Secretary was also directed to undertake negotiated rulemaking under Section 517 Regulations. Rules were to have been published in the Federal Register one year later. Final regulations were published on May 17, 2002.

4.8.2 Title VI – Tribal Self-Governance – DHHS

The Tribal Self-Governance Amendments of 2000 also added Title VI – Tribal Self-Governance – Department of Health and Human Services. Title VI is organized into Sections 601-604, which provides direction for a feasibility study, and Sections 6-13 that makes technical changes to the ISDEA.¹²³

Title VI Section 602(a) directs the Secretary of Health and Human Services¹²⁴ to conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency. The term “agency” means any agency or other organizational unit of the Department of Health and

¹¹⁶ *Section 509(g) Wages.*

¹¹⁷ *Section 509(g) Application Of Other Laws.*

¹¹⁸ *Section 510 Federal Procurement Laws and Regulations.*

¹¹⁹ *Section 512(b)(1)(2) Regulation Waivers: General, Approval.*

¹²⁰ *Section 512(c) Access To Federal Property.*

¹²¹ *Section 514 Reports.*

¹²² *Section 515(c) Disclaimers, Obligations of the United States.*

¹²³ *P.L. 106-260, 114 Stat. 731, August 18, 2000.*

¹²⁴ *Section 601(b)(2).*

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Human Services other than the Indian Health Service.¹²⁵ Section 602(b) states considerations for the study. These considerations are:

1. the probable effects on specific programs and program beneficiaries of such a demonstration project;
2. statutory, regulatory, or other impediments to implementation of such a demonstration project;
3. strategies for implementing such a demonstration project;
4. probably costs or savings associated with such a demonstration project;
5. methods to assure quality and accountability in such a demonstration project; and
6. such other issues that may be determined by the Secretary or developed through consultation pursuant to section 603.¹²⁶

Section 602(c) required the Secretary to submit a report to the Senate Committee on Indian Affairs and the House Committee on Resources, no later than 18 months after the date of enactment of Title VI. The contents of the report required are:

1. the results of the study under Section 602;
2. a list of programs, services, functions, and activities (or portions thereof) within each agency with respect to which it would be feasible to include in a tribal self-governance demonstration project;
3. a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) that could be included in a tribal self-governance demonstration project without amending statutes, or waiving regulations that the Secretary may not waive;
4. a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a tribal self-governance demonstration project; and
5. any separate views of Tribes and other entities consulted pursuant to section 603 related to the information provided pursuant to paragraphs (1) through (4).

Section 603 directed the Secretary to determine a consultation protocol¹²⁷ for consulting with Indian Tribes¹²⁸ during the course of the Section 602 Study. Section 603(a)(2) sets forth specific requirements for the Study protocol:

¹²⁵ Section 601(b)(1).

¹²⁶ Section 602(b)(1)(2)(3)(4)(5)(6).

¹²⁷ Section 603(a) Study Protocol.

¹²⁸ Section 603(a)(1) Consultation with Indian Tribes.

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- A. the government-to-government relationship with Indian Tribes forms the basis for the consultation process;
- B. the Indian Tribes and the Secretary jointly conduct the consultations required by this section; and
- C. the consultation process allows for separate and direct recommendations from the Indian Tribes and other entities described in subsection (b).

Section 603(b) directs the Secretary to consult with Indian Tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups. The Secretary may also consult with other entities as appropriate. Finally, Section 604 provides an authorization for funding the feasibility study.

The Department of Health and Human Services has made information about the Tribal Self Governance Feasibility Study and its Consultation Protocol Agreement available to the public on its website: www.aspe.hhs.gov/SelfGovernance. The Consultation process is organized into four phases. Phase one focuses on consultation with tribal entities on the feasibility and scope of a possible demonstration project. It also asks for recommendations. Phase two involves consultation with statutorily designated non-tribal entities and requests recommendations. Phase three concerns the preparation of a draft report to Congress that assesses the feasibility of a demonstration project, makes recommendations, and responds to the requirements of Section 602. Finally, Phase four involves preparation of a report to Congress that contains the separate views of Tribes and other entities consulted. The Department also provides information on steps that it is taking to implement the Study as well as a Consultation Timeline.

4.9 IHS Self-Governance Regulations – Titles V and VI

On February 14, 2002, the Department of Health and Human Services published a Notice of Proposed Rulemaking (NPRM) for “Tribal Self-Governance Amendments of 2000.”¹²⁹ This NPRM added a new part 137 to new subchapter M – Indian Health Service. Part 137 Tribal Self-Governance regulations are the product of “consensus” reached by a negotiated rulemaking committee¹³⁰ whose representatives were composed of Federal and tribal officials.¹³¹ Self-Governance tribal representatives made up a majority of the committee’s representatives. The regulations are based on both Titles V and VI. They are comprehensive, detailed, and organized into 16 parts, A through P.

¹²⁹ *Federal Register*, Vol. 67, No. 31, Thursday, February 14, 2002, page 6998.

¹³⁰ *Title V- Tribal Self-Governance Amendments of 2000 required the Secretary to initiate negotiated rulemaking procedures with a committee composed of a majority of Self-Governance Tribes.*

¹³¹ *Key areas of disagreement were also published. See, Fed Reg. ibid. p.6999.*

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Subparts A and B of the regulations respectively provide for general provisions and definitions. **Subpart C** deals with the eligibility of Tribes as contracting parties. Up to 50 additional Tribes per year are to be selected for participation provided that they meet the eligibility requirements. **Subpart D** states the authority and content for negotiated compacts, and clarifies that compacts are separate documents from annual funding agreements. **Subpart E** states the authority, content and term of funding agreements, including a description of the required and optional terms. **Subpart F** describes how statutorily mandated grants may be added to a funding agreement. **Subpart G** describes what funds are to be transferred; when they are to be transferred; and the circumstances where the Secretary is prohibited from reducing or failing to transfer funds. The subpart also describes where the Secretary may increase funds and what funds may be included in a Tribe's stable base budget. **Subpart H** describes the final offer and rejection process; the process and timeframes for resolving disputes; and the process for a Tribe to follow in presenting a final offer as well as the procedures the Secretary must follow in rejecting such an offer. The burden of proof is placed on the Secretary to demonstrate the validity of the grounds for his rejection of a Tribe's final offer. **Subpart I** contains numerous operational provisions dealing with: Audits and cost principles; records; redesign; non-duplication; health status reports; savings; access to government furnished property; and matching and cost participation requirements. **Subpart J** authorizes the Secretary to waive regulations that have been promulgated to implement Title V or regulations promulgated under Section 505(b) of Title V. This subpart describes how a Tribe may apply for a waiver; the process; and the timeframes for approval or denial. Denial of a request for waiver may be appealed to a Federal court. **Subpart K** describes withdrawal from participation in an inter-tribal consortium or tribal organization; the impact on funds distribution; and future Title I contracting. **Subparts L and M** respectively describes procedures to be followed for retrocession and reassumption of contracts. **Subpart N** applies to construction projects undertaken under Section 509 of Title V. This subpart is comprehensive. It clarifies that Tribes may assume construction programs (but not projects) under the compact and funding agreement authorities. This subpart provides: Purpose and scope; construction definitions; process for Tribes to assume federal environmental responsibility under the National Environmental Policy Act (NEPA) and related laws; notification (prioritization process); project assumption process; roles of the Secretary and Self-Governance Tribes; and other provisions. Among the other provisions, Section 137.377 clarifies that Federal procurement laws and regulations do not apply to construction agreements performed under Section 509 of Title V, unless otherwise agreed. **Subpart O** describes the consultation and annual report to Congress process. Finally, Subpart P describes the appeals process.

4.10 Prospects for future legislation

In the just concluded 107th Congress, Senate Bill 2711 was introduced Technical Corrections to the Indian Self-Determination Act. S.2711 would have added a section providing for the application of laws to administrative appeals. The section also dealt with attorney fees, claims, and incorporation of self-determination provisions, their force and effect, and timing of incorporation during the negotiations process. The bill expired with the end of the Congress but could be reintroduced after the 108th Congress convenes. Further, the report mandated by Title VI of ISDEA, regarding the feasibility of DHHS conducting a demonstration of Tribal self-governance for non-IHS social service programs, to be submitted shortly, could serve to remind the Congress of its interest in extending the reach of Tribal self-governance to additional program areas. Tribes engaged in self-governance have expressed their commitment to pushing legislation in this direction.

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<p style="text-align: center;">Indian Self-Determination and Education Assistance Act Tribal Self-Governance Act <u>Statutes and Regulations</u></p>

DATES	STATUTES
January 4, 1975:	<u>Indian Self-Determination and Education Assistance Act</u> , PL 93-638 88 Stat. 2203, ISDEA. Enacted Title I Indian Self-Determination Act and Title II Indian Education Assistance Act.
April 3, 1984:	<u>1984 Amendment to ISDEA</u> , PL 98-250, 98 Stat.118. Made technical and clarifying language on US code sections.
December 22, 1987:	<u>1987 Amendment to ISDEA</u> , PL 100-202, 101 Stat.1329-213, 1329-246. Made technical and clarifying language on personal injury claims.
September 27, 1988:	<u>1988 Amendment to ISDEA</u> , PL 100-446, 102 Stat. 1817. Amended PL 100-202 clarifying claims filed by different persons.
October 5 ,1988:	<u>1988 Amendment to ISDEA</u> , PL 100-472, 102 Stat. 2285. Made technical clarifying language on policy, definitions, reporting and audit requirements, carryover of funds, contracts, grants, assignment of Federal employees, administrative provisions, payments, contract amounts, funding, accounting, indirect costs, rules and regulations, consultation, civil actions and disputes; renumbering of sections; and addition of Title III Tribal Self-Governance Demonstration Project for five years and addition of 20 Tribes.
November 1, 1988:	<u>1988 Amendment to ISDEA</u> , PL 100-581, 102 Stat. 2941. Made technical clarifying language on tribal organization, planning, annual reporting, Indian owned enterprises, notice and hearing, civil actions, and Equal Access to Justice.
May 24, 1990:	<u>1990 Amendment to ISDEA</u> , PL 101-301, 104 Stat. 4665. Made technical clarifying language on Indian Tribe, grant or cooperative agreements, Single Agency Audit Act, construction contracts, agency personnel, notice and hearing, and contract amendment.
November 29, 1990:	<u>1990 Amendment to ISDEA</u> , PL 101-644,108 Stat. 4251. Made technical clarifying language on mature contract, self-determination contract, funds paid, annual reporting, personal injury claims, contract term, fiscal year and amounts, property, dates, and revision of rules and regulations.
December 4, 1991:	<u>1991 Amendment to ISDEA</u> , PL 102-184 Extended the Tribal Self-Governance Demonstration Project for three additional years and the number of additional Tribes was increased to 30.
1992	Amendments added – IHS Self –Governance demonstration

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- October 25, 1994: 1994 Amendment to ISDEA, PL 103-413, 108 Stat. 4250.
Made the Tribal Self-Governance Demonstration Project into a permanent program in Interior (Title IV) by enacting the Tribal Self-Governance Act of 1994; and authorized continuing participation of Tribes in the project. Authorized up to 20 Tribes per year.
- February 12, 1996: 1996 Amendment to ISDEA, PL104-109.
An Act to make technical corrections and law related to Native Americans. Section 403 amended to permit incorporation of self-determination provisions into funding agreements.

In addition, extended DOI Self-Governance provision to non-BIA, but non-BIA administration discretion retained by DOI.
- September 30, 1996: 1996 Amendment to ISDEA, PL 104-208.
Amended PL 103-413, to allow up to 50 Tribes per year to participate.
- August 18, 2000: 2000 Amendments to ISDEA, PL 106-260, 114 Stat.711.
Added Title V Tribal Self-Governance for IHS programs and Title VI for a self-governance demonstration feasibility study; also provided technical clarifying language for other Titles. Provides for additional Fed-Tribe negotiated rule-making authority.

AGENCY

REGULATIONS

- DOI/DHHS: 25 Code of Federal Regulations, Chapter V Part 900, “Contracts under the Indian Self-Determination and Education Assistance Act”. Joint DOI/DHHS Indian Self-Determination Act contracting.
- DOI: 25 Code of Federal Regulations, Chapter VI Part 1000, “Annual funding agreements under the Tribal Self-Governance Act amendments to the Indian Self-Determination Act.”
25 Code of Federal Regulations, Chapter VI Part 1001, “Self-Governance Program.”
- DHHS: Subchapter M – Indian Health Service, Department of Health and Human Services, Part 137 – Tribal Self-Governance. “Tribal Self-Governance”. [NPRM Fed. Reg./vol.67, No. 31/ Thursday, February 14, 2002. Proposed Rules]. Final—May 2002, IHS self-government.

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HISTORY FEDERAL-INDIAN POLICY

<u>PERIOD</u>	<u>FEDERAL POLICY</u>
1776:	<u>Articles of Confederation</u> , Article IX(4): Power to regulate trade, manage trade, legislative rights to acquire Indian lands; Founders debates.
1787:	<u>United States Constitution</u> , Treaty and Commerce clauses; Power to make treaties and reserved rights.
1790-1834:	<u>Trade and Intercourse Acts</u> : Regulation of trade and intercourse.
1802-1900:	<u>Indian Removal and Consolidation</u> : Abolition or consolidation of tribal governments, and forced removal to reservation.
1886	<u>Tribes forced onto reservations</u>
1870:	<u>President Grant's Peace policy, Civilization, and Religious Education</u> : Federal assignment of agencies to religious denominations for assimilation. ????
1871	<u>Treaty-making period ends</u> – Indian Appropriation Act
1871-1928:	<u>Allotments and Assimilation</u> : Dawes and Curtis acts; creation of the BIA and reservation system; creation of Indian training and boarding schools.
1885:	<u>Major Crimes Act</u> : Expansion of Federal power over Indians.
1903:	<u>Plenary power of Congress</u> : Absolute power over Indian lands and people. <i>Lonewolf v. Hitchcock</i> .
1924	<u>Indian Citizens Act</u>
1928	<u>Allotment Act</u> : deeding land to individuals.
1934	<u>Indian Reorganization Act</u> : restored Tribal sovereignty; ended allotment.
1928-1945:	<u>Period of Indian Reorganization</u> : Indian citizenship, reorganization of tribal governments, reforms of John Collier.
1954	<u>Transfer Act</u> (P.L. 83-568): moved IHS to DHEW.
1945-1968:	<u>Termination policy</u> : complete integration of Indians into American society.
1970-present:	<u>Indian Self-Determination</u> : Renascence of tribal government, Indian political rights, and Federal trusteeship.
1974	American Indian Policy Review Commission: Nixon administration, P.L. 93-580.