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# The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act

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## **Cover Page Footnote**

Mr. Strommer is a partner at Hobbs, Straus, Dean & Walker, LLP, a national law firm that has specialized for thirty years in representing tribes and tribal organizations throughout the United States. Mr. Osborne is a partner at Hobbs, Straus's Portland, Oregon office. This article reflects the views of the authors only. This article reflects the input of a number of other lawyers at Hobbs Straus, all of whom generously took time to read drafts and offer ideas that are incorporated in the article.

# THE HISTORY, STATUS, AND FUTURE OF TRIBAL SELF-GOVERNANCE UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

*Geoffrey D. Strommer & Stephen D. Osborne\**

*This year marks the 40th anniversary of the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), a cornerstone of modern federal Indian policy. In 1988, amendments to the ISDEAA created the Tribal Self-Governance Demonstration Project. By providing a statutory basis for the broader movement of tribal self-governance, this legislation recognized and advanced the proposition that Indian tribes can provide better governmental services to their own members than can distant federal bureaucracies. Expanded and refined in subsequent legislation in 1994 and 2000, the Self-Governance Policy has proven so successful that today over 50% of all federal Indian programs are carried out by tribes rather than federal agencies. This article reviews the history of the self-governance program, identifies challenges to the continued growth of self-governance, and discusses possible directions that the program could take in the coming years.*

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*No right is more sacred to a nation, to a people, than the right to freely determine its social, economic, political, and cultural future without external interference. The fullest expression of this right occurs when a nation freely governs itself. We call the exercise of this right Self-Determination. The practice of this right is Self-Governance.*<sup>1</sup>

### I. Introduction

After centuries of federal policies ranging from extermination and removal to assimilation and neglect, tribal self-determination has become the hallmark of United States Indian policy.<sup>2</sup> It is also a human right.<sup>3</sup> Like other nations and sovereign governments, Indian tribes promote their tribal economies, build governmental infrastructures, provide law and order, manage tribal natural and cultural resources, meet the healthcare and educational needs of their members, and perform other governmental functions.<sup>4</sup> For the last forty years, the Indian Self-Determination and

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1. Joe DeLaCruz, *quoted in* LUMMI SELF-GOVERNANCE COMM'N & EDUC. PROJECT, SELF-GOVERNANCE: A NEW PARTNERSHIP 2 (1995) [hereinafter LUMMI SELF-GOVERNANCE MANUAL] (on file with authors). Mr. DeLaCruz, the late Quinault Nation President, is acknowledged by many people throughout Indian country as the tribal sage of self-determination and self-governance. *See, e.g., Tribal Self-Governance: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 15 (2006) (statement of Ron Allen, Chairman, Jamestown S'Klallam Tribe, noting Mr. DeLaCruz's role in beginning of self-governance movement); *infra* notes 196-97 and accompanying text (describing Mr. DeLaCruz's role in forming alliance of tribal leaders that pushed for self-governance).

2. *See, e.g.,* Emma R. Gross, *The Origins of Self-Determination Ideology and Constitutional Sovereignty*, in *NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY* 125 (John R. Wunder ed., 1996) (discussing the underlying philosophical justifications for establishing self-determination as the touchstone of federal Indian policy).

3. *See, e.g.,* U.N. Charter art. 1, para. 2, *available at* <http://www.un.org/en/documents/charter/chapter1.shtml> (affirming "the principle of equal rights and self-determination of peoples"); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf) ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

4. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 238-54 (1989). The inherent sovereignty of tribes has long been a cornerstone of federal Indian law. *See, e.g.,* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1941) ("[P]owers [of] an Indian tribe are not . . . delegated . . . by Congress, but rather [are] inherent powers of a limited sovereignty which has never been extinguished."); S. REP. NO. 100-274, at 3 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2622 ("The present right of Indian tribes to govern

Education Assistance Act of 1975 (ISDEAA or Act)<sup>5</sup> has provided the legal framework within which tribes can exercise their right to self-determination and self-governance, while jump-starting and developing the capacity for government-building activities.<sup>6</sup>

The ISDEAA gives tribes the right to assume the responsibility, and associated funding, to carry out programs, functions, services and activities (PFSAs) that the United States government would otherwise be obliged to provide to Indians and Alaska Natives. Examples of such services include healthcare, education, road construction, and social services.<sup>7</sup> Congress significantly amended the Act in 1988,<sup>8</sup> 1994,<sup>9</sup> and 2000.<sup>10</sup> By tribal and federal accounts alike, the self-determination policy embodied in the

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their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States.”)

5. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e, 458aa-458hh, 458aaa-458aaa-18 (2006)).

6. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 16-17 (Harvard Kennedy Sch., Faculty Research Working Paper Series 1, Paper No. RWP10-043, 2010). For a critical analysis of self-determination, see George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in *STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY* 212 (George Pierre Castile & Robert L. Bee eds., 1992) [hereinafter *STATE AND RESERVATION*] Esber criticizes the Act because continued federal control through the Bureau of Indian Affairs (BIA) is “greater because of Indians’ dependency on the BIA to carry out the contracting process that is supposed to more fully involve tribes in the national economy.” *Id.* at 213-14.

7. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012). In this article, we often use “tribes” as a shorthand term that includes “tribal organizations,” which the Act defines as tribal governments or organizations controlled, sanctioned, or chartered by tribal governments. 25 U.S.C. § 450b(1) (2012). This allows smaller tribes to combine programs and resources to produce efficiencies of scale.

8. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa-458aaa-18); *see* discussion *infra* Part II.C.

9. Tribal Self-Governance Act of 1994 (Indian Self-Determination and Education Assistance Act Amendments of 1994), Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. § 458aa-hh (2012)); *see* discussion *infra* Part II.D.

10. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa-458aaa-18 (2012)). The 2000 Amendments also created Title VI, which authorizes a feasibility study of including non-IHS agencies in the DHHS for a tribal self-governance demonstration project. *See* discussion *infra* Part II.E.

ISDEAA has been very successful in assisting tribes to develop their local economies and build their governmental capacities.<sup>11</sup>

Despite the centrality of the ISDEAA to the United States' policy of tribal self-determination, many treatises on federal Indian law virtually ignore the Act.<sup>12</sup> This article aims to fill that gap by setting forth the history and potential future direction of self-determination and self-governance, primarily as a statutory directive of the ISDEAA, but also within the broader context of tribal-federal relations. Part I briefly recounts the history of federal Indian law and policy from colonial times to the present, tracing the vacillating policy from isolation to assimilation to termination to self-determination. Part II examines the history and development of the ISDEAA by analyzing the various amendments and enacted titles: (1) Title I and self-determination contracts; (2) Title III's self-governance demonstration program; (3) Title IV's permanent self-governance program in the Department of the Interior (DOI); and (4) Title V, the permanent self-governance program in the Department of Health and Human Services (DHHS).<sup>13</sup> Part III examines current challenges and opportunities and suggests future directions for expanding and refining the statutory basis of tribal self-governance, including expansion of the Act's principles to all agencies of the federal government. Despite current political challenges and fiscal constraints, we conclude that tribal self-governance will continue to expand, benefiting not only Native peoples but all Americans.

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11. See e.g., Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida, Prepared Statement Before the House Resource Committee (Aug. 3, 1999) (describing self-determination as "the most successful Indian policy [ever] adopted by the United States"); *Tribal Self Governance: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 2 (2006) (statement of Sen. Lisa Murkowski) ("There is little dispute within Indian country that the policy of self-determination . . . is probably one of the best, if not the single best thing that this Federal Government has ever done to help our Native people."); 1 NAT'L INDIAN HEALTH BD., *TRIBAL PERSPECTIVES ON INDIAN SELF-DETERMINATION AND SELF-GOVERNANCE IN HEALTH CARE MANAGEMENT* 12 (1999) [hereinafter NIHB REPORT] (Executive Summary) (summarizing findings of study that even with reduced purchasing power of congressional appropriations for Indian health, the growth of tribal management under self-determination and self-governance has led to improved health for tribal peoples).

12. See, e.g., DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* (6th ed. 2011). This otherwise excellent 1032-page collection of cases, materials and commentary contains less than one full page on the ISDEAA scattered among pages 220, 222, and 333.

13. The 2000 amendments enacting Title V also included Title VI, which authorized DHHS to study the feasibility of extending self-governance to non-IHS programs and agencies within the Department. See *infra* Part II.E.3 (discussing results of Title VI feasibility study and prospects for legislation to implement the study's recommendations).

## II. A Brief History of Federal Indian Law and Policy

Tribal self-governance, of course, is not new. Tribes governed themselves quite well for millennia before European “discovery” and conquest. The principles underlying the statutory self-governance programs derive from inherent tribal sovereignty and the history of interaction between tribal and Euro-American governments. A brief look at the history of that interaction helps clarify the basis of the current self-governance law and policy and where it may be headed in the future.

### A. Discovery: Early Relations with the Colonists, Treaties, and the Origins of Government-to-Government Relations 1776-1826

At the time of European “discovery” of the New World, many tribes possessed sophisticated forms of government,<sup>14</sup> as well as expansive systems of trade among themselves and with the early colonists.<sup>15</sup> Relations between the colonists and the Indians were based on the understanding that, where possible, Indians desired to remain a distinct people, governing themselves on their own lands and on their own terms.<sup>16</sup> This much was recognized by the United States and formed the backdrop to early federal Indian policy.<sup>17</sup>

After the Revolutionary War of 1776 and formation of the United States Constitution in 1789, the relationship between the United States and tribal governments was ambivalent.<sup>18</sup> On the one hand, treaties between the United States and Indian tribes served as formal recognition of government-to-government relationships.<sup>19</sup> On the other hand, the cultures of the so-

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14. For a discussion of the evolution of traditional tribal governments, see generally O'BRIEN, *supra* note 4.

15. See generally WALTER H. MOHR, FEDERAL INDIAN RELATIONS, 1774-88 (1933) (recounting the relations between Indian tribes and the early colonists). The 1802 Trade and Intercourse Act restricted alienation of Indian-owned lands, Act of Mar. 30, 1802, 2 Stat. 139, in addition to authorizing the President to “furnish [Indians] with useful domestic animals and implements of husbandry, and with goods or money,” *id.* § 13, 2 Stat. at 143.

16. THOMAS R. BERGER, A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICANS SINCE 1492, at 81-84 (2d ed. 1999) (discussing the impacts of Chief Justice John Marshall's early recognition of Indian sovereignty).

17. *Id.*

18. See generally CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 26-31 (1987) (discussing this tension in the seminal federal Indian law cases).

19. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 26-33 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (discussing the role of treaties in the United States' policy of establishing government-to-government relationships with Indian tribes).



called “savages” were seen as inferior to white “civilization,” and thus were treated as doomed to disappear.<sup>20</sup> As President George Washington put it in 1783, “the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape.”<sup>21</sup> A somewhat later and more benign (though insidious) version of this image figured Indians as children of The Great White Father in Washington.<sup>22</sup>

This paternalism and outright hostility coexisted uneasily with recognition of the separate sovereignty of tribes during the time of the formation of the United States. In some ways, tribes were analogous to states of the union or foreign nations, as the Constitution indicated in granting Congress the exclusive power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>23</sup> This so-called “Indian Commerce Clause” became, and remains, the primary basis of federal authority over tribes.<sup>24</sup> The Supreme Court has interpreted this clause, in conjunction with the Supremacy Clause,<sup>25</sup> to mean that Congress has “plenary power” over tribes.<sup>26</sup>

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20. See generally BRIAN DIPPIC, *THE VANISHING AMERICAN* (1982); ROY HARVEY PEARCE, *SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND* (1965).

21. Letter from George Washington to James Duane (Sept. 7, 1783), in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 1, 2 (Francis Paul Prucha ed., 2d ed. 1990).

22. See generally FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* (1984) [hereinafter PRUCHA, *THE GREAT FATHER*]. Cf. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting, as evidence that tribes' relation to the United States resembles that of wards to their guardian, that tribes “address the president as their great father”). Tribes did appropriate this paternalistic trope with regularity, but more as a canny rhetorical ploy than from a sense of inferiority.

23. U.S. CONST. art. I, § 8, cl. 3. The apportionment clauses, by excluding “Indians not taxed” from the population count for purposes of representation in Congress, also appears to recognize the separate political status of tribes. *Id.* art I, § 2, cl. 3, *superseded by id.* amend. XIV, § 2 (apportioning representation according to population, “excluding Indians not taxed”).

24. COHEN, *supra* note 19, at 396-97 (describing Indian commerce clause as “linchpin” of federal power over Indian affairs and basis of both historic and modern legislation).

25. U.S. CONST. art. VI, cl. 2.

26. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The notion that Congress has plenary power over tribal nations is in tension, if not outright conflict, with democratic doctrines such as popular sovereignty, the rule of law, and the consent of the governed. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 467 (2005). The doctrine is also suspect under international law. See *supra* note 3 and accompanying text. The Supreme Court has stated that federal power over tribes, while plenary, is not absolute. See *United States v. Creek Nation*, 295 U.S. 103, 109–

From the earliest days of the Republic, the federal government has recognized a moral as well as legal responsibility toward tribes and their members, as evidenced in the Northwest Ordinance of 1789: “The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent.”<sup>27</sup> The gulf between such official pronouncements and the actual treatment of tribes proved immense, but the pronouncements did serve to establish the federal government as the nominal protector of Indian rights.<sup>28</sup> With plenary power came commensurate moral obligations, at least in theory.<sup>29</sup>

Against this backdrop of contradictory and somewhat incoherent attitudes, Chief Justice John Marshall authored three landmark United States Supreme Court opinions in the 1820s and 1830s that established several foundational principles of federal Indian law.

*B. The Marshall Trilogy and the Indian Removal Policy 1826-1887*

Chief Justice Marshall's Indian law trilogy, like many of his other landmark decisions, sought to harmonize competing legal, cultural, and political traditions. On the one hand, the United States and its predecessor colonies had long recognized Indian tribes as governments that exercise sovereignty over their respective territories and people.<sup>30</sup> On the other hand, the ideological justification for dispossessing Indians from their lands required that tribes *not* be seen as the equals of Pennsylvania or France, but rather as savage hordes destined to disappear before the advance of civilization, as America fulfills its Manifest Destiny to expand across the continent.<sup>31</sup> The key to understanding Marshall's opinions is that they manage to preserve important tribal rights, including tribes' limited sovereignty and right to self-governance, while legitimizing what had already taken place—the expropriation of Indian lands.

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10 (1935) (plenary power subject to constitutional restrictions and to limitations inhering in guardianship role).

27. Ch. 8, n.(a), 1 Stat. 50, 52.

28. See COHEN, *supra* note 19, at 419-22 (discussing origins of trust responsibility).

29. *Id.*

30. See O'BRIEN, *supra* note 4, at 50–53 (discussing the early government policy of treaty-making and federal regulation of trade and intercourse).

31. See, e.g., PEARCE, *supra* note 20, at 155 (quoting Thomas Jefferson on “the advance of civilization” from lawless Indians to semi-barbarous pioneers to pastoral farmers to the civilization of the seaport towns); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 310 (Peter Haslett ed., 2d ed. 1967) (1690) (using American Indians as his example of primitive peoples who fail to use their lands efficiently, thus giving more advanced (European) societies the right to “appropriate” that land).

In *Johnson v. M'Intosh*,<sup>32</sup> the question was which of two claimants had title to a parcel of land in present-day Illinois: M'Intosh, who had bought it from the federal government, or Johnson, who had bought it from the Illinois and Piankeshaw Nations.<sup>33</sup> In holding for the federal grantee, the Supreme Court affirmed the doctrine of discovery: Whichever European (or "Christian") nation "discovers" territory gains "the exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."<sup>34</sup> Following the Revolutionary War, Great Britain had ceded its discovery rights to the United States, giving the United States "clear title . . . subject only to the Indian right of occupancy."<sup>35</sup> Thus the tribal land grant was invalid; only the United States could extinguish Indian title and convey title to an individual.<sup>36</sup> The United States did extinguish Indian title by purchasing the land from the tribes prior to selling it to M'Intosh.<sup>37</sup> Thus the latter prevailed, and the tribal grantee's successors in interest were out of luck.<sup>38</sup>

Although Marshall questions whether the doctrine of discovery accords with "natural right," this question is ultimately moot because the doctrine is "indispensable to that system under which the country has been settled . . . it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice."<sup>39</sup> History trumps natural law—or rather, the historical reality of dispossession creates its own legal justification: might makes

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32. 21 U.S. (8 Wheat.) 543 (1823).

33. *Id.* at 571-72.

34. *Id.* at 587. For a thorough discussion of the doctrine of discovery, which already had a lengthy pedigree in European and American law by Marshall's time, see ROBERT J. MILLER, *NATIVE AMERICA DISCOVERED AND CONQUERED* 9-50 (2006). It should be noted that the concepts of "discovery" and "conquest" are wholly repudiated, notwithstanding their doctrinal history, by indigenous peoples around the world, including Native Americans. The United Nations Permanent Forum on Indigenous Issues noted that Discovery doctrine "[i]s the foundation of the violation of their (Indigenous people's) human rights." Special Rapporteur of the UN Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, at 1, U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010).

35. *Johnson*, 21 U.S. (8 Wheat.) at 584-85.

36. *Id.* at 593-94.

37. *Id.*

38. *Id.* at 604-05.

39. *Id.* at 591-92. Marshall gently mocks the doctrine of discovery even as he upholds it, locating the roots of the doctrine in the "extravagant . . . pretension," *id.* at 591, of the "potentates of the old world," *id.* at 573.

right.<sup>40</sup> To rule for the Indian grantee would have been to undermine title to the entire country.<sup>41</sup>

*Johnson v. M'Intosh* legitimized the historical process of conquest and colonization,<sup>42</sup> but the decision also enshrined important Indian property rights and principles of tribal self-governance. European discovery did not extinguish tribal property rights; although the federal government held "ultimate title," tribes retained the right of possession and use.<sup>43</sup> This "Indian title" derives from the inherent sovereignty of tribes, and can only be extinguished by the federal government.<sup>44</sup> *Johnson*, and Marshall's later opinion in *Worcester v. Georgia*, affirmed tribal rights to regulate lands in which aboriginal title has not been extinguished, even as to the activities of non-Indians.<sup>45</sup> Moreover, although tribes could not grant a land title that United States courts could recognize, Marshall remarked that tribal conveyances would be valid under *tribal* law—although the tribe could convey only the right of occupancy and not fee title.<sup>46</sup> *Johnson* thus recognized tribes as separate governments, albeit divested of important political and property rights.<sup>47</sup>

Marshall laid the groundwork of the trust relationship in the second of his trilogy, *Cherokee Nation v. Georgia*.<sup>48</sup> The Cherokee Nation sought to

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40. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832) ("But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.").

41. *Johnson*, 21 U.S. (8 Wheat.) at 579 (noting that "our whole country [has] been granted by the crown while in the occupation of the Indians").

42. See, e.g., MILLER, *supra* note 34, at 50-53; LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 143-44 (2005) (describing "global" influence of *Johnson* in former English colonies such as Canada and Australia).

43. *Johnson*, 21 U.S. (8 Wheat.) at 574; *id.* at 587.

44. See *id.* at 593; COHEN, *supra* note 19, at 972-73 (citing cases recognizing and protecting original Indian title).

45. *Johnson*, 21 U.S. (8 Wheat.) at 593; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive").

46. *Johnson*, 21 U.S. (8 Wheat.) at 593 (stating that a person purchasing land from tribes "holds their title under their protection, and subject to their laws"). The tribal-federal "split" between aboriginal and "fee" title also evolved into the trust system under which fee title to much Indian land is held by the federal government in trust for the use and benefit of tribes or individual Indians. COHEN, *supra* note 19, at 967-68.

47. See MILLER, *supra* note 34, at 52 (stating that the doctrine of discovery divests tribes of right to deal commercially and diplomatically with any nation other than discoverer, as well as right to freely alienate land).

48. 30 U.S. (5 Pet.) 1 (1831).

enjoin Georgia from enforcing state laws on tribal lands; the laws were clearly designed to undermine tribal government and seize tribal lands.<sup>49</sup> While expressing sympathy with the Cherokees, Marshall held that the court lacked jurisdiction.<sup>50</sup> The Constitution allows courts to hear controversies between a state and a foreign state,<sup>51</sup> but was the Cherokee Nation a foreign state? Based on the “numerous treaties” entered into by the tribal and federal governments, Marshall concluded that tribes clearly were distinct political entities.<sup>52</sup> Like their land base, however, their sovereignty was limited by treaty cessions and by the historical process of incorporation by the United States. In a famous passage, Marshall wrote that tribes were not foreign nations but “domestic dependent nations.”<sup>53</sup> Tribes were “in a state of pupillage” to their civilized tutors.<sup>54</sup> “Their relation to the United States resembles that of a ward to his guardian.”<sup>55</sup> According to Marshall, the Constitution grants federal courts jurisdiction over disputes involving states and foreign states, but not tribes or “domestic dependent nations,” so the Cherokees' remedy was not in the federal courts.

While Marshall's metaphors strike us today as condescending and paternalistic, they articulated a moral and legal responsibility on the part of the federal government that would evolve into the enforceable obligations of a trustee.<sup>56</sup> Much of federal Indian law since Marshall, both statutory and case law, has involved the nature and contours of this trust relationship.<sup>57</sup>

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49. *Id.* at 15. For example, the Georgia law prohibited the tribal council from meeting and the tribal court from sitting or judging. See *Worcester*, 31 U.S. (6 Pet.) at 521–22 (quoting sections 2 and 3 of Georgia act of December 22, 1830).

50. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

51. U.S. CONST. art. III § 2, cl. 1.

52. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

53. *Id.* at 17. Marshall found support for distinguishing tribes from states of the union and foreign nations in the Indian Commerce Clause of the Constitution, discussed above. *Id.* at 18–19. By entrusting Congress with the power to regulate commerce “with foreign Nations, and among the several States, and with the Indian Tribes,” the Constitution distinguishes three distinct classes of entities. *Id.*; U.S. CONST. art. I § 8, cl. 3.

54. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

55. *Id.*

56. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886) (stating that with plenary power “there arises the duty of protection”); *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (“[I]t naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.”).

57. See COHEN, *supra* note 19, at 419–22 (locating roots of trust relationship in the Marshall trilogy, and noting that “[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government”).

The third case in Marshall's trilogy involved the relationship between tribes and states. In *Worcester v. Georgia*, several missionaries to the Cherokees were convicted of violating a Georgia law prohibiting non-Indians from residing in Cherokee territory without a license from the governor.<sup>58</sup> The Supreme Court overturned the convictions on the ground that Georgia's laws did not apply in Cherokee territory, even within the exterior boundaries of Georgia. Marshall repeatedly affirmed that tribes are “distinct, independent political communities,” as recognized by the United States' history of making treaties with tribal (as with foreign) governments.<sup>59</sup> “The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .”<sup>60</sup> The flip side of the broad federal authority over the “ward” by its “guardians” is the correspondingly limited authority of states over tribes. *Worcester* established the general rule, still applicable though riddled with exceptions, that states lack jurisdiction in Indian territories located within their boundaries.<sup>61</sup>

This courageous ruling put the Court on a potential collision course with President Jackson and his Indian Removal Policy.<sup>62</sup> At the same time Marshall was enunciating the United States' responsibilities to its domestic dependent Indian nations, the government was bent on isolating its “wards” or “pupils” by removing tribes from the settled southern and eastern regions of the republic.<sup>63</sup> By the early 1800s, it had become clear that tribes in the East were neither assimilating completely nor retiring into the wilderness with the wolves, as George Washington had predicted.<sup>64</sup> To placate states chafing at sovereign tribes within their boundaries—and to free up tribal lands for white settlement—the federal government pursued a policy of removing eastern tribes to territories in the West.<sup>65</sup> With the election of

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58. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 529 (1832).

59. *Id.* at 559.

60. *Id.* at 561.

61. *Id.* *Worcester's* bright-line rule has evolved into a pre-emption test unique to federal Indian law. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (“State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”).

62. DIPPIE, *supra* note 20, at 57-59 (describing Georgia-Cherokee controversy as impetus to removal policy).

63. *Id.* at 59-61.

64. *Id.* at 58 (describing Cherokees and other southeastern tribes as “obstacle to expansionist ambitions”).

65. COHEN, *supra* note 19, at 48.

Andrew Jackson in 1828, this removal policy kicked into high gear, and in 1830, Congress passed the Indian Removal Act.<sup>66</sup> Removal was to be voluntary (per the official policy enunciated in the Northwest Ordinance), but Jackson made clear that tribes refusing to relocate would lose federal protection and be subject to state laws and jurisdiction.<sup>67</sup> In the end, those who did not move “voluntarily” (generally through fraud or coercion) were removed forcibly.<sup>68</sup> The Cherokee Trail of Tears is the most infamous of the forced marches to the new Indian Territory in Oklahoma; many other tribes suffered similar displacements, with consequent loss of life and cultural upheaval.<sup>69</sup> By the end of the Removal Era, around 1850, most tribes had been removed from the East, although factions had escaped removal and eventually gained federal recognition and protection.<sup>70</sup>

The *Cherokee* cases represented last-ditch efforts to resist removal. Although the Cherokees prevailed in *Worcester*, their cause was doomed politically.<sup>71</sup> Nonetheless, the Marshall trilogy established several enduring principles of federal Indian law: the inherent sovereignty of tribes; their status as separate (though dependent) governments; the federal government's exclusive authority over, and consequent responsibility for, the “dependent” tribes; and the lack of state power over Indian affairs.

### *C. Allotment, Assimilation, and Termination 1887-1970*

Removal was hardly the enduring solution Jackson and his supporters envisioned. Within a few decades, rapid westward expansion fueled a reversal of Indian policy from isolation to assimilation. First, Congress declared the end of formal government-to-government relations by banning new treaties in 1871.<sup>72</sup> Second, Congress instituted a program of forced

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66. Act of May 28, 1830, ch. 148, 4 Stat. 411.

67. COHEN, *supra* note 19, at 48.

68. See PRUCHA, *THE GREAT FATHER*, *supra* note 22, at 214-69.

69. *Id.*

70. See, e.g., *United States v. John*, 437 U.S. 634, 638-46 (1978) (describing history of Mississippi Band of Choctaw Indians); *United States v. Wright*, 53 F.2d 300, 302-05 (4th Cir. 1931) (describing the history of North Carolina Cherokees, now known as the Eastern Band of Cherokee Indians of North Carolina).

71. See Joseph C. Burke, *The Cherokee Case: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 530-31 (1969) (describing how the South Carolina nullification controversy of 1832-1833 united Jackson, the Court, and Georgia, rendering *Worcester* and the Cherokees a political “embarrassment”).

72. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566, (codified as amended at 25 U.S.C. § 71 (2012)) (“[N]o Indian nation or tribe within the territory of the United States

assimilation through the General Allotment Act (Dawes Act) of 1887.<sup>73</sup> The Dawes Act provided for the breakup of tribally owned reservation lands by allotting them to individual Indian owners. Individual ownership, it was argued, would speed the “civilization” of Indians by breaking up the old communal life and making them individualistic farmers.<sup>74</sup> “Surplus” lands, or unallotted tribal lands, were ceded or sold off to non-Indian settlers and corporations.<sup>75</sup> The Indian land base dwindled from 138 million acres in 1887 to forty-eight million acres by 1934.<sup>76</sup> Although the policy of allotment was later repudiated, its legacy can still be seen in the high parcelization, varying and multiple ownership, and jurisdictional “checkerboard” of many reservations.<sup>77</sup>

The allotment era saw the rise of federal domination of life on the reservations and the corresponding decline in tribal governments; the Bureau of Indian Affairs (BIA) “proliferated as a federal, bureaucratic alternative to self-governance.”<sup>78</sup> Congress solidified the presence and impact of the BIA when it passed the Snyder Act in 1921.<sup>79</sup> The Snyder Act expanded BIA authority to expend funds for reservation activities such as healthcare delivery, education, and employment.<sup>80</sup> As Congress later noted in explaining the background of the ISDEAA, “[o]fficials of the BIA assumed the role of colonial administrators on the reservations and administered programs and services on the reservations under a policy which later became known as ‘paternalism.’”<sup>81</sup>

In 1934, Congress repudiated the policy of allotment by passing the Indian Reorganization Act (IRA or Wheeler-Howard Act).<sup>82</sup> The IRA

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shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”). Existing treaties were unaffected. *Id.*

73. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–358 (2012)).

74. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995).

75. *Id.* at 13–14.

76. COHEN, *supra* note 19, at 79.

77. *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1980) (stating that tribal regulatory jurisdiction generally does not extend to activities of non-members on fee lands within reservation); Royster, *supra* note 74, at 46–49.

78. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1258 (1995).

79. Act of Nov. 2, 1921, ch. 114, 42 Stat. 208 (codified as amended at 25 U.S.C. §§ 13–13e (2012)).

80. 25 U.S.C. § 13; COHEN, *supra* note 19, § 5.03[2].

81. H.R. REP. NO. 93-1600 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7781.

82. 48 Pub. L. No. 73-383, Stat. 984–88 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2012)).



aimed to reverse the erosion of the tribal land base by eliminating allotment and authorizing the Secretary to take Indian lands into trust (and thus off state and local tax rolls).<sup>83</sup> The IRA also attempted to revitalize tribal self-government by providing for formal adoption of tribal constitutions, tribal corporations, and formal tribal membership enrollment procedures.<sup>84</sup>

Twenty years later Congress shifted course once again and embarked on the Termination Era, during which the United States formally repudiated government-to-government relations with over one hundred federally recognized Indian tribes, thus ending their federal recognition as tribes.<sup>85</sup> As part of the termination policy, in 1953 Congress passed Public Law 83-280 (commonly known as P.L. 280),<sup>86</sup> whereby the United States ceded criminal and civil jurisdiction over Indians to some states, and authorized other states to assume jurisdiction over federally recognized tribes within their borders. The goal of termination was to end federal supervision and control over the Indian “wards,” weaken tribal governments, and assimilate

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83. 25 U.S.C. § 465; *see also* *Carcieri v. Kempthorne*, 497 F.3d 15, (1st Cir. 2007) (en banc) (rejecting non-delegation challenge to § 465 and discussing purpose of statute to end allotment and assimilation policy), *rev'd on other grounds*, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

84. 25 U.S.C. § 476. For a discussion of the purposes and implementation of the IRA, *see* COHEN, *supra* note 19, at 86–87.

85. House Concurrent Resolution 108 is often cited as the pivotal Act of Congress that terminated the United States' supervisory role and trust responsibility toward many tribes and also as Congress's push toward rapid assimilation:

Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and such tribe, and report to Congress . . . not late than January 1, 1954, his recommendations for such legislation as . . . may be necessary to accomplish the purposes of this resolution.

H.R. Con. Res. 108, 67 Stat. B132, 83d Cong. (Aug. 1, 1953) (enacted).

86. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360) (2012)). Under Public Law 280, Congress gave states jurisdiction over criminal offenses committed by Indians in Indian country, and also transferred certain aspects of civil jurisdiction to states. 28 U.S.C. § 1360(a). Public Law 280 is currently in effect in the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, with important exceptions for certain tribes. 18 U.S.C. § 1162(a).

individual Indians, often through relocation from reservations to large cities such as Los Angeles, Chicago and Minneapolis.<sup>87</sup>

#### *D. Self-Determination 1970-Present*

By the 1960s, the termination policy was gradually giving way to recognition of Indian tribal rights to self-determination. The Kennedy Administration did not seek to terminate any tribes, and, under the programs of the Great Society, the Johnson Administration embraced Indian tribes through unprecedented investments in Indian social programs and reservation infrastructure.<sup>88</sup> In 1968, Congress passed the Indian Civil Rights Act,<sup>89</sup> making many of the guarantees of the Bill of Rights applicable to Indian tribes while also expressly favoring tribal rights to self-determination.<sup>90</sup> Also in 1968, President Johnson delivered a special message to Congress about “The Forgotten American,”<sup>91</sup> the first special message devoted solely to Native Americans and federal Indian policy.

Despite this favorable shift away from termination, President Johnson’s definition of self-determination was viewed by some critics as more of a paternalistic image than of beneficial substance.<sup>92</sup> For many tribes, self-determination went well beyond the concept envisioned by President

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87. COHEN, *supra* note 19, at 91–93.

88. *See generally* THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961–1969 (2001); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 22 (1983) (discussing the era of self-determination). The Great Society was President Johnson’s term for a series of domestic programs aimed primarily at eliminating poverty and racism.

89. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, tit. IV, 82 Stat. 78 (codified at 25 U.S.C. §§ 1301–1303 (2012)); *see* TRIBAL TERRITORY, SOVEREIGNTY, AND GOVERNANCE 153–55 (John R. Wunder & Cynthia Willis Esqueda eds., 2000) (discussing the ICRA and the IRA in the context of federal policy shifting towards self-determination); *see also* NATIVE AMERICANS AND THE LAW: THE INDIAN BILL OF RIGHTS (John R. Wunder ed., 1968) [hereinafter INDIAN BILL OF RIGHTS] (analyzing the effects of the ICRA and its impacts on tribal sovereignty and self-determination).

90. *See* 25 U.S.C. § 1301(1) (defining Indian tribe as a group “recognized as possessing powers of self-government”); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Court held in *Martinez* that the ICRA does not subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief to enforce its provisions. *Id.* Rather, the ICRA manifests a congressional purpose to protect tribal sovereignty from undue interference by limiting judicial review in federal courts to review of tribal criminal convictions by way of habeas corpus. *Id.*

91. President Johnson, Special Message to Congress on the Problems of the American Indian: “The Forgotten American,” 1 PUB. PAPERS 336–37, 343–44 (Mar. 6, 1968).

92. *See, e.g.*, S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 200–14 (1973) (discussing the origins of self-determination).

Johnson and included legal and political sovereignty, fulfillment of treaty obligations, the return and protection of homelands, and the continued maintenance of the United States' trust responsibilities.<sup>93</sup> In 1970, President Nixon largely embraced this vision and ushered in a new era of federal Indian policy, calling for self-determination for all Indian tribes.<sup>94</sup> Recognizing that the Termination Era was a disaster for tribal governments throughout Indian country, President Nixon urged the abolition of termination and its corrosive effects on tribal communities:

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy. . . . [S]elf-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can be effectively fostered.<sup>95</sup>

Although Congress retained its plenary control over Indian affairs,<sup>96</sup> President Nixon recognized that federal bureaucracies had largely failed Indian peoples, and that the time had come for a fresh approach. "Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them."<sup>97</sup>

To the surprise of many observers in Indian country, President Nixon resolved to define self-determination specifically and to make self-determination the official federal Indian policy.<sup>98</sup> The President proposed a

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93. *Id.* Some tribal leaders even argued that self-determination required strong tribal independence separate from the United States, rather than having the United States supervise limited economic development. *Id.* at 160.

94. PRESIDENT NIXON'S MESSAGE TO CONGRESS TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 3 (1970) [hereinafter NIXON'S MESSAGE TO CONGRESS].

95. *Id.*

96. *See supra* note 26 and accompanying text.

97. NIXON'S MESSAGE TO CONGRESS, *supra* note 94.

98. INDIAN BILL OF RIGHTS, *supra* note 89. Louis R. Bruce, a Mohawk-Sioux from Pine Ridge and Nixon's Commissioner of Indian Affairs, and LaDonna Harris, a Comanche and the wife of Senator Fred Harris (D-Okla.), were instrumental in crafting Nixon's message to Congress. *Id.*

legislative package designed to expedite transfer of the administration of federal programs that benefit Indian people to Indian tribal governments. It took Congress nearly five years to respond, but ultimately it passed the Indian Self-Determination and Education Assistance Act of 1975.<sup>99</sup> This Act reflects congressional acceptance of tribal autonomy and the failure of termination policies.<sup>100</sup>

### *III. The Indian Self-Determination and Education Assistance Act*

The ISDEAA is largely concerned with strengthening tribal governments and tribal organizations on Indian reservations by emphasizing tribal administration of federal Indian programs, services, functions, and activities, as well as associated funds.<sup>101</sup> The Act currently consists of five major sections: (1) a self-determination contracting program within the BIA and the Indian Health Service (IHS) under Title I;<sup>102</sup> (2) education assistance programs under Title II;<sup>103</sup> (3) a permanent self-governance program within the DOI for both BIA and non-BIA programs under Title IV;<sup>104</sup> (4) a permanent self-governance program within the DHHS under Title V;<sup>105</sup> and (5) a feasibility study for including non-IHS agencies within the DHHS in a self-governance demonstration project under Title VI.<sup>106</sup>

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99. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012)).

100. *See, e.g.*, H.R. REP. NO. 93-1600 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7782 (describing twentieth-century federal Indian policy, including “a brief, though disastrous experiment with the so-called ‘termination’ policy”).

101. THEODORE W. TAYLOR, *AMERICAN INDIAN POLICY* 161 (1983) (providing an overview of the Act and the policy of self-determination).

102. *See* discussion *infra* Part II.A.

103. This article will not address this Title in any great depth.

104. For example, programs operated for the benefit of Indians because of their status as Indians by the Bureau of Reclamation (a non-BIA bureau within the DOI). *See* discussion *infra* Part II.D.

105. In 2000, Congress repealed the self-governance demonstration project under Title III and placed it within the permanent self-governance program under Title V. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa–458aaa-18 (2012)); *see also* discussion *infra* Part II.E.

106. *See* discussion *infra* Part II.E.3.

*A. Title I and the 1975 Act*

*1. Early Models and the Nixon Administration*

The earliest models of self-government and self-determination were found in the restoration bills of previously terminated tribes,<sup>107</sup> as well as through important efforts by the Kennedy, Johnson, and Nixon Administrations, all of which formed the political backdrop to President Nixon's formulation of the self-determination policy.<sup>108</sup> In his message to Congress, President Nixon noted that the BIA had begun a policy of contracting services to tribes for the operation of BIA programs.<sup>109</sup> These efforts quickly ran up against bureaucratic recalcitrance and a perceived lack of legal authority.

For example, in 1970, the Miccosukee Tribe in southern Florida presented a proposal to the BIA to contract for services provided by the BIA's Miccosukee Agency, School, and related activities.<sup>110</sup> The Associate Solicitor for Indian Affairs initially declined the contract proposal based on the view that the BIA lacked legal authority to enter into the contract with the Tribe.<sup>111</sup> After several rounds of negotiations among the Tribe, the Solicitor's Office, and the Appropriations Committees of the House and Senate, it was determined that the Tribe could create a private corporation with which the BIA would have legal authority to contract for services.<sup>112</sup> Nevertheless, at each turn in its negotiation with the BIA, the Miccosukee Tribe was confronted with objections to the specific contents of its contract proposal, "add[ing] up to an attitude on the part of the federal bureaucracy that the existing laws were not designed to facilitate the purchase by the Government from an Indian tribe of programs already being performed by the Bureau."<sup>113</sup> In short, the experience of the Miccosukee Tribe demonstrated that the BIA's efforts to move forward with self-determination were hampered by existing legal authority. Specific legislation was necessary to bring to fruition the emerging concept of self-determination.

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107. See, e.g., H.R. REP. NO. 93-572 (1973) (enacted) (repealing the Act Terminating Federal Supervision over the Property and Members of the Menominee Indian Tribe of Wisconsin, Pub. L. No. 93-197, 87 Stat. 770 (1973)).

108. CLARKIN, *supra* note 88, at 270–72.

109. NIXON'S MESSAGE TO CONGRESS, *supra* note 94.

110. S. Bobo Dean, *The Consent of the Governed—A New Concept in Indian Affairs?*, 48 N.D. L. REV. 534, 542 (1971).

111. *Id.* at 542-46.

112. *Id.*

113. *Id.* at 546.

## 2. Drafting the Bill

Despite the power-to-the-Indian-people rhetoric of President Nixon's message, the initial self-determination legislation was drafted primarily by federal bureaucrats with little input from Indian tribes.<sup>114</sup> Perhaps for this reason, the legislative proposal received “no noticeable support among reservation Indians” and a cold reception from Congress.<sup>115</sup>

By 1972, Congress had its own legislation on the table. Senate Bill 3157 began with the following declaration: “[I]nasmuch as all government derives its just powers from the consent of the governed, maximum Indian participation in the government of Indian people shall be a national goal.”<sup>116</sup> Though this bill was flawed and ultimately would not be enacted,<sup>117</sup> its grounding of tribal self-governance in the fundamental democratic principle of “consent of the governed” would animate succeeding legislation.

Five years after Nixon's address, in 1975, Congress passed the ISDEAA.<sup>118</sup> The declaration of policy at the head of the statute articulates a break with past policy while also recognizing the continuity of self-determination with the federal government's “unique and continuing relationship to the Indian people”:

- (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
- (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a

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114. See, e.g., George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in STATE AND RESERVATION, *supra* note 6, at 212, 214 (criticizing the Act as a “top-down decision”).

115. Dean, *supra* note 110, at 536.

116. S. 3157, 92d Cong. § 1(a)(1).

117. For example, there was no provision requiring the Secretary to turn over a program upon tribal demand; any such transfer was to be “in his discretion.” Dean, *supra* note 110, at 541-42.

118. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e, 458aa-458hh, 458aaa-458aaa-18 (2012)).

meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.<sup>119</sup>

Congress sought to accomplish these goals by giving Indian tribes and tribal organizations the right to negotiate agreements with federal agencies that have the funding for and responsibilities of operating programs that benefit eligible American Indians and Alaska Natives.<sup>120</sup> In effect, tribes step into the shoes of the federal government by assuming the responsibility for operating programs formerly provided by federal agencies.

After much debate in Congress,<sup>121</sup> tribes walked away with their principal objective obtained: the ability to identify the programs, services, and funding they wanted to assume control over and administer through contracts.<sup>122</sup>

### *3. An Overview of Self-Determination Contracts Under Title I*

The intent of the contract theory was to allow tribes to build the capacity to better perform essential governmental functions, as well as to improve the programs by making them more responsive to local tribal needs. For example, tribes operating a healthcare clinic through a self-determination contract have more local control, knowledge of need, and flexibility to better serve the healthcare needs of tribal members. Programs under local tribal administration are more effective than those run by federal agencies headquartered many miles away, and at the same time develop leadership skills and administrative capacity.<sup>123</sup>

Since the Act's passage in 1975, Title I contracts have provided one of the primary mechanisms for Indian tribes to exercise their self-

119. 25 U.S.C. § 450(a)-(b).

120. See H.R. REP. NO. 93-1600, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7776 (describing purpose of bill that became ISDEAA).

121. See generally H.R. REP. NO. 93-1600; Dean, *supra* note 110 (discussing the differences between two legislative proposals in the Senate).

122. The Act allocated contracts determined by the Indian Priority System (IPS), non-banded funds, and congressional appropriations. Johnson & Hamilton, *supra* note 78, at 1262-63. This was an important victory for the tribes. *Id.* In the early 1990s, the IPS was replaced by the Tribal Budget System, which included the Tribal Priority Allocation (TPA) to improve the process of allocating funds to tribes. *Id.* at 1264 (citing U.S. DEP'T OF THE INTERIOR, THE INTERIOR BUDGET IN BRIEF FOR F.Y. 1996, at 128 (1995)).

123. See generally 25 U.S.C. § 450(a)(1).

determination rights by helping tribes to build their governmental capacities to serve the local needs of tribal members.<sup>124</sup> However, full implementation of the principles embodied in Title I has been very difficult to achieve because both federal departments responsible for implementing the Act—the DHHS and the DOI—proved, at best, to be reluctant partners of tribes. Federal bureaucrats repeatedly used their discretion to thwart full implementation of Congress's intent, leading to a series of amendments.<sup>125</sup>

As first enacted, section 106(a) of Public Law 93-638 provided that contracts with tribal organizations were in accordance with federal contracting laws and regulations, although the Secretary could waive provisions in these laws and regulations which he determined were not appropriate.<sup>126</sup> Thus, self-determination contracts were essentially procurement contracts administered by federal contracting officers. The Act has since been amended to provide that federal contracting laws and regulations do not apply to self-determination contracts unless such laws expressly apply to Indian tribes,<sup>127</sup> and to add a statutory model agreement.<sup>128</sup>

Also, as first enacted, section 103(c) of Public Law 93-638 authorized the Secretary to require any tribe requesting a contract to obtain adequate liability insurance to protect the federal government. Congress subsequently brought tribal contractors, compactors, and their employees within the coverage of the Federal Tort Claims Act (FTCA).<sup>129</sup> Since tribal contractors stepped into the shoes of the federal agencies, Congress reasoned, it would not be fair to tribes or others to allow the agencies to use the self-determination process as means to divest themselves of potential liability.<sup>130</sup>

Title I gives all federally recognized Indian tribes and tribal organizations, as defined in the Act,<sup>131</sup> the right to contract for programs, functions, services, and activities—along with associated funds and

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124. Johnson & Hamilton, *supra* note 78, at 1263.

125. In 1987 the Senate condemned the “agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law.” S. REP. NO. 100-274, at 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2656.

126. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 106(a), 88 Stat. 2203, 2210.

127. 25 U.S.C. § 450j(a)(1).

128. *Id.* § 450l(c).

129. *Id.* § 450f(d); Act of Nov. 5, 1990, Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959), *as amended by* Act of Nov. 11, 1993, Pub. L. No. 103-138, § 308, 107 Stat. 1379, 1416.

130. S. REP. NO. 100-274, at 27-28, *reprinted in* 1988 U.S.C.C.A.N. at 2646-47.

131. 25 U.S.C. § 450b(e), (*l*).



responsibilities—provided to Indians and Alaska Natives by the DOI or DHHS.<sup>132</sup> Once a contract proposal has been submitted, the statute imposes a strict process and timeline to review the proposal.<sup>133</sup> Section 102 of Title I of the Act requires the Secretaries to enter into a contract, upon tribal request, unless one of five narrowly defined statutory exceptions applies.<sup>134</sup>

This section also prescribes the appeal rights for participating tribes.<sup>135</sup> If the Secretary declines a tribe's contract proposal, the Secretary must help tribes overcome the obstacles that prompted the refusal and afford the tribe a right to a hearing on the record.<sup>136</sup> The Act also authorizes each Secretary to award grants to help participating tribes develop the capability to operate programs that they might eventually contract for under section 102.<sup>137</sup> Once a proposal has been approved, the agencies are required to negotiate and award a contract and annual funding agreement (AFA)<sup>138</sup> with the Indian tribe or tribal organization within a certain timeframe<sup>139</sup> calculated in accordance with the Act.<sup>140</sup>

Title I contracts are unique government-to-government agreements that differ significantly from other contracts, grants, or cooperative agreements

132. *Id.* § 450f(a)(1).

133. *Id.* § 450f(a)(2).

134. *Id.* The Secretary may only decline to enter into a proposed contract if:

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

*Id.*

135. *Id.* § 450f(b).

136. *Id.*

137. *See id.* § 450(f)(b)(2).

138. *See id.* § 450l. The Act requires that two agreements be negotiated: a contract and an AFA. The contract sets forth the general terms of the government-to-government relationship that carry forward from year to year, while the AFA identifies on a yearly basis the funds and responsibilities that the federal government transfers to the tribal contractor.

*Id.*

139. *Id.* § 450f(a)(2).

140. *See id.* § 450j-1.

that the United States negotiates with other parties.<sup>141</sup> Section 108 of the Act sets forth a model agreement containing provisions that must be included in all contracts.<sup>142</sup> Congress included these mandatory provisions in an attempt to strike a balance between promoting tribal self-determination while maintaining federal oversight over tribal contracts.<sup>143</sup> In addition to the mandatory provisions, the contract can include any other provisions agreed to by both parties.<sup>144</sup>

The model contract set forth in the Act protects the unique relationship between tribes and the United States by ensuring that tribal sovereign immunity is not affected by Title I contracts, and that the United States' trust responsibility towards tribes is not terminated, waived, reduced, or otherwise affected.<sup>145</sup> Title I contracts must include a provision that requires tribes that have assumed responsibilities over trust resources of individual Indians to provide the same level of service that the United States would have provided.<sup>146</sup>

Although the DOI and DHHS have general oversight over how tribes carry out their responsibilities under Title I contracts, the Act limits agency discretion to impose other burdensome requirements. For example, the only reporting requirement that participating tribes are required to provide the agencies is an annual audit.<sup>147</sup> In limited circumstances, the DOI and DHHS have the right to take unilateral steps to ensure contractors are carrying out agreed-upon responsibilities. For example, the agencies have the right to reassume any contracted program if there is a violation of rights or endangerment to the health, safety, or welfare of any person, or if a contractor mismanages trust funds or lands or interests in such lands.<sup>148</sup> The agencies also have the right to delay, suspend, or withhold contract payments for a period of 30 days if a determination is made that the

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141. *See id.* § 450j. The Act specifies that no “Federal contracting or cooperative agreement laws (including regulations)” apply to Title I contracts “except to the extent that such laws expressly apply to Indian tribes.” *Id.* § 450 j(a)(1).

142. *Id.* § 450l.

143. *See* S. REP. NO. 103-374, at 11-12 (1994) (discussing intent of model contract reporting provision “to eliminate excessive and burdensome reporting requirements”).

144. 25 U.S.C. § 450l(a)(2).

145. *See id.* § 450n; *see also id.* § 450l(c)(d)(1).

146. *Id.* § 450l(c) (4).

147. *See id.* § 450c(f) note (referencing 31 U.S.C. § 7501 et seq.). However, the agencies may seek to require additional reports if justified and required under the criteria set forth in the statute. *Id.* § 450c(f)(2).

148. *Id.* § 450m; Contracts Under the Indian Self-Determination and Assistance Act, 25 C.F.R. §§ 900.240–.256 (2014).

contractor has failed to carry out the contract without good cause.<sup>149</sup> Where unilateral actions are taken, contractors are entitled to appeal rights.<sup>150</sup>

Contracting tribes also have the right to propose a redesign of contracted programs after they are awarded, to better suit unanticipated local needs.<sup>151</sup> The statute requires the agencies to evaluate redesign proposals under the same criteria as new contract proposals.<sup>152</sup> Tribes also have the right to reallocate awarded funds, provided the reallocation, “would not have an adverse effect on the performance of the contract.”<sup>153</sup>

Tribes are treated as federal agencies for certain purposes when performing responsibilities under a Title I contract including coverage under the FTCA,<sup>154</sup> the right to access excess and surplus federal property,<sup>155</sup> and the right to access federal sources of supply.<sup>156</sup> These provisions reflect the fact that Indian tribes and tribal organizations step into the shoes of the federal government when they assume program responsibilities under the ISDEAA.<sup>157</sup> In contrast, some Title I contract provisions reflect the distinction between Indian tribes and the United States. For example, participating tribes have the right to impose tribal employment preference laws when hiring personnel to carry out contracted responsibilities.<sup>158</sup> Tribal contractors are also exempt from the Davis-Bacon Act, which requires most federal contractors to pay the locally prevailing wage rate as determined by the Department of Labor.<sup>159</sup>

The Supreme Court has recognized that Title I contracts are as legally binding as any other contract: “Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts).”<sup>160</sup> This does not mean that ISDEAA contracts *are* ordinary procurement contracts, as Congress made clear in exempting ISDEAA agreements from the

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149. 25 U.S.C. § 450j-1(*l*).

150. *Id.* §§ 450m, 450j-1(*f*)(2); 25 C.F.R. §§ 900.170–176.

151. 25 U.S.C. § 450j(*j*).

152. *Id.*

153. *Id.* § 450j-1(*o*).

154. *Id.* § 450f(*c*); 25 C.F.R. §§ 900.180–210.

155. 25 U.S.C. § 450j(*f*); 25 C.F.R. §§ 900.85–106.

156. 25 U.S.C. § 450j(*f*).

157. *See* S. REP. NO. 100-274, at 9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628 (“It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts.”)

158. 25 U.S.C. § 450e(*c*).

159. *Id.* § 450e(*a*).

160. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 639 (2005) (emphasis added).

Federal Acquisition Regulations.<sup>161</sup> Title I contracts are unique government-to-government agreements in which “[t]he federal government’s trust responsibility tempers all of the ordinary contract rules . . . .”<sup>162</sup>

Title I contract provisions thus reflect a delicate balance between competing sets of interests: the interest of tribes to pursue self-determination goals while ensuring that the United States’ trust responsibility remains intact, and the interest of the United States to pursue a policy of tribal self-determination while retaining some control and oversight over how responsibilities are carried out by tribal contractors.<sup>163</sup>

#### 4. Title I Rulemaking

The process for developing regulations to fully flesh out and implement the Act was a confusing and complex undertaking. As enacted in 1975, the Act provided only minimal legal authority for the Secretary of the Interior to develop rules.<sup>164</sup> The first set of Title I regulations were rejected by the Tribes as unworkable; the BIA and IHS retained far too much control over tribal contracts and provision of services.<sup>165</sup> Ironically, an early report by the Government Accounting Office (GAO) concluded just the opposite—that the United States retained inadequate controls over contracts and grants

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161. See 25 U.S.C. § 450j(a)(1) (2012) (stating that contracts “shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes”); S. REP. NO. 100-274, at 29, reprinted in 1988 U.S.C.C.A.N. at 2648 (stating the intent of amendment to § 450j(a) is that “the system of federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations shall not apply to Indian self-determination contracts”); see also 25 U.S.C. § 450b(j) (providing, in definition of “self-determination contract,” that “no contract . . . shall be construed to be a procurement contract . . . .”); S. REP. NO. 100-274, at 18, reprinted in 1988 U.S.C.C.A.N. at 2637 (stating that the definition of “self-determination contract” makes clear that “the system of federal acquisition regulations . . . should not apply to self-determination contracts”); *Cherokee Nation*, 543 U.S. at 640 (recognizing that exemption from FAR is designed to reduce bureaucratic burdens on tribes).

162. S. REP. NO. 100-274, at 36, reprinted in 1988 U.S.C.C.A.N. at 2655.

163. Compare 25 U.S.C. § 450a (declaring policy of tribal self-determination) with 25 U.S.C. § 450c (imposing reporting and audit requirements on tribal contractors).

164. See 25 U.S.C. § 450k.

165. See Indian Self-Determination and Education Assistance Act Amendments, 61 Fed. Reg. 32,482, 32,482 (June 24, 1996) (codified at 25 C.F.R. pt. 900 (2012)) (describing “extremely critical” reaction of tribes to first draft of rules, completed without tribal input).

awarded under the Act.<sup>166</sup> These disparate responses illustrate the delicate balance attempted by the Act.

The 1994 Amendments made several important changes to Title I<sup>167</sup> in response to earlier objections by participating tribes. Based on tribal and Congressional reactions to the proposed regulations published in 1994, the 1994 Amendments added section 107(d)(2) to Title I of the Act.<sup>168</sup> This section requires that the rulemaking process follow the guidance of the Negotiated Rulemaking Act,<sup>169</sup> including requiring tribal representation in the drafting and promulgation of the regulations.<sup>170</sup> Any future revisions to the regulations must also follow the guidance of the Negotiated Rulemaking Act.<sup>171</sup>

After extensive negotiations, the tribal and federal teams reached consensus on the language of the vast majority of the regulations, with the DOI and DHHS Secretaries deciding four non-consensus issues.<sup>172</sup> The final rule implementing Title I regulations became effective on August 23, 1996.<sup>173</sup>

#### *B. Title II: Education Assistance*

Since the early days of the republic, the federal government has assumed responsibility for educating Indians as part of its program of “civilizing” tribes and their citizens.<sup>174</sup> These Indian schools were infamous for

166. U.S. GOV'T ACCOUNTING OFFICE, GAO-116394, STILL NO PROGRESS IN IMPLEMENTING CONTROLS OVER CONTRACTS AND GRANTS WITH INDIANS (1981). The report criticized the BIA for not taking action recommended by GAO in 1978 to improve controls over grants and contracts. The report concluded that contracts and grants should include adequate criteria for measuring tribal performance, be submitted and approved before their starting dates, and should be adequately supervised. *Id.*

167. Indian Self-Determination and Education Assistance Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. §§ 458aa–hh (2012)); see discussion *infra* Part II.D.

168. 25 U.S.C. § 450k.

169. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–570 (2012)).

170. 25 U.S.C. § 450k(d).

171. *Id.* § 450k.

172. See Indian Self-Determination and Education Assistance Act Amendments, 61 Fed. Reg. 32,482, 32,483 (June 24, 1996) (codified at 25 C.F.R. pt. 900 (2012)).

173. *Id.* at 32,482.

174. See, e.g., Civilization Fund Act (Act of Mar. 3, 1819), ch. 85, 3 Stat. 516, 516 (establishing permanent “civilization fund” to provide “against the further decline and final extinction of the Indian tribes . . . and for introducing among them the habits and arts of civilization”).

removing young children from their homes, cutting their hair, punishing them for speaking their native languages, and generally attempting to “kill the Indian . . . and save the man.”<sup>175</sup> Most of the early schools were local mission schools, but by the late nineteenth century the focus of Indian education had shifted to federal boarding schools so that students could be more completely removed from their home cultures and immersed in “civilization.”<sup>176</sup> Congress continues to recognize the federal trust responsibility for the education of Native peoples, though the explicit assimilationist goal of Indian education has been abandoned.<sup>177</sup>

In the 1960s, some tribes began to contract with the federal government to manage BIA schools.<sup>178</sup> Passage of the ISDEAA in 1975 accelerated the trend toward self-determination in education, as did the Tribally Controlled Schools Act of 1988 (TCSA).<sup>179</sup> As Congress declared in the ISDEAA,

a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.<sup>180</sup>

Most of these services are now provided by tribes through ISDEAA contracts and TCSA grants with the Bureau of Indian Education (BIE)

175. Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892), in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880-1900*, at 261 (Francis Paul Prucha ed., 1973). Captain Pratt was the founder of the Carlisle Indian School in Pennsylvania.

176. COHEN, *supra* note 19, at 82. One court recently summarized “the legacy of the federal government’s involvement in Indian education” as follows:

The legacy is characterized by inadequate resource allocation, systematic exclusion of Indian parents and communities from any role in the education of their children, and a one-way transmission of white American education to the Indian child as a means to remove the child from his aboriginal culture and assimilate him into the white culture.

*Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1066 (D.S.D. 2007).

177. *See, e.g.*, 25 U.S.C. § 2000 (2012) (declaring trust responsibility to fund BIA school system); *id.* § 2501(b) (affirming trust responsibility for education, but disavowing “further perpetuation of Federal bureaucratic domination of [education] programs”).

178. Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 507–12 (1973).

179. Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 (codified at 25 U.S.C. §§ 2501-2511 (2012)).

180. 25 U.S.C. § 450a(c) (2012).

within the DOI. As of September 2013, tribes and tribal organizations directly managed 126 of the 183 schools (69%) in the BIE system.<sup>181</sup> Tribal colleges and universities are almost all managed by tribes.<sup>182</sup> As contemplated by the ISDEAA, tribes have taken control of the educational process that will develop future leaders.

Tribes have demonstrated their capacity to offer more dynamic academic programs than BIE has offered, with an emphasis on cultural education through tribally-controlled schools. Yet, many obstacles still hinder educational performance and have limited the positive impacts of the ISDEAA in the Indian education arena. Among the challenges faced by tribally-controlled education programs are (1) chronic underfunding of Indian education programs and administrative support costs; (2) inadequate investment to construct, reconstruct, and properly maintain tribal school facilities; and (3) repeated BIE reorganizations and realignments that have resulted in increasingly centralized BIE bureaucracy that has not fully embraced the ISDEAA objective of increasing tribal control over fundamental education policy decisions. Over the past few years, tribes have contested the federal imposition of new, more detailed programmatic requirements, performance assessments, and duplicative and burdensome reporting requirements. A new dialogue with the Joint Department of Interior and Department of Education Study Group on Indian Education seeks to modernize and advance the self-determination framework for Indian education to achieve high performing tribally-controlled schools.

### *C. Title III, Self-Governance, and the 1988 Amendments*

The self-governance legislation in Title III had its roots in the 1975 ISDEAA and agency failure to carry out Congress's intentions in that Act.<sup>183</sup> As discussed above, Title I of the Act enabled participating tribes to enter into contracts with the BIA and the IHS to administer and deliver federal programs to Indian beneficiaries. By 1988, however, the implementation of Title I had revealed significant shortcomings that allowed federal agencies to exercise too much control while thwarting tribes' ability to adapt programs to local needs. In 1988, a handful of tribes, exasperated with the DOI's and the DHHS's failures to fully implement Congress's self-determination policy in Title I, persuaded Congress to address these problems in two ways: by significantly strengthening Title I

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181. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-774, INDIAN AFFAIRS: BETTER MANAGEMENT AND ACCOUNTABILITY NEEDED TO IMPROVE INDIAN EDUCATION 3-4 (2013).

182. *Id.* at 3.

183. 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012).

and by introducing the Self-Governance Demonstration Project under Title III.<sup>184</sup>

In crafting the 1988 Amendments, Congress expressed its outrage at the agencies' implementation of the ISDEAA. While recognizing that "[t]he federal policy of Indian self-determination is one of the most progressive federal Indian policies in our Nation's history,"<sup>185</sup> the Senate decried the "agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law."<sup>186</sup> For example, the Senate cited the growth of a "contract monitoring bureaucracy,"<sup>187</sup> "unduly burdensome reporting requirements,"<sup>188</sup> the failure of the agencies to fully fund indirect costs,<sup>189</sup> end-runs around the statutory declination process,<sup>190</sup> and other agency misbehavior. To address these issues, Congress made several key amendments to Title I, including the addition of a new section 106 to clarify and protect contract funding levels<sup>191</sup> and a new section 110 allowing contractors to seek injunctive relief and damages in federal district courts.<sup>192</sup>

The 1988 Amendments not only shored up Title I, however. They also introduced a new phase in the legal evolution toward tribal self-governance: the Tribal Self-Governance Demonstration Project under Title III.<sup>193</sup> "Self-governance" refers both to the broad principle that tribes have the right to govern themselves, and to particular statutory rights enabling them to do so through the use of federal program funding. As a statutory initiative, self-governance (1) expands the types of programs and responsibilities that participating tribes can take over; (2) places greater emphasis on

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184. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2289 (1988), *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (2000) (codified at 25 U.S.C. §§ 458aaa-458aaa-18 (2012)).

185. S. REP. NO. 100-274, at 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2621.

186. *Id.* at 37, *reprinted in* 1988 U.S.C.C.A.N. at 2656.

187. *Id.* at 7, *reprinted in* 1988 U.S.C.C.A.N. at 2626.

188. *Id.*

189. *Id.* at 8-12, *reprinted in* 1988 U.S.C.C.A.N. at 2627-31.

190. *Id.* at 24, *reprinted in* 1988 U.S.C.C.A.N. at 2643.

191. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988); S. REP. NO. 100-274, at 30-34, *reprinted in* 1988 U.S.C.C.A.N. at 2649-53.

192. Indian Self-Determination Amendments of 1987, § 206, 102 Stat. at 2294-95; S. REP. NO. 100-274, at 34-36, *reprinted in* 1988 U.S.C.C.A.N. at 2653-55.

193. Indian Self-Determination Amendments of 1987, § 209, 102 Stat. at 2296-98 (codified at 25 U.S.C. § 450f note (1988)), *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 10, 114 Stat. 711, 734.



minimizing oversight by federal agencies; and (3) maximizes flexibility for tribes to redesign programs and reallocate resources in their agreements. The origins of Title III illustrate the interplay of the self-governance philosophy and its legal mechanism in the ISDEAA.

*1. Bureaucratic Problems, the Alliance of American Indian Leaders, and the Constitution*

One reason self-governance did not occur until the 1988 Amendments is the bureaucratic stranglehold and monopoly that the federal agencies retained over tribal administration of self-determination contracts under Title I.<sup>194</sup> Another reason is the lack of federal funding for tribal contractors' administrative costs, a problem commonly known as contract support cost shortfall.<sup>195</sup> These bureaucratic problems, among others, spurred tribal leaders to pursue congressional action that eventually led to Title III.

In 1986, Joe DeLaCruz, then President of the Quinault Nation, along with leaders of nine other tribes, formed the Alliance of American Indian Leaders (the Alliance).<sup>196</sup> In 1987, the Alliance developed and submitted a proposal to the United States House Interior and Related Agencies Subcommittee on Appropriations. The proposal called on the United States Congress to adopt concurrent resolutions that acknowledged the role that Indian tribes played in the formulation of the United States Constitution, and that formally recognized the principle of government-to-government relations.<sup>197</sup> Then, in the fall of 1987, the *Arizona Republic* published a series of stories that would serve as a catalyst to forever change the

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194. See S. REP. NO. 103-374, at 2 (1994) (describing 1988 amendments as response to “excessive bureaucracy and unnecessary contract requirements”); see also Johnson & Hamilton, *supra* note 78, at 1264–66 (describing the “byzantine bureaucratic burden on contracting tribes” under Title I).

195. See S. REP. NO. 100-274, at 8, *reprinted in* 1988 U.S.C.C.A.N. at 2627 (“Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.”); see also. S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L. REV. 349 (2000).

196. The Alliance included the following tribal chairmen: Joe DeLaCruz, Quinault Nation; Wendell Chino, Mescalero Apache Tribe; Roger Jordain, Red Lake Band of Chippewa; Art Gambel, Mille Lacs Band of Ojibwe; Larry Kinley, Lummi Nation; Willy Colgrover, Hoopa Valley Tribe; Ed Landerman, Rosebud Sioux; Richard Realbird, Crow Tribe; Ed Thomas, Tlingit and Haida Central Council; and Mickey Pablo, Confederated Salish & Kootenai. LUMMI SELF-GOVERNANCE MANUAL, *supra* note 1, at 2.

197. *Id.*

relationship between Indian tribes and the United States.<sup>198</sup> The series dealt with the misuse of funds and corruption within the BIA, which prompted both chambers of Congress to call oversight hearings.<sup>199</sup>

The Alliance met in Washington, D.C. during the same week that the hearing took place and some of the Alliance members attended the hearing. Assistant Secretary for Indian Affairs Ross Swimmer proposed legislation which would have allowed the BIA to transfer to any Indian tribe, upon the tribe's request, its share of all BIA resources.<sup>200</sup> As proposed by Assistant Secretary Swimmer, the legislation would have contained a provision absolving the United States of its trust responsibilities to any tribes that accepted the transfer.<sup>201</sup> The Alliance balked at the proposal and urged Chairman Yates to reach a compromise through a demonstration project that maintained self-governance without abolishing the United States' trust responsibility.

## 2. *The Demonstration Project*

Chairman Yates liked the idea of a demonstration project, and in 1988 Congress amended the ISDEAA to authorize the Indian Self-Governance Demonstration Project for five years.<sup>202</sup> Nine of the ten tribes participating in the Alliance were the first tribes to initiate the self-governance planning process.<sup>203</sup>

The demonstration project authorized a planning grant phase for twenty tribes, which would then go on to negotiate self-governance compacts with the Secretary of the Interior.<sup>204</sup> The hallmark of these agreements was the unprecedented flexibility of tribal contractors to redesign programs and reallocate funding to suit local needs.<sup>205</sup> In effect, these tribes would receive funds in the contractual equivalent of block grants from the Secretary.<sup>206</sup>

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198. Chuck Cook, Mike Masterson & Mark N. Trahan, *Fraud in Indian Country*, ARIZ. REPUBLIC, Oct. 4–11, 1987 (series of thirty articles).

199. Johnson & Hamilton, *supra* note 78, at 1267.

200. *Id.*

201. *Id.* at 1267-68.

202. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 209, 102 Stat. 2289, 2296-98 (codified at 25 U.S.C. § 450f note (1988)), *repealed by* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 10, 114 Stat. 711, 734.

203. LUMMI SELF-GOVERNANCE MANUAL, *supra* note 1, at 8.

204. 25 U.S.C. § 450f note (2012).

205. *Id.* § 303(a)(2).

206. *See* S. REP. NO. 100-274, at 39 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2658 (referring to Title III agreements as “consolidated funding contracts”).

In 1991, Congress extended Title III for an additional three years to make up for BIA delays and amended Title III to include up to thirty tribes in the demonstration project.<sup>207</sup> In addition, Congress authorized a study to include self-governance in the IHS.<sup>208</sup> Congress included the IHS in the Self-Governance Demonstration Project when it passed the Indian Health Amendments of 1992.<sup>209</sup>

Title III is no longer in effect because Congress enacted Title IV in 1994,<sup>210</sup> which created a permanent self-governance program for all bureaus within the DOI, and in 2000, Congress added Title V,<sup>211</sup> which completely repealed the demonstration project. In summary, after the 1994 Amendments Title III applied only to self-governance agreements between participating tribes and the IHS, and the 2000 Amendments eliminated the demonstration project by creating a permanent self-governance program within the DHHS.

Title III's broad reprogramming and reallocation authority were significant breakthroughs for tribal self-governance. The demonstration project was a success because it delicately balanced the interest of tribes to assume full responsibility over all available programs, functions, services, and activities (PFSAs) and funding under the Act, with less federal oversight after the PFSAs were assumed. However, because Title III was a demonstration project, its provisions were very general, providing the agencies with substantial discretion in implementing the statute. As discussed below, the permanent self-governance programs under Titles IV and V are more detailed and place more limits on the discretion of the Secretary of the Interior and the Secretary of Health and Human Services, respectively. Under Title III, the IHS retained the right to decide which tribes and how many tribes were eligible to participate in the demonstration project.<sup>212</sup> Once the IHS determined that a tribe was eligible, the IHS held the right to decide whether it would sign an annual funding agreement with

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207. Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-184, 105 Stat. 1278 (1991) (repealed 2000).

208. *Id.* § 6(d), 105 Stat. at 1278-79.

209. Indian Health Amendments of 1992, Pub. L. No. 102-573, 106 Stat. 4526 (repealed 2000).

210. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. § 458aa-hh) (2012)); *see* discussion *infra* Part II.D.

211. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa-458aaa-18) (2012)); *see* discussion *infra* Part II.E.

212. 25 U.S.C. § 450f (2012). In contrast, every federally recognized tribe and tribal organization has the right to negotiate a self-determination contract under Title I. *Id.* § 450f(a)(1).

the tribe and what provisions it would include.<sup>213</sup> Even tribal reprogramming and reallocation authority were “subject to the terms of the written agreement,” giving the agencies significant control.<sup>214</sup>

#### *D. Title IV and the 1994 Amendments*

In 1994, Congress significantly amended the ISDEAA by enacting the Tribal Self-Governance Act, also known as the Indian Self-Determination and Education Act Amendments of 1994 (the 1994 Amendments).<sup>215</sup> The Tribal Self-Governance Act represented a “step in the direction of empowerment and away from paternalism . . . replac[ing] a stifling federal bureaucracy with tribal governments focused on choices and responsibility.”<sup>216</sup> The 1994 Amendments revised a number of provisions in Title I and included a new Title IV, which implemented a permanent Tribal Self-Governance Program within the DOI.<sup>217</sup> Title III, which was formerly the Self-Governance Demonstration Project for both the IHS and the DOI, became limited to only IHS programs.

##### *1. Legislative History*

By 1993, both the United States Congress and the tribes that participated in the Title III demonstration project were ready to move forward with legislation to make self-governance a permanent program.<sup>218</sup> The demonstration project was deemed a success, as the Senate Committee noted:

Since 1988, Interior has conducted Self-Governance under demonstration authority. The Self-Governance Demonstration Project has had measurable success. It has achieved the goals it set out to achieve—examining the benefits of allowing Tribes to assume more control and responsibility over [PFSAs]. It has also required [DOI] to enter into bilateral, negotiated agreements governing the transfer of responsibilities and associated funding

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213. *Id.* § 450f.

214. *Id.*

215. Indian Self-Determination Act Amendments of 1994, 108 Stat. 4250. The 1994 Amendments established a permanent tribal self-governance program within the Department of the Interior (DOI), whereby the Bureau of Indian Affairs (BIA), and every other bureau in the DOI that provides services to Indian tribes is authorized to transfer programs to participating tribes and tribal organizations. *Id.*

216. Johnson & Hamilton, *supra* note 78, at 1251.

217. 25 U.S.C. § 458aa.

218. Johnson & Hamilton, *supra* note 78, at 1269.

levels to Tribes and providing for streamlined management processes that remove layer upon layer of bureaucratic regulation and control. These agreements, known as Self-Governance Compacts, are important binding agreements that reflect government-to-government negotiations. Self-Governance encourages Tribal and Federal experimentation and flexibility.<sup>219</sup>

However, the Senate Committee was also troubled “by the continuing refusal of the [DOI] for the past four years to negotiate, on a line-by-line basis with participating [tribes], tribal shares of [BIA] central offices funds and resources despite clear directives to do so.”<sup>220</sup>

Senator John McCain (R-Ariz.) and Representative Bill Richardson (D-N.M.) (then the Chairman of the United States House Subcommittee on Native American Affairs) introduced legislation in the Senate and House, respectively.<sup>221</sup> Senator McCain's bill passed the Senate without a hearing and, in early 1994, the House Subcommittee considered Congressman Richardson's bill, House Bill 4842. At the eleventh hour of the 103rd Congress, Congressman Richardson got House Bill 4842 through the House, and the Senate passed the bill the following day. President Clinton signed the 1994 Amendments into law on October 25, 1994. It is notable that, over the years, legislative initiatives related to self-governance and the development of policies of Tribal Self-Governance have typically enjoyed broad bi-partisan support and relative stability.<sup>222</sup>

## *2. Amendments to Title I*

In the 1994 Amendments, Congress also enacted a number of amendments to Title I, attempting once again to force the DHHS and DOI to implement self-determination as it was originally contemplated in 1975.<sup>223</sup> For example, Congress significantly strengthened the declination

219. S. REP. NO. 103-205, at 5 (1993).

220. *Id.* at 9-10.

221. S. 1618, 103d Cong. (1993); H.R. 3508, 103d Cong. (1993).

222. Cornell & Kalt, *supra* note 6, at 16 (“[T]he survival of the U.S. federal policy of Indian self-determination through self-governance over the last four decades is rooted in a double appeal that it has for both the general electorate and their U.S. Congressional and Executive Branch representatives.”).

223. The Senate Committee was troubled by, among other things, the “excess bureaucracy and unnecessary contract requirements[]” undermining tribal self-determination and -governance and the agencies' failure to promulgate workable regulations. S. REP. NO. 103-374, at 2-3 (1994).

criteria and procedures, restricting the Secretary's ability to deny tribal proposals.<sup>224</sup> The 1994 Amendments also instituted the mandatory "model agreement" in section 108,<sup>225</sup> ensuring uniform inclusion of key contracting rights of tribes.

### 3. Title IV and the Permanent Self-Governance Program in DOI

The Tribal Self-Governance Act of 1994, Title II of the 1994 Amendments, reaffirmed that "the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations[.]"<sup>226</sup> Congress recognized the United States' "special government-to-government relationship with Indian tribes, including the right of tribes to self-governance."<sup>227</sup> Congress sought to enhance tribal self-governance by reducing federal bureaucratic control without abdicating the trust responsibility.<sup>228</sup>

Title IV marked a break with Title I in several important respects. First, a tribe has to establish eligibility by demonstrating financial stability and financial management capability for the previous three fiscal years and completing a planning phase.<sup>229</sup> The tribe must then initiate negotiations for a self-governance compact and annual funding agreement (AFA) with the Secretary of the Interior.<sup>230</sup> A self-governance compact is an executed document that affirms the government-to-government relationship between a self-governance tribe and the United States.<sup>231</sup> A compact differs from an AFA in various ways, including that parts of the compact apply to all bureaus within the DOI, rather than a single bureau, and that it is generally

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224. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 102(6), 108 Stat. 4250, 4251-52 (amending section 102(a) of the ISDEAA) (codified at 25 U.S.C. § 450f(a) (2012)).

225. *Id.* § 103, 108 Stat. at 4260-68 (establishing new section 108 of the ISDEAA, 25 U.S.C. § 450l (2012)).

226. *Id.* § 202(1), 108 Stat. at 4271.

227. *Id.* § 202(2), 108 Stat. at 4271.

228. *Id.* §§ 202(3)-(4), 108 Stat. at 4271; *id.* § 203(4), 108 Stat. at 4271.

229. 25 U.S.C. § 458bb(c), (d) (2012).

230. *Id.* § 458cc. Grants are available for tribes to complete the planning and negotiation phases. *See* 25 C.F.R. pt. 1000, subpart C (2014) (regulating section 402(d) of ISDEAA regarding planning and negotiation grants); *id.* pt. 1000, subpart D (2000) (regulating financial assistance for planning and negotiating grants for non-BIA programs).

231. 25 C.F.R. § 1000.161.

negotiated to be perpetual in nature, not limited to any specific fiscal year(s).<sup>232</sup>

Title IV does not contain a mandatory model agreement like that set forth in section 108 for Title I contracts. The parties must negotiate all of the terms of compacts and AFAs.<sup>233</sup> As a result, provisions in compacts and AFAs can vary and be less predictable. Because there are no explicit declination appeal procedures in Title IV, tribes appear to have less leverage to negotiate terms.<sup>234</sup> However, section 403(*l*) gives a tribal contractor the right to include in its Title IV compact or AFA any Title I provision it wishes—including the declination procedures of section 102(a), which limit the federal government’s discretion to deny proposals.<sup>235</sup> Funding provided under Title IV agreements must be equal to the amount the contractor would have been eligible to receive under Title I.<sup>236</sup>

Perhaps most significantly, Title IV expanded tribal contractors’ rights to redesign or consolidate PFSAs and to reallocate BIA funding. Title I allows redesign and reallocation, but only if the Secretary is notified and does not decline under section 102.<sup>237</sup> Under Title IV, the Secretary does not have to approve redesign unless it involves a waiver of a regulation.<sup>238</sup> Nor does the Secretary have to approve the reallocation of funds among programs that a tribe administers under a single AFA.<sup>239</sup> The 1994 Amendments also require the Secretary to interpret laws and regulations “in a manner that will facilitate the inclusion” of programs into agreements,<sup>240</sup> similar to the favorable Indian canons of construction.<sup>241</sup>

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232. *Id.* § 1000.161. Appendix A of the Title IV regulations provides a model format for self-governance compacts. *See also* 25 U.S.C. § 458cc(b)(1) (2012).

233. *See* 25 U.S.C. 458cc(b).

234. *But see* Aleutian Pribilof Islands Ass’n v. Kempthorne, 537 F. Supp. 2d 1, 9-10 (D.D.C. 2008) (holding that BIA refusal to apply Title I declination criteria to Title IV proposal was “arbitrary and capricious”).

235. 25 C.F.R. § 1000.84 (2000); *see* 25 U.S.C. § 458cc(*l*)(2012).

236. 25 C.F.R. § 1000.91(a)(1) (2014); *see* 25 U.S.C. § 458cc(g)(3)(2012). The Act makes six sections of Title I mandatorily applicable to Title IV agreements. 25 U.S.C. § 458ff(c)(2012).

237. 25 U.S.C. § 450j(j) (2012).

238. 25 C.F.R. § 1000.88 (2014).

239. *Id.* §§ 1000.103, 1000.145. An exception to this general rule is that reallocation, consolidation, or redesign of non-BIA programs of “special geographic, historical, or cultural significance” are subject to secretarial approval. *Id.* § 1000.144 (2000).

240. 25 U.S.C. § 458cc(i).

241. *Cf. id.* § 450(*c*) (section 1(a)(2) of model agreement) (“Each provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of

#### 4. *Extension of Self-Governance Beyond BIA to Other DOI Programs*

The 1994 Amendments offered not only greater program flexibility and less federal oversight, but also an expanded scope of contractibility. The Secretary of the Interior is required to annually publish in the Federal Register a list of the non-BIA programs that are available for tribal operation, and set programmatic targets for the number of signed agreements each year in order “to encourage bureaus of the Department to assure that a significant portion of such [PFSAs] are actually included” in self-governance agreements.<sup>242</sup> This provision is an important victory for participating self-governance tribes because of the prospect of assuming control of programs on the vast public lands that overlap or adjoin Indian lands. Title IV authorizes non-BIA agencies to enter into agreements with requesting tribes to transfer control of these lands, which were historically under tribal control.<sup>243</sup>

Considering the vast amounts of formerly tribal lands administered by non-BIA agencies within Interior, however, progress in developing Title IV agreements with those agencies so far has been exceedingly slow. As of 2007, one researcher counted a total of only eighteen such agreements: one with the Bureau of Land Management, seven with the Bureau of Reclamation, two with the Fish and Wildlife Service, five with the National Park Service, and three with the Office of the Special Trustee for American Indians.<sup>244</sup> The problem has been that the Department has interpreted non-BIA contracting provisions narrowly to leave most tribal proposals to the discretion of the respective bureau.<sup>245</sup>

As interpreted by the DOI—and so far, by the courts as well—there are two distinct vehicles for tribes to assume non-BIA programs: mandatory inclusion under section 403(b)(2) and discretionary inclusion under section 403(c).<sup>246</sup> Section 403(b)(2) states that funding agreements may include PFSAs administered by the DOI, “other than through the Bureau of Indian

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the Contractor . . . .”); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (stating that statutes for the benefit of Indians to be liberally interpreted in favor of tribes).

242. 25 U.S.C. § 458ee(c)(2).

243. *See id.* § 458cc(c) (authorizing inclusion in funding agreements of Interior programs that “are of special geographic, historical, or cultural significance to the participating Indian tribe”).

244. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 530 tbl. 2 (2007).

245. *Id.* at 477-78.

246. 25 U.S.C. § 458cc(b)(2); *id.* § 458cc(c).



Affairs, that are otherwise available to Indian tribes or Indians[.]”<sup>247</sup> Programs are “otherwise available,” in the Department's interpretation, if they would be eligible to contract under Title I.<sup>248</sup> This means that they must be programs “for the benefit of Indians because of their status as Indians” under section 102.<sup>249</sup> Such programs must be included in Title IV agreements upon tribal request.

Non-BIA programs that are not specifically targeted to Indians may still be included in Title IV agreements under the discretionary authority in section 403(c), which allows inclusion of PFSAs “administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”<sup>250</sup> These programs, while benefiting a wider constituency than Indians alone, may still be awarded on a non-competitive basis in a Title IV agreement *at the bureau's discretion*.<sup>251</sup>

The Ninth Circuit upheld the DOI's two-tiered implementation of non-BIA compacting authority in *Hoopa Valley Indian Tribe v. Ryan*.<sup>252</sup> The Hoopa Valley Tribe sought to contract as a matter of right, first under Title I and then under Title IV, various PFSAs carried out by the Bureau of Reclamation (BOR) under the Trinity River Basin Fish and Wildlife Management Act,<sup>253</sup> as amended.<sup>254</sup> The BOR ultimately determined that two of the proposed PFSAs fell within the mandatory contracting authority, but the other twenty-six did not, because they benefited all stakeholders in the Trinity River and its fisheries, not the Tribe alone.<sup>255</sup> The district court upheld BOR's decision and the Ninth Circuit affirmed. The Trinity River restoration program was not “specifically targeted” to Indians, but served

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247. *Id.* § 458cc(b)(2).

248. *See* 25 C.F.R. § 1000.123–124 (2014); *see also* 65 Fed. Reg. 78,688, 78,695 (Dec. 15, 2000) (explaining DOI interpretation as well as tribal position that programs “otherwise available” include all PFSAs aside from inherent federal functions).

249. 25 U.S.C. § 450f(a)(1)(E) (2012) (directing Secretary to approve, upon request, proposal to assume “programs . . . for the benefit of Indians because of their status as Indians without regard to the agency or office of the . . . Department of the Interior within which it is performed”).

250. *Id.* § 458cc(c); *see* 25 C.F.R. § 1000.126 (2014) (defining “special geographic, historical or cultural” significance).

251. 25 C.F.R. § 1000.128.

252. *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 993 (9th Cir. 2005).

253. Act of Oct. 24, 1984, Pub. L. No. 98-541, 98 Stat. 2721.

254. *Hoopa Tribe*, 415 F.3d at 989.

255. *Id.*

local, state, and commercial interests.<sup>256</sup> Therefore, the BOR restoration projects (aside from the two identified by the BOR) were not “for the benefit of Indians because of their status as Indians,” and thus were not eligible for mandatory contracting under either Title I or Title IV.<sup>257</sup> While the Tribe was free to negotiate with the BOR to assume these other nineteen activities under the discretionary 403(c) provision for programs of “special geographic, historical, or cultural significance” to the Tribe, the BOR was not required to assent.<sup>258</sup>

This narrow interpretation of Title IV non-BIA contracting authority, which effectively gives the non-BIA bureaus unchecked discretion to deny tribal proposals, is a significant problem to which we will return in Part IV.C *infra*. Non-BIA bureaus within the Department tend to see their constituency as national, not tribal, leading them to view Title IV “not as a step in a long path toward Indian self-determination, but as an aberration in public land policy and an intrusion into public land management.”<sup>259</sup> These non-BIA bureaus within the DOI will—as the *Hoopa Tribe* case illustrates—defend their program and funding oversight with costly litigation based upon their broad discretion, thus creating a chilling effect for tribes that would even consider attempting to negotiate a Title IV agreement with that agency.<sup>260</sup> In order to carry out its stated goal of expanding tribal self-governance throughout Interior, Congress should strengthen Title IV's contracting authority for non-BIA programs.

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256. *Id.* at 991.

257. *Id.* at 992 (citing 25 U.S.C. § 450f(a)(1)(E) (2012)).

258. *Id.* at 991 (relying heavily on its earlier decision in *Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1138 (9th Cir. 2003) (en banc)). In the earlier decision, the Navajo Nation proposed a mandatory contract to administer the Temporary Assistance to Needy Families (TANF) program, but the court held that TANF “is not a federal program designed specifically to benefit Indians” under section 102(a)(1)(E), but rather one “that collaterally benefit[s] Indians as a part of the broader population.” *Navajo Nation*, 325 F.3d at 1138.

259. King, *supra* note 244, at 481 (referring to the National Park Service, but in our experience the description could apply just as well to the other land management agencies within DOI).

260. See *Hearing on S. 1715 and S. 1696 Before the S. Comm. on Indian Affairs*, 108th Cong. 113-15 (2004) (testimony of Ben Stevens, Council of Athabascan Tribal Governments (CATG) describing difficulties negotiating CATG's agreement with U.S. Fish & Wildlife Service under current Title IV and advocating for amendments to facilitate agreements between tribes and non-BIA agencies in DOI).

*E. Title V and the 2000 Amendments*

The Tribal Self-Governance Amendments of 2000<sup>261</sup> made the self-governance demonstration project in Title III of the Act a permanent program within the DHHS. The 2000 Amendments repealed Title III and enacted two new titles, V and VI.<sup>262</sup> Title V established a permanent self-governance program within the DHHS and Title VI authorized a study of future inclusion of non-IHS agencies in the DHHS Self-Governance Program.

*1. Legislative History*

Tribal efforts to seek the enactment of permanent self-governance legislation on the DHHS side began in 1996 at the fall Self-Governance Conference in Phoenix, Arizona. Tribal leaders and technical representatives, in consultation with tribes, worked on drafting a bill that tribes around the country could support. In June 1997, after the tribal draft was completed, Representatives George Miller (D-Cal.) and Don Young (R-Alaska) co-sponsored the bill's introduction as House Bill 1833 in the United States House.<sup>263</sup> On October 5, 1998, House Bill 1833 passed the House. Following a hearing in the Senate Committee on Indian Affairs (SCIA), however, the bill was not scheduled for Senate floor action prior to the adjournment of Congress.

In the next session, Representatives Miller and Young introduced House Bill 1167 on March 17, 1999, which included all of the provisions that had been worked out the year before. House Bill 1167 passed the House on November 17, 1999. A Senate version of the bill, Senate Bill 979, was introduced by Senators Ben Nighthorse Campbell (R-Colo.) and McCain on May 6, 1999.

The SCIA held a hearing on the bill on July 28, 1999, during which Administration and tribal witnesses testified in strong support of the bill.<sup>264</sup> On April 4, 2000, the Senate agreed to substitute language in Senate Bill 979 as proposed by the SCIA, incorporated that text into House Bill 1167 in lieu of the House-passed language, and then passed the amended House Bill 1167. From early April until early July, tribal representatives, SCIA staff, the House Resources Committee, the DHHS, and other administration

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261. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa through 458aaa-18).

262. *Id.* §§ 4-5, 10, 114 Stat. at 713-32, 734.

263. No similar bill was introduced in the Senate.

264. *Hearing on S. 979 Before the S. Comm. on Indian Affairs*, 106th Cong. (1999).

representatives worked hard to resolve all differences between the two bills. By the middle of July, all of the differences between the two bills were worked out and the compromise bill was enacted by the House and Senate.

On July 24, 2000, the House passed House Bill 562, which amended House Bill 1167 to incorporate all the changes that were agreed to by the SCIA and Resources Committee staff after Senate action in April. The measure was then sent to the Senate, which, under unanimous consent, approved and cleared the bill for the White House on July 27, 2000. On August 18, 2000, the act was signed into law.<sup>265</sup>

## 2. Title V Innovations

Title V retains Title III's broad goal of strengthening tribal sovereignty and the principle of Indian self-determination, while also promoting the federal government's official policy of government-to-government relationships with tribes.<sup>266</sup> The provisions of Title V are much more comprehensive than those in Title III, however, and were drafted to address up front many of the problems that tribal leaders ran into as they sought full implementation of Title IV.<sup>267</sup>

Title V operates in a manner similar to Title IV. Section 503 of the Act permits each existing Title III tribe to participate in the permanent self-governance program under Title V instead.<sup>268</sup> In addition to tribes and tribal consortia transitioning from Title III to Title V, an additional fifty eligible tribes per year are entitled to participate in Title V.<sup>269</sup> Like Title IV, eligible tribes are those that have completed a planning phase, requested entry into the program, and demonstrated financial stability and financial management capability for three years.<sup>270</sup> However, Title V allows that evidence of the absence of uncorrected significant and material audit exceptions in the required annual audit is conclusive evidence of financial stability and capability.<sup>271</sup>

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265. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified at 25 U.S.C. §§ 458aaa-458aaa 18).

266. *Id.* § 3, 114 Stat. at 712 (declaration of policy) (included in 25 U.S.C. § 458aaa notes).

267. *See, e.g., Hearing on S. 979 Before the S. Comm. on Indian Affairs, supra* note 264, at 80 (statement of Henry Cagey, Lummi Indian Nation, describing Title IV as "skeletal legislation" that proposed Title V would fill out).

268. 25 U.S.C. § 458aaa-2(a).

269. *Id.* § 458aaa-2(b)(1).

270. *Id.* § 458aaa-2(c).

271. *Id.* § 458aaa-2(c)(2).

Title V requires the Secretary of the DHHS to negotiate and enter into funding agreements that authorize participating tribes to “plan, conduct, consolidate, administer, and receive full tribal share funding,” including IHS competitive grants for all PFSAs “that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the [PFSA] is performed.”<sup>272</sup> Title I also authorizes contracting for programs that are “for the benefit of Indians,” but the scope of that term has given rise to disagreements between the agency and the tribes.<sup>273</sup> Under section 505(b), the term refers to all IHS programs where “Indian tribes or Indians are primary or significant beneficiaries.”<sup>274</sup>

Like Title IV (and unlike Title I) Title V contains no mandatory model agreement. Nevertheless, both compacts and funding agreements are required, and certain provisions must be included in the agreements. The compact should include general terms of the government-to-government relationship and terms that control from year to year.<sup>275</sup> The funding agreements must set forth terms generally identifying the PFSAs to be performed, budget categories, funds to be provided (including those provided on a recurring basis), time and transfer method of funds, responsibilities of the Secretary, and other provisions as agreed.<sup>276</sup> Either the compact or funding agreement must include provisions relating to health status reports, reassumption of PFSAs, final offers for compacts and funding agreements and rejection thereof, negotiation in good faith, expenditure of secretarial savings, prohibition on the Secretary’s diminishment of the trust responsibility, and which agency officials are responsible for “final agency action.”<sup>277</sup>

Title V significantly strengthens tribal rights in comparison with Title IV in that it includes declination appeal procedures similar to Title I, limiting the Secretary’s discretion not to enter into an agreement.<sup>278</sup> Title V is similar to Title IV in terms of negotiating annual funding agreements, but Title V provides tribes with a right of “final offer” in compact and funding agreement negotiations where the Secretary and participating tribe cannot

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272. *Id.* §§ 458aaa-3(a), 458aaa-4(b)(1).

273. *See, e.g.,* Navajo Nation v. Dep’t of Health & Human Servs., 325 F.3d 1133 (9th Cir. 2003) (en banc).

274. 25 U.S.C. § 458aaa-4(b)(2).

275. *Id.* § 458aaa-3(a), (b).

276. *Id.* § 458aaa-4(d).

277. *See id.* § 458aaa-6(a).

278. *See id.* §§ 458aaa-6(b)-(d).

agree on terms, including funding levels.<sup>279</sup> Tribes must submit the final offer to the Secretary, who has no more than forty-five days (or longer if agreed to by the tribe) to make a determination on the offer.<sup>280</sup> If the Secretary does not properly or timely reject a final offer, it is deemed approved as a matter of law.<sup>281</sup> The Secretary's rejection of a final offer must be contained in a written notification based on a finding that clearly demonstrates, or is supported by controlling legal authority, that (1) the funding level request exceeds what is due, (2) the requested PFSA is an inherent federal function, (3) the tribe cannot carry out the requested PFSA without creating a risk to public health, or (4) the tribe is ineligible to participate in self-governance.<sup>282</sup>

The burden of proof on appeal of rejections of final offers is more stringent than that in the Title I (and Title IV) declination process: The Secretary has “the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer.”<sup>283</sup> Title V also provides that the tribe could instead proceed directly to federal district court pursuant to section 110 of Title I.<sup>284</sup> When the Secretary rejects a final offer, the Secretary must agree to all severable portions that do not justify a rejection and provide the tribe with an option to enter into a partial compact or funding agreement, subject to any additional changes necessary to conform the compact or funding agreement to the severed portions.<sup>285</sup> A tribe that enters into such a partial agreement retains the right to appeal the Secretary's rejection.<sup>286</sup>

Reallocation and redesign authority under Title V is similar to that under Title IV. Section 506(e) authorizes tribes to redesign or consolidate PFSAs and reallocate or redirect funds for such PFSAs “in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served,” so long as such action does not result in denying eligibility for services to groups that would otherwise be eligible

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279. *See id.* § 458aaa-6(b).

280. *Id.*

281. *Id.*

282. *Id.* § 458aaa-6(c)(1)(A); *see id.* § 458aaa(a)(4) (defining “Inherent federal functions” as “those Federal functions which cannot legally be delegated to Indian tribes”).

283. *Id.* § 458aaa-6(d).

284. *Id.* § 458aaa-6(c)(1)(C).

285. *Id.* § 458aaa-6(c)(1)(D).

286. *Id.* § 458aaa-6(c)(2).

for service under federal law.<sup>287</sup> The provision includes no secretarial right to review.

The Title V legislation also made several very important amendments to Title I of the ISDEAA. Section 6 of the 2000 amendments amended section 102(e)(1) of Title I to make clear that in any civil action under section 110 of the Act (federal district court actions), the Secretary has the burden of proof to establish the validity of his grounds for declining a proposal.<sup>288</sup>

Section 7 amended section 105(k) of Title I to provide that tribes and tribal organizations are “deemed an executive agency and part of the Indian Health Service” for federal property acquisition purposes.<sup>289</sup> This change allows tribes and tribal organizations to use the Veterans Administration Prime Vendor as a source of supplies. Section 105(k) was also amended to require the Secretary to enter into acquisition agreements with tribes for goods available to the General Service Administration (GSA) or other federal agencies but previously unavailable to tribes, including acquisition from prime vendors.<sup>290</sup>

Section 8 of the bill added a new section 105(o) to Title I,<sup>291</sup> allowing tribes to designate patient records as federal records in order to make those records eligible for storage in Federal Records Centers. Finally, section 9 of the bill reinstated section 106(c) of Title I,<sup>292</sup> a provision requiring the Secretaries of the DHHS and DOI to prepare and submit to Congress an annual report on the implementation of the ISDEAA.

### 3. *Title VI*

The 2000 ISDEAA amendments also added Title VI, which directed the Secretary of Health and Human Services to study the feasibility of extending the tribal self-governance program to non-IHS agencies within the DHHS.<sup>293</sup> The Secretary was to consult with tribes and other stakeholders and consider a number of factors, including effects on program beneficiaries, statutory or regulatory impediments, likely costs or savings, quality assurance and accountability measures, and others. In short, the study was to determine whether Congress should authorize tribes to

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287. *Id.* § 458aaa-5(e).

288. *Id.* § 450f(e)(1).

289. *Id.* § 450j(k).

290. *Id.*

291. *Id.* § 450j(o).

292. *Id.* §450j-1(c).

293. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 5, 114 Stat. 711, 731–732 (2000).

compact non-IHS PFSAs, just as Title IV allows tribes to compact certain non-BIA PFSAs within the DOI.<sup>294</sup>

Over the next few years, tribal representatives worked with the DHHS to ensure that core self-governance principles—such as redesign and reallocation authority—informed the feasibility study. In its final report to Congress in 2003, the DHHS concluded that it was feasible to extend tribal self-governance within the Department.<sup>295</sup> The report listed eleven programs from three non-IHS agencies that could be included initially<sup>296</sup>:

Administration on Aging

- Grants for Native Americans

Administration for Children and Families

- Tribal Temporary Assistance for Needy Families (TANF)
- Low Income Home Energy Assistance
- Community Services Block Grant
- Child Care and Development Fund
- Native Employment Works
- Head Start
- Child Welfare Services
- Promoting Safe and Stable Families
- Family Violence Prevention: Grants for Battered Women's Shelters

Substance Abuse and Mental Health Services Administration (SAMHSA)

- Targeted Capacity Expansion

Beneficiaries of these programs would likely benefit from their inclusion in the demonstration project, the report concluded. Stakeholders, such as state and local governments, did not oppose the demonstration project.<sup>297</sup> A number of statutes would need to be amended and regulations changed or waived to give tribes the authority to assume—and redesign or consolidate—the PFSAs and ensure program accountability.<sup>298</sup> Based on its

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294. See 25 U.S.C. § 458cc(b)(2).

295. Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., Tribal Self-Governance Demonstration Feasibility Study at 8 (Mar. 2003).

296. *Id.* at 17.

297. *Id.* at 8-9.

298. *Id.* at 18 & app. E.



cost-benefit analysis, the DHHS recommended moving forward with legislation implementing the demonstration project.<sup>299</sup>

While tribes did not agree with every finding of the feasibility study,<sup>300</sup> they strongly supported the idea of the demonstration project. Shortly after the feasibility study was released, tribal representatives crafted draft legislation that became the Tribal Self-Governance Demonstration Project for the DHHS.<sup>301</sup> Introduced by Senators Campbell and Daniel Inouye (D-Haw.) on October 1, 2003, Senate Bill 1696, the Department of Health and Human Services Self-Governance Act of 2004, basically tracked the recommendations of the DHHS feasibility study, while addressing some of the tribal objections to the study.<sup>302</sup>

On May 19, 2004, the Senate Committee on Indian Affairs (SCIA) held a hearing on Senate Bill 1696.<sup>303</sup> Several tribal leaders and representatives

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299. *Id.* at 12-21.

300. For example, tribes objected to the following provisions:

- *Indirect Cost “Caps”*: Eight of the eleven PFSA’s proposed for inclusion in the demonstration project imposed statutory or regulatory limits on administrative costs, making it difficult if not impossible for tribes to fully recover their indirect costs associated with those PFSA’s. The study recommended that the administrative cost caps be maintained, in order to keep down the costs of the demonstration project.
- *Reallocation Ceiling of 20%*: To maintain a baseline level of services for each PFSA, the report recommended a “maintenance of effort” provision that would cap the reprogramming of funding at 20% of the funds for a particular PFSA.
- *Burden of Proof on Appeal*: On appeals of final offers, and on decisions to withdraw regulatory waivers, the report recommended that the burden of proof fall on the tribe, and the Secretary’s decision be reversed only if it is “arbitrary and capricious.” In Title V, by contrast, the burden is on the Secretary to show by clear and convincing evidence that the decision is correct.

301. S. 1996, 108th Cong. (2003).

302. *See* S. REP. 108-412, at 4 (2004) (stating that Committee on Indian Affairs agreed with tribal recommendations following Feasibility Study, and that Committee “largely adopted those recommendations in S. 1696”). For example, Senate Bill 1996 dropped the proposed 20% cap on reallocation; instead, the bill allowed unlimited reallocation of funds so long as their use met allowable cost standards established in Title V. S. 1696, § 2 (setting forth reallocation authority in section 606(a)). For waivers and appeals, the bill placed a heavy burden of proof on the Secretary to demonstrate by “clear and convincing evidence” the validity of the agency decision. *Id.* (setting forth burden of proof in section 606(b)(4)(B)).

303. *Hearing on S. 1715 and S. 1696 Before the S. Comm. on Indian Affairs*, 108th Cong. (2004).

testified in strong support of the bill.<sup>304</sup> Despite an invitation from the Committee, however, no representative from the DHHS appeared at the hearing.<sup>305</sup> This absence was perplexing since the bill largely reflected the agency's own recommendations from just one year before. While some provisions departed from the DHHS recommendations, the provisions were not unlike similar ones already existing in Title V.

On June 16, 2004, the SCIA favorably reported Senate Bill 1696 to the full Senate and recommended passage. In its committee report on November 16, 2004, the SCIA chronicled the success of the self-determination policy and described the extension of this success to other programs beyond the BIA and IHS as “the next evolution in tribal self-governance.”<sup>306</sup> With its goals of minimizing federal bureaucracy and maximizing tribal authority in decision-making, Senate Bill 1696 “continues the steady march of meaningful tribal control of programs affecting their communities.”<sup>307</sup>

Despite the favorable Senate report and strong support from tribes, Senate Bill 1696 died at the end of the session. The Bush administration's lack of support carried forward through a second term, with the DHHS flatly refusing to participate in any discussion of the bill. Under its new Chairman, Senator McCain, the SCIA shifted its legislative priorities, and tribal leadership did the same. As discussed ~~below~~ in Part III.E., it is time for serious and meaningful efforts to revive legislation implementing the Title VI demonstration project.

#### *IV. The Future of Self-Governance*

The success of self-governance under the ISDEAA is reflected in the remarkable growth of its programs over the years. In 1991, only seven tribes entered self-governance agreements with the BIA, for a total amount of slightly over \$27 million.<sup>308</sup> By Fiscal Year (FY) 2013, 254 tribes and tribal consortia entered into 106 funding agreements, operating \$432 million in programs, functions, services and activities.<sup>309</sup> Approximately

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304. S. REP. NO. 108-412, at 7 (2004).

305. *Id.*

306. *Id.* at 2.

307. *Id.* at 4.

308. U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FY 2014, INDIAN AFFAIRS, at IA-TG-4 (n.d.), available at <http://www.bia.gov/cs/groups/xocfo/documents/text/idc1-021730.pdf>.

309. S. REP. NO. 108-412, at 4.

40% of all federally recognized Tribes are self-governance tribes under the DOI program.

On the IHS side, in 1994 only fourteen tribes participated in self-governance agreements totaling \$51 million.<sup>310</sup> In FY 2015, according to the IHS, eighty-nine compacts and 114 funding agreements will transfer about \$1.6 billion—over one-third of the IHS total appropriation—to tribes and tribal organizations.<sup>311</sup> Many of these compacts represent multiple tribes—including the Alaska Tribal Health Compact, which includes virtually all of the 228 tribes in Alaska—so well over half of the 566 federally recognized tribes participate in self-governance either directly or through tribal organizations and consortia.<sup>312</sup>

Despite the resounding success of the self-governance program in improving services and building tribal capacity, the growth documented above has slowed to a crawl in the last few years. Part of this is the normal flattening of the growth curve as the programs mature, but there are several specific obstacles that could, and should, be removed to encourage further participation in tribal self-governance. Among these are Congress's failure to appropriate sufficient funds for contract support costs; continuing agency resistance to the letter and spirit of the self-governance statutes; legislative gaps and other problems in Title IV; and the restriction of self-governance within the DHHS to IHS programs. In addition, opportunities exist to expand self-governance beyond the DOI and DHHS to other federal agencies, such as the Departments of Transportation, Agriculture, Justice, and others.

#### *A. Contract Support Costs*

Carrying out federal programs requires that tribes develop and maintain administrative capacity. As Congress recognizes, that takes money. The ISDEAA commands that “[t]here shall be added to [program funding] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a

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310. Office of Tribal Self-Governance, Indian Health Serv., FY 2007 Self-Governance Data Table (n.d.) (on file with authors).

311. U.S. DEP’T OF HEALTH & HUMAN SERVS., FISCAL YEAR 2015 INDIAN HEALTH SERVICE JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 138 (n.d.), available at <http://www.ihs.gov/budgetformulation/includes/themes/newihsthem/documents/FY2015CongressionalJustification.pdf>.

312. *Id.* at 210 (listing Self-Governance Funded Compacts); see also *Alaska Area, INDIAN HEALTH SERV.*, <http://www.ihs.gov/alaska/> (last visited Feb. 10, 2015) (describing Alaska Native health care system).

contractor to ensure compliance with the terms of the contract and prudent management . . . .”<sup>313</sup> If these administrative or overhead costs are not fully paid, tribes must often re-direct program funds to cover these necessary expenses, thus lowering the level of services provided (or at least funds spent) below what the Secretary would have otherwise provided.<sup>314</sup> This creates a strong disincentive for tribes to contract or compact programs.<sup>315</sup>

In 1987, responding to “the overwhelming administrative problems caused by indirect cost shortfalls,”<sup>316</sup> Congress amended the ISDEAA by adding a new section 106, which requires payment of full contract support cost (CSC) funding.<sup>317</sup> Unfortunately, over the ensuing fifteen years neither the IHS nor the BIA paid the full amount tribal contractors needed, as the agencies themselves acknowledged in CSC “shortfall reports” mandated by the ISDEAA.<sup>318</sup> In FY 2010, for example, the BIA paid on average only 75.17% of tribes' ongoing CSC needs,<sup>319</sup> while IHS paid on average 81.5%.<sup>320</sup> For larger contractors, this resulted in budget gaps in the millions of dollars,<sup>321</sup> while smaller contractors' shortfalls were equally devastating proportionately.

Full funding is critical because of the devastating effects of CSC shortfalls. By definition, CSCs are “the *reasonable* costs for activities which *must* be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management.”<sup>322</sup> These are fixed and unavoidable costs, such as insurance, property and personnel management systems, audits, and facilities overhead and

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313. 25 U.S.C. § 450j-1(a)(2) (2012).

314. U.S. GEN. ACCOUNTING OFFICE, GAO RCED 99-150, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 5 (1999).

315. The fact that tribes continue to do so even in the face of persistent and deep contract support cost shortfalls testifies to the broader social benefits of self-determination and self-governance beyond the specific programs themselves, including tribal capacity-building and community empowerment.

316. S. REP. NO. 100-274, at 12 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2631.

317. 25 U.S.C. § 450j-1.

318. *See id.* § 450j-1(c).

319. BIA, Fiscal Year 2010 Contract Support Cost Shortfall Report (n.d.).

320. IHS, Fiscal Year 2011 Contract Support Cost Shortfall Report (n.d.) (on file with authors) (2010 data). The agencies have different ways of designating the reports, with IHS identifying both the year of submission and the (prior) year to which the data pertain.

321. *Id.* For example, the FY 2012 IHS report indicates that the Alaska Native Tribal Health Consortium suffered a “Total FY 2011 CSC Deficiency” of \$8,568,748 and the Southcentral Foundation a CSC shortfall of \$3,479,733.

322. 25 U.S.C. § 450j-1(a)(2) (emphasis added).

maintenance. Faced with CSC shortfalls, tribes have limited options, none of them good.

First, tribes can cut indirect costs. Cost reduction, however, can only go so far before becoming counterproductive. At a certain point, administrative infrastructure (personnel, computer systems, accounting systems) deteriorates, reducing productivity and efficiency and jeopardizing contract compliance.<sup>323</sup>

Tribes can also use program funding. Using direct program dollars to cover CSC shortfalls reduces the resources available for already underfunded and much-needed programs and services, in effect imposing a financial penalty on tribes for exercising their right to self-determination.<sup>324</sup>

Alternatively, tribes can use tribal resources. Some tribes cover CSC shortfalls with revenues from tribal businesses, trust funds, or other resources. These resources could otherwise be used for economic development, land acquisition, additional services, or other purposes.<sup>325</sup> Forcing tribes to divert their own funds to administer federal programs not only creates tangible harm, in the form of lost economic opportunities, but it is unfair and inconsistent with how other government contractors are treated. As a government contracting expert testified to the Senate Committee on Indian Affairs in 2004, it would be “unthinkable” for the General Services Administration to suggest that IBM bear the indirect costs of building computers for the government.<sup>326</sup>

Faced with these unappealing options, it is not surprising that some tribes have opted to forgo self-determination and self-governance under the ISDEAA altogether. The lack of full contract support funding has

323. U.S. GEN. ACCOUNTING OFFICE, *supra* note 314, at 39-40.

324. The Principal Chief of the Cherokee Nation explained this dilemma to the Senate Committee on Indian Affairs:

The contract support cost problem has caused severe financial strains on the Cherokee Nation's programs and facilities, as it has for many other tribes in the country. What it means in real terms is that the Nation must reduce these critical health, education and other programs to pay for these shortages.

*Tribal Contract Support Cost Technical Amendments: Hearing on S. 2172 Before the S. Comm. on Indian Affairs*, 109th Cong. 34 (2004) [hereinafter *Hearing on S. 2172*] (written statement of Chad Smith).

325. S. REP. NO. 100-274, at 8-9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627-28 (“Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.”).

326. *Hearing on S. 2172*, *supra* note 324, at 20 (statement of Herbert Fenster (citing U.S. CONST. art. I, § 9, cl. 7)).

undoubtedly played a significant role in the leveling off of participation in self-determination and self-governance in recent years. In 2006, the DOI's Acting Deputy Assistant Secretary for Indian Affairs noted the relatively flat rate of participation in self-governance, and told Congress that "tribes have indicated that they would increase their overall participation if the issue of contract support cost funding was resolved."<sup>327</sup>

CSC funding has spawned long and intensive litigation against both the BIA and IHS, including two United States Supreme Court decisions. In 2005, the Supreme Court ruled, in *Cherokee Nation v. Leavitt*,<sup>328</sup> that IHS was liable for failing to pay full CSC in years before Congress began "capping" CSC spending—that is, identifying a specific amount IHS was "not to exceed."<sup>329</sup> In the absence of a statutory restriction, the Court held, IHS's entire lump-sum appropriation was legally available to reallocate to fully pay CSC needs.<sup>330</sup> The Court noted that the Act uses the word "contract" 426 times, and concluded that contracts with tribes are as binding as with any other government contractor.<sup>331</sup>

*Cherokee* left unresolved the question of government liability during years when there *were* statutory restrictions—the so-called "cap years." For several years, the lower courts and appeals boards held unanimously that the caps protected the government from liability. The ISDEAA makes all funding, including for CSC, "subject to the availability of appropriations."<sup>332</sup> The caps limited the amount of CSC available, the reasoning went, so the agency could not be faulted if it spent no more. This reasoning prevailed in the Federal Circuit's 2010 decision in the *Arctic*

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327. *Obstacles and Impediments to Expansion of Self-Governance: Oversight Hearing on Tribal Self-Governance Before the S. Comm. on Indian Affairs*, 109th Cong. 129 (2006) (statement of George T. Skibine); see also *Contract Support Costs Within the Indian Health Service Annual Budget: Hearing Before the H. Comm. on Resources*, 106th Cong. 14 (1999) (statement of Kevin Gover, Ass't Secretary for Indian Affairs, that "[t]he first step" toward expanding self-governance "is definitely 100 percent funding of contract support"); NIHB REPORT, *supra* note 11, at 9 (showing that 27% of IHS direct service tribes, and 28% of Title I contracting tribes, viewed lack of contract support funding as a barrier to contracting and compacting).

328. 543 U.S. 631 (2005).

329. *Id.* at 634-35. Congress began capping CSC appropriations for BIA in FY 1994, and for IHS in FY 1998. *E.g.*, Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997) (providing that, in FY 1998, "not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts" with IHS).

330. *Leavitt*, 543 U.S. at 647.

331. *Id.* at 639, 644.

332. 25 U.S.C. § 450j-1(b) (2012).

*Slope* case, after which the prospects of cap-year CSC claims appeared bleak.<sup>333</sup> Less than a year later, however, the Tenth Circuit in *Ramah Navajo Chapter v. Salazar* held that the caps limit the aggregate amount the BIA may distribute, but do not excuse underpayment of any single contractor's full CSC as long as the appropriation is enough to cover that individual contract.<sup>334</sup> That decision created a split among the federal appeals courts, and the Supreme Court granted the government's petition to review the *Ramah* decision and resolve the conflict.

The *Ramah* case was—and remains, as of this writing—a long-running CSC class action on behalf of tribes and tribal organizations that contract or compact with the BIA or the Office of Self-Governance within the DOI. The portion of the case before the Supreme Court in 2012 involved CSC shortfall claims for cap years 1994 through 2001. In a 5-4 decision, the Court affirmed the Tenth Circuit.<sup>335</sup> The majority opinion—authored by Justice Sotomayor and joined by Justices Scalia, Kennedy, Thomas, and Kagan—began by summarizing the *Cherokee* decision and stressing that ISDEAA contracts are as binding as any other contracts.<sup>336</sup> Under government contracting law, the rule has long been that if an appropriation is sufficient to pay a contractor in full, the fact that the government expends the appropriation on other permissible purposes (including other contracts) does not excuse the government from paying the contractor in full.<sup>337</sup> This rule, which derives from an 1892 Court of Claims case, *Ferris v. United States*, protects both the contractor and the United States by ensuring government contracting is not overly risky and hence expensive.<sup>338</sup> Applying this rule, the majority noted that the annual CSC appropriation of between \$91 million and \$125 million far exceeded the amount due to any single contractor, including *Ramah*.<sup>339</sup> Because the BIA had discretion over how to distribute this amount, the agency could have paid *Ramah* its full CSC need, even though that would have meant paying another contractor

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333. *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *vacated*, 133 S. Ct. 22 (2012).

334. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), *aff'd*, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

335. *Salazar*, 132 S. Ct. at 2195.

336. *Id.* at 2188.

337. *Id.* at 2189.

338. *Id.* at 2189-90.

339. *Id.* at 2190.

less.<sup>340</sup> Thus, the Court concluded, the BIA could not avoid the contractual promise to pay Ramah's CSC in full.<sup>341</sup>

The *Ramah* decision applied directly only to the BIA, but after that decision, the Court vacated a contrary Federal Circuit decision involving IHS and the Arctic Slope Native Association.<sup>342</sup> On remand, the Federal Circuit followed *Ramah*, noting that the IHS's appropriations cap language was nearly identical to the BIA's, and holding that the IHS too was obligated to pay the tribal contractor's full CSC.<sup>343</sup> With liability for past-year shortfalls established, tribal contractors anticipated expeditious settlements of both the *Ramah* class action against the BIA and the many individual claims against the IHS, but those expectations were mistaken.<sup>344</sup> No settlement has been reached in the *Ramah* case nearly two years after the Supreme Court's decision, and settlements of IHS claims have been few and far between.<sup>345</sup> The Supreme Court did not offer any guidance as to what "full" CSC means, and the parties took divergent views that proved difficult to reconcile. In early 2014, however, settlements began to accelerate, some for substantial amounts such as \$25 million, \$25.5 million, and \$52 million.<sup>346</sup>

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340. *Id.*

341. *Id.* at 2191. In dissent, Chief Justice Roberts (joined by Justices Ginsburg, Breyer, and Alito) argued that two "unambiguous restrictions" limited available funding and thus precluded liability. First, the appropriations caps limited the total amount BIA could pay in each year. Second, the ISDEAA "reduction clause" says that BIA "is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b) (2012). The cap prevented BIA from reprogramming funds from outside the CSC appropriation to cover the shortfalls, while the reduction clause prevented BIA from shifting funds within the appropriation from one tribe to cover the shortfall of another. Unlike in *Cherokee Nation*, there were no unrestricted funds, and unlike in *Ferris*, funds available to one contractor were not legally available to another. Therefore, Chief Justice Roberts and the other dissenters would have held that tribes are not entitled to full CSC.

342. *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 133 S. Ct. 22 (2012), *vacating* 629 F.3d 1296 (Fed. Cir. 2010).

343. *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 501 Fed. Appx. 957, 959 (Fed. Cir. 2012).

344. See Kimberly Kindy, *Federal Contractors on Edge as Indian Tribes Wait for Claims*, WASH. POST, Dec. 22, 2013, [http://www.washingtonpost.com/politics/federal-contractors-on-edge-as-indian-tribes-wait-for-claims/2013/12/22/5662fe28-5c3e-11e3-95c2-13623eb2b0e1\\_story.html](http://www.washingtonpost.com/politics/federal-contractors-on-edge-as-indian-tribes-wait-for-claims/2013/12/22/5662fe28-5c3e-11e3-95c2-13623eb2b0e1_story.html).

345. *Id.* (noting that less than 1% of claims had been settled as of December 2013).

346. See *Judgment Fund Payment Search*, U.S. TREASURY DEP'T, <https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do> (last visited Nov. 24, 2014).



While a resounding victory for tribes, the *Ramah* decision nonetheless did not ensure full CSC funding moving forward. The Court concluded its opinion by noting that Congress had given the BIA (and IHS) conflicting statutory mandates.<sup>347</sup> The ISDEAA requires the BIA to pay full CSC to all contractors, yet in every year at issue Congress failed to appropriate enough for the BIA to do so.<sup>348</sup> The Court offered several suggestions to Congress should it wish to resolve this dilemma, including amending the ISDEAA to allow payment of less than full CSC, placing a moratorium on new contracts, making line-item CSC appropriations for every ISDEAA contract, or appropriating enough CSC funding.<sup>349</sup> Early in the FY 2014 budget process, the Obama Administration adopted one of the Court's "solutions" and proposed to incorporate by reference into the Appropriations Act funding tables developed by the BIA and IHS that would identify a specific amount of CSC available for each contract.<sup>350</sup> This would have created, in effect, line-item appropriations placing every contractor on notice of the amount of CSC available, arguably defeating the *Ferris* rule and avoiding government liability for CSC shortfalls. This proposal to circumvent the *Ramah* ruling provoked an immediate firestorm of outrage not only from Indian country, but from other government contractors.<sup>351</sup> The United States Chamber of Commerce and the National Defense Industrial Association had filed a Supreme Court amicus brief in the *Ramah* case arguing that a ruling for the Government would have "enormous destabilizing effects on the government contracting

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347. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195 (2012).

348. *Id.*

349. *Id.*

350. See Letter from Dr. Yvette Roubideaux, Director, HIS, to Tribal Leaders (June 12, 2013) (describing Administration's reasoning in adopting proposal based on Supreme Court's options in *Ramah* opinion) (on file with authors).

351. See, e.g., Nat'l Congress of Am. Indians, Resolution #REN-13-015: Request That the Administration Resolve Contract Support Costs Claims, Withdraw Its Proposal to Limit Contract Support Costs in Its FY 2014 Budget, and Support Full Contract Support Cost Funding (2013), available at [http://www.ncai.org/attachments/Resolution\\_vMSQbplUjZzuadFLeexAJarvOvfJQXBdnGcYMEqgSubRpxojiFv\\_REN-13-015%20final.pdf](http://www.ncai.org/attachments/Resolution_vMSQbplUjZzuadFLeexAJarvOvfJQXBdnGcYMEqgSubRpxojiFv_REN-13-015%20final.pdf); Letter from U.S. Chamber of Commerce to Secretary Kathleen Sebelius, U.S. Dep't of Health & Human Servs. (Oct. 9, 2013) (on file with authors).

community.”<sup>352</sup> The proposal was also met with strong opposition from many in Congress.<sup>353</sup>

In the end, Congress did not adopt the “mini-cap” proposal; instead, the Appropriations Act contained no caps at all, either on individual contracts or aggregate CSC spending.<sup>354</sup> This restored the statutory landscape to that the Supreme Court delineated in *Cherokee Nation*: with no statutory restriction on CSC spending, the agencies’ entire lump-sum appropriations were available to pay CSC in full.<sup>355</sup> Having no legal basis to do otherwise, IHS and the BIA announced their intentions to pay full CSC in FY 2014 and again in FY 2015.<sup>356</sup> As stated in the BIA’s FY 2015 budget justification to Congress: “Full funding for CSC ensures tribes have sufficient resources to oversee program implementation and allows tribes to deliver services more effectively. Full funding for tribal administration of programs is a key element of the Administration’s commitment to support tribal self-governance.”<sup>357</sup>

For the moment, then, the struggle has shifted from *whether* to pay full CSC to *how much* constitutes full payment and how to resolve CSC issues moving forward. Following a directive from Congress in the Explanatory Statement accompanying the FY 2014 Appropriations Act,<sup>358</sup> the BIA and IHS initiated a joint consultation with tribes “to formulate long-term accounting, budget, and legislative strategies that will yield solutions going forward.”<sup>359</sup> As of this writing, these strategies are still being formulated

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352. Brief for Chamber of Commerce of the United States of America et al. as Amici Curae Supporting of Respondents at 6, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (No. 11-551).

353. See, e.g., Letter from Sen. Mark Begich et al. to Sylvia Mathews Burwell (Sept. 30, 2013) (on file with authors). In this letter, a bipartisan group of eleven senators wrote to OMB Director Sylvia Mathews Burwell calling the mini-caps proposal “short-sighted and ill-timed” and urging the Administration to withdraw it. *Id.*

354. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5.

355. See *Cherokee Nation v. Leavitt*, 543 U.S. 631, 641-42 (2005).

356. Kimberly Kindy, *U.S. Agrees to Fully Fund 2014 Service Contracts with Indian Tribes*, *Lawmakers Say*, WASH. POST, Feb. 13, 2014, [http://www.washingtonpost.com/politics/us-agrees-to-fully-fund-2014-service-contracts-with-indian-tribes-lawmakers-say/2014/02/13/5f2f3cd6-94bc-11e3-b46a-5a3d0d2130da\\_story/html](http://www.washingtonpost.com/politics/us-agrees-to-fully-fund-2014-service-contracts-with-indian-tribes-lawmakers-say/2014/02/13/5f2f3cd6-94bc-11e3-b46a-5a3d0d2130da_story/html).

357. U.S. DEP’T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION, FISCAL YEAR 2015: INDIAN AFFAIRS at IA-ES-1 (n.d.), available at [http://www.doi.gov/budget/upload/FY2015\\_IA\\_Greenbook.pdf](http://www.doi.gov/budget/upload/FY2015_IA_Greenbook.pdf).

358. See 160 CONG. REC. H475, H975 (Jan. 15, 2014).

359. Letter to Tribal Leaders from Dr. Yvette Roubideaux, Director, IHA, and Kevin Washburn, Assistant Secretary of the Interior, Indian Affairs (Feb. 12, 2014) (on file with authors).

and the mechanics of full funding are still being developed and refined. Tribes are assured of full CSC funding only through FY 2015. Given the agencies' historical and continuing resistance to tribal self-governance (as discussed next), it would not be surprising to see the re-emergence of the line-item mini-caps or some other proposal to circumvent or subvert the right to full CSC.

*B. Implementation Issues: Continuing Agency Resistance to Self-Governance*

CSC funding has hardly been the only issue creating tension between tribes and federal agencies. If there is anything that tribes—and Congress—have learned over the years, it is that the DOI and DHHS can be counted on to resist tribal self-governance, because it requires the transfer of program authority and associated funding from the federal bureaucracy to tribal control.<sup>360</sup> While the agencies have made some progress in acknowledging tribes' statutory rights to self-governance, often they continue to interpret and implement the statutes as narrowly as possible, in contravention of the ISDEAA's mandate that the statute and the contracts be interpreted liberally for the benefit of tribes and in favor of transferring programs and funding to tribes.<sup>361</sup>

Recently both IHS and the BIA have taken legal positions directly contrary not only to tribal interests, but also to clear statutory language. For example, in *Susanville Indian Rancheria v. Leavitt*,<sup>362</sup> IHS rejected the Tribe's final offer under Title V because the Tribe proposed to charge

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360. See, e.g., S. REP. NO. 100-274, at 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2656 (“The strong remedies provided in [the 1988] amendments are required because of [BIA's and IHS's] consistent failures over the past decade to administer self-determination contracts in conformity with the law”); H.R. REP. NO. 106-477, at 34-35 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 592 (“Because the Act requires the agencies to divest themselves of programs, staff, and funding at tribal request, the courts should not give Administrative Procedure Act-type deference to agency decisionmaking.”).

361. See 25 U.S.C. § 450l(c) (2012) (section 1(a)(2) of model agreement) (“Each provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and following related [PFSAs] . . . .”); *id.* § 458aaa-11(f) (“Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.”); *id.* § 458aaa-11(a) (requiring Secretary to interpret all federal laws, executive orders, and regulations in a manner that will facilitate inclusion of PFSAs into Title V agreements, implementation of compacts and funding agreements, and achievement of tribal health goals and objectives).

362. No. 2:07-cv-259-GEB-DAD, 2008 WL 58951 (E.D. Cal. Jan. 3, 2008).

pharmacy service beneficiaries a small co-pay. IHS provided no funding for pharmacy services, and the Tribe determined that without the user fees, the Tribe would be unable to provide such services at all. IHS took the position that the Tribe could not charge beneficiaries because the agency itself cannot do so, despite the plain language of the controlling Title V provision: “The Indian Health Service under this sub-chapter shall neither bill nor charge those Indians who may have the economic means to pay for services, *nor require any Indian tribe to do so.*”<sup>363</sup> The court held that this provision clearly did not prevent the Tribe from charging; it prevented IHS from *requiring* the Tribe to charge.<sup>364</sup> Remarkably, IHS argued that if the court found the statute ambiguous, it must defer to IHS's interpretation under the common-law *Chevron* doctrine,<sup>365</sup> despite the statutory rule of construction that ambiguities be resolved in favor of tribes.<sup>366</sup> The court found no ambiguity, however.<sup>367</sup>

The DOI, too, has abused the declination process and even attempted to circumvent it altogether. In *Cheyenne River Sioux Tribe v. Kempthorne*,<sup>368</sup> the BIA declined the Tribe's contract proposal to run a school, but the cursory declination letter merely cited three declination criteria without including specific findings demonstrating that the criteria were met.<sup>369</sup> The letter did not include a detailed explanation of the decision, nor did it include the documents the agency relied on in making that decision.<sup>370</sup> The court ruled the declination deficient, holding that the Secretary's burden of proof requires that he clearly demonstrate, through a detailed explanation with specific findings, that a declination decision is justified.<sup>371</sup> Because the BIA failed to comply with the declination statute and regulations, the court did not find it necessary to address the merits of the BIA's decision, and held the contract deemed approved by operation of law.<sup>372</sup>

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363. 25 U.S.C. § 458aaa-14(c) (emphasis added).

364. *Susanville*, 2008 WL 58951 at \*7.

365. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that when a statute is ambiguous, courts must generally defer to the reasonable interpretations of the federal agency charged with administering the statute).

366. 25 U.S.C. § 458aaa-11(f) (2012).

367. *Susanville*, 2008 WL 58951 at \*7.

368. 496 F. Supp. 2d 1059 (D.S.D. 2007).

369. *Id.* at 1064-65.

370. *Id.* at 1065.

371. *Id.* at 1067-68.

372. *Id.*

The IHS suffered a similar fate when it failed to comply with the “final offer” procedures under Title V.<sup>373</sup> The Maniilaq Association, an Alaska Tribal Organization, proposed to incorporate into its funding agreement a lease of a health clinic in the Native Village of Ambler.<sup>374</sup> The IHS did not respond within the statutorily required forty-five days, and when it did, it argued that the proposal was not a proper final offer because leases cannot be included in funding agreements.<sup>375</sup> The court rejected IHS’s narrow interpretation of the ISDEAA and held that the final offer was valid and deemed approved as a matter of law.<sup>376</sup>

The BIA went a step further in *Aleutian Pribilof Islands Ass’n v. Kempthorne*<sup>377</sup> by attempting to deny the tribal contractor’s appeal rights altogether. For many years, the Aleutian Pribilof Islands Association (APIA), a nonprofit consortium of Alaska tribes, had performed certain cultural heritage resource preservation activities under its Title IV agreement. In 2005, the BIA decided that the proper beneficiary of the cultural heritage program was the regional for-profit corporation, The Aleut Corporation (TAC), not the thirteen federally recognized tribes represented by the APIA.<sup>378</sup> BIA simply removed the funds from the APIA’s agreement with no written explanation of its decision and without notifying APIA of its right to appeal or how to do so.<sup>379</sup> The BIA argued that the declination procedures and criteria were not triggered, because the APIA was not the “primary beneficiary” of the program.<sup>380</sup> The court rejected this argument, holding that the BIA’s attempted end-run around the declination criteria was “arbitrary and capricious.”<sup>381</sup>

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373. See 25 U.S.C. § 458aaa-6(b) & (c).

374. *Maniilaq Ass’n v. Burwell*, Civ. Action No. 13-cv-380 (TFH), 2014 U.S. Dist. LEXIS 117084 (D.D.C. Aug. 22, 2014). The clinic is one of the facilities operated by Maniilaq under the Village Built Clinic program, which IHS has chronically underfunded for years. Maniilaq proposed a lease under the authority of the ISDEAA, 25 U.S.C. § 450j(l), a Title I provision incorporated into the Alaska Tribal Health Compact as well as Title V. *See id.* § 458aaa-15(a).

375. *Burwell*, 2014 U.S. Dist. LEXIS 117084, at \*7-\*8.

376. *Id.* at \*33. The court discussed the canon of construction favoring tribes—which is incorporated into Title V at 25 U.S.C. § 458aaa-11(f)—is support of its conclusion that “Congress intended the ISDEAA to be implemented in a manner favoring flexibility in funding agreements like the one at issue in this case.” *Id.* at \*12.

377. 537 F. Supp. 2d 1 (D.D.C. 2008).

378. *Id.* at 5.

379. *Id.*

380. *Id.* at 10.

381. *Id.* at 12; *cf.* S. REP. NO. 100-274, at 24 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2643 (condemning agency “threshold” arguments for avoiding declination criteria, and

While the APIA case turned on Administrative Procedure Act (APA) claims—making it unnecessary for the court to reach APIA’s ISDEAA claims—typically the standard of review in declination cases is not the same as the deferential APA standard, which requires the plaintiff to show that the agency's decision is “arbitrary, capricious . . . or . . . not in accordance with law.”<sup>382</sup> This deferential standard of review imposes a heavy burden of proof on the party challenging agency action.<sup>383</sup> In contrast, the ISDEAA imposes a heavy burden of proof on the agency to justify its declination decisions, providing that the Secretary “shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).”<sup>384</sup>

The ISDEAA does not require the agencies to fund proposals to run programs they had not previously run themselves.<sup>385</sup> But in *Pyramid Lake Paiute Tribe v. Burwell*,<sup>386</sup> the IHS declined the Tribe’s proposal to assume operation of an Emergency Medical Services program that the agency had been funding for almost twenty years. The IHS determined it did not want to fund the program going forward, so the applicable funding level was \$0, and the Tribe asked for more than that, allowing IHS to decline.<sup>387</sup> The court held, however, that the applicable funding level is determined at the time of the proposal, and IHS could not subsequently cancel the program and avoid the requirements of the ISDEAA.<sup>388</sup>

The examples above—which could be multiplied<sup>389</sup>—illustrate the agencies' continuing efforts to frustrate tribal rights to self-determination and self-governance seemingly inscribed clearly in the ISDEAA. To advance the cause of tribal self-governance, the statutes need to be

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stating intent that denials of tribal proposals be “handled only through the declination process”).

382. 5 U.S.C. § 706(2)(A) (2012).

383. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

384. 25 U.S.C. § 450f(e) (2012).

385. *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013).

386. No. 1:13-cv-01771 (CRC), 2014 U.S. Dist. LEXIS 142386 (D.D.C. Oct. 7, 2014).

387. *Id.* at \*17; 25 U.S.C. § 450f(a)(2)(D).

388. *Id.* at \*18.

389. *See, e.g.,* Three Affiliated Tribes of the Fort Berthold Indian Reservation v. United States, 637 F. Supp. 2d 25 (D.D.C. July 27, 2009) (rejecting IHS attempt to make decision declining contract support cost funding unreviewable through Rule 19 argument); *see also infra* notes 408-11 and accompanying text (discussing recent DOI and DHHS efforts to remove “477 program” funding from self-governance agreements so agencies could assert more direct control).

strengthened and improved, beginning with Title IV, the DOI Self-Governance law.

*C. Title IV Amendments*

After Title IV was enacted in 1994, there followed a long and contentious negotiated rulemaking process, during which numerous gaps and shortcomings in Title IV became apparent. In 2000, the same year the Title IV regulations were finalized, Congress enacted Title V, the DHHS version of Self-Governance.<sup>390</sup>

It soon became apparent that Title V worked much better than Title IV. Having learned from the problems experienced by tribes—and by the federal government—in implementing Title IV agreements, Congress in Title V filled many of the gaps and corrected many of the problems in Title IV. Tribal leaders determined that Title IV should be amended to address these issues and to conform to Title V.

Tribal and federal leaders thus began a process to amend Title IV, which remains incomplete as of this writing. Tribal representatives engaged in ongoing discussions of draft Title IV legislation with representatives from the BIA and other DOI personnel. In 2003, a bill was introduced and favorably reported by the SCIA, but never made it out of the Committee.<sup>391</sup> In 2006, the SCIA again considered comprehensive Title IV amendments,<sup>392</sup> but again the initiative died at the end of the session.

The tribal-federal workgroup continued its negotiations, and in October, 2007, House Bill 3994 was introduced. The DOI continued to resist certain key provisions, however—for example, one allowing tribes to assume, as of right, non-BIA PFSAs. In a last-ditch effort to secure passage of the bill in 2008, tribes agreed to delete this provision and made other concessions. Nonetheless, this bill also ran out of steam as the congressional term and the Bush administration wound down.

After the Obama administration took office, self-governance Tribes reinitiated dialogue with House and Senate staff on legislation to amend Title IV. A major effort was again made to amend Title IV with the “Department of the Interior Tribal Self-Governance Act of 2010,” which

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390. See 65 Fed. Reg. 78688 (Dec. 15, 2000) (final Title IV regulations, codified at 25 C.F.R. pt. 1000).

391. See S. REP. NO. 108-413 (2004); Dep’t of the Interior Tribal Self-Governance Act of 2003, S. 1715, 108th Cong. (2004).

392. See *Obstacles and Impediments to Expansion of Self-Governance: Oversight Hearing on Tribal Self-Governance Before the S. Comm. on Indian Affairs*, 109th Cong. (2006).

was introduced in the House as House Bill 4347 and passed the House on September 22, 2010.<sup>393</sup> House Bill 4347 was received in the Senate, and referred to the SCIA, but was met with Departmental opposition in a hearing on November 18, 2010, and failed to move further toward enactment.<sup>394</sup> House Bill 4347 would have made several amendments to Title I, including providing a clearer definition of “self-determination contract”; adding a requirement for liberal construction of contractual ambiguities resolved in favor of the tribal contractor; and inserting a provision for additional allowability of costs for tribal governing bodies.<sup>395</sup>

House Bill 4347 included substantial amendments to Title IV as well. It sought to reduce the Secretary’s discretion to deny tribal assumption of PFSAs in non-BIA DOI agencies; bring the “final offer” timeline and burden of proof standard in declinations in line with those provided in Title V; clarify how the Federal Tort Claims Act (FTCA) provides coverage under the ISDEAA; add a wide range of construction/facilities provisions, including additional tribal capacity to further assume federal responsibilities under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA); and clarify the Secretary’s capacity to repeal any regulation inconsistent with the provisions of the bill.<sup>396</sup> A similar bill to House Bill 4347 was introduced the following session as House Bill 2444, “Department of the Interior Tribal Self-Governance Act of 2011,” but it failed to leave the Subcommittee on Indian and Alaska Native Affairs. Follow-up legislation was introduced in 2012 by Senator Daniel Akaka (D-Haw.) with Senate Bill 3685, but it similarly did not leave the SCIA.<sup>397</sup>

On May 9, 2013, SCIA Chairwoman Senator Cantwell (D-Wash.) and Chairman Barrasso (R-Wy.) reintroduced the legislation as Senate Bill 919,

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393. H.R. REP. NO. 111-603 (2010). *But see* Hobbs, Straus, Dean & Walker, General Memorandum 10-118 (Oct. 1, 2010) [hereinafter General Memorandum 10-118], available at [http://www.npaihb.org/images/resources\\_docs/weeklymailout/2010/october/week1/GM\\_10-118\\_SelfGovBillApproved\\_by\\_House.pdf](http://www.npaihb.org/images/resources_docs/weeklymailout/2010/october/week1/GM_10-118_SelfGovBillApproved_by_House.pdf) (describing how the published House Report differs from the passed legislation due to late amendments).

394. H.R. 4347, *To Amend the Indian Self-Determination and Education Assistance Act to Provide Further Self-Governance by Indian Tribes, and for Other Purposes: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2010).

395. *See* General Memorandum 10-118, *supra* note 393, at 1.

396. *Id.* at 2.

397. Department of the Interior Tribal Self-Governance Act of 2012, S. 3685, 112th Cong.



the “Department of the Interior Tribal Self-Governance Act of 2013.”<sup>398</sup> Hearings on Senate Bill 919 were held on January 29, 2014, and the bill was reported out of the Committee in August 2014. The Congressional Budget Office released its report on the bill on November 13, 2014, and determined that passage of the bill would no net effect on spending. Despite this encouraging development, passage during the current Congress appears unlikely, but tribes will continue to push for passage in spite of the increasingly partisan political environment.<sup>399</sup>

After over two decades, tribes persist in pursuing Title IV amendments. The remaining long-term issues of contention mainly involve non-BIA Programs. Tribes would like to expand the scope of mandatory compacting to programs of which Indians are significant beneficiaries, as opposed to exclusive beneficiaries under the current DOI interpretation.<sup>400</sup> The current statutory language within Title IV gives DOI bureaus too much discretion and negotiating leverage. Finally, non-BIA agencies within the DOI have consistently opposed efforts that would enhance tribal ability to assume more non-BIA programs on a mandatory basis.

As the cases described above illustrate, tribes need these types of strong statutory protections given the DOI's historical and continuing resistance to self-governance. Amending Title IV to bring it into line with Title V would greatly simplify self-governance for tribes by creating a relatively uniform legal regime for both agencies.

#### *D. Title VI and the Expansion of Self-Governance within DHHS*

Another key legislative initiative is to implement the demonstration project for non-IHS agencies within the DHHS. Although the DHHS has already found this expansion of self-governance viable in its feasibility study of 2003, the agency can be expected to continue its opposition to actual legislation.<sup>401</sup>

The central issue is that the Title VI demonstration project would devolve control of PFSAs from DHHS agencies to tribes. To the extent that non-IHS agencies deal with tribes at all, it is through a grantor-grantee relationship that allows the agencies to impose strict controls on the use of

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398. The House companion bill, House Bill 4546, was introduced by Rep. Peter DeFazio (D-Or.) on May 1, 2014.

399. *See, e.g., Congress Set to Pass Historically Few Laws in 2013*, L.A. TIMES, Dec. 11, 2013, <http://articles.latimes.com/2013/dec/11/news/la-pn-congress-few-laws-2013-2013-12-11>.

400. *See supra* Part III.D. *See also* 25 C.F.R. §§ 1000.123–124 (2000).

401. *See* 25 U.S.C. §§ 450j(o), 450j-1(C) (2012) (recounting DHHS resistance to Title VI bill in 2003-2004).

agency resources. Such a relationship differs markedly from the government-to-government relationship under self-governance, where tribal contractors can redesign programs and reallocate funds to suit tribal needs rather than agency priorities. Shifting from a grantor-grantee to a self-governance relationship would also require federal officials to emerge from their offices and actively negotiate compacts and funding agreements with participating tribes and tribal organizations.

The contrast between a grantor-grantee mentality and a government-to-government relationship poses an intangible but very real obstacle to the further expansion of tribal self-governance within the federal government. In 2011, the DHHS created a Self-Governance Tribal Federal Workgroup (SGTFW) to further explore the findings of the 2003 feasibility study (concluding that self-governance expansion was possible within the DHHS).<sup>402</sup> When the SGTFW issued its Final Report in September 2013, it focused in on many of the grant programs within the DHHS, and found that “[t]he overarching barrier to expansion of Self-Governance is the lack of legislative authority to conduct a Self-Governance demonstration project in HHS programs outside of IHS.”<sup>403</sup> The Workgroup found that Title VI authorized the 2003 feasibility study, but that the ISDEAA itself limits the DHHS grant programs that can be incorporated into funding agreements under Title V.<sup>404</sup> Nonetheless, the DHHS took the position that the Workgroup was not authorized to work on legislation to overcome the perceived legal and logistical barriers to the expansion of self-governance.<sup>405</sup> Following the Final Report, tribal members of the SGTFW requested that the Department expand the charge of the SGTFW, or establish a new working group, to develop draft legislation to implement a Title VI demonstration project. The Secretary of the DHHS, however, denied this request, stating “[t]he Department does not have plans to create a Workgroup for purposes of working on draft [self-governance] legislation with tribal representatives.”<sup>406</sup> Although the Final Report concludes that

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402. See DHHS Self-Governance Tribal Fed. Workgroup, Final Report 4 (Sept. 26, 2013).

403. *Id.* at 8.

404. *Id.* (referencing 25 U.S.C. § 458aaa-4(b)(1)-(2) (limiting incorporation of grant programs into ISDEAA compacts and funding agreements to grant programs that are “carried out for the benefit of Indians because of their status as Indians”)).

405. See *id.* at 11-12.

406. Letter from Kathleen Sebelius, Secretary of DHHS, to Chairwoman Malerba, Mohegan Tribe (July 26, 2013) (addressed also to tribal co-signers of June 4, 2013 letter requesting SGTFW continuation on legislation).

“[e]xpansion of Self-Governance in HHS remains a priority,”<sup>407</sup> it will likely fall to tribes to develop and advocate legislation to implement the expansion of self-governance to non-IHS agencies within the DHHS, as envisioned in Title VI.

Another example of this dynamic—the federal bureaucracy's inherent resistance to yielding its control and funding to tribes—can be seen in the DHHS's and the BIA's recent change in position on so-called “477 Plans.” The 477 Program, named after Public Law 102-477,<sup>408</sup> allows tribes to consolidate previously fragmented employment and training-related grant funds from the Departments of Labor, DOI, and DHHS into a single 477 Plan with a unified budget and reporting system. For many years, 477 funds have been transferred to self-governance tribes through ISDEAA Title IV agreements. But in October, 2008, in the waning days of the Bush administration, the DHHS announced that funding for 477 Plans would no longer be transferred through ISDEAA agreements. Reportedly, the Interior Solicitor's Office determined that there was no legal authority to provide Temporary Assistance for Needy Family (TANF) funds and possibly other funds in 477 Plans through ISDEAA agreements, although DOI did not release any formal legal analysis to that effect. Instead of ISDEAA agreements, the agencies proposed that the 477 funds would be transferred through a grant process administered under DOI regulations.<sup>409</sup> Then, in 2009, the Office of Management and Budget (OMB), at the request of the DHHS, issued Circular A-133, a compliance supplement which required 477 tribes to report 477 expenditures separately by funding source rather than by expenditure under a tribal 477 Plan. These changes would give the DOI and the DHHS significantly more control over how tribes administer, account for, and report on 477 funds. The agencies have so far delayed implementation of these unilateral changes, and different legislative efforts have been made to correct the problems tribes have encountered from this change.<sup>410</sup> The most recent legislative effort to “fix 477” is Senate Bill

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407. DHHS Self-Governance Tribal Fed. Workgroup, *supra* note 402, at 14.

408. Indian Employment, Training, and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, 106 Stat. 2302 (codified as amended at 25 U.S.C. §§ 3401-3417 (2012)).

409. *See* 43 C.F.R. pt. 12 (2014); 25 C.F.R. pt. 276 (2014).

410. Hobbs, Straus, Dean & Walker, General Memorandum 13-101 (Nov. 18, 2013) (discussing the attempt by the House Appropriations Interior, Environment, and Related Agencies Subcommittee to include language in section 430 of the FY 2012 appropriations bill that would have resolved the tribal-federal agencies differences in the 477 Program). The federal agencies opposed the change which led to the Appropriations conferees agreement to defer consideration of legislation in exchange for agency agreement for the formation of the

1574, which was introduced by Senator Lisa Murkowski (R-Alaska) on October 16, 2013. Under the proposed amendments, all funds for programs and services covered by an approved 477 plan would be transferred to a tribe or tribal organization pursuant to an existing contract, compact, or funding agreement under ISDEAA, and tribes and tribal organizations could combine federal funds for use in performing allowable activities authorized under an approved 477 Plan, with no requirement to maintain separate records tracing services or activities for audit purposes.<sup>411</sup>

The 477 controversy involves some of the same issues, and even programs, as the Title VI initiative.<sup>412</sup> In both cases, the federal agencies wish to retain a grantor-grantee relationship with tribes, as opposed to government-to-government relationships under the ISDEAA. The inherent tension between tribal self-governance and federal bureaucratic control will make it difficult, if not impossible, for tribal and federal representatives to agree on the precise contours of new Title VI legislation (or the 477 fix). Congress is well aware of this tension, however, and can resolve any deadlocks.

Despite likely DHHS opposition, tribes will no doubt press forward with another Title VI bill and legislative 477 fix. Direct tribal operation of non-IHS DHHS programs, such as TANF and Head Start, would be a major achievement, yet should also be relatively non-controversial. The DHHS's own study demonstrates the feasibility of the Title VI demonstration project, limiting the agency's ability to obstruct proposed legislation without appearing unreasonable. And as the Senate recognized ten years ago, Title VI represents simply the next logical step in the "evolution in tribal self-governance."<sup>413</sup>

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"P.L. 102-477 Administrative Flexibility Work Group" which included policy and program representatives from the tribes and DOI, HHS, DOL, and OMB. After two years of meetings and negotiations, the "Flexibility" group did not reach any agreement on these issues). The agencies have apparently dropped the proposed funding change and will continue to transfer funds through the ISDEAA, and have proposed reporting requirements by "functional category" based on expenditures under tribal 477 Plans. *See* 79 Fed. Reg. 8985 (Feb. 14, 2014).

411. *Id.* at 2.

412. 477 programs also identified in the Title VI feasibility study and included as part of the proposed demonstration program include TANF, the Child Care and Development Fund, and Native Employment Works.

413. S. REP. NO. 108-412, at 2 (2004).

*E. Expansion of Self-Governance Beyond the DOI and the DHHS*

The logical culmination of tribal self-governance as a statutory relationship is to bring tribes' relationships with every government agency under a single ISDEAA compact. That is, every agency that operates PFSAs with Indians as significant beneficiaries would be authorized to compact a tribe's share of those PFSAs and associated funding upon tribal request.

Candidates for such programs abound. Even a cursory look at other Cabinet level Departments and executive agencies in the federal government reveals opportunities for further ISDEAA expansion, particularly with established programs on which tribes rely to protect their ancestral homelands and/or for the efficient operation of tribal government. While not by any means an exhaustive list, the following examples demonstrate some of the immediate opportunities within the federal government for the expansion of tribal self-governance under the ISDEAA.

*1. Department of Transportation*

Tribal representatives have long advocated establishing a self-governance program within the Department of Transportation (DOT), either via an amendment to Title IV<sup>414</sup> or as part of a broader highway reauthorization bill.<sup>415</sup> The 2005 highway bill, SAFETEA-LU,<sup>416</sup> authorized tribal governments to enter into agreements directly with the Secretary of Transportation “in accordance with the [ISDEAA].”<sup>417</sup> Some DOT officials interpreted this language to mean that the agreements must be consistent with the ISDEAA, but are not really ISDEAA agreements; consequently the DOT has refused to include standard Title IV provisions in their agreements. This erroneous interpretation generated a great deal of confusion and disagreement over the extent to which Title IV applies to

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414. *E.g.*, *Dep't of the Interior Tribal Self-Governance Act of 2007: Hearings on H.R. 3996 Before the House Committee on Natural Resources*, 110th Cong. 5-7 (2007) (statement of W. Ron Allen); *id.* at 5-6 (statement of Melanie Benjamin). Both tribal leaders quote the proposed section 419, which would have established a tribal self-governance program in DOT, and explain its rationale, in their testimony. *Id.* at 5-7.

415. *See* American Energy and Infrastructure Jobs Act of 2012, H.R. 7, 112th Cong., § 1506 (establishing “Tribal Transportation Self-Governance Program” in DOT). This provision was not included in the Senate version of the highway bill that was eventually enacted, as discussed *infra*.

416. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

417. 23 U.S.C. § 202(b)(7)(A) (2012).

those agreements. Meanwhile, although SAFETEA-LU expanded tribes' ability to directly access the Federal Transit Administration (FTA) program for tribes to widen public transportation services on Indian reservations,<sup>418</sup> Congress did not extend the ISDEAA to the Tribal Transit Program. In its rulemaking process, despite numerous tribal comments, the FTA refused to consider developing a tribal transit grant agreement modeled on ISDEAA grant agreements.<sup>419</sup>

On July 6, 2012, President Obama signed into law the first long-term highway authorization enacted since 2005: the Moving Ahead for Progress in the 21st Century Act.<sup>420</sup> MAP-21, as it is known, has brought increased funding for surface transportation programs, including over \$105 billion for FYs 2013 and 2014 across the entire transportation budget.<sup>421</sup> It has also made several changes that are specific to tribes, including a shift from what was previously referred to as the Indian Reservation Roads (IRR) program to the more broadly defined "Tribal Transportation Program" under MAP-21.<sup>422</sup> Although tribes have repeatedly proven themselves capable of utilizing increased federal transportation infrastructure funds and other transportation program services, both the DOT and the DOI have continued to resist fully applying the provisions of the ISDEAA to transportation programs. MAP-21 did not fix that problem, notwithstanding the efforts of tribal leaders to address those concerns. The legislative process that led to the authorization of MAP-21 in the House included developing specific legislation known as "Section 1506. Tribal Transportation Self-Governance Program" as part of House Bill 7, the "American Energy and Infrastructure Act of 2012."<sup>423</sup> This proposed legislation was included in the House of Representatives' transportation legislation as part of House Resolution 547, but it was not included in the Senate bill, nor was it enacted into law as part of MAP-21. The proposed language in House Bill 7's section 1506 would have removed any ongoing doubt that the negotiation and implementation of tribal funding agreements with the DOT would be governed by Title IV,

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418. 49 U.S.C. § 5311(c) (2012).

419. See FTA, Public Transportation on Indian Reservations Program; Tribal Transit Program, 71 FED. REG. 46,959, 46,962 (Aug. 15, 2006).

420. Moving Ahead for Progress in the 21st Century Act or MAP-21, Pub. L. No. 112-141, 126 Stat. 405 (2012).

421. Office of Policy & Governmental Affairs, Fed. Highway Admin, Map-21: A Summary of Highway Provisions 1 (July 17, 2012), available at [http://www.fhwa.dot.gov/map21/docs/map21\\_summary\\_hgwy\\_provisions.pdf](http://www.fhwa.dot.gov/map21/docs/map21_summary_hgwy_provisions.pdf).

422. 23 U.S.C. § 202.

423. See generally H. REP. NO. 112-397 (2012).

including a requirement that any secretarial interpretation of federal law should facilitate the inclusion of PFSAs (and associated funding) within fully implemented self-governance compacts and AFAs.<sup>424</sup>

As of this writing, though, the need for the extension of self-governance to the DOT is made even clearer by the implementation of MAP-21 by the DOT and the BIA. On May 12, 2012, the Office of the Inspector General (OIG) of the DOT commenced an analysis of the Tribal Transportation Program that continued until August 2013.<sup>425</sup> The OIG analysis was cursory and limited to data-gathering from very few tribes, but nonetheless it concluded, in part, that greater oversight and more comprehensive access to remedial actions are warranted for tribes not meeting program requirements.<sup>426</sup> Unfortunately, federal opposition to the expansion of tribal self-governance over transportation programs was reflected in initial draft regulations shared by the agencies during tribal consultations in 2013 and intended to implement the tribal provisions in MAP-21.<sup>427</sup> Tribes are prepared to work diligently to share more representative examples of successful tribal transportation programs with the DOT and coordinate efforts so that the MAP-21 rulemaking results in regulations that are consistent with the ISDEAA. When the next major highway reauthorization occurs (expected in FY 2015), tribes will be prepared once again to make the case for the extension of self-governance within the DOT.

## *2. Department of Justice*

The United States Department of Justice (DOJ) plays a very important federal role with respect to tribes given primary federal jurisdiction over Indian lands and people, as well as ongoing law enforcement responsibilities that are a function of that federal jurisdiction.<sup>428</sup> In 2010,

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424. H.R. 7, § 1506 (proposed section 207(j)).

425. Office of Inspector Gen., Fed. Highway Admin., Opportunities Exist to Strengthen FHWA's Coordination, Guidance, and Oversight of the Tribal Transportation Program, Rept. No. MH 2014-003 (Oct. 2013), available at <http://flh.fhwa.dot.gov/programs/ttp/documents/oig-audit-report.pdf>.

426. *Id.* at 10.

427. See U.S. Dep't of the Interior, Bureau of Indian Affairs: Tribal Consultation on the Draft Regulations Governing the Tribal Transportation Program, 78 Fed. Reg. 21861, 21861 (Apr. 12, 2013) (describing dates, locations, and purpose of tribal consultation on proposed regulations for 25 C.F.R. Part 170).

428. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (“State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.”)

recognizing the wide range of programs that impacted Indian tribes and Alaskan Natives, as well as the complexity of having tribes access those programs on an ongoing basis, the DOJ created the Coordinated Tribal Assistance Solicitation (CTAS).<sup>429</sup> In FY 2014, the CTAS offers eligible tribes the opportunity, through a single application, to request funding from nine distinct programs within the DOJ: public safety and community policing; comprehensive planning for justice systems; tribal courts assistance in alcohol and substance abuse prevention programs; corrections and corrections alternatives; violence against women; violence against children; crime victims assistance programs; juvenile justice; and tribal youth prevention programs.<sup>430</sup>

While this departmental coordination within the DOJ allowing for the effective administration of grant-funded programs impacting Indian Country is a step in the right direction, at least one major analysis of the DOJ has found that it does not go far enough.<sup>431</sup> One of the most important and comprehensive reports ever on justice in Indian Country was released by the Indian Law and Order Commission (Commission) in November 2013.<sup>432</sup> Among many excellent recommendations for improving law and order in Indian Country, the Commission identified the need for the potential expansion of the ISDEAA within the DOJ.<sup>433</sup> Citing the lack of collaboration and cooperation between BIA law enforcement and DOJ programs, the Commission recommended consolidating these functions within a new agency in the DOJ and allowing tribes to contract with that agency under the ISDEAA.<sup>434</sup> “Some of these problems could be resolved if Tribal governments were able to access DOJ Indian country resources via [Title I] contracts, self-governance compacts, or P.L. 102-477 funding agreements, all of which allow Tribal governments to take over management of Federal funds.”<sup>435</sup> This call for extending the ISDEAA to the DOJ makes sense, especially in the context of the Commission’s

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429. U.S. DEP’T OF JUSTICE, COORDINATED TRIBAL ASSISTANCE SOLICITATION FOR FY 2014 FACT SHEET (2014).

430. *Id.* at 3.

431. *See generally* INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER (Nov. 2013) [hereinafter ROADMAP].

432. *Id.* The Indian Law and Order Commission is a federal commission that was created by Congress with the passage of the Tribal Law and Order Act of 2010. *See generally* 25 U.S.C. §§ 2801-2815 (2012).

433. ROADMAP, *supra* note 431, at 87.

434. *Id.* at 85, 87, 89.

435. *Id.* at 87.



emphasis throughout the Report on the need to empower local tribal communities to take control of and accountability for law enforcement.<sup>436</sup>

### *3. Department of Agriculture*

As with other cabinet level departments, the Department of Agriculture (USDA) has a wide range of programs and activities that directly impact tribes and Indian lands. Recent legislation points to one specific example of a USDA program where ISDEAA expansion is the logical next step: implementation of the Tribal Forest Protection Act of 2004.<sup>437</sup> The Tribal Forest Protection Act essentially authorizes the Secretaries of Agriculture and the Interior to give special consideration to tribally proposed Stewardship Contracting (or other projects) on Forest Service and Bureau of Land Management (BLM) land bordering or adjacent to Indian trust land in order to protect Indian trust resources from fire, disease, or other threats arising from the Forest Service or BLM land.<sup>438</sup>

The Tribal Forest Protection Act has some similarities to the ISDEAA structurally, including similar eligibility criteria, delineation of how and why proposals can be declined, and reports back to Congress on implementation.<sup>439</sup> However, there is no specific authorization of funding or right to funding, and the Act does not reference the ISDEAA as an appropriate authority for agreements or incorporate its other protections. In order for the USDA to fully implement the Tribal Forest Protection Act of 2004, it would be logical for Congress to extend to that Act all of the ISDEAA's provisions and protections, such as FTCA coverage.

### *4. Department of Homeland Security*

Various Department of Homeland Security (DHS) agencies and programs impact tribes and tribal lands. Recent amendments to the Stafford Act, through provisions contained in the Sandy Relief Act of 2012, provide tribes expanded authority to administer various Federal Emergency Management Agency (FEMA) programs.<sup>440</sup> Tribes now have the capacity

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436. *See, e.g., id.* at 23-24 (recommending that Congress allow tribes to “opt out” of federal Indian country criminal jurisdiction and/or congressionally authorized state jurisdiction, except for federal laws of general application, and “recognize the Tribe’s inherent criminal jurisdiction”); *id.* at 43-44 (discussing Alaska communities where, often, tribes constitute the only day-to-day governmental presence).

437. *See generally* 25 U.S.C. §§ 3115a (2012).

438. *Id.* § 3115a(a)(4), (b)(1), (c)(1)-(3).

439. *Id.* § 3115a(c), (d), (g).

440. *See generally* 42 U.S.C. §§ 5121-5207 (2012).

to work with FEMA directly, rather than through state government, in declaring national emergencies on tribal lands, seeking assistance to address damage from emergencies, and carrying out hazard mitigation planning activities to mitigate or prevent future emergencies on tribal lands.<sup>441</sup>

These programs and activities are a logical point for expansion of the ISDEAA, as the intent of these new tribal authorities within the Stafford Act is to increase tribal self-determination and sovereignty in the face of crisis and disaster. Congress should consider allowing tribes to utilize the familiar contractual, legal, and funding mechanisms of the ISDEAA during a disaster, when FEMA support and funding are needed, by extending the ISDEAA to its recent expansion of tribal rights under the Stafford Act.

##### *5. Environmental Protection Agency*

Since 1993, the Environmental Protection Agency (EPA) has provided support to federally recognized tribes to build internal environmental program capacity through its Indian General Assistance Program (IGAP).<sup>442</sup> The importance of the EPA IGAP program in Indian Country cannot be overstated, as it provides many tribes, particularly small tribes, with much-needed financial support without which these tribes would not have an environmental program. In its recent IGAP guidance, the EPA explained that its OIG had examined the efficacy of the IGAP in 2008, and found that it lacked uniform implementation nationally.<sup>443</sup> It suggested, in part, that the EPA should “[r]evis[e] how IGAP funding is distributed to tribes to place more emphasis on tribes’ prior progress, environmental capacity needs, and long-term goals.”<sup>444</sup>

The over-arching goal of the IGAP is to build tribal capacity, and the ultimate ends of tribal capacity are self-determination and self-governance. The EPA IGAP is a logical opportunity for ISDEAA expansion within the EPA, as the IGAP provides tribes the opportunity to identify internal tribal programmatic needs from year to year, with the goal of self-directed tribal leadership to meet those needs through program administration. Through

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441. See FEMA, Frequently Asked Questions: Process for Tribal Governments to Request a Presidential Declaration (Oct. 2013, available at <http://www.fema.gov/media-library-data/1383332744585-e4c4534105a89fc66ff397216e39afb7/FAQs%20-%20Declaration%20Request%20Process%20for%20Tribal%20Governments.pdf>).

442. See EPA, GUIDANCE ON THE AWARD AND MANAGEMENT OF GENERAL ASSISTANCE AGREEMENTS FOR TRIBES AND INTERTRIBAL CONSORTIA at iii-iv (2013), available at <http://www.epa.gov/tribal/GAP-guidance-final.pdf> (regarding “Final Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia”).

443. *Id.* at 14.

444. *Id.* at iv.

tribal-EPA consultation, the ISDEAA could be extended to the IGAP, and potentially other EPA programs,<sup>445</sup> to simultaneously advance tribal environmental health and administrative capacity.

#### *6. Department of Defense*

In the Department of Defense (DOD), there are a wide range of programs that impact tribes. There are many instances where the extension of the ISDEAA would be a logical next step. For example, Congress has, since 1993, inserted a provision in the DOD Appropriations Act requiring the DOD to devote funds annually to mitigate its environmental impacts to Indian lands and lands conveyed under the Alaskan Native Claims Settlement Act (ANCSA).<sup>446</sup> The Native American Lands Environmental Mitigation Program (NALEMP) has generally administered from \$8-10 million per year, mitigating DOD damage to tribal lands.<sup>447</sup> A number of tribes have utilized this program to identify problem areas created by the DOD and clean up their ancestral homelands. However, the agreement structure for the NALEMP program has centered around DOD-defined Memoranda of Agreement (MOAs) and Cooperative Agreements rather than extending the provisions of the ISDEAA to allow tribes greater programmatic management and oversight over these efforts.<sup>448</sup>

These are merely a small illustrative listing of logical programs for potential extension of the ISDEAA further beyond the DOI and the DHHS. One challenge will be the tendency of federal agencies to leave grant programs, and grant funding, under strict regulatory schemes and limited program guidance. Another challenge will be to help agencies overcome their tendency to see their funding agreements with tribes as merely sole-source procurement contracts, rather than true self-determination agreements.<sup>449</sup> As Congress has recognized, however, these government-to-

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445. Under various federal environmental laws, Indian tribes are treated as states for the purposes of implementing elements of broad regulatory schemes, including the Clean Water Act (CWA), Clean Air Act (CAA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Consideration should also be given to extending the ISDEAA to the funding mechanisms associated with these “treatment as state” programs for tribes.

446. *E.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 111-12 (appropriating \$12 million for mitigation of environmental impacts on Indian lands resulting from DOD activities).

447. U.S. DEP’T OF DEFENSE, NALEMP IMPLEMENTATION MANUAL 2 (Apr. 2005).

448. *Id.* at 8.

449. King, *supra* note 244, at 524-25 (describing National Park Service view of self-governance through lens of procurement contracting).

government agreements are akin to solemn treaties as well as ordinary contracts:

Treaties are a significant part of the legal relationship between Indian tribes and the United States. Self-governance, by its use of compacts, another traditional contracting device used between governments, is designed to honor the government-to-government relationship and remind the parties to these agreements of the historical basis for their relationship.<sup>450</sup>

*V. Conclusion: Self-Governance in an Evolving Political Context*

Our focus has been on self-governance as a statutory right of federally recognized tribes, under the ISDEAA, to administer federal programs for their own people according to their own priorities. The ISDEAA and the many contracts and compacts it has spawned over the years have helped further the movement away from pervasive federal control and towards tribal autonomy. The ISDEAA, however, is only one aspect of a larger movement toward tribal self-rule in economic and political spheres. Contracting and compacting federal programs brings jobs to tribal communities and builds tribal administrative capacity, but tribes also exercise self-determination through economic development, cultural activity, language revitalization, and other aspects of nation-building. There is no doubt that the federal policy of self-determination in general, and the ISDEAA in particular, have played a significant role in strengthening tribal governments and communities over the past forty years.<sup>451</sup> Conversely, as tribes experience more success exercising their sovereignty in a variety of contexts, this larger movement can be expected to drive changes in Title IV, Title V, and future self-governance statutes.

The evolving political context within which tribal self-governance itself evolves is largely beyond tribal control. For now, the traditional bipartisan support in Congress for Indian self-determination is largely intact, but some observers see that bipartisanship eroding as conservatives move away from the libertarian themes exemplified in President Nixon's 1970 address.<sup>452</sup> If tribal self-governance becomes identified solely as a Democratic or liberal

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450. H.R. REP. NO. 106-477, at 17 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 575.

451. *See generally* Cornell & Kalt, *supra* note 6, at 12-16 (“[T]he overall pattern of results [from tribal self-determination] in Indian Country is quite positive, and the reasons lie in the facts that local decision making and administration (1) improve accountability and (2) allow on-the-ground programs and policies to better reflect local values.”).

452. *Id.* at 18, 27 (discussing President Nixon's address on tribal self-determination).

cause, the legislative reforms and advances discussed above will become much more difficult to achieve. Tribal leaders have long been successful in tying self-governance to larger federal policy initiatives, both conservative and liberal, from the civil rights movement of the 1960s, to the “devolution” of social programs from federal to state and local control in the 1980s and 1990s, to the current “wars” on drugs and terrorism.<sup>453</sup> But one thing is certain: whatever particular legislative and administrative forms and vehicles tribal self-governance takes in the future, it is, and will remain, a fundamental right under United States and international law.<sup>454</sup>

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453. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 *CONN. L. REV.* 777, 795-96 (2006) (citation omitted) (quoting Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 *YALE L. & POL’Y REV.* 227 (1996)).

454. *See supra* notes 2-3 and accompanying text.

