

**TESTIMONY OF
LAWRENCE ROBERTS
DEPUTY ASSISTANT SECRETARY INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
“ADVANCING THE FEDERAL-TRIBAL RELATIONSHIP THROUGH
SELF-GOVERNANCE AND SELF-DETERMINATION”**

SEPTEMBER 20, 2012

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee. Thank you for the opportunity to appear before you today at this Oversight Hearing on Indian Self-Determination and Self-Governance. President Obama recognizes that federally recognized Indian tribes are sovereign, self-governing political entities with a government-to-government relationship with the United States government, as provided in the U.S. Constitution, treaties, court decisions, and federal statutes. Secretary Salazar too is a strong supporter of the principles of tribal self-determination and self-governance and is committed to enable these important policies.

This Administration supports tribal self-determination. Furthermore, we believe that tribal leadership is critical in facing and solving the problems of today, and that Native Americans must have a voice in programs and government efforts which are important to their lives. During the opening remarks delivered by President Obama at the Tribal Nations Conference held on November 5, 2009, the President affirmed that he is “absolutely committed to moving forward with [tribes] and forging a new and better future together. It’s a commitment that’s deeper than our unique nation-to-nation relationship. It’s a commitment to getting this relationship right, so that you can be full partners in the American economy, and so your children and your grandchildren can have an equal shot at pursuing the American Dream.” In the spirit of our strong commitment, we offer our views on the tangible progress achieved under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450 et seq.

Background

The ISDEAA is a historic Act because it requires the Department of the Interior and the Department of Health and Human Services to transfer various federal Indian programs to tribes, giving them the same funds the agency would have spent on those programs. In 1975, Congress passed and President Ford signed into law the ISDEAA, which is one of the most significant pieces of Indian legislation enacted into law. Under the Act, federally recognized tribes may choose to have the Bureau of Indian Affairs (BIA) provide direct services or operate BIA programs under an ISDEAA Title I Contract. The ISDEAA established a new methodology for Indian tribes and the Federal government to work together to accomplish the intent of the President and the Congress in establishing and funding the various Indian programs administered through the Department of the Interior (DOI) and, specifically, the Bureau of Indian Affairs.

Since 1975, the ISDEAA has been amended several times; three of the most significant amendments are: P.L. 100-472 (October 5, 1988), commonly referred to as the 1988 Amendments; P.L. 103-413 (October 25, 1994), commonly referred to as the 1994 Amendments; and P.L. 106-260 (August 18, 2000), commonly referred to as the 2000 Amendments. Title I of the ISDEAA is the Indian Self-Determination Act, Title II is the Indian Education Assistance Act, Title III (which has been repealed) was the Tribal Self-Governance Demonstration Act, Title IV is the Tribal Self-Governance Act (DOI), Title V is Tribal Self-Governance (Department of Health and Human Services [DHHS]), and Title VI is Tribal Self-Governance (DHHS - Feasibility Study).

The BIA has a long history of entering into contractual agreements with Indian tribes to operate BIA programs. Prior to the passage of the ISDEAA the BIA was contracting with Indian tribes utilizing the authorities provided through the Buy Indian Act (25 U.S.C. 47). However, the Buy Indian Act is a procurement act that did not allow the BIA to work directly with a specific Indian tribe to develop a contract proposal, plan the operation of a program, and negotiate a specific contractual agreement.

From its inception in 1975 through 1988, only the BIA within the Department and the Indian Health Service (IHS) within the Department of Health and Human Services (DHHS) were authorized to utilize the ISDEAA. During this time frame, all Self-Determination contracts were considered procurement agreements, awarded by Warranted Contracting Officers, and construction contracts were not authorized. In 1988, P.L. 100-472 was enacted and expanded the ISDEAA to authorize its use by all Bureaus and Offices within the Department. The 1988 Amendments authorized construction contracts and provided that non-construction ISDEAA contracts were no longer to be construed as procurement contracts. Title III, the Tribal Self-Governance Demonstration Project, was also added to ISDEAA as part of the 1988 Amendments.

In 1994, P.L. 103-413 was enacted and made additional significant amendments to the Act. P.L. 103-413 made clear that all self-determination contracts, including construction contracts, were not to be construed as procurement contracts. The 1994 Amendments also added Title IV, thus establishing Self-Governance as a permanent option for tribes. These amendments, in section 403(b), authorized federally recognized tribes that meet criteria established for the Self-Governance Program to negotiate funding agreements with the Department for programs, services, functions, or activities (PSFAs) administered by the BIA and, within certain parameters, by other bureaus of the Department.

The ISDEAA allows federally recognized Indian tribes, tribal organizations, and tribal consortiums to assume programs administered by Department bureaus and offices other than the BIA, subject to negotiations, when the programs are available to Indian tribes or Indians because of their status as Indians. The ISDEAA also provides the Secretary with discretion to include other programs administered by the Secretary which are of special geographic, historical, or cultural significance to the participating self-governance tribe requesting a funding agreement. The ISDEAA was intended to strengthen the government-to-government relationship between Indian tribes and the Federal Government by putting in place a process and a procedure to ensure that Indian tribes and the Federal Government accomplish the goals and objectives of the tribes

and ensure that Indian people had a voice in the planning, design, and implementation of programs and services for the benefit of Indian people.

Tribal participation in all aspects of self-determination contracting and self-governance continues to expand. In FY 2012, Indian Affairs funded approximately \$800 million to over 500 tribes through Title I ISDEAA Contracts.

These self-determination contracts and self-governance funding agreements allow federally recognized tribes to plan, conduct, consolidate, and administer federal PSFAs according to priorities established by tribal governments. Under these agreements, tribes provide a wide range of programs and services to their members such as law enforcement, education, road maintenance and road construction, forestry, fisheries, agriculture, and other natural resource programs, rights protection and trust related programs, such as real estate services, appraisals, probates, and welfare assistance and Indian child welfare assistance. Under these contracts and funding agreements, tribes have the authority to redesign or consolidate BIA PSFAs, other than construction. In addition, tribes are allowed to carry over unspent funds into the next fiscal year without Secretarial approval. As a result, funds can be used with relative flexibility to address each tribe's unique condition, provided it is for the same activity that the funds were originally contracted for. Tribes are subject to annual on-site visits by Department staff to monitor performance. Tribes are also subject to annual audits pursuant to the Single Audit Act Amendments (P.L. 104-156) and OMB Circular A-133. In addition, most tribes have included language in their contracts and funding agreements indicating that they will work with the Department to provide applicable data and information pursuant to the Government Performance and Results Act of 1993.

Self-Governance Compacts and Funding Agreements

In 1988, Congress added another option to the ISDEAA by establishing a demonstration program allowing federally recognized tribes to operate BIA programs under a self-governance funding agreement. The origin of this option was an oversight hearing held in 1987 by Chairman Yates. At the hearing Chairman Yates asked if there was a better way to conduct business in Indian country. The tribal leaders attending the hearing proposed the concept of identifying and transferring the tribe's share of the federal budget to the tribe so it could govern itself without federal intervention. Chairman Yates asked the federal and tribal leaders attending the hearing to work together to suggest how to implement the tribal concept.

Congress enacted P.L. 100-472, which authorized the Secretary of the Interior to negotiate self-governance compacts with up to 20 tribes. Title III was later amended to include Indian Health Service (IHS) programs. Permanent programs were enacted as Title IV for the Department's Indian programs and Title V for IHS programs.

The number of tribes participating in the DOI self-governance program has grown from seven tribes in FY 1991 to 251 tribes in FY 2012. These 251 tribes are currently funded through 103 self-governance funding agreements. The amount of funding transferred to tribes through self-governance funding agreements has grown from \$27 million in FY 1991 to \$436 million in FY 2011. Given that the distribution of FY 2012 funding is ongoing and set on a two-year funding

cycle, the total amount distributed to self-governance tribes will be better known at the end of FY 2013. In addition to BIA funds included in the funding agreements, funds from other federal programs allocated or awarded to self-governance tribes may be transferred with the ISDEAA funding agreement. This includes Indian Reservation Roads funds from the Department of Transportation and Indian employment training and related services funds pursuant to P.L. 102-477, from the Department of Health and Human Services Temporary Assistance for Needy Families (TANF), Child Care, and Native Employment Works (NEW) funds as well as Department of Labor, Workforce Investment Act (WIA) funds.

The DOI Office of Self-Governance (OSG) administers the Self-Governance Program with respect to PSFAs that would otherwise be performed by BIA. The OSG is located within the Office of the Assistant Secretary – Indian Affairs (AS/IA). The Director of OSG reports to the Deputy Assistant Secretary – Policy and Economic Development within the Office of the Assistant Secretary – Indian Affairs. OSG was organized so as not to duplicate BIA field structure and operations.

OSG administers the government-to-government relationships with a steadily increasing number of self-governance tribes, currently greater than 45% of all federally recognized tribes in Indian country. In recent years, there has been a steady increase of 2-3 new self-governance tribes per year. OSG has a full range of responsibilities to self-governance tribes, including the following:

- Assist in the growth of tribal self-governance by disseminating information and developing education products;
- Work with additional tribes to join the DOI tribal self-governance program;
- Select tribes to participate in the DOI tribal self-governance program;
- Negotiate self-governance compacts with new self-governance tribes;
- Conduct annual negotiations of funding agreements for BIA programs with each self-governance tribe;
- Provide financial management, budgeting, accounting, and contracting services associated with the reprogramming and transfer of funds from BIA programs and other federal programs associated or awarded to self-governance tribes;
- Schedule and reconcile fund transactions with program and account managers in BIA and other federal agencies;
- Satisfy the program accountability requirements of other federal agencies, the BIA, and OSG;
- Maintain financial integrity and accurate delivery and reporting of all funds negotiated in self-governance funding agreements;
- Work with tribes, the Assistant Secretary's Office of Internal Evaluation and Assessment, and

the Department's National Business Center to review and close all outstanding A-133 audits of self-governance tribes;

- Consult with self-governance tribes to avoid and resolve policy issues through the Self-Governance Advisory Committee, which meets quarterly with the Assistant Secretary – Indian Affairs;
- Provide technical assistance on policy and program matters affecting self-governance tribes;
- Provide a central point for coordinating and resolving policy and practical self-governance issues;
- Work with self-governance tribes and federal policy officials to implement tribal self-governance and resolve issues or problems which arise;
- Process requests for waivers of BIA regulations;
- Prepare and submit an annual report to Congress with the views of self-governance tribes;
- Review legislative proposals that impact tribal programs; and
- Implement tribal self-governance by serving Indian communities, including the development and implementation of regulations, policies, and guidance in support of self-governance initiatives.

Tribal self-governance was established with the purpose of reducing the number of staff and costs needed to administer the program so that more resources can be provided and used by self-governance tribes. The OSG has worked to gain efficiencies through a number of means. For example, OSG and self-governance tribes work together to integrate the negotiation and financial management functions through the development of a self-governance data base which provides transparency, accuracy, efficiency, and effectiveness of operation in the implementation of tribal self-governance. The database allows self-governance tribes to see their federal accounts in real-time as an internet based system and minimizes OSG resources needed to perform some financial management functions.

Another example of an initiative to gain efficiencies includes OSG working with tribes to develop a Tribal Data Exchange (TDE) system to automate the collection of information from tribes. DOI requires complex sets of data to support budget formulation, funds distribution, program management, and statutory and regulatory reporting processes. OSG and self-governance tribes often receive multiple requests for data that are repetitive, time consuming, and lack method or form of electronic collection. OSG, working with self-governance tribes on the Data Management Committee established by the Tribal Budget Advisory Committee (now called the Tribal Interior Budget Committee), reached out to contracting tribes as well as direct service tribes to develop a data collection and reporting tool that enables timely and accurate collection, analysis, reporting, and delivery of tribal data. This tool is designed to meet the internal and external data collection and reporting needs of tribes.

OSG is working with self-governance tribes on a number of other initiatives. One is the development of a training curriculum for senior managers, new tribes, and an on-line product for federal employees. Another is the development of a funding methodology matrix study that involves the review of all BIA program funding and the methodologies used by the Bureau.

Before entering into tribal self-governance, a tribe must provide authorization from its tribal governing body, complete a planning phase, and demonstrate, for the previous three fiscal years, financial stability and financial management capability as evidenced by having no material audit exceptions in its required annual audit of its self-determination contracts. As a result, programs once operated by a tribe under self-determination contracts and associated funding are often rolled into self-governance funding agreements. Under tribal self-governance, each individual tribe determines the relationship it wants to have with the federal government, including the number and type of programs the tribe will operate, as well as those programs that the federal government will retain.

Under tribal self-governance, there is authority to negotiate annual and multi-year funding agreements and receive funding which enable tribes to plan, conduct, consolidate, and administer PSFAs for tribal citizens according to priorities established by their tribal governments. Unlike tribes that contract under Title I of the ISDEAA, self-governance tribes do not report to a federal contracting officer and do not operate under a scope of work. Tribal staff report to the tribal council who in turn report to tribal citizens. Self-governance tribes have reduced reporting requirements.

Control and flexibility in the use of funds to meet tribal conditions, needs, and circumstances promotes more efficient and effective governance and is a major source of significant relative benefits of tribal self-governance. In fact, numerous self-governance tribes are award recipients who have been accorded high honors from the Harvard Project on American Indian Economic Development for Good Governance (Ak-Chin Indian Community for its Community Council Task Force; Chickasaw Nation for its Chickasaw Press; Choctaw Nation for its Domestic Violence Prevention Project; Citizen Potawatomi Nation for Constitutional Reform; Makah Tribe for its Cultural Education & Revitalization Program; Muscogee (Creek) Nation for its Reintegration Program; Oneida Tribe of Indians of Wisconsin for its Oneida Nations Farms; Osage Nation for its Governmental Reform Initiative; Red Lake Band of Chippewa Indians for its Walleye Recovery Program; Confederated Salish & Kootenai Tribes of the Flathead Nation for its Trust Resources Management; Tulalip Tribes of Washington for its Quil Ceda Village developed to achieve economic diversification; and Confederated Tribes of the Umatilla Indian Reservation for its Free Transportation System).

Relative benefits of tribal self-governance are also generated by:

- Waivers of Federal regulations when not prohibited by Federal law or inconsistent with the terms of the funding agreement;
- Tribes having the authority to incorporate Title I provisions into their self-governance funding agreements;

- Tribes not being required to abide by Federal Program Guidelines, Manuals, and Policy Directives;
- Self-governance funds being treated as non-federal funds for meeting matching requirements;
- Eligibility to receive lump sum advance payments;
- Authority to invest advance payments to generate interest not accountable to DOI or a special revenue fund;
- Establishment of a tribal base budget to promote stability of funding over time;
- Eligibility to receive new funds on the same basis as other tribes;
- Eligibility to receive non-recurring funds including project, and needs based funds; and
- Eligibility to receive pass-through funds from other Agencies which are administered by BIA.

Self-governance tribes are subject to annual trust evaluations to monitor the performance of trust functions they perform to ensure that there is no imminent jeopardy to physical trust assets, natural resources, and public health and safety. They are also subject to annual audits pursuant to the Single Audit Act and OMB Circular A-133, to ensure that audit standards are met and there is financial accountability of their tribal operations. In addition, most self-governance tribes have included language in their funding agreements indicating that they will work with the BIA to provide applicable program performance data and information pursuant to the Government Performance and Results Act of 1993.

Conclusion

We appreciate the ways that self-determination contracts and self-governance funding agreements under this Act have helped to strengthen the government-to-government relationship with Indian Tribes. Indian tribes have been good managers of the programs they have undertaken through contracts and funding agreements under the ISDEAA. Many times, Indian tribes add their own resources to the programs and are able to fashion programs to meet their needs and the particular needs of their members. Indian tribes are also better suited to address the changing needs of their members.

We appreciate the opportunity to provide our thoughts at this oversight hearing. On a broader note, I would like to reiterate this Administration's commitment to the government-to-government relationship with tribes. Many challenges face our Native American communities and this Administration is committed to working with this Committee and with tribes so that, together, we can create opportunities for these communities to grab hold of their future and to thrive and flourish.

This concludes my statement and I will be happy to answer any questions you may have.