

The History, Status, and Future of Tribal Self-Governance

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2021 marked the 46th anniversary of the **Indian Self-Determination and Education Assistance Act** of 1975 (ISDEAA), and the 33rd anniversary of the Tribal Self-Governance Demonstration Project.

My comments today will focus on how the self-governance program came about, some of the challenges that have had to be overcome, why it has been such a resounding success, and how the program will likely develop over the upcoming years.

The Starting Point: Congress Has Plenary Power over Indian Affairs

Constitution: “Indian Commerce Clause” (Article I, Section 8) grants Congress the exclusive power “[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

- Recognizes tribal governments are sovereigns on par in many ways with states and foreign nations
- But tribes’ sovereignty is limited by, and subject to, the “plenary power” of Congress

The Schizophrenic History of Federal Indian Law and Policy

- **Removal Policy (1826-1887):** isolate tribes out west
- **Allotment Policy (1887-1934):** assimilate Indians by breaking up tribal lands, weakening governments
- **Indian Reorganization Act (1934):** reverse allotment, restore tribal governments
- **Termination**
 - P.L. 280 (1953) – State jurisdiction over Indian country
 - Relocation: tribal members moved from reservations to cities
- **Self-Determination era begins (1970s)**

The Self-Determination Era (1970-Present)

- 1960s: Kennedy Administration stops the practice of terminating tribes; the Johnson Administration invests in Indian social programs and reservation infrastructure.
- 1970: President Nixon, in famous message to Congress, asks Congress to renounce termination and declares tribal self-determination the official federal policy for all Indian tribes.
- 1975: Congress enacts the ISDEAA, which allows tribes for the first time to assert direct control over certain federal programs, functions, services and activities.

Key Principles Behind the ISDEAA

- Tribe, not federal agency, at their option assume the responsibility and funding for programs, functions, services and activities.
- Promotes local control—tribes are closest to beneficiaries and most responsive to their needs.
- Encourages development of capacity for government-building and stable political and administrative institutions.
- Promotes political accountability.
- Affirms tribal sovereignty and the trust responsibility.

Benefits of ISDEAA Agreements

- Mandatory and binding contracts.
- Reflect the unique government-to-government relationship and trust responsibility.
- Right to take over all funding and be paid administrative costs separately.
- Flexibility to redesign programs and reallocate funds.
- Tribes step Into the Shoes of Federal Agencies:
 - Federal Tort Claims Act coverage
 - Access to VA Prime Vendor
 - GSA acquisition
 - Leasing of tribal facilities to deliver services

Key Implementation Problems

- Lack of BIA and IHS support;
- Not all funds on table;
- Initially no administrative costs paid;
- Micromanagement after transfer resulting in growth of BIA and IHS staffing;
- Onerous reporting requirements; and
- Paternalistic interference.

The Birth of the Self-Governance Movement

- Multiple attempts to amend ISDEAA prior to mid 1980s.
- DOI and IHS try to force through unfavorable regulations.
- Tribal leaders fed up with IHS and BIA implementation of ISDEAA.
- Congressional hearings on BIA mismanagement of tribal resources.
- First Self Governance proposal: demonstration project/block grant approach
- Assistant Secretary Swimmer response: yes, but take the trust responsibility

ISDEAA Amendments Related to Self-Governance

- **1988:** Title III Self-Governance Demonstration Project, designed to minimize federal oversight and maximize tribal flexibility
- **1994:** Title IV, permanent Self-Governance legislation for the Department of the Interior
 - Tribes may assume on a discretionary basis programs from non-BIA agencies in DOI
 - Also introduced the Title I model contract and other improvements to Title I
- **2000:** Title V, permanent Self-Governance legislation for IHS
 - Included Title VI, which directed the Secretary of HHS to study the feasibility of extending self-governance program to non-IHS agencies within DHHS.
- **2020:** Title IV amended by the PROGRESS Act
 - Brought Title IV up to par with Title V
 - Also amended Title I provisions

The Indian Self-Determination and Education Assistance Act

Today the ISDEAA consists of five major Titles:

- Self-determination contracting program within the DOI and DHHS under Title I
- Education assistance programs under Title II
- Permanent self-governance program within the DOI for both BIA and non-BIA programs under Title IV
- Permanent self-governance program within DHHS under Title V
- A feasibility study for including non-IHS agencies within the DHHS in a self-governance demonstration project under Title VI

The Growth of Self-Governance

- BIA:
 - 1991, 7 tribes had self-governance agreements with the BIA that totaled just over \$27 million.
 - 2021, 285 tribes and tribal consortia have 133 funding agreements totaling over \$1.3 billion.
- IHS:
 - 1994, 14 tribes had self-governance agreements totaling \$51 million.
 - 2021, 375 tribes have 105 compacts and 131 funding agreements totaling over \$2.6 billion.

Obstacles to Self-Governance

Contract Support Costs underfunding:

- For decades Congress underfunded the administrative or overhead costs associated with carrying out self-governance programs.
- Examples of these fixed and unavoidable costs include insurance, property/personnel management systems, and facilities overhead.
- CSC underfunding gave rise to decades of litigation which continues to this day. So far three of these cases have gone to the SCOTUS: **Cherokee, Ramah Navajo and Menominee.**
- Since 2014, Congress has required IHS and BIA to fully fund CSC and soon we might see CSC funding become mandatory.
- Current litigation over what constitutes full CSC entitlement - payment on third party revenues: **Northern Arapaho, San Carlos and Swinomish.**

Obstacles to Self-Governance

Agency Resistance to Self-Governance:

- IHS and BIA regularly interpret self-governance statutes and regulations as narrowly as possible because it transfers control of program authority and funding to tribes. The result has been litigation:
 - IHS attempted to block **Susanville Indian Rancheria's** nominal co-pay requirement
 - BIA unilaterally cut off funding to the **Aleutian Pribilof Islands Association** for its cultural heritage resource preservation activities after deciding that the consortium was not the primary beneficiary of the program.

Obstacles to Self-Governance

Agency Resistance to Self-Governance: (cont.)

- The IHS refused to allow the **Pyramid Lake Paiute Tribe** to assume operation of their Emergency Medical Services program
- IHS refused to enter leases, under section 105(l) of the ISDEAA, that would fully compensate the **Maniilaq Association** for the use of Village Built Clinics in Ambler and Kivalina to deliver services under a self-governance agreement

In all of the above cases, the courts upheld the ISDEAA and ruled in favor of the tribes and tribal organizations.

The Future of Self-Governance

- Title VI: Expansion of Self-Governance in DHHS
 - 2003 Feasibility Study: Identified 11 programs from non-IHS agencies, including TANF, Head Start, and LIHEAP
 - Initiative restarted in 2021; introduction of bill expected in upcoming months
- Title IV: Expansion of Self-Governance in DOI
 - Multiple efforts since 1994 to take over programs from USFWS, BLM, NPS and other non BIA agencies
 - Few examples of success: **CATG, Grand Portage, Flathead, Yurok, Sitka**
 - Professor Washburn’s recent article in Iowa Law review explores the potential for more of these kinds of efforts

The Future of Self-Governance

Expansion Beyond DOI and DHHS: The Tribal Transportation Self-Governance Program

- Fixing America's Surface Transportation (FAST) Act (2015) included a new Tribal Transportation Self-Governance Program.
- Modeled on Titles IV and V, program allows inclusion of all DOT funding in single agreement.
- Tribes enjoy benefits of the ISDEAA such as FTCA coverage and final offer process.
- Negotiated rulemaking process completed, program operational.

The Future of Self-Governance

Other Agencies?

- Environmental Protection Agency
- Department of Agriculture
- Department of Homeland Security
- Department of Justice

Conclusion: Self-Governance in an Evolving Political Context

- The ISDEAA has helped strengthen tribal governments and communities over the past forty five years and will continue to do so in the future.
- Tribal success in exercising sovereignty has and will continue to drive changes in Title IV, Title V and future self-governance statutes and policies.
- Self-governance is a political movement focused on self-reliance and independence; it has fundamentally changed the relationship between BIA, IHS, other federal agencies and tribal governments.
- The future will involve expanding self-governance more deeply into DOI and DHHS agencies other than BIA and IHS, as well as expansion to other agencies
- Final word of caution: traditional bipartisan support for ISDEAA may be in danger.

Questions?

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