

## **IMPROVING TRIBAL SELF-GOVERNANCE**

### **Policy Statement - Presidential Transition 2009**

**Dated: December 8, 2008**

The United States Constitution recognizes Indian Nations as sovereign governments. Hundreds of treaties and executive orders, federal laws, and court cases have reaffirmed that Indian Nations retain the *inherent power to govern themselves*. Tribal Self-Governance evolved out of the Tribal Self-Determination movement that was underway in the early 1970's. Tribes seeking a change in the Federal-Tribal relationship opted to enter into Compacts of Self-Governance with the United States of America which has enabled them to reinvest control over essential governmental programs from a monolithic Washington bureaucracy back to their Tribal governments and their elected leaders.

Tribal Self-Governance, as with other governments, takes primary responsibility for establishing local priorities, allocating resources, and redesigning governmental programs as necessary and appropriate to address local needs and conditions. Tribal local economies are simultaneously strengthened and infused with the creation of jobs and the building of Tribal administrative capacities and management expertise. Tribal Self-Governance provides Tribal governments with local control and decision-making authority over the federal financial resources that benefit American Indian and Alaska Native people in their communities.

Tribal Self-Governance works primarily because it allows funding and program implementation to be controlled, utilized, and evaluated at the local service delivery level. Tribal leaders and their citizens care more about their communities than anyone else and will always do what is best for their Tribe, both because they are of the people and because they are accountable to the people. Self-Governance provides the opportunity for Tribal governments to exercise their sovereignty with minimal federal intrusion and involvement, while at the same time ensuring that the federal government continues to uphold its trust responsibility by working on a government-to-government basis in support of Tribal Self-Governance. This initiative has benefitted not only Tribes in Self-Governance, but all Tribes. Budget transparency is probably the greatest across-the-board feature of this initiative which was not available to Tribes prior to Self-Governance. The Tribal Self-Governance initiative has been one of the most successful federal Indian policies in the history of the United States.

Tribal Self-Governance is a long-term initiative that has been embraced by Tribal governments to meet the needs of Tribal communities. Numerous successes and positive impacts have been realized by Tribes through Self-Governance which is evidenced by the increasing number of Tribes entering Self-Governance over the last 20 years. It is a new way of doing business that is consistent with the Obama Administration's platform of *Hope and Change* and represents the future for Indian Country. Because of numerous positive impacts and the documented Tribal successes, it is crucial that the new Administration and Congress support the Tribal Self-Governance initiative.

Expanding Tribal Self-Governance opportunities for Tribes is a high priority for Tribal leaders. In 2008, 57% of federally recognized Tribes participated in Tribal Self-Governance in the

Department of Health and Human Services (DHHS), representing over \$1 billion of the Indian Health Service (IHS) budget. In addition, 40% of 567 federal recognized Tribes are Self-Governance in the Department of the Interior (DOI), representing over \$300 million of the Bureau of Indian Affairs (BIA) budget. These numbers represent the significant change as well as the tremendous importance of Tribal Self-Governance as a key federal Indian policy initiative.

While the policy of Tribal Self-Governance has been a great success, improvements are needed in order to preserve and expand Self-Governance opportunities.

- First, the Presidential Transition Team should move swiftly within the first 100 days of the new Administration to protect Tribal Self-Governance opportunities within the BIA and IHS.
- Second, the Administration should support the following Self-Governance improvements and expansions to the Indian Self-Determination and Education Assistance Act (ISDEAA):
  - Enactment of key amendments to Title IV so that the DOI Self-Governance initiative is strengthened on a par with the more successful DHHS Self-Governance initiative carried out under Title V of the Act; and,
  - Expand Self-Governance in DHHS to non-IHS under a demonstration project which was determined to be feasible in a study conducted by DHHS in 2003 as authorized by Title VI of the Act.
- Third, in the 111<sup>th</sup> Congress, we request that the Administration support Tribal efforts to amend the ISDEAA, Title V to allow funding from the Special Diabetes Program for Indians to be administered directly under Title V of the Act.

### **Tribal Self-Governance Recommendations – First 100 Days**

These recommendations can be implemented immediately by Presidential Executive Order or by a Secretarial Directive to protect Tribal Self-Governance opportunities.

1. Contract Support Costs: The chronic underfunding of Contract Support Costs (CSCs) represents the single greatest impediment to the expansion of Tribal Self-Governance. Without CSC funding, Tribal Governments must reduce services and programs to cover the Federal cost of implementing Self-Governance. The Supreme Court has confirmed that CSC funding is a federal contract obligation, yet the past Administration continued to single out Indian Tribes alone, from all other government contractors, in refusing to pay full CSCs. The new Administration should address this issue in the FY 2009 and FY 2010 budgets by increasing or lifting the existing "caps" on IHS and BIA funding for CSCs. The Administration should also instruct the Office of Management and Budget (OMB) and HHS/DOI Secretaries to include adequate CSCs requests in their annual budget justifications since the federal government is responsible for fully funding CSC requirements.

2. Settlement of the Ramah-Ogala-Zuni litigation. The Secretary should immediately assign a high level negotiating team to explore settlement of the 18-year old *Ramah* litigation over past unpaid contract support costs. Three prior partial settlements have been reached in that case, including settlements of claims for unpaid costs that Tribes incurred between 1988 and 1995 in carrying out ISDA contracts. But the post-1995 portion of the case remains mired in litigation. A reasonable settlement should be achieved that removes this divisive area of contention with Tribes, that permits Tribes to recover at least a portion of their historic unpaid costs so that Tribes can use those funds to invest in their communities at this particularly difficult time, and that lays the groundwork for a fairer and more enlightened approach in the future to the funding of contract support costs. Given that an appeal in this case is now pending, immediate priority attention here is necessary.
3. Elevate BIA Self-Governance Office: The Secretary of the Interior should act immediately to elevate the Office of Self-Governance (OSG), so that it is removed from the BIA and placed within the DOI Office of the Secretary. Maintaining OSG within the BIA has contributed to micromanagement by the BIA and the inability of OSG to fully implement the Self-Governance Act; thus undermining Tribal Self-Governance. BIA should be prohibited from holding hostage the annual compacting process as an opportunity to impose restrictions and directives upon Tribal governments.
4. Direct all DOI agencies to Support Tribal Self-Governance: The Secretary of the Interior should issue a directive to all DOI agencies to reorient their priorities so that they support Tribal Self-Governance and work with Tribes to collaboratively overcome impediments to the full realization of Tribal Self-Governance. Each agency should be directed to organize a task force, inclusive of Tribal representatives, to develop specific agency targets and should be required to report to the Secretary every 180 days on progress being made to achieve those targets.
5. Direct the BIA to prioritize support for Tribal governments. The Secretary of the Interior should issue a new directive to the BIA establishing as the BIA's highest priority the maximization of Tribal Self-Governance and Self-Determination. The BIA should be instructed that it is to work as a partner with Tribal governments to support Self-Governance and to remove all identified impediments to maximize local autonomy and control over federal resources benefiting Indian people. As part of this modernization initiative, the Secretary should substantially increase the technical and human resources currently available to support Self-Governance, to support DOI's responsibilities in connection with "contract support cost" issues, and to support the Department's roads and related compacting activities.
6. Restore the National Business Center (NBC) 50% Rule: The Secretary of the Interior should reverse the DOI National Business Center's unilateral 2007 decision to eliminate the longstanding indirect cost rule placing 50% of Tribal government costs in Tribal indirect cost pools, a change which has adversely impacted Tribal governments because their indirect cost rates are set by the NBC. The 50% rule has previously been determined by federal agencies to represent a fair and reasonable estimate of time spent by elected officials when administering federal programs, and has remained in place for three decades. If anything, the 50% rule underestimates Tribal government costs of administering federal programs, due to

the unique nature of assuming federal programs, services, functions, and activities under the ISDEAA.

7. *Continue Funding PL 477 Program:* The new Administration should act immediately to direct that DOI continues funding the 477 Program through transfers in Self-Governance agreements and to direct that DOI, HHS and the Department of Labor (DOL) engage the Self-Governance Tribes in government-to-government consultations on the implementation of the program. The Tribal employment and training program established by the 477 Act allows Self-Governance Tribes to combine employment and training-related federal funds from DOI, HHS and DOL into a consolidated 477 Plan approved by the Secretary of the Interior with a consolidated budget and a consolidated reporting system. Since its inception in 1992, the Program's funds have been transferred to participating Tribes through Self-Governance agreements. Currently, 70% of Self-Governance Tribes are involved in the program and 477 Plan funding accounts for nearly 20% of the total current funds obligated through Self-Governance. Despite the success of the program, DOI announced in October 2008 that beginning in January 2009 the program will be funded through DOI grants rather than Self-Governance agreements. This action, made without consultation or explanation, threatens the stability and integrity of both the 477 Program and Self-Governance. The new administration should require the agencies to consult with Tribes on the legal basis for Self-Governance funding and, if necessary, proposed amendments to ISDEAA to ensure continued funding through Self-Governance agreements.
8. *Indian Health Policy and CMS:* By Executive Order or HHS Secretarial directive, the new Administration should re-affirm the special relationship between the United States and Indian Tribes which maintains the ongoing trust responsibility toward Indian people regarding health care. This action should affirm that the trust responsibility, and laws enacted pursuant thereto, provide ample authority for the Secretary—whether acting through the IHS, CMS, or other agencies of HHS—to take pro-active efforts to achieve the Indian health objectives articulated by Congress, especially the goal of eliminating the alarming health disparities of American Indians and Alaska Natives (AI/AN).

In 1976, Congress amended the Social Security Act to authorize Medicare and Medicaid payments to Indian health programs for services provided to AI/ANs enrolled in those programs. Congress' intent was clear: to enable AI/ANs to fully access their Medicare and Medicaid benefits in health programs operated for them in on/near reservation communities, to enhance the quality of care provided, and to improve the substandard conditions of Indian health facilities. However, the expectation of full and fair access to Medicare and Medicaid has not been realized because often federal policies fail to include mechanisms needed to make Medicare and Medicaid work in the unique Indian health delivery system.

Achieving this goal requires intimate familiarity with the Indian health system. In 2003, CMS established a Tribal Technical Advisory Group (TTAG) to provide guidance on how to assure AI/AN participation in CMS programs. The TTAG has made recommendations on agency policies needed to remove barriers—or avoid creating barriers—to allow full access. Often, however, CMS officials have failed to adopt Tribal recommendations when promulgating regulations or making administrative decisions, with the result that little

progress is made in advancing the full access goals. Most disturbing is that some CMS policy positions have reversed long-standing federal Indian principles when dealing with AI/AN issues. The new Administration should work closely with Tribes and the TTAG to assure that the Indian health system is fully integrated into and that all AI/ANs have full access to CMS-administered programs.

9. Elevation of IHS Director. In 1954, the Indian Health Service was transferred to DHHS from the Bureau of Indian Affairs, where it had been headed by the Assistant Secretary for Indian Affairs (ASIA). The ASIA had direct contact with the DOI Secretary but the transfer did not include equal federal leadership for Indian issues for IHS. The appropriations for the IHS remained in the Interior Appropriations Subcommittees instead of the Labor, Health and Human Services, and Education Appropriation Subcommittees which further complicates the puzzle. The IHS which comprises little more than one-half of one percent of the Department's total operating budget (\$4.3 billion of a total \$740 billion) was now tasked with being a unique direct service agency carrying out critical trust functions. The Administration should prioritize elevating the position of the IHS Director to the level of Assistant Secretary for Indian Health.
10. Reactivation of the Office of Intergovernmental Affairs (OIA) and the Intradepartmental Council on Native American Affairs (ICNAA) Given the unique government-to-government relationship between the United States and Native American Tribes, the Administration should also reactivate the Office of Intergovernmental Affairs (OIA); invite participation in OIA of elected Tribal leadership; staff OIA with knowledgeable Indian health professionals; provide greater support and visibility for the OIA Office of Tribal Affairs; and provide for direct Tribal leadership involvement in the Intradepartmental Council on Native American Affairs (ICNAA).

## **Indian Self-Determination and Education Assistance Act (ISDEAA) – Self-Governance Amendments**

### *Title IV Amendments*

For several years, a top legislative priority of Self-Governance Tribal leaders has been to secure permanent and comprehensive amendments to Title IV of the ISDEAA, addressing Tribal Self-Governance within the Department of the Interior.<sup>1</sup> Most recently, the House Committee on Natural Resources introduced H.R. 3994, the Department of the Interior Tribal Self-Governance Act of 2007. The bill represented five years of negotiation between DOI and Tribal representatives. On November 8, 2007, Tribal leaders testified in strong support of the bill, and as a result of further negotiation and compromise on the part of Tribal representatives, as well as input from House staff, H.R. 3994 was revised to accommodate the DOI's most serious objections. A revised version of H.R. 3994 has laid the groundwork for re-introduction and passage early in the new Congress.

---

<sup>1</sup> In 2004, Title IV amendments were proposed in S. 1715, the Department of the Interior Tribal Self-Governance Act of 2003, a bill that was favorably reported and recommended for passage by the Senate Committee on Indian Affairs. See S. Rep. No. 108-413 (Nov. 16, 2004). Congress adjourned before passage of a bill in the House.

The proposed bill would bring the Self-Governance rules for Interior (Title IV) in line with the Self-Governance rules for DHHS (Title V), creating substantial administrative efficiencies for Tribes while eliminating excessive agency oversight and control that have impeded Self-Governance. The amendments would clarify and limit the reasons for which Interior could refuse to award a proposed Self-Governance agreement, would require prompt transfer of funds to carry out an agreement, would protect Tribes from unilateral agency impositions of unauthorized terms, and would provide a clear avenue of appeal to challenge agency actions.

This legislation also seeks to expand Self-Governance to non-BIA bureaus within the DOI. Even though there has been some recalcitrance within the Department to enter into Self-Governance Compacts with Tribes, some Tribes have successfully negotiated agreements. These Tribes represent the tenet of Self-Governance which is to advance their respective Tribal goals to address the needs of their local communities.

The amendments would also clarify that Title IV applies to agreements between Tribes and the Department of Transportation (DOT) to carry out the Indian Reservation Roads (IRR) Program and other DOT programs, thereby extending the benefits of Tribal Self-Governance to Tribal transportation infrastructure initiatives, as intended by Congress in SAFETEA-LU.<sup>2</sup>

#### *Title VI Demonstration Project*

In 2000, Congress added Title VI to the ISDEAA, directing DHHS to study the feasibility of expanding Self-Governance to non-IHS agencies within DHHS. The DHHS March 2003 study concluded that expanding Self-Governance was feasible and identified several candidate programs for inclusion in Self-Governance agreements. In 2003 a Tribal bill that would have authorized a demonstration project to implement the study's recommendations was reported out of the Senate Committee on Indian Affairs (SCIA), but died at the end of the session. The proposed legislation has been opposed by the Administration during President Bush's second term.

The new Administration should help move this important legislation forward during the 111<sup>th</sup> Congress, so that Tribes can assume direct operation of such essential programs as Temporary Assistance for Needy Families (TANF), Community Services Block Grants, and Headstart.

#### *Title V Diabetes Amendment*

Since 1997, Congress has provided significant funding—\$150 million in FY 2008—for a Special Diabetes Program for Indians (SDPI). The program is administered by the DHHS grants office, not the IHS, and thus is not subject to the ISDEAA. This has created burdensome administrative complications for Self-Governance Tribes. The problem can be solved by an amendment to section 505(b) of Title V of the ISDEAA, adding SDPI funds and associated activities to Title V agreements. This amendment would extend Self-Governance by enhancing control over program design, increasing accountability to Tribal communities, and converting a grantee relationship with the DHHS grants office into a government-to-government relationship with the Secretary.

---

<sup>2</sup> See 23 U.S.C. § 202(d)(5) (Tribes and DOT directed to enter agreements "in accordance with the [ISDEAA]").

## *Conclusion*

These Tribal Self-Governance “First 100 Days” recommendations and legislative priorities will considerably improve the ability of Tribes to exercise their options under the Self-Governance initiative. Self-Governance has dramatically improved the efficiency, accountability and effectiveness of programs and services for many Tribes and their members. These recommendations will allow Tribes to continue to benefit from these efficiencies while promoting the growth and sustainability of Tribal communities. We urge the new Administration and the 111<sup>th</sup> Congress to undertake the measures described above to enhance and extend Tribal Self-Governance.