

# Negotiations Paradigm Shift

“Saying Goodbye to Distributive and Hello to Integrative Negotiations”

# NEGOTIATIONS

- Making of collective decisions through agreement

# Agreement

- Exchange of conditional promises
  - A mutually recognized exchange of tacit commitments
  - E.g. Treaty, convention (agreement, contract or compact)
  
- Meeting of the Minds
  - Parties agree to the extent that they reach the same conclusion regarding a particular problem

# Ethics

- Reflects the values of the negotiator and the implicit code of good behavior in negotiations
- Practice caution with Actions
  - Bluffing
  - Threats
  - Withdrawing a concession already made

# Metaphors for Understanding Negotiations

- **Bargaining:** zero-sum game—one participant gains what the other loses.
- **Joint Choice:** consists of different alternatives—evaluation criteria are considered the main subject of the negotiations
- **Joint Research:** complexity linked with growing interdependence
- **Joint Construction of the Future:** paying attention to factors that cannot be controlled by the participants

# Linking Negotiations to Process of Human Cognition

- Bargaining – Process of resource division
- Joint Choice – Process of mutual evaluation of alternatives
- Joint Research – Investigation of a conflict situation
- Joint Construction of the Future – Planning process to determine a scenario of development

# Attributes of a Successful Negotiator

- ▶ **Flexibility:** establishes as soon as possible the goals of negotiation and knows the general shape of the kind of agreement that he or she wishes to reach but remains flexible about the various possible ways of attaining these goals.
- ▶ **Interpersonal Sensitivity:** sensitive to various cues about the other negotiator while not being too reactive to what one sees.
- ▶ **Inventiveness:** continually strives to be creative, to evaluate the underlying interests of the two sides, and on that basis to develop as many ways as possible to satisfy these interests.

# Attributes of Successful Negotiators

- **Patience:** looking beyond the possibility of immediate gain, even if this means accepting less than one would like in the short term, while negotiating in ways that make sense in the long run.
- **Tenacity:** willing to persist in efforts to turn each other around, to transform a potentially adversarial relationship into a more collaborative arrangement.

# Negotiation Process

General Process and Individual Area  
Specific processes

# Purpose of Negotiating

- Under the law of Title V, Tribes may negotiate for Tribal Shares for the Program, Services, Functions, or Activities (PSFA) of the Service Unit, Area Office and Headquarters.
- The PSFA may be a portion or a whole of the PSFA.
- Title V assumes the Tribe may use the PSFA to tailor the PFSA to the unique needs of the Tribal Members.

# Federal Negotiation Team

- **Agency Lead Negotiator**—has the authority of the IHS Director and the Indian Health Service. Primary role is to lead negotiations and negotiate with the Tribe.
- **Financial Management Officer**—Can be from either the HQ or Area Offices and assists with financial tables necessary to determine the monetary amount in the compact.
- **Office of Tribal Self-Governance**—develops, directs, and implements Self-Governance policies and Title V law.
- **Headquarters and Area Offices**—Office Directors of the programs the Tribe may wish to compact.
- **Office of General Counsel**—provides legal advice on the negotiation process.

# OTSG Program Analysts

- Tena Larney
  - Alaska, Billings, Nashville, Portland, and Tucson
- Christopher Manydeeds
  - Aberdeen, Bemidji, California, Navajo, and Phoenix
- Anna Johnson
  - Albuquerque and Oklahoma City
- Opportunity! (Check IHS Jobs for Job Vacancy Announcement)

# OTSG Financial Analyst

- Kevin Quinn
  - Alaska (Oversight and Assistance), Aberdeen, California, Nashville, Navajo, and Portland
- Carla Mayo
  - Albuquerque, Bemidji, Billings, Oklahoma, and Phoenix , and Tucson
- Opportunity! (Check IHS Jobs for Vacancy Announcement)

# Responsibilities of Federal Team

- Advocate Tribal Self-Governance as an elected Tribal choice for Tribes to administer and operate their own Health Care Delivery Systems
- Establish relationships of trust with Tribal partners
- Provide technical assistance, support and information

# Federal Technical Assistance

- Describe provisions and regulations of Title V
- Assist Tribes in meeting eligibility criteria
- Provide information on Planning and Negotiation Cooperative Agreements
- Provide information on PSFA, staffing, timelines, funding agreement types
- OTSG Database – accessing information on payments and amendments

# Major Components of Negotiation

- Composition of the Negotiations Team
- Time frame for negotiations
- Identification of Residual Amounts
- Determination of Tribal Share Distribution Formula
- Identification of PSFA to Include in the Funding Agreement
- No Reduction in Services to Non-Participating Tribes
- Retained services or Buy-Back Agreements
- Discussion on Current Policy Issues and Directives
- Process and time frame for Agency Review

# Documents of Negotiation

- Important Documents for Negotiation:
  - Tribal Resolution requesting participation in Self-Governance
  - Compact—setting forth the general terms of the government-to-government relationship
  - Funding Agreement—the financial document that specifies the monetary amounts for the Program Services, Functions, and Activities.

# Pre-Negotiation Issues

- Determination of IHS that Tribe meets Title V Eligibility criteria
- Meet with the Tribe to determine issues for research and discussion.
- Develop a negotiation Agenda with Tribe
- Develop ground rules for negotiation with Tribe
  - Formal meeting
  - Informal meeting
  - One-on-one meeting
  - Series of meetings

# Pre-negotiation

- Initial meeting with the Tribe to determine issues for research and discussion.
- The Tribe sets the agenda for the meeting.
- This meeting differs from Area to Area
  - Alaska is a formal meeting with all Alaska Native Organizations
  - Bemidji is an informal meeting with all Tribes
  - New Tribes usually have a one-on-one meeting.Several pre-negotiations can take place

# Pre-negotiation (Cont)

- Program Title and Description
- Total Budget Amount (see tables listed below)
- Identification of Residual
- Identification of Tribal Share
- Basis for Determining Tribal share  
(Distribution Formula)
- Compact and/or Funding Agreement  
Language Revisions (if returning Tribe)

# Negotiation

- The Tribe and the USA Federal Government meet on a government-to-government basis.
- The Tribe sets the agenda for the meeting.
- Tribe makes offers on PSFA or a portion thereof and negotiates the monetary amounts.
- The ALN will talk about any changes in the law or budget for that year.
- IHS considers negotiation generally a collaborative process, not adversarial.
- The primary focus of the Federal government is on the facilitating the transfer of PSFAs

# Final Offer

- By Law, the Tribe may make a final offer to the Secretary (IHS Director).
- This occurs when the Federal Government and the Tribe are unable to agree to the terms of the Compact or Funding Agreement
- The Secretary has 45 days after filing a final offer to make a determination on specific criteria.
- If the Secretary fails to make a determination within 45 days, the offer shall be deemed agreed to by the Secretary.

# Final Offer Rejection Criteria

- The Secretary may reject a final offer on the following criteria:
  - The amount of funding proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under this Title
  - The program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe.
  - The Indian Tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
  - The Indian Tribe is not eligible to participate in self-governance under section 503.

# Final Offer Rejection (Cont)

- The Federal Government shall provide technical assistance to overcome the objections state in the notification required by the previous criteria.
- The Tribe has the right to a hearing with record to engage in full discovery relevant to any issues raised in the matter or the opportunity to appeal on the objection raised, except that the Tribe may also directly proceed to initiate federal action in Federal district court.
- The Tribe has the option of entering into the severable portions of the a final proposed compact or funding agreement, or provision thereof, that the Secretary did not reject, subject to any additional alternations necessary to conform the compact or funding agreement to the severed provisions.

# Final Offer (Cont)

- The Secretary has the burden of proof in any hearing or appeal or civil action
- The Secretary shall negotiate in good faith at all times
- The Secretary is prohibited from waiving modifying, or diminishing in any way the trust responsibility of the USA with respect to Tribes and individual Indians.

# Conclusion

- Negotiation is a government-to-government process specified by law
- The Tribes set the agenda during the negotiation process
- This is a collaborative effort on both governments.

# Contracting and Compacting for IHS Functions and Funds under ISDEAA

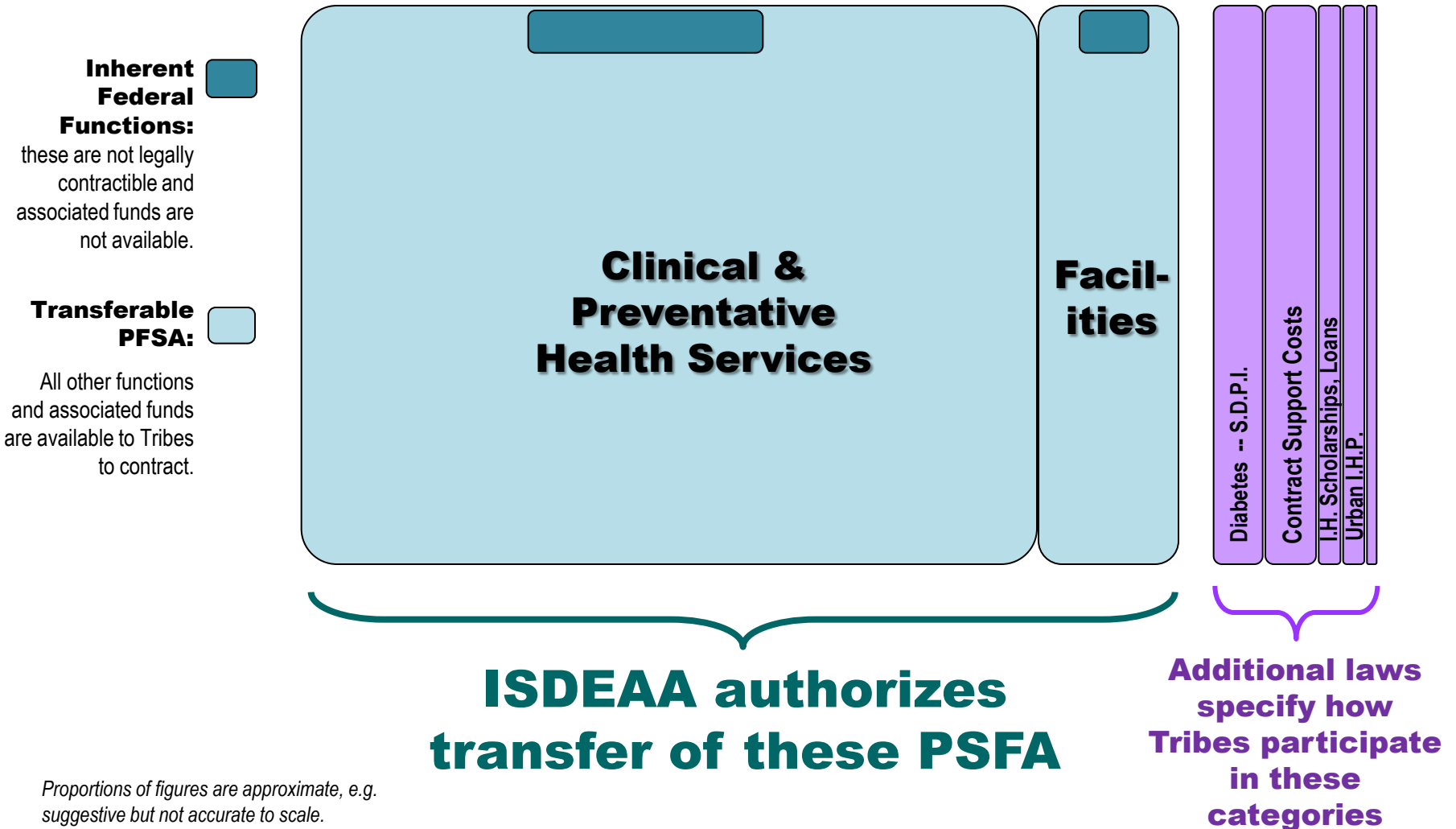
## Overview

This summarizes general background with emphasis on TRIBAL SHARES, especially for Headquarters/IHS-Wide.

# Definitions

- **PSFA** means programs, services, functions, and activities (or portions thereof) of the IHS that an Indian Tribe may elect to carryout through a contract or compact
- **Tribal share** means that portion of resources currently used by IHS to carryout the PSFAs to be contracted/compacted by an Indian Tribe and which are not required by IHS to carry out inherent Federal functions
- **Inherent Federal functions** mean those governmental functions which IHS must perform which cannot legally be delegated to Tribes
- **Residual** means that portion IHS resources required to carry out remaining inherent Federal functions when all other PSFAs have been transferred to tribes.

# Which categories of IHS programs may be contracted/compacted under ISDEAA?



*Proportions of figures are approximate, e.g. suggestive but not accurate to scale.*

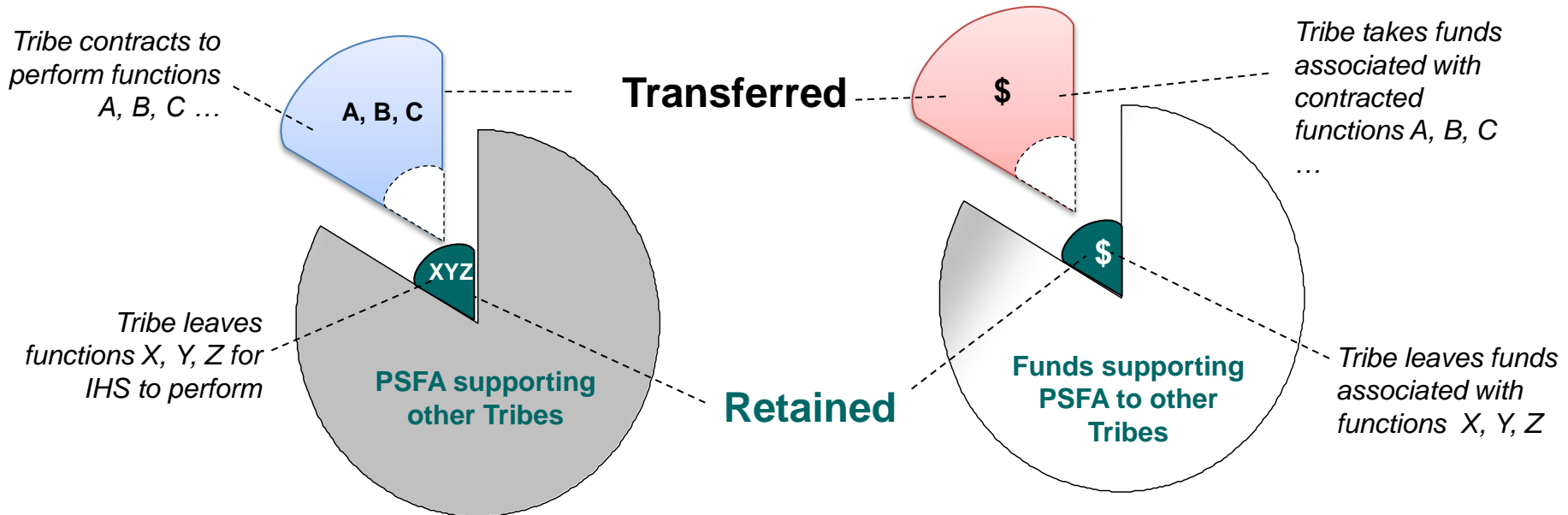
# Funds are inextricably linked to the PSFA

## PSFA

Tribes decide to contract all, a portion, or none

## Shares

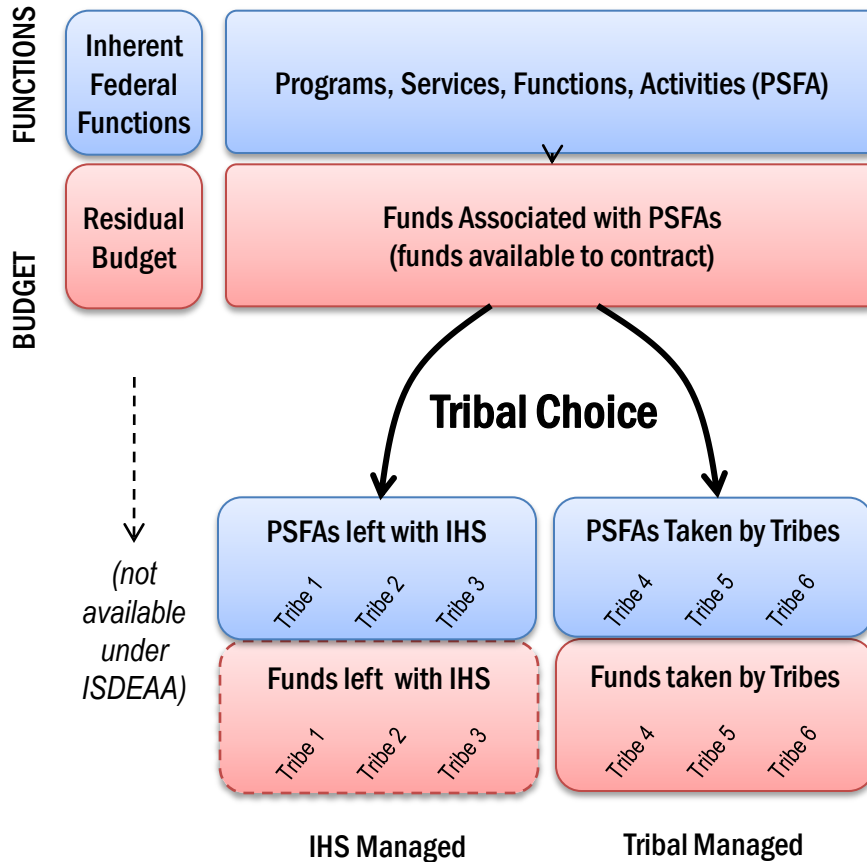
Associated funds follow the decision about the PSFA



This chart does NOT depict Inherent Federal Functions and Funds

# More than ½ of IHS PSFA are managed by Tribes

## All IHS PSFA AND ASSOCIATED FUNDING



- ❑ IHS Area Offices and headquarters perform support functions on behalf of many local IHS service units. This work is formally referred to as “Programs, Services, Functions, Activities” (PSFA) which may be transferred to Tribes under ISDEEA.
- ❑ Funds are inextricably connected to the PSFAs. That portion of funds associated with a contracted PSFA are available to the Tribe.
- ❑ The funds associated with PSFA are referred to as “shares” because the amount available to each tribe is commensurate with the portion of PSFAs for which each Tribe contracts.
- ❑ A few inherent Federal functions, such as oversight and resource allocation, legally cannot be contracted. Tribes may not take funds necessary to perform inherent Federal functions.

# Shares for each Tribe must be determined when a PSFA to be contracted/compact benefits multiple tribes

- A Tribe contracting/compacting for its portion of PSFA which benefits multiple Tribes is entitled to that portion of funds (. . . **the Secretary would have otherwise provided for the operation of the programs or portions thereof . . .**) that benefit the Tribe or its members.

# A Tribe is entitled to the SUM of portions at any IHS level for PSFAs to be contracted/compacted

## ○ **Local Level: Site shares**

- a portion\* of funds currently spent by the health care delivery site for the PSFA to be contracted/compacted  
\*(if only 1 Tribe, the portion is 100%)

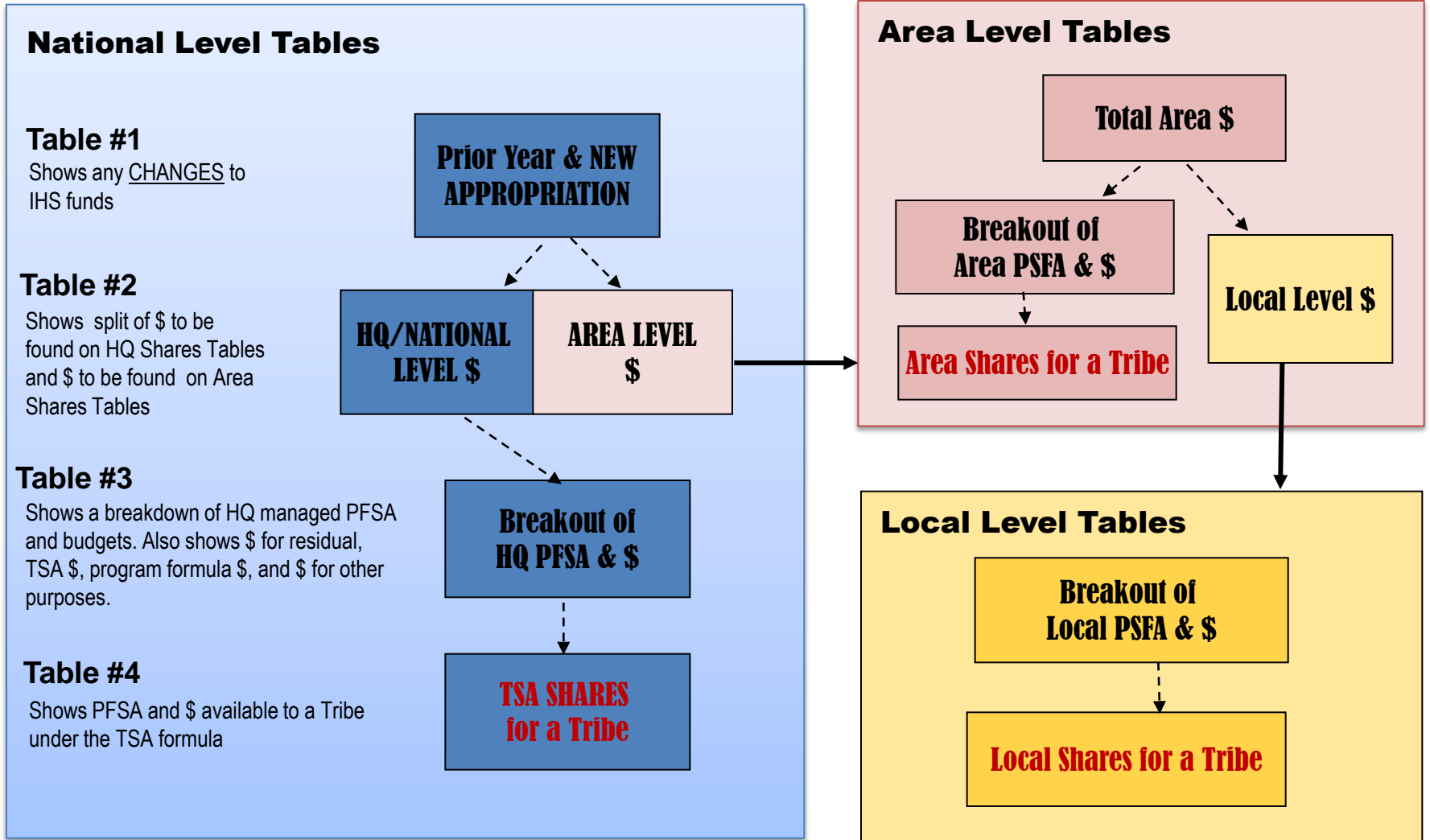
## ○ **Area Level: Area Office shares**

- A portion of funds of the Area Office indirectly spent for local level PSFAs to be contracted/compacted, *plus*
- A portion of other funds spent for Area level PSFAs to be contracted/compacted

## ○ **IHS-wide Level: HQ/IHS-wide shares**

- A portion of HQ/IHS-wide funds indirectly spent for Area and local level PSFAs to be contracted/compacted, *plus*
- A portion of other funds spent for IHS-wide PSFAs to be contracted/compacted

# Shares Tables Exist for all 3 Levels of IHS



Format and content of Area and Local level tables will vary, but will generally cover the topics listed above.

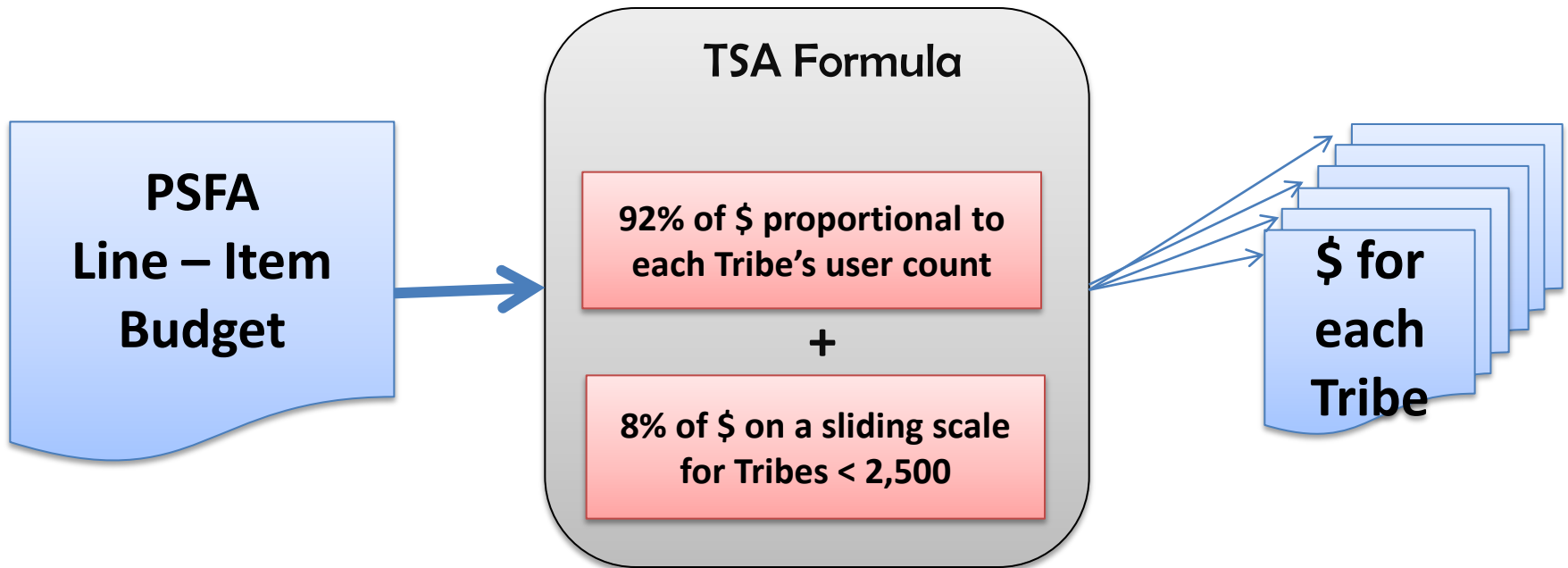
# What is the evidence and methods used to determine shares available to Tribes?

- **Direct Financial Evidence:** Shares are precisely determined when IHS financial accounting records show actual spending for PSFAs to be contracted, e.g. expenditures at a local level site serving 1 Tribe.
- **Indirect Evidence:** Shares available to Tribes that currently share a PSFA is often determined in proportion to program measures such as workloads, services, or patient counts for each Tribe benefited by the shared PSFA. The program measure and proportions are selected after consulting with affected Tribes.
- **Proxy Formula:** if direct or indirect evidence does not exist or is impractical to obtain, a proxy formula is used to compute the portion of funds for each Tribe which share the benefits of the PSFA. Proxy formula are typically based on user counts, number of Tribes, or other general distributive factors . Proxy formula factors are determined after consulting with affected Tribes.

# Tribal Size Adjustment (TSA) Formula

-- a “proxy” type formula

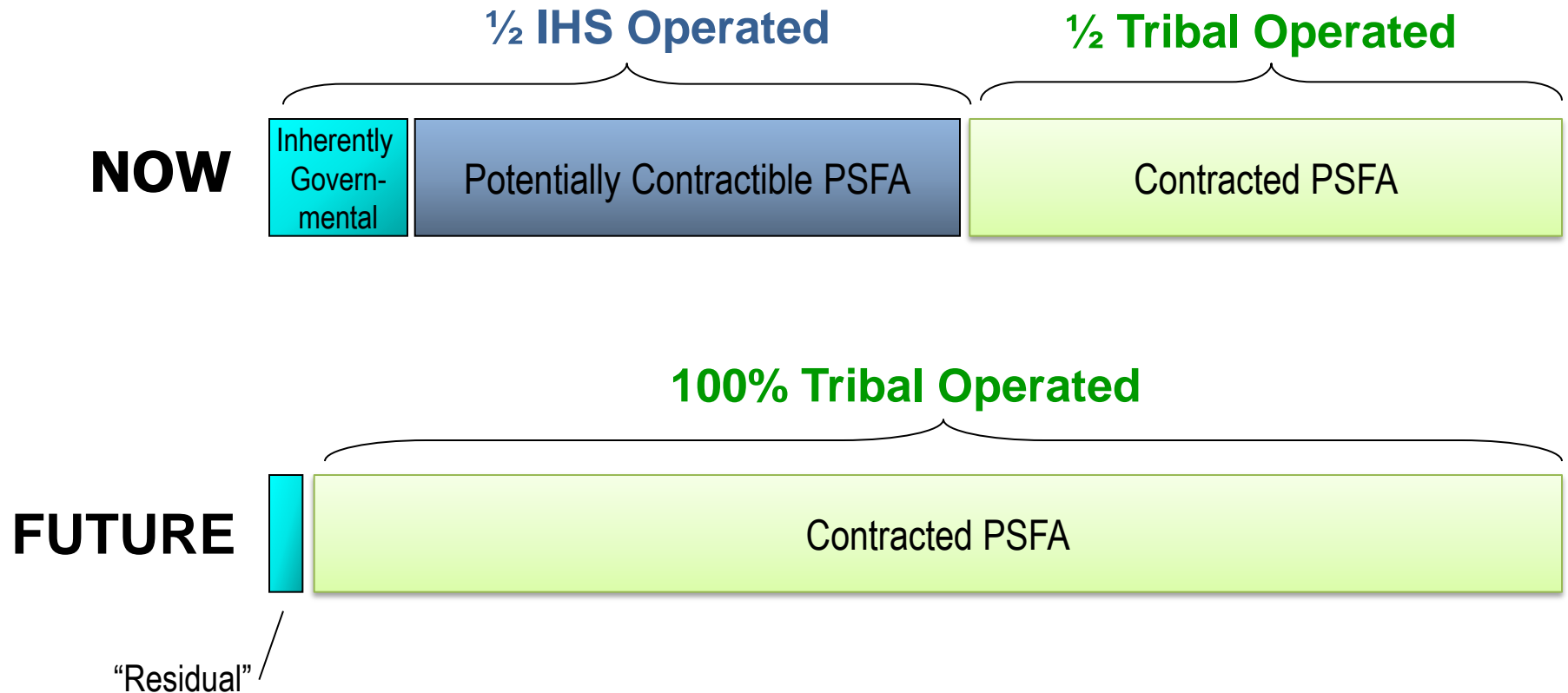
Shares for all Tribes, even those not contracting or compacting, are determined for many HQ PSFA using the TSA formula. The TSA formula was established by a joint Tribal/IHS workgroup as a practical and less burdensome approach because measures of HQ expenditures and benefits accruing to more than 560 Tribes nation-wide were not available and are not practical to create.



# Shares are determined at the point in time the PSFA is initially contracted/compact

- After a Tribe contracts/compacts for a PSFA, the shares linked to the contracted/compact PSFA are **assured thereafter** except for limited reasons specified in the law.
- Congress anticipated that IHS would downsize, redesign, and reconfigure as PSFA and funds were transferred to Tribes.
- Shares provided to a contract/compact are **not altered by any subsequent internal realignment or redesign** by IHS of PSFA that it carries out for other Tribes not a party to the contract/compact.
- Realignment or redesign by IHS may alter shares associated with any PSFA **not yet transferred** to a contract/compact
- **Non-recurring funds** maybe included in contract/compact agreements from time to time, but are not assured beyond the time limit or after project completion.

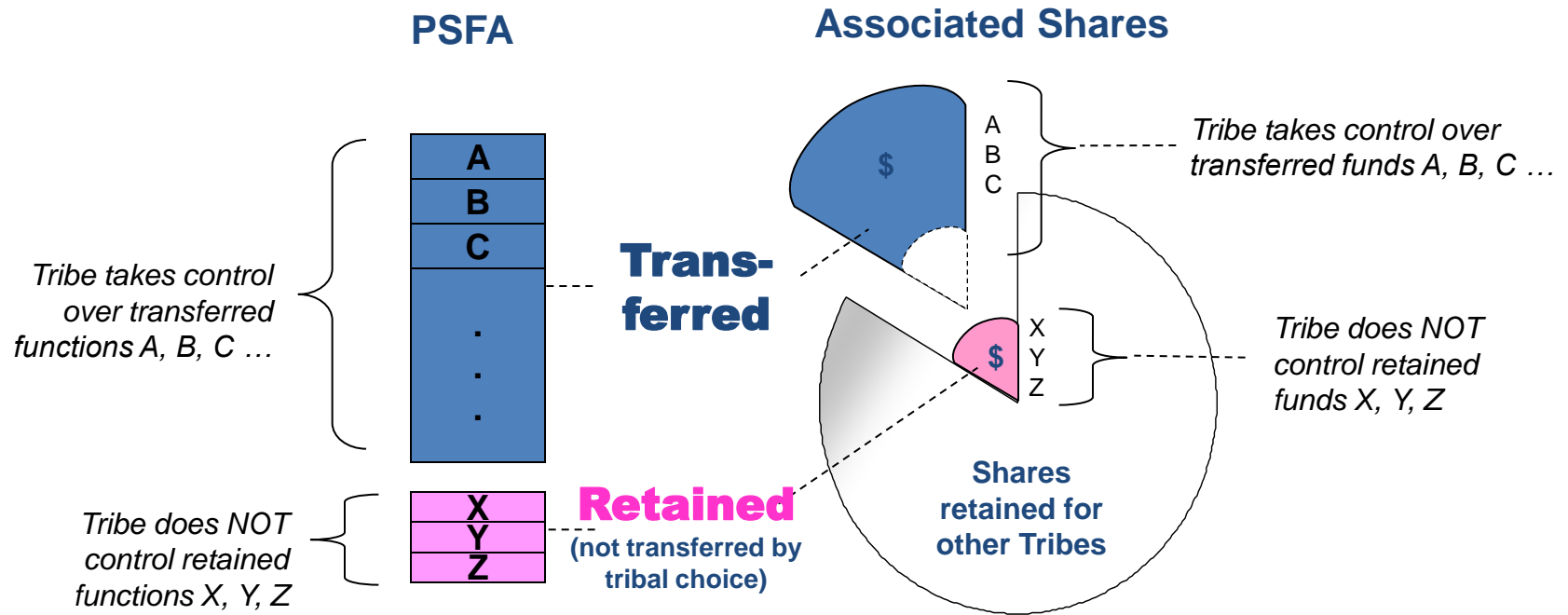
# Inherently Governmental Functions: now and in a hypothetical future



ISDEAA anticipates that direct Federal spending will decrease commensurately as functions are transferred to Tribes

\*Illustration only, bar scale is hypothetical

# Basic Terms: “Retained” versus “Transferred”



## RETAINED:

When Tribes choose to have IHS perform PSFA, the IHS performs the retained PSFA (X,Y,Z) in a best efforts manner within funds retained for X,Y,Z. Generally, we refer to PSFA performed by the IHS as Retained PSFA and the associated funds as Retained Shares. Performance of retained PSFA (X,Y,Z) is not negotiated and not guaranteed. Agency discretion in performing retained PSFA is not altered by the contract/compact for Transferred PSFA (A,B,C).

## TRANSFERRED:

The Tribe performs transferred PSFA (A,B,C...) in a best efforts manner within funds for A B,C although it is permitted to supplement performance with funding from other sources. The ISDEAA law permits a Tribe to later return the Transferred PSFA and associated \$ to the IHS or to later take possession of retained PSFA (X,Y,Z) and associated \$. The agency does not have unilateral authority to reassume PSFA transferred under ISDEAA except under narrow conditions defined in the ISDEAA.