

TRIBAL SELF-GOVERNANCE

A HANDBOOK FOR TRIBAL GOVERNMENTS



TRIBAL SELF-GOVERNANCE HANDBOOK

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Purpose of Handbook

This Handbook was originally developed in March 2002 to provide both new and existing Self-Governance Tribes and the Indian Health Service (IHS) a useful and practical guide to assist in the government-to-government negotiations of Self-Governance Compacts and Funding Agreements. Self-Governance is a legal option available to Tribal governments as they pursue their self-determination goals.

This Handbook has been updated to reflect many of the legal and policy changes that have occurred since its original publication. For example, the Final Rule implementing Title V of the Tribal Self-Governance Amendments of 2000, Public Law (Pub. L.) 106-260 (the Act) was published in the Federal Register on May 17, 2002, with an effective date of June 17, 2002. Further, in April 2008, Mr. Robert G. McSwain, a member of the North Fork Rancheria of Mono Indians of California was sworn in as the new Director, IHS. In this capacity and on behalf of the Agency, Mr. McSwain supports Self-Governance and continues to work with the Tribal leadership in a government-to-government relationship to implement the provisions of Tribal Self-Governance legislation and authorities in the IHS, under Title V of the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended.

This Handbook is not intended to replace or dictate any formal position taken by individual Tribal governments or the IHS during their respective negotiations and is not a legally binding document. Rather, its intent is to furnish a resource tool for Tribal leaders and staff, IHS representatives, Agency Lead Negotiators (ALN) and Office of Tribal Self-Governance (OTSG) staff regarding the various policy issues and programs, services, functions and activities (PSFA) undertaken in the implementation of Self-Governance within IHS.

Any questions, concerns and/or comments regarding this Handbook should be directed to Ms. Hankie P. Ortiz, Esq., Director, Office of Tribal Self-Governance, Rockville, MD at (301) 443-7821.

How This Handbook is Organized

This Handbook is organized to provide a Tribal government with current information available on Self-Governance in general and IHS Tribal Self-Governance specifically. Several other documents, policies and manuals have been previously published internally by both IHS and by other Tribal organizations such as the Self-Governance Communication and Education Tribal Consortium and the National Indian Health Board. This Handbook has been structured to incorporate these various relevant publications into a single, user-friendly document.

Self-Governance: A Way of Life

The United States Constitution recognizes Indian nations as governments and hundreds of treaties, federal law and court cases have re-affirmed that Indian nations retain the *inherent powers to govern themselves*. In 1975, the Indian Self-Determination and Education Assistance

Act (ISDEAA) was signed into law. This landmark legislation recognized the primacy of the government-to-government relationship between the United States and sovereign Tribal nations. The ISDEAA was enacted to ensure “effective and meaningful participation by the Indian people in the planning, conduct, and administration” of federal services and programs provided to the Tribes and their members, 25 U.S.C. § 450a(b). The ISDEAA provides Tribes the option exercising self-determination by either assuming from IHS the administration and operation of health services and programs in their communities or remaining within the IHS-administered direct health system.

In 1992, the IHS was instructed by Congress to initiate budget research and planning activities with Tribal governments as authorized by Pub. L. No. 100-472. Through enactment of Public Law 102-573, the Indian Health Care Amendments of 1992, authority to fund the Tribal Self-Governance Demonstration Project (TSGDP) was extended to IHS and the Office of Tribal Self-Governance was established. Through enactment of Public Law 106-260, the Tribal Self-Governance Amendments of 2000, permanent authority was given to the IHS under Title V, Tribal Self-Governance.

Tribal Self-Governance has created opportunities for Tribes to exercise their inherent self-governing powers. Self-Governance returns decision-making authority and management responsibilities to Tribes and their governing bodies. Self-Governance is about change through the transfer of federal funding available for programs, services, functions, and activities to control. Tribes are accountable to their own people for resource management, service delivery, and development.

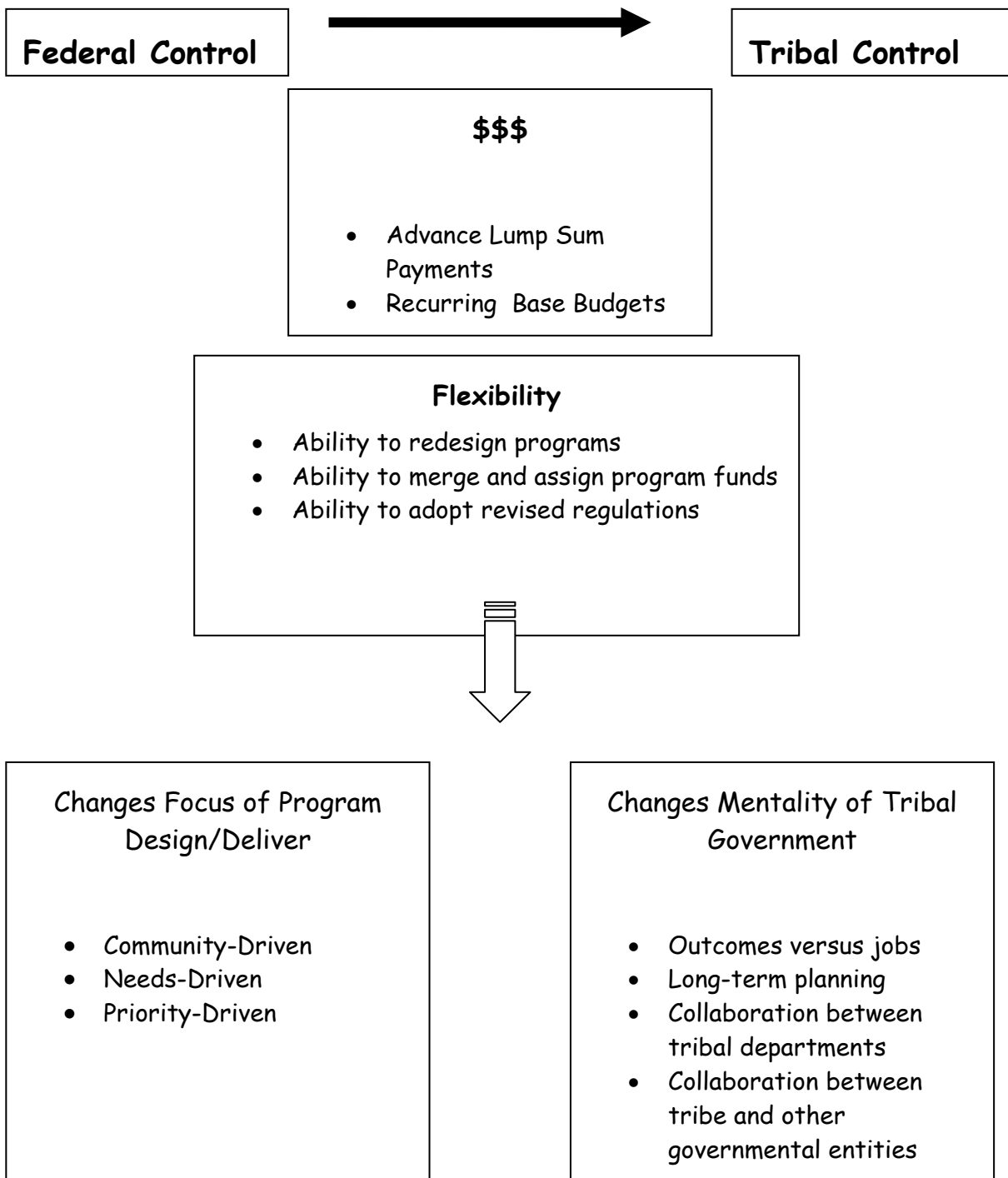
Since implementation of the first Self-Governance Compact and Funding Agreement on September 30, 1993, the interest and growth in Self-Governance is astonishing. As of February 2009, there are currently 328 Tribes (representing 58% of all federally-recognized Tribes) participating in Self-Governance with 2 additional Tribes conducting planning and negotiation activities under grants awarded from the Office of Tribal Self-Governance.

Self-Governance is not just another legislative initiative or Tribal program. It is a way of life for Tribal nations today. Under Self-Governance, Tribes are allowed to take their program funds, along with the funds that were used by the federal government to manage the contracts or direct services, and manage them as best benefits their community.

Why Is Self-Governance A Success? Under Self-Governance, program funds, control and accountability are pushed as close to the delivery of the services as possible. At the local level, Tribal leaders and Tribal members care most about their people and communities. Given the opportunity to make decisions regarding priority of funding and the subsequent design and delivery of program services, Tribal governments will do what is best for their members and community.

The following chart illustrates Tribal management under Self-Governance at the local level.

Tribal Management Under Self-Governance



Getting Started - Steps Required under Self-Governance

As authorized in Pub. L. 106-260, the Self-Governance Act, and the accompanying final published regulations, there are three major components to the Self-Governance initiative. These components include the: (1) planning phase, (2) negotiations process, and (3) actual implementation. This Handbook primarily focuses on the first two phases involving planning and negotiations. However, to whatever extent a Tribe chooses to enter into Self-Governance, completion of each of these components is essential to their success.

Planning

The Self-Governance Act requires that, “Each Indian Tribe seeking participation in Self-Governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian Tribe and shall include— (1) legal and budgetary research; and (2) internal Tribal government planning and organizational preparation relating to the administration of health care programs.” While planning and negotiation grants may be available from IHS (based on availability of appropriations), the regulations do not require that a Tribe receive a grant to be eligible for participation. A Tribe may use other resources to meet the planning requirement and to negotiate.

Eligibility Criteria

The Self-Governance Act makes provision for existing Self-Governance Tribes to participate in Self-Governance should they elect to do so. This law also stipulates that each year an additional 50 Indian Tribes that meet the eligibility criteria shall be entitled to participate in Self-Governance. Eligibility criteria include the following: (A) successfully complete a planning phase to the satisfaction of the Tribe (*as noted above*); (B) request participation in Self-Governance by resolution or other official action by the governing body of each Indian Tribe to be served; and (C) have demonstrated for 3 fiscal years, financial stability and financial management capability. This law further explains that criteria for determining financial stability and financial management capacity include evidence that during the three year period the Indian Tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe’s Self-Determination Contracts or Self-Governance Funding Agreements with any Federal agency, [the audit] shall be conclusive evidence of the required stability and capability.

Negotiations Process

Both the Self-Governance Act and subsequent final enacted Title V regulations contain specific detailed provisions related to the negotiation process-- including, but not limited to: Compacts, Funding Agreements, Final Offer, Multi-Year Funding and the Appeals process.

Negotiations have been, and remain, a dynamic, evolving and Tribally-driven process that involves Tribal and IHS representatives and the Office of Tribal Self-Governance (OTSG). Negotiations require careful planning and preparation by both sides and timely, accurate information. Negotiations are conducted on a government-to-government basis and each Tribal situation is unique requiring careful review and deliberation to ensure that each Tribe receives fair consideration in the negotiations process.

Negotiations bring Tribal and Federal teams to the table under a government-to-government relationship. At negotiations, Tribal and federal teams discuss each Tribe's progress and problems under Self-Governance and work through issues to reach agreements on each Tribe's Compact (in initial negotiations) and Funding Agreements (in subsequent negotiations). Sections 504 and 505 of Title V require IHS to negotiate a Compact and Funding Agreement with each Tribe that participates in Self-Governance. These negotiations provide opportunities for both sides to work together to make each Self-Governance agreement a good partnership.

Negotiations are the method of determining and agreeing upon terms and provisions of a Tribe's Compact and Funding Agreement, including the Tribe's share of the programs to be included in the Funding Agreement. In theory, the underlying materials (including the negotiation financial tables) should be shared and agreed upon early in the negotiations process. When the facts cannot be agreed upon, they become issues for negotiation. For the Self-Governance negotiations, these facts include complete program and budget information at all organizational levels of the IHS. Negotiations should not be conducted as an allocation process, but rather these budgets and issues should be mutually reviewed and discussed during the negotiations.

The following sections provide more detailed information about the Negotiations Process, including:

1. Negotiation Authority (Roles and Responsibilities)
2. Negotiation Documents (Compact and Funding Agreement)
3. Negotiation Process (Pre-Negotiations, Negotiations and Post-Negotiations)
4. Programs and Funding (including Residual, Tribal Shares and Base Budgets)
5. Inclusion of Statutorily Mandated Grants
6. Process and Provisions for Final Offer
7. Process and Provisions for Appeals

1. Negotiation Authority (Roles and Responsibilities)

The Self-Governance Negotiations Process (including the Negotiation authority and roles/responsibilities of IHS officials) utilized within the IHS was first developed by a joint IHS/Tribal Workgroup and published in the Title III Transition Team Report in 1996. This report was further reviewed and amended by the Tribal Self-Governance Advisory Committee (TSGAC). Final amended changes were subsequently approved by then IHS Director, Dr. Michael Trujillo in his April 10, 1997 letter to the TSGAC Chairman.

Many of the general principles and procedures included in the Self-Governance negotiation process are still applicable and remain in place today. However, the enactment of the final Title V regulations in May 2002 provides further clarification. The following sections outline the current roles and responsibilities that are in place.

Tribal Governments (Leaders)

As independent sovereign nations, it is the decision of the Tribal government to determine who will represent the Tribe during the negotiations. In most circumstances, the Tribal team will include a Tribal leader from the governing body, technical and program staff, legal counsel and other consultants, as may be determined. Regardless of the composition of the Tribal team, it is essential that those representing the Tribe have the final decision-making authority in order to successfully negotiate and reach final agreement on the issues.

Office of Tribal Self-Governance (OTSG)

The OTSG develops, directs and implements Self-Governance policies and procedures as authorized under Title V. The OTSG serves as an advocate for Self-Governance Tribes within the IHS. Specifically, the OTSG has “full Self-Governance implementation authority of the IHS Director, including authority over the negotiation process, independent of other divisions of the IHS in matters relating to Self-Governance.” This authority was delegated to the OTSG Director by the IHS Director, Dr. Michael Trujillo in his April 10, 1997 letter to the TSGAC Chairman.

Agency Lead Negotiators (ALN)

The IHS Agency Lead Negotiators (ALN) represent the Director, IHS and the Agency position during negotiations. The ALN work under the direction of the OTSG to provide Tribes with Self-Governance information, assist Tribes in Self-Governance planning, coordinate meetings between Tribes and the Agency during planning and negotiations, and coordinate the Agency’s response to Tribal questions. The ALN role requires a detailed knowledge of the Agency, current policy and practice and an understanding of the rights and authorities provided the Tribes under Title V.

The ALN are given the authority to complete and conclude final negotiations with Tribes. When necessary, ALN receive assistance from other Area or HQ staff [including staff from IHS

Office of Finance and Accounting (OFA) and Office of General Counsel (OGC)] prior to and during negotiations. Such assistance may include reviewing documents, identifying Agency concerns, providing advice on issues, calculating new Tribal shares, advising the ALN on IHS retained services, or drafting language for Compacts/Funding Agreements. It is important for such staff to be available, as necessary, to assist ALN at final sessions so that final negotiations may be concluded at the table.

In most instances, the ALN perform negotiation duties in addition to other full-time jobs. As a result of the current turnover in ALN due to retirement or job re-assignment, the IHS recognized that a system needed to be established to provide for continuity in implementation of the provisions required in the Self-Governance Act. As a result, in 2004 under the direction of the IHS Director, a IHS and Tribal workgroup was formed to develop a Self-Governance "Curriculum and Standards Manual" to train and certify ALN's. The Curriculum will be used to train ALN's on the factual, legal, regulatory and policy information on Self-Governance. ALN's will be required to be certified following completion of this training.

Office of Finance and Accounting (OFA)

The IHS Office of Finance Accounting (OFA) is responsible for the timely preparation of the annual financial tables needed for negotiations. Additionally, the OFA provides advice to the ALN's as requested on issues that may arise during the negotiations.

Office of General Counsel (OGC)

The Office of General Counsel (OGC) is located within the Office of the Secretary – Department of Health and Human Services. OGC's role during Self-Governance negotiations is to provide legal counsel to the IHS, through the ALN or others in the agency, including the IHS Director. Such legal advice may be sought by the ALN or volunteered by OGC if a legal issue needs to be brought to the attention of the ALN.

Tribal Self-Governance Advisory Committee (TSGAC)

The IHS Tribal Self-Governance Advisory Committee (TSGAC) plays no direct role in the individual Tribal and IHS government-to-government negotiations. Yet, the TSGAC does provide advocacy and policy guidance on the implementation of Self-Governance. The Director, IHS first established the TSGAC in April 1996.

As adopted and stated in the Committee Protocols, the TSGAC: (1) consists of Tribally-elected officials representing a cross-section of Self-Governance Tribes; (2) represents Self-Governance Tribes by acting on their behalf, to clarify issues that affect all compacting (Self-Governance) Tribes specific to issues affecting the delivery of health care for American Indians and Alaska Natives; (3) confers, discusses and reaches consensus on specific Self-Governance issues; and, (4) provides verbal and written advice about Self-Governance issues to the Director, IHS, and the Director, OTSG.

Self-Governance Tribes from each Area select their own TSGAC delegate and alternate. These representatives bring the views and issues from each Area while working on the Self-Governance policy issues that are brought to the Committee. The TSGAC is provided support from a Tribal/Federal Technical Workgroup whenever situations warrant further research and review to carry out a policy issue for the Committee.

Because of the active participation of the TSGAC members since its formation, this Committee has proven to be a successful forum for providing advice and input before final decisions are made on policy issues which advance Tribal Self-Governance objectives within the IHS.

2. Negotiation Documents

Two documents (mutually-negotiated agreements) are required for participating Self-Governance Tribes:

Compact - The Compact sets forth the general terms of the government-to-government relationship between the Indian Tribe and the Secretary, consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and other terms as the parties intend to control from year to year. Subpart D of the Title V regulations (Sections 137.30 through 137.35) describes the authority for Self-Governance Tribes to negotiate Compacts and identifies what is included in a Compact.

The regulations define a Self-Governance Compact as a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States. Tribes must have a Compact in order to participate in Self-Governance. A Compact is a separate document from a Funding Agreement, and must be executed before or at the same time as a Funding Agreement. Upon approval and execution of a Self-Governance Compact, the Compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all program, services, functions and activities (PSFA), or portion thereof.

Tribes may receive copies of existing Compacts from OTSG or their ALN. Preferably, Tribes are encouraged to first make their request directly to another Tribe. Normally, Tribes draft and submit their own Compacts to IHS and the Tribal draft is used in the negotiation of terms and conditions.

Funding Agreement - The Funding Agreement is a legally binding and mutually enforceable written agreement that identifies the programs, services, functions, and activities (PSFA), or portion thereof, that the Tribe will carry out, the funds being transferred from Service Unit, Area and HQ in support of those PSFA and such other terms as are required or may be agreed upon pursuant to the Self-Governance Act. Subpart E of the Title V regulations (Sections 137.40 through 137.57) describes the authority for Self-Governance Tribes to negotiate Funding Agreements and identifies what is included in a Funding Agreement. This subpart also

describes the terms required to be included in a Funding Agreement and the terms that may be included at the Self-Governance Tribe's option.

A standardized Self-Governance Funding Agreement Table (Worksheet) is available to Tribes to assist in identifying all PSFA amounts available from the OTSG. Once finalized, this Table (or other mutually acceptable Worksheet) is incorporated as part of the Funding Agreement and serves as the initial "obligating" document and starting point for the funding process. For reference, Tribes may receive copies of existing Funding Agreements from OTSG or their ALN. Normally, Tribes draft and submit their own Funding Agreements to IHS and the Tribal draft Funding Agreement is also used in negotiations.

3. Negotiations Process

Pre-Negotiations:

Pre-negotiations are used to provide information on budget, Tribal share calculations and residual information and to provide adequate time for review by both the Tribe and IHS. At least 120 days in advance of the final negotiation date, the IHS shall provide the Tribes with the following information (at all IHS levels-HQ, Area, Service Unit and Program base) in hard copy and electronic format.

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

The following is a brief description of the "Budget Tables" which summarizes this information:

Table 1: Congressional Changes to IHS Appropriations

Table 2: Breakdown of Appropriation for Allowances to Areas and through HQ- (for the year being negotiated)

Table 3: Breakdown of HQ Allowances Detailed HQ Accounts and Categories for Tribal Shares [Note: The "Crosswalk" tables are also part of this, wherein the previous years budget is "cross walked" to the upcoming or new years budget showing details of changes where applicable.]

Table 4: The individual Tribal allocation tables by budget activity and detailed Headquarters accounts.

During pre-negotiations, the team and governing authority from a Tribe that has not yet negotiated its first Self-Governance agreement may want to request these materials and other information from the IHS. Such requests may be directed to the ALN for the Tribe's Area and to OTSG. The Tribe may also want to schedule a pre-negotiation meeting(s) with HQ and/or Area staff and leadership to discuss the materials and questions and concerns from its Tribal negotiating team and governing authority.

During pre-negotiations, the team and governing authority from a Tribe that is continuing Self-Governance participation may also want to request information from or meet/have a conference call with IHS. The Tribe may wish to discuss financial materials that show its estimated funding for the next year (program, Area, and HQ) and increases that it has or will receive in the current year and the basis for those increases and may have questions regarding any funding amounts that may be lower than in the previous year. Discussion issues may also include current or successor year IHS retained services or buy-backs, the status of requests (from the Tribe or IHS), or new policy directives or negotiation issues from IHS.

Negotiations:

The actual documents required for negotiations are a Compact and Funding Agreement (see Section 2 – Negotiation Documents above). In the Title V legislation, Section 504(a) – Compacts and Section 505(a) - Funding Agreements respectively require that “The Secretary shall negotiate and enter into a written Compact (Funding Agreement) with each Indian Tribe participating in Self-Governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States.”

Additionally, Section 137.6 – Secretarial Policy included in the Title V regulations states, “in carrying out Tribal Self-Governance under Title V, the Secretary recognizes the right of Tribes to self-government and supports Tribal sovereignty and self-determination. The Secretary recognizes a unique legal relationship with Tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.”

In keeping with the general parameters and nature of the government-to-government relationship, the Tribe should establish a checklist for the negotiations that includes all issues and objectives of the Tribe to be incorporated into the Compact and Funding Agreement. These documents are normally drafted by the Tribe and provide the basis for negotiation and discussion with the Agency.

The negotiations process includes discussion among the parties on the following major components:

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

Post-Negotiations:

Following completion of the negotiations, the Compact, Funding Agreement and associated worksheets are signed by the authorizing Tribal official and submitted to the Agency for final processing and signature.

4. Programs and Funding (Programs, Residuals, Tribal Shares and Stable Base Budgets)

Headquarters (& Area) Programs, Service, Functions and Activities:

The Indian Health Services (IHS) Headquarters (HQ) Programs, Services, Functions and Activities (PSFA) Manual was originally published in May 1997 and last revised in March 2002. This Manual has been updated to reflect the most current information available on the entire HQ managed programs and funding through April 2005. This Manual identifies all the HQ-managed funds by PSFA and their associated costs. This Manual also includes a budget break down of all HQ funds and indicates if the HQ PSFA are transferable to Tribes should they chose to assume responsibility for providing that service. Since its original publication, the budget break down tables has been updated on an annual basis to reflect the most current funding available based on Congressional action.

The Manual is good reference for both Tribal and Federal negotiators on the HQ funds and PSFA's that are available for Tribal assumption; and, if not available, why such funds are restricted. It also provides valuable guidance as Tribes make their individual decisions on

which HQ PSFA to obtain from the Agency and which to assume and take responsibility for along with the related Tribal share funding. The HQ PSFA Manual is evolving document that will need to be reviewed and updated on an annual basis to reflect the most current policy decisions of the Department and IHS.

At the Area level, Area Shares Tables are available which provide a breakdown of Area Office programs, services, functions, and activities that are used as allocation tables for the distribution of area shares to Area Tribes. At this time, there is not a single format used by each Area Office, depicting the Area Shares allocations.

A similar PSFA Manual linked to budget tables for Area Office programs should also be developed by each respective IHS Area Office. The development of an Area-Office Self-Governance Manual which documents PSFA available, identifies any inherent federal functions, justifies any residual and documents how various Area policy decisions are made is also necessary in order to conduct Self-Governance negotiations. This information would be useful for participating Self-Governance Tribes, IHS Negotiation Teams and Area Office staff and would assist in meeting the reporting requirements mandated in the Title V legislation.

Residual Amounts

The term “residual” has often been used interchangeably with the term “inherent federal functions”. Title V and the subsequent regulations both define inherent federal functions as follows:

“The term ‘inherent Federal functions’ means those Federal functions which cannot legally be delegated to Indian tribes.”

In simplest terms, “residuals” are those funding amounts associated with those “inherent federal functions”.

In 1995, a final decision was made by then IHS Director Dr. Trujillo regarding the IHS Headquarters (HQ) residual functions and amount. Since that time, the Headquarters residual amount and associated HQ-managed programs have been identified in the HQ budget breakdown table. These amounts have been adjusted annually to incorporate pay costs for federal employees.

At the Area level, there is no consistent process for the identification of residual functions and amounts. However, it has been recognized that guidance to the Areas should be provided by HQ in order to ensure consistent principles and process required for these residual functions. It is further recognized that an annual analysis of functions and resources should be conducted.

This process should include the active participation of Tribal governments and be conducted consistent with the Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments and the IHS Government-to-Government Consultation Policy. These issues may be the subject of discussion between the Tribe and the respective Area as part of the Negotiation Process.

Finally, it is important for this process to be clearly defined in order to meet the requirements of the Title V legislation. Section 513 of the Act requires the HHS Secretary to submit a report each year and to include amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.

Tribal Shares—

Program Formula & Tribal Size Adjustment (TSA) Formula

Title V and the subsequent regulations both provide a definition of Tribal shares as follows, *“The term ‘tribal share’ means an Indian tribe’s portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.”*. Further in the Act, Section 513 of Title V also requires the DHHS Secretary to submit a report which identifies funding formulas used for Tribal share amounts.

The most current HQ PSFA Manual includes the relevant funding formulas used for distribution of Tribal shares. Generally, these formulas fall into two categories; (1) program formula funds based on various workload factors; or (2) Tribal Size Adjustment (TSA). The TSA formula was originally developed and finalized in 1995. For those HQ programs that are available and distributed using a program formula, the factors and criteria used for those various formulas are noted throughout the HQ PSFA Manual.

A determination will need to be made regarding the Tribal Share distribution formula that will be used for any additional Congressional increases for new HQ-managed funds. In cases where Congressional language does not dictate the method of distribution, the IHS may establish or form a joint IHS/Tribal Committees and Workgroups to review and develop allocation formulas. Regardless of the process that may be established, a key determination about the use of any particular factor is whether or not the resources and cost required to adequately develop, verify and maintain the necessary data on a national basis is justified. This cost may be too high or yield little value.

However, some factors such as geographic isolation may be so significant that they require adjustments to the basic formulas. Some programs and proposed formulas may require application of several factors. This task is complicated by the fact that it affects over 500 Tribes, all with different demographic and Tribal service/system characteristics. However, simplicity in allocation formulas serves to reduce confusion as well as Tribal, Federal costs associated with determining and verifying workload statistics. Proposed allocation formulas can continue to be further refined as information is generated and provided to Tribes.

Stable Base Budgets

Section 505(g) of Title V provides Tribes with the option for stable base funding; *“At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision funds available under Section 106(a)) to be transferred to such Indian tribe, for such period as may be specified in the funding agreement, subject to annual adjustment*

only to reflect changes in congressional appropriations by sub-sub-activity excluding earmarks.”

Subpart G – Sections 137.120 – 137.124 of the Title V regulations provides additional guidance regarding stable base funding. The stable base budget amount may include, at the option of the Self-Governance Tribe, (a) recurring funds available under section 106(a) of the Act [25 U.S.C. 450j-1]; (b) recurring Tribal shares; and (c) any recurring funds for new or expanded PSFA not previously assumed by the Self-Governance Tribe. Stable base funding amounts are subject to adjustment: (a) annually only to reflect changes in Congressional appropriations by sub-sub-activity excluding earmarks; (b) by mutual agreement of the Self-Governance Tribe and the Secretary; or (c) as a result of full or partial retrocession or reassumption. The Self-Governance Tribe may provide in its Funding Agreement that the effective period of the stable base budget will be either longer or shorter than the term of the Funding Agreement.

The current IHS Indian Health Manual, Part 6, Chapter 3, regarding Contract Support Costs includes the following provision regarding Base Budgets:

Contract Support Costs Pilot Projects and Base Budgets. There are currently several ongoing CSC pilot projects (including CSC base budgets) that are intended to incorporate innovative approaches to CSC funding issues. Upon the completion and evaluation of these projects, this circular may be amended to incorporate new provisions.

Section 106(a)(2) of the Indian Self-Determination and Education Assistance Act, as amended, authorizes the Secretary, HHS, to pay for the reasonable costs of Self-Determination and Self-Governance Tribes for activities which must be carried out by the Tribes to ensure compliance with the terms of their respective Agreements and prudent management. It is designed to pay for costs which the Tribes experiences but the Secretary does not, or to pay for costs which the Secretary pays for from sources other than those available at the Tribal level from the IHS.

Section 106(a)(2) also authorizes the Secretary to pay for the reasonable costs of “new and expanded” Self Determination contractors for activities which must be carried out by contractors to ensure compliance with their agreements; to pay for costs which the contractor experiences but the Secretary does not; or to pay for costs which the Secretary pays for from sources other than those available at the contracting level.

5. Inclusion of Statutorily Mandated Grants

Title V provides that a statutorily mandated grant may be added to the Funding Agreement after award. Grant funds added to a Funding Agreement will be provided as an annual lump sum advance payment after the grant is awarded. In addition, the Title V regulations provide that Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement are covered by the Federal Tort Claims Act (FTCA).

However, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated and the program may not be redesigned. Additionally, the reporting requirements for a statutorily mandated grant program are subject to the terms and conditions of the grant award.

The Title V regulations governing Statutorily Mandated Grants can be found at ([Subpart F – Sections 137.60 to 137.73](#)) .

6. Process and Provisions for Final Offer

There may be circumstances where the Tribe and Agency do not reach mutual resolution on issues during the negotiation process. In cases where agreement cannot be reached, the Title V statute and subsequent regulations ([Subpart H – Sections 137.130 to 137.155](#)) provide for a “Final Offer” process for resolving, within a specified timeframe, disputes that may develop in negotiation of Compacts, Funding Agreements or amendments, thereof.

A written final offer should be submitted by the Tribe either during negotiations to the Agency Lead Negotiator (ALN) and/or the IHS Director. The Final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe’s final proposal to resolve the disagreement. Therefore, the unresolved issues should be clearly identified and separated from the Compact, Funding Agreement, or amendment. This document should be clearly identified as a “Final Offer”. The remaining ‘agreed to’ Compact, Funding Agreement, or amendment can then be forwarded by the ALN to OTSG for signature. This allows the portions of these documents to go into effect and allows the unresolved issues to be addressed separately through the Final Offer Process. Tribes should be advised that when the entire Compact and/or Funding Agreement is submitted as a final offer, it opens the complete document(s) to renegotiation including those portions not disputed during the negotiation process.

A 45 day review period begins from the date the IHS receives the final offer. If the Agency takes no action within the 45 day review period (or any extensions thereof that may be negotiated), the final offer is accepted automatically by operation of law. The Secretary may only reject an Indian Tribe’s final offer for one of the following reasons:

(a) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) the PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) the Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) the Indian Tribe is not eligible to participate in Self-Governance under section 503 of the Act [25 U.S.C. 458aaa-2].

The Secretary must reject a final offer by providing written notice to the Indian Tribe based on the criteria referenced above not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with the regulations. If the Secretary rejects a final offer, the Secretary must offer and provide additional technical assistance to overcome the stated grounds for rejection, if requested by the Indian Tribe.

The Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. (See Appeals procedures below.) Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m-1] in Federal district court to challenge the Secretary's decision.

Appealing the decision of the Secretary does not prevent entering into the Compact, Funding Agreement, or amendment. Any other provision included in the Compact or Funding Agreement that it not in dispute goes into effect.

7. Process and Provisions for Appeals

The Final Title V Regulations (Subpart P – Sections 137.410 – 137.450) provide an appeals process for both Pre- and Post-Award Disputes of Compacts and Funding Agreements, including Construction Project agreements. The following briefly describes those decisions which can be appealed by a Tribe for Pre-Award Disputes which may occur in the negotiations process:

- (a) A decision to reject a final offer, or a portion thereof, under Section 507(b) of the Act;
- (b) A decision to reject a proposed amendment to a Compact or Funding Agreement, or a portion thereof, under Section 507(b) of the Act;
- (c) A decision to rescind and reassume a Compact or Funding Agreement, in whole or in part, under Section 507(a)(2) of the Act, except for immediate reassumptions under Section 507(a)(2)(C) of the Act;
- (d) A decision to reject a final construction project proposal, or a portion thereof, under Section 509(b) of the Act; and
- (e) For construction project agreements carried out under section 509 of the Act, and a decision to reject project planning documents, design documents, or proposed

amendments submitted by a Self-Governance Tribe under Section 509(f) of the Act.

The regulations provide specific information on when and where to file an appeal from decisions made by IHS. Further, the regulations provide for what procedures apply to Interior Board of Appeals proceedings and authority.

However, a Tribe has other options beside a formal appeal. The Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Finally, the Tribe may, in lieu of filing an administrative appeal under the Subpart or upon completion of an informal conference, file an action in Federal court pursuant to section 110 of the Act.

Construction Projects

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Title V provides that Indian Tribes participating in Self-Governance may carry out construction projects if they elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions of law that would apply if the Secretary were to undertake a construction project.

Subpart N of the Title V regulations (Sections 137.270 through 137.270) provides detailed information regarding the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs consistent with the Act. The regulations distinguish between construction projects, and ongoing programs that support construction projects. Additionally, it sets forth the process for Self-Governance Tribes to enter into and administer Self-Governance construction project agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the Compact and Funding Agreement process as described above (see page 10).

Post-Negotiation: Other Implementation Provisions

Following final negotiation and signature of the Compact and Funding Agreement, the Title V regulations provide for other authorities and requirements for Tribal governments, including:

Program Re-Design: A Self-Governance Tribe may redesign or consolidate PSFA included in a Funding Agreement and reallocate or redirect funds for such PSFA in any manner which the Tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

Health Status Reports: Compacts or Funding Agreements negotiated between the Secretary

and a Self-Governance Tribe must include a provision that requires the Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Tribe and will be derived from existing data elements currently collected by the Tribe. These data elements may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements.

Finally, while not mandated by law, Tribes are also encouraged to participate in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting in order to advance Indian health advocacy efforts.

Records: Tribes are required to maintain records and provide Federal agency access to those records only upon written notice from the Secretary. After 30 days advance written notice from the Secretary, the Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code. Unless specified otherwise in the Compact or Funding Agreement, the records of the Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

Other Policy Issues

The Title V Self-Governance Act and subsequent regulations provide the framework and legal authorities for planning, negotiations and implementation of Self-Governance. However, other policy issues and internal IHS directives and guidance can be the basis for discussion and negotiation between Tribes and the IHS. Certainly, there are several options available in cases where the Tribes and IHS cannot reach resolution, such as those discussed above under the Final Offer and Appeal processes. Additionally, the Tribe and IHS may decide to “agree to disagree” and include a written summary of the issue under a “Memorialization of Dispute” and include as an attachment to the Funding Agreement.

This Handbook is not intended to encourage a particular process or option that an individual Tribal government may wish to pursue to address any policy and other issues that may arise during the negotiations. Certainly, it is the right and prerogative of each Tribal government to make that determination on how best to proceed based on the specific circumstances. At their option, a Tribe may want to consult with other Tribal leaders and/or representatives of the Tribal Self-Governance Advisory Committee (TSGAC). In their role as advisors to the IHS Director, the TSGAC may want to further discuss a specific policy issue with the Director that impacts other Self-Governance Tribes. Again, this is not intended to replace the rights of each individual Tribal government and the government-to-government relationship between each Tribe and the federal government.

Further Information

This Negotiation Handbook is to serve as a starting point for Self-Governance Tribes in their discussions and negotiations of Compacts and Funding Agreements. As noted, Tribes will need to also contact their respective IHS Area Office to obtain further local information.

Self-Governance Communication and Education: Since its formation in 1990, the Self-Governance Communication and Education office has been responsible for developing educational and informational materials on Self-Governance. A Tribal Consortium (currently consisting of 10 Self-Governance Tribes) provides oversight and coordination of the activities being performed. These activities include but are not limited to the following: coordination and planning conferences, conduct workshops, develop educational and information materials on Self-Governance, and planning activities related to the Indian Health Service and Department of Interior Self-Governance Advisory Committee meetings.

Tribes are encouraged to contact this Office for additional information on Self-Governance. Inquires can be directed to:

Maureen Kinley
c/o Self-Governance Communication and Education
Pacific commerce Center, 5060 Pacific Highway, Suite 101, Ferndale, WA 98248
Telephone (360) 380-1820 ~ Facsimile (360) 380-1981 ~ Email: mkinley@tribalselfgov.org
Website: www.tribalselfgov.org

Office of Tribal Self-Governance: Any other questions or general requests regarding this Handbook should be directed to:

Office of Tribal Self-Governance - Indian Health Service
801 Thompson Avenue, Suite 240
Rockville, MD 20852
Phone: (301) 443-7821 ~ Facsimile: (301) 443-1050
Website: www.ihs.gov/NonMedicalPrograms/SelfGovernance/