

# Tribal Self-Governance

## 2016-2017 Presidential Transition Priorities

(Updated: November 8, 2016)

The Indian Self-Determination and Education Assistance Act (ISDEAA) marked a new era in Indian Policy, recognizing Tribal Nations' inherent authority and right to self-govern. This historic legislation marked a turn for Tribes as well—generating interest in increased Tribal control over Federal programs, economic development, and governance. After years of frustration with the Federal government's slow bureaucratic delivery of services guaranteed in hundreds of Treaties, Tribal leaders worked together to advocate for Tribal rights to deliver services to their citizens directly. In 1988, their advocacy led to the successful passage of the Tribal Self-Governance Demonstration Project within the Bureau of Indian Affairs (BIA). After Tribes proved to deliver services more efficiently and effectively, Congress permanently reauthorized the program at the Department of the Interior (DOI) and extended Self-Governance authority to the Indian Health Service (IHS). Tribes earned permanent Self-Governance authority to deliver health care programs under IHS in 2000.

Since the initial demonstration projects, Self-Governance has been more than a government program. It is a Tribally-driven initiative to exert Tribal sovereignty over governmental services. Under Self-Governance, Tribal governments exercise their sovereign right to control their territories, Treaty rights, natural resources and welfare of their citizens. Self-Governance Tribes provide health care, social services, and education, manage natural resources and public safety and enhance cultural resources for Tribal citizens across the Nation. They have the authority to redesign programs and reassign Federal funds to more efficiently meet local needs and, therefore, are more accountable to their citizens.

The Self-Determination era irrevocably transformed the previously paternalistic relationship between Tribal Nations and the Federal government. Today, Federal agencies must recognize Tribes' sovereign status and uphold the nation-to-nation relationship, building and improving all Tribal communities across the Country. Tribes are sovereign governments within the United States and Self-Governance is an initiative that holds the Federal government accountable for delivery on guarantees made when the United States government was just forming.

Since initiation of the first Self-Governance agreement more than two decades ago, the number of Tribes, amount of programs and funding managed under this legislation has steadily increased. Today, 272 Federally-Recognized Tribes and Tribal organizations exercise Self-Governance authority within DOI. Likewise, 351 Tribes and Tribal organizations exercise Self-Governance authority within IHS to operate and manage Health Programs. For Self-Governance Tribes, Federal agencies become advisors and technical assistance providers, rather than day-to-day service delivery managers. Self-Governance Tribal leaders expect that the next President and Administration will work collaboratively to further our vision to preserve, protect, and advance Tribal and Indigenous sovereignty, culture, history, and treaty and self-governing rights. In general, Self-Governance Tribes encourage the next Administration to pursue equitable funding for all programs that serve American Indians and Alaska Natives (AI/AN) and eliminate barriers to nation building, created by competitive grants and other short-term funds.

With this in mind, Self-Governance Tribes assembled in the fall of 2016 to develop the following priorities for the new Administration to incorporate as they prepare for the next four years. These priorities respect and further develop the government-to-government relationship and Tribes' inherent right to govern their Nations.

## Appointments

The vitality and effectiveness of the nation-to-nation relationship depends on whom the President chooses to act on their behalf. Presidential appointees assist in setting the President's agenda for Tribal Nations and certainly oversee realization of the President's vision for their nation-to-nation relationship. Not only do these officials need to agree with the vision, every Cabinet member and many others should also be knowledgeable of Tribes' sovereign status and the history of Federal relations with Tribal Nations.

The following appointments are critical in advancing the nation-to-nation relationship and the implementation of Self-Governance. These individuals should have an established knowledge of Tribal governments, operations, and priorities. These critical roles are:

- White House Advisor on Indian Nations
- Secretary of Department of the Interior
  - Assistant Secretary of Indian Affairs at the Department of the Interior
- Secretary of Health and Human Services
  - Director of Indian Health Service
  - Administrator for the Administration on Native Affairs
  - Administrator of the Substance Abuse and Mental Health Service Administration
  - Administrator of the Center for Medicare and Medicaid Services
- Secretary of the Department of Transportation
  - Deputy Assistant Secretary for Tribal Government Affairs at the Department of Transportation
- Office of Management and Budget
  - Assistant Director for Native American Programs

## Tribal Advisory Committees

Tribal advisory committees assist Administration Officials in work on leading issues. Previously, they have provided technical assistance and information to Federal departments and agency partners, offered feedback on Administrative proposals, and coordinated implementation of new programs and activities. Tribal leaders who participate in advisory committees take time away from their communities to bolster the nation-to-nation relationship and provide substantive feedback to ensure that agency priorities are aligned with Tribal Nations and are implemented to the benefit of Tribal citizens. Tribal advisory committees have facilitated two-way communication and problem solving on the implementation of Tribal/Federal programs. Self-Governance Tribes advocate for the following committees to either be continued or established:

- **Maintain White House Council on Native American Affairs.**  
 The White House Council on Native American Affairs is the first of its kind and the only space where the Presidential Cabinet meets regularly to consider crosscutting issues in Indian Country. Tribal Leaders strongly encourage the next Administration to maintain this Council so that multi-disciplinary issues, such as the issues identified in the *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country, 2016 Update*, have a venue for solution-based discussion. Further, Self-Governance Tribes expect that the nation-to-nation relationship be extended to this Council and that Tribal Leaders have a regular seat at the table during the meetings.
- **Continue the Tribal Nations Leadership Council (TLNC) at the Department of Justice (DOJ).**  
 Created in 2010, TLNC is a council of Tribal Leaders who advise DOJ Leadership about ongoing and emerging justice and public safety issues in Tribal communities. Continued partnership between DOJ and Tribal Leaders will be critical as Tribal Nations continue to identify solutions that address critical needs in Tribal communities.
- **Maintain the Department of Health and Human Services (HHS) Secretary's Tribal Advisory Committee (STAC).**  
 AI/ANs are the only Americans with a right to government-provided health care as described in more than 300 treaties. Therefore, the next Administration must ensure the continuation of STAC. STAC reinforces the Federal government-to-government relationship by providing a forum for Tribal Leaders and Tribal governments to offer advice and recommendations on HHS programs that impact Tribal health care delivery and the welfare of Tribal communities.
- **Establish a Self-Governance Advisory Committee within the Department of Transportation (DOT).**  
 Though the Tribal Transportation Self-Governance Program (TTSGP) Negotiated Rulemaking Committee will likely complete its work by the end of 2017, DOT will need ongoing support and advisement from Tribal leaders as implementation of the Fixing America's Surface Transportation (FAST) Act proceeds. An advisory committee can provide support and education for DOT leadership, Tribes, and other industry stakeholders.
- **Establish a Justice Programs Council on Native American Affairs (JPCNAA) within DOJ.**  
 A senior level Advisory Council within the Office of Justice Programs (OJP) was established to ensure coordination and consultation on justice and public safety issues in Indian Country. The Council reviews and develops Tribal justice and safety policy recommendations and strategies that align with the OJP Strategic Plan's model and are embraced and implemented by OJP leadership. In order to better address justice and public safety issues in Indian Country, the JPCNAA needs to be established within the DOJ as a whole. For example, within HHS, Congress authorized the Intradepartmental Council on Native American Affairs (ICNAA) as part of the Native Programs Act. This internal council brings together all operating and staff divisions within HHS to frame the department's policies and initiatives, and guide their overall interactions with AI/AN. We request that you include the same authority for JPCNAA in DOJ.

- **Institute a Veterans Health Advisory Committee.**  
The next Administration should make coordination between Tribes, IHS, and the Veterans Administration (VA) a top priority in order to improve the access and quality of care provided to veterans. This Committee should be charged with developing solutions for improving coordination of care, updating and extending the National VA-IHS Memorandum of Understanding (MOU), and creating policy recommendations to provide greater health care access and quality for all veterans.

## Tribal Consultation

Tribal consultation is the cornerstone of the government-to-government relationship. True Tribal consultation occurs when there is reciprocal information exchange and cooperative problem solving toward a collective solution. Many agencies have worked over the last two decades to develop and adopt Tribal consultation policies that guide their interactions with Tribal Nations. Many of the policies are well thought out and produce meaningful outcomes in Indian Country. We encourage the new Administration to adopt and reinforce the tenants of Executive Order 13175 and to set the expectation that consultation outcomes create meaningful changes in Tribal communities across the United States. Additionally, we respectfully request that Federal agencies whom have not yet adopted a Tribal consultation policy, work with Tribes to develop and implement a Tribal consultation policy, to guide their interactions with Tribal Nations, and appoint liaisons to coordinate said interactions with Tribes. Two such Federal agencies are the Department of State and US Army Corp of Engineers, whom Tribal Nations have identified as top priorities for establishing a Tribal Consultation Policy.

---

## Department Priorities

### Department of the Interior (DOI)

#### Implement the Indian Trust Asset Reform Act (ITARA).

Title II of ITARA provides for the establishment of Tribal Demonstration Projects for Tribes and the Secretary of the Interior to jointly develop resource management plans. Tribal Self-Governance has proven that when Federal agencies and Tribes form partnerships in the management of trust assets, Tribal conflicts and disagreements are significantly reduced. Therefore, we encourage DOI to work with Tribes to expeditiously implement Title II early in the next Administration.

Additionally, DOI recently conducted consultation on implementation of Title III. Self-Governance Tribes made many recommendations to protect and promote compactable functions and programs within the Office of Special Trustee (OST). The Presidential transition should include actions to secure these compactable OST functions and programs and maximize the opportunity to expand Tribal Self-Governance activities.

#### Assign a Tribal-Federal Task Force to develop a plan for Trust Modernization.

The Self-Determination era began in the 1970s and marked a change in the relationship between the Federal government and Tribal nations. The next Administration should look forward to modernizing and extending this relationship as the Federal government marks nearly fifty years of progressive government-to-government relations. Tribes have already initiated work to envision what a modern trust relationship would resemble and highly encourage the new Administration to capitalize on this work and mark a new era in Federal-Tribal relations.

### Preserve authority to include one-time or short-term resources in Self-Governance Funding Agreements.

Self-Governance Tribes have noticed a troubling trend that DOI is moving one-time funding opportunities to grants that are restrictive in nature—undermining core Self-Governance tenants—and cannot be included in Self-Governance Funding Agreements. This trend allows DOI to heavily regulate and restrict the inclusion of indirect costs needed to administer Tribal programs, which in turn, hinders Tribal governments’ ability to re-design programs to better meet the needs at the local level.

### Expand Tribal consultation on the Bureau of Indian Affairs’ (BIA) funding allocation and formula distribution.

In 2012, Self-Governance Tribes published the *Program Formulas Matrix Report*, which identifies 11 program areas, where current formulas and methodologies used by the BIA for funding distribution can be improved. Further, the report provided specific recommendations on what is needed to address and implement these changes. Unfortunately, action on these recommendations has stalled in the last several years. Contrary to these recommendations, DOI continues to move funding to one-time grants, making the *Program Formula Matrix Report* recommendations increasingly important. Continued consultation and discussion between BIA officials and Tribes is needed to implement the changes recommended in the report.

### Conduct an analysis to evaluate unmet need and gaps in service delivery.

Tribal Nation-building requires the creation of measures that truly reflect how the investment in Indian Country has strengthened Tribal governmental authority and capacity. Tribal governmental infrastructure supports strong Tribal economies and Tribal self-sufficiency; however, the current paradigm within DOI does not advance expanded Tribal authority. Self-Governance Tribes request that DOI conduct an analysis to determine what the unmet need in Indian Country truly is and to evaluate the gaps in Federal and Tribal programs. This analysis will assist Tribal Nations in their planning and advocacy with DOI.

### Develop a streamlined vehicle for Tribes to leverage cross-cutting funding.

Self-Governance Tribes urge that continued emphasis be placed on all Federal agencies to identify and make available cross-cut budget and program information to assist Tribes in addressing Tribal community social, economic and resource management issues. We also urge DOI to initiate work in developing a streamlined Tribal contract vehicle, to implement the cross-cut budgets and programs, that is consistent with the government-to-government relationship, thereby ending the treatment of Tribes as vendors and contractors.

### Improve funding distribution to Self-Governance Tribes.

DOI’s ability to efficiently distribute funding to Self-Governance Tribes lags woefully behind other government agencies. These delays—sometimes greater than 60 days—create undue stress in Tribal communities, which can result in service gaps for Tribal citizens and deter efficient and effective implementation of Tribally-operated programs. As a partner in service delivery, it is critically important DOI work to improve their distribution of funding to Tribal Nations.

### Increase staff for Land Buy Back Program to improve the probate backlog.

The return of Tribal land to Tribal Nations is critical to expanding Self-Governance and Tribal authority. Land also provides additional opportunities for Tribal Nations to capitalize on

economic development. Many Tribal Nations have participated in the Land Buy Back Program in an effort to restore Tribal homelands; however, others have delayed their participation due to the insufficient staffing and resources needed for processing probate requests. We encourage the DOI to increase their efforts to improve this backlog by allocating more staff and resources to the Land Buy Back Program.

#### Support Tribally driven data collection.

Currently there is a lack of available socio-economic data that is used to demonstrate need. The Federal Government needs to establish better systems to collect the data that is needed to support funding requests for Tribal programs and services.

#### Fulfill the fiduciary trust responsibility.

DOI should work to increase funding for Indian programs and services, along with reclassifying trust administration as non-discretionary. Additionally, DOI should require an independent, external contractor to audit fund management of all agencies distributing to Tribal Nations, to ensure that the trust responsibility is being upheld. Each Tribe should also be allowed to decide for itself the role it would like to play in the management of trust assets.

#### Improve inter-departmental coordination, communication and transparency.

Previously, DOI has failed to notify the Office of Self-Governance (OSG) when individual departments receive program increases or develop special projects and initiatives. This breakdown has resulted in loss of funding increases for Self-Governance Tribes. The next Administration should work with Tribes to create an accurate accounting of all programs, services and funding, within DOI, that are available to Tribes. Additionally, OSG should often be treated as a centralized location to relay information to Self-Governance Tribes. Grant funding information must be shared with OSG, so that it can then be made available to Self-Governance Tribes. In general, DOI should strive for greater transparency throughout the Department regarding funding formulas; funding distribution; funding provided to Tribes; and steps taken to ensure better coordination and communication internally and externally.

#### Support Self-Governance and Self-Determination in DOI's Strategic Plan.

Although the Strategic Plan is structured to measure agency performance, it fails to account for the 272 Self-Governance Tribes who have assumed management and control of DOI programs, services, functions and activities (or portions thereof) that were previously managed by the Federal government. We understand that funding is tied to how well the agency performs in these areas and it is very disconcerting that there is an absence of measurements that correlate to those services provided directly by Tribal Nations on behalf of the DOI.

Currently, the two existing measures tied to supporting Self-Governance and Self-Determination are: (1) the percent of Public Law 93-638 (P.L. 93-638) Title IV Compacts with Clean Audits; and, (2) the percent of Single Audit Act reports submitted during the reporting year for which management action decisions, regarding audits or recommendations, are made within 180 days. These measurements do not effectively evaluate OSG's performance. The audits are tied to Tribal performance, a function over which OSG has very limited, if any, control. We strongly recommend new measurements that more adequately reflect the role OSG performs—with respect to contracting and accounting services—be developed. Some alternative measurements that more accurately depict OSG performance, include, but are not limited to:

- The percent of increase in the number of new Self-Governance Tribes;
- The percent of increase in the funding transferred to Self-Governance Tribes;

- The number of new policies or operational revisions within OSG to improve Self-Governance implementation;
- Timely payments of funds to Self-Governance Tribes;
- The percent of increase of new Self-Governance funding agreements with non-BIA agencies;
- Inclusion of Self-Governance Tribes in appropriations requests—including accurate program breakdown and display of Self-Governance program funding in the BIA Green Book;
- Enacted policies for consistent calculation of pay costs and guidance across BIA regions;
- Updated Self-Governance data for any program increases in funding allocations;
- The number of Inter-Agency Agreements that allow for flexibility and combining of resources to address community needs;
- Socio-economic data for each Tribe and a comparison of how it correlates to State data on the general population.

## Department of Health and Human Services (HHS)

### Assign a High Level Tribal-Federal Task Force to provide recommendations for the redesign of IHS.

This Task Force should provide an analysis and make recommendations regarding alternative business models, streamlined and efficacious internal IHS policies and process, methods to maximize capture of third party revenue and access to alternative resources, and strategic workforce development ideas, such as medical school partnerships and Tribal medical residency programs.

### Implement a Self-Governance Demonstration Project according to the 2013 Self-Governance Tribal Federal Workgroup.

Self-Governance Tribes and HHS worked collaboratively to develop a report to implement a Self-Governance Demonstration Project across HHS. However, the report recommendations were never implemented. The next Administration should implement a Demonstration Project for Self-Governance Tribes in order to evaluate the feasibility and effectiveness of operating those programs, as identified in the report including the Agency for Community Living, Substance Abuse and Mental Health Services Administration Targeted Capacity Expansion, Temporary Assistance for Needy Families, Child Care and Development Fund, Native Employment Works, and Head Start and Early Head Start.

### Equalize Medicaid Access and Benefits in Indian Country.

Medicaid is a critical component in supplementing the overall funding available to the Indian health system and has consistently been used to further the trust responsibility in Indian Country. Yet, access to Medicaid is controlled by the States and varies widely for AI/AN. In fact, more than 44% of all Tribal citizens live in States that have not expanded Medicaid, limiting their access to care and creating uneven access to funding for the entire Indian health system. This Administration should work with Tribes to identify and implement a national solution that honors the federal trust responsibility and equalizes access for all AI/AN.

### Improve long-term care access in Tribal communities.

Section 205 of the Indian Health Care Improvement Act (IHCIA) provides IHS and Tribes broad flexibility to provide long-term care services; however, Congress has not appropriated additional funding for these services. Many Self-Governance Tribes provide long-term care services using other revenue sources, but the responsibility lies with the Federal government to fund Indian health care. HHS and sister departments should consider additional funding opportunities to increase access to long-term care in Tribal communities.

### Update the IHS Facilities Construction Policy to include broad Tribal input.

The IHS Health Care Facilities Design and Construction Policy does not currently reflect new authorities available under IHCIA, nor does it accurately reflect the tenants of Self-Governance. Additionally, the Facilities Appropriations Advisory Board (FAAB) recently decided to review and possibly update the Policy to reflect new authorities and make recommendations to the prioritization system. Self-Governance Tribal leadership agrees with FAAB's decision and believes the time is ripe to make changes that have broad Tribal support and allow for greater flexibility in construction projects.

### Initiate additional Joint Venture Construction Projects.

The Joint Venture Construction Program (JVCP), authorized under section 818 of IHCIA, allows IHS to establish agreements with Tribes that require the Tribe to acquire, construct, or renovate a health care facility and lease it to the IHS, at no cost, for a period of twenty years. This Program is often used as a means to increase access to care in rural, isolated communities without the cost of Federal construction; however, it is underutilized and inconsistent. The next Administration should develop a consistent schedule to accept and approve new JVCP projects in order to increase the access and quality of care in Tribal communities.

### Establish a task force to identify resources and administrative policy changes to provide additional housing options for health care providers in rural, underserved areas.

Housing remains a consistent issue for Tribes and IHS in recruiting and retaining qualified providers in rural, underserved areas. This Task Force should identify policy changes and resources that can be used to meet the growing need for qualified health providers.

## Department of Justice (DOJ)

### Fulfill requirements under Section 221 of the Tribal Law and Order Act (TLOA).

Public Law 280 (P.L. 280), which delegated federal criminal law enforcement authority to certain states, was enacted as part of the Federal Termination Policies in the 1950's. P.L. 280 degraded law enforcement services in many Tribal communities and as a result, has been a source of ongoing conflict between Tribes and States. However, Section 221 of TLOA sought to remedy these conflicts by mandating DOJ to reassume Federal jurisdiction at a Tribes' request. Despite advocacy and requests from Tribes, DOJ has not fully exercised its authority under Section 221. Therefore, Self-Governance Tribes join with the Affiliated Tribes of Northwest Indians and National Congress of American Indians to urge DOJ to implement the requirements of TLOA Section 221 when requested to do so by Tribes.

### Host department-wide Tribal consultations on the DOJ annual budget.

Similar consultation with Tribes is conducted by DOI's Tribal-Interior Budget Council (TIBC), the HHS Annual Tribal Budget Consultation (ATBC) and the Indian Health Service Tribal Budget Formulation Workgroup. This has been an invaluable process to elevate the funding disparity



that exists for Tribal programs in comparison to Federal spending for other citizens, including those who are incarcerated.

#### Increase support for the National Indian Country Training Initiative (NICTI).

The National Indian Country Training Coordinator leads this DOJ training effort. The Coordinator ensures that Federal prosecutors and agents, as well as state and Tribal criminal justice personnel, receive the training and support needed to address the particular challenges relevant to prosecutions in Indian Country. Training is provided via webinars and regional, in-person sessions to thousands of Federal, state and Tribal stakeholders on a host of criminal justice issues. Due to the unique challenges that are present in Indian Country, it is imperative that DOJ increases their level of support for NICTI.

### Department of Transportation (DOT)

#### Ensure the Tribal Transportation Self-Governance Program (TTSGP) is implemented throughout the DOT in accordance to the Fixing America's Surface Transportation (FAST) Act.

The FAST Act, passed in December 2015, marked the first ever Self-Governance expansion outside DOI and HHS. Due to the historic nature of this expansion and the expected final rule for TTSGP, it will be essential that the next Administration be prepared to fully implement the FAST Act. Departmental leadership and program managers should be required to understand and honor Self-Governance tenants to ensure that the FAST Act is implemented appropriately.

### Department of Veterans Affairs (VA)

#### Fully implement the National VA-IHS MOU.

To date, the VA-IHS MOU has proven to successfully facilitate patient care and provide the least administrative burden for VA, IHS, and Tribal Health Programs (THPs); however, Section 405(c) of IHCA has not been fully implemented. The current national agreement and, by default, nearly all THP agreements do not include reimbursement for Purchased/Referred Care (PRC). IHCA provided a broad directive to reimburse IHS and THPs for care provided to AI/AN veterans, which includes specialty and referral care provided through IHS and THPs.

#### Improve coordination of care between VA and Indian health systems.

As VA, IHS, and THPs work to build greater partnerships, we must address issues with regard to coordination of care. Failing to adequately coordinate care is magnified by VA's unwillingness to reimburse referral services. For example, if a Native veteran goes to an IHS or THP facility for service and needs a referral, the same patient must then be seen within the VA system before a referral can be secured. This is not a good use of federal funding, nor is it navigable for AI/AN veterans.

#### Utilize the National VA-IHS MOU to provide care to non-Native Veterans.

Tribes assert that IHCA Section 405(c) provides the authority for IHS and THPs to receive reimbursement for services provided to non-Native veterans. While the Veterans Access, Choice and Accountability (Choice) Act is a means for VA to purchase services in addition to the IHS/THP-VA MOUs, Choice Act agreements cannot be viewed as a replacement for the existing MOUs. Together, we should strive to ensure that the Choice Act does not diminish existing

agreements, but instead becomes a limited-use option for IHS and THPs to increase health care access for all veterans.

## Environmental Protection Agency (EPA)

### Develop a Self-Governance Pilot Project.

Many Tribes have successfully administered grants from EPA for many years, including but not limited to: General Assistance Program (GAP), Clean Water Act programs, Air Quality programs, and Superfund projects. Tribes enjoy a productive partnership with EPA, and are exploring options to increase flexibility and local decision making within existing EPA authority, in order to demonstrate how Self-Governance principles can be applied to environmental programs. The objective is to develop a model with EPA, whether it be through interagency agreement(s) with DOI or IHS, a Performance Partnership Grant, or another mechanism, that will allow Tribes consolidation of programs, authority to re-budget and reallocate, and flexibility to develop local priorities within the Congressional authorization for each respective program. Self-Governance previously worked with Administration officials to begin this discussion; however, additional work and attention is necessary to fully implement a pilot project.