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# Indian Health Service Self-Governance Review Through 1994 Negotiations

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# **FINAL REPORT**

# INDIAN HEALTH SERVICE SELF-GOVERNANCE REVIEW THROUGH 1994 NEGOTIATIONS

Staff Instructions on Self-Governance Purchase order #93-LF-01071701D

Submitted to:
INDIAN HEALTH SERVICE
Office of Planning, Evaluation and Legislation
Office of Tribal Self-Governance
Department of Health and Human Services

January 12, 1994

Submitted by: Kauffman and Associates, Inc. 206 G Street, N.E. Suite 200 Washington, DC 20002

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Project Director: Ellen R. Kemper, Esq.

# INDIAN HEALTH SERVICE REVIEW OF THE SELF-GOVERNANCE DEMONSTRATION PROJECT

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### **EXECUTIVE SUMMARY**

# Purpose of this Curriculum

The Indian Health Service Office of Tribal Self-Governance contracted with Kauffman and Associates, Inc. under Purchase Order #93-LF-01071701D to document the activities of the IHS pertaining to planning and negotiating compacts with tribes in the early stages of the the Self-Governance Demonstration Project.

# **Self-Governance Generally**

The Self-Governance Demonstration Project (SGDP) is a tribally driven initiative to strengthen the government-to-government relationship between the federal government and tribal governments. It was authorized in 1988 as Title III, a new title amending the Indian Self Determination Act. The SGDP began as a three-year pilot project for ten tribes and the Bureau of Indian Affairs (BIA). It has since been expanded for eight years to include thirty tribes, several agencies within the Department of Interior, and also the Indian Health Service (IHS).

Under the SGDP, a tribe can select Self-Governance (SG) by initiating a planning process and then negotiating with an agency to "compact" a mutually acceptable agreement for the distribution of funds directly to the tribal government. A SG tribe is entitled to receive an amount equal to that which the tribe would have been eligible to receive under Self-Determination contracts and grants. The major distinction between Self-Determination contacts and Self-Governance compacts is that under SGDP the tribe can redesign programs and reallocate its funds according to tribal priorities. Also, the tribal share of funds includes a proportionate share of the Area Office and Headquarters budgets that would otherwise be expended for the benefit of the SG tribe.

Participation in the SGDP produces written agreements between the federal agency and the tribal government. A Compact sets forth the obligations of the parties and general

procedural matters. An Annual Funding Agreement establishes the funding amount for the compact year. There may also be a Baseline Measures document used as an evaluation tool to document the changes from the start of demonstration through to the end of demonstration.

Both the Secretaries of the Interior Department and of the Department of Health and Human Services (DHHS) are required to submit a report regarding the SGDP to Congress on January 1 and July 1 each year. The first report from the DHHS will be submitted on July 1, 1994.

## **IHS Participation**

The IHS did not participate in the SGDP until late 1991 when the first Congressional amendments to the SGDP authorized the IHS to conduct a feasibility study of extending the SGDP to the IHS and to establish within the IHS an Office of Tribal Self-Governance to coordinate the activities of the study. Before the study was due, the Congress again amended the SGDP and authorized the DHHS Secretary to negotiate and enter into Annual Funding Agreements with participating tribal governments.

The IHS first awarded a \$500,000 grant on July 1, 1992 to the Cherokee Nation on behalf of all the tribes with BIA Self-Governance Compacts to develop model documents and conduct related research. The next step was to award planning grants to individual tribes.

Negotiations began in the spring 1993 and were concluded by 6/30/93 for six tribes to implement SG for Fiscal Year 1994. Negotiations were concluded by 9/30/93 for eight tribes to implement SG for Calendar Year 1994. The IHS continues to award planning funds to interested tribes. The IHS expects that by 9/30/94 it will have negotiated sixteen more compacts and annual funding agreements (thereby reaching the authorized limit of thirty) as well as have negotiated renewed funding agreements for the first fourteen tribes to compact with the IHS.

To prepare for the 1995 negotiations, the IHS Office of Self-Governance (0TSG) must address issues that arose during the first year of negotiations and implementation. The

0TSG must ensure consistency among the IHS Area Offices. The 0TSG works closely with the SG tribes to resolve these issues. Some times the SG tribes are at odds with the IHS regarding particular issues, nonetheless, the IHS is committed to cooperative resolution.

All SG compacts contain a provision allowing the tribe to retrocede compacted programs to the IHS at the tribe's request. Notice requirements range from 45 days to one year's time. The IHS does not have the authority to reassume the compacted programs as it does under the Self-Determination contract authority.

# **Major Issues Outstanding**

Most of the issues that are during the first year of the demonstration project are related to the calculation and distribution of the tribal share of funds. This document addresses the issues in detail and attempts to provide the latest developments on the issues. The outstanding issues are divided into four main categories with several subheads for each as follows:

<u>Policy Matters</u> addresses permanent status for SG, the policy making process, population figures, restructure and downsizing, starting dates and the trust responsibility.

<u>Procedural Matters</u> are avoiding adverse impact to nonparticipating tribes, contract/compact conversion, dispute resolution, personnel, the regulation waiver process, and retrocession and reassumption.

<u>Residual Determination</u> discusses the definition of inherently governmental functions and residual, zero based budgeting, and technical assistance.

Baseline Measures, Reporting and Evaluation covers the reporting requirements for tribes and the IHS internally and to Congress.

<u>Tribal Share Methodology and Other Financial Issues</u> begins with a general discussion, addresses the formulas used in the initial negotiations, shortfall, advance payments,

indirect costs, insurance responsibility, outside funds, buy backs, and other categories of funds, mostly the nonrecurring competitive and reimbursement budget items.

<u>Property and Facilities</u> touches on the issues regarding construction funds and the Federal Acquisition Regulations, other federal regulations that concern property issues, equipment and other personal property, and also facilities.

# Recommendations

Kauffman and Associates, Inc. lists over a dozen tasks for the IHS to undertake in order to resolve the issues outstanding for the 1994 compacts and to be prepared for the 1995 negotiations. The recommendations include mostly procedural and policy matters but begin with the initial task of educating within the IHS in order to maintain employee morale and avoid dissemination of incorrect information. The IHS should use the demonstration phase of Self-Governance to resolve any outstanding issues because it is likely that Self-Governance will become a permanent way of doing business between the federal government and tribal governments by Fiscal Year 97.

### Summary

The SGDP recognizes tribes as sovereign governments and provides a mechanism for the United States to deal with tribes on a government-to-government basis. To embrace this concept federal IHS employees should rethink their role and behavior. The tribes seek to redesign federal programs to be sensitive to their community needs while enhancing their self-governance. The end result of SGDP should be more federal funds to the tribes (due to the tribal share of Area and HQ funds) with less strings attached (because reporting requirements have been minimized.) Nonetheless, because the tribes are relying on federal funds, equipment and facilities from various federal agencies in order to operate a health delivery system, the tribes continue to interface with the federal government. Procedural issues such as federal authorizations and paperwork may be lessened but they will not be eliminated. As more tribes undergo the Self-Governance process, thereby causing the federal agencies to downsize, the role of the federal employee will shift from carrying out the duties of the federal government to assisting a tribal government in carrying out its duties and responsibilities.

# INDIAN HEALTH SERVICE REVIEW OF THE SELF-GOVERNANCE DEMONSTRATION PROJECT

## L. Purpose of this Document

The Indian Health Service (IHS) Office of Tribal Self-Governance contracted with Kauffman and Associates, Inc. (KAI) under Purchase Order # 93-LF-01071701D to document the activities of the IHS pertaining to planning and negotiating compacts with tribes in the early stages of the the Self-Governance Demonstration Project.

This document is written primarily for those IHS employees who have been involved in Self-Governance (SG) negotiations from the Headquarters or Area levels. Even though these individuals are knowledgeable about SG, this document will help them to recapture and reexamine the IHS activities to date and to identify outstanding issues before the IHS prepares the first IHS SG Report to Congress and as they work with tribes to plan and negotiate the 1995 compacts and funding agreements.

This document can also serve as a reference tool for those selected as permanent employees of the IHS Office of Tribal Self-Governance (OTSG). It is also a good starting point for any IHS employee, tribal member, Congressional staffer, or other researcher who wants to learn more about the role of the IHS in the Self-Governance Demonstration Project.

## IL Self-Governance Generally

#### A. Self-Determination

The SGDP is the latest development of the Self-Determination policy which began in the late 1970's with the passage of the original Indian Self Determination and Educational Assistance Act, P.L. 93-638. That Act authorized tribes to contract from the IHS and Bureau of Indian Affairs (BIA) programs provided for Indian people. The next step was the Indian Tribal Government Tax Status Act in 1982 which allowed tribes to qualify for federal tax advantages, including the ability to issue tax-exempt bonds to finance government projects. Then in 1983 President Reagan formally reaffirmed President Nixon's Self-Determination policy. In 1987 the Supreme Court ruled that tribes are not subject to state regulation. In 1988 the Indian Gaming Regulatory Act was enacted which authorized tribes to compact with states. Later that same year the Tribal Self-Governance Demonstration Project was authorized by law.

## B. Self-Governance Chronology

The SGDP is considered a tribally driven initiative. The SGDP is an effort to reaffirm the government-to-government relationship and to initiate a new way of doing business between Indian Tribes and the Federal Government. Under the SGDP, SG Tribes design their own programs from negotiated shares of the Department of Interior (DOI) and the IHS budgets. Self-governance compacting goes beyond self-determination contracting by providing tribes greater flexibility to reallocate funds and redesign programs and services in order to meet community determined tribal priorities. Within IHS, it also allows participating tribes to access

<sup>1</sup> P.L. 97-473, Title II.

<sup>&</sup>lt;sup>2</sup> California v. Cabazon Band of Mission Indians.,480 US 202 (1987).

<sup>&</sup>lt;sup>3</sup> 25 USC §§2702-2721 (1988).

Indian Self-Determination Act Amendments, P.L. 100-472 (1988).

Shaping Our Own Future: The Next Step Towards a True Government-to-Government Relationship. The Tribal Self-Governance Demonstration Project Workshop. Sponsored by: Lummi Nation, Jamestown K'lallam Tribe, Hoopa Valley Tribe and the Quinault Indian Nation (1991): pg. 24 [hereinafter referred to as Shaping Our Own Future (1991).]

Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Michel Lincoln on behalf of the Indian Health Service).

IHS Area Office and IHS Headquarters (HQ) administrative funds directly related to programs, services, activities, and functions assumed under SG Compacts. A brief chronology follows:

- 9/15/88 SGDP becomes law. P.L. 100-472.
- 7/2/90 DOI forwards 7 Compacts to Congress for Fiscal Year 91 (FY 91).
- 1/91 William Lavell is appointed as the DOI Director of the DOI Office of Self-Governance.<sup>7</sup>
- FY 92 Appropriation authorizes the IHS to initiate planning activities, directed the IHS to award \$500,000 for tribal planning grants.
- 12/4/91 The IHS is funded to conduct a study for the purpose of determining the feasibility of extending the SGDP to the IHS and is authorized to establish an office of self-governance under P.L. 102-184.
- 10/29/92 SGDP authority extended to the IHS; extended SGDP to Sept. 30, 1996 under P.L. 102-573.

The IHS views the underlying principles of self-governance as follows:8

- Tribal governments are empowered to set priorities on health care expenditures according to local conditions with minimum federal involvement.
- Programs, services, functions, and activities will be transferred from the IHS to each SG tribe.
- SG tribes are encouraged to create innovative cost-effective health care delivery methodologies applicable to their unique reservation situations.
- Actions of the SG tribes cannot adversely affect non-participating tribes.
- SG does not solve all problems, particularly the problem of unmet needs or inadequate funding, but it does allow tribal governments to develop their own solutions.

Self-Governance: A Tribally Driven Initiative. The Tribal Self-Governance Demonstration Project (undated).

A. Friedlob, D. Dupree, and J. Carney, Self-Governance Demonstration Project (SGDP) Baseline Measurement and Program Evaluation -- Draft (9/10/93), pg. 1 and Cherokee Nation, Cherokee Report: Final Progress Report for the Self-Governance Demonstration Project (6/28/93) (Planning Grant #ISU000946-01. Period 7/1/92 through 3/31/93) [hereinafter referred to as The Cherokee Report.

## C. Comparison with Bureau of Indian Affairs

There are several differences between the BIA and the IHS approach to self-governance. Some are philosophical and some are political. The one most discussed by the tribes is the placement of the Office of Tribal Self-Governance within the agency.

Within the Department of Interior the Office of Tribal Self-Governance is placed in the Office of the Secretary. This places the OTSG above the BIA. In negotiations, when the OTSG Director makes a decision he acts as an arbiter between the tribe and the BIA. The tribes view this favorably. The downside to that placement is the need for additional paperwork between these two DOI offices. Nonetheless, the DOI does provide both advanced payments and Federal Tort Claims Act (FTCA) coverage without running into obstacles as did the IHS.

In the Department of Health and Human Services (DHHS), the authorizing legislation places the OTSG within the IHS.<sup>9</sup> This location provides the Self-Governance tribes a direct line in its negotiation for IHS funds. It also arguably places greater responsibility on the IHS itself to implement the SGDP than seems to be placed on the DOI OTSG (which does not have direct line authority on BIA programs). Nonetheless, some tribes perceive the current placement as losing the opportunity to have an advocate within the Department. Tribes expected the OTSG Director to act as an arbiter in the IHS negotiations, but instead felt that the IHS OTSG Acting Director acted as a representative of the IHS. Tribes have proposed that the IHS OTSG be elevated outside of the IHS to the Office of the Assistant Secretary of Health. A proposed tribal alternative is that one Office of Self-Governance be established within the Office of Management and Budget (requiring Presidential appointment) to handle compact negotiation for all federal agencies and departments.<sup>10</sup> The IHS has agreed to establish a Policy Council with substantial tribal representation to serve as the forum to review and recommend policies relevant to Self-Governance.<sup>11</sup>

P.L. 100-472, amending the Indian Self-Determination and Education Assistance Act, Title III, §308(b), [hereinafter referred to as SG law or as Title III].

Section-by-Section Analysis of the draft Bill to make Permanent the Tribal Self-Governance Project, Self-Governance Conference (3/30/93): pg. 10, See also The proposed technical amendments to the SGDP, S. 550) (1993).

Memo from Acting IHS Director M. Lincoln to W. Ron Allen (11/30/93) (In response to the letter generated at the Las Vegas consultation, Nov. 1993): pg. 1 [hereinafter referred to as IHS Response to SG Tribes Las Vegas.]

# D. Comparison with Indian Self-Determination Act, Contracts under Title I.

### SIMILARITIES BETWEEN TITLE I CONTRACTS AND TITLE III COMPACTS

- Evolved both because of inherent problems experienced by Self-Determination contracting tribes and as a natural next step in Federal Indian Policy.<sup>12</sup>
- Rooted in tribally developed initiatives.
- Similar initial procedures. For a tribe to participate in either, first the governing body must pass a tribal resolution. Then the federal agency involved must provide technical assistance to help the tribe prepare for the contract or compact.
- Planning funds are allocated on a discretionary basis.
- Both contracts and compacts are negotiated without advertising.
- Tribes have the right, at their discretion, to retrocede some or all programs.

DIFFERENCES BETWEEN TITLE I CONTRACTS AND TITLE III COMPACTS									
	SELF-DETERMINATION CONTRACTS (TITLE I)	SELF-GOVERNANCE COMPACTS (TITLE III)							
Goals <sup>13</sup>	To assure maximum participation by Indian tribes in the planning and administration of federal programs for Indian communities.	To formalize relations on an equal government-to-government basis; allow tribes to determine internal priorities, redesign, and reallocate to meet tribal needs; promote greater social economic and political self-sufficiency, establish better tribal accountability through local autonomy, reduce paperwork and streamline the decision-making process and change the agency role from day-to-day manager to advocate and trustee.							

The Falmouth Institute, Self-Governance Demonstration Project, (10/93) (A workbook distributed for a seminar held Oct. 19 & 20, 1993 in Phoenix, Arizona): pg. 6-1. [hereinafter referred to as the Falmouth Workbook.]

<sup>13</sup> Falmouth Workbook: pg. 6-8.

DIFFERE	NCES BETWEEN TITLE I CONTRAC	TS AND TITLE III COMPACTS
	SELF-DETERMINATION CONTRACTS (TITLE I)	SELF-GOVERNANCE COMPACTS (TITLE III)
Eligibility	All tribes eligible.	Limited to 30 tribes, geographical representation, 2 mature contracts, and demonstrated stable finances.
Negotiation Process	Tribe submits proposal. Secretary approves or declines. Tribe has right to appeal denial.  Negotiation as Area level.	Tribe completes planning grant (or comparable planning activity.) Formal negotiation process begins. Both governments must agree. Negotiations include central/HQ level.
Modification	Changes in the budget or scope of work require written modification.	Redesign of programs and reallocation of funds are at tribe's discretion.
Funding	Amount spent by the IHS to operate a contracted service or program.	Amount spent by the IHS for the tribe plus related administrative portion at all levels
Reporting	Tribe provides quarterly financial report annual audit, and brief annual program report. IHS reports by 3/15 to Congress • total funds for each program and budg activity for direct and indirect costs; • deficiency in indirect costs; • indirect cost rate for each tribal org.; & • direct cost base for each tribal org.	7/1 each year, on the relative costs s: and benefits of the SGDP. Report et to be based on mutually determined baseline measurements jointly developed by the Secretary and
Retrocession and Reassumption	Tribe can retrocede with one year's notice. IHS can reassume control if there is 1) danger to health, safety or welfare of any person or 2) gross negligence or mismanagement of funds.	Tribe can retrocede; period of advance notification is provided in compact. Has ranged from 45 days to 1 year.

## **III. IHS Participation**

#### A. Authorization and Action

In November 1991, Congress advised the IHS to begin collective planning activities with the tribes that negotiated SG compacts with the Department of Interior. Seventeen tribes attended the initial meeting with the IHS held in January 1992. As a result of that meeting a cooperative agreement for \$500,000 was awarded to the Cherokee Nation for planning purposes such as researching agency programs and the IHS budget as well as for developing a model compact.<sup>14</sup>

That same month, the IHS began its effort to educate its staff about the SGDP. A special session was held for senior executive staff with representation from a SG tribe and the Senate Committee on Indian Affairs.

In October 1992, the Indian Health Care Amendments of 1992 amended the Indian Self-Determination Act to extend the SGDP to the IHS. Almost immediately, a number of tribes expressed interest in negotiating self-governance agreements with the IHS. In response the IHS detailed staff to the IHS OTSG.

In the first six months of 1993, the IHS initiated a review of the functions of its HQ and Area Offices to determine which Agency functions and activities are inherently Federal and which are likely compactable. The IHS wrestled with this issue and provided guiding principles so each Area could make its own determinations. Three underlying principles used in this exercise were:

- There will be no adverse impact to the nonparticipating tribes.
- Under 100% compactability, the IHS will downsize.
- The last tribe that decides to compact with the IHS receives proportionally the same funds as the first tribe.

Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Michel Lincoln on behalf of the Indian Health Service): pg. 1 [hereinafter referred to as IHS Testimony (10/20/93).

With this exercise complete the IHS was able to begin compact negotiations with tribes in May of 1993. Note, however that the Areas' interpretations of inherent governmental functions differed enough to warrant further research into this issue.<sup>15</sup>

In May, pre-negotiations were started with tribes in four areas (Bemidji, Oklahoma, California, Billings). Portland Area was soon to follow. According to the *Cherokee Report* it took on average more than five meetings with the Area Office for the tribes to accomplish the budget flow analysis. 16

Six compacts were completed by 6/30/93. Three compacts were effective on 9/30/93 and the other three on 10/1/93. The early start for Grand Traverse Tribes, Hoopa Valley Tribe, and Sac and Fox Tribes was needed to carry over funds allocated in the FY 93 appropriations for contracts that continued into FY 94.17 Eight more compacts were negotiated by 9/30/93 to begin 1/1/94. In total, 14 compacts were completed in less than one year's time. The total amount transferred to tribes under SG thus far is nearly \$50 million. 18

The IHS has made the commitment to meet with SG tribes, planning tribes and nonparticipating tribes to resolve outstanding issues. The IHS agreed to financially support a SG Tribal Task Force to develop distribution methodologies for all Reimbursement and Competitive funds not made available by the IHS to tribal share in 1994 negotiations. <sup>19</sup>

#### **B.** Delegations of Authority

On June 30, 1993, the Secretary of DHHS delegated all Indian Self-Determination Act (ISDA) authority vested in the Secretary (except the authority to promulgate regulations, submit reports to Congress, establish advisory committees or national commissions, and appoint members to committees or commissions) to the Assistant Secretary for Health. The Assistant Secretary for Health delegated the authority to the Director of the Indian Health Service with the following

<sup>15</sup> IHS Testimony (10/20/93): pg. 3.

<sup>16</sup> The Cherokee Report: pg. 15.

Department of Health and Human Service Attorney to Indian Health Service re Self-Determination transition (6/30/93).

<sup>18</sup> IHS Testimony (10/20/93): pg. 4.

IHS Response to SG Tribes Las Vegas, pg. 3. The tribal Self-Governance Task Force on Tribal Share Methodologies had its first organizational meeting in Reno, Nevada on December 8 & 9, 1993. The second meeting is scheduled in Rockville, Maryland January 5 - 7, 1994 (as this document went to print.)

condition: The authority to award the SG Compacts and Annual Funding Agreements (AFAs) may not be exercised in FY 94 until an implementation plan, describing the methodology for administering the program, is approved by Deputy Assistant Secretary for Health Management Operations.

At present, the IHS Director has authority to sign the compacts, annual funding agreements and other obligating documents. The OTSG is located in the Office of the IHS Director and works closely with the IHS Office of Tribal Activities.<sup>20</sup> The OTSG has authority to plan and negotiate.

Congress and tribes affected by the agreements are authorized to review the compacts and AFAs. The documents must be submitted to the Senate Committee on Indian Affairs and the House Committee on Interior and Insular Affairs as well as the affected tribes ninety days prior to the effective date of the documents.<sup>21</sup>

#### C. Office of Tribal Self-Governance

The IHS OTSG personnel are responsible for all phases of the IHS SG program. The initial purpose of the OTSG was to facilitate the development of research and data necessary to develop SG compacts.<sup>22</sup> Its current functions are: to develop, direct, and oversee the implementation of the tribal SGDP policies and programs applicable to Title III of the ISDA as amended; provide technical assistance to tribes in the development of Tribal SGDP; review and approve proposals for SG planning grants; negotiate compacts and funding agreements with participating tribal governments; identify the amount of funds necessary to implement the agreements and prepare annual budgets; and ensure that the responsibilities of the federal government are not waived, modified, or diminished with respect to the Indian tribes and individual Indians.<sup>23</sup> The degree of Federal oversight is limited to the absolute minimum

Delegation of Authority for Self-Governance from Donna E. Shalala to Asst. Secretary of Health (6/30/93): pg. 1.

<sup>21</sup> P.L. 93-638 as amended, Title III, §303(a)(9).

S.Rep. 102-392, Indian Health Care Improvement Act of 1992 (8/27/92) (Select Committee on Indian Affairs): pg. 43.

Indian Health Service, Public Health Service, Department of Health and Human Services, Financial Analyst Job Announcement, Announcement # 93-112, (8/27/93).

required by specific laws or program regulations which protect the safety and rights of individuals and to adherence to specific limitations in the Appropriation Act.<sup>24</sup>

The OTSG was originally staffed by IHS employees detailed from other positions. The Acting Director of IHS thought it was important to detail some of the top IHS employees to negotiate the compacts in a short time frame. The period of time for the detail has expired for two employees although the Acting Director and the Secretary remain on detail. The IHS is moving toward a permanent staff in the OTSG. A Program Analyst was hired October 31, 1993. A Financial Analyst was advertised but the current hiring freeze within the Public Health Service is preventing the hiring of any new positions.

The Directorship of OTSG was advertised twice; after the first panel was closed, the Acting Director decided to readvertise in order to broaden the pool of applicants. The second panel was rejected by the SG tribes at the November 1993 meeting between the IHS and SG tribes. At that time, a group of SG tribes requested that the position be reclassified as a top level Senior Executive Service (SES) position.<sup>25</sup> This process has begun and may take another six months or longer.

As configured now, a fully staffed OTSG will have five FTE positions, four professionals, and one support staff. The OTSG may need to increase beyond its requested capacity. Each vacant position will be competitively applied for, and each position will be selected on the basis of the most qualified candidate. Resources needed for this office have been set aside from congressional appropriations but are subject to the Public Health Service hiring freeze.

Self-Governance Communication and Education Project, Minutes and Handouts of the November, Las Vegas Meeting (11/93): pg. 26, [hereinafter referred to as Las Vegas Meeting Minutes (11/93).]

Final Report: Ad-Hoc Work Group for the Review of Area Office Functions for the Support of Tribal Self-Governance Compacts, Sponsored by The Portland Area Indian Health Service Portland, Oregon (April 13-15, 1993): pg. 3 [hereinafter referred to as the Portland Area Ad Hoc Work Group Report (4/93).]

### D. Criteria for Self-Governance Tribes

The SG law authorizes thirty tribes to participate in the Demonstration Project.<sup>26</sup> To participate tribes must:

- be a federally recognized Indian Tribe as defined in 25 USC §450b(e)
- have operated two or more mature self-determination contracts
- demonstrate financial stability (furnish organization-wide single audit reports prescribed by the Single Audit Act of 1984 for the previous three years, which contain no significant or material audit exceptions)
- formally request to participate through a final governing body action
- participate in a planning activity for self-governance (through a SGDP planning grant or some other comparable planning activity) and
- formally authorize the negotiation process.

# E. Planning Grants and Cooperative Agreements

The SG law authorizes the IHS to fund one year planning and negotiations grants for tribes who may want to compact with the IHS.<sup>27</sup> The purpose of the original planning grant was to conduct budgetary and legal research, internal government planning and reorganization, if desired, and to develop a negotiations strategy.<sup>28</sup> Now planning and negotiating activities are funded separately.

<sup>26</sup> P.L. 93-638 as amended, Title III, §302(a).

<sup>27</sup> P.L. 93-638 as amended, Title III, § 310.

S.Rep. No. 102-199 (11/1/91) (accompanying S. 1287 before the Senate Committee on Indian Affairs): pg. 6 and S.Rep. 102-392, Indian Health Care Improvement Act of 1992 (8/27/92) (Select Committee on Indian Affairs): pg. 43.

During the planning process, the IHS makes available budget information for the planning tribes. The IHS meets with tribes to provide clarification on budgets, tribal share, calculations and residual information.<sup>29</sup>

In FY 93, \$1,800,700 was made available to the 23 SG tribes with signed DOI compacts for planning activities; each tribe received \$78,300.30 The OTSG converted some of its unused personnel funds to expand the number of tribes receiving planning grants. At that time, given the time constraints, tribes were required to submit an application and provide 1) a tribal council or governing body resolution, 2) narrative description of planning/negotiating activities that identify the goals and objectives of the grant, 3) line-item budget with justification, and 4) interim and final report identifying problems encountered and accomplishments made. The planning grant funds were awarded as modification to existing IHS ISDA, Title I contracts as a nonrecurring activity.31

For 1995 negotiations, the IHS opened the planning process to more tribes. Some SG tribes requested that the IHS limit, or at least give priority, to tribes which have DOI compacts. The SG tribes also asked the IHS to reduce the written detailed proposal and other formal requirements. The SG tribes favor a very concise application and simple budget.<sup>32</sup>

The IHS maintains that cooperative agreements are another form of a grant and thereby are authorized by the Self-Governance legislation. Because cooperative agreements require substantial programmatic involvement by the Federal awarding agency and because the IHS must provide detailed amounts of information to the planning tribes, the IHS decided the cooperative agreement would be the best instrument to use. The detailed information is needed for the tribes to analyze the complex IHS budget and structure. <sup>33</sup> Requirements were not changed. The IHS will also consider geographical representation in its award of planning funds as stated in the SG law, Title III, §302(a)(2).<sup>34</sup>

Internal IHS Memo from Doug Black to Area Directors re Self-Governance, with attachments from DOI (3/31/93): pg. 4.

Falmouth Workbook: pg. 5-3; Internal IHS Memo re Self-Governance Status (7/12/93): pg. 1; Telephone conversation with Carol Martin, OTSG (11/24/93).

<sup>31</sup> Memo from IHS Director to SG Tribes re planning grants (12/30/92).

Letter from Ron Allen representing SG tribes to M.Lincoln (11/10/93) (hand delivered during meeting in Las Vegas, Nevada): pg. 4; can be located in Las Vegas Meeting Minutes (11/93): pg. 24.

Tribal Self-Governance Planning and Negotiation Cooperative Agreements (11/19/93): pg. 10.

Tribal Self-Governance Planning and Negotiation Cooperative Agreements (11/19/93).

On 11/22/93 the IHS OTSG announced a 12/17/93 deadline for planning cooperative agreements and 2/25/94 for negotiation cooperative agreements. About \$1.22 million is available; \$320,000 for negotiation (at \$20,000/per tribe) and \$900,000 for planning (at \$50,000/per tribe). The planning phase allows a tribe to gather information to determine the current types and amounts of programs, services and funding levels available within its service area and to plan for the types, amounts of programs, services, and funding to be made available to the tribe under a compact. The negotiation cooperative agreements provide tribes with funds to help cover the expenses involved in preparing for and actually negotiating with the IHS. Any Tribe which has already received a planning grant must submit a request for a negotiation grant to the OTSG Director.

# F. Pre-negotiations and Negotiations

Pre-negotiations activities follow initial planning activities. In pre-negotiations tribes decide which health services functions, activities, programs and projects to select for transfer, and how much funding is available to the tribe at the Service Unit level. Then the IHS uses this information to determine how much funding would be allocated to the tribe from the Area Office and Headquarters level functions associated with the direction, control, and administrative support of the health program services activities to be transferred. <sup>35</sup> But the underlying premise is that if there is a question as to whether a particular activity, program, service or function is eligible for inclusion in the project it shall be resolved in favor of inclusion unless there is adverse impact. <sup>36</sup> The SG law requires the Secretary to interpret Federal laws and regulations in a manner so as to facilitate the SGDP. <sup>37</sup>

When the tribe is ready for final negotiations, a meeting date is scheduled for tribal representatives to meet with IHS representatives. Again, level of effort and funds are discussed. Also to be discussed are any factual matters that were not agreed upon in the prenegotiations process.<sup>38</sup> Tribal policy makers, technical budget staff, and tribal lawyers will likely be present at the negotiations. Records are kept on the negotiation proceedings and a

35 Portland Area Ad Hoc Work Group Report (4/93): pg. 2.

H.Rept.. 102-320 (11/18/91) (Tribal Self-Governance Demonstration Project): pg. 4) and S.Rep. 102-392, Indian Health Care Improvement Act of 1992 (8/27/92) (Select Committee on Indian Affairs): pg. 43.

P.L. 93-638 as amended, Title III, §303 (e) and (f).

Shaping Our Own Future (1991): pg. 5.

computer and printer are available in the negotiation session.<sup>39</sup> Sometimes the tribe and the IHS will agree on using either a tribal or IHS person to act as a facilitator. That person will act in an unbiased manner and be responsible for keeping the negotiating parties on task.

The IHS does not have a formal negotiation process in place. In the past negotiations, the IHS approached the negotiations as if no shortfall funding was available and every tribe elected to compact. The IHS negotiators need, on hand, supportive documentation explaining the budget and all decisions relative to tribal share. It was suggested that the IHS further develop its team effort so that the HQ and Area staff are involved together and not as separate components. It was also suggested that a set of guiding principles be developed to assist in the next round of negotiations.

# G. Ongoing Issue Resolution with SG Tribes

The SG tribes sometimes seem at odds with the IHS. Several barriers exist. Some tribes think that because this is a demonstration project the goal is to put every funding category on the negotiating table. IHS is cautious, thinking that if funds are placed on the negotiating table once, they will never be removed despite what happens during the SGDP. Nonetheless the IHS has negotiated to include some of the debated items for this first year only. (E.g. the Tribal Management Grant funds for the Grand Traverse Bands and the Health Facility Renovation funds for the Hoopa Valley Tribe.) In addition, a tribal SG task force is being funded by the IHS to resolve outstanding fiscal issues affecting the tribal shares.<sup>40</sup>

<sup>39</sup> Shaping Our Own Future (1991): pg. 8.

Las Vegas Meeting Minutes (11/93): pg. 32. See footnote 18 above.

# V. Compacts and Annual Funding Agreements

## A. Compacts

A compact is a legal instrument mutually agreed upon by each party government. A SG Compact defines responsibilities and authorities of the IHS and the SG tribe. The IHS is required to negotiate a compact in good faith, but unlike under Self-Determination contracts, the IHS cannot be compelled to sign the agreement unless it accepts its terms.<sup>41</sup>

A model compact was prepared as part of the *Cherokee Report*. For the most part the compacts are similar, the evolution of specific provisions are noticeable as one reads them all. A summary comparing provisions of the fourteen 1994 SG Compacts has been prepared for the OTSG Director (it is a very lengthy document.) A chart comparing selected provisions of the fourteen compacts will follow.

R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Director, Office of Legislation and Regulations re Self-Governance (12/8/92). pg. 3.

# COMPARISON OF 1994 COMPACT PROVISIONS

Provision Authority	S&F P.L. 93- 638 aa	ML P.L. 93-638	GT P.L. 93-638	Hoopa ISD&E A Act	Cherok P.L. 93-638	Flathd P.L. 93- 638 as amended	Ely S P.L. 100-472	Duckw P.L. 100-472	Siletz ISD&E A Act	Ab.Shn P.L. 93-638	JmsKII P.L. 100-472	Lummi P.L. 100- 472	Makah ISD&E A Act	P.Gam ISD&E A Act
Reallocation 30% Rule	9/30 yes	10/1 no	9/30 no	9/30 limited to trust	10/1 no	10/1 50%	1/1/94 no	1/1/94 no	1/1/94 no	1/1/94 no	1/1/94 no	1/1/94 no	1/94 no	1/1/94 no
Sol. Obligat'n Trust Resp. Evaluation Team	Trust Resp.	Trust Resp. yes	Trust Resp. yes	Trust Resp. yes	Solemn Obligat.	Trust Resp.	Trust Resp.	Trust Resp.	Trust Resp. yes	Solemn Obligat.	Trust Resp. yes	Trust Resp. yes	Trust Resp. yes	Trust Resp.
US to provide reports		monthly	monthly	monthly		no date	1/4 but want mo.	1/4 but want mo.	1/4ly	no date	1/4ly	1/4ly	1/4ly	1/4ly
IHS to reorg	yes total	yes 1/4ly	yes 1/4ly	yes total	- 1/4ly	- 1/4 but want all	yes 1/4ly	yes 1/4ly	yes 1/4ly	yes 1/4ly	yes total	yes 1/4ly	yes 1/4ly	yes 1/4ly
Retrocession  Reassumption  Days for next compact	1 year - 120	45 day - 120	1 year - 120	1 year - 120	1 year - 120	1 FY - 120	l year in Cpt 120	1 year in Cpt 120	1 CY - 6/1-	1 CY - 120	45 day - 120	45 day - 120	45 day - 6/1-	45 day - 6/1-
Days for reg	days 30 day	days 30 day	days 60 day	days 30 day	days 30 day	not set	days 30 day	30 day	9/30 30 day	not set	days 30 day	days 30 day	9/30 30 day	9/30 30 day
Days for BM to be established	60 days	105 days	75 days	before effective date	60 days	90 days	do sep- arately & confer	do sep- arately & confer	no date	no date	90 day	90 day	no date	90 day
IHS to establish BM	-	yes	yes	yes	-	[ -		<u> </u>	[]	yes				yes
Submit reports early	-					30 day	Ē						-	
Non-Indians served for fee		yes	yes	-		-	-			<u>-</u>	<u>-</u>		-	-
Start-up costs		-	-		<u>-</u>	<u>-</u>	TBD in Cpt and in AFA	TBD in Cpt and in AFA	TBD		TBD	TBD	TBD	\$824, 632
Indirect Costs ConSupCosts	in AFA	in AFA	in AFA	in AFA	<u> </u>	in AFA	in AFA	in AFA	in AFA	in AFA	in AFA	in AFA	in AFA	in AFA

# COMPARISON OF 1994 COMPACT PROVISIONS

Provision	S&F	ML	GT	Hoopa	Cherok	Flathd	Ely S	Duckw	Siletz	Ab.Shn	JmsKll	Lummi	Makah	P.Gam
70/30% split	no	no	no	no	no	no	yes	yes	yes	no	yes	yes	yes	yes
HQ resp.in							yes	yes	yes				yes	yes
AFA Payment in in				ves			ves	ves	yes					
AFA	L		L	[Ac-	L	L	1759	1,00	753				<u></u>	ļ
TA in in AFA							yes	yes	yes				yes	yes

## B. Annual Funding Agreements

An Annual Funding Agreement (AFA) is the instrument that describes what programs and/or funds will be tribal and what programs will be retained by the IHS. The SG law establishes minimum terms that must be included in the AFA. 42 The AFA shall authorize the tribe to plan, operate and consolidate programs that are otherwise available to them through the IHS and to redesign programs subject to terms of the agreement. According to the SG law, the AFA shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretaries pursuant to the agreement; and prescribes the authority of the tribe and the Secretaries and the procedures to be used to reallocate funds or modify budget allocations within any project year. In practice the AFA is short on functional descriptions and long on budget analysis. Each AFA also provides for the retrocession of all or a portion of all the programs covered by the agreement and that the Secretary cannot diminish the trust responsibility. Also, in practice, the user population is noted in the AFA (rather than in the Compact) for those tribes that elected to divide the Area and HQ tribal shares based on both user population and the number of tribes in the Area. (More detail under Section V.E.2.)

# C. Area Specific Issues

Each Area is unique and certain issues are highlighted in different areas. More specific issues are discussed below by Area Office.

## Portland Area Office

Five tribes within the Portland Area negotiated SG Compacts and AFAs with the IHS. These agreements took effect 1/1/94. The tribes are the Jamestown S'Klallam, Lummi, Makah, Port Gamble S'Klallam and the Siletz. The Portland Area negotiated to retain \$3 million for residual functions. The tribes disputed \$1.2 million of that amount and requested that the Portland Area Office reduce its residual amount over the years as follows: \$2.5 million in 1995; \$2.0 million in 1996; \$1.0 million after 1996. The Portland Area agreed (in Section 3 of its AFAs) to this reduction if a task force team comprised of the IHS, SG Tribes and nonparticipating tribes does not resolve the residual issue by 3/31/94.

<sup>42</sup> P.L. 93-638 as amended, Title III, §303(4) and (5).

Three tribes (Siletz, Makah, and Jamestown S'Klallam) applied their indirect cost rate to tribal shares derived from the Area and HQ. This was contrary to the IHS policy at that time but is now being reconsidered by the IHS. Nonetheless, it created some disagreement between the IHS and many SG tribes.

Portland Area tribes primarily brought their ISDA contracts under SG although the Lummi Nation also agreed to take over its health facility in transitional stages during the first year.

Portland Area tribes divided the tribal share of the Area and HQ budgets 30% by number of tribes and 70% by user population. This formula provides a larger tribal share for smaller tribes. Although also used in the Phoenix Area, the formula applied to 1994 negotiations only. The IHS and the tribes will revisit the formula in the next round of negotiations.

### Phoenix Area Office

Three tribes within the Phoenix Area planned for self-governance and ultimately two compacted. All three tribes are small tribes within the Owyhee Service Area in Nevada. The compacts with the Duckwater Shoshone and Ely Shoshone are identical. Both begin 1/1/94. The Shoshone-Paiute Tribes of Duck Valley decided not to compact and then changed their mind. At that time it was too close to the deadline for Calendar Year 94 (CY 94) for the IHS staff to negotiate. The IHS made a policy decision for the compact year to coincide with either the fiscal or calendar year. When the Shoshone-Paiute Tribes of Duck Valley missed the deadline they were advised that they would be eligible for FY 94. The tribe has filed a complaint of adverse impact directly to the IHS. No formal notification has been addressed to Congress. The situation is compounded by the fact that all three tribes had been served by the facility on the Duck Valley reservation. That facility, however, primarily serves its reservation residents. The facility share negotiated by the SG tribes is not substantial and was funded by substituting their share with Contract Health Care funds from Area reserves.

## Billings Area Office

The only compact in the Billings Area is with the Flathead Nation. The AFA with the Flathead Nation includes a substantial amount of funds from the Billings Area Office (\$670,100) but no restructuring has taken place. Once the FY 94 budget has been distributed, the Area Office will examine the possibility of downsizing. The Flathead Nation took over the entire Service Unit, but it is primarily a Contract Care program. There is no clinic or hospital although Dental, Pharmacy and Preventative Services are provided directly. Most of the Service Unit staff who worked for the IHS transferred to direct hire by the tribe. Only five federal employees were

retained under Memorandum Of Agreement and Intergovernmental Personnel Agreements. No one has been eliminated from service against his or her wishes.

Also, the Flathead Nation successfully negotiated more funds for its Fiscal Intermediary dollars than the IHS originally proposed. At first the IHS proposed to allocate \$29,000 for the tribal share of the Fiscal Intermediary funds based on a user population methodology. Later the IHS agreed to divide the funds based on workload instead and then the amount of funds allocated increased to \$150,000. The IHS Office of Health Programs will review the Fiscal Intermediary funding during SGDP implementation.

## Bemidii Area Office

Out of the 29 tribal units in the Bernidji Area all but 3 are tribal contractors. Only one of the three direct care tribes has begun planning activities for SG. The two SG tribes, the Mille Lacs and Grand Traverse bands, were both tribal contractors. These tribes developed their own baseline measures (which are very detailed.) These two tribes also included in their compacts a provision to serve non-Indians on a fee for service basis. These tribes were allotted a portion of the Aberdeen Area Office for financial, procurement and personnel services that had been performed by Aberdeen for the Bernidji Area Office. In calculating that share the tribe, the Area and HQ initially came up with substantially different figures.

### California Area Office

The Hoopa Valley Tribe is the only tribe in the California (Sacramento) Area that elected to compact with the IHS for 1994. The tribe rejected the formula dividing a portion of the Area funds based on the number of tribes in the Area. The formula seemed an inappropriate formula for that Area because some California tribes are quite small and all the California tribes operate their programs through ISDA contracts. It was agreed that the Area and HQ shares would be divided by user population percentages only.

## Oklahoma Area Office

Compacts with the Sac and Fox Tribes and the Cherokee Nation became effective 10/1/93. The Absentee Shawnee Tribe compact was effective as of 1/1/94. The Absentee Shawnee Tribe has a facility in the Absentee Shawnee community that is leased to the IHS and that serves four other tribes as well. The tribe negotiated for program dollars but did not negotiate for facility operation funds. This will require the IHS and the Absentee Shawnee Tribe to develop a method to reimburse the IHS when an Absentee Shawnee tribal member comes to the IHS facility for services.

## V. Major Issues

## A. Policy Matters

- 1. Permanent Status
- 2. Policy Making
- 3. Population Figures
- 4. Restructure and Downsizing
- 5. Starting Dates
- 6. Trust Responsibility

# 1. Permanent Status

The SGDP is expected to be authorized as a permanent way of doing business between the federal government and tribal governments. Legislation has been introduced and passed in the Senate to establish Self-Governance on a permanent basis with the Department of Interior.<sup>43</sup> For the IHS, permanent status will come later. The DOI experience with SG dates back to 1988; the IHS signed its first compact in 1993 and is expected to continue with the pilot project through Fiscal Year 96. Permanent legislation for the IHS will likely be enacted about that time.

The proposed legislation makes some changes in the requirements for Self-Governance. For DOI, it eliminates from the eligibility requirements the need to consider geographic diversity.<sup>44</sup> It also reduces the reporting requirement to only one report per year (Jan. 1) but broadens the scope of the report to include identification of all funds that are specifically or functionally related to the provision of services and benefits to SG tribes and their members, and to document corresponding reduction in the Federal bureaucracy. Any regulations promulgated for Self-Governance will undergo negotiated rulemaking.

<sup>43</sup> S. 1618 (1993).

S. Rep. 103-205 (11/22/93) (Senate Committee on Indian Affairs, Legislation Establishing Self-Governance, and for Other Purposes): pg. 7.

# 2. Policy Making

The IHS Acting Director relies on his Council of Area and Associate Directors to assist with developing policy. SG tribes favor the IHS establishing a Self-Governance Policy Council like that in the DOI.<sup>45</sup> The Acting IHS Director concurs with this concept and has asked the SG tribes to forward a model concept and structure for his consideration. He intends to discuss implementation of the model with the SG tribes.<sup>46</sup>

Proposed technical amendments to the SGDP would establish a SG Policy Council of the DHHS to be chaired by the Director of the OTSG with additional members including the IHS Director, a representative of the DHHS Secretary, a representative of the Office of General Counsel, and two non-federal members appointed by the Secretary representing tribes with SG agreements with the DHHS. The non-federal members shall serve one-year, nonconsecutive terms and are to be selected to achieve geographic representation from among nominations made by tribes having agreements.

## 3. Population Figures

User population is a key element in calculating tribal share. User population estimates are the count of IHS eligible users who have used IHS services at least once during the last three-year period. User population differs from the service population. Service population is all those eligible for IHS services in any given year as adjusted from the most recent United States Decennial Census.

User population, a key element in calculating tribal share, is tallied from IHS generated data. This number is verifiable by the IHS; verification is needed to ensure that an individual is only counted once (e.g. if a person's name was recorded differently at various encounters.) The IHS Data Center uses the Resource Patient Management System (RPMS) to identify possible duplicate users. Then the Areas, and sometimes the Service Units, are asked to further review records for duplication. If the user population needs to be projected then the most recent user population estimate is adjusted by the applicable service population growth factor for the geographic area.

Letter from Ron Allen representing SG tribes to M.Lincoln (11/10/93) (hand delivered during meeting in Las Vegas, Nevada).

<sup>46</sup> IHS Response to SG Tribes Las Vegas; pg. 1.

FY 91 figures were the latest figures available that had been verified prior to the 1994 SG negotiations. Because the IHS cannot provide updated figures some tribes have proposed to provide their own figures.<sup>47</sup> The IHS intends to continue supplying the figures to ensure consistency in the negotiations throughout Indian country. The IHS needs to review its capability for verifying its user population figures to see how to expedite the process. The unverified data is released in January for the previous fiscal year and usually takes over a year to verify.

Reliance on user population has been questioned within the IHS. User population figures are difficult to use in multi-tribal service areas where one tribe is participating in the SGDP but the others are not. It may be wise to differentiate between the users of the SG tribe and the users from other tribes. This could be done by funding the SG tribe on a recurring basis for its own members and on a non-recurring basis for nontribal members who use the facility. Then, if one of the other tribes chooses to compact and build its own facilities, it will be possible to shift their nearby tribal members without affecting the base funding of the earlier SG tribe.

## 4. Restructure and Downsizing

Although the law does not specify that the federal agencies are to restructure and downsize, it is explicit in the legislative history. The IHS needs to design options to restructure and reorganize its organization, as its resources are transferred to SG tribes, to ensure a satisfactory level of services is provided to nonparticipating tribes. The IHS understands that numerous forces are placing increasing pressure on the IHS structure, functions, and budget thereby requiring the IHS to develop an improved, more effective standardized management structure. The SGDP fits in well with the Administration's effort to reduce administrative costs throughout the federal government. The Administration's plan calls for cutting red tape, stripping away layers of control systems and middle-management and most of all, serving customers and measuring success by customer satisfaction. 50

A compromise on population counts was negotiated out for two compacts (Grand Traverse and Mille Lacs.)

S.Rep. No. 102-199 (11/1/91) (accompanying S. 1287 before the Senate Committee on Indian Affairs): pg. 3.

Indian Health Service FY 1994 Planning Issues -- Self-Governance (undated).

Heap 103-158 (6/24/93) (Dept. of the Interior and Peletral Agencies Approx

H.Rep. 103-158 (6/24/93) (Dept. of the Interior and Related Agencies Appropriations Bill, 1994. Committee on Appropriations.): pg. 1; Vice President Al Gore's "Creating a Government That Works Better and Costs Less" (9/7/93).

At the Congressional oversight hearings on the SGDP during the week of 10/18/93, the Senate Committee on Indian Affairs asked IHS to report on downsizing. The IHS will have to determine where residual functions will be performed and how the IHS may restructure to accommodate changes.<sup>51</sup> The IHS will have to determine when the Area Office services become non-functional and regionalization becomes practical.<sup>52</sup> Any decision to eliminate and/or combine Areas for additional savings would have to be made in coordination with the tribes and Congress.<sup>53</sup>

Some compacts address this issue directly. A common compact provision states that the DHHS and IHS expect to reorganize, restructure, or to take other options to provide the same level of service to other tribal governments and demonstrate new administrative and program policies and methods to provide improved service delivery to address tribal needs.<sup>54</sup> The IHS should determine if certain Area functions can move to the HQ or be combined to create fewer regional sites. At one point, the Area Directors hypothesized that at 100% Self-Governance, an Area Office could run with 10 - 20 employees and \$1 to 1.5 million annual budget.<sup>55</sup> Indeed, this amount was discussed as "doable" by FY 98 in the Portland Area and the Bernidji Area. The Portland Area did commit in its agreement with SG tribes to downsize during the SGDP.

The SG tribes, in the Cherokee Report paint a picture of their view of the future IHS:

"IHS will develop into a "tribal resource center," functioning as advisor/consultant/ resource in those fields where IHS staff have a wealth of experience and expertise. Few individual tribes will have the monetary resources to support full-time staff positions in sanitation, environmental engineering, MCH [Maternal Child Health] coordination, developmental disabilities, nutrition, information systems development, data retrieval, or coordinated purchasing/warehousing/distribution of supplies. It is precisely these special functions for which tribal management will have a continued need of outside assistance. But IHS will have to compete with the private sector."

<sup>51</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 39.

Portland Area Ad Hoc Work Group Report (4/93): pg. 42.
 Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab B; S.Rep. 101-534 (10/16/90) (Dept. of Interior and Related Agencies Appropriations Bill, 1991): pg. 130-131.

In Ely Shoshone and Duckwater Shoshone compacts, Art. I, § 2(d).

Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab B.

<sup>56</sup> Cherokee Report (1993): Appendix VI, Section C.

In response to the pressures to reduce administrative costs within the IHS, a Restructuring Work Group has been established. The Work Group is comprised of tribal and IHS representation; three SG tribal leaders are part of the work group.<sup>57</sup> The Work Group is to examine relevant issues, evaluate potential options, and propose recommendations to transform the IHS so that it is better able to meet the challenges of a rapidly changing environment. A full written report is due 2/1/94.

## 5. Starting Dates

Early on the IHS made a policy decision that the compact year must coincide with either the Fiscal Year (Oct. through Sept.) or the Calendar Year (Jan. through Dec.) The Fiscal Year coincides with the IHS budget but because many contracting tribes had recently taken the major step to change over to Calendar Year funding cycles, the IHS agreed to accommodate either an Oct. 1 or Jan. 1 start date. This decision was intended to simplify the process and greatly reduce the administrative burden on the IHS. All negotiations must be completed at least 90 days prior to the the effective date in order to send copies of the Compacts and AFAs to Congress and to other tribes in the Service Area; negotiations must be completed before June 30 for fiscal year compacts or September 30 for calendar year compacts.

Two planning tribes did not agree that the IHS should limit compacts to those two start dates. The Shoshone Paiute Tribes of Duck Valley and the Swinomish Tribal Community received planning grants and then decided not to negotiate for Calendar Year 94. The tribes, however, changed their positions just before the September 30 deadline. The OTSG staff was not able to accommodate the change in plans on such short notice and informed the tribes that the next round of negotiations would take place prior to June 30, 1994.

The IHS policy regarding starting dates has not been changed despite negative response from the tribes. According to the IHS, the SGDP would be unmanageable if other dates were used.

<sup>57</sup> Cherokee, Lummi and Navajo.

## 6. Trust Responsibility

The SGDP has unearthed the issue whether or not IHS has a trust responsibility to Indian people and Indian tribes. In the past the IHS has termed its activities as flowing from the "solemn obligations" of the federal government to provide health care. The term "trust responsibility" was reserved only for physical resources not individual Indians.

The IHS has interpreted the trust language in the SG law to apply only to DOI, not the IHS.<sup>58</sup> However, trust responsibility of the IHS has been recognized by the Congress and the courts. Congress stated, "The U.S. [United States] has assumed a trust responsibility to provide health care to Native Americans." Trust language has been the basis for courts ordering provision of services, such as health services, to Indians.<sup>60</sup>

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The model compact, developed as part of the *Cherokee Report* describes the federal obligation to tribes as a "solemn obligation". With the exception of the Cherokee Nation and the Absentee Shawnee Tribe, the compacts substituted the stronger description of "trust responsibility" in the first section in the Article on Obligations of the United States. The ramifications of applying the trust responsibility to the IHS are unclear. Some believe it is only a semantic difference and others believe it expands the fiscal responsibility of the IHS many fold. But these waters have not yet been tested.

### B. Procedural Matters

- 1. Avoiding Adverse Impact
- 2. Contract/Compact Conversion
- 3. Dispute Resolution
- 4. Personnel
- 5. Regulation Waiver Process
- 6. Retrocession and Reassumption

R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Director, Office of Legislation and Regulations re Self-Governance (12/8/92): pg. 3.

S.Rep. 100-274 (12/22/87) (Indian Self-Determination Act Amendments of 1987 before the Select Committee on Indian Affairs): pg. 27.

<sup>60</sup> Shaping Our Own Future (1991): pg. 36.

# 1. Avoiding Adverse Impact

For the last several years, equity and parity in treatment of tribes served by direct care and ISDA contracts has been the cornerstone of IHS policy based on Congressional direction. Self-governance should not change this.<sup>61</sup> The SG law states that the SGDP is not meant to reduce or limit the services, contracts or funds available to nonparticipating tribes.<sup>62</sup> This means that the last tribe to compact with the IHS should receive proportionately the same amount of funds as the first tribes. By law, each nonparticipating tribe in a multi-tribal Service Area is entitled to receive a copy of any AFA from that Service Area at least 90 days in advance of its proposed effective date.<sup>63</sup> The non-participating tribe can then initiate legal action if it foresees adverse impact.<sup>64</sup> Legal action can be initiated prior to the effective date or after the AFA has been implemented; the contract disputes procedures from the Indian Self-Determination Act apply.<sup>65</sup>

Anticipated adverse impacts may include operation of local health care facilities serving members of multiple tribes if one or more tribes select SG. Also included are divisibility issues involving financial allocations of limited IHS resources especially for those programs located in the IHS Area Offices and the IHS HQ. For example, as specialist positions are compacted it will be hard to afford specialists (by hire or contract) for other tribes.

During the SGDP, the non-participating tribes have expressed concern that the IHS is relinquishing too much of its budget too fast. Generally tribes want the federal government to undertake long-term planning to ensure that Self-Governance is not treated as a means to diminish the relationship between the federal and tribal governments but continues to provide a base for tribal programs in terms of both funding and administrative support.<sup>66</sup>

Internal IHS Memo re Self-Governance Status (7/12/93): pg. 2.

P.L. 93-638 as amended, Title III, §306, see also Shaping Our Own Future (1991): pg. 39.

<sup>63</sup> P.L. 93-638 as amended, Title III, §303(a)(9).

R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Directors re Legislative Implementation Plan (4/1/93). pg. 10.

<sup>65 25</sup> USC §450m-1.

R. Strickland, "Trying a New Way", ("draft copy, no date") (Independent Assessment Report on the Self-Governance Demonstration Project, Title III, P.L. 100-472 prepared by The Center for the Study of American Indian Law and Policy, The University of Oklahoma and the Center for Tribal Studies, Northeastern State University): pg. 48.

On the other hand, some nonparticipating tribes have already benefited from the scrutiny that the IHS applied to its budget. Budget documentation has improved for all tribes in Areas where SG compacts have been negotiated. Other benefits include a new look at how the Supply Centers are funded and stocked. A more equitable accounting system can be derived from this.

Nonetheless, the IHS must prepare a methodology to address the concerns of the nonparticipating tribes. At present there is no procedure to measure adverse impact. A procedure should be put in place prophylactically so that the IHS can measure whether services to nonparticipating tribes are diminished.

# 2. Contract/Compact Conversion

The SG law requires that government contracts in place at the time of SG assumptions must be completed by the Government or terminated. Because transition from an ISDA contract to a SG compact is a change in form of legal instrument, funds from one instrument could not carry over to the other.<sup>67</sup> But in the FY 94 Appropriations Congress clarified that any carryover funds from a Title I Self-Determination contract may be deobligated and reobligated to a Title III self-governance funding agreement. <sup>68</sup>

Now there can be a smooth transition from contracting to compacting for tribes with carryover funds. Without this language, three tribes had to convert their contacts to compacts for one day, the last day of the fiscal year; the Hoopa Valley, Sac and Fox, and Grand Traverse Tribes the carryover funds were reobligated for different, nonrecurring needs as a special one-time adjustment in the compacts. The need for such conversion was eliminated by the appropriation language.

#### 3. Dispute Resolution

Any disputes which arise under a SG Compact will be resolved according to the procedures established in 25 USC §450m-l, that is, the contract disputes provision for ISDA

Department of Health and Human Service Attorney to Indian Health Service re Self-Determination transition (6/30/93).

<sup>68</sup> P.L. 103-138 (11/11/93) (Appropriations for DOI and Related Agencies.) pg. 107 Stat. 1409-1410).

contracts.<sup>69</sup> This gives the U.S. District Courts and the U.S. Court of Claims concurrent original jurisdiction over disputes arising under the agreement and makes the dispute subject to the Equal Access to Justice Act and the Contract Disputes Act. The aggrieved party has the right to seek injunctive relief in the U.S. District Courts and to seek money damages in the Court of Claims or in the district court. In addition, the aggrieved party can seek judicial review of a decision by an agency contracting officer or an agency board of contract appeals.<sup>70</sup> Professional services and litigation costs related to contract disputes or other matters related to the performance of the compact are allowable costs (until the final administrative decision is reached.)<sup>71</sup>

However, no formal procedure exists to resolve disputes that occur during the negotiations process. Disagreements that arise prior to the signing of a compact are decided by the IHS Director. If a tribe disagrees with an action by the IHS, it is usually footnoted in the AFA.

#### 4. Personnel

Personnel procedural matters are important to discuss thoroughly during compact negotiations. SG tribes have four basic options regarding personnel in existing facilities and programs. Two options would require the IHS to retain funds in its budget. All the options have been used by tribes in Self-Determination contracting.

The first option, the Intergovernmental Personnel Agreement, is used when the tribe seeks to retain an incumbent Civil Service employee and the employee seeks to retain his or her status with the federal government. In essence, the agreement is for the IHS to "assign" the employee to the tribe. The funding for the position and any fringe benefits or other associated costs would be either retained by the IHS or paid by the tribe. The second option, the Memorandum of Agreement is similar to the first except that it is used for the Commission Corps Officers.

The third option is for a federal employee to leave federal service and become a tribal employee. Under the Self-Determination law, as amended to include SGDP, such

<sup>69</sup> P.L. 93-638 as amended, Title III, 303(d).

<sup>70</sup> S.R. No. 100-274 (SCIA), pg. 34.

Memo from Executive Office of the President/Office of Management and Budget to Acting Assistant Secretary for Policy, Management, and Budget/Department of Interior (7/16/91): pg. 6.

employees can retain most of the civil service benefits of the Federal personnel system.<sup>72</sup> These employees lose none of their regular promotion and compensation entitlements available to other Federal employees. Again, funds must be allocated to pay for the benefits.

The fourth option is to employ these individuals as tribal employees under the tribal employment benefit package. The tribe would be wholly responsible for managing the benefits package and no federal benefits would accrue.

#### 5. Regulation Waiver Process

The concept of regulation waiver is rooted in the SG law which requires the Secretaries, to the extent feasible, to "interpret Federal laws and regulation in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements . . .."<sup>73</sup> Each SG compact includes a provision for waiver of federal regulations. The common provision is that waiver of federal regulation may be expedited before the effective date of the compact or the tribe may submit a written request and the Secretary has to have a written decision within 30 working days of receipt.<sup>74</sup> Under some compact provisions, the Secretary is required to honor the tribal request for waiver unless the Secretary makes a determination that regulation is not appropriate for waiver or inconsistent with the purposes of the Act and that the waiver is not in the best interest of the Indians. <sup>75</sup>

Some SG tribes find the waiver process to be unclear and cumbersome; a deterrent to tribes to request waivers. <sup>76</sup> It requires a written submission identifying both the regulation to be waived and the replacement procedure. SG tribes have recently agreed upon a procedure with the BIA that they would like to apply to the IHS. The IHS Acting Director is committed to reviewing the BIA procedure as a basis to establish an IHS procedure acceptable to the DHHS Secretary and the tribes. Also, proposed technical amendments

<sup>72 25</sup> USC §450i(e).

<sup>73</sup> P.L. 93-638 as amended, Title III, § 303(e).

Model Compact, Article IV, § 15(b).

E.g. Sac and Fox Compact, Article II, §11; Mille Lacs Compact, Article II, §12, Hoopa Valley Compact Compact, Article IV, §11; and Flathead Tribes Compact Compact, Article II, §11.

Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Harold Demoss, Council Member, Cherokee Nation Tribal Council): pg. 5.

adopt an expedited procedure to approve or deny tribal requests for waiver of Federal regulations.<sup>77</sup> No formal requests to waive a regulation have been submitted to the IHS.

The IHS OTSG should establish a waiver bank on a computer data base with written justification for each waiver approval and declination as well as a reference to any substitute regulations provided by the tribes. All SG tribes and planning tribes should have access to this information.

# 6. Retrocession and Reassumption

Unlike ISDA contracts, there is no authority in the SG law for federal reassumption of a compact. However, as part of its solemn obligation to the tribes and tribal members, if the federal government determines that the safety of individual Indians is endangered by the SG tribes' actions or inaction, the Secretary shall immediately notify the Tribes of the concerns. Two tribes did include a provision to permit reassumption under the same situations as with ISDA Title I contracts. That is, the IHS can reassume for danger to the health safety or welfare of any person or for gross negligence or mismanagement in the handling or use of federal funds. 80

Retrocession, on the other hand, is expressly permitted under the law. It is a safeguard that the tribes insisted on including. Retrocession will follow the ISDA contract procedures.<sup>81</sup> Retrocession becomes effective one year from the date of the request by the Indian tribe or at such date as may be mutually agreed upon by the Secretary and the Indian tribe.<sup>82</sup>

The IHS prefers that it receive a year's notice of retrocession but remains flexible if earlier dates are mutually agreed upon by the tribe and the IHS. Some compacts require that retrocession occur within 45 days. Because retrocession can occur in a short time frame and

Proposed S. 550, to amend the Indian Self-Determination Act, Title III, § 314(b)-(c).

R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Director, Office of Legislation and Regulations re Self-Governance (12/8/92): pg. 2.

<sup>79</sup> Falmouth Workbook: pg. 5-27.

<sup>80 25</sup> USC § 450m.

P.L. 93-638 as amended, Title III, 303(a)(8) and Shaping Our Own Future (1991): pg. 65.

<sup>82 25</sup> USC §450j(e).

human subjects are at risk, some feel the IHS is responsible to maintain large capacity to quickly reassume health service delivery. The retrocession provision, at minimum, creates the need for the federal government to be continually aware of the status of the tribal operations.

### C. Residual Determination

- 1. Inherently Governmental Functions
- 2. Residual Defined
- 3. Zero Based Budgeting
  - a) HQ Share
  - b) Area Share
- 4. Technical Assistance
- 5. Additional Review

#### 1. Inherently Governmental Functions

If all tribal governments were to compact for SG then the IHS would retain its inherently governmental functions and the resources needed to carry out those functions. The IHS began the task of defining its inherently governmental functions by using the contractibility test developed in the proposed ISDA regulations <sup>83</sup> and also the Office of Management and Budget (OMB) listing of federal functions. <sup>84</sup> The basic premise is that if a function can be contracted to a tribe then it also can be transferred to a tribe via a compact. Any function that is compactable is part of the tribal share; any function that is not compactable is part of the IHS residual. With that test, functions determined to <u>not</u> be compactable, are to be retained by the federal agencies:

• Involve the discretionary exercise of Governmental authority for or on behalf of the Secretary or the making of value judgments in making decisions for the federal government (as distinguished from the operation of services for tribal members, or activities eligible for funding as contract support costs . . ., gathering information, providing advice or purely ministerial functions);

Portland Area Ad Hoc Work Group Report (4/93): pg. 2; and proposed Self-Determination contract regulations, 25 CFR Section 900.106(3).

<sup>84</sup> OMB Circular A-76.

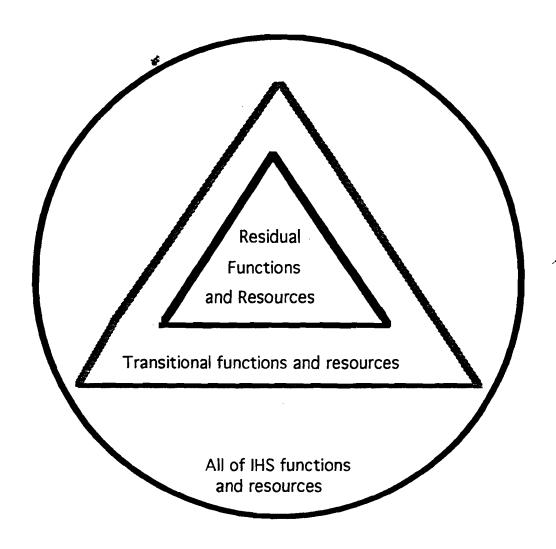
- Impermissibly limit the degree of federal discretion as indicated by finality of the proposed contractor action or the degree to which contractor discretion would be circumscribed by detailed laws, regulation or procedure;
- Can be implemented through special agency authority, such as the power to deputize nonfederal personnel;
- · Are required by law to be carried out by federal officials; or,
- Cannot be feasibly separated from the exercise of nondelegable trust responsibilities or significant Federal authority for the Federal Government under the law.

OMB Circular A-76 describes non-commercial functions, that is, functions that must be performed by a federal employee and not by a contractor. Eleven of the functions are applicable to the IHS:

- 1. Supervision of federal employees.
- 2. Budget formulation.
- 3. Allocation of budget (including monitoring).
- 4. Legislatively mandated functions and their requirements.
- 5. Some procurement functions.
- 6. Development of federal policy.
- 7. Deciding federal administrative hearings and appeals.
- 8. Determining the Secretarial views concerning administrative appeals.
- 9. Real property management and transactions.
- 10. Federal agency tort coverage.
- 11. Federal trust responsibility.

#### 2. Residual Defined

Understanding the definition of inherently governmental functions is just the first step. The next step is to quantify the residual and determine if the remainder represents the tribal share. The residual is the amount of resource retained by the IHS to provide inherently governmental functions. The following illustration may be helpful. If the circle represents all that the IHS provides and the dark triangle is the residual, then all that falls between the circle and the dark triangle represents tribal share. But because the IHS is not at 100% compactability, the dotted triangle was drawn to represent the amount of resources and their associated functions that would remain in the IHS during this transitional period.



# 3. Zero Based Budgeting

In order to define the residual for 1994 negotiations the IHS used zero-based budgeting. That is, each Area Office involved in the SGDP and the IHS HQ identified those functions which are residual as <u>if every tribe has compacted for Self-Governance</u>. Then the IHS calculated salary, fringe, travel, training and supplies needed to perform the residual functions.<sup>85</sup>

For the 1994 negotiations, the Area Office budget for SG was comprised of only recurring Area funds. Funds that are allocated on a nonrecurring basis, including funds reimbursed to the Area, funds allocated by project or demonstrated need, and all specifically earmarked funds, were calculated in the HQ budget.

The exercise was difficult because there is no template to apply Area to Area and some think that the Area differences are too diversified to generalize that way. However, six of the Areas accomplished this exercise. As expected, six different results were created.<sup>86</sup>

This process needs to be refined. The tribes have requested clarification in the definition of residual. The proposed technical amendments to the SGDP set forth generally uniform definitions to be used in determining the residual amount and requires that the federal agencies use zero based budgeting.<sup>87</sup> In addition, the draft permanent legislation requires that the residual amount not exceed 10% of the funds provided for each activity.<sup>88</sup>

#### a) HQ Share

The IHS used zero-based budgeting to determine the tribal share of the HQ budget. (In contrast to the BIA, which gave each tribe \$45,000 as its portion of the Central Office budget.) Each office of the IHS came up with its own set of assumptions based on the contractability test in draft Self-Determination Regulations. <sup>89</sup> Then the division attempted to

Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab C.

Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab B.

Proposed S.550 amendment to Title III, Section 311(e); Memo from Philip Banker-Shenk to Tribal Leaders and Staff of SG Tribes re Presentation of the case for S.550 — The 1993 Tribal SG Demonstration Technical Amendments Bill (3/30/93): pg. 5.

Section-by-Section Analysis of the draft Bill to make Permanent the Tribal Self-Governance Project, Self-Governance Conference (3/30/93): pg. 7.

braft 25 CFR Section 900.106(3).

delineate which functions and staff positions would remain if all tribes were to compact under SG. During negotiation the SG tribes could challenge these assumptions in an attempt to allocate more funds for tribal share.

Several of the HQ Divisions within the Office of Administration and Management determined that there were no compactable functions within the office. However, each of these offices did note that the volume of their responsibilities would decrease as more tribes entered SG compacts. The projected savings from the reduction in workload was then be added to the tribal shares.<sup>90</sup>

The Office of Environmental Health and Engineering (OEHE) noted that it uses a modified resource allocation formula, which distributes funds according to workload, not by user population. Approximately 94% of the Environmental Health budget is distributed on the basis of this formula with the remaining funds used for change of station costs and special national initiatives such as injury prevention and control. Priority needs should be considered in the tribal share distribution of the OEHE funds. If the OEHE funds were distributed by user population or by the number of tribes the funds would become too diluted to be effective. The modified resource allocation formula ensures that adequate funds are awarded to complete projects of the greatest need.

#### b) Area Share

The methodology for division of the Area Office budget is based on a basic set of assumptions including:

- All tribes may eventually elect self-governance.
- All tribes have the right to technical assistance from the Area Office.
- Some services provided by the Area Office are dependent upon workload or the relative size (population) of the tribe.
- As tribes compact for their share, the Area Office inherently governmental functions would diminish proportionately. 92

<sup>90</sup> Indian Health Service Office of Administration and Management Distribution of FY 93 Budget, SG Project (undated).

<sup>91</sup> Memo from James V. Waskiewicz to Reuben Howard re OEHE Headquarters Distribution (6/4/93).

Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab F.

The Areas with SG tribes undertook the same exercise to determine residual, apply zero-based budgeting, and calculate a tribal share and a residual share. But just as each composer applies his interpretation to written music, each Area interpreted the HQ guidelines differently. It was a good experiment between the Area Offices. But now, as the compacts have reached six areas and with planning grants present in (at least two) other areas, there needs to be a uniform methodology. Tribes will not accept IHS guidelines which vary because of an Area decision.

#### 4. Technical Assistance

The level of technical assistance available to SG tribes once they have compacted remains unanswered. Unless the tribe specifies in the AFA that it is asking the IHS to retain funds for a particular purpose or if a tribe takes zero funds from a funding category, then it is assumed that the IHS has transferred its responsibility for that program, service, activity or function. The funds originally from the Area budget are withdrawn from the Area recurring base allowances. The funds become an allowance to the OTSG for obligation to the AFA. Since the Area no longer has those funds within its allowance it is not accountable for the funds and does not retain oversight and monitoring of program services and activities carried out by the tribes under their AFAs. All responsibility for program design and execution, and program oversight, monitoring and accountability will be transferred to and assumed by the tribal governments under the terms of the compacts.<sup>93</sup>

The degree of technical assistance retained by the IHS is not necessarily clear in the AFA. Either tribes will be allowed to "buy back" technical assistance or the residual will include funds to provide technical assistance. This needs to be examined further. In at least two AFAs tribes secured technical assistance without a buy back: "For program services for which the Tribe has accepted responsibility, the IHS shall retain its responsibility to provide trust services to such programs and shall retain its responsibility to provide technical assistance to the Tribe in such programs." 94

At this transitional stage, however, if the Area Office has not eliminated any positions due to SG, the tribes may be entitled to request technical assistance. In fact, in some Areas the

<sup>93</sup> Memo from Tom Austin, Director, Office of Tribal Operations Portland Area to Area Alcoholism Coordinator (11/8/93): pg. 1.

Duckwater Shoshone and Ely Shoshone Annual Funding Agreements, Section 19.

requests from the tribes increase as a contracting tribe becomes a compacting tribe. The technical assistance would then be included in the transitional functions and resources retained by the IHS until there is total compactability. Specifically, the IHS needs to decide whether to continue training and programs such as the IHS/Tribal Consultation Conference or None for the Road and whether SG tribes can attend without a buy-back.<sup>95</sup> Technical assistance may not be required or prohibited; this is a policy and fiscal question.<sup>96</sup>

#### 5. Additional Review

During the IHS review process it became apparent that a more thorough review of residual and associated issues should be conducted during FY 94. Without a template from any other Agency or any other helpful guide, the IHS found itself with an immense task to be accomplished in a shoft period of time. Early on the IHS advised the tribes of the situation, recommending a more thorough review in FY 94. Tribes replied with their own recommendation for the IHS to maintain a 5% residual across the board. The IHS was not prepared to accept this proposal, because the initial review did not include input from the Office of the Assistant Secretary of Health (OASH), the DHHS, or nonparticipating tribes. The IHS decision to conduct a more thorough review in FY 94 can also take advantage of the IHS experience with implementing the SGDP during FY 94. SG tribes are a major player in this review through the tribal SG Task Force on Tribal Share Methodologies.

Even with all the above information, it is unclear how much federal oversight of SG tribes will be necessary or permitted. At this point, tribal accountability will be measured in the annual audit and the baseline report. Whether the IHS will review tribal reports or the reports will only be sent to Congress has not yet been determined.<sup>97</sup> The six tribes with FY 94 compacts agreed to submit their reports to the IHS 30 days prior to the Congressional due date.<sup>98</sup>

<sup>95</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 41.

R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Director, Office of Legislation and Regulations re Self-Governance (12/8/92): pg. 3.

<sup>97</sup> Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts): tab G.

Agreement reached 9/10/93 at a meeting held in Albuquerque according to Dorothy Dupree. Only the Flathead Tribes agreed to this in writing, Compact Provision, Article II, § 5.

# D. Baseline Measures, Reporting and Evaluations

- 1. Baseline Measurements
- 2. Reporting and Evaluations
  - a) By IHS
  - b) By SG Tribes

#### 1. Baseline Measurements

The baseline measure is an assessment of existing health conditions, programs, services, functions, and activities prior to compacting. The measurement is a major component in the semi-annual reports to Congress of relative costs and benefits of the SGDP. Baseline measurements are developed jointly by the IHS and participating tribes. <sup>99</sup>

The model compact calls for the IHS to complete Baseline Measurement negotiations within 30 days of signing the compact so that it can be submitted to Congress as an appendix to the Compact and AFA. The actual number of days agreed upon in the compacts varies from 30 to 105 days. Some compacts state that the IHS and tribe will work together to develop baseline measures. The Ely Shoshone and Duckwater Shoshone tribe agreed in their compacts to separately draft measurements and then to compare with the IHS in order to negotiate agreed upon measurements. Some compact provisions require that the measurements include specific program standards of care and quality assurance for the overall health care delivery system. 100

The basic data for resource allocation and budget formulation purposes are workload, utilization data, and service population. The IHS suggests that Tribes also report the following to better measure the SGDP: 1) cost effectiveness; 2) change in volume of services provided; 3) change in quality of services; 4) change in community satisfaction with health services; 5) cultural relevance; 6) improvement in health; and 7) satisfaction with Compact process. Nonetheless the tribes decide for themselves what information to collect as long as the tribes identify a system to measure and can demonstrate to Congress

<sup>99</sup> P.L. 93-638 as amended, Title III, §305.

<sup>100</sup> See Flathead Tribes, Compact Compact Provision, Article II, §11.

<sup>101</sup> Memo from IHS Acting Director, OTSG to SG tribes re: Denver Baseline Measurements Meeting (6/1/93).

that the system is functioning. For most tribes, the baseline measures are similar to tribal goals and objectives.

At first the IHS proposed that tribes employ components of the Core Data Set used by the IHS. The Core Data Set is a requirement for all IHS sites at this time. It supplies data reported by IHS providers, contractors, and grantees to IHS HQ for use in resource allocation and budget formulation. Many earmarked projects are funded based on information provided in the Core Data Set. But the reporting of the Core Data Set does not provide a tribe reports useful for local financial or program planning. (Such reports can be requested by the tribe but may not be immediately available.) Also the Core Data Set is not a key factor in determining tribal share although it is used to determine if a user is active. For these reasons, some SG tribes chose not to report the Core Data Set.

The Cherokee Nation agreed to provide the Core Data Set of the IHS reporting system (RPMS) initially but clearly stated that it plans to generate the same data locally allowing immediate access by service providers and/or management and eventually eliminate the need for RPMS altogether (even though RPMS can be used for these purposes). The Cherokee Nation allowed the IHS to retain the HQ Data Center funds for the first year,

thereby, putting the burden of collection and reporting on the IHS. 102

The Mille Lac and Grand Traverse tribes created their own baseline measures document for their own purposes but then agreed to provide some information to the Bemidji Area Office for the IHS' reporting purposes. These tribes based their measures on restoring the "former Native American state of 'wholeness'". The Tribes chose to measure: Encounters per provider; User Population (as defined by Tribe); Service/Program Growth; Levels & Hours of Service; Quality Assurance; Total Quality Management; Referrals; and Expenditures/Revenues.

However, the IHS anticipates that flexibility in tribal reporting may make it difficult for the IHS to justify its funding level to Congress. The IHS is congressionally mandated to establish an automated management information system to meet both the IHS and tribal requirements. The IHS might be required to maintain its role as repository of health and facility related data even if tribal information is provided in varied formats. Whether the

<sup>102</sup> Cherokee Nation, Amended AFA, Section 4.

IHS will be able to or be required to continue reporting health-related Indian needs should be addressed. If the tribes choose not to report uniformly, will resources be allocated based on old data or a prorated increases regardless of workload? Allocation of the IHS budget for nonrecurring services such as construction projects will be difficult if there is inaccurate and inconsistent data base to measure the construction deficiencies and needs.<sup>103</sup>

Some compacts require that the IHS provide baseline measurements for those programs retained. Some compacts state that baseline measurements for program, services, functions, and activities previously "performed or not performed" by the IHS shall be deemed established upon performance of the IHS up to and including CY 1993.<sup>104</sup> The IHS has not begun to provide these baseline measures.

Regarding which standards will be used, some tribes favor using national standards so that they could compare their health programs with others in the community. <sup>105</sup> The Healthy People 2000 standards as applied through the Indian Health Care Improvement Act<sup>106</sup> are generally not discussed with SG tribes; however, at least one SG tribe used those standards as a starting point for developing tribal health status indicators. In order for SG tribes to qualify to collect Medicaid and Medicare payments they must be accredited by the Health Care Finance Administration or the Joint Commission on Accreditation for Health Care Organizations.

### 2. Reporting and Evaluations

#### a) By IHS

The SG law requires the Secretary to submit to Congress a written report on January 1 and July 1 on the relative costs and benefits of the SGDP. The report is to be based on the mutually determined baseline measurements and should separately include the views of the Tribes. 107 The guidelines are broad and need clarification.

<sup>103</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 40-42.

<sup>104</sup> E.g. Grand Traverse Bands Compact, Article II, §19, Absentee Shawnee Tribe of Oklahoma Compact, Article II, § 17.

<sup>105</sup> Cherokee Report (1993): Appendix 5.

<sup>106</sup> P.L. 102-573 ((1992).

<sup>107</sup> P.L. 93-638 as amended, Title III, § 305.

The IHS may decide to address the following areas as identified by the BIA Baseline Measures Task Force for the reports to Congress:

- Documentation of the experience of the participants in the Self-Governance Demonstration Project
- Recording the progress and problems of the SGDP implementation from the perspectives of the Tribes and the BIA at the Agency, Area and Central Office;
- Providing information necessary for evaluating the SGDP and
- Development of future Federal/Indian policy and legislation. <sup>108</sup>

Another criteria mentioned by several IHS staff is to evaluate the tribe's program from the state and other federal agencies' point of view. That is, with SG, the state and other federal agencies will deal with the tribes separately rather than with the IHS Area Office. The IHS could measure whether this resulted in more or less services to tribes. Congress will also expect the IHS to measure the effects of the SGDP on its operations at the Service Unit, Area Office, and HQ levels.

Eight SG compacts establish a Compact Evaluation Team with one tribal representative and one DHHS representative. The evaluation team is tied directly to the reporting requirements but it is not required by law. Originally the IHS had proposed a national evaluation team but the tribes decided that they preferred evaluations independent from each other because of the government-to-government notion of Self-Governance.

The SG law requires the IHS to include tribal views in its reports.<sup>109</sup> The Flathead compact requires the tribe to make their views available to the Secretary 30 days prior to the deadline for submission of the Secretary's required report.<sup>110</sup> The other five tribes that compacted for FY 94 have also agreed to submit their reports 30 days prior to the Congressional deadline. The IHS should discuss this possibility with the eight tribes that compacted for CY 94. Tribes will also submit their views separately to the Congressional committees.

The IHS must initiate the reporting process early on because the DHHS' reports clearance system requires forwarding of the report 16 weeks before the due date. This means the

Shaping Our Own Future (1991): pg. 28, quoting Instructions - Self-Governance demonstration Project, Baseline Measures Report Requirements (December 1990).

<sup>109</sup> P.L. 93-638 as amended, Title III, § 305.

<sup>110</sup> Flathead Tribes Compact Provision, Article II, § 5.

initial draft of the report for July 1 must be prepared by March 1 and the January 1 report must be drafted by September 1. The tribes should be able to receive a draft of the IHS report long before the Congressional due date.

In addition, for Self-Determination contracts, the Secretary is to report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe.<sup>111</sup> These reports could provide a baseline measure of the program for any program that converted from contract to compact.

Other reports will be produced about the SGDP even though not mandated by law. There is no statutory requirement for a final report on the SGDP but the IHS intends to prepare and forward a final report along with its legislative recommendations and participating and nonparticipating tribal views, during the last year of the SGDP, that is, after FY 96.<sup>112</sup> The Compacts require the IHS to provide either quarterly or monthly reports on:

- IHS status of obligations and projections reports of HQ and Area Offices (including shared service obligations with other Areas and HQ West)
- Status of obligations and projections reports by the Area Office concerning programs, activities, functions and services performed in the Area comparable to those performed by the Tribe under Compact.
- Revisions, in program plans guidelines, budgets, new allowances, and reserved funds as they are made.
- Responses providing other information which may be requested by the Tribe within 10 working days of request.

#### b) By Tribes

Tribal reporting is also tied directly to Section 305 of the SG law. The law simply states that the biannual reports submitted to Congress by the Secretaries will "separately include the views of the tribes." Most likely, the SG Tribal Councils will prepare and submit two

<sup>111 25</sup> USC § 450c(e).

<sup>112</sup> R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Directors re Legislative Implementation Plan (4/1/93): pg. 13.

reports each year on progress/problems according to negotiated baseline measures to Congress in conjunction with, but separate from the IHS.<sup>113</sup>

There is no requirement for financial reporting other than the Single Audit Act requirements. Monitoring oversight is limited. All compacts have a provision that states:

1) Tribal records are not Federal records and are not subject to the Privacy Act (except for records already provided to the agency by the Tribe); 2) The Tribe shall have a record keeping system and provide reasonable access to the Secretary so he/she can meet legal requirements and allow for retrocession. And 3) The Tribe shall include all documents necessary for the annual audit in its record keeping system and make them available to the Secretary. 114

# E. Tribal Share Methodology and Other Financial Issues

- 1. Generally
- 2. Formulas
- 3. Shortfall
- 4. Advance Payments
- 5. Indirect Costs
- 6. Insurance Responsibility
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- 9. Categories Debated
  - a) Reimbursements and Competitive Funds
  - b) HQ Direct Operations/Office of the Director
  - c) Property Management
  - d) Supply Management
  - e) Scholarship
  - f) Recruitment and Retention

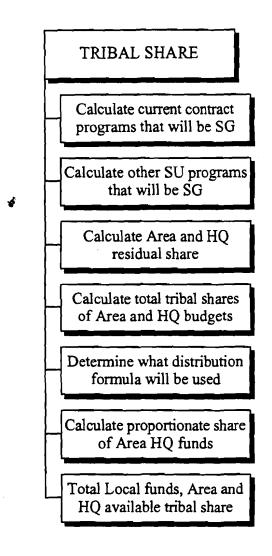
#### 1. Generally

The SG law limits each tribe to receive funds "equal to that which the Tribe would have been eligible to receive under contracts and grants... and for funds which are specifically

Shaping Our Own Future (1991): pg. 3.

<sup>114</sup> Shaping Our Own Future (1991): pg. 47.

related."115 The methodology to quantify that amount is difficult to pinpoint. As mentioned above, much is contingent on the definition and quantification of the "residual" category. The IHS and the SG tribes continue to work on how to define the tribal share. The steps used to calculate tribal share for the first negotiations were as follows:



The Areas have applied this procedure with some variation in categories included in the tribal share. Other obstacles were encountered by the IHS in determining the appropriate tribal share include the following:

• IHS budgets are seriously underfunded. Facilities are in need of repair. In the 1991 appropriations act, the House Committee estimates that the backlog of needed maintenance for existing IHS facilities is well over \$100 million. 116

<sup>115</sup> P.L. 93-638 as amended, Title III, § 303 (a)(6).

<sup>116</sup> H.Rept. 101-789 (10/2/90) (Dept. of Interior and Related Agencies Appropriations Bill, 1991): pg. 129.

Under the current system, major repairs and new facilities are high ticket items funded under a priority system. An effort is made to rotate the funds throughout the geographic locations. With Self-Governance the IHS is being asked to distribute the funds equally among the SG tribes thereby diluting the ability of any one tribe from funding major construction or repair.

- Budget codes are not used consistently from IHS Area to IHS Area therefore it
  is even more difficult to achieve consistency in Area calculations of tribal
  share.
- The negotiations by law can not have a negative impact on neighboring tribal governments or tribal organization contractors. This adds a new element to tribal distribution, the IHS has to look beyond the SG tribes to ensure fairness for the nonparticipating tribes.
- Divisibility of programs for partial transfer involving one or two federal personnel is not practical. For example, if there is only one psychiatrist in an Area and several tribes in the Area select Self-Governance, it will be difficult for the Area to retain that professional.
- Nonrecurring funds were not distributed at the initial negotiations because no distribution formula was available. The IHS recognizes that it must move forward with the tribes to ensure the distribution of these funds.

As the demonstration project progresses and the number of participating tribes increase, the formulas used to divide resources evolve. The tribes have sought Congressional support to expand the categories of funds available to tribes. In the proposed technical amendments would include in the tribal share numerous categories of funds that are now withheld.

#### 2. Formulas

The formula used to distribute the tribal share has several components. The formula has to be adjusted if the tribe is located in a multi-tribal Service Unit or the tribe chooses to compact less than 100% of the programs, services, activities or functions. Using the simplest example, if a tribe located within its own Service Unit decided to compact all programs, services, activities and functions the calculation would start with the amount of local funding (rollover ISDA contracts, location specific funds, program specific funds). The second step is for the SG tribe to add on a portion of the Area and HQ funds designated as tribal shares. Two formulas were used to calculate that portion.

<sup>117</sup> Shaping Our Own Future (1991): pg. 24.

One formula was to divide the funds based only on user population. Seven tribes received a percentage of the HQ contribution to share based on the tribal user population compared to total user population. And their Area share was based on their percentage of the number of Area users.

But the other seven tribes factored in the concept that some portion of the Area or HQ workload is based on the number of tribes served. This means some of the HQ or Area resources are allocated about the same for each tribe regardless of the size of the user population. After much consideration, the IHS chose to split out 30% of the Area and HQ resources to be divided by the number of tribes served by the Area or HQ respectively; and 70% to be based on tribal user population compared to total user population. The split formula was instituted on a nonrecurring basis in the first year of negotiations.

The formulas used the first year will likely be modified. The formula based on user population did not work well for tribes which share a facility with other tribes. Both formulas required further adjustment when a tribe compacted for only a portion of the programs, services and activities, then tribal shares need to be adjusted. This adjustment was difficult to estimate. In retrospect, the split formula is not equitable in Areas where some tribes had previously contracted for most of their programs and others had contracted for very little because tribes with substantial Self-Determination contracts typically use less Area resources than tribes with direct care facilities.

The IHS will work with the SG tribes (and the Task Force on Tribal Share Methodologies) to develop a new formula to be considered in the 1995 negotiations. Its factors would include user population, workload data, and the number of tribes. Tribes would like to eliminate the need to calculate formulas and funding amounts each year. Some base budgeting has already begun with the BIA. In the proposed technical amendments to SG, the base budget is to be calculated as the amount the tribe negotiated in the prior year plus pay cost adjustment increases related to employee costs identical to those applied to Federal employees plus inflation increases on the remaining funds. 118

<sup>118</sup> S. 550, proposed amendment to P.L. 93-638 as amended, Title III, §311(f).

#### 3. Shortfall

In FY 94 Congress appropriated \$3 million for shortfall costs related to the IHS undertaking Self-Governance. The IHS will use the shortfall funds to cover the negotiated tribal shares in instances where it cannot downsize at this time. Back in July 1993, the IHS estimated a total shortfall of \$4.5 million for FY 94.<sup>119</sup> Shortfall funds are to be used in cases where there cannot be a direct transfer of funds from the IHS to the tribes to fund SG compacts without jeopardizing the support provided by the IHS to other tribes.<sup>120</sup> The SG tribes would like to see some restrictions on IHS spending of the shortfall funds. For example, to limit the IHS to using the shortfall funds for one year at a particular organizational level or budget location. And, in order to receive shortfall funds the SG tribes want to see the IHS plan to downsize or restructure.<sup>121</sup>

When the tribes requested these funds from Congress, their intention was two-fold: 1) to pay for tribe's supplemental funding for transitional and ongoing additional costs; and 2) to address any temporary, transitional difficulties the IHS may have in making a Tribe's tribal share fully available to the Tribes as negotiated. Some tribes believe applying the total shortfall to the IHS budget distorts tribes' lobbying efforts. Some tribal leaders believe each SG tribe should be eligible for an equal amount of the shortfall funds (e.g. \$50,000); others think each tribe should negotiate for its particular needs (i.e. to meet their ongoing, recurring additional costs associated with the increased responsibilities of continually assessing tribal priorities, redesigning tribal programs to meet those priorities, and developing and maintaining an effective tribal regulatory and governmental structure that builds their capacity for full SG.) Some compacts provide that tribes will negotiate start up costs to be determined later should funds be available. The Port Gamble Tribe included in its AFA a detailed budget for start up costs totaling \$824,632. (Port Gamble is a tribe with 716 active users and a base budget of about \$525,000.)

<sup>119</sup> Memo from Doug Black to Loretta Beaumont and Sue Massica (Congressional staff) regarding SG shortfall funding (7/27/93): pg. 1.

H.Rep. 103-158 (6/24/93) (Dept. of the Interior and Related Agencies Appropriations Bill, 1994. Committee on Appropriations): pg. 104.

Memo from Philip Banker-Shenk to Tribal Leaders and Staff of SG Tribes re Presentation of the case for S.550 - The 1993 Tribal SG Demonstration Technical Amendments Bill (3/30/93): pg. 13.

<sup>122</sup> Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Marge Anderson, Chief Executive Mille Lacs Band of Ojibwe): pg. 6.

<sup>123</sup> E.g. IHS compacts with the Siletz, Duckwater, and Ely Shoshone.

### 4. Advance Payments

In several compacts the SG tribes requested annual lump sum payments but agreed to accept quarterly payments. Compact provisions include the caveat that "payments will be made as expeditiously as possible in compliance with applicable Treasury Department Regulations . . ..<sup>124</sup> The IHS does not operate its own payment system; the service is purchased from the Office of the Assistant Secretary for Health (OASH) and administered by the Payment Management System. The IHS was advised by the OASH that advance payments are not permissible under Treasury Regulations.

This upset the tribes for several reasons. First of all, tribes are receiving advance lump sum payments under their compacts with the BIA. It seemed as though the IHS was unilaterally changing provisions of the compact even though the compact is viewed as an agreement between two governments resulting from a mutually acceptable negotiation. The SG technical amendments include language to clarify that lump sum payments are permissible. 125

On November 17, SG tribal representatives met with OASH. The SG representatives will report the results of this meeting to the SG tribes and advise the IHS and OASH on proceeding with a waiver request to the Treasury Department. SG tribes will advise on whether the IHS should request a waiver from Treasury.

#### 5. Indirect Costs

The indirect cost issue came up because three of the five Portland SG tribes had applied their indirect cost rate to all funds made available in the tribal share. The compacts were signed by the tribes and then the IHS noticed that the compacts applied the indirect cost rate to the Area and HQ portion of the tribal share. Since the IHS policy, at the time of negotiations, was not to apply an indirect cost rate to these portions because the Area and

<sup>124</sup> Model Compact, Article IV, Section 4.

Memo from Philip Banker-Shenk to Tribal Leaders and Staff of SG Tribes re Presentation of the case for S.550 — The 1993 Tribal SG Demonstration Technical Amendments Bill (3/30/93): pg. 9.

<sup>126</sup> Memo from Acting IHS Director M. Lincoln to W. Ron Allen (11/30/93) (In response to the letter generated at the Las Vegas consultation, Nov. 1993): pg. 2.

HQ budgets represent indirect cost activities, the IHS sent a letter to the tribes asking for a formal change in the compacts. The IHS has modified its policy and is now willing to provide contract support cost funding for those negotiated tribal shares from HQ and Area Offices that will be used to increase health services provided by the SG tribes. These funds will be allocated on a nonrecurring basis. 127 In essence, the IHS has agreed to look at the reallocated purpose of the funds rather than their original purpose to determine if the indirect cost rate is applicable. Indirect costs will be determined in conformance with the Contract Support policy.

# 6. Insurance Responsibility

Insurance coverage is not explicitly mentioned in the SG law. Each compact, however, includes a provision applying liability insurance or equivalent coverage provided by the Secretary or an authorized representative pursuant to the statutory authority for tribal contracts. The same compact provision also states that the tribe is covered by all liability coverage under the Federal Tort Claims Act (FTCA) the same as tribal contractors and their employees. 129

Nonetheless, the DHHS Office of General Council (OGC) ruled that FTCA does not apply to SG compacts. The FTCA language includes any "contract, grant agreement and cooperative agreement" but not a "compact". The Office of General Counsel strictly construed the FTCA language because application of the FTCA constitutes a waiver of sovereign immunity. A statute waiving sovereign immunity may not be extended or enlarged by implication; therefore, the compact provision is insufficient to extend FTCA. <sup>130</sup> For the 1994 compacts Congress extended FTCA coverage retroactively in its appropriation language. The technical amendments for SG do expressly include FTCA coverage for compacts. <sup>131</sup>

The Department of Justice opposes applying the FTCA to SG compacts for the same reasons that it has consistently opposed the application of FTCA to ISDA contracts. The

<sup>127</sup> IHS Response to SG Tribes Las Vegas: pg. 2.

<sup>128</sup> P.L. 93-638 as amended, Title I, §102(c).

<sup>129</sup> Shaping Our Own Future (1991): pg. 55. The FTCA is found at 28 USC §1346(b) and Chapter 171.

Memo from Chief, Litigation Branch to Michel Lincoln, Acting IHS Director re Request for Opinion: 93 - 64: Applicability of the Federal Tort Claims Act to Tribal SG Compacts (6/2/93).

S. 550 proposed addition to P.L. 93-638 as amended, Title III, §313(b), see also 102 Congressional Record S 2644-2647 (3/10/93).

Justice Department rationale is that there is no "master-servant" relationship over those who provide medical services under tribal contracts. The federal government cannot exert control over the providers. The relationship is even more tenuous with tribal compacts where IHS monitoring authority is at a minimum and access for site visits is nearly nonexistent. In other agencies, (e.g. Veterans Administration or Department of Defense) physicians who merely contract with, but are not employees of, the federal government remain individually responsible for their medical negligence because there is no way to supervise or control their day-to-day operations. According to the Justice Department, to relieve contractors from responsibility for their conduct without being able to control that conduct completely defeats the deterrent value of the fault-based tort compensation system. The Justice Department thinks such a course of conduct is both fiscally unwise and potentially counterproductive to improved health care among the Indian tribes. Furthermore, it would be highly inequitable to provide FTCA protection from liability contractors with the Indian tribes while those who directly contract with the United States receive no similar assurance. If anything, such a distinction runs directly counter to the fundamental concept of Indian self-determination. Justice sees it as paradoxical to endorse the notion that the Indian tribes should be self-governing and in control of their welfare, while at the same time paternalistically relieving them and their contractors of responsibility for their actions. 132

#### 7. Outside Funds

Tribes want a share of those nonrecurring funds from outside federal funding sources that IHS benefits from; e.g. Centers of Excellence; county and state services; March of Dimes, Centers for Disease Control. This also includes funds or resources which originate from or are appropriated to other federal agencies but which are transferred to the Secretary's administrative access or control through interagency agreements or other authority. This includes funds that do not appear on the Secretary's budget as a cost item or activity but are nonetheless used by the Secretary or are otherwise functionally related to the Secretary's capacity to carry out its responsibilities to the tribe or its members in lieu of an AFA. (e.g. General Service Administration (GSA) agreements or arrangements, Federal Highway Administration re road construction and maintenance, Department of Education, Commissioned Officers Corps, scholarship and loan programs for medical professionals,

<sup>132</sup> S.Rep. 100-274 (12/22/87) (Indian Self-Determination Act Amendments of 1987 before the Select Committee on Indian Affairs): pg. 59-60.

AIDS research and treatment programs and all other programs or operations administered by the HHS Secretary which provide direct or indirect support or assistance to the operation of Indian health programs.) The proposed legislation goes so far as to include federal government travel rates obtained in agreements with airlines and other common carriers, federal government telephone and communication rates obtained in agreement with telephone and other communications businesses, and discounted new equipment government purchase agreements.<sup>133</sup>

### 8. Buy Back

At their option tribes are permitted to "buy back" services from the federal government. For example, the Cherokee Nation, in its addendum to the FY 94 AFA agreed not to include certain Automated Dafa Processing services at the HQ and Area level in the AFA.<sup>134</sup> This is considered a buy back provision.

In order to calculate the buy back amounts for any one tribe, there needs to be some consistency in the application of the distribution formula within the Area. Buy-backs can be used for MOA/IPA personnel support and training. The IHS is questioning whether certain technical assistance will be available only on a buy back basis.<sup>135</sup>

### 9. Categories Debated

Certain categories of services, mostly nonrecurring funds, of the HQ and Area budgets were not included in the tribal shares for 1994 negotiations. Most, if not all, of these items will be reviewed by the SG Task Force on Tribal Share Methodologies. Their goal is to develop a mutually acceptable methodology with the IHS by March. The task force will include input from nonparticipating tribes. To follow is the current status of those categories of funds. <sup>136</sup>

<sup>133</sup> S. 550 and 102 Congressional Record S 2644-2647 (3/10/93): pg. 2647.

<sup>134</sup> Cherokee Nation AFA, pg. 2, § 3.

<sup>135</sup> Indian Health Service, Outline for Presentation on Self-Governance OEHE and Branch Chiefs Meetings, Gaithersburg, MD (9/13/93): pg. 1.

<sup>136</sup> Memo from Acting IHS Director M. Lincoln to W. Ron Allen (11/30/93).

# a) Reimbursements and Competitive Funds

The basic principle is that unless there is an express statutory provision to the contrary, IHS funds distributed by competition or other formula are subject to SG negotiations of tribal shares; however, during the 1994 negotiations the IHS had no methodology to divide the \$231,661,853 of Competitive and Reimbursable funds for the tribal share. Specific categories of Reimbursement and Competitive Funds are discussed below:

# Emergency funds

Emergency reserves amount to \$3,513,700 and these are funds that the IHS Director has determined as necessary for unforeseen emergencies that may occur in the IHS or Tribal health programs (like a disease outbreak or major flood). The funding level is based on the Director's judgment and represents the ability to provide a safety net for the operational budget of health programs. The IHS has taken the position that distributing these funds on a tribal share basis will diminish the Director's ability to deal with unforeseen disasters. The amount of funds that could be distributed on an individual tribal share basis are not large amounts, however, collectively it undermines the Director's ability to provide a safety net for the field programs. Unobligated funds will be distributed on an equal basis to federal and tribal health programs at the end of the fiscal year.

# Contract Support Costs

There are about \$2,066,500 in contract support costs throughout the IHS budget. Contract support costs are often lumped together with indirect costs. By definition contract support costs are those reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which are not carried out by the Secretary normally but are provided from elsewhere. <sup>137</sup> E.g. federally mandated annual single-agency audits, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. <sup>138</sup>

The core of the issue for the SGDP is that the IHS initially held the position that contract support costs (or indirect rate costs) should not apply to administrative funds (that is, the HQ or Area portion of the tribal share). The IHS recently stated it would reexamine its

<sup>137 25</sup> USC §450j-1.

<sup>138</sup> S.Rep. 100-274 (12/22/87) (Indian Self-Determination Act Amendments of 1987 before the Select Committee on Indian Affairs): pg. 8 - 10.

position and would provide contract support cost funding for those negotiated tribal shares from HQ and Area Offices that will be used to increase health services (that is, the direct costs) provided by SG tribes. The Contract Support Costs will be allocated on a non-recurring basis. This means that the IHS will look to the reallocated use of the funds and not the originally intended use of the funds to determine contract support costs. The IHS wants to work with tribes to ensure that indirect costs are identified separately.<sup>139</sup> In the proposed technical amendments, tribes ask that contract support funds be paid 80% up front.<sup>140</sup> In addition, tribes request that the IHS negotiate a lump sum contract support fund if the indirect cost rate has been relatively constant for the three previous years.

# Equipment Replacement Funds

In FY 91 the IHS received a Congressional increase of \$10 million for replacement of medical equipment. The current method of distribution of these funds is based on the medical equipment as listed on the IHS replacement list. This list is maintained by the IHS and includes federal equipment in tribal health programs. Replacement requirements can change dramatically in an Area from year to year.

# Permanent Change of Station

These funds (about 10,124,200) are used by the IHS to reimburse the Area and Tribal health programs for the costs of moving federal employees and their families from one location to another. These funds are justified to Congress in the IHS Budget Justification Document. Because the funds are justified to Congress for moving expenses, the IHS was unable to develop a tribal share distribution methodology that would reflect the intent of these funds. The funds are not distributed evenly throughout the Areas. Alaska gets a large share due to the additional expenses associated with moving there. Once a methodology is developed, Permanent Change of Station costs will be available for compacts as nonrecurring amounts to defray actual relocation costs for employees.<sup>141</sup>

### Special Pay

These funds (about \$15,336,900) are used by the IHS to reimburse the Area and Tribal health programs for salary bonuses that medical and dental employees receive for recruitment and retention purposes. These funds are justified to Congress in the IHS Budget Justification Document.

<sup>139</sup> Memo from Acting IHS Director M. Lincoln to W. Ron Allen (11/30/93): pg. 2.

<sup>140</sup> S. 550, proposed addition to P.L. 93-638 as amended, Title III, § 312(b).

<sup>141</sup> Memo from James V. Waskiewicz to Reuben Howard re OEHE Headquarters Distribution (6/4/93).

### Continuing Education

These funds (about \$2,000,300) are used by the IHS to reimburse the Area and Tribal health programs for continuing medical education for physicians and nurses. These funds are justified to Congress in the IHS Budget Justification Document.

#### Assessments

These funds (about \$33,653,200) are used by the IHS to support the costs for services provided to the IHS by other federal agencies, including the office of the Secretary and the Public Health Service.

# Resource Patient Management System (RPMS)

These funds are used by the IHS to support an automated management system to meet both IHS and tribal requirements. In FY 90 the IHS received additional Congressional funding to support these efforts. The IHS would like to make available some of these funds in a way that adheres to the Congressional intent (mandating the IHS-wide computer system) and does not result in an adverse impact. The technical amendments to the SGDP are intended to include in the tribal share, federal resources used to support federal automated data processing operations. <sup>142</sup>

SG tribes did negotiate for the Service Unit Management of data processing to be included in their tribal share. It is more complicated to calculate the tribal share of the Area and/or HQ RPMS funds. The IHS did make RPMS available on a nonrecurring basis in the Portland, Bemidji, and Phoenix Areas.

### Office of Human Resources

The IHS withheld from tribal share distribution the \$892,928 targeted for the Scholarship and Loan Repayment program authorized under P.L. 94-437. These funds are used to enter into agreements directly with individuals and not tribal organizations. For this reason, the IHS has interpreted the legislative intent to mean that it prohibits the IHS from distributing these funds on a tribal share basis.

<sup>142 102</sup> Congressional Record S 2644-2647 (3/10/93) (regarding S.550, the technical amendments to the SGDP): pg. S 2647.

#### Office of Environmental Health and Engineering (OEHE)

Because the \$121 million dollars are used by the IHS to support specially earmarked projects that have been funded by Congress, the IHS has not included these dollars on a tribal share methodology.

# b) HO Direct Operations/Office of the Director

Some direct operations costs have been made available to tribes in anticipation of downsizing these offices. However, tribes are not satisfied that HQ retained \$2,915,352. The proposed technical amendments are intended to permit the SG tribes to exercise federal executive direction functions related to policy formulation and legislative monitoring.<sup>143</sup>

# c) Property Management

About \$195,000 was retained in the residual for Supply Management. The proposed technical amendments are intended to include all of the following in the tribal share: sewer and water system projects, construction project funds, priority lists, and resource allocation systems or methodologies, and federal facility management.<sup>144</sup>

# d) Supply Management

About \$195,000 was retained in the residual for Property Management. SGDP has forced the IHS to identify each Service Unit's contribution to central supply centers in terms of their share of goods ordered and their share of operating costs. SG tribes can then decide whether to withdraw their shares to create their own supply system or to participate in the IHS system. At least one tribe negotiated for some inventory (or its value) that had been purchased with previous year's funds.

# e) Scholarship

The IHS did not include \$10,906,800 in scholarship funds in the tribal share because the IHS Scholarship Program is a collection of centrally administered programs that are competed on a national basis among American Indian and Alaska Native individuals. Scholarship award categories, by law, reflect the overall health professional staffing needs of the Indian Health program, which change each year as the needs of programs change. Placement of scholarship recipients who have a service obligation is carried out under a legislatively mandated national placement policy. Therefore, the scholarship programs

<sup>143 102</sup> Congressional Record S 2644-2647 (3/10/93): pg. S 2647.

<sup>144 102</sup> Congressional Record S 2644-2647 (3/10/93): pg. S 2647.

address national, categorical needs, and compete on a national basis.<sup>145</sup> The scholarship programs are by law nationally competitive grant programs which require that determination of career categories, allocation, award and obligation of funds be Federal functions. Furthermore, the Health Professionals program has a legislated requirement for service of contract. All three programs have penalties for acceptance of an award and then declining it. Only the Federal government can impose and implement such penalties.<sup>146</sup>

# g) Recruitment and Retention

Several recruitment and retention programs have not been made available to tribes. Tribes would like to see the full panoply of federal personnel support, protection and benefit functions which are accorded federal employees through the Office of Personnel Management, the Merit Systems Protections Board, and other personnel offices. 147 Programs at question are:

- Division Health Professional Recruitment and Training
- Health Professional Support Branch
- Permanent Change of Station and Special Pay (detailed above)
- Continuing Education, Nursing and Physician
- Nursing Recruitment Sec. 112, P.L. 94-437, as amended 148

  The nursing program at the University of North Dakota is specifically identified in the Act. Eligibles for remaining funds are schools of nursing, tribally controlled community colleges and post-secondary vocational colleges and institutions having nurse midwife or nurse practitioner programs.
- INMED Program, Sec. 122, P.L. 94-437, as amended The INMED program at the University of North Dakota is specifically identified in the Act. Eligibles for remaining funds are colleges and universities.
- Health Professions Recruitment, Sec. 102, P.L. 94-437, as amended
   Discretionary funding with public or nonprofit private health or educational
   entities or tribes and tribal organizations. Competition is necessary to
   determine awards. Appropriations language for FY 1993 provides a tribal
   preference.

<sup>145</sup> Indian Health Service Office of Human Resource Self-Governance Allocation (undated): pg. 5.

Memo from Acting Director, Division of Acquisition and Grants Operations to Assoc. Dir. Office of Admin. and Management re Division Functions and Their Compactability under Self-Governance (5/21/93).

<sup>147 102</sup> Congressional Record S 2644-2647 (3/10/93): pg. S 2647.

Memo from Acting Director, Division of Acquisition and Grants Operations to Assoc. Dir. Office of Admin. and Management re Division Functions and Their Compactability under Self-Governance (5/21/93).

# F. Property and Facilities

- 1. Construction and Federal Acquisition Regulations
- 2. Other Federal Regulations re Real Property
- 3. Equipment and Personal Property
- 4. Facilities

# 1. Construction and Federal Acquisition Regulations

The IHS agrees with tribes that Federal Acquisition Regulations (FARS) should be waived so that SG tribes can receive funds for construction projects. This would authorize a SG tribe to have total responsibility for a construction project and the IHS will have only residual responsibilities for the required periodic and final inspections typically used with grant recipients. 149

However, the DHHS Office of General Counsel (OGC) has determined that the FARS do apply to IHS facility construction for SG tribes. In the view of the OGC, the construction of Federal facilities is the contracting officer's responsibility, which in turn, is an inherently governmental function that must be performed by an official of the Executive Branch of the United States. Responsibility for obtaining clearances and compliance with Federal and State laws continue to be an IHS responsibility. <sup>150</sup> The planning, cost control, and quality assurance activities are administrative and managerial activities conducted for the Secretary to ensure quality and fiscal accountability on all projects rather than part of the services "program" at the service unit level. SG Tribes can contract related "non-project" activities such as: maintaining a priority listing of the requests and needs of individual homeowners for sanitation facilities, surveying existing sanitation facilities, and providing technical assistance to tribes operating and maintaining sanitation facilities. <sup>151</sup>

<sup>149</sup> Memo from Associate Director Office of Environmental Health and Engineering to Director Division of Legislation and Regulations Office of Planning, Evaluation and Legislation re Legal Questions Pertaining to Facility Programs Under SG (5/24/93): pg. 1.

<sup>150</sup> Memo from the Department of Health and Human Services Office of Self-Governance to Michel Lincoln re Facilities Construction Programs under Self-Governance (8/24/93).

<sup>151</sup> Memo from Attorney Advisor, Public Health Division to Billings Area Director re Contractibility of Sanitation Facilities Construction Branch at the Flathead Service Unit (1/28/91): pg. 2.

IHS employees will continue to perform many functions as long as the SG tribes are not able to access construction funds. The project related activities that the Sanitation Facilities Construction program will continue to perform are project proposals, project summaries, memoranda of agreement, transfer agreements, and final reports. The Health Facilities program will review Program Justification Documents and Programs of Requirements. Each program will maintain its priority lists based on severity of need. 152

SG tribes have requested to expand the FARS exemption to embrace all SG activities including construction. Under the proposed SG Technical Amendments FARS would be waived for construction; all compacted construction activities would be without the regulatory oversight of the federal government.<sup>153</sup> Whether SG tribes be allowed to reprogram construction funds to services or to construction other than that contemplated by the construction funding needs to be clarified. For example, could a tribe use sanitation facilities funds to build a clinic or to start a new substance abuse rehabilitation program? Several other issues are to be decided, should tribes succeed in securing construction funds: To what extent does the Government retain responsibility to prevent fraud, waste, and abuse of such large sums of money? To what extent should the Government assure that the construction will meet the intended purpose and reasonable standards for quality of construction?<sup>154</sup> How should uncompleted projects be handled during the transition period?

There is concern, especially within the OEHE, that the resource allocation formula for construction projects will not work under SG. Currently the OEHE collects data from Area OEHE offices, the data is verified and then projects are prioritized. The IHS may need to monitor the data annually and to investigate any discrepancies from year to year. If the data is being supplied by tribal sources it may not be verifiable and may not be comparable to the IHS generated data. It may be necessary to change the system for allocation, perhaps substitute a grant or other competitive process.

# 2. Other Federal Regulations re Real Property

The IHS and tribes need to consider the ramifications of transferring property interests. The IHS must also examine if any requirements must be met for the IHS to transfer

<sup>152</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 42.

<sup>153</sup> Memo from Philip Banker-Shenk to Tribal Leaders and Staff of SG Tribes re Presentation of the case for S.550 -- The 1993 Tribal SG Demonstration Technical Amendments Bill (3/30/93): pg. 10.

<sup>154</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 42.

ownership to the tribe or to the BIA in trust for the tribe. If legal title remains with the federal government, as it does with trust status land, will the federal government or the tribe be responsible for implementing federal laws? Laws that should be considered are: Resource Conservation and Recovery Act (the Superfund law which holds a property owner liable for cleaning up hazardous materials, whether or not the owner knew a tenant violated the law), Occupational Health and Safety Act, National Environmental Protection Act, and so on. 155 With tribal contractors, the Environmental Protection Agency can authorize that a tribal clinic be closed due to hazardous conditions.

### 3. Equipment and other Personal Property

The tribe may request that the Secretary make available and/or transfer title to the tribe for equipment and personal property that the Department had previously utilized to provide the programs, activities, functions and services now consolidated by the Tribe. All SG compacts state that a mutually agreed upon list specifying the property, facilities, and equipment is to be made available and periodically revised. <sup>156</sup> In practice, the IHS is having difficulty with this provision because of the temporary nature of the SGDP.

The IHS has arranged with the General Services Administration to provide each SG tribe a Screener Identification Card (GSA Form 2946) to enable the SG tribes to acquire such "excess" property as may be appropriate for the tribal programs. SG tribes can get the full benefit of their relationship with the GSA if they apply their screener card to all GSA regions nationwide and be sure that the card is valid for an indefinite period of time. Note, however, SG tribes must follow GSA procedures; the tribe must complete a Form 122 which states the purpose for using the equipment and an authorized federal government employee must sign for the release of the equipment. These procedures are in place to prevent a tribe from selling government property after title has transferred to the tribe.

Other procedural obstacles need to be examined. For example, federal regulations limit the GSA to lease vehicles only to contractors with a cost reimbursable contract. Compacts do not fall within that definition. The IHS OTSG and Property Management Branch should identify additional regulatory obstacles need to be remedied in order for the SGDP to be implemented to the fullest extent possible.

<sup>155</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 40.

<sup>156</sup> Model compact language Article II Terms, Provisions and Conditions, Section 8 Property.

#### 4. Facilities

Until facilities ownership is formally transferred to a tribe, the IHS would retain a responsibility to protect the Federal investment by assuring the proper upkeep of Federally-owned facilities. This may be perceived as limiting the authority of tribes to run their own affairs. The degree of Federal responsibility must be defined and staff retained to fulfill the responsibility. Sample use agreements should be developed. Reactions to emergencies must be contemplated; for example, if a Federal facility burns to the ground, is the SG tribe or the IHS responsible for interim costs and/or permanent replacement?<sup>157</sup>

The other issues regarding facilities relate to multi-tribal sites. In the Phoenix Area the compacting tribes asked for their share of the Phoenix Indian Medical Center. This presents a difficult divisibility situation because there are many urban Indians (30% of the Area population) who use that facility who are affiliated with tribes outside of the Phoenix Area's geographical region. Similar issues could arise for the more than fifty urban Indian clinics throughout the country.

And if a tribe does receive a tribal share for a multi-tribal facility, can that facility refuse to serve a member of that tribe? For example, if the Cherokee Nation were to compact for Claremore Hospital with its patient load of 30% non-Cherokee Indians. It seems a minority interest tribal government can withdraw its share of the facility resources but cannot restrain its members from continuing to utilize the facility's services. Any facility providing direct health care has a legal obligation to serve the eligible Indians in its service area. Its service population is based on local residency and is completely unrelated to tribal affiliation. Who covers the cost when the SG tribe that maintains the facility serve members from the tribe which withdrew its funds when it compacted? More research by the IHS and SG tribes regarding facilities, especially multi-tribal facilities, is needed.

<sup>157</sup> Portland Area Ad Hoc Work Group Report (4/93): pg. 41.

<sup>158</sup> Cherokee Report (1993): Appendix IX.

#### VI. Recommendations

# A. Educate IHS employees about the SGDP.

Except for the Area Directors and some individuals at the IHS HQ, few IHS employees understand the purpose or the ramifications of the SGDP. Yet, many IHS employees are likely to be concerned about how SG will affect their position and funding in their Service Unit or Area. They hear rumors about reductions in force, administrative cuts, and tribal administration of health programs and facilities. Employee morale is sure to be affected.

The IHS needs to engage its formal communications channels to educate it employees about the SGDP. Courses should be held at each IHS facility and office. Employees should learn that Self-Governance is not intended to be another program change but it is a fundamental change in the way the IHS will conduct business with tribes. They should learn the procedural aspects of SG, the time frame for the first thirty tribes, what is expected in the permanent legislation, and how IHS intends to restructure and downsize.

#### B. Establish a compacting process.

The IHS has not established set procedures to be used in the SG negotiations. The OTSG should develop a "how to" manual with sections on Planning, Pre-negotiations, Negotiations, and Implementation. Each section should include a set of guiding principles and basic uniform procedures. This will bring consistency to the compacting process even though negotiations are conducted at the various IHS Areas often with different representatives from the IHS. As guidelines the procedures are subject to modification to accommodate concerns of all involved parties. Examples of guiding principles follow.

### <u>Planning</u>

- Formulas to be based on 100% compactability.
- Portions of budget under Area responsibility, portion calculated by HQ.

## Pre-negotiations

- Tribes must demonstrate a budgetary process is in place prior to signing a compact.
- Share special policy or procedural issuances of limited applicability as well as waivers of routine policies and procedures with written justification (e.g. Money set aside is based on 100% takeover; a partial takeover gets partial funds.)
- Selection of an unbiased facilitator.

# **Negotiations**

- The placement and role of the OTSG within the IHS will be explained at the onset
- Specific budgetary and statistical information will be available to the negotiators with written justification.

## **Implementation**

- Procedure for buy-back of services.
- Standard financial form needs to be developed to reconcile and for an audit trail to exist.

## C. Research analogous situations.

SGDP is touted as a new way of doing business between the federal government and the Indian nations. For the United States, however, it is similar to doing business with other countries. Several models exist within our current federal structure.

The United States has formal written compacts with its trust territories. Within the Department of Interior there is an Office of Territorial and International Affairs. The Office has administrative responsibility for American Samoa and the Trust Territory of the Pacific Islands and the relationship between the Federal Government and Guam, the Virgin Islands and the Commonwealth of the Northern Mariana Islands. The Office is also responsible for the general administrative oversight of federal funds and programs provided to the two freely associated states, the Marshall Islands and the Federated States of Micronesia. The responsibilities of the Office include providing program and budget planning and overseeing performance and budget execution for federal funds appropriated to the territories, and performing financial management oversight responsibilities for all financial matters and operations as they relate to federal funding to the territories.

Another similar situation within our federal system is the Agency of International Development in the State Department which funds, among many other programs, health programs for many less developed countries. The Unites States provides funds and oversight for these programs.

The IHS, working with the Department of Interior and State Department, should thoroughly investigate how the United States has been conducting business and distributing funds to other political entities. Issues of concern are: how the funding is appropriated and distributed, what baseline measures or other measures of performance are required, what financial accounting is reported, and what other oversight is present.

## D. Follow Health Reform legislation.

The IHS and tribes have been involved in the health care reform process through a series of conferences. Tribal leaders have expressed a desire to continue the IHS as a separate (but enhanced) health care delivery system. Indian leaders see a need for Indian communities to receive more than the core benefit package available nationwide because Indian people are also entitled to preventive, community health and environmental health services.<sup>159</sup>

Health care reform is another factor influencing the restructuring of the IHS. It's too early to predict what changes will be made within the IHS to accommodate the national effort, but tribal leaders and the IHS policy makers should keep abreast of the Health Care Reform proposals. The ramifications should be anticipated and accommodated early on to avoid crisis management.

## E. Resolve residual and other financial issues.

For those issues that remain outstanding, the IHS participating self-governance tribes and nonparticipating tribes should work to resolve the issues. Besides the tribal share methodology, other issues to discuss at this time are waivers of federal regulations, and

<sup>159</sup> Schoening, Athena "Health Care Reform Update" Office of Tribal Activities/Indian Health Services, Tribal Activities Bulletin, Vol. 2, Issue 4 (Summer 1993).

policies and manual issuances that will have to be raised if self-governance becomes permanent. 160

For those categories on which the IHS and the tribes cannot agree, and for those categories in which Congress has shown a strong interest, (e.g. RPMS, Facilities Priority) the IHS should rely on Congressional interpretation. The IHS cannot second guess whether Congress meant to include some items in the tribal share distribution, it must discuss particular budget categories with the oversight committees, the Senate Committee on Indian Affairs and the House Committee on Interior and Insular Affairs as well as the SG tribes.

## F. Expedite verification of user population data.

The IHS needs to verify population figures as quickly as possible. The data is available from the IHS Data Center at the end of January for the previous fiscal year but has been taking over a year to verify. It is incumbent upon the IHS to identify its bottlenecks and determine how to overcome them. This should be done immediately because it may require additional funds to be allocated to the residual. The IHS should work with tribes to determine how to best quantify and verify the user populations especially where tribes are not reporting under the RPMS.

# G. Identify and remedy procedural issues.

While the SG tribes are concerned with making sure the tribal share is not short funded, the IHS is concerned that proper procedures are being carried out. The two concerns must be reviewed in tandem to ensure a balance between a fair tribal share and adequate funds to perform the inherently governmental functions necessary to carry out the SGDP.

Because it is a demonstration program, no changes in general IHS policies or manual issuances were made. It is now time to make special policy or procedural issuances of limited applicability as well as waivers of routine policies and procedures. It is also important to identify those policies and manual issuances that would have to be raised once Self-Governance becomes permanent.<sup>161</sup>

<sup>160</sup> R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Directors re Legislative Implementation Plan (4/1/93): pg. 11.

<sup>161</sup> R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Directors re Legislative Implementation Plan (4/1/93): pg. 11.

For example, a tribe cannot ask that a piece of personal property or other equipment be transferred to tribal ownership without expecting a fair amount of paperwork to follow the transaction. The IHS needs to define which forms will continue to be required for specific transactions. Federal agents must be designated to sign a property release. This is especially important at this time as equipment is being made available from a number of military base closings. Another procedural obstacle to be resolved is that the GSA can only lease vehicles to entities on a cost reimbursement contract. But because compacts are not cost reimbursable contracts, new procedures must be instituted.

Other procedural issues that need resolution are the advance payment and buy-backs of IHS services.

# H. Evaluate tribal processes prior to negotiations.

Once a SG Compact is signed and approved there is minimal federal oversight of compact implementation. For that reason, it is important to have appropriate safeguards in the planning phases prior to final negotiations. The IHS should ensure that each planning tribe can demonstrate that it established and implemented a budgeting process. There may be other fundamental processes that IHS should review prior to negotiations. Once the process is approved, the IHS oversight would be limited to measure whether the tribe followed the process. This would allow the IHS to withhold judgment regarding how the tribe chose to allocate its tribal share while at the same time ensuring that the tribe followed an appropriate budgeting and distribution process.

# L Establish dispute procedure for the negotiation phase.

There is no authority to resolve disputes between the IHS and tribes during the negotiations process. Tribes have suggested that a SG Policy Council be established to resolve issues that arise during negotiations. Currently the IHS Acting Director resolves issues that arise during negotiations.

## J. Maintain a record of matters pertaining to the SG compacts and planning grants.

Each Area Office should maintain a record of contacts with SG tribes and an estimate of time and expense involved in transactions involving each SG tribe. The IHS should develop a system for tracking its experiences with SG tribes which can be made available to all Area Offices and HQ.

## K. Track the audit results and Congressional reports to measure success or failure.

Under the SGDP tribes are not required to report to the IHS. Their baseline measures and their views of the IHS report are delivered directly to Congress. Financial reporting under the Single Audit Act of 1984 will be delivered to the Office of Management and Budget. Although the tribes are not required to send these reports to the IHS, it is in the best interest of the IHS to review these documents especially throughout the demonstration phase. These reports will be the best documented feedback regarding the SGDP and could also be useful to all SG tribes. It should not be overlooked.

# L. Design a methodology to determine whether SG Compacts have created adverse impact on other tribes.

The SG law requires the IHS to ensure that nonparticipating tribes are not adversely affected if other tribes within the Service Area participate. The IHS must be prepared to address the concerns of the nonparticipating tribes. At present there is no procedure to measure adverse impact. A procedure should be put in place prophylactically so that the IHS can measure whether services are in danger of being diminished.

In order to minimize the impact, the IHS should first develop a mechanism to identify early indicators of adverse impact. The IHS should also develop a methodology to address concerns of those tribes that allege adverse impact. Any evaluation regarding adverse impact should begin with a review of the current operating system (IHS direct care or tribal contractors) to determine if better management would improve the situation and restore the affected tribe to pre-SG levels of direct and indirect services. This is important because the adverse impact could be due to a problem between the Area office and the Service Unit

<sup>162</sup> Memo from Acting Director, IHS to Area Directors re: Designation as the IHS Area Representative for Compacts of SG between the IHS and Tribes (4/7/93).

unrelated to the SGDP. Once internal factors are ruled out, the methodology should examine the SGDP step-by-step to determine if a change in one or two components could restore the affected tribe to its previous status. The methodology should be easy to apply to various circumstances. The analysis should be objective and concise to ensure quick results.

## M. Prepare the first Congressional report.

By DHHS internal procedures, the first draft of the first report to Congress must be completed by March 1, 1994 in order to be ready for submission to Congress on July 1. Eight compacts call for a Compact Evaluation Team of one representative from the IHS and one from the tribe. These joint evaluation teams should be selected in the near future so that they may design a procedure and an outline for the report to Congress and the March 1 internal deadline.

Other factors to be measured and reported are whether the SGDP affects workload demands on the IHS system, what steps IHS took to implement tribal shares, and what downsizing and restructuring has taken place or is planned.

### N. Draft permanent legislation provisions and accompanying regulations.

Two bills related to Self-Governance have been introduced into Congress. One contains technical amendments, the other promotes establishing SG on a permanent basis within the DOI. These bills have the support of the SG tribes.

Permanent legislation for the IHS Self-Governance Compacts can be expected before the end of Fiscal Year 1996. Although one could expect the tribes to lobby for legislation at that time, the IHS should consider what provisions it would want to be included in the permanent legislation. For example, the IHS might want to suggest that the role of the OTSG Director is not to negotiate compacts but to be an arbiter to facilitate compact negotiations.

The IHS should also consider what regulations would be necessary once Self-Governance continues on a permanent basis. The SGDP has operated without regulations in order to promote opportunities for tribal flexibility and individual adaptation. The IHS should also review the current criteria to determine if it should be less stringent, e.g. are two mature

Mille Lacs, Grand Traverse, Hoopa Valley, Siletz, Jamestown K'llallam, Lummi, Makah, and Port Gamble.

contracts necessary? Provisions for how to calculate base funding should be considered at this time. These issues will be debated in Committee hearings.

The IHS needs to consider whether it agrees with the provisions proposed in the proposed legislation and, if not, what substitute provisions it should propose. Provisions to consider include expansion to 20 tribes per year, allowing 60 days to address waiver requests, reporting once a year (to include the separate views of the tribe), negotiated rulemaking, and allowing each tribe to choose the extent of its participation in SG.

# O. Prepare a final report for the SGDP.

The IHS has expressed a desire to draft a final report for the SGDP. It is important that the IHS report be helpful to the tribes, federal agencies and Congress. It is recommended that the report be prepared by an independent contractor with knowledge of Indian affairs, Federal/Indian policy, and the SGDP. The contractor should include interviews with participating tribes, IHS employees, and the OTSG. Other issues to address in such a report are:

- Examine reasons to compact. Identify regulatory provisions and bureaucratic regulations that were most troublesome to the tribes. Discuss community or political pressure to compact.
- Measure flexibility. Discussion of constraints that tribes were able to remove, that is, constraints that were present prior to the SGDP.
- Document budgetary reallocations. Specifically, document new programs, new positions, and cost effectiveness.
- Document changed program administrative procedures. (E.g. streamlining of accounting systems, budgeting processes, decisions-making and planning/priority setting, developing new record-keeping and management information systems.)
- Review third party revenue. Determine if there has been an increase or decrease in total revenue and if there has been any change in the amount of time it takes to receive payment.
- Document reorganization. Document new departments, new committees (e.g. oversight), and new policy.
- Review state services. Discuss whether the state recognizes the tribe as a contractual counterpart, if state programs have been lost or new ones established. Document whether states have compacted with tribes regarding health services.

- Review tribal retention and recruitment programs. Evaluate success.
- Determine the impact on tribal members. 164

#### P. Look to Future

The IHS should prepare for issues that are likely to arise in the future. Brainstorming sessions should be conducted to think about what those issues might be and what contingencies the IHS should prepare and how to work with tribes to resolve issues. Future issues might include how to deal with a newly recognized tribe and whether tribes should lobby for their own appropriations individually.

A. Friedlob, D. Dupree, and J. Carney, Self-Governance Demonstration Project (SGDP) Baseline Measurement and Program Evaluation -- Draft (9/10/93): pg. 13 - 14.

## VII. Summary

The SGDP is not the answer to all health care needs. The underfunding in the IHS budgets will be passed down to the SG tribes. But it will be the tribes themselves who determine how to allocate the finite resources to best meet the needs of their tribal communities.

Tribes are operating on the assumption that the SGDP will be successful. The IHS has to operate on the assumption that it may be asked, at any time, to reassume the delivery of health services. The IHS needs to be informed of current programs for that reason. The tribes initiated Self-Goyernance to minimize oversight as much as possible. This conflict may be more difficult to resolve than the questions over how much funds are available for tribal shares.

Yet the IHS also expects the SGDP to be successful and to become a permanent way of doing business between the federal and tribal governments. This will require that all the IHS employees embrace the concept of Self-Governance. SGDP should be factored into all IHS program planning and innovations.

Now, during the demonstration phase, certain implementation issues should be addressed and resolved. Examples are: which regulations can be waived, how start-up funds and indirect costs will be funded, and how evaluations will be conducted.

# INDIAN HEALTH SERVICE SELF-GOVERNANCE REVIEW THROUGH 1994 NEGOTIATIONS

# **APPENDICES**

Staff Instructions on Self-Governance Purchase order #93-LF-01071701D

January 12, 1994

Appendix One: Negotiated Tribal Shares for 1994 Compacts

IHS SG TRIBES	Tr. Mem.	Users	TS Mth	Total \$\$	Tribal prog	Area/SerU	HQ	Ind. Rate	Includes	
Absentee Shawnee	2,700			1,044,253	687,527	156,000	. 200,726		?able indirect	
Cherokee Nation	150,000	77,817				737,782	1,562,218			
Duckwater Shoshone	301	131	30/70	597,356	410,852	112,154	74,350		*tribal prog =	SU budget Indir. TBD
Ely Shoshone	272	241	30/70	687,044	59,677		80,357		Indir. to be determined later	
Flathead Tribes	6,790	7,320		10,786,722	9,632,500	670,100	484,122		*tribal prog =	SU budget Indir. TBD
Grand Traverse Band	2,321	2,142		1,670,085	1,355,600	171,401	143,084	12.1%	*FY 94 only(	rec'd 533,639 For FY 93)
Hoopa Valley Tribe	2,200	2,961				248,457	195,831			
Jamestown S'Klallam	234	260	30/70	263,018	161,404	55,013	46,601	44.8%		
Lummi Nation	3,167	3,481	30/70	5,272,923	610,035	3,226,470	223,635	67.5%	1,212,783	Ind. amt doesn't compute
Makah Tribe	2,028	1,270	30/70	592,752	370,075	65,286	102,646	32.6%	54,745	* AFA off by \$1
Mille Lacs Band	2,750	1,968		1,555,451	1,242,500	183,015	129,936			* AFA off by \$1
Port Gamble Band	760	716	30/70	527,463	381,421	69,830	76,212			*asked \$824,632 for start-
Sac & Fox Tribe	2,240	2,217		1,208,563						up costs (supplied budget)
Siletz Tribe	2,200	4,679	30/70	4,590,917	2,882,412	253,336	305,719	33.4%	1,149,450	

Chart incomplete as of printing date. Suggested that this be reviewed.

# Appendix Two: Individuals Interviewed

- 1. Acting Director Office of Self-Governance, IHS Headquarters -- Reuben Howard
- 2. Analyst Office of Self-Governance, IHS Headquarters -- Carol Martin
- 3. Associate Director Office of Management, IHS Headquarters -- George Buzzard
- 4. Associate Director Office of Tribal Affairs, IHS Headquarters -- Doug Black
- 5. Director of the Office of Tribal Operations, Portland Area Office -- Tom Austin
- 6. Associate Director Office of Tribal Activities, Phoenix Area Office -- Michael Joseph
- 7. Director Office of Plathing, Phoenix Area Office -- Keith Longie
- 8. Phoenix Area Office, Special Assistant to the Director -- Mark Downing,
- 9. Associate Director Office of Tribal Activities, Albuquerque Area Dorothy Dupree

# Appendix Three: DESCRIPTION OF THE 14 IHS 1994 SELF-GOVERNANCE TRIBES

1. Absentee-Shawnee

2025 S. Gordon Cooper Drive Shawnee, OK 74801-9381

Phone: (405) 275-4030 Fax: (405) 275-5637

Compacting Authority:

Executive Committee

SG Coordinator:

position vacant as of 12/31/93; expected to be filled by 2/94.

Highest Official:

Governor Larry Nuckolls

IHS Area:

Oklahoma City

Compact Year:

CY 94

User Population:

Tribal Membership:

2700+

Description:

About 450 acres.

#### 2. Cherokee Nation of Oklahoma

P.O. Box 948

Tahlequah, OK 74465

Phone: (918) 456-0671 Fax: (918) 456-6485

Compacting Authority:

Principal Chief for and on behalf of the Cherokee Nation .

SG Coordinator:

Patrick Ragsdale

Highest Official:

Principal Chief Wilma Mankiller

IHS Area:

Oklahoma City

Compact Year:

FY 94

<u>User Population:</u>

77,817

Tribal Membership:

150,000

Description:

Headquartered in Tahlequah, Oklahoma

About 110,124 acres; 59,656 tribally owned and 50,468 in allotment. Reservation population is about 8% Indian. (1986 figures: 885,029 on reservation, 60,000+

Cherokee, 11,000 other Indian.) It's not a reservation per se, but historical jurisdiction boundaries which cover 14 counties (all of 9, parts of 5.) Sallisaw has a new health

center.

# 3. Duckwater Shoshone Tribe

P.O. Box 1 40068 Duckwater, NV 89314

Phone: (702) 863-0227 Fax: (702) 863-0301 Compacting Authority: Tribal Chairman for the Tribal Council

SG Coordinator: Jerry Millett

Highest Official: Chairman Boyd Graham

IHS Area: Phoenix Compact Year: CY 94 User Population: 131 Tribal Membership: 301

<u>Description</u>: 650,250 acres includes grazing lands.

## 4. Ely Shoshone Tribe

16 Shoshone Circle Elko, NV 89301

Phone: (702) 289-3013 Fax: (702) 289-8780

Compacting Authority: by the Ely Shoshone Tribal Chairman

for the Ely Shoshone Colony Council

SG Coordinator: Peter Ford

Highest Official: Chairman Jerry Charles

IHS Area:PhoenixCompact Year:CY 94Tribal Membership:272User Population:241

<u>Description</u>: 111 acres, of which 100 are tribally owned. This reservation is actually 3 neighborhoods in the town of Ely, Nevada. Small western Shoshone tribe.

## 5. Flathead Nation

P.O. Box 278 Pablo, MT 59855

Phone: (406) 675-2700 Fax: (406) 675-2806

Compacting Authority: Tribal Council of the Confederated Salish and Kootenai

Tribes of the Flathead Nation

SG Coordinator: Part of the Office of Contracts, Grants, Compacts

Highest Official: Chairman Michael T. Pablo

IHS Area:BillingsCompact Year:FY 94User Population:7320Tribal Membership:6790

<u>Description</u>: 1.25 million acre reservation, ceded over 20 million acres of

western Montana, signatories to the Hellgate Treaty of 1855. First tribe to adopt a

constitution under the Indian Reorganization Act of 1935.

# 6. Grand Traverse Band of Ottawa and Chippewa Indians

Route 1, Box 135

Suttons Bay, MI 49682

Phone: (616) 271-3538 (616) 271-4861 Fax:

Compacting Authority:

Tribal Council

SG Coordinator:

Donna Swallows

Highest Official:

Tribal Chairman Joseph C. Raphael

IHS Area:

Bemidii

Compact Year:

FYs 93 & 94

User Population: Tribal Membership: 2142 2321

Description:

Tribe federally recognized in 1980. Has received IHS

services since 1980. Recently added another county to the IHS Service Area which

increased the user population by 115. Reservation is now 72 acres.

## 7. Hoopa Valley Indian Tribe

P.O. Box 1348

Hoopa, CA 95546

Phone: (916) 625-4211

Fax: (916) 625-4594

Compacting Authority:

Tribal Council

SG Coordinator:

Danny Jordan

Highest Official:

Chairman Dale Risling Sr.

Compact Year:

FYs 93 & 94 (joint BIA and IHS compact)

IHS Area:

California

User Population: Tribal Membership: 2961

2200

Description:

About 90,000 acres in northwestern California; 80,000

tribally owed, 10,000 in allotted. 1990 Appropriations act mentioned developing a

community health care facility there - it is being planned.

## 8. Jamestown S'Klallam Tribe

305 Old Blyn Highway

Sequim, Washington 98382

Phone: (206) 683-1109 (206) 683-4366 Fax:

Compacting Authority:

Jamestown S'Klallam Indian Tribal Council

SG Coordinator:

Cyndi Holmes

Highest Official:

Chairman William Ron Allen

IHS Area: Compact Year: Portland CY 94

User Population: Tribal Membership: 260

234

Description:

Land base of 40 acres, most members live near the

reservation, not on it. Federally recognized in 1981.

## 9. Lummi Indian Nation

2616 Kwina Road

Bellingham, WA 98226

Phone: (206) 734-8180 (206) 647-6298 Fax:

Compacting Authority:

Lummi Indian Business Council

SG Coordinator: Highest Official: Rayette Finkbonner Chairman Henry Cagey

IHS Area:

Portland CY 94

Compact Year: User Population:

3481

Tribal Membership:

3167

Description:

About 7668 acres, mostly allotted.

### 10. Makah Tribe

P.O. Box 115

Neah Bay, WA 98357

Fax:

Phone: (206) 645-2205 (206) 645-2033

Compacting Authority:

Makah Indian Tribal Council

SG Coordinator:

Julie Johnson

Highest Official:

Chairman George Bowechop

IHS Area: Compact Year: Portland

User Population:

CY 94 1270

Tribal Membership:

2028

Description:

27,027 acres, mostly tribally held.

## 11. Mille Lacs Band of Ojibwe

HCR 67, Box 194 Onamia, MN 56359

Phone: (612) 532-4181 Fax: (612) 532-4209

Compacting Authority:

Band Assembly of the Mille Lacs Band

of Ojibwe and the Business Committee

SG Coordinator:

Karen Ekstrom

Highest Official:

Chairperson Marge Anderson

IHS Area: Compact Year: Bemidji

User Population:

FY 94 1968

Tribal Membership:

2750

Description:

Central Minnesota, about 100 miles north of the twin cities.

7,500 acres throughout four counties. Treaty of 1855. Three branches of government.

### 12. Port Gamble S'Klallam Tribe

P.O. Box 280

Kingston, WA 98346

Phone: (206) 297-2646 (206) 297-7097 Fax:

Compacting Authority:

Port Gamble Community Council

SG Coordinator:

Rick Decoteau

Highest Official:

Chairman Gerald Jones

IHS Area:

Portland

Compact Year:

CY 94

User Population:

716

Tribal Membership:

760

Description:

1341 acres all tribally owned.

## 13. Sac and Fox Nation of Oklahoma

Route 2, Box 246 Stroud, OK 74079

Phone: (918) 968-3526 Fax: (918) 968-3887

Compacting Authority: Business Committee

SG Coordinator: none

Highest Official: Principal Chief Elmer Manatowa, Jr.

IHS Area: Oklahoma City

<u>Compact Year</u>: FY 94 <u>User Population</u>: 2217 Tribal Membership: 2240

Description:

#### 14. Siletz Tribe

P.O. Box 549 Siletz, OR 97380

Phone: (503) 444-2532 Fax: (503) 444-2307

Compacting Authority: Confederated Tribes of Siletz Indians

of Oregon Tribal Council

SG Coordinator: Nelson Witt, CEO

Highest Official: Chairperson Delores Pigsleu

IHS Area:PortlandCompact Year:CY 94User Population:4679Tribal Membership:2200

Description: The Siletz tribe was terminated in 1955 and became the second tribe in U.S. history to be restored to federal recognition. The Confederation comprises 24 bands. The tribe now has 3630 acres located in Oregon's coastal range that were conveyed in 1980. In the 1990 Appropriations, Siletz was appropriated \$470,000 to equip and staff the new Siletz clinic to be used for a demonstration project, regarding how to meet the funding needs of tribes which provide facilities outside of the IHS priority funding process. The clinic opened in 1991 and it provides medical/dental services to tribal members and non-Indians from the Siletz community and the surrounding area.

Appendix Four: List of Related Documents

Kauffman and Associates, Inc. has prepared two other documents for the IHS Office of Tribal Self-Governance. One copy of each was submitted to the IHS Office of Tribal Self-Governance concurrent with this document.

# 1. Congressional Mandates related to Self-Governance

This document reviews laws relevant to Self-Governance and to the IHS budget.

# 2. Comparison of the 14 Compacts and Annual Funding Agreements

This detailed (over 70 page) document compares the provisions of the fourteen compacts with each other and the model compact.

# Appendix Five: References

- 1. 102 Congressional Record S 15089 (11/4/93) (re S. 1618).
- 2. 102 Congressional Record S 2644-2647 (3/10/93)(regarding S.550, the technical amendments to the SGDP).
- 3. A. Friedlob, D. Dupree, and J. Carney, Self-Governance Demonstration Project (SGDP) Baseline Measurement and Program Evaluation -- Draft (9/10/93).
- 4. Americans for Indian Opportunity. Survey of American Indian Environmental Protection Needs on Reservation Lands: 1986, (Sept. 1986).
- 5. Cherokee Nation, Cherokee Report: Final Progress Report for the Self-Governance Demonstration Project (6/28/93) (Planning Grant #ISU000946-01. Period 7/1/92 through 3/31/93).
- 6. Compact to SG between USA and Cherokee Nation, Attachment Three re Baseline Measures (10/19/93).
- 7. Delegation of Authority for Self-Governance from Assistant Secretary of Health to Director, IHS (6/30/93).
- 8. Delegation of Authority for Self-Governance from Donna E. Shalala to Asst. Secretary of Health (6/30/93).
- 9. Department of Health and Human Service Attorney to Indian Health Service re Self-Determination transition (6/30/93).
- 10. Draft Preamble re 638 NPRM (undated).
- 11. Final Report: Ad-Hoc Work Group for the Review of Area Office Functions for the Support of Tribal Self-Governance Compacts, Sponsored by The Portland Area Indian Health Service Portland, Oregon (April 13-15, 1993).
- 12. FY 91 Justification of Appropriation Estimates for Committee on Appropriations, Volume XIII, pg. IHS-108 (undated).
- 13. FY 93 Justification of Appropriation Estimates for Committee on Appropriations, Volume XV, pg. IHS -45 (1992).
- 14. Grand Traverse Band and Mille Lacs Band, Proposed/Potential Baseline Measures for SG Compacts, Draft #5 (9/3/93).

- 15. H.Rep. 103-158 (6/24/93) Dept. of the Interior and Related Agencies Appropriations Bill, 1994. Committee on Appropriations.
- 16. H.Rept. 101-789 (10/2/90) (Dept. of Interior and Related Agencies Appropriations Bill, 1991).
- 17. H.Rept. 101-971 (10/27/90) (Conference Report re DOI and Related Agencies Appropriations for 1991).
- 18. H.Rept. 101-120 (6/29/89) (Dept. of Interior and Related Agencies Appropriations Bill, 1990).
- 19. H.Rept. 102-256 (10/17/91) (Conference Report Appropriations for DOI and Related Agencies for 1992).
- 20. H.Rept.. 102-320 (11/18/91) Tribal Self-Governance Demonstration Project.
- 21. IHS Appropriation Effect of House Action FY 1991 Report. (undated).
- 22. Indian Health Service FY 1994 Planning Issues -- Self-Governance (undated).
- 23. Indian Health Service Office of Administration and Management Distribution of FY 93 Budget, SG Project (undated).
- 24. Indian Health Service Office of Human Resource Self-Governance Allocation (undated).
- 25. Indian Health Service Self-Goverance Planning Funds Announcement (8/20/93).
- 26. Indian Health Service Statistical Note on Indian Population Figures prepared by the IHS Division of Program Statistics (4/8/93).
- 27. Indian Health Service, Outline for Presentation on Self-Governance OEHE and Branch Chiefs Meetings, Gaithersburg, MD (9/13/93).
- 28. Indian Health Service, Public Health Service, Department of Health and Human Services, Program Analyst job announcement Announcement # 93-81, (6/29/93).
- 29. Indian Health Service, Public Health Service, Department of Health and Human Services, Financial Analyst job announcement Announcement # 93-112, (8/27/93).
- 30. Indian Health Service, Residual Functions: (Zero Based Approach) (undated).
- 31. Indian Health Service, Rough Draft of 9/9/93 SG Meeting Recommendations from September 1&2, 1993 Meeting (9/9/93).
- 32. Indian Health Service, Self-Governance Briefing for Office of Inspector General ((12/1/92) (includes SG law, Congressional reports).

- 33. Indian Health Service, Self-Governance Meeting (7/25/89) (IHS Agenda and Handouts).
- 34. Internal IHS Memo from Doug Black to Area Directors re Self-Governance, with attachments from DOI (3/31/93).
- 35. Internal IHS Memo re Self-Goverance Status (7/12/93).
- 36. Kauffman and Associates, Inc., Summary of the Indian Health Care Amendments of 1990 (P.L. 101-630, Title V) (1991).
- 37. Letter from Acting Director, IHS to Acting Asst. Secretary for Health (undated) (Formal papers re setting up OSG Establishment of the Office of Tribal Self-Governance within the Office of the Director -- Action).
- 38. Letter from Cherokee Nation to Reuben Howard re financial and facilities issues (9/9/93) (with attachments).
- 39. Letter from Ron Allen representing SG tribes to M.Lincoln (11/10/93) (hand delivered during meeting in Las Vegas, Nevada).
- 40. Memo by Indian Health Service Acting Director of the Office of Self-Governance re Reimbursements and Competitive Funds (8/20/93).
- 41. Memo from Acting Director, Division of Acquisition and Grants Operations to Assoc. Dir. Office of Admin. and Management re Division Functions and Their Compactibility under Self-Governance (5/21/93).
- 42. Memo from Acting Director, Division of Env. Health to Assoc. Dir. Office of Administration and Management re Draft Distribution of HQ Budget -- Self-Governance (6/3/93).
- 43. Memo from Acting Director, IHS to Area Directors re: Designation as the IHS Area Representative for Compacts of SG between the IHS and Tribes (4/7/93).
- 44. Memo from Acting IHS Director to W. Ron Allen (11/30/93).
- 45. Memo from Acting IHS DirectorTo tribal leaders from IHS Acting Director re IHS Work Group on Restructuring (10/26/93).
- 46. Memo from Assoc. Dir. Office of Information Resources Management to Assoc. Dir. Office of Admin. and Management re Review of Proposed Office of Information Resources Management Share of Headquarters Funds for Self-Governance (5/18/93).
- 47. Memo from Associate Dir. Office of Administration and Management to Associate Directors re SG HQ Distribution (5/12/93).

- 48. Memo from Associate Director Office of Environmental Health and Engineering to Director Division of Legislation and Regulations Office of Planning, Evaluation and Legislation re Legal Questions Pertaining to Facility Programs Under SG (5/24/93).
- 49. Memo from Attorney Advisor, Public Health Division to Associate Director, Office of Environmental Health and Evaluation re: Request for Opinion #90-13: Contractibility of Sanitation Facilities Construction Branch Program at Kincheloe, Michigan (12/11/90).
- 50. Memo from Attorney Advisor, Public Health Division to Billings Area Director re Contractibility of Sanitation Facilities Construction Branch at the Flathead Service Unit (1/28/91).
- 51. Memo from Chief, Litigation Branch to Michel Lincoln, Acting IHS Director re Request for Opinion: 93 64: Applicability of the Federal Tort Claims Act to Tribal SG Compacts (6/2/93).
- 52. Memo from Director Division of Contracts and Grants Policy, OAM to Assoc. Dir. Office of Admin. and Management re Compactibility of Contracts and Grants Policy Functions (5/24/93).
- 53. Memo from Director Program Integrity and Ethics Staff to Deputy Assoc. Dir. Office of Admin. and Management re Self-Governance and Non-contractible functions (5/25/93).
- 54. Memo from Doug Black to Loretta Beaumont and Sue Massica (Congressional staff) regarding SG shortfall funding (7/27/93).
- 55. Memo from Doug Black to six Area Directors re shortfall (7/30/93).
- 56. Memo from Executive Office of the President/Office of Management and Budget to Acting Assistant Secretary for Policy, Management, and Budget/Department of Interior (7/16/91).
- 57. Memo from IHS Acting Director, OSG to SG tribes re: Denver Baseline Measurements Meeting (6/1/93).
- 58. Memo from IHS Director to SG Tribes re planning grants (12/30/92).
- 59. Memo from IHS Office of Communication to IHS Office of Tribal Affairs re: Information for Presentation to State Public Health Administrators (4/22/92).
- 60. Memo from Indian Health Service Associate Director, OPEL to Associate Director, Office of Tribal Affairs re Self-Governance Compacts (6/16/93).

- 61. Memo from Indian Health Service Director, Division of Health Services Planning and Operations Research, OPEL to Director, Division of Legislation and Regulations, OPEL re: Draft Self-Governance Compacts: Sac and Fox and Grand Traverse Band of Ottawa and Chippewa Indians (5/28/93).
- 62. Memo from James V. Waskiewicz to Reuben Howard re OEHE Headquarter Distribution (6/4/93).
- 63. Memo from Michel Lincoln to Area Directors re Preparation for Self-Governance Negotiations-Action (5/21/93).
- 64. Memo from Philip Banker-Shenk to Tribal Leaders and Staff of SG Tribes re Presentation of the case for S.550 – The 1993 Tribal SG Demonstration Technical Amendments Bill (3/30/93).
- 65. Memo from the Department of Health and Human Services Office of Self-Governance to Michel Lincoln re Facilities Construction Programs under Self-Governance (8/24/93).
- 66. Memo from the Grand Traverse Band to Indian Health Service re Self-Determination transition (6/16/93).
- 67. Memo from Tom Austin, Director, Office of Tribal Operations Portland Area to Area Alcoholism Coordinator (11/8/93).
- 68. Memorandum from Associate Solicitor of Indian Affairs to the Asst. Sec. of Indian Affairs re Summary of SGDP Legislative History (5/29/90) (Reprinted in Falmouth Workbook, pgs. 3-7.)
- 69. Office of Tribal Activities/Indian Health Services, Tribal Activities Bulletin, Vol. 2, Issue 4 (Summer 1993).
- 70. P.L. 103-138 (11/11/93) (Appropriations for DOI and Related Agencies.)
- 71. P.L. 100-472, ISDA Amendments of 1988.
- 72. Presentation for Inspector General re P.L. 93-638 Amendments and Self-Governance (1/19/93).
- 73. R. Strickland, "Trying a New Way", ("draft copy, no date") (Independent Assessment Report on the Self-Governance Demonstration Project, Title III, P.L. 100-472 prepared by The Center for the Study of American Indian Law and Policy, The University of Oklahoma and the Center for Tribal Studies, Northeastern State University.)
- 74. R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Directors re Legislative Implementation Plan (4/1/93).

- 75. R.J. McCloskey, Director, Division of Legislation and Regulations, Office of Policy Evaluation and Legislation, Memo to Associate Director, Office of Legislation and Regulations re Self-Governance (12/8/92).
- 76. S. Rep. 103-205 (11/22/93) (Senate Committee on Indian Affairs, Legislation Establishing Self-Governance, and for Other Purposes.)
- 77. S. Rep. No. 101-85 (7/25/89) (Dept. of Interior and Related Agencies Appropriations Bill, 1990 to accompany H.R. 2788.)
- 78. S.Rep. 100-274 (12/22/87) (Indian Self-Determination Act Amendments of 1987 before the Select Committee on Indian Affairs.)
- 79. S.Rep. 101-534 (10/16/90) (Dept. of Interior and Related Agencies Appropriations Bill, 1991.)
- 80. S.Rep. 102-392, Indian Health Care Improvement Act of 1992 (8/27/92) (Select Committee on Indian Affairs.)
- 81. S.Rep. No. 102-199 (11/1/91) (accompanying S. 1287 before the Senate Committee on Indian Affairs.)
- 82. Secretary of Health and Human Services, DRAFT Report to Congress FY 92, SGDP, P.L. 102-184 (April 1993).
- 83. Section-by-Section Analysis of the draft Bill to make Permanent the Tribal Self-Governance Project, Self-Governance Conference (3/30/93).
- 84. Self-Governance: A Tribally Driven Initiative. The Tribal Self-Governance Demonstration Project (undated).
- 85. Self-Governance Communication and Education Project, Minutes and Handouts of the November, Las Vegas Meeting (11/93).
- 86. Shaping Our Own Future: The Next Step Towards a True Government-to-Government Relationship. The Tribal Self-Governance Demonstration Project Workshop. Sponsored by: Lummi Nation, Jamestown K'lallam Tribe, Hoopa Valley Tribe and the Quinault Indian Nation (1991).
- 87. Telephone conversation with Duke Ellis, IHS HQ West Property Management Branch, (12/6/93).
- 88. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Michel Lincoln on behalf of the Indian Health Service.)

- 89. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Michael T. Pablo, Chairman of the Confederated Salish and Kootenai Tribes of the Flathead Nation.)
- 90. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Elmer Manatowa, Principal Chief Sac and Fox Nation.)
- 91. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Marge Anderson, Chief Executive Mille Lacs Band of Ojibwe.)
- 92. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Harold Demoss, Council Member, Cherokee Nation Tribal Council.)
- 93. Testimony about the Tribal Self-Governance Demonstration Project, Oversight Hearing Before the Senate Committee on Indian Affairs (10/20/93) (By Dale Risling Sr., Chairman of the Hoopa Valley Tribe of California, written testimony als included draft paper Issues Regarding the Application of the Office of Federal Procurement Policy Act and the Federal Acquisition Regulations to SG Tribes.)
- 94. The Falmouth Institute, Self-Governance Demonstration Project, (10/93) (A workbook distributed for a seminar held Oct. 19 & 20, 1993 in Phoenix, Arizona).
- 95. Tribal Self-Governance Planning and Neogtiation Cooperative Agreements (11/19/93).