

**TRIBAL SELF-GOVERNANCE DEMONSTRATION
FEASIBILITY STUDY**

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF THE ASSISTANT SECRETARY FOR
PLANNING AND EVALUATION**

MARCH 2003



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 12 2003

The Honorable Ben Nighthorse Campbell
Chairman, Senate Indian Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Campbell:

Title VI of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended), requires the Department of Health and Human Services (HHS) to conduct a study on the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions and activities of the agency and to submit a report of this study to Congress. The enclosed report has been prepared in response to this requirement.

In the report, the Department concludes that a demonstration project is feasible and the report identifies 11 HHS programs that might be included in a demonstration. The report also delineates legislative changes that would be necessary to include the recommended programs in the demonstration and implement the recommended design of the demonstration. The separate views of the tribes and other entities that were consulted in the development of the study are located in appendix G of the report.

I am pleased to transmit this report to Congress.

Sincerely,

Tommy G. Thompson

Enclosure



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 12 2003

The Honorable Richard W. Pombo
Chairman, Committee on Resources
United States House of Representatives
Washington, D .C. 20515

Dear Chairman Pombo:

Title VI of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended), requires the Department of Health and Human Services (HHS) to conduct a study on the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions and activities of the agency and to submit a report of this study to Congress. The enclosed report has been prepared in response to this requirement.

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A handwritten signature in cursive script that reads "Tommy G. Thompson".

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Enclosure

INTRODUCTION

PURPOSE

To determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services (HHS).

BACKGROUND

History of Tribal Self-Governance Legislation

In 1970, President Nixon, in a "Special Message to Congress on Indian Affairs," laid the foundation of a new federal policy to promote tribal self-determination. Since that time, the policy of the federal government has been to promote tribal self-determination. As a major first step, the Indian Self-Determination and Education Assistance Act (the Act) was passed in 1975 to allow tribal management of programs that previously had been managed on their behalf by the Departments of the Interior (DOI) and Health, Education, and Welfare. Specifically, Title I of the Act authorized tribes to assume management of programs in the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) through contractual agreements with the two agencies. For the IHS, programs that could be contracted included hospitals, clinics, dental services and prevention and health promotion services. Under these contracts, tribes assumed full responsibility for planning, conducting, and administering the contracted programs, including hiring personnel, delivering services, record keeping, and other administrative functions.

Subsequent amendments to the Act extended the scope of tribal control over BIA and IHS programs. A 1988 amendment to the Act (Title III) created the first "Tribal Self-Governance Demonstration Project" in the DOI. Under the demonstration, tribes were authorized to consolidate multiple contracts and grants into a single funding agreement and assume control over decision-making and management of BIA programs, services, functions, and activities previously managed by the agency. Most significantly, the demonstration provided tribes with broad flexibility to use the resources under the agreement, including the flexibility to consolidate and redesign programs to better meet tribal needs. In 1994, the success of the demonstration was recognized and Congress amended the Act to create a permanent self-governance authority in BIA. In 1996, the Act was again amended to allow tribes to take over control and management of programs in the DOI outside the BIA.

In the meantime, 1992 amendments to the Indian Health Care Improvement Act extended the Title III self-governance demonstration to the IHS and its programs. The Tribal Self-Governance Amendments of 2000 (P.L. 106-260) confirmed the success of the self-governance demonstration in the IHS by the passage of Title V of the Act, making tribal self-governance permanent within the IHS.

The amendments of 2000 also added Title VI (Appendix A) to the Act, requiring that the Secretary of HHS "conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency [HHS]." This Title applies to non-IHS programs administered by the Department. Title VI also delineates what the Secretary must consider in conducting the study

and requires a joint federal/tribal stakeholder consultation process. This report addresses the Title VI study and report requirements.

Self-Governance Goals

Tribal self-governance is an expansion of self-determination with notable changes in how federal funding is received and expended by tribes. Tribes have described tribal self-governance as a "new partnership" between the federal government and tribes. As defined by Congress in P.L. 106-260, the goal of self-governance is "to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities." In practice, self-governance has two basic parts: 1) the transfer of the responsibility for managing Federal programs (and funds) that serve Indians from existing service providers to the tribes, and 2) providing tribes with the broad authority to redesign federal programs and reallocate federal resources to more effectively and efficiently meet the needs of tribal communities.

Department Programs

Title VI requires an assessment of the feasibility of expanding self-governance to HHS programs and activities beyond those in the IHS. Currently, HHS comprises 10 major agencies and a number of staff offices. These agencies have jurisdiction over more than 300 different programs, ranging from highly specialized medical research to the provision of health and social service benefits to individuals. As a prelude to the study, an inventory of all non-IHS programs was compiled. Throughout the study, the inventory provided a baseline of programs to assess the feasibility for self-governance.

STUDY REQUIREMENTS

To determine the feasibility of a self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services, Title VI requires that the Secretary consider the following: 1) the probable effects on specific programs and program beneficiaries of such a demonstration project; 2) statutory, regulatory, or other impediments to the implementation of such a demonstration project; 3) strategies for implementing such a demonstration project; 4) probable costs or savings associated with such a demonstration project; 5) methods to assure quality and accountability in such a demonstration project; and 6) other issues determined by the Secretary or in consultation with Indian tribes.

The study report must include the results of the feasibility assessment and a list of the HHS programs, services, functions, and activities (or portions thereof) that would be feasible to include in a self-governance demonstration project. The list must indicate which programs would be feasible to include both with and without amending statutes or waiving regulations that the Secretary may not waive. In the case of those programs and other functions that could be included only with amending statutes or waiving regulations that the Secretary may not waive, the study must identify legislative actions required to include those programs.

In conducting the study, the Secretary is required to consult with tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups. Consultations are jointly conducted by the Secretary and tribes. At the conclusion of the study, the legislation allows for separate and direct recommendations from the tribes and other entities with respect to the conclusions of the Secretary regarding a self-governance demonstration project.

METHODOLOGY

Program Feasibility

The study must identify HHS programs, services, functions, and activities (or portions thereof) that are feasible for inclusion in a self-governance demonstration project. The study recommends eleven existing HHS programs for inclusion in a demonstration. The recommendation is based on a number of considerations. First, except in the area of substance abuse and mental health programs, transfer of the programs to tribal authority has already taken place. In this respect, the primary issue of self-governance for a demonstration is not the transfer of program authority, but the issue of flexibility, control over priorities, and administrative simplification. Tribes have a demonstrated record in managing these programs and no studies or other evidence exists to suggest that tribes are not managing these programs satisfactorily. Second, there are no insurmountable legal barriers that were identified that would preclude inclusion of these programs in a demonstration under the recommended design, although it will be necessary to make certain provisions in the existing program statutes and regulations inapplicable to the tribes participating in a demonstration in order to implement the recommended design (see Appendix E). A cited provision in a program statute or regulation can be made inapplicable to the tribes participating in a demonstration project through either a provision in the legislation authorizing the project or amendment of the statute authorizing the program or programs in question. Third, based on consultation with the tribes, the tribes feel these programs address significant needs facing their communities. Fourth, most of these programs have well-established processes for arriving at tribal funding amounts, thereby avoiding the IHS and BIA difficulties in determining funding levels. Finally, consideration was given to the number of programs that were successfully managed under the BIA and IHS demonstrations. The number was small in each case, less than 10 programs. Using the BIA and IHS demonstrations as a proxy, it appears that a demonstration within that range of programs is feasible. The manageability of a larger demonstration, in terms of programs, is unknown and could impose more risk.

Impact on Programs and Beneficiaries

The Secretary is required to consider the probable effects of a demonstration on specific programs and program beneficiaries in determining the feasibility of a demonstration project. To determine probable effects, information was mined from a number of federally and privately sponsored studies and reports that examined the self-governance experience in the BIA and IHS and tribal management of non-IHS programs in HHS. These are summarized in the impact section of this report and a comprehensive list of the studies and reports that were consulted is provided at Appendix B.

While most of the existing studies focus on BIA and IHS self-governance programs, the studies are used as a proxy to assess the ability of tribes to manage programs, assure program quality and accountability, and serve beneficiaries under a self-governance demonstration for non-IHS

programs. For the most part, the studies are qualitative, based on personal accounts of staff and clients of self-governance programs. No quantitative assessment of client outcomes, program quality or access to services under self-governance currently exists. One recommendation of this study is for Congress to require a comprehensive evaluation of a demonstration project as part of any legislation authorizing a demonstration.

Costs and Savings

The study requires an assessment of the probable costs and savings of the project. Again, much of the information for this assessment is derived from the BIA and IHS experience with self-governance. Costs and savings have been quantified to the extent that data is available. Some elements of costs and savings were not quantifiable due to lack of reliable data. The specific methodology used to arrive at a cost or savings projection is incorporated in the discussion of the cost or savings element.

Consultation

Congress provided a significant role for stakeholder consultations in the development of the study findings. In light of this, stakeholders were consulted on key study issues such as what HHS programs should be included in a demonstration, the potential impact of a demonstration on beneficiaries, and the design of a demonstration. The consultation process included a variety of stakeholders such as tribes, state government organizations and program managers within HHS. The process was used not only to solicit opinions on particular issues of design and programs, but to try to reach a consensus, to the extent possible, on the recommendations that are in this report. Therefore, the consultation process and the opinions and recommendations of the stakeholders played a significant role in reaching the conclusions of the study.

Consultations were carried out jointly by a tribal advisory group and HHS staff. An initial consultation protocol (Appendix C) was jointly developed by HHS staff and the tribal advisory group. The protocol served as the basis for the consultation process. The leader of the tribal advisory group, Merle Boyd, and the HHS study leader, Dr. Delores Parron, served as joint chairpersons of the consultation process.

Initially, four regional tribal consultation meetings were held, followed by a consultation meeting with representatives of state and local government organizations. A meeting with non-governmental organizations representing health and human service professional associations and beneficiaries was also held. Finally, a national wrap-up session for all interested stakeholders was held in Washington, D.C. Written invitations to the tribal sessions were extended to more than 950 tribes and tribal organizations. Some 20 organizations representing state and local governments were invited to the state and local government session. Over 180 non-governmental organizations were invited to that session. All stakeholder organizations were invited to the national wrap-up session. Transcripts of each session are available at the study website (<http://aspe.hhs.gov/SelfGovernance>) and Appendix D provides additional information and details regarding each session. Written comments were also solicited from all stakeholder organizations at various stages of the study, including during initial consultations and on a formal draft of the report.

Throughout the study, a study website (see above) was maintained. It included background information on the study, information on meetings and meeting transcripts, as well as drafts of study issue papers. Stakeholders were provided the website address and were encouraged to regularly visit the site for up-to-date developments and information.

FINDINGS

A SELF-GOVERNANCE DEMONSTRATION PROJECT IS FEASIBLE

Study results indicate that a self-governance demonstration project for non-IHS programs, services, functions, and activities (or portions thereof) of HHS is feasible, provided that the statutory changes listed in Appendix E are made. To arrive at that conclusion, a number of factors were considered. The probable effects of a self-governance demonstration on beneficiaries weighed considerably in the conclusion. The opinions and recommendations of potential stakeholders also were important. A determination that a number of HHS programs could reasonably be part of a demonstration was critical to the conclusion. While it is recognized that these factors are qualitative to a great extent, Congress placed considerable weight on these factors, especially the consultation process, when authorizing the study. Findings relevant to each of these factors are discussed below in detail.

A Demonstration Would Likely Have a Positive Effect on Programs and Program Beneficiaries, Although Some Problems May Exist.

Most extant studies of the impact of direct tribal management of federal programs conclude that tribal assumption of program operations generally has had a positive effect on program beneficiaries. This conclusion must, however, be qualified. The extant studies are primarily qualitative in nature, based on interviews with tribal officials, and do not provide quantitative data on service outcomes, such as the number of clients served or beneficiary health and well-being. Also, the number of studies that have looked at the impact of tribal assumption of program operations on beneficiaries is limited and the study samples are not nationally representative.

With this caveat, a summary of what is known about the probable effect of a self-governance demonstration project on beneficiaries follows. As mentioned earlier, a bibliographical reference to these reviewed studies is provided in Appendix B.

- A General Accounting Office (GAO) study of individual tribal community health contracts in Alaska concluded that service levels were not greatly affected by the switch from IHS Regional Health Organizations to community-run programs, although existing problems with the inadequate reimbursement of indirect costs have the potential to affect service levels if tribes begin to move program funds to cover shortfalls in indirect costs. ([GAO/HEHS-98-134](#))
- A review of the tribal Child Care Development Fund (CCDF) grants by the HHS Office of the Inspector General found that such grants increased access to child care in their service areas. This was done in several ways. For example, a number of tribes chose to

administer certificate programs that maximize the number of children served by paying lower rates to providers. Tribes also chose to extend services to tribal members not eligible for the State programs, rather than supplanting the State services. This was done by expanding eligibility criteria beyond those that are set by the States and by setting copayments below State levels to make services affordable to those who could not afford State copayments. Tribal programs were found to be more culturally sensitive than State-run programs. ([OEI-05-98-00010](#))

- A report by the National Indian Health Board (NIHB) looked at the impact of self-governance on beneficiaries by comparing compacting, contracting and IHS direct-service experiences over several years. The information was based on questionnaires submitted by tribal leaders and health care directors. Study results for the study period showed that tribally-operated health care systems substantially improved access to services: 50% of tribally-operated systems reported a net increase in community-based programs; 100% added at least one new clinical service; 34% had more auxiliary services; and 100% had at least one new prevention program, with 68% having more than one additional prevention program. In addition, the contracting and compacting tribes in the study added a net total of 37 facilities - about 44% of the contracting and compacting tribes in the study. The survey also found that some 93-95% of compact and contract tribal leaders and health directors felt quality of care (waiting time, types of services, number of people served and overall health care system) had improved during the term of study. This is compared to 62% for IHS direct-service tribes. (*Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management*, NIHB, 1998)
- Based on interviews and available tribal records, an independent evaluation of the first year of the BIA self-governance demonstration project (1991) showed evidence of increased program and service availability. However, little information was available to compare client experiences before and after tribal assumption of services. (*Independent Assessment Report on the Self-Governance Demonstration Project*, The Center for the Study of American Indian Law and Policy, University of Oklahoma and The Center for Tribal Studies, Northeastern State University at Tahlequah Oklahoma, unpublished)
- Reflecting its earlier warning, a subsequent GAO study (GAO/HEHS-98-134), based on interviews with tribal and federal staff, concluded that tribes had begun to use either program funds or other tribal resources to support shortfalls in indirect costs. The effect had been either to reduce services to tribal members, if program funds were used as an offset, or to preclude the use of tribal resources to supplement program funds or support other activities to help tribal members. Examples given included: reductions in staff salaries; the inability to offer salaries sufficient to attract qualified personnel, filling positions with unqualified or under qualified personnel; and unfilled positions - all of which could have an eroding effect on access and quality of services to beneficiaries. ([GAO/RCED-99-150](#))
- In the course of conducting the current feasibility study, BIA and IHS employees were interviewed and asked for their assessment of how self-governance had affected program beneficiaries. Most indicated that, although they lacked empirical data to support their conclusions, they believed self-governance overall had been positive.

A final note with respect to the potential impact of a demonstration is necessary. Many of the cited studies also mention the positive benefit that self-governance has on the roles and capabilities of tribal governments. While this may not relate directly to service levels, it is an important benefit that should not go unmentioned.

Stakeholders Do Not Oppose a Tribal Self-governance Demonstration if Concerns Are Addressed.

In the course of consultations on the feasibility of a demonstration, stakeholders did not disagree that a demonstration is feasible (transcripts of the sessions are available on the website cited earlier). While this was the case, stakeholders also raised a number of issues regarding the need to design a demonstration that would address concerns about program impact, quality and identity. For example, State and local government stakeholder organizations were especially concerned about dual eligibility and program accountability. These and other stakeholder concerns were considered and are addressed in the study recommendations.

Statutory Changes Would Be Needed to Include a Number of HHS Programs in a Demonstration.

While specific programs are identified and listed as feasible for inclusion in a self-governance demonstration project, it is important to note that their inclusion is recommended in conjunction with specific demonstration design recommendations that will provide important protections for program identity and quality. Further, specific statutory changes in virtually all of the programs will be needed before they can be included in a demonstration with the recommended design. Appendix E lists the necessary statutory changes. In general, the changes appear to be ones that can be addressed.

COSTS WILL LIKELY OUTWEIGH POTENTIAL SAVINGS UNDER A DEMONSTRATION

The BIA and IHS demonstration experiences are used as a proxy to approximate what may happen to costs under a demonstration. Both demonstrations reasonably resemble the size and scope of the recommendations in this study and their use as a proxy is intended to illustrate a general range of what might happen. The actual scope of a demonstration that is authorized would determine costs more precisely. In this respect, both the BIA and IHS self-governance experiences indicate the likelihood that a self-governance demonstration project will require funding above current levels in several cost categories. It is also probable that the cost of a demonstration will exceed any realized savings from self-governance, at least in the short term (savings, if they occur, would more likely be long term). Since none of the targeted programs include direct Federal delivery of services, but rather are components of a Federal/State/Tribal partnership, there also will be no apparent immediate savings in Federal administrative costs (see pp. 13-14).

Costs

Possible costs of a demonstration project fall into five cost categories: startup, including tribal planning and negotiation costs; project management; direct; indirect; and matching costs.

- Startup

Before entering a demonstration project, tribes will need to assess their capacity to enter into a self-governance agreement. This includes identifying tribal law or tribal organization changes that may be needed, management systems improvements that must be made, or other changes necessary prior to the assumption of program responsibility. Tribes also will need to prepare and submit self-governance proposals, negotiate self-governance agreements with HHS, and implement identified management changes and improvements after startup. All of this will require tribes to incur startup costs for which they are unlikely to have sufficient tribal resources.

Because of the limited resources of many tribes, both BIA and IHS have made small, one-time grants available to tribes to cover startup costs. In IHS, \$50,000 planning grants were offered to tribes to defer the costs of assessing capacity, developing proposals and identifying and implementing management changes. An additional \$20,000 grant is available for covering the cost of negotiating initial self-governance agreements with HHS. During consultations with the tribes on design issues, the availability of similar grants was identified as essential by the tribes for a demonstration project. If authorized, \$3.5 million would be needed to provide a planning and negotiation grant to each of the 50 tribes or tribal consortia participating in a demonstration based on the IHS model. If a demonstration was later made permanent, a much larger number of tribes would probably choose to participate, increasing the cost proportionally.

- Project Management

Design recommendations for a demonstration (see the recommendations section of the study) include a single point of contact in HHS for project management. During stakeholder consultations, tribes were especially vocal about the need for this structure. Under this design, a single office in HHS would be assigned the responsibility for management of a demonstration project, including policy development, leading negotiations, technical assistance, financial management, and project oversight.

Currently, both BIA and IHS have offices dedicated to the management of their self-governance programs. Both offices have workloads similar to what might be anticipated under a demonstration and are almost identical in size. Therefore, the cost of these offices is assumed to be a good proxy for the cost of a project management office for a demonstration. Based on this assumption, the annual cost of supporting a project office would be about \$1.2 million annually.

Not included in the office estimate are additional project costs for travel to sites for negotiation of initial and annual agreements. Assuming an average of 50 negotiations annually, teams of five federal negotiators (similar to the IHS experience), and an average per person cost of \$1,500, annual travel costs to the project would average about \$375,000. Also, not included in the office estimate are legal support costs. The cost of legal staff to review agreements and waiver requests, assist with negotiations, and address

other legal issues that are likely to arise during the course of a demonstration is estimated at \$1,000,000 annually (the equivalent of six full-time staff based on the IHS experience).

Finally, the cost of an evaluation of a demonstration project (see the recommendations section of the study) is likely to be about \$1,000,000 annually, including costs to help tribes meet data collection requirements of the evaluation. All stakeholders agreed that a comprehensive evaluation is needed to assess the results of a demonstration. Tribes were especially concerned that additional resources be available if data collection requirements were significant.

The cost to tribes of data collection and reporting related to performance measurement requirements (see recommendations section) is not included as a cost, since existing program funds can be used for data collection and reporting related to program outcomes.

In total, annual project management costs are estimated to be about \$3.575 million annually during the period of a demonstration. One time costs of up to \$3.5 million would be needed for tribal planning grants.

- Direct Costs

Of the programs recommended for inclusion in a demonstration project (see recommendations section), tribes currently are eligible for and receive funding under all eleven of the programs. In all but one, funds are already set aside for tribal grantees.

- Indirect Costs

A number of recent studies have documented the problems tribes encountered during the BIA and IHS self-governance experience in receiving full reimbursement for indirect costs (see GAO/HEHS-98-134, GAO/RCED-99-150 and GAO-01-249). The studies also highlight the potential impact of shortfalls in indirect costs. Either program or tribal funds may be diverted to cover shortfalls, resulting in a diminution of services or other development opportunities for tribal members.

Full reimbursement of indirect costs is an issue for a tribal self-governance demonstration project. Eight of the programs identified as feasible to include in a demonstration currently have statutory or regulatory limits on administrative costs (see Appendix F) which may affect the ability of tribes to fully recover their indirect costs. Administrative costs can make up a substantial portion of a Tribe's total indirect costs. The magnitude of the potential problem caused by the limitation on administrative costs can be seen from a projection of the shortfall of indirect costs under tribal programs. Using an aggregate negotiated indirect cost rate of 25% for tribes by the DOI between 1989 and 1996 (the aggregate or average rate was cited by the GAO in a study of tribal indirect cost rates - GAO/RCED-99-150), and assuming that administrative costs sometimes comprise all of the indirect costs incurred by a tribal grantee, shortfalls in indirect costs could range from 0% to 20% for the eight programs that impose reimbursement limits. Tribes having indirect rates above the average rate of 25% would have significantly greater shortfalls.

Three options are available to Congress to address the indirect cost issue. First, caps on administrative costs can be maintained, although the impact of caps may discourage participation in a demonstration by tribes with insufficient resources to offset shortfalls or force tribes to use tribal resources that otherwise could be used for services or other development purposes. Second, caps can be waived. This has the potential for diverting funds from program services to cover administrative costs. Third, caps can be waived, but additional funds provided to offset a potential shift of funds from services to indirect cost categories.

If the last option is considered by Congress, the cost of a demonstration would be considerable. For example, administrative costs and development costs are limited to 15% of the Head Start program. Using the aggregate negotiated rate of 25%, an average shortfall in indirect costs for a grantee whose administrative and development costs comprise all of their indirect costs would be 10% of the grant award. For the Head Start program, 160 tribal grantees received a total of \$171 million in FY 2001 grants, an average of a little more than \$1.0 million per grantee. Applying the average indirect cost differential to the Head Start program and assuming 50 tribes or tribal consortia in a demonstration, the shortfall in indirect costs for one year would be about \$5 million. While this is one example, there are seven other programs where similar costs would be incurred. If a demonstration were later made permanent, the cost of raising the allowable administrative and development cost rate from 15% to 25% for all 160 tribal Head Start Grantees could be as high as \$16 million.

Of the three options, the Department's recommendation is to maintain the status quo; i.e., administrative cost caps should be maintained. As stated, the two other options would have considerable consequences. The cost of a demonstration would rise significantly; or funds would be directed away from program services. These options would also mean that participating tribes would be treated differently than other recipients under the programs, including those tribes not participating in a demonstration project. What is recommended, to help balance the potential tribal need for indirect costs, is to allow tribes to consolidate indirect costs funds up to the total allowable from all programs and use those funds to cover any allowable indirect costs.

- **Matching**

Four of the programs determined feasible for inclusion in a self-governance demonstration require that grantee funds match federal funds. These requirements currently apply to tribal as well as State grantees. Matching requirements range from 0% to 25%. For tribes with limited resources, matching requirements make participation in a demonstration project problematic, although several programs permit and do waive all or part of the matching requirement. Congress may want to consider this impact if a demonstration is authorized. Appendix F outlines current matching requirements for targeted programs.

Savings

In trying to assess probable savings that might accrue under a tribal self-governance

demonstration project, potential savings from the transfer of program management to the tribes and program consolidation were examined. In doing so, the development of numerical estimates of savings was found to be impractical due to a lack of quantitative data on which to base estimates. However, from an analytical viewpoint, it does not appear that any substantial amount of savings is likely to accrue to offset the projected costs of a demonstration. An analysis follows.

- Program Efficiencies

Much of the literature on self-government concludes that savings in management costs will accrue as tribes consolidate or simplify accounting, reporting, and other management structures under self-government agreements. For example, when tribes consolidated multiple contracts with IHS into single, self-governance compact agreements, savings in overhead expenses associated with the management of the separate contracts were believed to accrue. There is no clear evidence, however, to support that conclusion. While extant studies mention that possibility and some cite case examples, none provide quantitative evidence to that effect.

- Devolution of Federal Responsibility

It is generally assumed that the transfer of program responsibility to tribes under self-governance will reduce the need for federal staff and other expenses and that the attendant savings can be transferred to the tribes for program use. This was the case as tribes exercised self-governance options in IHS. Technically, no actual savings accrue in this situation, nor were savings intended to accrue. Federal funds simply move from one provider (the federal government or other non-tribal entity) to another (the tribe). The process involves an offset and transfer of funds. A further discussion of this process is warranted to explain what tribes may or may not expect in the way of funds available for transfer under a demonstration.

Fundamentally, there is a difference between the IHS experience and what can be expected under self-governance for non-IHS programs. The IHS is a direct service delivery program. IHS personnel directly provide health services to tribal members. As tribes take over service delivery from IHS, IHS personnel are no longer needed and attendant savings or personnel are transferred to the tribes.

However, for the HHS programs recommended for inclusion in a demonstration project, federal personnel do not deliver services directly. Rather, these programs are carried out as either financial assistance (grant) programs or through contracts. Under these instruments, grantee or contract personnel deliver services. Therefore, under a self-governance demonstration, there would not be a corresponding reduction in federal staff as tribes assume responsibility for programs under a demonstration.

On the other hand, it is probable that some grantees or contractors (State agencies for example) may experience savings if tribes begin to deliver services heretofore delivered by grantee or contract staff. However, it is not possible to provide an estimate of what

savings might accrue for a particular program for a variety of reasons. Data to estimate the amount of funds currently spent by grantees or contractors serving tribal clients are not available. Also, most of the programs recommended for inclusion in a demonstration project already authorize tribes to receive grants or contracts to deliver services to tribal members and many tribes already are doing so. In these cases, no savings would accrue if the transfer of a program to tribal control takes place prior to the initiation of a demonstration project. Furthermore, it is not known which tribes would qualify under a demonstration and what programs they would want to include in a self-governance agreement. This uncertainty makes it impossible at this time to estimate the extent to which specific programs might devolve from existing grantees or contractors to a tribe and what attendant savings might be available for transfer to the tribe.

With respect to the transfer of program responsibility and funds from existing grantees to tribes, it also should be noted that tribes may actually receive less funding in some cases. Specifically, in programs such as the Low Income Home Energy Assistance Program (LIHEAP) and Temporary Assistance to Needy Families (TANF), some States regularly supplement the statutory minimum that tribes are due under statutory formulas or provide additional funds if tribes run out of funds. States could withdraw these supplements if tribes elect to participate in a demonstration and receive funding directly, rather than receiving funding through the State. Continuation of supplemental agreements between tribes and States would not, however, be precluded because of a demonstration. Inclusion of LIHEAP and TANF by a tribe in a demonstration project, would be a tribal choice and based on what the tribe determines is in its best interest and negotiations between the tribe and State.

While federal funds are largely transferred to grantees or contractors, federal personnel will be involved in project management activities related to the grants or contracts. These activities include policy development, award and oversight, financial management, and legal duties. There is no likelihood, however, that a self-governance demonstration will lead to savings related to these federal functions since most staff performing these functions are not solely, or even significantly, dedicated to tribal work. Most have broad portfolios that encompass all types of grantees or contractors and tribal work will be a very small percentage of the total time and effort. In those few cases where federal staff may be working exclusively on tribal programs, the functions are those typically needed for award, audit, and other federal responsibilities, not direct program administration or service delivery.

RECOMMENDATIONS

PROGRAMS

Recommendation 1: Eleven existing HHS programs have been identified as feasible for inclusion in a tribal self-governance demonstration project.

The study requires identification of HHS programs, programs, services, functions, and activities (or portions thereof) that are feasible to include in a tribal self-governance demonstration project. Based on the factors discussed in the study section on methodology, the following programs are identified.

Administration on Aging

Grants for Native Americans

Administration for Children and Families

Tribal Temporary Assistance for Needy Families

Low Income Home Energy Assistance

Community Services Block Grant

Child Care and Development Fund

Native Employment Works

Head Start

Child Welfare Services

Promoting Safe and Stable Families

Family Violence Prevention: Grants for Battered Women's Shelters

Substance Abuse and Mental Health Services Administration

Target Capacity Expansion

All of these programs already have statutory authority that provides for grant awards directly to tribes and tribal responsibility for program management. In this sense, the tenet of self-governance relating to tribal assumption of program administration is already realized and implemented under these programs. However, tribes must administer each program separately under current program rules and are not allowed to redesign or consolidate programs to meet tribally-defined needs to the extent contemplated under the other important tenet of self-governance.

Recommendation 2: The Secretary should be authorized to add up to six additional programs during the course of the demonstration project.

While specific programs would be authorized at the outset of the demonstration, tribal needs are not necessarily limited to those programs that are initially included. To allow flexibility and meet additional tribal needs as the demonstration progresses, it is desirable to provide some ability to expand the demonstration beyond the initial programs. Therefore, it is recommended that the Secretary have the authority to place up to six additional programs in the demonstration.

Recommendation 3: Programs targeted for a demonstration project should be specifically designated in authorizing legislation.

Eleven existing programs are recommended for inclusion in a demonstration project. Authorizing legislation should clarify this point. No additional programs are recommended at this time, and stability is important to the ultimate evaluation of a demonstration.

Statutory/Regulatory Changes

Title VI requires that all statutory and non-waivable regulatory changes needed to include recommended programs in a self-governance demonstration project be listed in the report. Such changes, for the eleven existing programs, have been identified and are presented in Appendix E. Specifically, the changes identified in Appendix E are needed to make existing program or administrative statutes and regulations compatible with the demonstration design recommendations outlined in the design section that follows. The need for similar changes may limit the Secretary's ability to add additional programs during the course of a demonstration.

DEMONSTRATION DESIGN

While Title V of the Act contains the basic elements that define self-governance in the view of tribes and the Congress, there are significant differences between the IHS model and a demonstration that includes non-IHS programs that will vary significantly in objectives, services, beneficiaries, and administrative requirements. These differences argue for modifying the Title V model. For example, most of the programs recommended for inclusion in a demonstration have statutorily derived formulas for awarding funds, making it impractical to adopt the Title V approach to negotiating funding agreements. The need to address program identity and accountability issues raised by stakeholders also argues for something other than the Title V model.

Therefore, rather than relying on Title V, a specific set of demonstration design recommendations (not to be confused with specific recommendations that follow on the ability of tribes to redesign programs during the course of a demonstration) have been developed and are recommended as the basis for a demonstration. If Congress chooses to create a self-governance demonstration, these design elements should be included in the authorizing legislation.

Definition- Indian Tribe

Recommendation: For the purpose of a demonstration project, it is recommended that the definition of an Indian tribe include federally-recognized Indian tribes or, where authorized by an Indian tribe, an inter-tribal consortium or a tribal organization acting on its behalf.

Selection of Participating Tribes

Recommendation: A demonstration should be limited to up to 50 projects composed of tribes or inter-tribal consortia that either have established compact and funding agreements under Title V of the Act or tribes or consortia that have successfully carried out a planning grant (or in lieu of a planning grant completed a pre-award survey) and meet specified financial stability requirements.

A demonstration project should be open to tribes or tribal consortia that have established compact and funding agreements under the terms of Title V of the Act. These tribes or consortia have already demonstrated program and financial management capacity. For those tribes or consortia not meeting this threshold, eligibility should be established by successful completion of a planning grant (or in lieu of a planning grant completed a pre-award survey) and demonstration

of 3 fiscal years of financial stability and management as evidenced by having no uncorrected significant and material audit exceptions under Federal grants or contracts.

In addition, a demonstration should be limited to 50 projects to maintain costs and the manageability of a demonstration and attendant evaluation. The Secretary should be authorized to establish criteria for the selection of participating tribes or consortia in the event that more than 50 tribes or consortia apply for a demonstration. It should be noted that a demonstration will not affect the ability of non-participating tribes or consortia to apply for and operate HHS programs, including the programs under a demonstration.

Planning and Negotiation Grants

Recommendation: Planning grants should be authorized to assist tribes in preparing self-governance proposals. Grants should be limited to tribes with a demonstrated need.

As discussed in the cost section of the study, most tribes do not have sufficient resources to prepare and negotiate self-governance agreements. Prior models have allowed one-time grants for that purpose. Similarly, it is recommended that planning and negotiation grants (at \$70,000) be authorized for up to 50 tribes or tribal consortia that want to participate in a self-governance demonstration project. Since some tribes may already administer programs and have experience with self-governance, grants should be limited to those tribes demonstrating a need for planning technical assistance.

Application Process

Recommendation: The Secretary should be authorized to consolidate existing program application requirements into a single application that tribes would submit for proposing participation in a demonstration project.

Currently, programs recommended for inclusion under a demonstration project have separate and often extensive application requirements. While administrative simplification is integral to self-governance and a single application should be part of a demonstration project, implementation of the single application approach will require abolishing separate application processes and information requirements that now exist in the targeted programs. While some of these processes and requirements may not be critical or overlap, others will remain essential to defining the scope of the programs, services, functions, or activities to be carried out under a demonstration; e.g., information related to definitions of service areas, client eligibility, programs objectives and assurances required in program legislation. Therefore, it is important that the Secretary be given specific authority to develop a consolidated process and format for submission of compacts, including the ability to require continued use of critical elements of the existing application process and information requirements from the targeted programs.

Compacts

Recommendation: The Secretary should be authorized to negotiate, to the extent permitted under current law, and enter into a written compact with each Indian tribe participating in a demonstration.

The compact should set forth the terms of the agreement that apply while the agreement is in effect and modifications made only by mutual agreement of the parties.

Funding Agreements

Recommendation: The Secretary should be authorized to negotiate, to the extent permitted under current law, and enter into a written funding agreement with each participating Indian tribe.

With the exception of Head Start, the Older Americans Act, and the SAMHSA Targeted Capacity Expansion program, the programs targeted for a demonstration have statutorily mandated formulas for calculating award amounts, including provisions for indirect costs. In the case of Head Start, awards are based on a negotiated amount. In the case of the Older Americans Act, the Administration on Aging uses a population-based formula (although, as stated, not statutorily mandated). Therefore, it will be important for legislation authorizing a demonstration to recognize that award amounts under funding agreements will largely be based on formulas or other statutory requirements of the authorizing legislation of the programs and will not be subject to negotiation or change unless Congress revises existing formulas. Specific legislative authority will also be needed to allow tribes to move funds between programs included in their demonstrations. With these caveats regarding award amounts, the overall recommendation is that agreements should be mutually negotiated between the Secretary and the tribe.

Indirect Costs/Matching

Recommendation: Current statutory requirements relating to indirect cost should be maintained.

The issue of indirect cost is discussed in detail under the "findings" section of the study. Removing statutory caps on administrative cost that affect recovery of indirect cost would significantly increase the cost of a demonstration project (or potentially result in a reduction of services) and create a situation where State programs would be treated differently than tribes. It is also possible that administrative efficiencies of a demonstration will allow tribes to realize cost savings that will reduce or eliminate any burden caps impose. For these reasons, the recommendation is to maintain current indirect cost caps where applicable, while allowing the consolidation of total allowable indirect costs from each program into a single indirect cost pool to cover administrative costs of the compact and funding agreement.

For similar reasons, a change in current law with respect to program matching requirements also is not recommended, although some of the target programs allow the Secretary to waive matching requirements.

Redesign and Consolidation

Recommendation: Tribes should be provided the authority to redesign and consolidate programs during the course of the demonstration project, subject to limits imposed by non-waivable statutory or regulatory provisions of the individual programs.

Redesign and consolidation authority is a principal tenet and inseparable from the definition of self-government. In practice, this authority provides tribes with the flexibility to change programs and reallocate funds among programs to meet specific tribal needs under a self-government agreement within the boundaries of controlling program legislation.

Also, it should be noted that, since a demonstration largely will be administered within existing legal requirements, redesign and consolidation opportunities will be limited by the authority to waive statutory requirements.

Waivers

Recommendation 1: Program waivers, to the extent provided by statute and regulation, should be available to tribes throughout the demonstration project.

The ability to redesign and consolidate programs and activities depends, in part, on the use of regulatory waiver authority. The Secretary's authority to grant waivers is spelled out in current law and regulations applicable to the targeted programs. Current authority is seen as sufficient and no additional waiver authority is requested for a demonstration.

Recommendation 2: Waiver requests should be limited to the term of a demonstration and subject to withdrawal if the Secretary determines compliance with the waived provision is essential to program integrity. If withdrawal is contemplated, tribes should be provided due process that would include timely notification and the ability to propose a corrective action plan.

Since waivers may have a substantial impact on program beneficiaries, the ability of the Secretary to monitor the use of waivers and to withdraw waivers is an important element under a demonstration project when there is clear evidence that continuation of a waiver will result in substantial harm to the beneficiaries. Tribes should have administrative appeal rights with the tribe bearing the burden of proof and the standard of review being whether the decision withdrawing the waiver was arbitrary or capricious.

Withdrawal and Termination

Recommendation: A demonstration should defer to current law regarding withdrawal and termination for the targeted programs.

Withdrawal occurs when a tribe decides not to receive funding and the Federal government funds another grantee in its place to conduct the program. Termination occurs when the Federal government terminates tribal control of programs for cause. Current statutory and regulatory provisions address withdrawal and termination and should be maintained for the demonstration. It is important to note that States or other entities would assume services should withdrawal and termination occur, since these programs are not delivered directly by HHS.

Final Offers - Appeals

Recommendation: While tribes should have the ability to appeal rejections of final offers for compacts and funding agreements, these appeals should be limited in scope.

To evaluate a time-limited demonstration, it is important that the project and agreements be in place quickly and stability of the program be established. This will not be the case if appeals delay the start of one or more components of a demonstration, such as putting in place funding agreements or reporting systems. Therefore, it is recommended that a demonstration project provide for a limited appeals process in cases where the department and tribes are unable to reach agreement on the terms of self-governance agreements. The legal framework for the

process should include the issuance by the Department of a written statement giving the reasons for disapproval of a final tribal offer and the right of a tribe to appeal the decision to the Intra-Departmental Council on Native American Affairs, a body of senior department officials responsible for advising the Secretary on tribal matters in the Department. The burden of proof on appeal would be borne by the tribe. An "arbitrary or capricious" standard would be used. The decision of the Council should be final and not subject to judicial review.

Conflict of Interest

Recommendation: A conflict of interest prohibition should be established for tribes participating in a demonstration project.

Tribes should be required to have internal measures in place to prevent conflict of interest in the administration of the programs under a demonstration project.

Cost Principles

Recommendation: Cost principles found in applicable Office of Management and Budget (OMB) circulars and made applicable to recipients of financial assistance by various Federal regulations must be made applicable to tribes under a demonstration project.

Audit Exceptions

Recommendation: Current audit procedures under OMB Circular A-133 regarding resolution of audit exceptions must be made applicable to a demonstration project.

Record Keeping

Recommendation: Current Federal recording keeping requirements applicable to grantees should apply to tribes participating in a demonstration.

Savings

Recommendation: To the extent that compacts and funding agreements reduce the administrative or other responsibilities of the Secretary through program consolidation with respect to the operation of programs under a demonstration project, the savings should be made available to the tribes.

While it is not expected that savings to HHS will accrue because of a demonstration, any savings that can be identified should be available to the tribes.

Transfer of Funds

Recommendation: To facilitate coordination of programs under a demonstration, the Secretary should be authorized to establish a common funding cycle for programs under a demonstration project.

Currently, some of the programs targeted for a demonstration have different award and funding cycles. Manageability of a demonstration would be greatly improved by allowing all programs under a demonstration to begin on the same cycle. This would also enhance coordination of program reporting and evaluation of a demonstration project.

Prompt Payment Act

Recommendation: Chapter 39 of title 31, United States Code must be made applicable to the transfer of funds due under a compact or funding agreement in a demonstration project.

This would ensure that the interest penalty and other provisions of the Prompt Payment Act would apply to the transfer of funds under a funding agreement in a demonstration project.

Carryover of Funds

Recommendation: All funds awarded under a funding agreement should remain available until expended.

Current law requires federal approval for tribes to carry over funds from one fiscal year to the next. Again, a core element of self-governance is tribal discretion and control over the management of funds. This recommendation will devolve federal control over this level of decision making while enhancing tribal flexibility.

Construction

Recommendation: The provisions of Title V, Sections 509 and 510 relating to construction should be made applicable to a demonstration, subject to retention of a federal interest in the property.

This recommendation will ease the administrative burden on tribes, consolidating current construction rules that vary from program to program into a single, uniform set of construction rules that tribes currently use under the IHS self-governance program. This promotes the goal of administrative simplification. This recommendation also would allow tribes, under the consolidation and redesign authority to consolidate and use funds from the programs under a compact or funding agreement for construction purposes to the extent that the use of funds for construction is allowable under the authorizing legislation of the programs included in the demonstration project. In this respect, it should be noted that several of the programs currently prohibit the use of funds for construction and would require changes to the legislation authorizing the programs (see Appendix E), if funds from these programs were to be available for construction. The legislation authorizing a demonstration project should specify that there is a federal interest in facilities constructed using funds provided under a demonstration project in order to avoid future controversy on the matter.

Changes in Funding

Recommendation: Changes in tribal funding for any program or activity under a demonstration should be in accordance with existing statutory authority and nothing in a demonstration should be construed to change that authority.

Clearly, nothing in a demonstration should affect the level of funding a tribe should otherwise receive under the statutes and regulations governing the programs in a demonstration. It is recommended that the authorization for a demonstration include language stating that participation in a demonstration will not change the amount of funding a tribe would receive for any program compared to the amount it would receive from that program outside of a demonstration.

Length of Demonstration

Recommendation: A demonstration should be authorized for five years.

A five-year demonstration should provide adequate time to implement and evaluate a demonstration project.

Project Administration

Recommendation: A single program office in HHS should manage a demonstration project.

Given the number and complexity of programs and tribes that could participate in a demonstration, a single point of contact and coordination of demonstration project operations is essential to success. Specific legislative authority would be needed for a single office to be able to provide consolidated awards, which are currently made by the separate HHS programs recommended for inclusion in the demonstration, to tribes participating in a demonstration. Therefore, the Secretary should be authorized to establish a single point of contact for management of a demonstration project. The Secretary should also have the authority to establish policy, negotiate and make awards, and evaluate a demonstration.

METHODS TO ASSURE QUALITY AND ACCOUNTABILITY

Congress requested that the Secretary advise on methods to assure quality and accountability in a self-governance demonstration. The following recommendations address this requirement.

Financial

Recommendation: The Single Audit Act, as amended and including its implementation guidance, must be made applicable to a self-governance demonstration.

The Single Audit Act is the government-wide mechanism for assuring financial accountability and is already applied to self-governance projects under Title V of the Act.

Program

Recommendation 1: Program accountability and quality should be monitored through specific performance measures and performance reports, established through negotiations with the tribes prior to the establishment of self-governance agreements.

The flexibility to redesign and consolidate programs and activities and waive certain existing program requirements in a demonstration raises concerns about maintaining program identity and assuring that eligible beneficiaries continue to receive quality services. These concerns can be addressed through program performance measures and reporting. This parallels the Government Performance and Results Act and is the current paradigm for program accountability. In the case of a demonstration, the Secretary would negotiate a single set of performance measures and performance report that would be standard for all tribes throughout a demonstration. The measurement system would incorporate key measures and data requirements that currently exist for each program under a demonstration into a single system, eliminating redundancy. A tribe would report on only those measures applicable to the programs under their particular self-governance agreement.

Recommendation 2: A maintenance of effort provision should be part of a demonstration with the option for tribes to reprogram up to 20 percent of funds of the individual programs.

To further address the concern that the redesign and consolidation authority, by allowing tribes to move funds between programs, would result in the erosion of program services, a maintenance of effort requirement is recommended. Such a provision could require tribes to maintain a baseline level of services and expenditures for each program under a demonstration. To provide flexibility to redesign and consolidate programs and activities, tribes should be allowed to reprogram up to 20 percent of the funds of a program. This change will require amendments to existing legislation authorizing the programs selected to participate in the demonstration project, or to the statute establishing the project.

Recommendation 3: An overall evaluation of a demonstration should also be authorized.

In order to evaluate the success of a demonstration as a basis for deciding future extensions of self-governance, a process and outcome evaluation of a demonstration should be authorized. This should incorporate such items as an evaluation of the use of waivers and limitations of a demonstration model for future self-governance authorizations.

Recommendation 4: Authorization should be given to use compact funds to comply with performance data collection and reporting requirements.

Tribes should be authorized to use compact funds to fully cover any data collections and reporting requirements.

Program Duplication - State Concerns

Recommendation: Participating tribes should be required to demonstrate efforts to coordinate information on dually eligible clients with States.

One prominent issue raised by State government organizations during the consultation process was the issue of dually eligible clients - clients who can elect to be served through either State systems or the tribe. In these cases (e.g., child care subsidies) the potential for duplicate benefits exists, as well as for a negative impact on States. For example, a tribe might receive funds to provide child care subsidies to qualified tribal members while the State does not. However, because the tribal member is eligible under current law for subsidies both from the tribe and the State, the tribal member can elect to receive subsidies from the State. Since the tribe, not the state, receives funds for services to tribal members, this creates an unfunded liability for the State. Short of changing eligibility rules, a system of information sharing might help this problem. Therefore, a recommendation is made to have tribes demonstrate efforts to coordinate client information with States. For example, tribes might identify dually eligible tribal members to the States and indicate when they have elected to receive services from the tribe.

APPENDIX A

Tribal Self-Governance Amendments of 2000 (P.L. 106-260, Enacted 8/18/00)

Section 5.

The Indian Self-Determination and Education Assistance Act is amended by adding at the end the following:

TITLE VI--TRIBAL SELF-GOVERNANCE-DEPARTMENT OF HEALTH AND HUMAN SERVICES

SEC. 601. DEFINITIONS.

- a. In General.--In this title, the Secretary may apply the definitions contained in title V.
- b. Other Definitions.--In this title:
 - 1. Agency.--The term `agency' means any agency or other organizational unit of the Department of Health and Human Services, other than the Indian Health Service.
 - 2. Secretary.--The term `Secretary' means the Secretary of Health and Human Services.

SEC. 602. DEMONSTRATION PROJECT FEASIBILITY.

- a. Study.--The Secretary shall conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency.
- b. Considerations.--In conducting the study, the Secretary shall consider--
 - 1. the probable effects on specific programs and program beneficiaries of such a demonstration project;
 - 2. statutory, regulatory, or other impediments to implementation of such a demonstration project;
 - 3. strategies for implementing such a demonstration project;
 - 4. probable costs or savings associated with such a demonstration project;
 - 5. methods to assure quality and accountability in such a demonstration project; and
 - 6. such other issues that may be determined by the Secretary or developed through consultation pursuant to section 603.
- c. Report.--Not later than 18 months after the date of the enactment of this title, the Secretary shall submit a report to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives. The report shall contain--
 - 1. the results of the study under this section;
 - 2. a list of programs, services, functions, and activities (or portions thereof) within each agency with respect to which it would be feasible to include in a tribal self-governance demonstration project;
 - 3. a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) that could be included in a tribal self-governance

demonstration project without amending statutes, or waiving regulations that the Secretary may not waive;

4. a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a tribal self-governance demonstration project; and
5. any separate views of tribes and other entities consulted pursuant to section 603 related to the information provided pursuant to paragraphs (1) through (4).

SEC. 603. CONSULTATION.

a. Study Protocol.--

1. Consultation with Indian tribes.--The Secretary shall consult with Indian tribes to determine a protocol for consultation under subsection (b) prior to consultation under such subsection with the other entities described in such subsection.
2. Requirements for protocol.--The protocol shall require, at a minimum, that--
 - A. the government-to-government relationship with Indian tribes forms the basis for the consultation process;
 - B. the Indian tribes and the Secretary jointly conduct the consultations required by this section; and
 - C. the consultation process allows for separate and direct recommendations from the Indian tribes and other entities described in subsection (b).

- ### **b. Conducting Study.--**In conducting the study under this title, the Secretary shall consult with Indian tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups, and may consult with other entities as appropriate.

SEC. 604. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this title, Such sums shall remain available until expended.

APPENDIX B

TRIBAL SELF-GOVERNANCE STUDIES BIBLIOGRAPHY

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APPENDIX C

CONSULTATION PROTOCOL

The "Tribal Self-Governance Amendments of 2000" requires the Department of Health and Human Services to conduct a study to determine the feasibility of a tribal self-governance demonstration for appropriate programs, services, functions, and activities

(or portions thereof) of the agency (other than the Indian Health Service). In conducting the study, the Department is to consult with Indian tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups. Additionally, before undertaking the consultation, the Department must develop a consultation protocol in consultation with the Indian tribes. At a minimum, the protocol is to provide that: (a) the protocol be based on a government-to-government relationship between Indian Tribes and HHS; (b) Tribes and the Secretary jointly conduct the consultations; and (c) the consultation process allows for separate and direct recommendations from the Indian tribes and other entities.

This document sets forth the consultation protocol for the study. Consultation will be carried out in terms of the principles and processes set forth in this document.

PRINCIPLES

The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of Indian Tribes to self-governance.

Although progress has been made, Congress has found that centralized rules and regulations of the Federal bureaucracy erodes tribal self-governance and dominates tribal affairs.

Tribal self-governance has been demonstrated to improve and perpetuate the government-to-government relationship and strengthen tribal control over Federal funding and program management.

To the maximum extent possible, the goal of the feasibility study is to identify ways to reduce and eliminate barriers that prevent Tribes and Tribal organizations from assuming responsibility for Department of Health and Social Services programs.

The Feasibility Study shall be conducted consistent with the government-to-government relationship and the principles of self-governance.

Tribal consultation required through the Feasibility Study shall be carried out consistent with the Executive Order 13175 regarding Consultation and Coordination with Indian Tribal Governments.

CONSULTATION - GENERAL

Formal consultations with designated entities will take place at three important junctures of the study: 1) at the outset of the study; 2) following the development of a draft report; and 3) following the development of a final report before transmittal to Congress. Details on the consultation process follow.

As required by Section 603(a)(2)(B) of the Tribal Self-Governance Amendments of 2000, consultations will be jointly conducted by the Department and the Indian tribes. With respect to this requirement, the Title VI Feasibility Study Team of the HHS Tribal Self-Governance Advisory Committee and the Deputy Assistant Secretary for Planning and Evaluation (Special Policy Initiatives and Planning) are jointly responsible for the management of the study consultation process.

CONSULTATION - PROCESS

Consultation with statutorily designated entities will take place in four phases.

Phase One: Consultation with tribal entities will be held at the start of the study to determine tribal views on the feasibility and scope of a possible demonstration project. The results of consultation with tribal entities at this early stage will be used to focus the scope of initial consultations with non-tribal entities (see below). Consultation questions at this stage will be:

Do tribal entities believe a self-governance demonstration project is feasible for appropriate Department programs outside the Indian Health Service? If no, why not?

If so, which programs would be appropriate for inclusion in a demonstration?

Should the financial, quality, accountability, eligibility, and process rules (design) that govern tribal self-governance under Title V of the Indian Self-Determination and Education Assistance Act apply to a demonstration project?

If not, what other design options are recommended?

The phase one consultation process will include a written request for recommendations followed by a series of geographically diverse regional meetings (number and location to be decided). Subsequent to the consultations, tribal recommendations will be analyzed jointly by the tribal study team and the Department to focus the scope of initial consultations with non-tribal entities in terms of programs that might be included in a demonstration project and the design of the project.

Phase Two: Consultation with statutorily designated non-tribal entities will be based on the results of the phase one consultation with tribes. Tribal views on programs to be included and design options for a demonstration will be presented to non-tribal entities who are stakeholders interested in the programs recommended for inclusion. Consultation questions at this stage will be:

Are the programs for inclusion and project design options recommended by the tribes feasible for inclusion in a demonstration program. If not, why?

Are there particular design options that would be better or overcome problems?

The phase two consultation process will include a written request for recommendations from the following entities: national organizations representing states, counties, and municipalities and national organizations representing program beneficiaries and public interest groups. The written request will be followed by a meeting in Washington with the organizations representing states, counties, and municipalities. A parallel meeting will also be held with beneficiary and public interest groups.

Phase Three: Following the phase one and two consultations, the Department will prepare a draft report to Congress. The draft report will assess the feasibility of a demonstration and, if found to be feasible, provide recommendations on the specific programs to be included in the demonstration, the design of the demonstration (financial, quality, accountability, eligibility, and process rules), and any statutory, regulatory, or other impediments to the implementation of a demonstration. A written request for comments on the draft will be sent to tribal and other entities participating in the phase one and two consultations. In particular, the request will solicit views on the probable effects (positive or negative) of a recommended demonstration on the specific programs to be included in the demonstration and on the program beneficiaries of such programs.

If necessary, a followup meeting may be held with national and regional tribal organizations to discuss reactions to the draft report. A similar opportunity will be available to non-tribal entities.

Phase Four: Section 602(c)(5) of the Tribal Self-Governance Amendments requires that the Department report to Congress contain any separate views of tribes and other entities consulted. To address this requirement, a written request for separate views on the Department's final report will be sent to tribal and other entities prior to transmittal of the report to Congress. Any entity wishing to submit a separate view of the report may do so on the understanding that it will be included in an appendix to the report.

CONSULTATION - IMPLEMENTATION

Information: In order to facilitate consultation with tribes, HHS will provide an inventory of its programs, services, activities and functions with as much information as feasible, including program descriptions, recipients, beneficiaries and funding levels. HHS will also provide as much information as possible on particular program activities underway with tribal entities. In addition, HHS will maintain a website where it will post information on the study.

Logistical Responsibility: The Department may provide contractor support to handle the logistics of consultation meetings and mailings. Any contractor thus acquired should be knowledgeable in tribal consultation.

Meeting Leadership: Meetings will be jointly chaired by the head of the tribal study team and the Deputy Assistant Secretary for Planning and Evaluation or their designees. A facilitator may assist in conducting the meetings at the direction of the joint chairs.

Recording Meeting Recommendations: Minutes of the meeting will be kept by note takers and an audio recording made for later reference if clarification is needed.

Written Communications: Written request for comments during the consultation process will be jointly made by the head of the tribal study team and the Deputy Assistant Secretary for Planning and Evaluation.

Availability of Comments: Written comments received at various stages of the study will be placed on the study website to the extent feasible.

APPENDIX D

TITLE VI TRIBAL SELF-GOVERNANCE CONSULTATION SESSIONS

Regional Tribal Sessions

Minneapolis, MN

April 13, 2001

Attendees: Federally-recognized tribes

Nashville, TN
April 26, 2001
Attendees: Federally-recognized tribes

San Francisco, CA
May 1, 2001
Attendees: Federally-recognized tribes

Anchorage, AK
May 3, 2001
Attendees: Federally-recognized tribes

Governmental Organization Session
Washington, DC
June 6, 2001
Attendees: State and Local Governmental Organizations

Constituent (Non-Governmental) Organizations Consultations
Washington, DC
June 7, 2001
Attendees: Non-Governmental Organizations representing a variety of constituent groups.

National Wrap-Up Session
Washington, DC
June 14, 2001
Attendees: Federally-recognized tribes, State and Local Government Organizations, Constituent (Non-Governmental) Organizations

APPENDIX E

EXISTING LEGAL BARRIERS TO IMPLEMENTATION OF STUDY RECOMMENDATIONS

Design Provision	Design Recommendation	Required Changes to Authorizing Statutes and Regulations
Application Process	Secretary authorized to consolidate and adopt a single, application process and application form covering all programs in the self-governance demonstration. Key components of existing application requirements in program legislation would be retained, e.g., required assurances.	Legislative authority needed to allow Secretary to consolidate separate program application/plan requirements for programs in the demonstration.
Redesign & Consolidation	Tribes authorized to redesign and consolidate program activities under compacts and funding agreements, including the authority to transfer up to 20% of the funds of a program. Authority limited only by maintenance of effort provision.	<p>All statutes authorizing grant programs are subject to an implicit requirement that the funds which they authorize cannot be spent for purposes other than those authorized by the statute. Consequently, consolidation and transfer of funds between targeted programs must be specifically authorized either in the legislation authorizing the funds in question or the legislation authorizing the Demonstration project.</p> <p>Head Start, 42 U.S.C. Sections 9835(a)(2), specifically prohibits combining Head Start funds with other program funds. LIHEAP, 42 U.S.C. Section 8624(b)(1), prohibits use of program funds for non-program purposes. CCDBG, 42 U.S.C. Section 9858m(e)(4), may also prohibit use of funds for non-program purposes.</p> <p>Modification to these statutory requirements is needed to implement redesign and consolidation authority. TANF, 42</p>

		U.S.C. Section 604, prohibits the use of TANF funds for purposes not "reasonably calculated to accomplish the purposes" of the program. The TANF regulations limit authorized transfers of TANF funds to the Child Care and Development Block Grant and the Social Services Block Grant programs, subject to certain restrictions.
Carryover of Funds	Tribes would be authorized to carryover funds from one year to the next until expended. No federal approval is required.	42 U.S.C. Section 9907 (a)(2) permits CSBG funds to be carried over by grantees into the succeeding fiscal year. 45 CFR Part 92.23(a) requires HHS grantees in programs covered by the regulation, including the Head Start program, to obtain permission to carryforward unobligated funds. 45 CFR Part 96.81 limits requests for carryover to 10% of LIHEAP award. Both Child Welfare Services and Promoting Safe and Stable Families require expenditure of funds within fiscal year. 45 CFR Parts 1357.40(d)(5)(C)(iv) and 1357.50(h). 45 CFR Part 98.60(e)(1) of the CCDBG program regulation require tribal grantees to obligate all funds "by the end of the fiscal year following the fiscal year for which the grant is awarded. Any funds not obligated during this period will revert to the Federal government." Modification to each of these statutes and regulations will be needed to implement the design recommendation.
Sec. 509. Construction Projects	Tribes would be authorized to use funds under compacts and funding agreements for construction in accordance with Title V of the Act (which would be adopted for the demonstration). Under the redesign and consolidation authority, funds could be moved between programs and program activities, including into construction activities.	Program statutes and regulations would need to be modified to permit use of funds for construction unless limits are placed on redesign and consolidation authority under the demonstration. 42.U.S.C. Section 9839(g) set conditions for the use of funds to construct Head Start facilities. 42 U.S.C. Section 9918 generally prohibits the use of CSBG funds for construction, absent the Secretary granting a waiver. The statute should be amended to clarify that tribes participating in the demonstration project

		<p>will be authorized to use CSBG funds for construction projects. 42 U.S.C. Section 9858m(c)(6)(C) places limitation use of CCD funds for construction. 42 U.S.C. Section 8628 prohibits use of LIHEAP funds for construction. 45 CFR Part 1357.40(d)(5)(iii) explicitly prohibits use of Child Welfare Services funds for construction. 45 CFR Part 286.45(e) prohibits the use of TANF funds for construction or purchase of facilities.</p>
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APPENDIX F

**ADMINISTRATIVE AND INDIRECT COSTS/MATCHING REQUIREMENTS
TARGET PROGRAMS**

Agency	Program	Tribal Funding FY 2001	Program Purpose	Tribal/Beneficiary Eligibility	Tribal Allocation Formula	Matching Requirements	Allowable Indirect and Administrative Cost Rates
AoA	Grants for Native Americans	\$23m. of \$23m. ⁽¹⁾	Provide congregate & home delivered meals and supportive services.	<p>Tribal - Tribes (or groups of Tribes) w/50 or more Indians aged 60 or over.</p> <p>Beneficiary - Each tribe may define what an "older Indian" is for purposes of receiving services.</p>	Awards are determined by a formula based on the number of elders, age 60 and over, within the tribally designated services area. In FY 2001, tribes with 50-100 elders received \$69,100; 101-200 elders, \$78,420; 201-300elders, \$89,040;	None	Tribes may use their negotiated indirect cost rate (currently the maximum negotiated for any tribe is 67 percent).

					301-400elders, \$100,350; 401-500 elders, \$110,980; 501-1,500 elders, \$128,550; more than 1,500 elders, \$168,800.		
SAMHSA	Mental Health and Substance Abuse Prevention & Treatment Targeted Capacity Expansion	Approx. \$41m for all tribes.	Plan, carry out, and evaluate mental health and substance abuse prevention and treatment activities.	Indian tribes and Tribal organizations. Beneficiary - Individuals requiring mental health and substance abuse prevention and treatment services.	None	None	Negotiated rate.
ACF	Tribal Temporary Assistance for Needy Families	\$ 78m. ⁽²⁾ of \$16,689m.	Provide assistance to needy families; end dependence; reduce out of wedlock pregnancies; and support two-parent families.	Tribal - All federally-recognized tribes in the lower 48 and 13 specified entities in Alaska are eligible. Beneficiary - Tribe decides who to serve and sets income caps for eligibility. A Tribal member may chose whether to be served by the State or the Tribe. The Tribe may, with	Based on the total Federal payments attributable to State expenditures, including administrative costs (which includes systems costs) for FY 1994 under the former AFDC, Emergency Assistance and Job Opportunities and Basic Skills Training programs, paid on behalf of Indian families residing in the	None	Administrative cost (which include indirect cost) may not exceed an ACF/Tribal negotiated cap. Negotiated rate cannot exceed: 35% in 1 st year of grant; 30% in 2 nd year of grant; and 25% thereafter.

				agreement w/State also serve non-Indians.	geographic service area or areas identified in the Tribal Family Assistance Plan. In addition, some States provide some matching funds to tribes which the states count toward their maintenance of effort requirement.		
ACF	Low Income Home Energy Assistance Program	\$ 12m. ⁽³⁾ of \$2,000m.	Help low income households meet the costs of heating and cooling their homes.	Tribal - Federally and State recognized tribes and tribal organizations designated by eligible tribes. Beneficiary - Low income households. Grantees set eligibility criteria for low income households; household income cannot exceed the greater of 150% of the poverty level in the State or 60% of State median income; or the household must receive TANF, food	Each Tribe is eligible to receive from the State share an amount that equals the ratio of number of eligible Indian households residing in the State on the reservation (or trust lands adjacent to the reservation) to the number of eligible state households, or such greater amount as the Tribe and State may negotiate. For non-reservation tribes, HHS, in consultation with the tribe and State, defines the number of Indian households. Most States agree to tribal	None	For tribes and tribal organizations with allotments of \$20,000 or less, the limitation on planning and administration cost is 20% of funds payable and not transferred for use under another block grant; and for grantees with allotments over \$20,000 the limitation on the cost of planning and administration is

				stamps, SSI, or need-tested veterans' benefits.	allocations that are greater than the the statutorily mandated minimum; some States voluntarily assist tribal households if Tribal funds run out.		\$4,000 plus 10% of the amount of funds payable (and not transferred for use under another block grant) that exceeds \$20,000.
ACF	Community Services Block Grant	\$ 4m of \$600m.	Assist low-income individuals and families in rural and urban areas to become self-sufficient.	Tribal - Federally and State qualified Tribes and Tribal organizations designated by eligible tribes. Beneficiary - Poor individuals/families at or below the annual poverty line, or at the tribe's discretion, up to 125% of the official poverty line, if the tribe determines that would better serve the CSBG program.	For Tribes receiving direct HHS grants: the Secretary reserves from the State allotment at least an amount equal to the ratio that the population of all eligible Indians at or below poverty line bears to the population of all individuals eligible for assistance in the State. Except for small number of States that voluntarily negotiate higher amounts, funding is exclusively based on statutory formula.	None	Tribal grantee administrative expenses, comparable to the administrative expenses incurred by States at the State level, are capped at the greater of 5% of the grantee's CSBG allotment, or the grantee's CSBG allotment multiplied by the ratio of \$55,000 to the smallest state allotment for that fiscal year.
ACF	Child Care Development	\$ 91m. ⁽⁵⁾ of	Assist low-income	Tribal - Federally recognized tribes,	Discretionary - Secretary reserves	None	Administrative costs are limited

	Fund ⁽⁴⁾	\$4,567m.	families with child care, promote parental choice, provide consumer education, support working parents, & implement health/safety standards	tribal organizations and consortia. Beneficiary - Services for children under 13 (or, at the option of grantee, 19, if disabled or under court supervision) who reside in a family whose income does not exceed 85% of the State median (or 50% of the Tribal median income) and whose parents are working or attending job training.	between one and two percent of the annual appropriation for Tribes/Tribal organizations. Each tribe receives a base amount of \$20,000 and, for each child in the tribe under age 13, a per child amount determined by dividing the amount of funds available for all tribes by the total number of Indian children living on or near the tribal reservations or other appropriate areas served by the tribal grantee. Mandatory - Secretary reserves up to 2% of amount appropriated under section 418(a)(3) of the Social Security Act for tribes. Each tribe receives an amount per Indian child under age 13. The per child amount is determined by	to 15% of grant amounts, excluding the discretionary base amount which can be used for any activity in accordance with the purposes of the program. Program has declassified some administrative functions so they may be funded under the 85% services portion.
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					dividing the total amount of funds available to tribes by the total number of Indian children in the tribal service areas, including Indian children living on or near reservations with the exception of tribes in Alaska, California and Oklahoma.		
ACF	Native Employment Works	\$8m. of \$8m.	To make work activities available to grantee designated service populations and service areas.	Tribal - Federally recognized tribes and Alaska Native organizations that operated a tribal JOBS programs in FY 1995. Beneficiary - Unemployed and underemployed individuals as determined by the grantee.	NEW grant awards for each eligible tribe are set by law at the FY 1994 tribal JOBS funding level for that tribe.	None	No restrictions; may use the negotiated indirect cost rates. Also no statutory or regulatory limits on administrative costs.
ACF	Head Start	\$171m. ⁽⁶⁾ of \$6,200m	Promote school readiness of low-income children and their families.	Tribal - Any Indian tribe which meets the qualification requirements may apply for grant funds.	Secretary determines award. Annual funding decisions are based on historic performance, proportional cost of living and quality	20% matching requirement, cash or in kind; may be waived in whole or in part under	Total of 15% of grant (including non-Federal share) may be for administrative or development

				<p>Beneficiary - Generally, children from low-income families; however, under certain conditions, over 10% of children enrolled in a Tribe's program may be from families whose incomes exceed the low-income guidelines.</p>	<p>improvements increments, and judgements about value/cost of expansion proposals. Except in AK and OK, most funding is for reservation-based services. Funding levels are based mostly on historical amounts raised to account for inflation; however, negotiations take place over new services or to pay for one-time needs.</p>	<p>certain circumstances.</p>	<p>costs; a waiver for up to 12 months can be given. The program reviews applications for and permits payment under the 15% limit for specified categories of functions (payroll systems, administrative office rent, etc.) whether claimed as a direct or indirect cost.</p>
ACF	Child Welfare Services (Title IV-B, Subpart 1)	\$ 5m. ⁽⁷⁾ of \$292m.	Strengthening child welfare services.	<p>Tribal - Tribes and consortia are eligible for funds.</p> <p>Beneficiary - Services are available to children and their families without regard to income or length of residence.</p>	<p>Tribal awards are derived by dividing the State's Title IVB allotment by the number of children in the State, then multiplying the result by a number determined by the Secretary (currently 3), then multiplying this result by number of Indian children (an individual under age 21) in the Tribe's</p>	<p>25%, but may use the Indian Self-Determination and Educational Assistance & CSBG funds to match.</p>	<p>Negotiated rate.</p>

					population.		
ACF	Promoting Safe and Stable Families (Title IV-B, Subpart 2)	\$ 3m. ⁽⁸⁾ of \$305m.	Family preservation, family support, time limited reunification and adoption support services.	Tribal - Tribes are eligible. 63 tribes funded in 2001 Beneficiary - Services are available to children and their families without regard to income or length of residence.	1% of the mandatory funds and 2% of discretionary funds appropriated is set aside for tribes. Tribal share is based on the ratio of the number of children (an individual under age 21) in a Tribe with an approved plan to the number of all children in all Tribes with approved plans. No tribe may be funded if its allotment would be less than \$10,000.	25%, but may use the Indian Child Welfare, Indian Self-Determination and Educational Assistance & CSBG funds to match.	Negotiated rate.
ACF	Family Violence Prevention and Services; Grants for Battered Women's Shelters	\$12m. of \$117m.	To prevent family violence and provide shelter & related assistance for victims of family violence and their dependents.	Tribal - All Federally recognized Indian Tribes, tribal organizations and nonprofit private organizations approved by and an Indian tribe which have submitted applications containing statutorily prescribed documentation and assurances.	At least 10% of the appropriation for grants for battered women's shelters is allocated to Tribes and Tribal entities. An individual Tribe's allocation consists of two parts: a base amount and a share of the remaining funds; both derived from the	Entities other than States or Tribes must provide non-Federal match of 20% with respect to an existing program and 35% with respect to a new program.	Statute is silent on limits on administrative or indirect costs; however, Tribes must spend at least 70% of the grant on emergency shelter and related assistance, including at least 25% of the grant

				<p>Beneficiary - Statutory provisions prohibit the use of income eligibility standards; the use of funds for direct payments to family violence victims or their dependents. Statute also requires non-discrimination on the bases of sex, religion, age disability, etc. in conducting any program or activity wholly or partially funded with FVPSA funds.</p>	<p>Tribal population.</p> <p>1. For the base amount, a Tribe with 1,500 or fewer members receives \$1,500; one with 1,501-3,000 receives \$3,000; one with 3,001-4,000 receives \$4,000. The 1,000member/\$1,000 increments then continue until Tribes of 50,001-100,000 receive \$50,000 and Tribes with 100,001-150,000 receive \$100,000.</p> <p>2. The remaining funds are added to a Tribe's base amount in proportion to the ratio of the Tribe's population to the entire population of Tribes with acceptable applications.</p>	<p>or related assistance as defined by the statute.</p>
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APPENDIX G

SEPARATE VIEWS OF STAKEHOLDERS

Pursuant to Section 602(c)(5) of the Indian Self-Determination and Education Assistance Act, as amended, stakeholders who were consulted in the development of the study have the opportunity to express any "separate views" that they might have with respect to the findings and recommendations of the study. The report to Congress on the results of the study must include these views. In compliance with this requirement, stakeholders were given 30 days after the completion and release of the final study to file any "separate views" with the Department. All letters received in response to the 30 day period are included in this appendix.

- [Hobbs, Straus, Dean & Walker, LLP](#)
- [Duckwater Shoshone Tribe](#)
- [Penobscot Indian Nation](#)
- [Port Gamble S'Klallam Tribe](#)
- [The Chickasaw Nation](#)
- [Ely Shoshone Tribe](#)
- [Native Village of Eyak](#)

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1. 233 Native American grantees representing nearly 300 tribes/villages (75 percent of the eligible AI/AN population).
 2. 34 Native American grantees representing 171 Tribes/Villages.
 3. 130 Native American grantees representing 209 Tribes/Villages.
 4. This title combines what have been, historically, thought of as two separate programs: one a discretionary block grant and the other a mandatory formula program, both providing child care services.
 5. Includes mandatory and discretionary; these funds were appropriated to 257 Tribes; through consortia arrangements.
 6. Approximately 160 grantees currently, serving substantially more tribes because of consortia, in Alaska particularly.
 7. 128 Native American grantees representing approximately 200 Tribes/Villages.
 8. Funding 60 grantees (and estimated 120 Tribes/Villages).