



**U.S. Department of Health and Human Services
Self-Governance Tribal Federal Workgroup**

Final Report

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EXECUTIVE SUMMARY

In 2000, Congress authorized Tribes to enter into Self-Governance compacts¹ and funding agreements² with the Indian Health Service (IHS) as a permanent authority under Public Law 106-260 (Title V), Tribal Self-Governance Amendments Act of 2000, section 458aaa of the Indian Self-Determination and Education Assistance Act³ (ISDEAA). P.L. 106-260 also included Title VI, Demonstration Feasibility Study, further amending the ISDEAA, by requiring the Secretary of the Department of Health and Human Services (HHS or Department) to conduct a study to determine the feasibility of a Tribal Self-Governance demonstration project for appropriate HHS programs, services, functions, and activities (or portions thereof) in agencies other than the IHS. HHS submitted the required report to Congress in March of 2003. The report concluded that the demonstration project was feasible. Although Congress has considered legislation to authorize a Self-Governance demonstration project, legislation has not been enacted into law to date.

In 2011, the Department revitalized efforts to advance Tribal Self-Governance in response to consultation input by Tribes. HHS conducted an updated internal review of its programs and authorities in the context of the previous feasibility study. HHS concluded that there is no existing authority that would permit a demonstration project of the sort proposed by the 2003 feasibility study which could be carried out under Title VI of the ISDEAA without specific legislative authority from Congress.

To further explore options to expand Tribal Self-Governance beyond the IHS and into other agencies in HHS, the HHS Intradepartmental Council on Native American Affairs⁴ and HHS Secretary's Tribal Advisory Committee⁵ determined the need to understand more specifically how Self-Governance would work with programs whose funding was not dedicated solely for Tribes. As a result, the HHS created a Self-Governance Tribal Federal Workgroup (SGTFW) to assist HHS to:

¹ A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States. A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year (25 U.S.C. §458aaa-3; 42 C.F.R. §§ 137.30-31).

² A funding agreement is a legally binding and mutually enforceable written agreement that identifies the programs, services, functions, or activities (PSFAs), or portions thereof, that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V (25 U.S.C. §458aaa-4; 42 C.F.R. § 137.40).

³ Title V of the Indian Self-Determination and Education Assistance Act is codified at 25 U.S.C. § 458aaa et seq. The regulations are codified at 42 C.F.R. Part 137.

⁴ Congress authorized the Intradepartmental Council on Native American Affairs as part of the Native American Programs Act to ensure coordination and consultation on health and human service issues as well as social and economic development issues affecting the American Indian, Alaska Native, and Native American population.

⁵ Secretary's Tribal Advisory Committee signals a new level of attention to Government-to-Government relationship between HHS and Indian Tribal Governments. The Committee's primary purpose is to seek consensus, exchange views, share information, provide advice and/or recommendations; or facilitate any other interaction related to intergovernmental responsibilities or administration of HHS programs, including those that arise explicitly or implicitly under statute, regulation or Executive Order.

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1. Prioritize the HHS programs that Tribes wish to include in a feasibility study or demonstration projection, if statutorily authorized;
2. Develop detailed recommendations to overcome legal and logistical barriers to Self-Governance expansion; and,
3. Identify the benefits that Tribes seek to achieve through the expansion of Self-Governance to other HHS programs, and to develop recommendations to achieve those benefits.

The work of the SGTFW has provided insight into the variation in funding instruments and authorities utilized by the Department to carry out its programs along with identifying both the flexibilities and limitations on these instruments with regard to potential for Self-Governance expansion. These funding instruments and authorities differ significantly from those of IHS. The SGTFW concluded that while more information on HHS programs and education for agency staff is needed, the overarching barriers to Self-Governance expansion to non-IHS programs in HHS mean that implementation will require Congressional action. With this in mind, the Tribal workgroup participants developed a *Concept Paper* that addressed Tribal objectives for the expansion of Self-Governance. The Tribal participants also developed draft legislation to address the major barriers identified. There is no existing authority that will permit a demonstration project as proposed by the 2003 Feasibility Study without legislation. However, because there is a designated process for the approval of legislation within the Department, the development of potential legislative remedies was outside the charge of the SGTFW.

ADDRESSING THE WORKGROUP CHARGE

Workgroup Charge Objective 1: Prioritize The HHS Programs That Tribes Wish to Include In A Feasibility Study Or Demonstration Project, If Statutorily Authorized.

OVERVIEW

Initial discussions with the Tribal workgroup members focused on including all eleven programs determined by the March 2003 HHS Feasibility Study as appropriate and feasible for a Tribal Self-Governance demonstration project. The history of the selection of the eleven programs was discussed throughout this process. Federal members indicated that the programs were included because they were considered “low-hanging fruit” and have had funding set- asides that Tribes could access directly.

The group discussed several options for implementing Self-Governance within the identified programs. The options discussed were:

- Inclusion of all 11 identified programs.
- Inclusion of one program as a starting point. The Tribal workgroup members reiterated that this does not preclude engaging in broader efforts simultaneously that will eventually encompass all identified programs
- Selection of less than all 11 programs. Discussion ranged from one to several, with four programs mentioned mostly commonly.
- Selection of four programs at the outset with a phase in of the remaining 11 programs.

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WORKGROUP DEVELOPMENTS

Many options for prioritization of programs were evaluated by the SGFIW. For example, Federal workgroup members suggested starting with Temporary Assistance for Needy Families (TANF) and Head Start, as Tribes can receive funding for those programs directly from HHS and both are up for reauthorization soon. The Federal workgroup members also stated that legislation governing certain Substance Abuse and Mental Health Services Administration (SAMHSA) and Administration on Community Living (ACL) programs are also scheduled for reauthorization.

The Federal workgroup members provided informational tools to guide the discussion of both barriers and recommendations to overcome these obstacles to expanding self-governance. Utilizing the HHS program summaries and the HHS Programs and ISDEAA comparison charts⁶, the workgroup spent considerable time discussing the HHS programs and engaged in an effort to develop cohorts of programs that seemed to logically fit together, either based on the type of grant (discretionary or mandatory), status of the program (i.e., whether it is scheduled for reauthorization), or similarity of issues (e.g., transportation and meals for the elderly). Although the workgroup grouped the programs into three cohorts, the Tribal representatives emphasized that their ultimate objective was to advocate for self-governance in all programs. However, the Federal representatives recommended that the workgroup focus on Child Care, Head Start, programs funded under Title VI of the Older Americans Act, and a proposed SAMHSA behavioral health prevention Tribal grant program, as the Federal workgroup members viewed these programs as the most conducive of the eleven identified programs for transitioning into a self-governance model.

Following lengthy discussion and program comparisons, the workgroup considered the following cohorts of similar programs:

Cohort 1

1. Administration on Aging Programs (AoA)
2. Substance Abuse and Mental Health Services Administration Target Targeted Capacity Expansion SAMHSA-TCE)
3. Temporary Assistance and for Needy Families (TANF)
4. Child Care and Development Fund
5. Native Employment Works (NEW)
6. Head Start and Early Head Start

Cohort 2

1. Community Services Block Grant (CSBG)
2. Low-Income Home Energy Assistance Program (LIHEAP)
3. Residential Energy Assistance Challenge Program (REACH)

Cohort 3

1. Family Violence Prevention and Services Program
2. Child Welfare Services

⁶ These documents will be described more fully in the discussion of the workgroup's efforts to satisfy Objective 2, pp. 4-5.

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3. Promoting Safe and Stable Families

Initially, the Tribal workgroup members looked at Cohort 1 as the priority for implementation because many of those programs are either scheduled for reauthorization, currently eligible for inclusion in Public Law (P.L.) 102-477 projects, a type of funding mechanism that allows for a form of Self-Governance, or have other properties that render them easier to transition to Self-Governance⁷. Federal Workgroup members recommended an initial focus on: (1) Child Care, (2) Head Start, (3) programs under Title VI of the OAA, and (4) the proposed but not yet funded SAMHSA Tribal Behavioral Health Prevention Program. After much discussion, the SGFTW decided to use these four programs in the initial exercise to identify how Self-Governance would work and to achieve the benefits of expanded Self-Governance.

The Tribal workgroup members presented their recommendations for Self-Governance expansion in the form of a *Concept Paper* at the third meeting of the SGTFW. The *Concept Paper* recommended including the four programs identified by the Federal workgroup members in a demonstration project with the ability to phase in new programs each subsequent year until all eleven programs are included.

After discussion of the *Concept Paper* with Tribes at the annual Self-Governance Conference in May, 2012, Tribal members of the workgroup presented a new draft of the *Concept Paper* dated August 5, 2012. In this draft, the Tribal members of the workgroup proposed that the demonstration project initially include only the four programs identified by the Federal participants of the workgroup as the most receptive to Self-Governance principles. In addition to the four programs, Tribal participants proposed phasing in two new programs per year, to be selected in consultation with Tribes from among those identified in the feasibility study as well as from any other HHS programs for which Tribes are eligible to participate or for which Indians are eligible beneficiaries. A copy of the *Concept Paper* is included as an Appendix.

Workgroup Charge Objective 2: Develop Detailed Recommendations To Overcome Legal And Logistical Barriers To Self-Governance Expansion.

OVERVIEW

As a starting point for this discussion, Federal staff created a number of documents highlighting the existing statutory and regulatory provisions governing each of the eleven programs identified in the feasibility study for inclusion in a Self-Governance demonstration project should one be statutorily authorized. Federal staff compared aspects of the current Indian Self-Determination and Education Assistance Act (ISDEAA) for IHS programs to the features of each of the eleven HHS programs identified in the feasibility study. The charts included side-by-side comparisons of the flexibilities offered by ISDEAA with the corresponding flexibility or inflexibility of each program's statute and regulations. See Appendix (HHS Programs vs. ISDEAA comparison chart) See Appendix

⁷ “Annual Self-Governance Compacts” is deleted because DOI has only one self-governance compact per tribe, which covers BIA and non-BIA programs. “Program eligibility” is deleted because program eligibility is determined by statute and regulations, not by the AFA. A Tribe can assume PFSAs from the Secretary of the Interior that would otherwise be performed by BIA or by non-BIA bureaus.

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(Consolidated Grants vs. Block Grants comparison chart) Consolidated grants are a mechanism by which governments of the Insular Areas⁸ can submit one application for all or a subset of grants that the Department of Health and Human Services (HHS or the Department) has made eligible for inclusion.

The workgroup identified that the overarching barrier to expansion of Self-Governance is the lack of legislative authority to conduct a Self-Governance demonstration project in HHS programs outside of IHS. Title VI of the ISDEAA, which authorized the 2003 feasibility study, did not authorize the Department to undertake a subsequent demonstration project. *See* 25 U.S.C. § 450f note. It was noted that ISDEAA limits the grant programs that can be incorporated into funding agreements under Title V. *See id.* 458aaa-4(b) (2) (limiting incorporation into ISDEAA compacts or funding agreements to grant programs within the Department that are "carried out for the benefit of Indians because of their status as Indians"). Title V allows tribes to add grants that are administered by IHS for Indians because of their status as Indians to the Title V ISDEAA agreements after the grant is awarded, but would not allow other grants to be included. Thus, there is no easy mechanism for expanding self-governance beyond the IHS available in current law. Aside from the lack of authority to conduct a demonstration project, the workgroup identified multiple additional legal barriers to expand Self-Governance.

Tribes identified the four core principles of self-governance as re-budgeting, redesign, reprogramming, and reduced administrative burdens. In the context of the ISDEAA, re-budgeting and reprogramming allow tribes to take the money that they receive to administer services that the Federal government would otherwise provide and redistribute it among their own programs as they deem necessary to serve their populations. Redesign authority allows tribes to structure their services in a different way from the Federal government's services or to offer different services altogether if tribes deem the change necessary to serve their members. For example, authorizing statutes for the eleven programs do not allow for redesign, rebudgeting, or reprogramming to an extent.

Tribal workgroup members also explained that to be self-governing a Tribal government must be accountable to its people, even to a greater extent than to the federal government. Consequently, they view the administrative burden such as site visits and other types of monitoring, in addition to the reporting requirements, as potential barriers to efficient self-governance. The Head Start Act, for example, requires that HHS conduct triennial reviews of Head Start grantees. *See* 42 U.S.C. § 9836A(c) (1) (A). Tribal workgroup members who are operating or have operated Head Start programs feel that the preparation needed for a triennial review, which can take months of staff time, is burdensome and distracts the Head Start staff from being able to provide services to children consistent with Self-Governance. While the Department's grants regulations and policies permit modifications to project budgets and funded activities,⁹ in most instances budget or project activity changes require prior approval from the funding agency exclusively under terms specified in existing regulations. Tribal workgroup members responded that Self-Governance under the IHS

⁸ 48 U.S.C. § 1469a note. Currently, these grants are only available to governments of the Insular Areas, defined in Section 1469a as Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands.

⁹ *See* 45 C.F.R. § 92.30

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model, as expressed by Congress in the ISDEAA, allows Tribes to design projects, adjust budget estimates, and administer programs and projects as necessary to fulfill local needs based upon local Tribal control, without having to first get approval from the Federal government. In short, Self-Governance requires Tribes to be responsive and accountable to their people, and to a lesser extent, the Federal Government.

The mechanisms by which Tribes receive funding for these programs represent another legislative barrier to Self-Governance. Tribal workgroup members indicated that stable base funding (i.e., the same amount of funding is ensured each year, rather than subject to fluctuations in appropriations) is essential to Self-Governance because it allows Tribes to use a known quantity to leverage funds from other sources and to plan for future years.

The workgroup identified the amount of funding to be available for self-governance to be a potential barrier if authorizing legislation for a demonstration or permanent legislation were to be passed. Congress currently appropriates funds for the eleven programs targeted for inclusion in a self-governance demonstration. Those funds are then distributed, either according to a formula (in the case of block grants) or after competition (in the case of discretionary grants). Self-governance Tribes may receive funding either directly from HHS or from the States. The federal members of the workgroup are concerned that additional funds will be required to develop an infrastructure to operate a demonstration or permanent expansion of Self-Governance. Also, workgroup members noted that decisions would need to be made regarding whether the funds for a demonstration would be from existing program appropriations, or from a supplemental appropriation specifically appropriated for the purpose of the demonstration. Workgroup members believe that securing additional funds would be preferable to using those currently appropriated for the existing programs.

The SGFTW recognizes that if Self-Governance were to move forward at the current time, or pursuant to legislation authorizing a demonstration project, but without additional funds, funds for the demonstration, including for associated administrative functions, would have to come out of the funds currently available to carry out the included grant programs. In an effort to maintain fairness and consistency, the Tribal representatives on the workgroup proposed in the Concept Paper that for the purposes of Self-Governance demonstration that funding formulas would remain the same. The demonstration does not seek to change or supersede any statutory funding formulas for distribution of funds. Instead, funding for each Tribe would be determined using current formulas, as applicable. This means Tribes would not necessarily receive recurring funding levels as under the existing IHS model under Title V, another consequence of the grant-based nature of non-IHS programs. Another option would allow Tribes to elect a recurring funding level, but waive any entitlement to formula funding beyond that amount should their formula allocation rise. As always, funding would remain subject to the availability of appropriations.

Tribal governments believe that they should be provided with Contract Support Costs (CSC) to carry out a self-governance demonstration project, but agreed to waive that request for the demonstration period proposed in their concept paper and revisit the proposal for any permanent legislation. CSC can also present a legislative barrier to the expansion of Self-Governance within HHS. CSC is a special category of ISDEAA funding that awards Tribes an amount of money to cover the necessary costs of administering the programs, functions, services, and activities (PFSA)

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or, portions thereof, above the costs funded through the “Secretarial amount.” Two categories of funding are provided under the ISDEAA to cover the costs to the Tribes of administering the PFSA that the Federal government previously provided. The “Secretarial amount” is the amount the Secretary would have paid to continue to operate the PFSA directly. CSC funding covers additional, reasonable costs above the Secretarial amount for activities the Secretary did not carry out or did not fund under the contract that Tribes must carry out to ensure contract compliance and prudent management of the PFSA. The ISDEAA prohibits duplication of funding in CSC and the Secretarial amount.

Federal workgroup members believe that the rationale behind Congress’ establishment of the CSC provision does not apply outside of the ISDEAA context because Congress indicated that the objective behind creating the CSC provision was “to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation.” 140 Cong Rec H 11140. No risk of diminution exists with other Federal programs, such as the HHS grant programs that are identified for the Self-Governance demonstration project, where the Federal government has never administered the programs. Such programs simply do not involve a comparable devolution of responsibility from the Federal government to the Tribes, or the corresponding risk of diminution of program resources after Tribes assume operation from the Federal government. Tribal workgroup members did not agree with this rationale, but agreed for any proposed demonstration legislation not to request CSC because they recognize this is a potential barrier to the success of the effort.

The Federal workgroup members believe that while CSC would not apply to the Self-Governance demonstration project for the reasons discussed above, Tribes may be able to recover some funding for the indirect costs they incur while administering a grant program, on the same basis as any other grantee. The payment of indirect costs would be governed by the Federal cost principles that apply to grants programs, including caps on indirect cost funding that apply to all grantees.

The Federal workgroup members noted that, because the Federal workforce exercising inherently Federal functions related to grant-making and oversight would continue to do so in administering grants to other entities such as State governments, tribes not participating in the demonstration, and other grant recipients, the Federal workforce would have greater responsibilities as Tribes participate in the demonstration of expanded Self-Governance. In particular, Federal responsibilities and workload would increase as a result of new work related to negotiation and administration of Self-Governance agreements. As mentioned above, while Tribal workgroup members believe that Tribes should receive full CSC to carry out a Self-Governance demonstration project, they agreed to waive that request for the demonstration proposed in their Concept Paper and to revisit the issue for any permanent legislation.

Another significant legislative barrier to expansion of Self-Governance in a demonstration project is the applicability of the Federal Tort Claims Act (FTCA) coverage. None of the 11 programs from the feasibility study current have legislative authority to cover grantees under the FTCA. Tribal workgroup members recommend the extension of FTCA coverage to all Tribes in the administration of the demonstration project. Federal workgroup members recommended consulting with the HHS General Law Division and the Department of Justice regarding extension of FTCA

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coverage. Extension of FTCA coverage would require legislation and would represent an expansion of the FTCA.

With respect to logistical barriers, the workgroup identified Federal resistance to changing longstanding policies and procedures as a key barrier. It is also possible that program heads would not be amenable to self-governance if they had the impression that the performance standards of programs funded by their offices would change, despite the successful track record of tribes operating hospitals and clinics and a vast array of services under IHS Self-Governance. Administrative changes would also be required to accommodate reporting processes not fixed in statutes or regulations, but those that would instead be negotiated with the tribes and subject to an appeals process if the two parties could not reach agreement.

Another logistical barrier is that the eleven programs identified for inclusion in a Self-Governance demonstration are scattered among multiple agencies within the Department, including the Administration for Children and Families (ACF), the Administration for Community Living (ACL), and the Substance Abuse and Mental Health Services Administration (SAMHSA), all presently operated under their own leadership. None of these agencies have the capacity or expertise to negotiate Self-Governance contracts or compacts or to administer such agreements once finalized, although extensive expertise exists elsewhere in HHS, within the IHS. Nor do the proposed Self-Governance demonstration agencies have subject matter expertise to administer another agency's programs.

WORKGROUP DEVELOPMENTS

The Self-Governance Workgroup had extensive detailed discussions regarding recommendations on implementing a Tribal Self-Governance demonstration project within HHS. Although the workgroup was committed to furthering Self-Governance within HHS, the Tribal and Federal representatives offered vastly different approaches on how to accomplish this goal. Thus, the recommendations did not represent a consensus among the Federal and Tribal representatives. The Tribal representatives emphasized legislation as the most effective vehicle for achieving Self-Governance expansion because there was consensus among both the Tribal and Federal members that legislative authority was needed to conduct Self-Governance for the subject programs. In the absence of current legislative authority, the Federal representatives also offered several non-legislative approaches to expanding Self-Governance, such as exploring existing flexibilities within the eleven programs identified in the 2003 feasibility study, and looking to existing statutory authorities that allow grantees to consolidate and simplify administrative requirements in the absence of new legislation.

Legislation: The Tribal representatives indicated that their goal is to have legislative authority to enter into a Self-Governance compact that would govern all eleven programs. However, the Federal representatives asserted that they are prohibited from assisting in the development of legislation outside of the authorized and approved channels within the normal executive-legislative branch relationship. In recognition of this limitation, the Tribal representatives indicated that they would continue to pursue legislation independent of the workgroup. Although the Tribal representatives expressed interest in working with the Federal representatives to overcome barriers for advancing Self-Governance principles within the current parameters of grant program authorities, the Tribal workgroup members expressed their position that such work to expand grant flexibility did not

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constitute expansion of Self-Governance as in the ISDEAA, and thus was outside the charge of this workgroup. The Tribal representatives also expressed a desire to continue to meet on an ongoing basis with federal representatives regarding Tribal efforts toward developing legislation to implement a demonstration project. The intent of these meetings would be to achieve consensus among DHHS and the Tribes and thus allow the Tribes to develop mutually agreeable legislation.

Tribal Concept Paper. The Tribal workgroup members presented their recommendations for Self-Governance expansion in the form of a Tribal *Concept Paper* that details the Tribal recommendations for moving a Self-Governance demonstration forward within the Department. The Tribal *Concept Paper* incorporated ISDEAA as its foundational concept, but contained some significant deviations from ISDEAA for purposes of demonstration. As stated in the Opening Statement to the *Tribal Concept Paper*, “This paper contains numerous compromises that Tribal representatives developed and proposed for discussion purposes in an attempt to bring the workgroup to consensus on recommendation for a demonstration project. (See “*Tribal Concept Paper.*” in Appendix). The deviation from ISDEAA were concessions offered by the Tribal workgroup members in an effort to reach consensus on how to overcome the key barriers identified in this Report.]The Tribal *Concept Paper* called for a five-year demonstration project under which up to fifty Tribes would be eligible to enter into ISDEAA agreements. The project would initially include four programs, with the addition of other HHS programs over the five-year project period. The demonstration project would authorize, among other things, removal of various grant administrative cost caps, carryover of funds, program redesign and funding reallocation (unless expressly prohibited by statute), Federal Tort Claims Act coverage, final offer and appeal rights, and negotiated reporting requirements. See Appendix (Tribal Concept Paper).

In considering the scope of a possible demonstration project, the workgroup discussed identifying those programs in which a Self-Governance pilot would be most likely to be embraced by the Department and which would have the greatest chances of success in terms of outcome. The Federal members offered information and a review of existing flexible funding mechanisms summarized below as additional options if legislative authorities were not available. The Federal workgroup members acknowledged the challenge of modeling an ISDEAA agreement with program funds not dedicated to tribes or for services not directly administered by the Department for tribes. The Federal members offered information and a review of existing flexible funding mechanisms.

Public Law 102-477: The Federal workgroup members recommended exploring the Public Law 102-477 structure as a viable framework for Self-Governance. Public Law 102-477 authorizes Tribes to administer federally funded employment and job-training programs with funding from the Departments of Interior, Labor, HHS, and Education under a single project plan, with a single budget and reporting system. See Appendix (Public Law 102-477 explanatory document). Although not without some problems, 102-477 projects offer some of the flexibility Tribes seek under their Self-Governance implementation proposal, such as waiver options and reduced administrative burdens. The Federal representatives suggested that the workgroup look at P.L. 102-477 along with Self-Governance under the IHS to examine how the desirable elements of those mechanisms can be merged with other means to contribute to Self-Governance within the eleven programs identified in the feasibility study.

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Consolidated Grants: The Federal workgroup members also suggested modeling a demonstration project based on the consolidated grants authority for governments of the Insular Areas. In furtherance of this recommendation, the Federal representatives provided a comparison chart of block grants and consolidated grants that outlined certain features that would provide the types of flexibilities that the Tribes seek under the demonstration project such as single applications, less reporting (annual versus monthly), waiver of matching requirements, reallocation options, and authorized uses of funds. See Appendix (Block Grants v. Consolidated Grants Comparison Chart).

Existing Flexibilities: The Federal workgroup members recommended that the workgroup should focus on leveraging those flexibilities (such as waivers of existing requirements) that are already in place within the identified programs as a way to further Self-Governance in the absence of legislation. The Federal representatives suggested looking at HHS waiver authority. As an example of flexibilities within existing authorities, Federal staff discussed the Head Start program and clarified some misconceptions and described flexibilities in that program. For instance, Child Care and Head Start funds may be combined by an agency to pay for playgrounds, teachers, or any other allowable expense under either program. Both of these programs were identified as being of utmost importance to the tribes.

Workgroup Charge Objective 3: Identify The Benefits That Tribes Seek To Achieve Through The Expansion Of Self-Governance To Other HHS Programs, And To Develop Recommendations To Achieve Those Benefits.

OVERVIEW

The Tribal workgroup members identified four core principles which they deemed foundational to the concept of Self-Governance. These principles, which center on Tribes' ability to control operational aspects of their programs and funding are: (1) Redesign Authority, (2) Reprogramming Authority, (3) Rebudgeting Authority, and (4) Reduced Administrative Burden. Tribal workgroup members believe that having this control will allow them to better serve and be accountable to their people at the local level. Tribal workgroup members also indicated that while they prefer the Self-Governance expansion to include all of the current benefits of the ISDEAA that they have in IHS programs (See Appendix), differences in funding and administration of the grant programs from other HHS OPDIVs are underpinning barriers to the expansion of Tribal Self-Governance, and the Tribal Workgroup members believe that the Tribal *Concept Paper* outlines how best to address these obstacles for purposes of a demonstration. Federal workgroup members indicated that they share the desire of the Tribal participants to serve Tribal communities effectively and to be accountable to those communities.

WORKGROUP DEVELOPMENTS

Redesign and Reprogramming Authority: Tribal workgroup members emphasized the need to have the authority to redesign programs to meet the needs of their communities without being required to gain approval from the Federal government. Tribal workgroup members asserted that any redesign efforts initiated by Tribes would be carried out in a manner to ensure that the program's original congressional intent is fulfilled. Federal workgroup members recognized that redesign and reallocation authority will allow Tribes to move money and change programs to best fit the needs of their local communities. Tribal and Federal members agreed that the concept of "redesigning a program out of existence" was not contemplated nor acceptable, but had been raised as a concern

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by some federal staff, and that the Tribal representatives made the point that Tribes are required to carry out the statutory purposes of programs and that, to their knowledge, program elimination has not occurred in the past.

Re-budgeting Authority: Tribal workgroup members used the Bureau of Indian Affairs programs as an example of how Tribes are able to redesign and reallocate based on priorities, often leading to consolidated services as they typically serve the same consumers. Tribes also have the authority to carry funds over from one fiscal year to the next without additional approvals. Federal workgroup members explained that the manner in which funding is distributed is only part of the concern. Another concern is rules and regulations which govern the distribution of Federal funds. Tribal workgroup representatives noted that Self-Governance does not remove accountability for use of Federal funds.

Reducing Administrative Burden: Reducing the administrative burdens allows Self-Governance Tribes to focus more on the delivery of program services. Examples of reduced burdens include reduced reporting requirements, reduced application requirements, and reduced approval requirements for redesign and rebudgeting. Tribal workgroup members stated that single audits and annual reports provide necessary accountability. Further, Tribal members of the workgroup referred to the reporting requirements of P.L. 102-477 as an example of annual reporting that includes quantifiable elements as well as qualitative information and combines programs under different appropriations acts and administered by different federal agencies into a single, consolidated report. It was noted by the Federal participants that annual reporting under ISDEAA may not be consistent in all cases with existing statutes and regulations for programs from the various HHS OPDIVs, another concern that will need to be addressed in the demonstration project legislation.

REPORT CONCLUSION

The SGTFW completed work on the original charges and this report summarizes the workgroup discussions on each charge. The discussions were valuable as a means of sharing information and perspectives on options for expanding Self-Governance in HHS. HHS will continue to advance work on the expansion of Tribal Self-Governance through the Secretary's Tribal Advisory Committee (STAC) and the Intradepartmental Council on Native American Affairs (ICNAA). This report, including all addendums, proposals, and recommendations, will be sent to the STAC and ICNAA for further review and discussion. Expansion of Self-Governance in HHS remains a priority. The contributions made by the members of the SGTFW are appreciated. This Report provides an important foundation for HHS and Tribes to continue their partnership to support and build healthy Tribal communities and strengthen Tribal capacities.

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Appendix A: Tribal Concept Paper

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August 5, 2012**

Opening Statement

This paper was developed by the Tribal representatives on the Department of Health and Human Services (DHHS) Self-Governance Tribal-Federal Workgroup (SGTFW), after many hours of discussions with the Federal representatives regarding advancing a Self-Governance demonstration. This paper contains numerous compromises that Tribal representatives developed and proposed for discussion purposes in an attempt to bring the workgroup to consensus on recommendations for a demonstration. Unfortunately, the Workgroup was unable to reach consensus on recommendations for Self-Governance so the compromises reflected in this paper should not be interpreted as reflecting the final views on these issues from the Tribal side. This paper is included in the SGTFW Final Report for historical purposes to demonstrate the good faith efforts of Tribal representatives to reach consensus with the Federal team.

Introduction

This Tribal Concept Paper describes proposed concepts to establish a demonstration project in the DHHS that would extend Tribal Self-Governance principles to DHHS programs beyond those of the Indian Health Service (IHS). The paper is meant to facilitate discussion between Tribal Leaders and DHHS officials, as mediated through the HHS Self-Governance Tribal-Federal Workgroup established earlier this year.

The concepts described below are modeled on a previous bill, S. 1696, introduced in 2003, but with significant changes based on the dialogue between Federal and Tribal representatives in the SGTFW during 2012. That bill proposed a new Title VI to the Indian Self-Determination and Education Assistance Act (ISDEAA). This concept paper contemplates a new ISDEAA Title VI that focuses on programs other than IHS within DHHS. Tribes have attempted to address some of the Department's deepest concerns while retaining core principles of Tribal Self-Governance. The fundamental principles include redesign, reprogramming, rebudgeting, and reduced administration.

Following a brief background statement, the paper discusses the proposed approach to the key issues, as identified and discussed by the SGTFW. We recognize that DHHS officials cannot comment directly on proposed legislation. At the same time, however, the SGTFW cannot fulfill its charge to "[d]evelop detailed recommendations to overcome the legal and logistical barriers to Self-Governance expansion" unless the broad outlines of the demonstration project can be envisioned and discussed candidly.¹⁰

Background: Title VI, the Feasibility Study, and S. 1696

In Title VI of the Indian Self-Determination and Education Assistance Act (ISDEAA), Congress charged DHHS with conducting a study to determine the feasibility of a Self-Governance

¹⁰ *Workgroup Charge*, Department of Health and Human Services Self-Governance Tribal-Federal Workgroup (Draft, Feb. 2, 2012).

demonstration project for non-IHS programs.¹¹ In 2003, DHHS published its study concluding that such a demonstration project is feasible, identifying eleven programs that might initially be included, and outlining "demonstration design" elements that reflected the Self-Governance principles of Title V of the ISDEAA but recognized differences between the IHS model and the requirements of non-IHS programs.¹²

Shortly after the feasibility study was released, Tribal representatives crafted draft legislation that became Senate Bill 1696. Introduced by Senators Campbell and Inouye on October 1, 2003, S. 1696 tracked the key recommendations of the DHHS feasibility study. The demonstration project would run for five years. The eleven programs identified by DHHS would be eligible, along with a SAMHSA mental health and substance abuse block grant program. The Secretary could add up to six additional programs annually. DHHS would prepare annual reports for Congress on the costs and benefits of the demonstration project using evaluation and reporting data provided by participating tribes, with additional funding to be made available to tribes for that purpose. The bill was reported favorably,¹³ and a hearing was held, but S. 1696 died at the end of the session. The Bush administration's lack of support carried forward through a second term, with DHHS refusing to participate in any discussion of the bill. The SCIA shifted its legislative priorities, and Tribal Leadership did the same.

Under the Obama Administration, however, DHHS has re-opened the dialogue on Title VI implementation. The Department has held listening sessions, invited written comments, and convened the SGTFW. Tribes applaud the Department's recent efforts and advance the following proposal to further the dialogue on this Tribal legislative priority.

DHHS Self-Governance Demonstration Project: Legislative Concepts

The overarching issue is the extent to which the demonstration project will be modeled on the ISDEAA, as Tribes would like, or on a consolidated grant model, as DHHS would prefer. The following proposal seeks a middle ground that retains core Self-Governance principles but accommodates Federal concerns by departing in significant respects from the ISDEAA. We hope that DHHS will respond in a similar spirit of negotiation and compromise, so that the final demonstration will be something both Federal and Tribal Leaders can support, even if neither finds it ideal.

1. ISDEAA Agreement, Not Consolidated Grant: Congress enacted Title VI as part of the ISDEAA, seeking feedback on "a Tribal Self-Governance demonstration project." To be consistent with this vision, the agreements authorized by the demonstration project must be ISDEAA agreements. But Tribes are willing to consider departing from the ISDEAA model

¹¹ Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 5, 114 Stat. 711, 731 (2000).

¹² DHHS, Office of the Ass't Sec. for Planning and Evaluation, *Tribal Self-Governance Demonstration Feasibility Study* (March 12, 2003) (Feasibility Study).

¹³ S. REP. NO. 108-412 (2004).

in significant ways, as made clear below, in recognition of the differences between IHS direct-service programs and non-IHS grant programs.

2. Duration and Administration: The project would last five years. The demo would place management and administration responsibility in an office established by the Secretary, leaving the Secretary to determine how this would best be accomplished.
3. Eligibility: Up to 50 tribes would be eligible initially, and more could be selected at the Secretary's discretion.¹⁴ To participate, Tribes must either have (1) a current Self-Governance compact under Title IV or V; or (2) demonstrated, for the three previous fiscal years, financial stability and financial management capability with any ISDEAA agreement under Title I. Participating tribes would not have to have operated the included grant programs in the past. Tribes would not be required to have previously participated in Self-Governance to be eligible for this demonstration. Tribes would be eligible for planning and negotiation grants, but such grants would not be required to participate.
4. Included Programs: We propose that the demonstration project initially include only the four programs DHHS representatives on the SGTFW have identified as the most receptive to Self-Governance principles. This concept reflects a significant compromise on the part of Tribes. While we believe all 11 programs identified in the feasibility study, plus the SAMHSA behavioral health program and other DHHS programs such as the Special Diabetes Program for Indians, should eventually be included in Self-Governance, we hope that an initial focus on the four most receptive programs will increase DHHS support. The HHS would phase in two new programs per year. These would be selected, in consultation with tribes, from among those identified in the feasibility study as well as any other DHHS programs in which tribes are eligible to participate or of which Indians are eligible beneficiaries.
5. Redesignation or Recompensation: Participating tribes would be exempt from any redesignation or recompetition requirements for the duration of the demonstration.
6. Compacts and Funding Agreements: These would not be grant agreements, but government-to-government agreements as required by the ISDEAA. Tribes could negotiate new compacts, or use their existing Title V compacts with the Secretary. There would be one funding agreement for all non-IHS included programs.
7. Funding Formulas: Funding formulas will remain the same under this demonstration. The demo does not include any competitive grants, and does not seek to change or supersede any statutory funding formulas for distribution of funds. Instead, funding for each Tribe would be determined using current formulas, as applicable. This means Tribes would not necessarily receive recurring funding levels as under Title V, another concession to the grant-based nature of non-IHS programs. Another option would allow Tribes to elect a recurring funding level, but waive any entitlement to formula funding beyond that amount should their formula allocation rise.

¹⁴ This was the recommendation of the Feasibility Study.

8. Contract Support Costs: In a major concession by Tribes, the demo would not require payment of contract support costs on top of grant amounts. It would, however, waive any caps on administrative expenses. This concession is strictly limited to the duration of the demonstration. In addition, the Secretary would be required to include an analysis in the report described in item 15 below of the feasibility of fully incorporating contract support costs for these programs.
9. Tribal Shares: Unlike S. 1696, the demo would not require negotiation of Tribal shares of administrative funding without regard to the organizational level at DHHS.
10. Carryover of Funds: The demo would authorize carryover of funds, notwithstanding any other provision of law.
11. Redesign and Reallocation Authority: DHHS representatives have expressed concern that Tribes would be able to redesign a program out of existence. That has never been Tribes' intent, and we propose addressing this concern in four ways. First, the demo would limit reallocation to 20% of the funding for each included program in the first two years of a funding agreement, with the allowable percentage rising to 50% in the third and subsequent years.¹⁵ Second, Tribes must carry out the statutory purposes of the program. Third, if expressly prohibited by the program's authorizing statute, no reallocation authority would be granted. Fourth, all expenditures of funds must meet allowable cost standards set by the Office of Management and Budget. To allow related programs from IHS and the human services agencies to benefit from these provisions, redesign and consolidation would be authorized among a tribe's DHHS agreements, subject to the same limitations above.
12. Savings: The demo would not require the Secretary to distribute savings resulting from a reduction in administration or other responsibilities to the tribes participating in the demonstration. Rather, the demo would require the Secretary to identify any such savings at the conclusion of the demo and include that information in the report described in item 15 below.
13. Federal Tort Claims Act (FTCA) Coverage: The FTCA would apply to Tribes and their employees carrying out funding agreements. We recognize DHHS's objections to this proposal, as voiced in the SGTFW meetings, but FTCA coverage is a core ISDEAA benefit that advances Self-Governance by reducing insurance costs and freeing more funding for services. The cost to the United States of affording such coverage would be minimal compared to the collective costs borne by Tribes should the FTCA not apply.
14. Final Offer and Appeal Rights: The final offer procedures and criteria would apply. We recognize that grant programs do not typically contain such procedures, but without them the agency could adopt a take-it-or-leave-it approach reflecting Federal domination rather than Tribal Self-Governance.

¹⁵ The Department's recommendation in the Feasibility Study was to limit reallocation to 20% throughout the demonstration project. Methods to Assure Quality and Accountability, Recommendation 2.

15. Reporting and Evaluation of Demonstration: Program accountability and quality will be monitored through performance indicators and performance reports, established through negotiation between Tribes and DHHS representatives during the funding agreement negotiation process. DHHS will, in consultation with Tribes, provide Congress with a report summarizing the demonstration, success and challenges, as well as an analysis of administrative savings and contract support costs at the end of the project.

We have discussed the key issues above in general terms to avoid getting bogged down in details and to respect the Department's desire to avoid weighing in on specific legislative language. We are prepared, however, to provide additional details on how we envision the demonstration project working, including draft legislation we have developed, if DHHS would find it helpful.

Conclusion

To summarize, the Tribal proposal above adheres to fundamental principles of Self-Governance, but also includes significant concessions on included programs, contract support costs, Tribal shares, and redesign and reallocation authority. We offer these concessions in the hope of kick-starting negotiations because time is short in this legislative session. We hope and expect that DHHS, in responding to this concept paper, demonstrates a similar sense of urgency and willingness to compromise.

We look forward to continuing the dialogue on how to implement the demonstration project envisioned by Congress in Title VI in a fashion congruent with both Tribal and Federal interests. If you have any questions or would like further information, please contact SGTFW Tribal Co-Chair Ken Lucero at kenblucero@gmail.com or 505-220-4704.

Appendix B: Workgroup Member Listing



DEPARTMENT OF HEALTH AND HUMAN SERVICES
Self-Governance Tribal Federal Workgroup
Tribal Members

Ken Lucero Tribal Council Representative Pueblo of Zia	Rhonda Butcher Self Governance Director Citizen Potawatomi Nation
Gloria O'Neill President and CEO Cook Inlet Tribal Council	Leonard Forsman Tribal Chairman Suquamish Tribe
Steven Ortiz Tribal Chairman Prairie Band of Potawatomi Indians	Lynn Malerba Chief Mohegan Tribe
Jefferson Keel Lieutenant Governor Chickasaw Nation of Oklahoma	Judy E. Fink Tribal Chairwoman North Fork Rancheria of Mono Indians of California
Stacy Dixon Tribal Chairman Susanville Indian Rancheria	Carol Nuttle Tribal Council Representative Pawnee Nation