

**Tribal Sovereignty in the United States:
A Brief History of the
Indian Self-Determination Act
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Since 1975, or for 50 years, the Indian Self-Determination and Education Assistance Act (ISDA) has provided a unique legal framework for tribes to assume the responsibility, and associated funding, to carry out programs and services that the United States government would otherwise be obliged to provide to American Indians and Alaska Natives.

Today, tribal self-determination and self-governance policy, and other legislative initiatives designed along the lines of the Act, have proven to be some of the most successful policies that the United States has ever enacted impacting American Indians and tribal communities. This unique policy has empowered tribes to promote their tribal economies, build governmental infrastructures, provide law and order, manage tribal natural and cultural resources, meet the healthcare and educational needs of their members, and perform other governmental functions.

My comments will focus on the historic backdrop against which the self-determination policy emerged, some key highlights of the Federal-Tribal relationship today, what the ISDA looks like today—with some examples in the health care space, and how it has impacted and is impacting other federal policies.

Historic Background

The United States' policy towards American Indians and Alaska Natives has swung dramatically back and forth over the past several hundred years. Unfortunately, I only have thirty minutes so I do not have time to discuss in great detail all of the twists and turns of that tortured history. It is helpful, however, to understand the basics about that history because it helps put the last 50 years—the Self-Determination years—in context.

At the time of European “discovery” of the New World, many tribes possessed sophisticated forms of government and expansive trade systems. In the

initial phase of the relationship, European powers alternatively fought and entered into treaties with the tribal nations they encountered.

The **US Constitution** granted Congress the exclusive power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This so-called “**Indian Commerce Clause**” became, and remains, the primary basis of federal authority or so-called “plenary power” over tribes.

Relying on this Constitutional power, successive Presidents negotiated treaties with a number of tribal nations. Between 1778 and 1871 the **U.S. Senate ratified 370 Indian treaties**. Other treaties were negotiated but never ratified. After the practice of Senate-ratified treaty-making ended, many tribal nations have been federally recognized through executive order or statute. **Today there are over 570 federally recognized tribes in the United States. Approximately 229 of these tribes are in Alaska.**

In the 1820s and 1830s the Supreme Court’s Chief Justice John Marshall issued three landmark opinions which established enduring principles of federal Indian law: **the inherent sovereignty of tribes; their status as separate (though dependent) governments; the federal government’s exclusive authority over, and consequent responsibility for, the “dependent” tribes; and the lack of state power over Indian affairs.**

The election of President Andrew Jackson in 1828 accelerated the removal of eastern tribes to territories in the West, and in **1830** Congress passed the **Indian Removal Act**. By the end of the **Removal era**, around **1850**, most tribes had been removed from the East, although factions escaped removal and eventually gained federal recognition and protection in their original homelands.

In **1887** Congress instituted a program of forced assimilation in the **General Allotment Act**, which allotted tribally owned reservation lands to individual Indian owners, breaking up communal life and eroding the Indian land base. The **allotment era** saw the rise of federal domination of life on reservations, and the corresponding decline in tribal governments.

In **1934** Congress repudiated the policy of allotment by passing the **Indian Reorganization Act** (IRA), which aimed to reverse the erosion of the tribal land base by eliminating allotment and authorizing the Secretary to take Indian lands into trust (and thus off state and local tax rolls). The IRA also

attempted to revitalize tribal self-government by providing for formal adoption of tribal constitutions, tribal corporations, and formal tribal membership enrollment procedures.

Then once again, twenty years later in the early **1950s**, Congress shifted course and it ushered in the **Termination Era**, during which the United States formally repudiated government-to-government relations with over one hundred federally recognized tribes, thus ending their federal recognition as tribes. In response to these policies Tribes across the country unified and started the National Congress of American Indians, a nationwide organization dedicated to pursuing political changes to respond to these termination policies and advocate for the self-determination of tribal nations.

In the early and **mid-1960s**, in conjunction with the Civil Rights Movement, tribal advocacy began to yield fruit. The **Johnson Administration** embraced Indian tribes through unprecedented investments in Indian social programs and reservation infrastructure, and in **1968** Congress passed the **Indian Civil Rights Act**. However, President Johnson's definition of self-determination was viewed by some critics as overly paternalistic because it did not include empowering Tribes to self-determine their own destinies.

In **1970**, **President Nixon** recognized that federal bureaucracies had largely failed American Indian peoples, and that the time had come **for a fresh approach calling for self-determination** that would include legal and political sovereignty, fulfillment of treaty obligations, the return and protection of homelands, and the continued maintenance of the United States' trust responsibilities to tribes.

Congress passed what would become the **Indian Self-Determination and Education Assistance Act** reflecting these principles five years later in **1975**.

Since 1975 the ISDA has been amended many times, and the policies that drive the statute have been adopted and applied to other statutory schemes. **Statutory changes in this evolving landscape have been driven by political coalitions of like-minded tribal leaders intent on advancing their Tribe's sovereign rights, and have been achieved through bipartisan efforts in Congress that have ensured the continued political support necessary to sustain and build on the self-determination policy.**

How Does the ISDA Work?

The ISDA is largely concerned with strengthening tribal governments by emphasizing tribal administration of federal Indian programs and associated funds. It accomplishes these objectives by allowing tribal governments, if they so choose, to step into the shoes of federal agencies, take over existing federal funding, and deliver programs and services based on tribal priorities, all while maintaining the trust responsibility and the unique relationship that exists between tribes and the United States.

Importantly, all Indian programs have historically been chronically underfunded, so as tribes have stepped into the shoes of federal agencies and taken on the responsibility to provide programs and services, they have not been able to provide all of the services needed or that the United States has a responsibility to provide. The lack of funding has made it all the more important to ensure that no aspect of the ISDA dilutes or otherwise negatively impacts the United States' trust responsibility to tribes.

Implementation of the Act since 1975 has had its ups and downs. During the first 15 years, many Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) personnel—often members of tribes themselves—fought the transfer of funds and programs to Tribes. And once programs were taken over by tribes, they paternalistically micromanaged how the programs were administered. By the late 1980s, after years of trying to address these concerns directly and through amendments to the Act, tribal leaders finally lost patience and convinced Congress to enact legislation creating self-governance programs in both agencies.

The Act currently consists of five major sections:

A. Title I

Title I contracts empower tribes to exercise their self-determination rights by allowing them to take over programs and funds from the Department of the Interior (DOI) (BIA really) and the Department of Health and Human Service (DHHS) (IHS really) as a matter of right. The relationship between tribes and both agencies in Title I contracts has evolved into a delicate balance between competing sets of interests: the interest of tribes to pursue self-determination goals while ensuring that the United States' trust responsibility remains intact, and the interest of the United States to pursue a policy of tribal self-determination while retaining some control and oversight regarding how responsibilities are carried out by tribal contractors.

B. Title II: Education Assistance

Early federal education policies focused on assimilation, but after the Act was passed, tribes had a pathway to directly manage schools in the Bureau of Indian Education (BIE) system. Many tribes have done so: today 128 of the 183 BIE-funded schools are “Trially Controlled Schools”, and now, more than ever, education of Indian children is in the hands of tribes.

C. Title IV: Self Governance at DOI

In 1994, Congress added a new Title IV, which implemented a permanent Tribal Self-Governance Program within DOI. Title IV differed from Title I in several ways: (1) a tribe has to establish eligibility by demonstrating financial stability and financial management capabilities for the previous three fiscal years, complete a planning phase, and, once admitted into the program; (2) tribes could negotiate agreements that clarified their right to carry out responsibilities flexibly by redesigning or consolidating programs, functions, services, and activities (PFSAs), and to reallocate funding based on tribal priorities.

Title IV also authorizes, on a discretionary basis, non-BIA agencies to enter into agreements with requesting tribes to transfer control of these lands—lands historically under tribal control.

D. Titles V and VI: Self Governance at DHHS

The Act was amended in 2000 and the 2000 Amendments enacted two new titles: Title V established a permanent self-governance program within DHHS, and Title VI directed the Secretary of Health and Human Services to study the feasibility of expanding the tribal self-governance program to non-IHS agencies within DHHS. In a report to Congress published in 2003, DHHS concluded that it was feasible to extend tribal self-governance within the Department, but legislation has not yet been enacted to do so.

The Growth and Future of Self-Governance.

It is undisputed that the self-governance program has yielded unqualified successes around Indian Country: programs are much better run, services to Indian beneficiaries have expanded dramatically, and tribal governments have finally been able to take full responsibility for providing essential government

programs, in the best and most effective manner possible, in order to meet local needs.

The real growth in ISDA participation is happening with the self-governance program. While 20 years ago all tribes and tribal organizations that participated in ISDA contracting with DOI or DHHS had Title I contracts, today over **40% of all tribes participate in self-governance with DOI and the BIA**, and well **over 50% of all tribes participate in self-governance with HHS and the IHS**. In 2023, for example, the IHS had Title I contracts with 206 tribes and tribal organizations but 384 tribes participated in Title V. In the Department of the Interior, 526 tribes had contracts under Title I and 295 had compacts under Title IV.

And, what tribes and tribal organizations have been able to do once they have taken over IHS programs is nothing short of amazing:

- In Alaska the 229 tribes in the state have **one agreement** with the IHS, and through that agreement they are responsible for managing an extraordinarily sophisticated health care system that ranges from one room clinics in the most remote areas, to sub-regional clinics, to rural and urban hospitals. It is no exaggeration to say that the tribal health system is the only health care system in rural parts of the state.
- In other rural parts of the country, it is often the case that tribal health programs are the only providers in the region that provide services to Indians and non-Indians alike. In one example, the Jamestown S’Klallam Tribe in Sequim, WA has become the preferred provider for Medicaid and Medicare patients in a 4-county area, and they run a highly sophisticated Medication Assisted Treatment (MAT) drug treatment facility that is open to anyone in the community.
- And these are just a few examples. I work with tribal health programs all over the country, from Florida, New York, and North Carolina to tribes all over the west. In all of these areas, there are tribally run programs that I could use to illustrate the incredible success these self-governance programs are having.
- Perhaps most importantly, there is clear evidence that as these programs have become better and more sophisticated, the health disparities between Indians and non-Indians have started to shrink. To be sure, there remains a lot of work ahead, particularly in some very remote parts of the country, but the progress made over the past

25 years has been astonishing.

Despite the widespread success of self-governance programs at both agencies, there remain problems that impact full implementation of the Act.

First, carrying out federal programs requires tribes to develop and maintain administrative capacity, which results in fixed and unavoidable administrative costs such as insurance, property and personnel management systems, audits, and facilities overhead and maintenance. If these administrative costs are not fully paid, tribes need to re-direct program funds to cover these necessary expenses, thus lowering the level of services provided (or at least funds spent on those services) below what the Secretary would have otherwise provided. **After 30-plus years of litigation over whether tribes are entitled to be paid 100% of their administrative costs needs, which involved going to the U.S. Supreme Court 4 times, these issues, as of the most recent decision of the U.S. Supreme Court issued just last year, have for the most part been resolved. Litigation has also resulted in tribes, starting in 2016, receiving funds to adequately maintain and upkeep the facilities they use to deliver services.**

Second, while the agencies have made some progress in acknowledging tribes' statutory rights to self-governance, often they continue to **interpret and implement the statutes as narrowly as possible**, in contravention of the ISDA's mandate that the statute and the contracts be interpreted liberally for the benefit of tribes and in favor of transferring programs and funding to tribes. That needs to change.

Finally, DOI and DHHS personnel have routinely **opposed expansion of self-governance outside of the BIA and IHS to other agencies within DHHS and DOI** because they are concerned about loss of control over funds and programs. They strongly prefer paternalistic grantor-grantee relationships that allow them to impose controls on the use of funds and insist on regular and burdensome reports. These relationships differ markedly from the government-to-government relationship promoted under the ISDA, where tribal contractors can redesign programs and reallocate funds to suit tribal rather than agency priorities.

The Expansion of Self-Governance Principles Outside of DOI and DHHS

The self-governance programs at DOI and DHHS have worked so well that the principles underlying these programs are being exported to other agencies:

The Tribal Transportation Self-Governance Program (TTSGP) at the **Department of Transportation (DOT)** was established on December 4, 2015. Modeled largely on Title V of the ISDA, it extends to all programs available to tribes within the DOT. On October 1, 2020, after a close-to-five-year effort, DOT published final rules implementing the program. On June 8, 2022, the DOT signed the first agreement in the program with the Cherokee Nation.

Other Self-Governance-like models:

- ***PL 477***

In 1992 Congress enacted the Indian Employment, Training and Related Services Demonstration Act of 1992 as Public Law 102-477 (the “PL 477 program”). This demonstration program was made permanent in 2017. The PL 477 program allows tribes to “integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally-determined goals consistent with the policy of self-determination.” Tribes can integrate federal programs related to workforce development that were offered through the Departments of Interior, Labor, Health and Human Services, and Education into a single program plan that can, at the option of tribes, be integrated into an ISDA agreement. The PL 477 program promotes tribal self-determination by giving tribes greater authority to provide the social services their communities need without having to fit into restrictive federal requirements or meet burdensome oversight standards that detract from the tribe’s ability to provide services.

- ***TERRA Act***

Building on the success and framework of the PL 477 program a new bill, HR 7859 , the Tribal Environmental Resiliency Resources Act (TERRA Act), was recently introduced in the House. HR 7859 will allow tribes to bring climate-related concerns—such as community-driven relocation; disaster preparedness, mitigation, or relief; natural resource preservation or revitalization; or beyond—to one program office in BIA. Tribes will then work with the BIA to

identify eligible federal programs from at least sixteen federal agencies and integrate them into a single plan that, like the PL 477 program, allows commingling of funds and requires only a single annual report. At a tribe's option, the plan can be integrated in an existing ISDA agreement. Additionally, TERRA addresses Tribal climate resiliency needs with provisions such as streamlined and expedited procedures for permitting, review, and fee-to-trust purposes.

Conclusion: Self-Governance in an Evolving Political Context

The federal policy of self-determination and self-governance in general, and the ISDA in particular, have played a critical role in strengthening tribal governments and communities over the past 50 years. I think that the role of the ISDA and related statutes can be expected to grow as tribes continue to expand their exercise of sovereignty and self-governance.

Thank you so much for inviting me to speak today. I look forward to any questions you might have.