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Indian Self-Determination and Education Assistance Act (ISDEAA) and the Bureau of Indian Affairs

The Indian Self-Determination and Education Assistance Act (ISDEAA; P.L. 93-638, 25 U.S.C. §§5301 et seq.) emphasized tribal self-determination and self-governance “in planning, conduct, and administration” of certain federal programs. Passed by Congress in 1975, Title I of ISDEAA authorized the Departments of the Interior (DOI) and Health and Human Services (HHS) to contract with tribes to assume planning and administering certain federal services and programs with federal funding, referred to as *638 contracts* or *self-determination contracts*.

In 1994, the Tribal Self-Governance Act (TSGA; P.L. 103-413, 25 U.S.C. §§5361 et seq.) amended ISDEAA and added a new Title IV authorizing DOI to enter into *self-governance compacts* with tribes. Approved compacts allow tribes to assume funding of, and control over, some federal programs, services, functions, or activities (PSFAs) that DOI otherwise would provide directly to tribes. In 2000, the Tribal Self-Governance Amendments (P.L. 106-260, 25 U.S.C. §§5381 et seq.) created Title V, which permanently authorized compacts for some Indian Health Service programs.

This In Focus provides an overview of ISDEAA Titles I and IV and describes how tribes, as defined under ISDEAA, could receive services from DOI and particularly the Bureau of Indian Affairs (BIA). It provides an overview of budgetary and administrative functions supporting ISDEAA agreements, such as contract support costs (CSCs), 105(l) leases, and tribal priority allocations, and highlights an issue for Congress: ISDEAA’s definition of *Indian tribe*.

Overview of ISDEAA Titles I and IV

Both Title I and Title IV of ISDEAA authorized the Secretary of the Interior (Secretary) to contract or compact with tribes, upon a tribe’s request, to plan, conduct, and administer certain DOI programs, in whole or in part. Both titles also established the programs that can be contracted or compacted under ISDEAA, such as BIA programs authorized under the Snyder Act (42 Stat. 208) and non-BIA programs within DOI that benefit Indians.

Some of the Title I provisions include

- the option to enter into contracts for a period of up to three years, unless the Secretary and the tribe agree to a longer term, with the terms of the contract renegotiable annually to account for changed circumstances and cost increases (25 U.S.C. §5324), and

- the opportunity to consolidate two or more self-determination contracts into a single contract (25 U.S.C. §5321).

Title IV established the Office of Self-Governance within the Office of the Assistant Secretary-Indian Affairs in DOI (25 U.S.C. §5362). Among other things, Title IV

- allows a participating tribe to negotiate funding agreements (annual or multiyear) with DOI for PSFAs to be assumed by the tribe (25 U.S.C. §5363(p)) and
- permits tribes to redesign or consolidate federal programs and to reallocate funds within selected programs (25 U.S.C. §§5363(b), 5365(d)).

A key difference between self-determination contracts and self-governance compacts is the amount of tribal flexibility. Under Title I, DOI must approve any substantial changes to a contract. Under Title IV, however, a tribe may redesign or consolidate PSFAs, and reallocate funding, under a compact without DOI’s approval. Thus, although PSFAs may be redesigned under contracts and compacts, tribes with a contract must receive prior approval to do so.

Use of ISDEAA Contracts and Compacts

Because participation in ISDEAA agreements is voluntary, tribes have options in determining how they receive BIA-authorized services. For example, a tribe could choose to

- receive services directly from BIA, sometimes referred to as a *direct service tribe*;
- enter into a contract with BIA to administer individual programs and services BIA that otherwise would provide directly to the tribe (i.e., a self-determination contract);
- enter into a compact on a government-to-government basis with BIA to assume control over programs that BIA otherwise would provide directly to the tribe (i.e., a self-governance compact); or
- combine the above options to receive services.

Many, but not all, tribes enter into contracts or compacts under ISDEAA. According to BIA, in FY2022, an estimated 275 tribes will participate in contracts and an estimated 292 tribes will participate in compacts. As of 2021, the federal government recognized 574 tribes.

ISDEAA provides tribes the opportunity to assume federal responsibility in several areas within BIA, including law

enforcement, tribal courts, social services, and natural resources management. Tribes also may enter into contracts or compacts for non-BIA programs in DOI, such as those within the National Park Service and the United States Fish and Wildlife Service. The Secretary is required to publish annually a list of non-BIA programs eligible for inclusion in compacts.

Under certain circumstances, the Secretary is authorized to decline to enter into a contract and is allowed to reject the terms of a compact or a funding agreement. The Secretary also is authorized to reassume control of a contracted or compacted program under certain conditions.

Contract Support Costs

CSCs are the indirect costs incurred by tribes to administer federal programs under a contract or compact. CSCs are allocated in accordance with an approved agreement under ISDEAA. The Supreme Court twice has held that the federal government is required to pay the full amount of CSCs contracted for by tribes. In *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), the Court held that the federal government is required to pay the full amount of CSCs contracted for by a tribe when Congress appropriates sufficient, unrestricted funding. In *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012), the Court held that the federal government is required to pay the full amount of CSCs contracted for by a tribe when Congress appropriates sufficient funding to pay *any* individual contract's CSCs, despite Congress placing a spending cap on CSCs. Beginning in FY2016, CSCs were funded as an indefinite discretionary appropriation.

105(l) Leases

Under Section 105(l) of ISDEAA, the Secretary is required to enter into a lease with a tribe, upon the tribe's request, for a facility the tribe uses to carry out the tribe's responsibilities under a contract or compact, commonly referred to as a *105(l) lease*. In FY2021, Congress funded a new appropriations account, Payments for Tribal Leases, to consolidate BIA and Bureau of Indian Education (BIE) 105(l) leasing costs, which were funded under other BIA and BIE accounts in prior fiscal years. In considering the new account, the appropriations committees asserted that two federal district court decisions appeared to create an entitlement to tribes for compensation of 105(l) lease costs not typically funded through discretionary appropriations. (See *Maniilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227 (D.D.C. 2014); and *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016)). In FY2021, the appropriations committees directed DOI to develop guidelines for, and to consult with tribes on, processing such leases and to report to Congress on long-term solutions for funding the account. In its FY2022 budget request, BIA proposed reclassifying the new Payments for Tribal Leases account from a discretionary to a mandatory appropriations account beginning in FY2023.

Tribal Priority Allocations

Tribal Priority Allocations (TPA) are a BIA and BIE budgetary tool that allows direct involvement by tribes in setting priorities for their operating programs. TPA includes funds across multiple activities within both BIA's and

BIE's largest appropriations accounts—Operation of Indian Programs—as “guaranteed” base funding for tribes. TPA includes BIA programs in the functions of tribal government, human services, public safety and justice, community development, natural resources management, and trust services, as well as general administration. Some tribes receive BIE TPA funds from the following programs: Johnson-O'Malley, Tribal Colleges & Universities, and Scholarships and Adult Education. After appropriations are enacted, tribes or BIA may move TPA funds from one TPA program to another without approval from the appropriations committees.

TPA provides administrative flexibilities to tribes and can complement participation in self-determination contracts and self-governance compacts. For example, when a tribe first elects to enter into a self-governance compact, the Office of Self-Governance establishes a TPA base funding amount for the tribe based on the BIA programs selected by the tribe. Further, tribes can use TPA allocations through contracts and compacts under ISDEAA.

Definition of Indian Tribe

ISDEAA is noteworthy for its definition of *Indian tribe*, which is “any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or *regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” (25 U.S.C. § 5304(e); emphasis added). Unlike federally recognized tribes, which have government-to-government relationships with the United States, Alaska Native Corporations (ANCs) are businesses organized under Alaska state laws.

Although federal statutes do not uniformly define Indian tribes the same way, Congress has incorporated ISDEAA's definition of Indian tribe into legislation it has enacted touching on various tribal issues, including, for example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136).

In 2020, several tribes brought suit to challenge the Treasury Department's treatment of ANCs as Indian tribes for CARES Act funding under the ISDEAA definition of *Indian tribe*. For more information on the lawsuit, see CRS Legal Sidebar LSB10598, *Justices Consider Whether Treasury May Distribute CARES Act Funds for “Indian Tribes” to Alaska Native Corporations*, by M. Maureen Murphy. On June 25, 2021, the Supreme Court decided *Yellen v. Chehalis*, 594 U.S. ____ (2021) (*Chehalis*) and examined whether ANCs are considered within ISDEAA's definition of Indian tribe. The Court determined that ANCs are to be treated as Indian tribes eligible for CARES Act purposes under the ISDEAA definition of *Indian tribe*.

In light of the *Chehalis* decision, an issue for Congress may be the extent to which Congress intends to include or exclude ANCs when citing ISDEAA's definition of Indian tribe in other legislation.

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