

Tribal Self-Determination Authorities: Overview and Issues for Congress

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Marriel J. Murray,
Coordinator
Specialist in Natural
Resources Policy

Cassandra Dortch
Specialist in Education
Policy

Elayne J. Heisler
Specialist in Health
Services

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Congress has broad authority over issues relating to *federally recognized Tribes* (“Tribes”), and its approach to tribal issues has fluctuated over time. Beginning in the 1970s, Congress established a policy of promoting tribal self-determination and self-governance. The Indian Self-Determination and Education Assistance Act (ISDEAA; P.L. 93-638, 25 U.S.C. §§5301 et seq.) outlined federal policy on tribal self-determination, which includes the “effective and meaningful participation by the Indian people in the planning, conduct, and administration of [federal] programs and services.”

ISDEAA, as amended, enables Tribes, tribal organizations, and tribal consortia (collectively, *tribal entities*) to manage certain federal programs that would otherwise be administered by certain federal agencies. As enacted in 1975, ISDEAA authorized the Department of the Interior (DOI) and Department of Health and Human Services (HHS) to enter into *self-determination* (“638”) *contracts* with tribal entities (Title I) and increased the influence of tribal parents in public education (Title II). Since 1975, Congress has amended ISDEAA several times, for example, to provide more autonomy to tribal entities through *self-governance compacts* (Titles III, IV, and V). Tribal entities may choose different ISDEAA agreement options depending on their capacity and interests. The majority of Tribes have entered into ISDEAA agreements to manage federal programs.

ISDEAA includes various directives relating to the amount of funding that federal agencies must provide to tribal entities under ISDEAA agreements. First, tribal entities are entitled to the amount equal to what the federal agency would have otherwise spent operating that program. In addition, ISDEAA requires the payment of specific costs associated with ISDEAA agreements, including reasonable *contract support costs* (CSCs) and payments for *tribal* (“105(l)”) *leases*. Congress has taken several actions to help DOI and HHS meet their legal obligations to pay CSCs and 105(l) lease costs, which it may consider for other agencies with ISDEAA or ISDEAA-like authorities.

Since ISDEAA was originally enacted, Congress has authorized the expansion of tribal self-determination or self-governance across the federal government. This included amending ISDEAA to expand the use of ISDEAA agreements within existing departments (e.g., to DOI agencies other than the Bureau of Indian Affairs [BIA] and Bureau of Indian Education [BIE]). In addition, Congress has enacted ISDEAA-like authorities for other federal departments and agencies, including the U.S. Department of Agriculture’s (USDA’s) Food and Nutrition Service and Forest Service, the Department of Transportation, and the departments participating in the P.L. 102-477 “477” Workforce Development Program. In addition, under the Tribally Controlled Schools Act (TCSA; P.L. 100-297), Tribes and tribal organizations may choose to operate a BIE school under a grant from the BIE and manage facilities’ improvement and construction projects.

Congress could choose to constrict, maintain, or expand the types of programs and activities permitted under tribal self-determination authorities. Recent legislation indicates that some Members are interested in at least maintaining the tribal self-determination policy at departments that currently have the ISDEAA authority. Beyond DOI and HHS, Congress has often taken an incremental approach to tribal self-determination and continues to do so for departments such as USDA. In addition, Congress has considered ways to boost tribal capacity to manage federal programs as well as federal capacity to coordinate with Tribes to oversee these agreements.

At the same time, Congress has expressed interest in maintaining a degree of federal oversight over ISDEAA and other tribal self-determination agreements. Congress has taken several actions regarding tribal accountability for ISDEAA agreements at DOI and HHS and could consider similar actions for other departments. Since the 108th Congress, Congress has also held many oversight hearings and seen bills to examine federal implementation of tribal self-determination. Among other things, the PROGRESS for Indian Tribes Act of 2020 (P.L. 116-180) sought to create a consistent statutory framework for ISDEAA agreements.

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Introduction

Congress has broad legislative authority over issues relating to *federally recognized Tribes* (“Tribes”), and its approach to tribal issues has fluctuated over time.¹ In the 1700s-1800s, Congress ratified treaties with Tribes, whereby Tribes often ceded lands to the United States, sometimes in exchange for reservations, and were then removed from those ceded lands. In the late 1800s and early 1900s, laws often focused on assimilating Tribes into the dominant American culture, including by dividing up tribal lands into individual allotments and removing tribal youth to boarding schools.² In the 1930s and 1940s, Congress ended the allotment policy and granted more administrative control to Tribes with the passage of the Indian Reorganization Act of 1934.³ In the 1950s and 1960s, Congress again shifted its approach by ending the federal-tribal relationship and terminating the federal recognition of some Tribes in an effort to integrate them into the general population.⁴

Beginning in the 1970s, Congress established a policy of *tribal self-determination* that continues through the present day. The Indian Self-Determination and Education Assistance Act (ISDEAA; P.L. 93-638, 25 U.S.C. §§5301 et seq.) outlined federal policy on tribal self-determination. This policy includes the “effective and meaningful participation by the Indian people in the planning, conduct, and administration of [federal] programs and services.”⁵ ISDEAA sought to increase tribal influence in federal policy.

ISDEAA enables Tribes, tribal organizations, and tribal consortia (collectively, *tribal entities*) to assume control over certain federal programs using federal funds. If approved by the federal agency, certain tribal entities may enter into *self-determination* (“638”) *contracts* under ISDEAA Title I or *self-governance compacts* under ISDEAA Titles IV and V.⁶ Because participation in these *ISDEAA agreements* is voluntary, tribal entities have various options when choosing how to receive services from certain agencies in the Department of the Interior (DOI) and Department of Health and Human Services (HHS). For example, a Tribe could choose to

- receive services directly (“direct service”) from DOI’s Bureau of Indian Affairs (BIA), DOI’s Bureau of Indian Education (BIE), or HHS’s Indian Health Service (IHS);

¹ See U.S. Constitution, Article I, Section 8, clause 3 (“Indian Commerce Clause”). See also *United States v. Lara*, 541 U.S. 193, 200 (2004). A *federally recognized Tribe* (“Tribe”) is an entity formally recognized as having a government-to-government relationship with the United States, entailing special rights, immunities, and privileges as well as eligibility for certain federal programs and services (25 C.F.R. Part 83).

² See, e.g., General Allotment Act of 1887 (Dawes Severalty Act), ch. 119, 24 Stat. 388, and Lewis Meriam et al., *The Problem of Indian Administration*, Brookings Institution, February 21, 1928, p. 15.

³ 25 U.S.C. §§5101 et seq.

⁴ For more information on these periods of tribal policy, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Mariel J. Murray. Congress created a separate statutory framework for Alaska Natives: the Alaska Native Claims Settlement Act (ANCSA; 43 U.S.C. §§1601 et seq.) divided the state of Alaska into 12 geographic regions and allowed Alaska Natives to form Alaska Native corporations (ANCs), which own and manage resources for the benefit of Alaska Natives. The 228 Tribes in Alaska, many of which are called *Alaska Native villages*, are located within ANC boundaries. See Department of the Interior (DOI), Bureau of Indian Affairs (BIA), “Alaska Region,” <https://www.bia.gov/regional-office/alaska-region>.

⁵ Indian Self-Determination and Education Assistance Act (ISDEAA; P.L. 93-638, §3).

⁶ These contracts are popularly known as “638 contracts” after the original public law number. Contracts issued under the authority of ISDEAA are not covered under the Federal Acquisition Regulation (FAR), which establishes uniform policies and procedures for acquisition by all executive agencies, including through contracts (25 U.S.C. §5324).

- enter into a 638 contract with BIA, BIE, or IHS to administer *programs, functions, services, or activities* (PFSAs)⁷ that the agencies would otherwise provide (under ISDEAA Title I and II);
- enter into a self-governance compact to assume control over PFSAs that BIA or IHS would otherwise provide (under ISDEAA Title IV or V);
- enter into a self-governance compact to assume control over certain non-BIA PFSAs at DOI, such as those with “special geographic, historical, or cultural significance” (under ISDEAA Title IV); or
- combine the above options to receive federal services.

The majority of Tribes have entered into ISDEAA agreements to manage certain federal programs. As of March 2024, 526 out of 574 Tribes (92%) had self-determination (638) contracts, and 295 Tribes (51%) had self-governance compacts with DOI.⁸ As of March 2024, Tribes administer over 60% of the IHS budget. Under ISDEAA Title I, 206 Tribes or tribal organizations operate 246 contracts and annual funding agreements (AFAs) with IHS. Under Title V, IHS is party to 112 self-governance compacts and 139 funding agreements. More than two-thirds of Tribes participate in Title V programs at IHS.⁹ As explained below, tribal entities have also used other tribal self-determination authorities to assume control over specific programs and projects at various federal departments. For example, tribal entities may enter into a grant under the Tribally Controlled Schools Act (TCSA; P.L. 100-297) to assume control over certain activities that BIE would otherwise provide.

This report provides an overview of the history and current implementation of ISDEAA and other related tribal self-determination authorities that enable Tribes to administer certain federal programs.¹⁰ This report also discusses issues for Congress related to tribal self-determination. The report concludes with two appendixes: **Appendix A** provides a table comparing authorities included in ISDEAA contracts and compacts, and **Appendix B** provides a table of the abbreviations used in this report.

Federal Agencies Serving Tribes

The United States and Tribes have a unique relationship that affects federal policy. In particular, the United States has a *federal trust responsibility*, which is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, “has charged itself with

⁷ 25 U.S.C. §5321. Indian Health Service (IHS) regulations refer to “PSFAs” instead of “PFSAs,” but these terms have the same substantive meaning. Both BIA and the Bureau of Indian Education (BIE) refer to these as PFSAs; thus, the acronym PFSA is used as a shorthand when discussing all of these agencies throughout this report.

⁸ Statement of Bryan Newland, Assistant Secretary for Indian Affairs, DOI, in U.S. Congress, House Committee on Natural Resources (HNR) Subcommittee on Indian and Insular Affairs, *Advancing Tribal Self-Determination: Examining Bureau of Indian Affairs’ 638 Contracting*, hearings, 118th Cong., 2nd sess., March 6, 2024, H.Hrg. 55-061, p. 3, https://naturalresources.house.gov/uploadedfiles/testimony_newland_624.pdf (hereinafter HNR, 638 hearing).

⁹ HHS, “Indian Health Service: Justification of Estimates for Congressional Committees: Fiscal Year 2025,” March 5, 2024, p. 221, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf.

¹⁰ This report discusses only authorities that explicitly reference ISDEAA; however, other authorities may also allow Tribes to manage federal programs or funds (e.g., the Native American Housing Assistance and Self-Determination Act of 1996 [NAHASDA]; P.L. 94-330). For information on NAHASDA, see CRS Report R44261, *The Native American Housing Assistance and Self-Determination Act (NAHASDA): Issues and Reauthorization Legislation in the 114th Congress*, by Katie Jones.

moral obligations of the highest responsibility and trust” toward Tribes and tribal citizens.¹¹ This responsibility can include federal obligations to protect tribal treaty rights as well as lands, assets, and resources.¹² It can also include ensuring tribal access to education, health care, or other services.¹³ All federal departments must uphold the federal trust responsibility; however, Congress specifically directed the following agencies to serve Tribes and tribal citizens:

- **BIA.** BIA is the lead federal agency charged with providing federal services to Tribes and tribal citizens. In line with federal policy in the 1800s, BIA initially focused on promoting tribal settlement on defined reservations and cultural assimilation.¹⁴ The Snyder Act of 1921 later permanently authorized federal tribal programs, including directing BIA to use federal funds to provide services and assistance to Tribes and tribal citizens.¹⁵ BIA programs currently support tribal social services, economic development, law enforcement, emergency management, road and dam infrastructure, natural resource management, and probate, among other things. BIA also manages the 56 million surface acres and 59 million acres of subsurface mineral estate held in trust by the United States for Tribes and individual tribal citizens.¹⁶
- **BIE.** BIE is the lead federal agency charged with providing education to tribal children. After the Civil War, the federal government created a federal school system for Tribes with BIA funding, construction, and oversight. In 2006, the Secretary of the Interior separated the BIA education programs from the rest of BIA and placed them in a new agency called BIE. In addition to the Snyder Act of 1921, which permanently authorized BIE to operate education programs for Tribes, most BIE programs have specific authorities. The BIE-funded education system for tribal students includes 169 elementary and secondary schools, 14 “peripheral dormitories” for students attending public schools nearby, and 2 postsecondary institutions.¹⁷
- **IHS.** IHS is the lead federal agency charged with improving the health of Tribes and tribal citizens. The Snyder Act of 1921 permanently authorized federal-tribal health-related programs. IHS was initially under DOI; however, the Indian Health Facilities Transfer Act of 1954 (Transfer Act; P.L. 83-568) moved it to the then newly established Department of Health, Education, and Welfare (now known as HHS), where it is currently an agency of the Public Health Service. The Snyder Act, the Transfer Act, and the Indian Health Care Improvement Act of 1976 (IHCIA; P.L. 94-437, 25 U.S.C. §§1601 et seq.) as subsequently amended, are the

¹¹ *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

¹² See §5.05 “Enforcement of the Federal-Indian Trust Against the Executive” in Nell Jessup Newton, *Cohen’s Handbook of Federal Indian Law* (Washington, DC: LexisNexis, 2023).

¹³ *Ibid.*

¹⁴ DOI, BIA, “Budget Justifications and Performance Information: Fiscal Year 2025,” p. IA-GS-3, https://www.bia.gov/sites/default/files/media_document/fy2025-508-bia-greenbook.pdf (hereinafter BIA, FY2025 Budget Justifications).

¹⁵ 25 U.S.C. §13.

¹⁶ BIA, FY2025 Budget Justifications, p. IA-TNR-3. For more information about BIA’s history and current programs, see CRS Report R47723, *Bureau of Indian Affairs: Overview of Budget Issues and Options for Congress*, by Mariel J. Murray.

¹⁷ For more information about BIE’s history and current programs, see CRS Report RL34205, *Indian Elementary-Secondary Education: Programs, Background, and Issues*, by Cassandra Dortch.

major laws authorizing most of IHS's current activities.¹⁸ IHS provides an array of medical services, including inpatient, ambulatory, emergency, dental, public health nursing, and preventive health care.¹⁹

Overview of ISDEAA

Congressional policy on tribal self-determination has developed over time. As enacted in 1975, ISDEAA authorized self-determination ("638") contracts only at DOI and HHS (Title I) and increased the influence of tribal parents in public education (Title II). Since 1975, Congress has amended ISDEAA several times, for example, to provide more autonomy to Tribes through self-governance compacts (Titles III, IV, and V).²⁰ To provide historical context, this report discusses all ISDEAA titles, although some titles are no longer used.

ISDEAA, as amended, includes the following titles:

- Title I: Self-Determination ("638") Contracts (DOI and HHS)
- Title II: Education Assistance Programs (DOI)
- Title IV: Permanent Self-Governance Program (DOI)
- Title V: Permanent Self-Governance Program (IHS)
- Title VI: Feasibility Study (HHS)

The following sections summarize the authorities provided within these ISDEAA titles and agency implementation of these authorities. A summary of the previous Title III, Self-Governance Compact Demonstration Projects (DOI and IHS), has been included for historical context. Select terms used in ISDEAA are defined in the "Indian Self-Determination and Education Assistance Act: Select Definitions" text box.

Indian Self-Determination and Education Assistance Act: Select Definitions

Contract support costs: "reasonable costs for activities" that a Tribe, tribal organization, or tribal consortia would incur to ensure compliance with self-determination contracts and compacts (25 U.S.C. §5325 and 25 U.S.C. §5363).

Indian tribe ("Tribe"): any 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 (85 Stat. 688), 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).

Inter-tribal consortium: "coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance [at the Indian Health Service (IHS)], including tribal organizations" (25 U.S.C. §5381).

Program, function, service, or activity (PSFA): element of a federal program that may be included in self-determination contracts or self-governance compacts (25 U.S.C. §§5321 and 5363). Also referred to as "PSFA" (program, service, function, and activity) in IHS regulations.

Tribal consortium: "an organization of Indian Tribes that is authorized by those Tribes to participate in self-governance [at the Department of the Interior] and is responsible for negotiating, executing, and implementing annual funding agreements and [self-governance] compacts" (25 C.F.R. §1000.2).

Tribal organization: "the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities" (25 U.S.C. §5304).

¹⁸ 25 U.S.C. §§1601 et seq.; permanently authorized in §102201 of P.L. 111-148, as amended.

¹⁹ For more information about IHS's history and current programs, see CRS Report R43330, *The Indian Health Service (IHS): An Overview*, by Elayne J. Heisler.

²⁰ See, e.g., the Tribal Self-Governance Act (P.L. 103-413).

ISDEAA Title I: Self-Determination (“638”) Contracts (DOI and HHS)

ISDEAA, as amended, enables certain tribal entities, such as Tribes, tribal organizations, and tribal consortia, to administer programs that would otherwise be managed by certain federal departments and agencies. ISDEAA Title I authorized DOI and HHS to enter into 638 contracts with Tribes and tribal organizations. Through these contracts, Tribes and tribal organizations may request to assume funding of and control over DOI or HHS PFSAAs that the departments would otherwise provide directly to Tribes or tribal citizens. PFSAAs may include DOI or HHS programs that fit into the following categories:

- Category 1 programs operate under the Snyder Act (25 U.S.C. §13), the Indian Reorganization Act (25 U.S.C. §§5101 et seq.), and the IHCA (25 U.S.C. §§1601 et seq.);
- Category 2 programs operate “for the benefit of Indians” within DOI or HHS; and
- Category 3 programs operate “for the benefit of Indians” and receive appropriations from other agencies or departments.²¹

Agencies have interpreted which PFSAAs are included in one or more of the categories. Category 1 includes BIA, BIE, and IHS because the referenced laws provide authorizations for those agencies (see “Federal Agencies Serving Tribes”). Because those agencies serve (and benefit) Tribes and tribal citizens, their programs also generally meet the Category 2 criteria. ISDEAA did not specify which agencies would meet the Category 3 criteria; some non-BIA agencies at DOI have entered into self-determination 638 contracts.²²

Process for Requesting and Managing a 638 Contract

ISDEAA Title I delineates the process for Tribes and tribal organizations to request a 638 contract with DOI and HHS. First, an interested Tribe or tribal organization may submit a proposal to DOI or HHS.²³ If the proposal meets certain criteria (including appropriate PFSAAs), ISDEAA requires that DOI and HHS enter into a 638 contract with the Tribe or tribal organization within 90 days.²⁴ BIA negotiates, approves, manages, and monitors 638 contracts for BIA PFSAAs, and the funding is awarded at the regional level.²⁵ As of 2024, BIA manages more than 9,500 of these 638 contracts covering many different BIA programs.²⁶ Beginning in FY2023, BIE—with BIA assistance—established an office to assume responsibility for overseeing 638 contracts at schools.²⁷ At HHS, the process is similar, although IHS uses an area office structure as opposed to

²¹ 25 U.S.C. §5321. See BIA, “Programs and Services,” <https://www.bia.gov/programs-services>.

²² For example, the Bureau of Reclamation (BOR) within DOI has entered into both 638 contracts under Title I and self-governance compacts under Title IV. BOR, *Best Practices Handbook for Implementation of the Indian Self-Determination and Education Assistance Act (P.L. 93-638)*, June 2019, p. 11, https://www.usbr.gov/native/programs/93-638/BestPracticesHandbookForImplementOf93-638_Jun2019_508.pdf.

²³ 25 U.S.C. §5321.

²⁴ Ibid. See also 25 C.F.R. §900.8, 25 C.F.R. §900.16, and 25 C.F.R. §900.22.

²⁵ See “Indian Self-Determination Authorities and Waivers” in BIA, *Indian Affairs Manual*, p. 3, https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/13_IAM_1_Authorities_and_Waivers_508_OIMT.pdf. BIA has a central (national) office in Washington, DC, and 12 area (regional) offices that oversee 85 agency (field) offices.

²⁶ BIA, FY2025 Budget Justifications, p. IA-TG-4.

²⁷ Statement of Bryan Newland, HNR, 638 hearing, p. 4.

a regional office structure.²⁸ As of 2024, Tribes administer over 60% of the IHS budget. IHS manages 246 contracts with 206 Tribes and tribal organizations.²⁹

Once a proposal has been approved, the departments are required to negotiate and award a 638 contract and an AFA.³⁰ The joint DOI/HHS regulations define an AFA as “a document that represents the negotiated agreement of the Secretary [of the Interior or HHS, as appropriate] to fund, on an annual basis, the [PFSAs] transferred to an Indian tribe or tribal organization.”³¹ ISDEAA requires the use of a model AFA provided in ISDEAA, and Tribes may negotiate additional provisions.³² For example, AFAs can last for up to three years unless the parties agree to a longer term.³³ For construction projects, 638 contracts are subject to a separate proposal and review process.³⁴

ISDEAA Title I includes provisions to ensure federal oversight of 638 contracts. For example, Tribes and tribal organizations must use financial management, procurement management, and property management systems in executing their 638 contracts.³⁵ They must also submit requests to redesign or consolidate programs for departmental approval.³⁶ If tribal entities meet the financial threshold during the fiscal year, they must submit an annual audit report per the Single Audit Act (31 U.S.C. §75).³⁷ Finally, DOI or HHS may reassume operation of PFSAs if there is a finding of (1) a “violation of the rights or endangerment of the health, safety, or welfare of any persons” or (2) “gross negligence or mismanagement in the handling or use of funds.”³⁸ Tribes and tribal organizations are also permitted to return PFSAs that had previously been managed under a 638 contract to the operating agency, which is referred to as *retrocession*.³⁹

ISDEAA Title II: Education Assistance Programs (DOI)

Title II of ISDEAA, the Indian Education Assistance Act, authorizes federal support for the education of tribal students in elementary and secondary schools operated in accordance with state law (i.e., public schools). Part A of Title II of ISDEAA primarily consists of amendments to the Johnson-O’Malley Act (25 U.S.C. §§5342-5348), which authorizes Johnson-O’Malley (JOM) Assistance Grants. Currently, JOM Assistance Grants fund tribal organizations, Indian corporations,⁴⁰ public school districts, and states to provide eligible tribal students (i.e., from preschool, approximately three years old, to grade 12) with the necessary resources to meet their

²⁸ 42 C.F.R. §137. IHS is organized into 12 areas to deliver services. For more information, see CRS Report R43330, *The Indian Health Service (IHS): An Overview*.

²⁹ Department of Health and Human Services (HHS), “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025,” March 5, 2024, p. 221, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf. The overall appropriation for IHS in FY2024 was approximately \$7 billion.

³⁰ 25 U.S.C. §5329.

³¹ 25 C.F.R. §900.6.

³² 25 U.S.C. §5329.

³³ 25 U.S.C. §5324.

³⁴ 25 C.F.R. §900.114, 25 C.F.R. §900.122, and 25 C.F.R. §900.125.

³⁵ See, generally, 25 C.F.R. §900.

³⁶ 25 C.F.R. §900.

³⁷ 25 U.S.C. §5305.

³⁸ 25 U.S.C. §5330.

³⁹ 25 C.F.R. §§900.240-245.

⁴⁰ An *Indian corporation* is “a legally established organization of Indians chartered under State or Federal law and which is not included within the definition of ‘Tribal organization’” (25 C.F.R. §273.106).

unique and specialized educational needs at public schools. Part B of Title II of ISDEAA authorizes the Secretary of the Interior to enter into contracts with state educational agencies or school districts. These contracts fund site acquisition and facilities that such entities need in order to provide public education to tribal students living on tribal lands that is at least equal in resources, standards, and quality to the education provided to non-tribal students.⁴¹ The FY2024 appropriations act did not fund any such contracts.

ISDEAA Title III: Self-Governance Compact Demonstration Projects (DOI and IHS)

In 1988, Congress began to encourage a policy of greater tribal self-determination, which it called *tribal self-governance*, through enacting the Indian Self-Determination and Education Assistance Act Amendments of 1988 (P.L. 100-472). In a new Title III, Congress directed the Secretary of the Interior to establish a demonstration project to be known as the “Tribal Self-Governance Project.” The act authorized the Secretary to select 20 Tribes to receive a planning grant. If a Tribe successfully fulfilled the grant, it could then participate in the demonstration project by entering into an AFA under a *self-governance compact*. Compared to 638 contracts, self-governance compacts generally (1) expanded the types of federal programs and responsibilities that could be included, (2) minimized federal oversight, and (3) increased tribal flexibility to redesign programs and reallocate resources.⁴²

In 1992, Congress amended ISDEAA Title III in the Indian Health Amendments of 1992 (P.L. 102-573) to establish these demonstration projects at IHS as well. Congress also added a new section that provided one-year grants for planning and negotiation activities to implement these new self-governance compacts at IHS.

Effective August 18, 2000, the Tribal Self-Governance Amendments (P.L. 106-260, 25 U.S.C. §§5381 et seq.) repealed ISDEAA Title III.

ISDEAA Title IV: Permanent Self-Governance Program (DOI)

In 1994, the Tribal Self-Governance Act (P.L. 103-413, 25 U.S.C. §§5361 et seq.) amended ISDEAA to establish Title IV, expanding the Title III demonstration to allow the eventual inclusion of all eligible Tribes and tribal consortia. Tribes participating in a DOI Title III demonstration project upon enactment of P.L. 103-413 were converted to a Title IV self-governance compact. ISDEAA Title IV provided new options for Tribes and tribal consortia. First, as an alternative to 638 contracts, which are for specific PFSA, Tribes and tribal consortia may use self-governance compacts to manage one or more PFSA that meet the Title I criteria or would otherwise be available to Tribes.⁴³ During congressional consideration of the self-governance demonstration authority, many stakeholders advocated for the exclusion of BIA formula grant education programs from PFSA because of concern that Tribes might divert education funds to other priorities and that tribal school board control would be reduced. The BIA formula grant education programs of concern represent the majority of the BIA’s financial contribution to BIE elementary and secondary schools and tribally controlled colleges and

⁴¹ 25 U.S.C. §§5342-5348 and §§5351-5356.

⁴² For further discussion of the legislative history of this evolution to self-governance, see Geoffrey D. Strommer and Stephen D. Osborne, “The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act,” *American Indian Law Review*, vol. 39, no. 1 (2014), pp. 1-75, <https://digitalcommons.law.ou.edu/ailr/vol39/iss1/1> (hereinafter Strommer and Osborne, “History”).

⁴³ 25 U.S.C. §5363.

universities. As a result, the majority of BIE funds cannot be intermingled with other funds in the same DOI self-governance compact.⁴⁴

In addition to Title I PFSAs, Tribes and tribal consortia may request to use self-governance compacts for PFSAs at non-BIA agencies at DOI if the proposed PFSAs hold “special geographic, historical, or cultural significance.”⁴⁵ DOI regulations define these terms as follows:

(a) **Geographic** generally refers to all lands presently “on or near” an Indian reservation, and all other lands within “Indian country,” as defined by 18 U.S.C. [§]1151. In addition, “geographic” includes:

- (1) Lands of former reservations;
- (2) Lands on or near those conveyed or to be conveyed under the Alaska Native Claims Settlement Act (ANCSA);
- (3) Judicially established aboriginal lands of a Tribe or a Consortium member or as verified by the Secretary; and
- (4) Lands and waters pertaining to Indian rights in natural resources, hunting, fishing, gathering, and subsistence activities, provided or protected by treaty or other applicable law.

(b) **Historical** generally refers to programs or lands having a particular history that is relevant to the Tribe. For example, particular trails, forts, significant sites, or educational activities that relate to the history of a particular Tribe.

(c) **Cultural** refers to programs, sites, or activities as defined by individual Tribal traditions and may include, for example:

- (1) Sacred and medicinal sites;
- (2) Gathering of medicines or materials such as grasses for basket weaving; or
- (3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and gathering.⁴⁶

Process for Requesting and Managing a Self-Governance Compact

DOI’s Office of Self-Governance (OSG) implements Title IV (tribal self-governance) for all DOI agencies.⁴⁷ DOI estimated that in 2024, OSG will distribute approximately \$700 million in funding to 306 Tribes covered by 138 self-governance compacts.⁴⁸ OSG determines whether a Tribe or tribal consortium meets the eligibility criteria for self-governance, and each year, it may select up to 50 new Tribes or tribal consortia that meet those criteria.⁴⁹ Tribes and tribal consortia are eligible if they meet all of the following criteria:

⁴⁴ U.S. Congress, Senate Committee on Indian Affairs, *Indian Self-Determination and Education Assistance Act Amendments*, 100th Cong., 2nd sess., February 18, 1988, S.Hrg. 100-707.

⁴⁵ 25 U.S.C. §5363.

⁴⁶ 25 C.F.R. §1000.126.

⁴⁷ DOI’s Office of Self-Governance (OSG) implements DOI’s tribal self-governance program according to regulations located at 25 C.F.R. §1000. This report reflects regulations current as of November 6, 2024, and does not incorporate proposed changes included in DOI’s proposed rule issued on July 15, 2024. See BIA, “Self-Governance PROGRESS Act Regulations,” 89 *Federal Register* 57524-57577, July 15, 2024.

⁴⁸ BIA, FY2025 Budget Justifications, p. IA-ADM-12.

⁴⁹ 25 U.S.C. §5362. Every May, OSG releases the final Annual Self-Governance Negotiation Guidance for the coming year (DOI, OSG, “Self-Governance: A How-To Application and Information Guide for Prospective Tribes,” March 21, (continued...))

1. complete the planning phase, which includes legal and budgetary research as well as tribal government planning, training, and organizational preparation;
2. request participation in self-governance by tribal resolution or other official means; and
3. demonstrate financial capacity by already managing a 638 contract for the previous three fiscal years without any uncorrected significant or material audit exceptions in annual audits.⁵⁰

An eligible Tribe or tribal consortium seeking to participate in self-governance would enter into one compact applicable to all DOI agencies.⁵¹ The self-governance compact “affirms the government-to-government relationship between a Self-Governance Tribe and the United States.”⁵² Regulations include a model compact and also specify that self-governance compacts should generally include

- the authority and purpose of the compact;
- terms, provisions, and conditions of the compact; and
- obligations of the Tribe/tribal consortium and DOI.⁵³

In addition to the self-governance compact, Tribes and tribal consortia also negotiate AFAs for each agency.⁵⁴ AFAs identify PFSA, funding amounts, and the OSG schedule for fund distribution.⁵⁵ Depending on negotiations, AFAs may last for a year or longer.⁵⁶ Once a Tribe or tribal consortium has a self-governance compact and an AFA, they may redesign or consolidate PFSA, and reallocate funding within a fiscal year, without federal approval.⁵⁷ In addition, multiyear AFAs that include BIA PFSA are amended each year to include an annual Reprogramming Request.⁵⁸ Among other things, the Reprogramming Request specifies the BIA PFSA and funding amounts to be managed by the Tribe or tribal consortia.⁵⁹

ISDEAA Title IV includes provisions to ensure federal oversight of self-governance compacts. For example, if Tribes and tribal consortia meet the financial threshold per the Single Audit Act (31 U.S.C. §75), they are required to submit an annual audit report to OSG.⁶⁰ In addition, each AFA must include provisions allowing for DOI to monitor the AFA’s performance through an annual “trust evaluation,” whereby OSG collects tribal budget and performance data.⁶¹ Each AFA must also stipulate that DOI may reassume any PFSA operated by a Tribe or tribal consortium if

2019, p. 7, <https://www.tribalselfgov.org/wp-content/uploads/2018/12/How-To-Application-for-New-Tribes-03.21.19.docx> (hereinafter OSG, Self-Governance Guide).

⁵⁰ 25 U.S.C. §5362.

⁵¹ OSG, Self-Governance Guide, p. 5.

⁵² 25 C.F.R. §1000.2.

⁵³ 25 C.F.R. §1000.162 and Appendix A to Part 1000.

⁵⁴ 25 C.F.R. §1000.81, 25 C.F.R. §1000.121, and 25 C.F.R. §1000.161.

⁵⁵ 25 U.S.C. §5363. See also BIA, “Office of Self Governance,” <https://www.bia.gov/as-ia/osg>.

⁵⁶ 25 U.S.C. §5363.

⁵⁷ Ibid.

⁵⁸ OSG, Self-Governance Guide, p. 6.

⁵⁹ Ibid.

⁶⁰ 25 U.S.C. §5365.

⁶¹ 25 U.S.C. §5363. See also 25 C.F.R. §1000.354.

there is a finding of “imminent jeopardy” to a trust asset, natural resource, or public health and safety.⁶² AFAs with construction programs have additional requirements.⁶³

ISDEAA Title V: Permanent Self-Governance Program (IHS)

In 2000, the Tribal Self-Governance Amendments (P.L. 106-260, 25 U.S.C. §§5381 et seq.) created ISDEAA Title V, which permanently authorized the inclusion of some IHS programs in self-governance compacts that had been authorized in Title III. The act delineated the application process for certain tribal entities (Tribes, inter-tribal consortia, and tribal organizations) entering into a self-governance compact, while preserving those compacts that were negotiated during the demonstration program, and permitted the negotiation of new compacts under the new title.⁶⁴ Title V authorized Tribes operating Title III demonstration projects on the date of enactment to elect to participate in a Title V self-governance compact. Title V permitted these tribal entities to consolidate tribal shares of any IHS program, including competitive grants, and any PFSA or portion thereof, that was carried out to benefit Tribes or tribal citizens.⁶⁵ This includes all local, service unit, area, or headquarters functions that are administered under a number of laws, including the Snyder Act, the Transfer Act, the IHCA, and any act that requires an agency of HHS to administer, carry out, or provide financial assistance to Tribes.

Process for Requesting and Managing a Self-Governance Compact

IHS’s Office of Tribal Self-Governance manages self-governance compacts in accordance with Title V.⁶⁶ This office determines whether a tribal entity meets the eligibility criteria for self-governance, and each year, it may select 50 new tribal entities that meet all of the following criteria:

1. completed the planning phase, which includes legal and budgetary research as well as tribal government planning, training, and organizational preparation;
2. requested participation in self-governance by tribal resolution or other official means; and
3. demonstrated financial capacity by already managing a 638 contract for the previous three fiscal years without any uncorrected significant or material audit exceptions in annual audits.⁶⁷

An eligible, interested tribal entity seeking to participate in self-governance would enter into a self-governance compact. The law states that compacts should be negotiated and implemented “in a manner consistent with the Federal Government’s trust responsibility, treaty obligations, and the government-to-government relationship.”⁶⁸

In addition to the self-governance compact, tribal entities must negotiate AFAs. Each AFA must

⁶² 25 U.S.C. §5363 and 25 U.S.C. §5366. See also 25 C.F.R. §1000, Subpart M.

⁶³ 25 C.F.R. §1000.243.

⁶⁴ 25 U.S.C. §5384. Title IV regulations use the term *tribal consortium*, whereas Title V uses the term *intertribal consortium*. IHS’s definition includes tribal organizations.

⁶⁵ As noted above, IHS regulations refer to “PSFAs” instead of “PFSAs.”

⁶⁶ 25 U.S.C. §5386.

⁶⁷ 25 U.S.C. §5383.

⁶⁸ 25 U.S.C. §5384.

- identify the PFSA to be performed or administered under the compact, including the relevant budget category; the funds to be provided on a recurring basis; the method, timing, and transfer of the funds; and any other agreed-on provisions and
- remain in full force in subsequent years until a funding agreement is executed (i.e., are retroactive if a new agreement is not executed prior to the start of a new funding period). This applies unless a tribal entity withdraws or retrocedes an operation of one or more PFAS to IHS.

Once a tribal entity has a self-governance compact and an AFA, they may redesign or consolidate PFASs and reallocate funding within a fiscal year without federal approval.⁶⁹ They may also retrocede fully, or in part, to the Secretary any PFSA included in the compact or the AFA.⁷⁰ Title V also specifies that Tribes must comply with certain terms in order to be entitled to use federal property and other resources, that the Secretary is required to acquire such property or resources, and that the Tribe may reimburse IHS for these goods and services.

ISDEAA Title V includes provisions to ensure federal oversight of self-governance compacts at IHS. For example, if Tribes and intertribal consortia meet the financial threshold per the Single Audit Act (31 U.S.C. §75), they are required to submit an annual audit report.⁷¹ Tribal entities must report on the health status of tribal citizens and on the health services delivered under the compact, but the reporting cannot duplicate data already available to HHS and must impose minimal burdens on the reporting Tribe.⁷² In addition, the Secretary of HHS is authorized to reassume any PFSA if a situation arises that poses an imminent danger to public health or if the Secretary of HHS or the Inspector General determine that the Tribe has committed gross mismanagement. In both cases, written notice and a hearing are required before reassumption commences.⁷³

ISDEAA Title VI: Feasibility Study (HHS)

In 2000, the Tribal Self-Governance Amendments (P.L. 106-260, 25 U.S.C. §§5381 et seq.) created Title VI, which directed the Secretary of HHS to conduct a study of the potential for self-governance at non-IHS agencies at HHS. HHS completed that study in 2003 and found that demonstration projects were feasible but may increase agency costs.⁷⁴ It also noted that additional legislative authority would be required for non-IHS agencies at HHS to use self-governance compacts.⁷⁵ In 2011, HHS revived this effort to consider self-governance at non-IHS agencies with the establishment of the Self-Governance Tribal Federal Workgroup (SGTFW). The SGTFW concluded that the expansion of self-governance to non-IHS programs was feasible but that the existing congressional authorization was limited to a feasibility study and that demonstration projects would require specific additional authorization.⁷⁶ No such legislation has been enacted to date.

⁶⁹ 25 U.S.C. §5386.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² 25 U.S.C. §5387.

⁷³ 25 U.S.C. §5386.

⁷⁴ HHS, Assistant Secretary for Planning and Evaluation, “Tribal Self-Governance Demonstration Feasibility Study,” February 28, 2003, <https://aspe.hhs.gov/reports/tribal-self-governance-demonstration-feasibility-study>.

⁷⁵ Ibid.

⁷⁶ U.S. Department of Health and Human Services, Self-Governance Tribal Federal Workgroup, *Final Report*, 2013, https://www.tribalselfgov.org/wp-content/uploads/2021/06/SGTFWG_FinalReport_2013.pdf.

For a detailed comparison of ISDEAA titles and ISDEAA implementation at DOI and HHS, see **Table A-1**.

For a brief discussion of concerns related to employment status and liability under 638 contracts and self-governance compacts (collectively known as *ISDEAA agreements*), see the “Employment Status and Liability Under ISDEAA Agreements” text box.

Employment Status and Liability Under ISDEAA Agreements

ISDEAA has several unique provisions pertaining to the status of federal or tribal employees under ISDEAA agreements. For example, it allows federal employees to retain their jobs and federal personnel benefits after a tribal entity takes over a federal program or service under an ISDEAA agreement. Tribal entities can offer jobs with the newly transitioned program to existing federal employees, either as tribal employees or through a two-year Intergovernmental Personnel Act (IPA) Agreement. An IPA provides for the temporary assignment of personnel between the federal government and state and local governments, Tribes, colleges and universities, federally funded research and development centers, and other eligible organizations.

In addition, unlike with other federal agreements with nonfederal partners, Congress has treated tribal employees operating under ISDEAA agreements like federal employees for certain purposes. For example, the Federal Tort Claims Act (28 U.S.C. §§2671 et seq.) allows individuals injured by federal employees to seek compensation from the federal government. While it generally applies only to federal employees, in 1991, Congress extended coverage to tribal contractors, tribal employees, and volunteers operating under ISDEAA agreements. Therefore, individuals injured by tribal employees under an ISDEAA agreement may, under certain circumstances, seek compensation from the federal government.

Another unique provision is that Indian tribes or tribal organizations carrying out programs under ISDEAA or the Tribally Controlled Schools Act (TCSA) may purchase coverage, rights, and benefits under the Federal Employees Health Benefits (FEHB) Program for their employees. The FEHB Program is the largest employer-sponsored health insurance program in the United States, primarily covering federal employees and annuitants and their family members.

Sources: 25 U.S.C. §1647b, 25 U.S.C. §5323, 25 U.S.C. §5324, 25 U.S.C. §5363, 25 U.S.C. §5376, 25 U.S.C. §5396, 25 C.F.R. §900, and 25 C.F.R. §1000. See also Department of the Interior and Related Agencies Appropriations Act, 1991 (P.L. 101-512, §314), as amended by Department of the Interior and Related Agencies Appropriations Act, 1994 (P.L. 103-138, §308).

Federal Funding for ISDEAA Agreements

ISDEAA includes various directives relating to the amount of funding that federal agencies must provide to tribal entities under ISDEAA agreements. Tribal entities are entitled to the amount equal to what the federal agency would have otherwise spent operating that program.⁷⁷ In addition, ISDEAA requires the payment of the following specific costs associated with ISDEAA agreements:

- **Contract support costs (CSCs).** ISDEAA requires DOI and HHS to provide funding covering CSCs, the reasonable indirect or administrative costs for activities that must be carried out “to ensure compliance with the terms of the contract and prudent management.”⁷⁸ The Supreme Court has held that DOI and HHS generally must cover CSCs.⁷⁹ After years of debating how to ensure that these federal agencies complied with these legal obligations, in the Consolidated

⁷⁷ 25 U.S.C. §5325, 25 U.S.C. §5363, and 25 U.S.C. §5388.

⁷⁸ 25 U.S.C. §5325. Contract support costs (CSCs) were added as a requirement in the Indian Self-Determination and Education Assistance Act Amendments of 1988 (P.L. 100-472). For a detailed discussion of CSCs at BIA, see CRS Report R47723, Bureau of Indian Affairs: Overview of Budget Issues and Options for Congress, by Mariel J. Murray.

⁷⁹ *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012). See also *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 647 (2005).

Appropriations Act, 2016 (P.L. 114-113), Congress established two indefinite discretionary appropriations accounts for CSCs: one for BIA and BIE and another for IHS.⁸⁰ In contrast with its obligation to cover CSCs, BIE is not required to pay administrative costs for TCSA grants; such tribal grant support costs are subject to the availability of appropriations.⁸¹ For example, in FY2016, the first year that IHS made CSCs a separate account, IHS paid \$718 million for CSCs. This increased to \$969 million in FY2024 (an estimate; final amounts would typically be included in IHS's FY2026 Budget Justifications), which would be a 35% increase in eight years.⁸² BIA's CSCs have also increased—it paid \$233 million for CSCs in FY2021 and \$288 million in FY2023, an increase of almost 20%.⁸³ The FY2024 appropriations act provided up to \$95.8 million to pay administrative costs for TCSA grants.⁸⁴

- **“105(l)” lease costs.** ISDEAA requires DOI and HHS to enter into leases—commonly referred to as *105(l) leases*—to pay for tribally owned or rented facilities that are used to support activities under ISDEAA agreements or TCSA grants.⁸⁵ Courts have interpreted this ISDEAA provision as generally requiring HHS to enter into 105(l) leases on a tribal entity's request.⁸⁶ Congress has, at times, appropriated funding for 105(l) leases not just to IHS but also to BIA and BIE.⁸⁷ In the Consolidated Appropriations Act, 2021 (P.L. 116-260), Congress established two indefinite discretionary appropriations accounts for 105(l) leases: one for BIA and BIE and another for IHS.⁸⁸ At BIA, the 105(l) program has grown from 2 Tribes proposing and executing 3 leases in 2019 (the first year the agency received dedicated appropriations) to 93 Tribes proposing 259 initial

⁸⁰ For BIA, see P.L. 114-113, Division G, Title I, Bureau of Indian Affairs, Contract Support Costs. See also *Congressional Record*, vol. 161, no. 184, book III (December 17, 2015), p. H10218. For IHS, see P.L. 114-113, Division G, Title III, Related Agencies, Indian Health Service, Contract Support Costs. See also *Congressional Record*, vol. 161, no. 184, book III (December 17, 2015), p. H10222.

⁸¹ 25 U.S.C. §2008.

⁸² HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees Fiscal Year 2025,” March 5, 2024, p. 173, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf, and HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2017,” March 12, 2013, p. 14, <https://www.ihs.gov/sites/ofa/themes/responsive2017/documents/FY2017CongressionalJustification.pdf>. FY2017 is used as the source for FY2016 CSCs because they include final year data for FY2016. These amounts are not adjusted for inflation.

⁸³ DOI, BIA, “Budget Justifications and Performance Information: Fiscal Year 2023,” p. IA-CSC-3, https://www.bia.gov/sites/default/files/dup/inline-files/fy2023-bia-greenbook_0.pdf, and BIA, FY2025 Budget Justifications, p. IA-CSC-2. These amounts are not adjusted for inflation.

⁸⁴ The FY2024 appropriations act was the Consolidated Appropriations Act, 2024 (P.L. 118-42). The BIE FY2024 Budget Justification estimated that \$98.7 million would support 100% of the estimated administrative costs (p. BIE-ES-3, <https://www.doi.gov/media/document/fy2024-bie-greenbook-508-pdf>).

⁸⁵ 25 U.S.C. §5324(l). These leases are commonly called 105(l) leases because they are authorized under ISDEAA, §105(l).

⁸⁶ 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).

⁸⁷ In considering the new account, the House and Senate Committees on Appropriations asserted that the two *Maniilaq* 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 legislative text and explanatory statement, U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2021 (P.L. 116-260)*, 117th Cong., 1st sess., March 2021, H.Rept. 43-750, p. 1348).

⁸⁸ For BIA and BIE, see P.L. 116-260, Division G, Title I, BIA, Payments for Tribal Leases. For IHS, see P.L. 116-260, Division G, Title III, IHS, Payments for Tribal Leases. More information on funding amounts for these leases can be found in the “Contract Support and 105(l) Lease Costs” section of this report.

leases and 238 leases for renewal in 2023.⁸⁹ In FY2024, BIA expects to have more than 90 Tribes with over 600 lease renewals and new requests at a value of roughly \$100 million.⁹⁰ At IHS, lease costs have grown since FY2018 when the first proposals were submitted; in FY2024, IHS received 767 lease agreements or proposals that totaled \$374 million, an increase from FY2023 when the agency received 673 proposals. IHS does not report information on lease renewals or backlogs.⁹¹

ISDEAA also allows for some tribal flexibility in managing federal funding received under ISDEAA agreements. For example, tribal entities may use funds to meet matching or cost participation requirements under other federal and nonfederal programs.⁹² Tribal entities may receive lump sum funding, reallocate funds during the year, and carry over unspent funds to the next fiscal year.⁹³ They are also entitled to any cost savings realized under a compact. At the option of a tribal entity, IHS AFAs may provide for stable base funding for any PFSA that are transferred to tribal entities subject to annual adjustments to reflect changes in congressional appropriations.⁹⁴ For IHS, third-party payments (i.e., funds that are collected from third-party payers, such as Medicare, Medicaid, and private health insurance) for health services provided under a self-governance compact are considered to be program income, and the amount provided under an AFA is not to be reduced or offset because of such program income.⁹⁵

Overview of Select Other Tribal Self-Determination Authorities

Since ISDEAA was enacted in 1975, Congress has enacted statutes to expand the use of tribal self-determination or self-governance authorities across the federal government. This evolution included expanding the use of ISDEAA agreements within existing departments (e.g., within DOI and HHS), as well as to other federal departments and agencies. These other departments include the Departments of Agriculture and Transportation, as well as departments participating in the P.L. 102-477 “477” Workforce Development Program. These authorities are summarized below.

Indian Employment, Training and Related Services Demonstration Act (P.L. 102-477): ISDEAA at 12 Agencies

Congress has authorized the integration of federal employment, training, and related programs for Tribes across the government. The Indian Employment, Training and Related Services

⁸⁹ Statement of Assistant Secretary for Indian Affairs, DOI, Bryan Newland, HNR, 638 hearing, p. 3, https://naturalresources.house.gov/uploadedfiles/testimony_newland_624.pdf.

⁹⁰ Ibid. It also reported a backlog of 1,351 pending leases. These amounts are not adjusted for inflation.

⁹¹ HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025,” March 5, 2024, pp. 176-177, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf. These amounts are not adjusted for inflation.

⁹² 25 U.S.C. §5325.

⁹³ Ibid. See also 25 U.S.C. §5368 and 25 U.S.C. §13a.

⁹⁴ 25 U.S.C. §5385.

⁹⁵ *Becerra v. San Carlos Apache Tribe*, 602 U.S. 222 (2024), which was decided on June 6, 2024. The U.S. Supreme Court decided that IHS owed CSCs on third-party payments for services provided under ISDEAA contracts and compacts. IHS is preparing to implement these CSCs and is undertaking tribal consultation. Letter from Roselyn Tso, Director of IHS, to Tribal Leader, June 13, 2024, https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/2024_Letters/DTLL_061324.pdf.

Demonstration Act of 1992 (P.L. 102-477) established a demonstration program that permitted Tribes to consolidate employment- and training-related grant funds from multiple federal programs into a single funding stream. One of Congress's reasons for creating this program was to "serve tribally determined goals consistent with the policy of self-determination, while reducing administrative, reporting, and accounting costs."⁹⁶ As part of a Tribe's proposed "477 plan," Tribes may request using an ISDEAA agreement for the programs and funding to be consolidated.⁹⁷ Tribes would also be subject to reduced budget and financial reporting requirements.⁹⁸

As originally enacted, four federal departments' employment- and training-related grant funding could be consolidated: the Departments of the Interior, Labor, Health and Human Services, and Education. In 2017, Congress amended the law by making the existing authority permanent and extending it to eight additional departments: the Departments of Justice, Agriculture, Commerce, Energy, Homeland Security, Housing and Urban Development, Transportation, and Veterans Affairs.⁹⁹ The 2017 law also gave the Secretary of the Interior the exclusive authority to approve tribal 477 plans.¹⁰⁰ In addition, the act gave the 12 departments one year to design and ratify an interagency memorandum of agreement (MOA) to coordinate implementation.¹⁰¹ Participating departments must conduct annual reviews to identify any statutory, regulatory, administrative, or policy obstacles that prevent Tribes with approved 477 plans from "fully and efficiently" carrying out the purposes of the law.¹⁰²

Under the interagency MOA, Tribes can request programs to be added to their 477 plan, and BIA and the affected agency determine whether those programs can be included.¹⁰³ A program is eligible for integration into a 477 plan if it is

1. operated by 1 of the 12 covered federal agencies,
2. implemented for one of the covered purposes (employment and training programs plus related supportive services), and
3. receives a covered type of funding.¹⁰⁴

According to BIA, as of 2024, there are 78 approved 477 plans including 298 Tribes across 38 federal programs.¹⁰⁵ These departments and programs are shown in **Table 1**.

⁹⁶ 25 U.S.C. §3401.

⁹⁷ 25 U.S.C. §3412. This program and its associated plans are popularly known as "477" after the original public law number.

⁹⁸ 25 U.S.C. §3413.

⁹⁹ P.L. 115-93.

¹⁰⁰ 25 U.S.C. §3410.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*. See also BIA, "Memorandum of Agreement Providing For Implementation of the Indian Employment, Training and Related Services Consolidation Act of 2017," September 30, 2022, pp. 2-4, https://www.bia.gov/sites/default/files/dup/inline-files/477_moa_signed.pdf (hereinafter BIA, 477 MOA).

¹⁰³ BIA, 477 MOA, pp. 3-4.

¹⁰⁴ 25 U.S.C. §3404.

¹⁰⁵ BIA, "Division of Workforce Development," <https://www.bia.gov/bia/ois/dwd>.

Table I. Federal Departments and Programs That Have Been Integrated into a Tribal “477 Plan”

(data as of August 28, 2024)

Department	Agency or Program
Commerce	<ul style="list-style-type: none"> Minority Business Development Agency
Education	<ul style="list-style-type: none"> Native American Career and Technical Education Program American Indian Vocational Rehabilitation Alaska Native Education Program
Health and Human Services	<ul style="list-style-type: none"> Child Care and Development Fund Community Services Block Grant Family Violence Prevention and Services Program Low Income Home Energy Assistance Program Native Employment Works Tribal Temporary Assistance for Needy Families Title IV-B, Subparts 1 and 2^a
Housing and Urban Development	<ul style="list-style-type: none"> Indian Block Grant
Interior	<ul style="list-style-type: none"> Bureau of Indian Affairs (various programs) Bureau of Indian Education (various programs)
Justice	<ul style="list-style-type: none"> Alcohol and Substance Abuse Program Office of Violence Against Women Grants to Tribal Governments Program The Guided Path to Wellness Program Tribal Youth Program: Combatting School-to-Prison Pipeline Victims of Crime Act Tribal Victims Set-Aside Program
Labor	<ul style="list-style-type: none"> National Health Emergency Phase Two Disaster Recovery Workforce Innovation & Opportunity Act: Adult Comprehensive and Supplemental Youth Services

Source: Bureau of Indian Affairs, Office of Indian Services, Presentation at the Annual Meeting of Federal Partners and Tribal 477 Workgroup, August 29, 2024 (on file with the author); Bureau of Indian Affairs, Office of Indian Services, Presentation at the Annual Meeting of Tribes and Federal Agencies, September 28, 2020, <https://www.bia.gov/bia/ois/dwd>.

Notes: This table is based on sources from 2020 and 2024 and therefore does not capture programs or agencies that may have been included in other years. It is unclear whether other authorized departments (such as Energy and Veterans Affairs) have selected any federal programs for potential inclusion in 477 plans.

- a. This refers to the Stephanie Tubbs Jones Child Welfare Services Program (Subpart 1) and the MaryLee Allen Promoting Safe and Stable Families Program (Subpart 2).

Fixing America’s Surface Transportation Act (FAST Act; P.L. 114-94): ISDEAA at the U.S. Department of Transportation (DOT)

In 2015, the FAST Act (P.L. 114-94, §1121; 23 U.S.C. §207) established a Tribal Transportation Self-Governance Program (TTSGP) at DOT.¹⁰⁶ The act authorizes DOT to enter into self-

¹⁰⁶ For a summary of the legislative history prior to the 2015 enactment of the Fixing America’s Surface Transportation Act (FAST Act; P.L. 114-94), see James Glaze and Nathaniel Amdur-Clark, “The Transformation to Tribal Self- (continued...) ”

governance compacts and associated funding agreements with Tribes for DOT PFSAs and may include funding from various sources.¹⁰⁷ The act incorporated specific ISDEAA provisions relating to self-governance compacts and also included language similar to ISDEAA provisions.¹⁰⁸ The act also allows the Secretary of Transportation not to follow the referenced ISDEAA provisions if the Secretary determines that they conflict with other statutory language governing the TTSGP.¹⁰⁹ As of 2024, four Tribes had entered into tribal transportation self-governance compacts as part of the TTSGP.¹¹⁰

Agriculture Improvement Act of 2018 (2018 Farm Bill; P.L. 115-334): ISDEAA at the U.S. Department of Agriculture (USDA)

Congress expanded 638 contracting authority to two USDA agencies in the Agriculture Improvement Act of 2018 (2018 Farm Bill; P.L. 115-334).

U.S. Food and Nutrition Service (FNS)

The 2018 Farm Bill provides a demonstration project (pilot) authority for USDA's FNS to use 638 contracts for the Food Distribution Program on Indian Reservations (FDPIR).¹¹¹ Under FDPIR, which was first authorized in the Agriculture and Consumer Protection Act of 1973 (P.L. 93-86), USDA purchases agricultural commodities and administering agencies store the foods, determine applicant eligibility, distribute the foods to FDPIR participants, and provide nutrition education.¹¹² Administering agencies, such as *Indian tribal organizations* (ITOs)¹¹³ and state agencies, determine participant eligibility for food packages based on criteria such as income, tribal membership, and location (on or near a tribal reservation).¹¹⁴ USDA provides administering agencies with funds for FDPIR administrative costs.¹¹⁵ As of 2024, FDPIR provides both food

Governance in the Transportation Arena: A Progress Through Legislative Milestones," *TR News*, no. 294 (2014), pp. 19-25.

¹⁰⁷ See 49 C.F.R. §29.401.

¹⁰⁸ For example, 23 U.S.C. §207(l) explicitly incorporates various ISDEAA provisions by reference, but 23 U.S.C. §207(m) states that ISDEAA definitions will apply "except as otherwise expressly provided."

¹⁰⁹ *Ibid.*

¹¹⁰ These include the Cherokee Nation, Ohkay Owingeh, the Citizen Potawatomi Nation, and the Forest County Potawatomi. See Joaquin Estus, "Potawatomi Tribe Signs Self-Governing Compact with Transportation Department," *Indian Country Today*, August 20, 2024, <https://ictnews.org/news/potawatomi-tribe-signs-self-governing-compact-with-transportation-department>.

¹¹¹ Section 4003(b) of the 2018 Farm Bill (P.L. 115-334).

¹¹² *Ibid.*

¹¹³ Section 4003(b) of the 2018 Farm Bill defines *tribal organization* as the recognized governing body of a Tribe, as defined in ISDEAA (including the tribally recognized intertribal organization of Tribes), as well as any Tribe, band, or community "holding a treaty with a State government." The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) appears to use the similar term *Indian tribal organization*, which it defines in regulations as "(1) the recognized governing body of any Indian Tribe on a reservation; or (2) the tribally recognized intertribal organization which the recognized governing bodies of two or more Indian tribes on a reservation authorize to operate the Food Stamp Program or a Food Distribution Program on their behalf" (7 C.F.R. §253.2). See also USDA FNS, "FNS-101: Food Distribution Program on Indian Reservations," <https://www.fns.usda.gov/fns-101-fdpir> (hereinafter USDA FNS, "FNS-101").

¹¹⁴ USDA FNS, "FNS-101." See also CRS In Focus IF12255, *Farm Bill Primer: SNAP and Nutrition Title Programs*, by Randy Alison Aussenberg, Gene Falk, and Kara Clifford Billings.

¹¹⁵ USDA FNS, "FNS-101."

assistance and nutrition education to nearly 100,000 citizens of 276 Tribes.¹¹⁶ The 2018 Farm Bill authorizes FNS to enter into 638 contracts with eligible ITOs to manage the program, including purchasing agricultural commodities directly.¹¹⁷

The 2018 Farm Bill's 638 authority included several conditions. First, though most of FDPIR's funding is mandatory, the funding to operate this 638 authority is discretionary, so an annual appropriation is required to implement the authority. In addition, the 2018 Farm Bill requires that agricultural commodities purchased by ITOs in the demonstration project

1. be domestically produced;
2. supplant, not supplement, the type of agricultural commodities in existing FDPIR food packages for that tribal organization; and
3. be of similar or higher nutritional value as the type of agricultural commodities that would be supplanted in the existing FDPIR food package for that tribal organization.¹¹⁸

As of 2024, FDPIR has completed two rounds of funding for this program, distributing \$5.7 million to ITOs in Round 1 and \$4.4 million in Round 2. In February 2024, FDPIR reported plans to extend all Round 1 contracts for an additional two years through June 2026 to align with the period of performance in contracts with Round 2 ITOs.¹¹⁹ The agency noted that some ITOs in Round 1 have sufficient funds to extend beyond the initial two-year term while FDPIR is working to secure funds for other ITOs.¹²⁰

U.S. Forest Service (FS)

The 2018 Farm Bill provided FS and DOI's Bureau of Land Management (BLM) with the authority to enter into 638 contracts for projects proposed under the Tribal Forest Protection Act (TFPA; P.L. 108-278, 25 U.S.C. §3115(a)). Under TFPA, which was first authorized in 2004, a Tribe may propose a project on FS or BLM lands that border, or are adjacent to, forested tribal trust or restricted fee lands.¹²¹ These projects are designed to protect tribal forest lands and resources from wildfire, disease, and other threats coming from federal lands. The 2018 Farm Bill provided new authority for these agencies to enter into 638 contracts with Tribes to perform "administrative, management, and other functions" of TFPA projects.¹²²

FS has entered into an increasing number of TFPA 638 contracts since the 2018 Farm Bill. The agency has stated that the TFPA 638 authority provides them with the opportunity to achieve

¹¹⁶ Testimony of National Association of Food Distribution Programs on Indian Reservations President Mary Greene Trottier, in U.S. Congress, Joint House Agriculture Committee [HAC] and House Appropriations Subcommittee on Agriculture, *Severe Food Distribution Shortages in Tribal and Elderly Communities*, hearings, 118th Cong., 2nd sess., September 11, 2024, p. 1, https://agriculture.house.gov/uploadedfiles/mary_greene_trottier_testimony_package.pdf (hereinafter HAC, *Food Distribution Shortages*).

¹¹⁷ Section 4003(b) of the 2018 Farm Bill (P.L. 115-334).

¹¹⁸ *Ibid.*

¹¹⁹ USDA, Food Distribution Program on Indian Reservations (FDPIR) Tribal Leaders Consultation Working Group, "Briefing Paper," February 2024, p. 4, <https://www.usda.gov/sites/default/files/documents/fdpiir-briefing-paper-handout-february-2024-tribal-leader-consultation.pdf>.

¹²⁰ *Ibid.*

¹²¹ P.L. 108-278 (25 U.S.C. §3115(a)). For information about tribal lands, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Mariel J. Murray.

¹²² Section 8703 of the 2018 Farm Bill (P.L. 115-334, 25 U.S.C. §3115(b)).

various objectives while strengthening its government-to-government relationship with Tribes.¹²³ As of November 2023, a total of 22 agreements totaling \$41.7 million had been executed.¹²⁴ **Table 2** summarizes these agreements.

Table 2. U.S. Forest Service's 638 Contracts Under the TFPA Self-Determination Pilot

Fiscal Year	Number of 638 Contracts	Funding Obligated
2020	2	\$157,800
2021	3	\$592,860
2022	4	\$4,276,000
2023	13	\$36,702,485

Source: CRS based on personal communication between CRS and the U.S. Forest Service on November 10, 2023.

Notes: TFPA = Tribal Forest Protection Act. Data are current as of November 2023.

Tribally Controlled Schools Act (TCSA)

During consideration of the self-governance demonstration authority in the 1980s, Congress reviewed mechanisms for improving BIE student academic outcomes, including through greater local control and self-determination.¹²⁵ Almost 40% of BIE schools were operated under 638 contracts in 1987.¹²⁶ The TCSA (P.L. 100-297, 25 U.S.C. §§2501-2511), enacted in 1988, was originally intended to provide greater flexibility in the use of funds and fewer reporting requirements compared to 638 contracts.¹²⁷ Under TCSA, Tribes and tribal organizations may choose to operate a BIE school under a grant from BIE and manage facilities' improvement and construction projects. Each grant is composed of all requested federal education funds (e.g., BIE and U.S. Department of Education formula grants) that would otherwise be allocated to the school. In addition, grant schools receive *administrative cost grants* (also known as *tribal grant support costs*), which are comparable to CSCs except that the grants are not a required federal expenditure.¹²⁸ By FY2023, approximately two-thirds of BIE schools were operated under TCSA grants.¹²⁹ Estimated tribal grant support costs have been fully funded since FY2016.¹³⁰

TCSA grants are subject to several ISDEAA provisions. For example, the grants are subject to the ISDEAA provisions related to single audits, 105(l) leases, reassumption, and the use of funds to meet matching or cost participation requirements under other federal and nonfederal programs. A

¹²³ Statement of Associate Deputy Chief, U.S. Forest Service, John Crockett, in U.S. Congress, HNR, Subcommittee on Federal Lands, *Examining Opportunities to Promote and Enhance Tribal Forest Management*, hearings, 118th Cong., 1st sess., December 5, 2023, p. 3, https://naturalresources.house.gov/uploadedfiles/crockett_testimony.pdf (hereinafter HNR, Forestry Hearings).

¹²⁴ Communication between CRS and the U.S. Forest Service on November 10, 2023.

¹²⁵ U.S. Congress, Senate Permanent Select Committee on Indian Affairs, *Indian Education Amendments*, S.Rept. 100-233 to accompany S. 1645, 100th Cong., 1st sess., November 30, 1987, pp. 2-4.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ 25 U.S.C. §2008(b)(1).

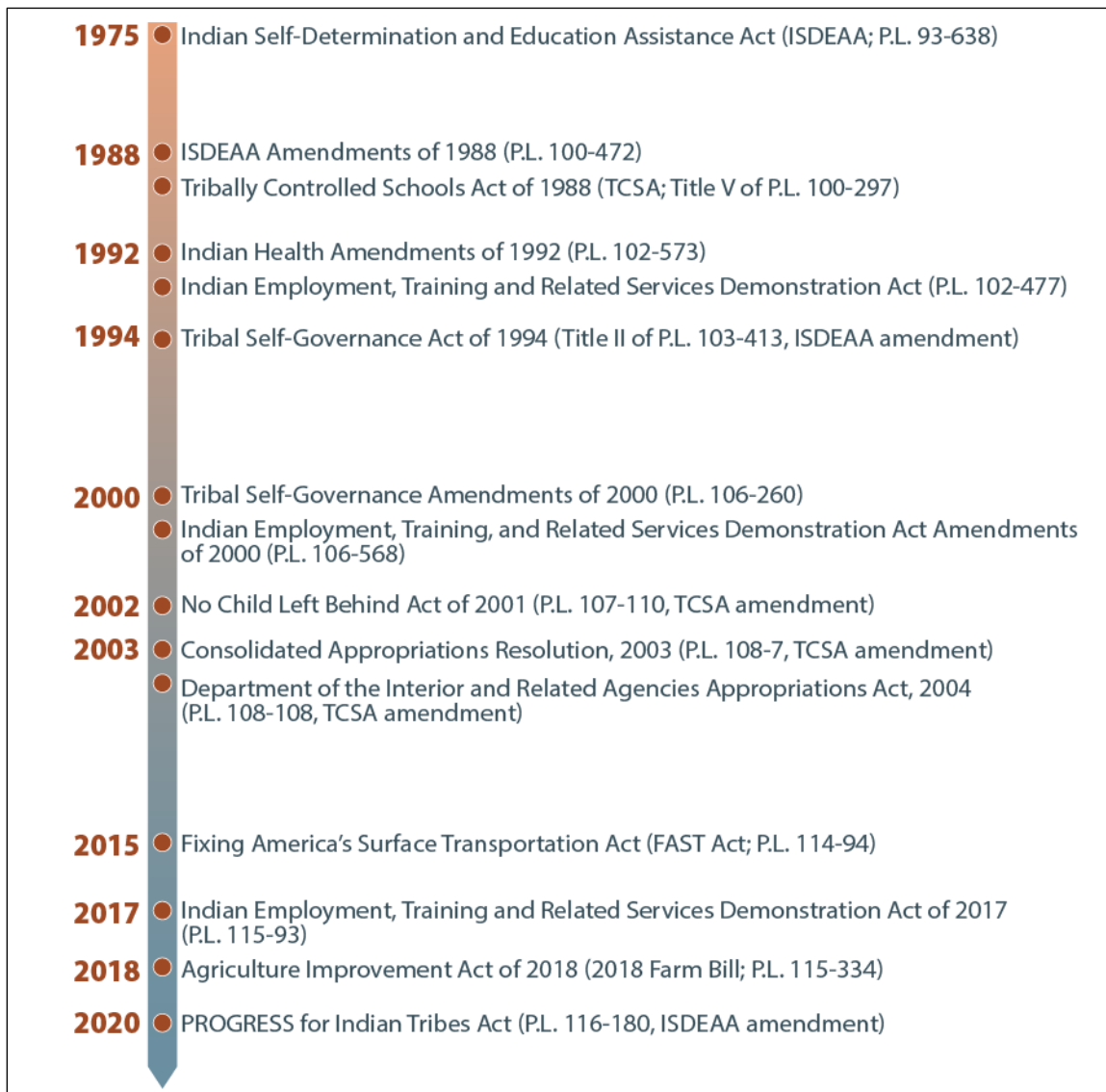
¹²⁹ BIE, FY2025 Budget Justifications, p. BIE-OIEP-13, <https://www.doi.gov/media/document/fy-2025-bureau-indian-education-greenbook>.

¹³⁰ BIA, Budget Justifications: FY2017-FY2019, and BIE, Budget Justifications: FY2020-FY2025.

grantee may request retrocession of any or all of the programs in the grant to BIE or to an ISDEAA contract.

Figure 1 shows a timeline of ISDEAA and these other tribal self-determination authorities.

Figure 1. Timeline of Select Tribal Self-Determination Authorities



Source: CRS.

Notes: This report discusses only authorities that explicitly reference ISDEAA; however, other authorities may also allow Tribes to manage federal programs or funds (e.g., the Native American Housing Assistance and Self-Determination Act of 1996; P.L. 94-330).

Issues for Congress

Members of Congress, Tribes, federal agencies, and others have identified various issues related to tribal self-determination, including the following:

- Scope of activities available for tribal self-determination

- Tribal capacity
- Federal capacity
- Tribal accountability
- Federal accountability
- Funding for ISDEAA agreements

Some of these issues may affect certain federal departments and agencies.

Scope of Activities Available for Tribal Self-Determination

Limited Federal Functions

Although ISDEAA agreements have been widely used, ISDEAA limits the types of activities that tribal entities may include in ISDEAA agreements to those that are not an *inherently federal function*.¹³¹ ISDEAA defines the term as “a Federal function that cannot be legally delegated” to a Tribe.¹³² Some Members of Congress have cited the following examples of inherently federal functions: the administration of federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of federal funds, and the exercise of certain prosecutorial powers.¹³³

DOI has explained that it interprets the term on a case-by-case basis by considering the activities the tribal entity seeks to assume, the applicable federal law governing the activities, and the amount of authority DOI would retain.¹³⁴ For non-BIA agencies at DOI, ISDEAA requires DOI to publish an annual list of all activities eligible for potential inclusion in self-governance AFAs along with programmatic targets.¹³⁵ In 1995, IHS identified inherently federal functions at headquarters (and the funding amounts that were associated with these functions).¹³⁶ Each IHS area also has a process for identifying area-level inherently federal functions, which may be subject to negotiation between the area office and the tribal entities seeking to enter into agreements.

Some Tribes and the Government Accountability Office (GAO) have suggested that Congress establish a statutory definition of “inherently federal function” to clarify the scope of ISDEAA agreements.¹³⁷ Tribes sometimes claim that federal departments such as DOI have opposed the transfer of program authority and funding under ISDEAA agreements and have therefore

¹³¹ This approach aligns with federal procurement law, which prohibits federal contracts that include “inherently governmental functions.” See FAR Subpart 7.5, “Inherently Federal Functions,” https://www.acquisition.gov/far/part-7#FAR_Subpart_7_5.

¹³² 25 U.S.C. §5361 and 25 U.S.C. §5381.

¹³³ DOI, Office of the Solicitor, “Inherently Federal Functions Under the Tribal Self-Governance Act,” memorandum, May 17, 1996, pp. 5-6, <https://www.tribalselfgov.org/wp-content/uploads/2019/07/Inherent-Federal-Functions-Leshy-1996.pdf>.

¹³⁴ *Ibid.*

¹³⁵ 25 U.S.C. §5372. See, e.g., DOI, BIA, “Fiscal Year 2023 List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs; Fiscal Year 2024 Programmatic Targets,” 88 *Federal Register* 54649-54654, August 11, 2023.

¹³⁶ Letter from IHS Director to Area Directors, “Policy Decisions for Self-Governance/Self-Determination Projection Negotiations-ACTION,” April 19, 1995, <https://www.ihs.gov/IHM/sgm/1995/sgm-9502/>.

¹³⁷ See Government Accountability Office (GAO), *Interior Should Address Factors Hindering Tribal Administration of Federal Programs*, GAO-19-87, January 2019, p. 15, <https://www.gao.gov/assets/gao-19-87.pdf> (hereinafter GAO, *Interior Factors*).

interpreted ISDEAA's restriction on inherently federal functions as broadly as possible to retain power.¹³⁸ GAO has also reported inconsistent implementation—for example, functions associated with a program may be considered inherently federal in one BIA region but not another.¹³⁹ Some Tribes and GAO have asserted that without a clear federal definition, federal employees, especially non-BIA employees at DOI, may continue to resist entering into ISDEAA agreements with Tribes.¹⁴⁰ Another option suggested by Tribes would be to establish a searchable federal database of all ISDEAA agreements at DOI or even across the federal government.¹⁴¹

Defining the scope of activities available for inclusion in agreements using other self-determination authorities also has been challenging. For example, a 2024 congressional hearing memo cited examples of unclear or contradictory guidance about which departmental programs are eligible for inclusion in a 477 plan.¹⁴² In one case, the Department of Justice (DOJ) informed a Tribe that it could not include DOJ programs related to victims services for survivors of sexual assault or domestic violence in a 477 plan, although BIA had approved the inclusion.¹⁴³ One potential solution is for the various authorized departments to identify all non-BIA programs that are eligible for integration into a 477 plan.¹⁴⁴

On the other hand, defining inherently federal functions for ISDEAA agreements, or requiring lists outlining available activities for inclusion in other self-determination agreements, may limit federal agencies' flexibility and discretion. Depending on the complexity of a program, it may be difficult to predict the activities involved in each program component or project. Agencies may also prefer the case-by-case approach to align it with the approach used in the Federal Acquisition Regulation (FAR). The FAR includes a list of functions that are typically considered “inherently federal” and a list of functions that would not meet that definition. The FAR also provides for agency discretion if needed, stating that certain services and actions that are not typically considered to be inherently federal may become so because of “the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance.”¹⁴⁵

Congress has considered defining the term “inherently federal function” in various instances. In the 117th Congress, various bills introduced to implement Indian water rights settlements included language noting that federal compliance activities were inherently federal.¹⁴⁶ Some Members of Congress have supported continuing to defer to the current case-by-case approach in interpreting

¹³⁸ Ibid. See also Statement of Melanie Benjamin, Chief Executive, Mille Lacs Tribe of Ojibwe, in U.S. Congress, Senate Committee on Indian Affairs, *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years*, 115th Cong., 2nd sess., April, 18, 2018, S.Hrg. 115-403, p. 35 (hereinafter S.Hrg. 115-403). See also Strommer and Osborne, “History,” p. 57.

¹³⁹ GAO, *Interior Factors*, p. 15. See also Statement of Melanie Benjamin, S.Hrg. 115-403.

¹⁴⁰ GAO, *Interior Factors*, pp. 1, 15; S.Hrg. 115-403, p. 35.

¹⁴¹ DOI, BIA, “Fiscal Year 2023 List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs; Fiscal Year 2024 Programmatic Targets,” 88 *Federal Register* 54649-54654, August 11, 2023, p. 54650.

¹⁴² HNR, Indian and Insular Affairs Subcommittee Staff, Oversight Hearing, *Advancing Tribal Self-Determination: Examining the Opportunities and Challenges of the 477 Program*, hearings, Hearing Memo, March 20, 2024, p. 5, https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_sub_on_iaa_ov_hrg_on_477_program_03.20.24.pdf.

¹⁴³ Ibid.

¹⁴⁴ This would be similar to the required list of non-BIA programs that ISDEAA requires DOI to publish annually (25 U.S.C. §5372).

¹⁴⁵ FAR Subpart 7.503, “Policy,” https://www.acquisition.gov/far/part-7#FAR_Subpart_7_5.

¹⁴⁶ See, e.g., H.R. 8921 and S. 1911 in the 117th Congress.

the term.¹⁴⁷ The 118th Congress has considered requiring agencies or departments to list activities that a Tribe can assume in an ISDEAA agreement. For example, one bill would require a list of all forest management activities for which contracting is available under the TFPA 638 authority.¹⁴⁸ Congress may consider whether to keep the status quo, which leaves room for agency interpretation, or to enact legislation that more explicitly defines what functions are inherently federal.

Limited “Demonstration” Authorities

Beyond DOI and HHS, Congress has often taken an incremental approach to authorizing tribal self-determination by issuing temporary authorities and may consider making some of these authorities permanent. For example, Congress first authorized FNS and FS to conduct “demonstration” projects using self-determination contracts in the 2018 Farm Bill.¹⁴⁹ Some tribal groups have asked Congress to make permanent the FDPIR authority to build local tribal infrastructures and food economies.¹⁵⁰ Others have also claimed that Tribes have successfully delivered FDPIR through 638 contracts: as of 2022, Tribes participating in FDPIR have reported higher take-up rates of tribally procured foods under the new 638 authority and higher engagement with the program, leading to better health outcomes.¹⁵¹ Citing examples of TFPA projects successfully mitigating wildfires, some Tribes have also advocated for permanently authorizing (and funding) the FS TFPA 638 authority and expanding the types of work allowed.¹⁵²

Tribal advocates have also asserted that currently authorized and appropriated funding is insufficient to achieve their goals. For example, FDPIR’s 638 authority is currently authorized at \$5 million per fiscal year, which tribal groups have claimed is not enough to support large amounts of traditional food purchasing or the potential expansion to more Tribes.¹⁵³ In addition, although some Tribes have sought to increase federal funding for tribal forest management, the TFPA 638 demonstration project authority did not include a specific authorization of appropriations.¹⁵⁴

¹⁴⁷ Rep. George Miller, “Tribal Self-Governance Amendments of 1998,” House Extensions of Remarks, *Congressional Record*, daily edition, vol. 144 (October 9, 1998), p. E1982, <https://www.govinfo.gov/content/pkg/CREC-1998-10-09/pdf/CREC-1998-10-09-pt1-PgE1982.pdf>.

¹⁴⁸ The Rural Prosperity and Food Security Act of 2024, §8236 (section-by-section summary available at www.agriculture.senate.gov/imo/media/doc/rural_prosperity_and_food_security_section-by-section.pdf).

¹⁴⁹ Congress did not define *demonstration project* in either case.

¹⁵⁰ Statement of the Honorable Darrell G. Seki Sr., Chairman, Red Lake Band of Chippewa Indians, in HAC, *Food Distribution Shortages*, pp. 4-5, https://agriculture.house.gov/uploadedfiles/the_honorable_darrel_g_seki_testimony_package.pdf.

¹⁵¹ Erin Parker et al., *Gaining Ground: A Report on the 2018 Farm Bill Successes for Indian Country and Opportunities for 2023*, Native Farm Bill Coalition (NFBC), 2022, p. 48, <https://www.nativefarmbill.com/gaining-ground> (hereinafter NFBC, *Gaining Ground*).

¹⁵² Testimony of Thora Padilla, President, Mescalero Apache Tribe, in U.S. Congress, Senate Committee on Indian Affairs (SCIA), *Legislative Hearing on S.4370, Tribal Forest Protection Act Amendments Act of 2024*, hearings, 118th Cong., 2nd sess., July 25, 2024, pp. 5-6, <https://www.indian.senate.gov/wp-content/uploads/07-25-2024-Padilla-Testimony.pdf> (hereinafter SCIA, Tribal Forest Protection Act [TFPA] Hearing).

¹⁵³ NFBC, *Gaining Ground*, p. 50.

¹⁵⁴ See, e.g., Testimony of President, Intertribal Timber Council & Executive Director, Confederated Tribes of the Colville Reservation Cody Desautel, in HNR, *Forestry Hearings*, p. 3, https://naturalresources.house.gov/uploadedfiles/desautel_testimony.pdf.

In the 118th Congress, several bills were introduced that would permanently authorize these authorities and sometimes also provide dedicated appropriations.¹⁵⁵ For example, some bills would increase discretionary funding or provide mandatory funding for FNS FDPIR self-determination contracts.¹⁵⁶ In addition, although funding was not authorized or appropriated in the farm bill TFPA 638 authority, Congress has appropriated funding for TFPA projects in other appropriations bills.¹⁵⁷ Also in the 118th Congress, proposed legislation would allow more types of activities to be included in TFPA 638 contracts and remove geographic restrictions, which may allow more Tribes and Alaska Native corporations to participate.¹⁵⁸

Limited Departments and Agencies

Some Tribes, scholars, Members of Congress, and federal departments have asserted that tribal self-determination authorities should be expanded to more federal departments and agencies. Various tribal entities have argued that increased tribal control and flexibility in managing federal programs fulfills the federal trust responsibility.¹⁵⁹ For example, the United Southern and Eastern Tribes testified that an expansion of tribal self-determination authorities to all federal programs would show the federal government's "full commitment" to tribal sovereignty and self-determination.¹⁶⁰ In addition, Tribes have argued that they can efficiently respond to changing conditions because of the flexibilities provided in ISDEAA.¹⁶¹ For example, certain tribal groups have claimed that providing a 638 authority to other USDA FNS programs would be "a significant acknowledgment of Tribal sovereignty in food systems."¹⁶² On the other hand, some federal programs, including FNS programs, may be hard for some Tribes to administer because of their complexity and infrastructure requirements.

Within HHS, as noted above (see "ISDEAA Title VI: Feasibility Study (HHS)"), HHS has identified non-IHS programs that may be appropriate for self-determination; however, legislation has not been enacted to date.¹⁶³ As a workaround, tribal health advocates have suggested that funds from other HHS agencies be transferred to IHS so that they can be added to ISDEAA

¹⁵⁵ See, e.g., HAC's version of a 2024 Farm Bill (Farm, Food, and National Security Act of 2024; H.R. 8467) and the Senate Agriculture Committee's version of a 2024 Farm Bill (Rural Prosperity and Food Security Act of 2024; section-by-section summary available at www.agriculture.senate.gov/imo/media/doc/rural_prosperity_and_food_security_section-by-section.pdf). Section 4102(a) of H.R. 8467, as introduced, included a self-determination contract pilot for the Supplemental Nutrition Assistance Program; this provision was amended during the May 23, 2024, markup to reference FDPIR only. Summaries of the Rural Prosperity and Food Security Act of 2024 include these policies, though legislative text has not yet been introduced as of November 6, 2024.

¹⁵⁶ "Rural Prosperity and Food Security Act of 2024," §4102 (section-by-section summary available at www.agriculture.senate.gov/imo/media/doc/rural_prosperity_and_food_security_section-by-section.pdf).

¹⁵⁷ See, e.g., Infrastructure Investment and Jobs Act (P.L. 117-58), Division J.

¹⁵⁸ See S. 4370 in the 118th Congress.

¹⁵⁹ Prepared Statement of the United South and Eastern Tribes Sovereignty Protection Fund, S.Hrg. 115-403.

¹⁶⁰ Ibid.

¹⁶¹ Statement of Joseph P. Kalt, The Harvard Project on American Indian Economic Development, *American Indian Self-Determination Through Self-Governance: The Only Policy That Has Ever Worked*, Testimony before the Alyce Spotted Bear and Walter Soboleff Commission on Native Children, December 15, 2022, p. 14, https://ash.harvard.edu/wp-content/uploads/2024/02/native_children_commission_hearing_12-15-22_kalt_statement_vfin2.pdf (hereinafter Kalt, Testimony). See also Statement of Melanie Benjamin, Chief Executive, Mille Lacs Tribe of Ojibwe, S.Hrg. 115-403.

¹⁶² NFBC, *Gaining Ground*, p. 51.

¹⁶³ In the 108th Congress, legislation was introduced (S. 1696); this bill was not enacted.

agreements.¹⁶⁴ A similar strategy was used with funds from the Centers for Disease Control and Prevention to provide for COVID-19 vaccine distribution for IHS and tribally operated facilities.¹⁶⁵ Though transferring funds appropriated to one HHS agency to IHS to supplement ISDEAA agreements may be an option in the absence of additional ISDEAA authorities, doing so can be cumbersome and may delay funds from reaching Tribes.

Some Tribes and scholars have asserted that tribal self-determination has improved the economic outlook for many Tribes, and that expanding these authorities to other federal departments and agencies could further boost tribal economies. For example, between 1989 (when many Tribes began to assume federal functions under ISDEAA) and 2019, the real (inflation-adjusted) income of the average U.S. resident increased by 17%, whereas the income of the average Native American on a reservation increased by more than 61%.¹⁶⁶ However, this increase in average wealth cannot be attributed solely to the use of ISDEAA and ISDEAA-like authorities.

Some Tribes have testified that ISDEAA agreements can help address public safety issues across jurisdictions and that ISDEAA authority should be expanded to include departments such as DOJ. For example, Tribes have testified that rather than relying “solely on the Federal Bureau of Investigation or BIA staff to patrol, police and investigate crime on tribal [lands],” ISDEAA enables Tribes to receive some base BIA funding for their own police departments.¹⁶⁷ This, in turn, can empower Tribes to work with other police departments to coordinate law enforcement across jurisdictions, according to one source.¹⁶⁸

Congress could choose to constrict or maintain current tribal self-determination authorities or expand authorities to different departments and agencies. Recent legislation indicates an interest among some Members to at least maintain the tribal self-determination policy at departments that currently have ISDEAA authority. For example, the Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019 (PROGRESS Act; P.L. 116-180) directs DOI agencies to negotiate ISDEAA agreements to “maximize implementation of the self-governance policy.”¹⁶⁹ In the 118th Congress, several bills were introduced that would expand self-determination authorities to USDA agencies with limited authority (like FNS and FS) as well as grant the authority to agencies such as the Natural Resources Conservation Service and the Food Safety and Inspection Service.¹⁷⁰

Tribal Capacity

Tribal entities may choose different agreement options authorized by the different ISDEAA titles depending on their capacity and interests. Tribal capacity to administer federal programs is a key

¹⁶⁴ Victor Joseph and Andrew Joseph, Jr, *The National Tribal Budget Formulation Workgroup’s Request for the Indian Health Service Fiscal Year Budget, FY2026* National Tribal Budget Formulation Workgroup, Washington, DC, April 2024, <https://www.nihb.org/resources/NIHB-FY26-Budget.pdf>.

¹⁶⁵ CRS Report R46711, *U.S. Public Health Service: COVID-19 Supplemental Appropriations in the 116th Congress*, coordinated by Kavya Sekar.

¹⁶⁶ Kalt, Testimony, p. 6. The author further argues that this economic growth is a product of self-determination generally leading to more business development rather than just a result of the increased tribal gaming in some areas during that period (Kalt, Testimony, pp. 8-11). This study did not provide income levels over this time period but noted that prior to the era of self-determination, average income for the Native population had declined.

¹⁶⁷ Prepared Statement of Honorable James Floyd, Principal Chief, Muscogee (Creek) Nation, S.Hrg. 115-403.

¹⁶⁸ *Ibid.*

¹⁶⁹ Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019 (PROGRESS Act; P.L. 116-180, §406(e)).

¹⁷⁰ See, e.g., H.R. 5970/S. 2912, S. 1780, and S. 2354 in the 118th Congress.

factor that can affect a Tribe's decision to enter into an ISDEAA agreement. For example, Tribes must demonstrate enhanced financial capacity to enter into self-governance compacts. Some tribal groups claim that ISDEAA has enabled certain Tribes to adopt uniform and cost-effective accounting, management, and reporting systems.¹⁷¹ Other Tribes, however, may need assistance to participate in self-determination.¹⁷²

Tribes and GAO have found that some tribal entities are constrained from using ISDEAA agreements because of limited tribal capacity.¹⁷³ Some Tribes, especially small or remote Tribes with limited staff resources, may not be able to effectively use and account for federal programs and funds. Without sufficient staff resources, some Tribes might experience difficulties with ISDEAA agreements because of the burden of initial requirements and ongoing reporting requirements. In addition, staff resources would be needed to deal with different authorities to enter into compacts with DOI (Title IV) and HHS (Title V). As outlined above, these ISDEAA titles were enacted at different times and are different statutory frameworks.

Some tribal groups have asserted that tribal self-determination and self-governance have not been effectively integrated throughout DOI, which creates a tribal burden.¹⁷⁴ The Self-Governance Communication and Education Tribal Consortium has argued that OSG's separation from BIA limits tribal access to BIA resources for Tribes with 638 contracts as well as OSG resources for Tribes with self-governance compacts.¹⁷⁵ In addition, DOI's Office of Inspector General (OIG) has asserted that this lack of coordination caused some Tribes to receive less funding than others for certain programs. DOI's OIG recommended that BIA and OSG develop standard operating procedures and formalize their cooperation in a memorandum of understanding or other agreement.¹⁷⁶

Some federal agencies offer financial and technical assistance to help Tribes build capacity. For example, BIA offers training as well as tribal planning and negotiation grants.¹⁷⁷ IHS also provides funding to Tribes to support self-governance through cooperative agreements for both planning and negotiations.¹⁷⁸ In addition, DOT's Federal Highway Administration offers a variety of training and professional development programs related to transportation planning, safety, the environment, infrastructure design, construction and project management, and other topics.¹⁷⁹ The

¹⁷¹ Statement of Jefferson Keel, President, National Congress of American Indians, U.S. Congress, Senate Indian Affairs Committee, *Tribal Transportation: Paving the Way for Jobs, Infrastructure, and Safety in Native Communities*, hearings, 112th Cong., 1st sess., September 15, 2011.

¹⁷² Testimony of President, Intertribal Timber Council & Executive Director, Confederated Tribes of the Colville Reservation Cody Desautel, in HNR, Forestry Hearings, p. 2, https://naturalresources.house.gov/uploadedfiles/desautel_testimony.pdf.

¹⁷³ GAO, *Interior Factors*, p. 11.

¹⁷⁴ Statement of Jay Spaan, Self-Governance Communication & Education Tribal Consortium, HNR, 638 hearing, p. 6, <https://www.congress.gov/118/meeting/house/116884/witnesses/HHRG-118-II24-Wstate-SpaanJ-20240306.pdf>.

¹⁷⁵ *Ibid.*

¹⁷⁶ DOI, Office of Inspector General (OIG), *Indian Affairs Offices' Poor Recordkeeping and Coordination Threaten Impact of Tiwahe Initiative*, 2017-ER-018, September 2018, p. 19.

¹⁷⁷ See, e.g., BIA, "Training Opportunities," <https://www.bia.gov/bia/ois/dsd/training-opportunities>.

¹⁷⁸ IHS, "Funding Opportunities Available to Support Tribal Self-Governance Planning and Negotiations Activities," <https://www.ihs.gov/newsroom/announcements/2023-announcements/funding-opportunities-available-to-support-tribal-self-governance-planning-and-negotiation-activities/>.

¹⁷⁹ DOT, Federal Highway Administration, "Training and Education," <https://highways.dot.gov/safety/learn-safety/training-education>.

PROGRESS Act requires DOI to provide technical assistance to Tribes if they lack the “adequate internal controls” necessary to manage a 638 contract.¹⁸⁰

Another tribal concern is a reported difficulty in using federal technology related to ISDEAA agreements.¹⁸¹ Many Tribes have expressed concerns that BIA’s and OSG’s systems are outdated and complex, which hinders tribal implementation of ISDEAA agreements.¹⁸² BIA has committed to engaging with DOI’s Office of Information Management Technology subcontractors to develop a cloud-based replacement for the current 638 application for ISDEAA agreements. It aims to launch this system by the end of FY2024.¹⁸³

At times, Congress has considered tribal capacity when debating self-determination-related legislation. For example, the PROGRESS Act attempted to reconcile BIA’s and IHS’s statutory frameworks for self-governance. Congress could also encourage or create additional financial or technical assistance programs at federal agencies. DOI and other agencies could also be directed to implement technology modernization efforts for infrastructure associated with ISDEAA agreements.

Federal Capacity

Several federal capacity concerns also arise regarding the management of ISDEAA agreements. For example, some tribal advocates claim that agency employees lack an understanding of tribal relations necessary for working with Tribes.¹⁸⁴ This can be especially challenging at agencies without ISDEAA agreement experience. Several departments have attempted to build agency capacity through trainings and webinars. For example, following enactment of the 2018 Farm Bill’s TFPA 638 project authority, USDA issued a best-practices guide.¹⁸⁵ In November 2022, DOI announced that it would consult with Tribes to “help inform consistent interpretation and implementation” across DOI for “improved transparency and certainty” around ISDEAA agreements.¹⁸⁶

Some tribal groups have also asserted that BIA and OSG lack staff capacity to meet tribal needs.¹⁸⁷ In 2019, GAO reported that staff shortages in key positions at OSG contributed to

¹⁸⁰ PROGRESS Act (P.L. 116-180), §203.

¹⁸¹ Statement of Jay Spaan, Self-Governance Communication & Education Tribal Consortium, HNR, 638 hearing, p. 5, <https://www.congress.gov/118/meeting/house/116884/witnesses/HHRG-118-II24-Wstate-SpaanJ-20240306.pdf>.

¹⁸² Ibid.

¹⁸³ Statement of Assistant Secretary for Indian Affairs, DOI, Bryan Newland, HNR, 638 hearing, p. 5, https://naturalresources.house.gov/uploadedfiles/testimony_newland_624.pdf. CRS has not verified whether this system is currently in place.

¹⁸⁴ See, e.g., Statement of Vanessa L. Ray-Hodge, Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, U.S. Congress, HNR, *Legislative Hearing on H.R. 312, ‘Mashpee Wampanoag Tribe Reservation Reaffirmation Act’; H.R. 375, to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes, and for Other Purposes; and Discussion Draft of H.R. __, ‘RESPECT Act,’* hearings, 116th Cong., 1st sess., April 3, 2019, H.Hrg. 35-971, p. 55.

¹⁸⁵ U.S. Forest Service, *Best Practices Guide to Execute a USDA Forest Service 638 Agreement Under the Tribal Forest Protection Act*, August 2020, <https://www.fs.usda.gov/sites/default/files/Best-Practices-Guide-20200909.pdf>.

¹⁸⁶ DOI, *First Annual Report on Tribal Co-Stewardship: Implementing Joint Secretarial Order 3403 on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters*, November 2022, p. 5, <https://www.doi.gov/sites/doi.gov/files/ar-esb46-009795-doi-and-tribal-co-stewardship-20221125.pdf>.

¹⁸⁷ Testimony of Delaware Nation President Deborah Dotson, HNR, 638 hearing, p. 4, https://naturalresources.house.gov/uploadedfiles/testimony_-_dotson.pdf.

delayed funding disbursements to Tribes.¹⁸⁸ OSG has also stated that it lacks the staffing, technology, and forensic accounting capability to provide more detailed budget information for Tribes, such as a year-by-year record of program line spending.¹⁸⁹ In FY2025, BIA requested additional funding to increase its capacity by hiring more awarding officials, who are responsible for working with Tribes to oversee the use of federal funds, programmatic and financial requirement reports, and compliance with federal law.¹⁹⁰

In 2024, DOI leadership testified that BIE has taken steps to increase sovereignty, capacity building through technical assistance, and oversight of ISDEAA Title I contracts and TCSA grant schools.¹⁹¹ In 2016, BIE began reorganizing away from strict regional oversight to a structure that provided differentiated support based on the schools' organization and control. The 2016 reorganization also established an Office of Sovereignty in Indian Education to provide technical assistance to tribes pursuing greater self-determination. In FY2023, BIE established an Office of Indian Self-Determination to promote tribal participation in, and access to, educational programs and services through TCSA grants and 638 contracts. BIE hired a program manager who is working with BIA to transition responsibilities to the new office.¹⁹²

Some Tribes have argued that ISDEAA agreements have occasionally enabled them to supplement limited capacity of some federal staff. For example, when the Salt River Pima Maricopa Indian Community assumed the functions of the BIA's Land Title and Records Office, the Tribe claimed that it improved transaction times for business leases, agricultural leases, home sites, right-of-way, and probates.¹⁹³ Some federal departments have also stated that ISDEAA agreements can supplement federal personnel by providing additional capacity to accomplish goals. For example, FS has stated that the tribal workforce provided in a TFPA 638 contract enables the agency to reduce the risk of fire, disease, or other threats to agency lands.¹⁹⁴

Some Tribes also assert that Tribes may be better able than the federal government to procure and deliver foods on tribal reservations.¹⁹⁵ In addition, these Tribes have argued that USDA's delay in delivering foods as part of FDPIR in 2024 "highlights the urgent need for Congress to expand Tribal Self-Determination and Self-Governance authority to programs that serve Tribal communities."¹⁹⁶

In the 118th Congress, bills introduced to expand tribal self-determination to new agencies or departments have sometimes addressed federal capacity or coordination. For example, bills would

¹⁸⁸ GAO, *Interior Factors*, p. 18. Beginning in FY2023, IHS received advance appropriations, which enabled them to disburse full-year ISDEAA contracts or compacts at the beginning of the fiscal year. Thus, agency delays may be less of an issue at IHS than at BIA or other agencies discussed in this report. For more information on advance appropriations for IHS, see CRS Insight IN12087, *Advance Appropriations for the Indian Health Service (IHS)*, by Elayne J. Heisler and Jessica Tollestrup.

¹⁸⁹ DOI, OIG, *Indian Affairs Offices' Poor Recordkeeping and Coordination Threaten Impact of Tiwahe Initiative*, 2017-ER-018, September 2018, pp. 17-18.

¹⁹⁰ BIA, FY2025 Budget Justifications, p. IA-TG-4.

¹⁹¹ Statement of Assistant Secretary for Indian Affairs, DOI, Bryan Newland, HNR, 638 hearing, p. 4, https://naturalresources.house.gov/uploadedfiles/testimony_newland_624.pdf.

¹⁹² *Ibid.*

¹⁹³ Statement of President of the Salt River Pima Maricopa Indian Community Martin Harvier, HNR, 638 hearing, p. 2, https://naturalresources.house.gov/uploadedfiles/testimony_-_harvier.pdf.

¹⁹⁴ Communication between CRS and U.S. Forest Service on November 10, 2023.

¹⁹⁵ Statement of Chickasaw Nation Under Secretary of Support and Programs Mrs. Marty Wafford, Department of Health, in HAC, *Food Distribution Shortages*, pp. 4-5, https://agriculture.house.gov/uploadedfiles/ms._marty_wafford_testimony_package.pdf.

¹⁹⁶ *Ibid.*

direct OSG and BIA to provide technical assistance to federal agencies.¹⁹⁷ In addition, some bills would require a centralized office within a department to manage ISDEAA agreements or designate a senior official on self-determination within the Office of the Secretary to coordinate ISDEAA agreements across the department.¹⁹⁸ Some bills would also require agencies to spend a minimum amount for staff to administer 638 contracts.¹⁹⁹

Tribal Accountability

As part of its oversight role, Congress could seek to ensure that Tribes are accountable for managing federal programs and funding. Some Tribes have argued that an “expensive and time-consuming” federal monitoring, reporting, and oversight bureaucracy is not needed to ensure tribal accountability.²⁰⁰ Tribes, they assert, are held accountable by their citizens through tribal elections, which are the “ultimate” accountability tool.²⁰¹ Furthermore, some Tribes have argued that ISDEAA provides sufficient safeguards to ensure tribal accountability. If they meet the monetary threshold, ISDEAA agreements are subject to annual audits pursuant to the Single Audit Act, and self-governance Tribes are subject to annual trust evaluations to monitor the performance of trust functions. In addition, OSG has reported that most Tribes with self-governance AFAs have agreed to work with BIA to provide applicable program performance data and information pursuant to the Government Performance and Results Act of 1993 (P.L. 103-62).²⁰² ISDEAA also allows the Secretaries of DOI and HHS to reassume control over federal programs in limited instances.

Despite ISDEAA safeguards, federal agencies such as DOI’s OIG have reported instances where Tribes did not submit required reports on time or otherwise did not appropriately track and monitor BIA funding in ISDEAA agreements.²⁰³ The development of ISDEAA agreements has also been criticized for a lack of transparency and public input.²⁰⁴ At their discretion or when required by law, DOI agencies may use a public consultation process when negotiating self-governance AFAs.²⁰⁵ This discretion is in contrast to the public disclosure requirements of certain

¹⁹⁷ See, e.g., HAC’s version of a 2024 Farm Bill (Farm, Food, and National Security Act of 2024; H.R. 8467), §4102.

¹⁹⁸ *Ibid.* Section 4204 and Rural Prosperity and Food Security Act of 2024, §12212 (section-by-section summary available at www.agriculture.senate.gov/imo/media/doc/rural_prosperity_and_food_security_section-by-section.pdf).

¹⁹⁹ See, e.g., HAC’s version of a 2024 Farm Bill (Farm, Food, and National Security Act of 2024; H.R. 8467, §4204(b)(2)).

²⁰⁰ Statement of Melanie Benjamin, Chief Executive, Mille Lacs Tribe of Ojibwe, S.Hrg. 115-403.

²⁰¹ *Ibid.*

²⁰² OSG, “2019 Tribal Self-Governance Report to Congress,” pp. 7-8, <http://osgdb.org/OSG/InformationFiles/FileLibrary/Annual%20Report%20to%20Congress/FY%202019%20Annual%20Report%20to%20Congress/2019%20Self%20Gov%20Annual%20Report%20to%20Congress%20Submitted.pdf>.

²⁰³ See DOI, OIG, “The Bureau of Indian Affairs Great Plains Region Did Not Oversee CARES Act Funds Appropriately,” 2021-FIN-032, <https://www.doi.gov/reports/managementadvisory/bureau-indian-affairs-great-plains-region-did-not-oversee-cares-act>. See also DOI, OIG, “The Omaha Tribe Did Not Account for CARES Act Funds Appropriately,” 2021-FIN-032-B, <https://www.doi.gov/reports/audit/omaha-tribe-did-not-account-cares-act-funds-appropriately>.

²⁰⁴ HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025,” March 5, 2024, p. 9, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf. In another example, the National Wildlife Refuge Association opposed a DOI U.S. Fish and Wildlife Service (FWS) ISDEAA agreement with the Council at Yukon Flats National Wildlife Refuge (NWR), stating that FWS should allow for a competitive bidding process (National Wildlife Refuge Association, “Yukon Flats NWR Annual Funding Agreement,” <https://perma.cc/XP7Y-FXD9>).

²⁰⁵ 25 C.F.R. §1000.210.

other agreements with nonfederal entities.²⁰⁶ On the other hand, Tribes may argue that because of their unique status as sovereigns, negotiations between governments should not require public input.

Under ISDEAA, tribal entities can provide data to federal agencies about certain outcomes. For example, IHS-operated programs use IHS's data systems and are required to report certain clinical measures. Tribally operated programs have the option to report these data but are not required to do so.²⁰⁷ The result is that the data on IHS's clinical measures are incomplete and do not include all tribal programs. In general, for IHS, a concern is that federally operated programs may perform less well than those operated by Tribes.²⁰⁸ Incomplete data make it difficult to compare the outcomes at federal and tribal facilities. If tribally operated programs are outperforming IHS programs, as some observers believe, then more complete data could be useful to provide lessons learned to improve federally operated programs.

Congress has taken several actions regarding tribal accountability for ISDEAA agreements at DOI and HHS, and it could consider similar actions for other departments. For example, Congress has restricted tribal flexibility to reallocate BIA funding in ISDEAA agreements for congressional priorities such as tribal law enforcement.²⁰⁹ The PROGRESS Act also clarified tribal and federal roles in self-governance compacts involving construction, including a section specifically entitled "tribal accountability."²¹⁰ Regarding tribal accountability for federal funds, Congress could direct all agencies with self-determination authorities to issue standardized procedures and provide more trainings to agency staff, as well as Tribes, on fund reporting and other requirements.²¹¹ Alternatively, because some Tribes believe that the current reporting system is too burdensome, Congress could consider ways to incentivize, but not require, Tribes to report on program outcomes so that Congress has a more complete picture of federal investment in programs and agencies that serve Tribes.

Federal Accountability

The implementation of tribal self-determination authorities varies across federal agencies, even those operating under the same authorities, which can create challenges for holding agencies accountable. For example, while DOI and IHS use the same ISDEAA Title I authority and associated regulations to implement 638 contracts, they operate their self-governance programs

²⁰⁶ Nearly all federal contracts valued over \$25,000 are required to be posted to the System for Awards Management (SAM; <https://sam.gov/>) and [grants.gov](https://www.grants.gov/).

²⁰⁷ HHS, "Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025," March 5, 2024, p. 8, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf.

²⁰⁸ Letter from Ken Degenfelder, Indian and Insular Affairs Subcommittee staff, and Jocelyn Broman, Indian and Insular Affairs Subcommittee staff, to HNR Republican Members, July 27, 2023, https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_sub_on_iaa_leg_hrg_on_ihs_discussion_draft_07.27.23.pdf. See also Testimony at the hearing from Honorable Cindy Marchand, Secretary, Confederated Tribes of the Colville Reservation, HNR, Subcommittee on Indian and Insular Affairs, *Legislative Hearing on "Restoring Accountability in the Indian Health Service Act of 2023,"* hearings, July 27, 2023, https://naturalresources.house.gov/uploadedfiles/testimony_marchand.pdf.

²⁰⁹ U.S. Congress, House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations Bill, 1999, conference report to accompany H.R. 4328, 105th Cong., 2nd sess., H.Rept. 105-825, October 19, 1998, pp. 1208-1209.

²¹⁰ PROGRESS Act (P.L. 116-180), §407(e).

²¹¹ DOI, OIG, "The Bureau of Indian Affairs Great Plains Region Did Not Oversee CARES Act Funds Appropriately," 2021-FIN-032, p. 3, <https://www.doioig.gov/reports/management-advisory/bureau-indian-affairsgreat-plains-region-did-not-oversee-cares-act>.

under different ISDEAA titles and regulations. These differences may also be due to internal management challenges and program directives.²¹²

DOI's OIG has issued several audit reports analyzing issues with BIA's and OSG's management of ISDEAA agreements. In 2018, DOI OIG reported that poor coordination between BIA and OSG, along with inadequate recordkeeping and inconsistent methodologies, resulted in inaccurate fund distribution to some Tribes.²¹³ In 2023, DOI OIG also found that BIA was not actively managing the closeout process for ISDEAA agreements, limiting Tribes' and tribal organizations' ability to use unspent funds.²¹⁴ In addition, GAO has recommended that DOI develop processes to share how it makes funding determinations and track and monitor the disbursement of funds within set time frames.²¹⁵

Since the 108th Congress, Congress has held many oversight hearings and seen bills to examine federal implementation of tribal self-determination. At some of these hearings, some Members of Congress and Tribes expressed frustration over the apparent resistance of federal departments to implement ISDEAA.²¹⁶ In the PROGRESS Act, Congress took steps to limit the reasons for which DOI or HHS may decline to enter a proposed agreement.²¹⁷ The act also stated that DOI must not revise, amend, or require additional terms in a new or subsequent AFA without tribal consent (unless the terms are legally required).²¹⁸ In addition, the act established payment schedules and procedures for self-governance agreements.²¹⁹ Among other things, the act directed the Secretary of the Interior to update the self-governance regulations by December 21, 2024. The PROGRESS Act also sought to create consistency between ISDEAA Title IV (DOI) and Title V (IHS).²²⁰ Another option is for Congress to establish consistent self-determination and self-governance procedures for all departments and agencies authorized to use ISDEAA or other self-determination agreements. Congress could also consider addressing some of the issues raised by DOI's OIG, for example, by requiring OSG to track annual funding for each tribal program or set time frames for BIA to close out ISDEAA agreements.

Funding for ISDEAA Agreements

Whether and how much to fund ISDEAA and related agreements is an issue facing Congress. Factors affecting this issue include ISDEAA's statutory language and other legal requirements, available appropriations, and varying tribal needs.

²¹² For example, the Self-Governance Communication & Education Tribal Consortium has asserted that DOI's OSG and BIA should ensure that organizational capacity, structure, and processes "promote opportunities" for increased self-governance (Statement of Jay Spaan, Self-Governance Communication & Education Tribal Consortium, HNR, 638 hearing, p. 5, <https://www.congress.gov/118/meeting/house/116884/witnesses/HHRG-118-II24-Wstate-SpaanJ-20240306.pdf>).

²¹³ DOI, OIG, *Indian Affairs Offices' Poor Recordkeeping and Coordination Threaten Impact of Tiwahe Initiative*, 2017-ER-018, September 2018, p. 1.

²¹⁴ DOI, OIG, *The Bureau of Indian Affairs Can Improve the Closeout Process for P.L. 93-638 Agreements*, 2020-CGD-060, June 2023, p. 1.

²¹⁵ See, generally, GAO, *Interior Factors*.

²¹⁶ See, e.g., Statements of Senators John Hoeven and Tom Udall, Port Gamble S'Klallam Tribe, and United South and Eastern Tribes, S.Hrg. 115-403, pp. 2, 3, 37, 43.

²¹⁷ PROGRESS Act (P.L. 116-180), §406(c)(6).

²¹⁸ *Ibid.* §402(n).

²¹⁹ *Ibid.* §408.

²²⁰ For example, the PROGRESS Act established a "final offer" process (like the one used by IHS) for when DOI and a tribal entity cannot agree on the terms of a self-governance compact or when the process is delayed (P.L. 116-180, §406(c)(6)).

Contract Support and 105(l) Lease Costs

Whether and how much to provide Tribes for CSCs and 105(l) leasing costs of administering ISDEAA agreements is a perennial issue. As discussed in “Federal Funding for ISDEAA Agreements,” ISDEAA requires DOI and HHS to pay CSCs to cover reasonable administrative costs. However, whether Tribes have historically received all the CSCs that they believe they were legally entitled to has been a source of contention. Since courts and Congress established that this funding was required, IHS’s CSCs have increased over time.

Whether agencies beyond BIA and HHS are required to pay CSCs has also been raised as an issue.²²¹ DOI has reported that—in addition to BIA—BLM, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the National Park Service have self-determination 638 contracts with Tribes and may pay CSCs.²²² These agencies do not have dedicated appropriations for these costs and therefore pay CSCs out of other program funds.²²³ Although the TFPA 638 authority did not specify that FS must pay CSCs, FS has committed to reimbursing Tribes for direct and indirect expenses of conducting agreed-on activities.²²⁴ Similarly, FNS has stated that because it does not have a budget line item for CSCs, it cannot pay for CSCs as an extra cost; however, applicants may include administrative costs as part of their proposals.²²⁵ Some departments have interpreted laws referring to ISDEAA as not requiring, or as perhaps even prohibiting, the payment of CSCs. For example, DOT has determined that the ISDEAA CSC provisions conflict with other statutes.²²⁶ However, a Tribe may use DOT grant awards to cover overhead and administrative expenses associated with operation of the grant, as provided in the grant award.²²⁷

ISDEAA states that agencies are required to enter into a 105(l) lease with a tribal entity, at its request, to pay for facilities, similar to the federal CSC obligation.²²⁸ At BIA, the 105(l) program has grown from 2 Tribes proposing and executing 3 leases in 2019 (the first year the agency received dedicated appropriations) to 93 Tribes proposing 259 initial leases and 238 leases for renewal in 2023.²²⁹ In FY2024, BIA expects to have more than 90 Tribes with over 600 lease renewals and new requests at a value of roughly \$100 million.²³⁰ At IHS, lease costs have grown since FY2018 when the first proposals were submitted; in FY2024, IHS received 767 lease agreements or proposals that totaled \$374 million, an increase from FY2023 when the agency received 673 proposals. IHS does not report information on lease renewals or backlogs.²³¹

²²¹ See, e.g., Testimony of Thora Padilla, President, Mescalero Apache Tribe, in SCIA, TFPA Hearing, p. 6, <https://www.indian.senate.gov/wp-content/uploads/07-25-2024-Padilla-Testimony.pdf>.

²²² Communication between CRS and BIA, May 7, 2024.

²²³ Ibid.

²²⁴ Communication between CRS and U.S. Forest Service on May 21, 2024.

²²⁵ USDA FNS, “Q&As FDIPIR Self-Determination Demonstration Project Round 2,” <https://www.fns.usda.gov/fdpi/ questions-and-answers-self-determination-demonstration-round2>. Also, communication between CRS and USDA, May 10, 2024.

²²⁶ DOT, “Tribal Transportation Self-Governance Program: Final Rule,” 85 *Federal Register* 33500, June 1, 2020.

²²⁷ 49 C.F.R. Part 29.407.

²²⁸ 25 U.S.C. §5324(l).

²²⁹ Statement of Assistant Secretary for Indian Affairs, DOI, Bryan Newland, HNR, 638 hearing, p. 3, https://naturalresources.house.gov/uploadedfiles/testimony_newland_624.pdf.

²³⁰ Ibid. It also reported a backlog of 1,351 pending leases.

²³¹ HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025,” March 5, 2024, pp. 176-177, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf.

Congress has taken several actions to ensure payment of CSCs and 105(l) lease costs that it may consider beyond DOI and IHS. After years of debating how to ensure that BIA, BIE, and IHS complied with their legal obligations, Congress established two indefinite discretionary appropriations accounts for CSCs in the Consolidated Appropriations Act, 2016 (P.L. 114-113): one for BIA and another for IHS.²³² Then, in the Consolidated Appropriations Act, 2021 (P.L. 116-260), Congress established two indefinite discretionary appropriations accounts for 105(l) leases: one for BIA and BIE and another for IHS.²³³ In the 118th Congress, the House's FY2025 appropriations bill would direct BIA to brief the House Committee on Appropriations on providing payments to Tribes and tribal organizations for CSCs associated with ISDEAA agreements across DOI.²³⁴

Congress may also continue to consider authorizing advance appropriations or mandatory appropriations for federal agencies providing CSCs or 105(l) payments.²³⁵ BIA and IHS have requested that one or both of these accounts receive mandatory funding in several budget requests.²³⁶ During the FY2025 appropriations process, the Interior appropriations bill introduced in the Senate would have made these accounts into *appropriated entitlements*.²³⁷ IHS received advance appropriations beginning in FY2023; neither CSCs nor 105(l) leases were included as accounts that received advance appropriations in FY2023 or FY2024. Advocates have asserted that the increasing costs for these accounts require trade-offs between funding CSCs and 105(l) leases and funding other priorities that are included in the same appropriations bill as BIA and IHS (see “Select Appropriations Issues at IHS” for further discussion).²³⁸ Congress might face several considerations in assessing whether to provide advance appropriations or mandatory appropriations, as doing so may limit annual congressional oversight over government spending.

²³² For BIA, see P.L. 114-113, Division G, Title I, Bureau of Indian Affairs, Contract Support Costs. See also *Congressional Record*, vol. 161, no. 184, book III (December 17, 2015), p. H10218. For IHS, see P.L. 114-113, Division G, Title III, Related Agencies, Indian Health Service, Contract Support Costs. See also *Congressional Record*, vol. 161, no. 184, book III (December 17, 2015), p. H10222.

²³³ For BIA and BIE, see P.L. 116-260, Division G, Title I, BIA, Payments for Tribal Leases. For IHS, see P.L. 116-260, Division G, Title III, IHS, Payments for Tribal Leases.

²³⁴ U.S. Congress, House Appropriations Committee, *Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2025*, report to accompany H.R. 8998, 118th Cong., 2nd sess., July 11, 2024, H.Rept. 118-581, p. 49.

²³⁵ See, e.g., H.R. 4832 from the 118th Congress. Advance appropriations are funds that become available for obligation one or more fiscal years after the budget year that is covered by a given appropriations act. See CRS Report R43482, *Advance Appropriations, Forward Funding, and Advance Funding: Concepts, Practice, and Budget Process Considerations*. Mandatory spending is controlled by authorizations laws and is generally for a program that is created and funded in the same law. It can be multiyear or permanent. *Appropriated mandatory* spending refers to programs that are funded annually (or for a longer period) in an appropriations act or another law. See CRS Report R44582, *Overview of Funding Mechanisms in the Federal Budget Process, and Selected Examples*.

²³⁶ See, e.g., DOI, BIA, “Budget Justifications and Performance Information: Fiscal Year 2016,” p. IA-ES-6, <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ocfo/ocfo/pdf/FY2016Greenbookidc1-031356.pdf>. For IHS, the FY2025 Budget Request proposes to make all of IHS funding mandatory in FY2026. HHS, “Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025,” March 5, 2024, p. 2, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf.

²³⁷ *Appropriated entitlements* receive funding in the annual appropriations acts, but the level of spending for appropriated entitlements is based on the benefit and eligibility criteria established in law. For more information on appropriated entitlements, see CRS Report RS20129, *Entitlements and Appropriated Entitlements in the Federal Budget Process*. U.S. Congress, Senate Appropriations Committee, *Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2025*, report to accompany S. 4802, 118th Cong., 2nd sess., July 25, 2024, S.Rept. 118-201, p. 6.

²³⁸ National Indian Health Board, “Mandatory Contract Support Costs and 105(l) Lease Payments,” <https://www.nihb.org/government-relations/CSC-105L.php>.

Select Appropriations Issues at BIA

Tribes seeking to expand existing ISDEAA agreements or enter into new ISDEAA agreements with BIA may face challenges for both historical and legal reasons. In 1990, BIA developed a *tribal shares process* to determine the amount available in each BIA region for Tribes that currently had ISDEAA agreements or could later choose to enter into ISDEAA agreements. BIA then allocated the remaining funding to those Tribes still receiving direct services from BIA.²³⁹ This process established the historical baseline for *tribal priority allocations* (TPAs), which Tribes receive annually.²⁴⁰ Currently, when BIA appropriations are enacted, BIA allocates TPA funding according to these historical baseline amounts and allocates appropriations increases that are not directed to a specific Tribe on a pro rata basis.²⁴¹ BIA may be unable to enter into ISDEAA agreements with Tribes that did not have ISDEAA agreements during the tribal shares process, or did not participate at all, if it does not receive appropriations beyond the historical levels.

In addition, BIA has been constrained by certain ISDEAA provisions. ISDEAA’s “reduction clause” states that BIA is not required to reduce funding for programs, projects, or activities serving one Tribe or tribal organization to make funds available to another Tribe or tribal organization.²⁴² This reduction clause has prevented BIA from shifting funds from one Tribe or tribal organization to cover the perceived needs or shortfalls of another.²⁴³

Congress has taken several actions to address these issues. On occasion, Congress has appropriated funding above historical TPA amounts for specific purposes.²⁴⁴ In addition, it has authorized BIA to create new TPAs for certain tribal groups that did not participate in the tribal shares process and lack historic TPA baseline amounts. For example, BIA’s New Tribes TPA provides base funding for Tribes that are newly federally recognized to establish and carry out the responsibilities of a tribal government.²⁴⁵ To support small and economically disadvantaged tribal groups, Congress established the Small and Needy Tribes Supplement TPA.²⁴⁶

In evaluating the potential for more tribal self-determination at BIA, Congress could also continue to debate tribal needs assessments. For example, in 2020, Congress amended ISDEAA to ensure ongoing needs assessments for Tribes with ISDEAA agreements.²⁴⁷ Pursuant to the law, Tribes may submit reports of their unmet funding needs of self-governance compacts to both DOI and Congress.²⁴⁸ Considering BIA’s reported difficulty in estimating ISDEAA agreement needs, these tribal reports may inform congressional oversight and decisionmaking on funding for Tribes entering ISDEAA agreements. In addition, Congress could continue to debate authorizing tribal

²³⁹ For more information about the development of Tribal priority allocations and the tribal shares process, see CRS Report R47723, *Bureau of Indian Affairs: Overview of Budget Issues and Options for Congress*, by Mariel J. Murray.

²⁴⁰ BIA must provide a Tribe entering into ISDEAA agreements with a *tribal share*—a non-inherently federal portion of BIA funds and resources—to execute the agreement. 25 U.S.C. §5361; 25 C.F.R. §1000.97.

²⁴¹ Communication between CRS and BIA, February 10, 2023.

²⁴² 25 U.S.C. §5325.

²⁴³ See, e.g., Strommer and Osborne, “History,” p. 54.

²⁴⁴ Catherine Curtis and Miriam Jorgensen, “American Indian Tribes’ Financial Accountability to the United States Government: Context, Procedures and Implications,” in *Aboriginal Policy Research, Volume 2: Setting the Agenda for Change*, ed. Jerry P. White, Paul Maxim, and Dan Beavon (Ontario, Canada: Thompson Educational Publishing: 2004), p. 19, <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1296&context=aprci>.

²⁴⁵ BIA, FY2025 Budget Justifications, p. IA-TG-6.

²⁴⁶ Department of the Interior and Related Agencies Appropriations Act, 1998 (P.L. 105-83).

²⁴⁷ PROGRESS Act (P.L. 116-180).

²⁴⁸ 25 U.S.C. §5372(a)(2).

reports at other departments with tribal self-determination authorities or requiring departments to conduct periodic surveys of Tribes to determine tribal interest in self-determination.²⁴⁹

Select Appropriations Issues at IHS

IHS spends less per patient than other government health programs and less than the average national health care spending per patient.²⁵⁰ The relatively lower amount of health-related spending compared to spending on the general population and the populations served by other federal programs has been identified as a long-standing challenge for IHS (and tribal entities assuming services under ISDEAA) to provide adequate health services. For example, IHS estimates that its per capita spending per beneficiary is \$3,332, which is less than half of the benchmark for federal health spending per user (\$7,515).²⁵¹ As a reflection of that and other challenges the agency has faced, it has been included on GAO's high-risk list in recent years.²⁵² Tribes and GAO have asserted that transferring federal programs that some consider historically underfunded puts a financial burden on Tribes.²⁵³

Some aspects of self-determination could contribute to funding challenges by subdividing available funding. For example, IHS operates facilities that serve multiple tribes, and at times, one or more tribes have elected to take their tribal shares and operate their own facilities. While the Tribes have the statutory authority to do this, it may create logistical challenges both for the new 638 contract, which loses some economies of scale, and for the remaining federally operated program, which would have less funding available to maintain services. This has occurred several times in recent years at IHS. For example, in 2020, one pueblo in New Mexico decided to take its share of federal funding from a hospital that served three Tribes to open its own clinic. This created a funding shortfall at the hospital and a reduction of services.²⁵⁴ In response to this and a similar situation in South Dakota,²⁵⁵ an FY2021 legislative proposal for IHS sought to require unanimous consent among the Tribes served by a given facility before that facility could be awarded a contract because of such concerns about the loss of economies of scale.²⁵⁶ This proposal was not enacted. Congress may consider how to address these scenarios should they arise again.

A recently enacted appropriations law limits self-determination activities in Alaska. The Consolidated Appropriations Act, 2024 (P.L. 118-42), extended a prohibition on funding for self-

²⁴⁹ See S. 612, Indian Needs Assessment and Program Evaluation Act of 1999 (106th Congress).

²⁵⁰ IHS, "2017 IHS Expenditures Per Capita and Other Federal Health Care Expenditures Per Capita," https://www.ihs.gov/sites/ihcif/themes/responsive2017/display_objects/documents/2018/2017_IHS_Expenditures.pdf.

²⁵¹ Ibid. See also U.S. GAO, *Indian Health Service: Spending Levels and Characteristics of IHS and Three Other Federal Health Programs*, 19-749R, December 10, 2018, <https://www.gao.gov/products/gao-19-74r>.

²⁵² GAO, "High Risk Series: Improving Federal Management of Programs That Serve Tribes and Their Members," https://files.gao.gov/reports/GAO-23-106203/index.html?_gl=1*4is5nq*_ga*MTA4MTI1ODc1OS4xNzE5MzI4Njgy*_ga_V393SNS3SR*MTcyNDk2MTM1OC40LjEuMTcyNDk2MTY2OS4wLjAuMA..#appendix14.

²⁵³ GAO, *Interior Factors*, p. 24.

²⁵⁴ Mark Walker, "Native Americans Reliant on Hospital Feel Abandoned by U.S. During Pandemic," *New York Times*, January 3, 2021, <https://www.nytimes.com/2021/01/03/us/politics/indian-health-service-hospital.html>.

²⁵⁵ The prior facility had served three Tribes, of which two moved to a tribally operated program, while IHS continues to provide direct services for the third Tribe. See IHS, "IHS Rapid City Service Unit Transfer to the Tribally-Managed Oyate Health Center," press release, February 25, 2022, <https://www.ihs.gov/newsroom/pressreleases/2022-press-releases/ihs-rapid-city-service-unit-transfer-to-the-tribally-managed-oyate-health-center/>.

²⁵⁶ HHS, "Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2021," February 5, 2020, p. 283, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY_2021_Final_CJ-IHS.pdf.

determination for Alaska Native villages that are located within an area served by an Alaska Native regional health entity. The Continuing Appropriations and Extensions Act, 2025 (P.L. 118-83), extends this prohibition through December 20, 2024, the duration of the continuing resolution. Because of this prohibition, Alaska Native regional health entities receive funding on behalf of Alaska Native villages to provide care to the IHS beneficiaries in those villages. This prohibition limits the self-determination of Alaska Native villages but also potentially keeps costs down.²⁵⁷ In 1998, GAO concluded that directly funding Alaska Native villages would increase CSCs and potentially shift funding from health care into administrative areas.²⁵⁸ The regional entities' funding would be reduced, and they would be responsible for a smaller service population, which could be seen as beneficial. From another perspective, this funding shift could reduce economies of scale and increase IHS costs for planning and negotiating contracts. It may also increase CSCs overall.²⁵⁹ Congress may consider whether to continue this prohibition in future appropriations, which may involve balancing the restrictions of self-determination with potential increased costs for the agency.

Another budget challenge for IHS is how CSCs may increase in FY2025 and beyond as a result of a 2024 Supreme Court decision about third-party payments. Although tribal citizens are eligible to receive health services at IHS facilities, the services they may receive are limited. Many tribal citizens may be covered by private insurance and/or are eligible for Medicare and/or Medicaid benefits. IHS (and Tribes with ISDEAA agreements) may supplement their funding with money recovered from third-party payers for the covered services they provide to tribal members who have private health insurance or who are enrolled in federal health programs.²⁶⁰ On June 6, 2024, the U.S. Supreme Court decided in *Becerra v. San Carlos Apache Tribe* and *Becerra v. Northern Arapaho Tribe* that IHS owed CSCs on third-party payments (also called *collections*) for ISDEAA agreements.²⁶¹ IHS CSCs for FY2024 were \$969 million; the overall IHS appropriation was \$7 billion.²⁶² Though CSCs are a separate budget line from the overall IHS appropriation, they are included in the overall appropriations bill total. Thus, Congress may examine how increased self-determination at IHS and other agencies interacts with other funding priorities included in the Interior-Environment appropriations bills.²⁶³

²⁵⁷ See GAO, *Indian Self-Determination Contracting: Effects of Individual Community Contracting for Health Services in Alaska*, HEHS-98-134, June 1, 1998, <https://www.gao.gov/products/hehs-98-134>.

²⁵⁸ *Ibid.*

²⁵⁹ IHS budget justifications, various years. See IHS, "Congressional Justifications," <https://www.ihs.gov/ofa/division-of-budget-formulation/congressional-justifications/>.

²⁶⁰ IHS, "Third-Party Revenue Accounts Management and Internal Controls," in *Indian Health Manual, Part 5: Management Services*, p. 5-1.1, <https://www.ihs.gov/ihm/pc/part-5/chapter-1-third-party-revenue-accounts-management-and-internal-controls/>. According to IHS, some facilities report that 60% or more of their annual budget come from third-party payments for services provided to IHS beneficiaries covered by a federal program (e.g., Medicaid) or those who have private health insurance (HHS, "Indian Health Service: Justification of Estimates for Appropriations Committees: Fiscal Year 2025," March, 5, 2024, p. 143, https://www.ihs.gov/sites/ofa/themes/responsive2017/display_objects/documents/FY-2025-IHS-CJ030824.pdf).

²⁶¹ IHS is preparing to implement these CSCs and is undertaking tribal consultation. Letter from Roselyn Tso, Director of the Indian Health Service, to Tribal Leader, June 13, 2024, https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/2024_Letters/DTLL_061324.pdf.

²⁶² CRS Report R47664, *Interior, Environment, and Related Agencies: Overview of FY2024 Appropriations*, by Carol Hardy Vincent.

²⁶³ National Indian Health Board, "Mandatory Contract Support Costs and 105(l) Lease Payments," <https://www.nihb.org/government-relations/CSC-105L.php>.

Funding Transfers Within or Between Departments

Federal agencies with newer tribal self-determination authorities may also have a limited ability to transfer funding within or across agencies. Some tribal groups have called on Congress to ensure legislation “fully supports” interagency transfers.²⁶⁴ In addition, DOT assessed that it lacked the authority to conduct some internal agency transfers of ISDEAA funding when the FAST Act authority was first enacted, although this authority was later provided in Section 109 of the Consolidated Appropriations Act, 2024 (P.L. 118-42).

There are several options for ISDEAA funding transfers within or between departments. Congress could explicitly provide internal transfer authority for specific departments, as it did for DOT. OSG manages self-governance compacts at DOI, and it also manages funds transferred from other departments such as for the 477 program.²⁶⁵ Congress could consider expanding OSG’s role in coordinating interagency funding beyond the 477 program.

²⁶⁴ Statement of the United South and Eastern Tribes Sovereignty Protection Fund, S.Hrg. 115-403.

²⁶⁵ BIA, “Office of Self Governance,” <https://www.bia.gov/as-ia/osg>.

Appendix A. Comparison of 638 Contracts and Self-Governance Compacts

Table A-I. Comparison of 638 Contracts and Self-Governance Compacts at the Department of the Interior (DOI) and Department of Health and Human Services (HHS)

(analysis of authorities within ISDEAA Titles I, IV, and V)

Elements	638 Contracts (DOI & HHS)	Self-Governance Compacts (DOI)	Self-Governance Compacts (HHS)
Application Process	<p>Tribes or tribal organizations may identify the <i>programs, functions, services, or activities (PFSAs)</i> they want to include in contracts and submit proposals for departmental review. With a few exceptions, the department (BIA/IHS) must accept a proposal within 90 days of receipt.</p> <p>BIA/IHS coordinates with Tribes to manage 638 contracts and associated annual funding agreements (AFAs).</p>	<p>Tribes or tribal consortia are eligible if they meet the following criteria:</p> <ul style="list-style-type: none"> (1) successfully complete the required planning phase, (2) request participation in self-governance by resolution or other official means, and (3) demonstrate financial capacity by already managing a 638 contract (three years of clean audits) with any federal agency. <p>Each year, DOI may select an additional 50 Tribes that meet the eligibility criteria.</p> <p>DOI's Office of Self-Governance coordinates with Tribes and tribal consortia to manage self-governance compacts, AFAs, and reprogramming requests.</p>	<p>Tribes, intertribal consortia, or tribal organizations are eligible if they meet the following criteria:</p> <ul style="list-style-type: none"> (1) participated in a self-governance demonstration project under ISDEAA Title III, (2) successfully complete the required planning phase, (3) request participation in self-governance by resolution or other official means, and (4) demonstrate financial capacity by already managing a 638 contract (three years of clean audits) with any federal agency. <p>Each year, the Indian Health Service (IHS) may select an additional 50 Indian Tribes that meet the eligibility criteria.</p> <p>IHS's Office of Tribal Self-Governance works with Tribes, tribal consortia, and tribal organizations to coordinate self-governance compacts, AFAs, and reprogramming requests.</p>

Elements	638 Contracts (DOI & HHS)	Self-Governance Compacts (DOI)	Self-Governance Compacts (HHS)
Eligible Federal Programs, Services, Functions, or Activities	<p>PFSAs that are authorized under certain laws or operate “for the benefit of Indians” are eligible for inclusion in a 638 contract.</p> <p>Tribes and tribal consortia cannot assume an <i>inherently federal function</i>.</p> <p>There is generally one PFSA per contract, although multiple PFSAs can be consolidated into one AFA.</p> <p>Tribes and tribal consortia may operate construction projects using a separate proposal and review process.</p>	<p>PFSAs eligible under Title I that (1) DOI would otherwise provide for Tribes or tribal citizens or (2) may have “special geographic, historical, or cultural significance” to the requesting Tribe or tribal consortium are eligible for inclusion in a self-governance compact.</p> <p>Tribes and tribal consortia cannot assume an <i>inherently federal function</i>.</p> <p>There may be multiple PFSAs per AFA.</p> <p>Tribes and tribal consortia may operate construction projects using a separate proposal and review process.</p>	<p>Programs, services, functions, or activities (PFSAs) that IHS would otherwise carry out for the benefit of Indians because of their status as Indians. These may include tribal shares of discretionary competitive grants that are eligible for inclusion in a self-governance compact.</p> <p>Tribes and tribal consortia cannot assume an <i>inherently federal function</i>.</p> <p>There may be multiple PFSAs per AFA.</p> <p>Tribes, tribal consortia, or tribal organizations may operate construction projects using a separate proposal and review process.</p>
Agreement Duration	Annual or multiyear funding agreements run for up to three years unless the parties agree to a longer term.	Annual or multiyear funding agreements.	Annual or multiyear funding agreements.
Agreement Administration	Tribes and tribal organizations must generally submit requests to redesign programs for federal approval.	Tribes and tribal consortia may generally redesign or consolidate PFSAs, and reallocate funding, without federal approval.	Tribes, tribal consortia, or tribal organization may generally redesign or consolidate PFSAs, and reallocate funding, without federal approval.
Reporting Requirements	If Tribes and tribal organizations meet the financial threshold per the Single Audit Act (31 U.S.C. §75), they are required to submit an annual audit report.	If Tribes, tribal consortia, and tribal organizations meet the financial threshold per the Single Audit Act (31 U.S.C. §75), they are required to submit an annual audit report.	If Tribes and intertribal consortia meet the financial threshold per the Single Audit Act (31 U.S.C. §75), they are required to submit an annual audit report.

Source: 25 C.F.R. §900, 25 C.F.R. §1000, 42 C.F.R. §137, 25 U.S.C. §5305, 25 U.S.C. §5321, 25 U.S.C. §5361, 25 U.S.C. §5362, 25 U.S.C. §5363, 25 U.S.C. §5364, 25 U.S.C. §5367, 25 U.S.C. §§5318 et seq.

Notes: BIA = Bureau of Indian Affairs; IHS = Indian Health Service. This report reflects regulations current as of November 6, 2024, and does not incorporate proposed changes to DOI’s self-governance program included in DOI’s proposed rule issued on July 15, 2024. See BIA, “Self-Governance PROGRESS Act Regulations,” 89 *Federal Register* 57524-57577, July 15, 2024.

Appendix B. Abbreviations

Table B-1. Abbreviations Used in This Report
(listed in alphabetical order)

Abbreviation	Meaning
AFA	Annual Funding Agreement
ANCSA	Alaska Native Claims Settlement Act (43 U.S.C. §§1601 et seq.)
BIA	Bureau of Indian Affairs
BIE	Bureau of Indian Education
BLM	Bureau of Land Management
CSC	contract support cost
DOJ	Department of Justice
DOI	Department of the Interior
DOT	Department of Transportation
FAR	Federal Acquisition Regulation
FAST Act	Fixing America's Surface Transportation Act (P.L. 114-94)
FDPIR	Food Distribution Program on Indian Reservations
FEHB	Federal Employees Health Benefits
FNS	Food and Nutrition Service
FS	Forest Service
GAO	Government Accountability Office
HHS	Department of Health and Human Services
IHCIA	Indian Health Care Improvement Act (P.L. 94-437, 25 U.S.C. §§1601 et seq.)
IHS	Indian Health Service
ISDEAA	Indian Self-Determination and Education Assistance Act (P.L. 93-638, 25 U.S.C. §§5301 et seq.)
ITO	Indian tribal organization
JOM	Johnson-O'Malley Act (25 U.S.C. §§5342-5348)
MOA	memorandum of agreement
OIG	Office of Inspector General
OSG	Office of Self-Governance (DOI)
PFSA	program, function, service, or activity
SGTFW	Self-Governance Tribal Federal Workgroup (HHS)
TCSA	Tribally Controlled Schools Act (TCSA; P.L. 100-297)
TFPA	Tribal Forest Protection Act (P.L. 108-278, 25 U.S.C. §3115(a))
TPA	tribal priority allocation
TTSGP	Tribal Transportation Self-Governance Program
USDA	U.S. Department of Agriculture

Author Information

Mariel J. Murray, Coordinator
Specialist in Natural Resources Policy

Elayne J. Heisler
Specialist in Health Services

Cassandria Dortch
Specialist in Education Policy

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