



INDIAN HEALTH SERVICE

**TRIBAL SELF-GOVERNANCE PROGRAM
NEGOTIATIONS HANDBOOK**



Updated: Spring 2012



“The Indian Health Service supports Self-Governance because it strengthens the nation-to-nation relationship between the United States and Indian Tribes. I respect the choices of Self-Governance Tribes to take on the responsibility of providing health care services to their communities. The challenges we face are great, but I am confident we can find solutions together in partnership.”

– Yvette Roubideaux, M.D., M.P.H.
Director, Indian Health Service

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Purpose of the IHS Tribal Self-Governance Program Negotiations Handbook

This Handbook was originally developed in March 2002 to provide new and existing Self-Governance Tribes and Indian Health Service (IHS) staff with a practical, user-friendly guide to negotiation of Title V Self-Governance Compacts and Funding Agreements in the IHS. The Handbook has been updated to reflect the many legal and policy changes that have taken place since its initial publication, including the permanent reauthorization of the Indian Health Care Improvement Act (IHCIA) as part of the Patient Protection and Affordable Care Act of 2010 (ACA) (Pub. L. No. 111-148).

The Handbook is an informational resource, combining policies, procedures, and material from several sources. It neither represents nor replaces any formal position of the IHS. Rather, it is intended to serve as a general reference tool for Tribal leaders and staff, IHS representatives, Agency Lead Negotiators (ALNs), and others on the IHS Tribal Self-Governance Program (TSGP) and the negotiation process.

For specific information on the legislation and regulations governing the IHS TSGP, please see Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. § 458aaa, et seq.) and the accompanying ISDEAA regulations (42 C.F.R. PART 137).

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What is the Tribal Self-Governance Program?

The Tribal Self-Governance Program (TSGP) is more than an IHS program; it is an expression of the nation-to-nation relationship between the United States and each Indian Tribe. Through the TSGP, Tribes have the option to assume IHS program funds and manage them to best fit the needs of their Tribal communities. Tribes participating in the TSGP negotiate with the IHS and take on full funding, control, and accountability for those programs, services, functions, and activities (PSFAs), or portions thereof, that the Tribe chooses to assume.

Participation in the TSGP is one of three ways that Tribes can choose to obtain health care from the Federal government for their members. Specifically, Tribes can choose to:

1. Receive health care services directly from the IHS.
2. Contract with the IHS to administer individual programs and services the IHS would otherwise provide (referred to as Title I Self-Determination Contracting).
3. Compact with the IHS to assume control over health care programs the IHS would otherwise provide (referred to as Title V Self-Governance Compacting or the TSGP).

These options are not exclusive; Tribes may choose to combine them based on their individual needs and circumstances. Participation in the TSGP affords Tribes the most flexibility to tailor health care services to the needs of their communities.

The TSGP is and has always been a tribally driven initiative, and strong Federal-Tribal partnerships have been critical to the program's success. Tribal leaders and representatives have been involved in every stage of the TSGP's development and implementation.

The Office of Tribal Self-Governance (OTSG) serves as the primary liaison and advocate for Tribes participating in the TSGP. The OTSG was established to implement Tribal Self-Governance legislation and authorities in the IHS, beginning with the IHS Tribal Self-Governance Feasibility Study authorized in 1991. The OTSG develops, directs and implements Tribal Self-Governance policies and procedures; provides information and technical assistance to Self-Governance Tribes; and advises the IHS Director on Agency compliance with TSGP policies, regulations, and guidelines.

Tribal Sovereignty and the Nation-to-Nation Relationship

American Indian and Alaska Native peoples exercised their inherent rights to self-determination and self-governance long before the arrival of the non-indigenous peoples to the Americas. Later, the US government recognized in the US Constitution that Tribes are distinct political entities. Hundreds of treaties, Federal laws, and court cases have also reaffirmed that Indian nations retain their inherent right to govern themselves and their territories subject only to limitations imposed by Federal law. This is known as Tribal sovereignty. The US Supreme Court has held that Tribes maintain their sovereignty unless a Federal statute specifically removes that authority or a Federal court determines that the Tribe's exercise of that authority is inconsistent within the Federal framework.

Tribal sovereignty includes the inherent right to govern and protect the health, safety, and welfare of Tribal citizens. Tribal governments exercise their inherent rights through many means, including determining citizenship, establishing civil and criminal laws, developing and implementing regulations, and delivering services. Tribal governments are responsible for providing a wide range of activities and services, such as education, law enforcement, environmental protection, health care, and basic infrastructure.

American Indians and Alaska Natives are citizens of sovereign Tribal nations that have a legal and political relationship with the US government. The nation-to-nation relationship between Tribal governments and the US government has existed since the formation of the United States. This relationship has a strong historical foundation

recognized in the US Constitution, treaties, Federal statutes, case law, executive orders, and administrative policies. Presidential administrations continue to reaffirm the nation-to-nation relationship between Tribal governments and the United States. All Federal agencies interact with Tribes as governments, not as special interest groups or individuals.

History of the IHS Tribal Self-Governance Program

In 1975, the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. No. 93-638) was signed into law. The ISDEAA reaffirmed congressional support of the nation-to-nation relationship between the United States and each Tribal nation. The ISDEAA was enacted to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of Federal services and programs provided to the Tribes and their members, see 25 U.S.C. § 450a(b). It provided Tribes with the option to exercise their sovereignty by either (1) assuming the administration and operation of PSFAs from the IHS or (2) continuing to receive health care through the IHS-administered, direct-care health system.

Following the passage of the ISDEAA, Tribes continued to advocate for increased autonomy in the administration of their health care programs. The ISDEAA was revised substantially in 1988 to "remove many of the administrative and practical barriers that [persisted] under the Indian Self-Determination Act" (Senate Report 100-274) and was comprehensively amended in 1994. In 1996, Tribal leaders and representatives participated with Federal agencies in a negotiated rulemaking process that resulted in a Final Rule to implement the program now known as Title I Self-Determination Contracting, see 61 FR 32482-534.

The 1988 amendments authorized the initial Self-Governance Demonstration Project (Pub. L. No. 100-472) within the US Department of the Interior (DOI). Following the success of the DOI Self-Governance Demonstration Project, Congress extended the same authority to the IHS through the Indian Health Amendments of 1992 (Pub. L. No. 102-573). The first IHS Demonstration Project agreements were signed on September 30, 1993. In 1994 the IHS Tribal Self-Governance Demonstration

Project was extended to 18 years, with authority to add 30 Tribes per fiscal year (Pub. L. No. 103-435). In 1996, the Tribal Self-Governance Advisory Committee (TSGAC) was created to provide advice to the Director of IHS and assistance on issues and concerns pertaining to Tribal Self-Governance and the implementation of the self-governance authority within the IHS.

In 2000, Congress enacted permanent authority for the IHS Tribal Self-Governance Program under Pub. L. No. 106-260, the Tribal Self-Governance Amendments of 2000 (Title V). This legislation required that regulations implementing the TSGP be developed through negotiated rulemaking. The IHS promulgated the regulations implementing the TSGP in the Federal Register on May 17, 2002, published at 42 C.F.R. Part 137.

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148. The ACA contained several Indian-specific provisions and reforms that will positively affect many American Indians and Alaska Natives. The ACA also permanently reauthorized, revised, and expanded the Indian Health Care Improvement Act (IHCIA), including new authorities for Tribes participating in the TSGP.

Since the first Demonstration Project agreements were signed in 1993, the IHS TSGP has seen tremendous growth. As of December 2011, 337 Tribes are participating in the TSGP. That's nearly 60 percent of the 566 federally recognized Tribes in the United States. In fiscal year (FY) 2011, approximately one-third of the total IHS budget appropriation was transferred to Tribes to support 82 TSGP Compacts and 107 TSGP Funding Agreements (FAs). The TSGP is still growing. In FY 2011, nine new Tribes and Tribal Organizations joined the TSGP. With the addition of two new IHS Areas since 2009, the TSGP is now operating in 10 of the 12 IHS Areas.

The TSGP has proven to have a significant positive impact on the health and well-being of participating Tribal communities. The TSGP produces results because Tribal communities are in the best position to understand and address their own health care needs and priorities. Through the TSGP, Tribes continue to develop innovative solutions that address the health care delivery challenges facing their communities.

1975 Indian Self-Determination and Education Assistance Act (Pub. L. No. 93-638)

Authorized Tribes to contract with the IHS and the Bureau of Indian Affairs (BIA) to operate programs or portions of programs.

1976 Indian Health Care Improvement Act (Pub. L. No. 94-437)

Implemented Federal responsibility for the care and education of Indian people.

1988 Tribal Self-Governance Demonstration Project (Pub. L. No. 100-472)

Authorized BIA to negotiate compacts with Tribes; gave Tribes more flexibility in operation of programs.

1991 IHS Funded to Perform Feasibility Study (Pub. L. No. 102-184)

Feasibility study funded on extending Tribal Self-Governance to the IHS.

1992 Self-Governance Authority Extended to IHS (Pub. L. No. 102-573)

Authorized the IHS to negotiate Compacts with Tribes through the Demonstration Project; gave Tribes more flexibility in operation of programs.

1994 Technical Amendments to Title III Section 301 and Section 302(a) (Pub. L. No. 103-435)

Extended Tribal Self-Governance Demonstration Project to 18 years; 30 Tribes per fiscal year to participate.

2000 Title V (Pub. L. No. 106-260)

Created a permanent Tribal Self-Governance Program (TSGP) within the IHS.

2002 Title V Regulations (42 C.F.R. Part 137)

Tribal Self-Governance Regulations promulgated to implement Title V.

2010 Patient Protection and Affordable Care Act (Pub. L. No. 111-148)

Permanently reauthorized and expanded the Indian Health Care Improvement Act (IHCIA) authorities.



Overview

The TSGP negotiation process was first developed by a workgroup composed of both IHS and Tribal representatives and was published as the Title III Transition Team Report in 1996. The TSGAC reviewed and amended the report, which assisted in the development and eventual promulgation of the ISDEAA Title V regulations in May 2002.

The efforts of the workgroup and TSGAC resulted in a collaborative process for entering the TSGP that has four major stages: Planning, Pre-Negotiations, Negotiations, and Post-Negotiations. The design of the negotiation process:

1. Allows a Tribe to set its own priorities when assuming responsibility for IHS PSFAs.
2. Observes the nation-to-nation relationship between the United States and each Tribe.
3. Involves the active participation of both Tribal and IHS representatives, including the OTSG.

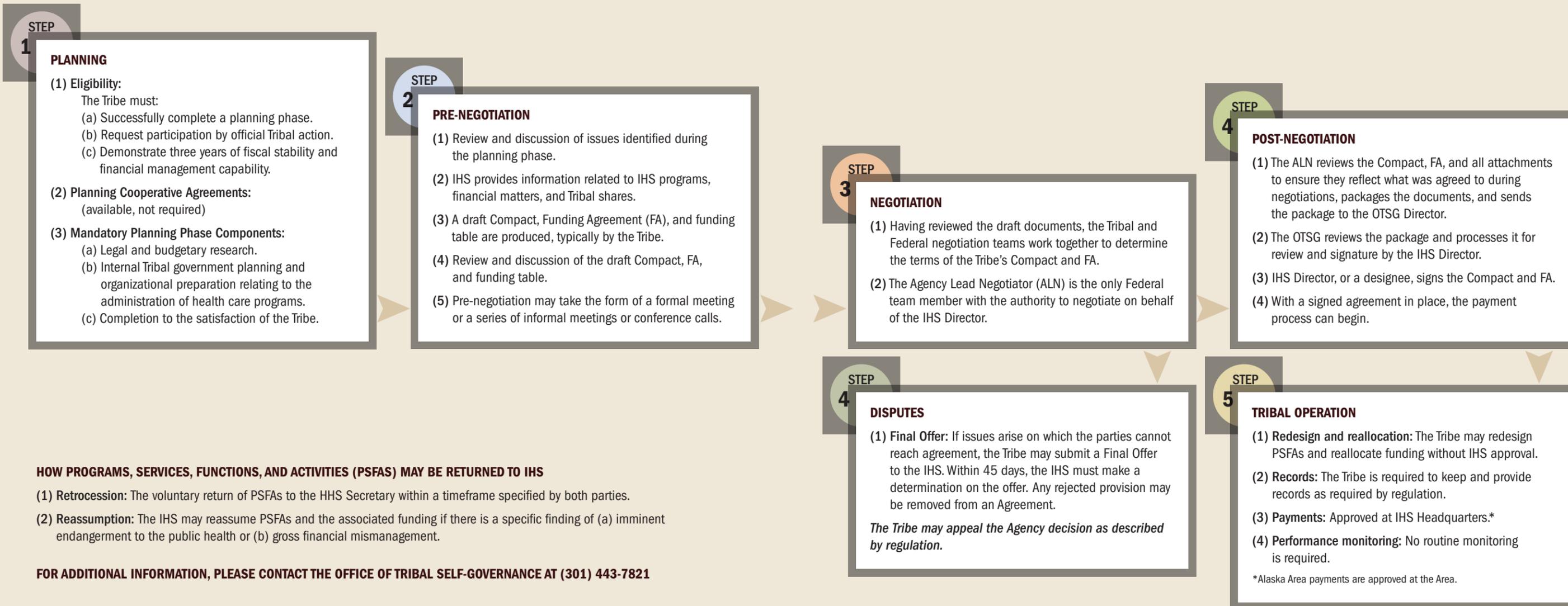
Negotiations are the method of determining and agreeing upon terms and provisions of a Tribe's Compact and Funding Agreement (FA), the implementation documents for the TSGP. Upon agreement by both parties to the provisions in the Compact and FA, the negotiating Tribe becomes a "Self-Governance Tribe" and a participant in the TSGP.

Negotiations are a dynamic, evolving, and tribally driven process that requires careful planning and preparation by both parties, including the sharing of precise, up-to-date information. Because each Tribal situation is unique, a Tribe's successful transition into the TSGP requires focused discussions between the Federal and Tribal negotiation teams about the Tribe's specific health care concerns and plans.

"Self-Governance is a Tribally driven initiative fundamentally designed to incorporate the government to government relationship into a meaningful partnership process between the United States and Indian Tribes; founded on our political relationship with the United States by treaties and agreements."

— Dale Risling, Sr., Chairman
Hoopa Valley Tribe of California
October 20, 1993

OVERVIEW OF THE IHS TRIBAL SELF-GOVERNANCE PROGRAM



Negotiation Documents

There are two documents produced through TSGP negotiations: a Compact and a Funding Agreement (FA). Both documents are required to participate in the TSGP. They are mutually negotiated agreements which become legally binding and mutually enforceable after both parties sign the documents. Either document can be renegotiated at the request of the Tribe.

Compact

The Compact sets forth the general terms of the nation-to-nation relationship between the Tribe or Tribal Organization and the Secretary of the US Department of

Health and Human Services (HHS), (consistent with the Federal government's legal obligations to Indian Tribes) and includes other terms that the parties intend to control from year to year (see 42 C.F.R. § 137.30). The Compact must be executed before or at the same time as an FA.

Funding Agreement

The FA (1) describes the length of the agreement (whether it will be annual or multi-year), (2) identifies the PSFAs, or portions thereof, that the Tribe will assume, (3) specifies the amount of funding, and (4) includes terms required by Federal statute and other terms agreed to by the parties.

A Tribe may choose not to renegotiate its FA, even at the conclusion of its specified term. Funding Agreements remain in effect until a subsequent FA is executed, absent notification from the Tribe that it is withdrawing from the TSGP or retroceding the operation of one or more PSFAs to the IHS, 25 U.S.C. § 458aaa-4(e).

Normally, Tribes produce a draft Compact and FA, and both negotiating parties use the draft agreements as the basis for discussions. Unlike the ISDEAA Title I Model Contract, there is no model Self-Governance Compact (though the ISDEAA does require some mandatory terms); each Compact and FA is drafted to meet the needs of the individual Tribal community.

Because every Tribe is different, provisions from one Compact or FA may not work in another.

However, copies of another Tribe's existing agreements may be useful for reference. Current Self-Governance Tribes are often willing to share their documents with other Tribes. Tribes are encouraged to first make their request directly to another Tribe. The OTSG and the ALNs can help to make appropriate referrals to Tribes in the same IHS Area or in similar situations (of a similar size, for example). Tribes may also receive copies of existing Compacts from the OTSG or their ALN through a Freedom of Information Act (FOIA) request.

Roles and Responsibilities

TSGP negotiations bring Tribal and Federal teams to the table under a nation-to-nation relationship. One of the hallmarks of the TSGP is the collaborative nature of the negotiation process. The following section briefly outlines the roles and responsibilities of the various entities involved throughout the process.

Tribal Governments (Leaders). A Tribal government selects its representatives for negotiations. The Tribal team may include a Tribal leader from the governing body, a Tribal Health Director, technical and program staff, legal counsel, and other consultants. Regardless of the composition of the Tribal team, Tribal representatives must have decision making authority to successfully negotiate and agree to the agreements' provisions. Upon agreement by both parties to the provisions in the two documents required for participation in the TSGP (Compact and FA), the negotiating Tribe becomes a "Self-Governance Tribe" and a participant in the TSGP.

Agency Lead Negotiators (ALNs). The IHS Director has delegated authority to the ALNs to represent the IHS Director during negotiations. Only the ALN has the delegated authority to negotiate on behalf of the IHS Director. The ALNs also provide Tribes with self-governance information, assist Tribes in self-governance planning, coordinate meetings between the Tribe and the IHS during the negotiation process, and coordinate the Agency's response to Tribal questions. Since the IHS OTSG is charged with the implementation of the Tribal Self-Governance legislation and authorities within the IHS, the OTSG oversees the ALNs.

The ALN role requires detailed knowledge of IHS, awareness of current policy and practice, and understanding of the rights and authorities available to a Tribe under Title V of the ISDEAA. In most instances, ALNs perform negotiation duties in addition to other full-time jobs. As necessary, ALNs receive assistance from other Area or Headquarters (HQ) staff prior to and during negotiations, including staff from the OTSG, IHS Office of Finance and Accounting (OFA) and the Office of the General Counsel (OGC).

Such assistance may include:

- Reviewing documents.
- Identifying Agency concerns.
- Providing advice on issues.
- Calculating HQ Tribal shares.
- Advising the ALN on IHS retained services.
- Drafting language for Compacts and FAs.

IHS staff must be available to assist ALNs as necessary to increase the speed and accuracy with which ISDEAA agreements are negotiated.

Office of Tribal Self-Governance. The OTSG develops, directs and implements TSGP policies and procedures authorized under Title V of the ISDEAA and serves as an advocate for Self-Governance Tribes within the IHS. Specifically, OTSG staff includes an Office Director; a Deputy Director; Financial Analysts who process payments to Self-Governance Tribes, carry out OTSG budget activities, and review audits to determine eligibility; Program Analysts who assist the ALNs in the negotiating and processing of Self-Governance Compacts and FAs; Policy Analysts who develop, review, and comment on policies, procedures, and proposed rulemaking that may affect the TSGP and Self-Governance Tribes; and administrative staff. All staff members provide advice and recommendations to the OTSG Director and OTSG Deputy Director.

Office of Finance and Accounting (OFA). The OFA is responsible for the timely preparation of the annual HQ financial tables needed for negotiations. Additionally, the OFA provides advice to the ALNs, as requested, on issues that may arise during the negotiations. Note: Area Tribal shares tables are produced by the Area finance office or the ALN.

Office of the General Counsel (OGC). The OGC is located within the Office of the Secretary, HHS. The OGC's role during Self-Governance negotiations is to provide legal counsel to the IHS.

Tribal Self-Governance Advisory Committee (TSGAC).

The TSGAC plays no direct role in individual TSGP negotiations. The committee advocates for Self-Governance Tribes, suggests policy guidance on the implementation of the TSGP, and advises the IHS Director on issues of concern to all Self-Governance Tribes. The TSGAC consists of tribally elected officials representing a cross section of Self-Governance Tribes. One delegate and one alternate are nominated by each Area Director to represent the views and issues of the Area's Self-Governance Tribes. The IHS Director selects the representatives and formally appoints them to the TSGAC. The TSGAC members confer, discuss, and reach consensus on specific self-governance issues and provide verbal and written advice about self-governance issues to the IHS Director and the OTSG Director. As a result of active participation by TSGAC members, the committee advances self-governance objectives within the IHS by providing advice and input before final decisions on policy issues are made.

The Planning Stage

Title V of the ISDEAA requires that a Tribe or Tribal Organization must meet three eligibility criteria to participate in the TSGP, including completion of a planning phase. Specifically, the Tribe or Tribal Organization must:

1. Complete a Planning Phase. Each Tribe is required to complete a planning phase to the satisfaction of the Tribe.
2. Request Participation in the IHS Tribal Self-Governance Program. Each Tribe to be served must submit a Tribal resolution or other official action by the governing body of the Tribe requesting participation in the TSGP.
3. Demonstrate Three Years of Financial Stability and Financial Management Capability. For the three years prior to participation in the TSGP, the Tribe must show evidence that there have been no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's Self-Determination Contracts or Self-Governance Funding Agreements with any Federal agency.

A Tribe may also choose to authorize another Tribe, an inter-Tribal consortium, or a Tribal Organization to participate in the TSGP on its behalf (see 25 U.S.C. §458aaa(b)). For additional information on eligibility for the TSGP, please see Section 503 of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §458aaa-2, and the accompanying regulations found at 42 C.F.R. §§137.15-26.

The planning phase must include legal and budgetary research and internal Tribal government planning and organizational preparation relating to the administration of health care programs, see 25 U.S.C. § 458aaa-2(c) (1)(A). In general, the planning phase helps Tribes to make informed decisions about which PSFAs, or portions thereof, to assume and what organizational changes will be necessary to support the assumption of those PSFAs.

During this phase, the IHS is responsible for:

- Providing descriptions of PSFAs and associated funding at all levels, including funding formulas or methodologies related to determining Tribal shares.
- Meeting with the Tribe to provide program information and discuss the methods currently used to manage and deliver health care.
- Sharing information related to the use of Intergovernmental Personnel Act assignments (IPAs) and Memorandums of Agreement (MOA) to retain civil service and Commissioned Corp personnel.
- Identifying the statutes, regulations, and policies that provide authority for administering IHS programs.
- Providing technical assistance on the IHS budget, Tribal shares, and other topics as needed.

A thorough planning phase makes the rest of the negotiations process more timely and efficient. It helps to identify issues in advance and ensures that the Tribe is fully prepared for the transfer of IHS PSFAs to the Tribal health program. The ultimate goal of the planning stage is to ensure that the Tribe is aware of the responsibility involved in assuming IHS PSFAs.

Planning activities also result in some costs to the Tribe. To help defray these costs, the IHS OTSG offers a Planning Cooperative Agreement for Tribes new to the TSGP and those considering assuming new or expanded PSFAs. Announcements are made through a Federal Register Notice, the Grants.gov website (www.grants.gov) and the OTSG website (www.ihs.gov/selfgovernance). The announcement contains information on the number of agreements available, how to apply, deadlines, requirements and scoring criteria.

Tribes are not required to receive a Planning Cooperative Agreement to participate in the TSGP. A Tribe or Tribal Organization may use its own resources to meet the planning requirement. It is also important to note that engaging in self-governance planning in no way obligates a Tribe to enter into the TSGP, even if the Tribe has received a Planning Cooperative Agreement. As a result of the planning phase, a Tribe may elect to delay participation or not participate at all.

IHS Programs, Services, Functions, and Activities Information

Title V agreements may include any IHS Programs, Services, Functions and Activities (PSFAs), or portions thereof, that are available for Tribal assumption. For HQ PSFAs, this information is contained in the *Indian Health Services Headquarters Programs, Services, Functions, and Activities Manual* (PSFA Manual). The PSFA Manual was originally published in May 1997 and last revised in June 2002. It identifies all the HQ PSFAs by budget line item. It also identifies which PSFAs are available for Tribal assumption; and, if not available, why such funds are restricted.

The PSFA Manual provides valuable guidance as Tribes make their individual decisions on which HQ PSFAs to leave with the IHS (known as retained services) and which to assume, in light of the available funding. Because many programs have changed since the PSFA Manual was last updated, Tribes may want to confer with the relevant program offices regarding the full range of PSFAs currently performed. The ALN can either facilitate a meeting or teleconference with IHS program staff or coordinate written responses to Tribal questions.

Working with program staff can be important to clarify which PSFAs correspond with particular line items so that the Tribe does not inadvertently assume PSFAs it intended to leave with the Agency.

At the Area level, Area Shares Tables provide a breakdown of Area office PSFAs. These tables are used as allocation tables for the distribution of Area shares. At this time, there is not a single format used by each Area Office, depicting the Area shares allocations. Some IHS Areas have developed Area PSFA manuals, which may contain documentation of available PSFAs, identification of inherent Federal functions, or justification of any residual. If available, Area PSFA Manuals may be obtained by contacting the appropriate ALN.

Important Terms

Tribal Shares

When a Tribe assumes a PSFA, or portion thereof, the funding associated with that PSFA is called the "Tribal share." As defined in Title V, "The term 'Tribal share' means an Indian Tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions," 25 U.S.C. § 458aaa(a)(8).

The HQ PSFA Manual includes the funding formulas used for distribution of HQ Tribal shares. Generally, these formulas fall into two categories: (1) program formula funds based on workload or (2) the Tribal Size Adjustment (TSA) Formula. For those HQ programs that are distributed using a program formula (mostly Environmental Health and Engineering), the factors and criteria used for those various formulas are noted throughout the HQ PSFA Manual. In general terms, the TSA Formula attributes shares to local programs in proportion to user counts plus a modest sliding scale increment to small Tribes of less than 2,500 users. The IHS adopted the TSA formula in 1996, following Tribal consultation. Shares are proportionately adjusted to include annual budget increases or any budget decreases specified by Congress.

Residual Amounts

The residual is the funding associated with inherent Federal functions. Inherent Federal functions are those functions which cannot legally be delegated to Tribes. Though the terms are often used interchangeably, the residual refers to the funding associated with inherent Federal functions, not the functions themselves.

In 1995, the IHS rendered a decision regarding the identification of IHS HQ residual functions and the associated funding amounts. Since that time, the HQ residual amount and associated HQ-managed programs have been identified in the HQ budget breakdown table. These amounts have been adjusted annually to incorporate pay costs for Federal employees.

Each Area has its own process for identifying the Area residual. The identification of Area-level inherent Federal functions may be the subject of discussion between the Tribe and the Area as part of the negotiation process.

Note: Other funds may be unavailable for Tribal shares due to prior commitments or legislative restrictions, for example, where the law does not provide for Tribal award, the continuation of congressional earmark, contract obligations, or court orders.

Stable Base Budgets

Section 505(g) of Title V of the ISDEAA provides Tribes with the option for stable base funding:

At the option of an Indian Tribe, a Funding Agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under Section 106(a)) to be transferred to such Indian Tribe, for such period as may be specified in the Funding Agreement, subject to annual adjustment only to reflect changes in congressional appropriations by sub-sub-activity excluding earmarks. 25 U.S.C. § 458aaa-4(g)

At the option of the Self-Governance Tribe, the stable base budget amount may include: (a) recurring funds available under section 106(a) of the ISDEAA (contract support costs), (b) recurring Tribal shares, and (c) any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe. Stable base funding amounts are subject to adjustment: (a) annually only to reflect changes in congressional appropriations by sub-sub-activity, excluding earmarks; (b) by mutual agreement of the Self-Governance Tribe and the Secretary; or (c) as a result of full or partial retrocession or reassignment, 42 C.F.R. § 137.123.

The Tribe may specify in its FA that the effective period of the stable base budget will be either longer or shorter than the term of the FA, 42 C.F.R. § 137.124. The regulations also provide additional guidance regarding stable base funding at 42 C.F.R. §§ 137.120-124.

Inclusion of Statutorily Mandated Grants

In addition to Tribal shares, Title V provides that a statutorily mandated grant may be added to the FA after the grant has been awarded, 25 U.S.C. § 458aaa-4(b) (2). Grant funds added to an FA will be provided as an annual lump sum advance payment. However, funds from a statutorily mandated grant may not be reallocated and the program may not be redesigned, unless it is permitted under the authorizing statute or the terms and conditions of the grant award. Statutorily mandated grants may also impose additional reporting requirements, as described in the terms and conditions of the grant award. Tribes and their employees carrying out statutorily mandated grant programs added to an FA are covered by the Federal Tort Claims Act, 42 C.F.R. § 137.72. The Title V regulations governing statutorily mandated grants can be found at 42 C.F.R. §§ 137.60-73.

Pre-Negotiations

During pre-negotiations, the Tribal and Federal negotiation teams review and discuss the issues identified during the planning phase. A draft Compact, FA, and funding table are produced, typically by the Tribe, and distributed to the ALN, OTSG Program Analyst, and Regional Attorney. These draft documents are used as the basis for the pre- and final negotiations. After receiving the proposed documents, the parties thoroughly review the draft documents and may provide comments, recommendations, or edits to the ALN for discussion. Pre-negotiations provide an opportunity for the Tribe and the IHS to identify and discuss issues directly related to the Tribe's Compact, FA, and Tribal shares. Pre-negotiations may take the form of a formal meeting or a series of informal meetings or conference calls.

Tribal Shares and Financial Information

In advance of final negotiations, the Tribe should work with the IHS to secure the following information (at all IHS levels – HQ, Area, Service Unit, and Program base) in hard copy or electronic format:

- Program Title and Description
- Financial Tables and Information
 - Recurring Base Amount
 - Area Tribal Shares Table
 - Area Table 4F (Environmental Health and Engineering shares)
 - Payroll projections of Federal staff retained through IPAs or MOAs.
 - HQ Table 1: Congressional Changes to IHS Appropriations
 - HQ Table 2: Breakdown of Appropriation for Allowances to Areas and Through HQ (for the year being negotiated)
 - HQ Table 3: Breakdown of HQ Allowances, Detailed HQ Accounts, and Categories for Tribal Shares (This includes the “crosswalk” tables, wherein the previous year’s budget is “cross walked” to the upcoming or new year’s budget, showing details of changes where applicable.)
 - HQ Table 4: The individual Tribal allocation tables by budget activity and detailed HQ accounts.

- Identification and Justification of Residual
- Basis for Determining Tribal Share (Distribution Formula)

The Tribe may want to schedule a pre-negotiation meeting with HQ or Area leadership to discuss the materials, as well as any questions or concerns from the Tribal negotiating team and governing authority. The Tribe may also wish to discuss financial materials that show its estimated funding for the next year, increases that it may receive in the current year and the basis for those increases, or any questions regarding funding amounts that may be lower than the previous year. Other possible issues for discussion include current- or successor-year IHS retained services or buy-backs, the status of requests from the Tribe or IHS, or new policy directives or negotiation issues from the IHS.

Negotiation Cooperative Agreements

The development and negotiation of a Compact and FA result in some costs to the Tribe. To help defray these costs, the IHS OTSG offers a Negotiation Cooperative Agreement for Tribes new to the TSGP and those considering assuming new or expanded PSFAs. Announcements are made through a Federal Register Notice, the Grants.gov website (www.grants.gov) and the OTSG website (www.ihs.gov/selfgovernance). The announcement contains information on the number of agreements available, how to apply, deadlines, requirements, and scoring criteria.

Tribes are not required to receive a Negotiation Cooperative Agreement to participate in the TSGP. A Tribe may use its own resources to develop and negotiate its Compact and FA. Tribes that receive Negotiation Cooperative Agreements are not obligated to participate in the TSGP or to assume the new or expanded PSFAs proposed in the Cooperative Agreement application.

Negotiations

At final negotiations, Tribal and Federal negotiation teams come together to determine and agree upon the terms and provisions of the Tribe's Compact and FA. (At the election of the Tribe, subsequent negotiations may amend only the FA.) Generally, Tribes new to the TSGP prefer face-to-face negotiations, but other alternatives are available (conference calls).

The Tribal team may include a Tribal leader from the governing body (or a designee), the Tribal Health Director and technical and program staff, legal counsel, and other consultants. The Federal team is led by the ALN. The ALN is the only member of the Federal team with the authority to negotiate on behalf of the IHS Director. The Federal negotiation team generally includes an OTSG Program Analyst and member of the Office of the General Counsel but may also include other IHS staff and subject matter experts as needed. The ALN may request other IHS staff be available, as necessary, to assist the ALN so that final negotiations may be concluded at the table, particularly the OTSG Financial Analyst and staff from the Office of Finance and Accounting (OFA) or the Office of Environmental Health and Engineering (OEHE). All financial tables and information shared during the pre-negotiation stage should be brought to final negotiation for reference.

These negotiations provide the opportunity for both sides to work together in good faith to enhance each Self-Governance agreement. Negotiations are not an allocation process; they provide an opportunity to mutually review and discuss budget and program issues. As issues arise, the Tribal and Federal negotiation teams work through the issues to reach agreement on the final documents. At any time, the Tribal or Federal negotiation team may call a caucus to discuss issues internally.

While Title V of the ISDEAA and the subsequent regulations provide the framework and legal authorities for the IHS TSGP, other policy issues and internal IHS directives and guidance can be the basis for discussion and negotiation between Tribes and the IHS. There are several options available in cases where the Tribes and IHS cannot reach resolution (discussed below under Disputes and Appeals). This Handbook does not encourage a particular process or option that an individual Tribal government may wish to pursue in order to address issues that may arise during the negotiations. It is the right and prerogative of each Tribal government to make the determination on how best to proceed based on the specific circumstances. At its option, a Tribe may want to consult with other Tribal leaders and/or representatives of the TSGAC. In their role as advisors to the IHS Director, the TSGAC may want to further discuss a specific policy issue with the Director that impacts other Self-Governance Tribes.

A Note Regarding Construction Projects

Title V Construction Projects Agreements are separate from the Compact and FA and are subject to an independent proposal and review process by the HQ Office of Environmental Health and Engineering. Tribes participating in the TSGP may carry out construction projects under Title V if the Tribe agrees to assume all Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), the National Historic Preservation Act (16 U.S.C. § 470 et seq.), and related provisions of law that would apply if the Secretary were to undertake a construction project. Subpart N of the Title V regulations, 42 C.F.R. §§ 137.270–410, provides detailed information regarding the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs consistent with the ISDEAA.

The regulations distinguish between construction projects and ongoing programs that support construction projects. The regulations set forth the process for Self-Governance Tribes to enter into and administer Title V Construction Project Agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the Compact and FA process as described above.

Post-Negotiations

Document Processing and Payment

After negotiations are complete, the Compact and FA are signed by the authorizing Tribal official and submitted to the ALN. (The Tribe may also elect to sign the documents after they have been signed by the IHS Director. In that case, they will be returned to the Tribe for signature after they have been signed by the Director.) The ALN reviews the final package to ensure each document accurately reflects what was agreed to during negotiations. Once the ALN completes this review, the ALN packages the Compact, FA, and all attachments and supporting documents and forwards the package to the OTSG Director.

Upon receipt of the final package sent by the ALN, the OTSG reviews the submitted Compact, FA, and any attachments to prepare them for the Director's signature, and the OFA validates the amounts and certifies the availability of HQ Tribal Shares. The complete package is forwarded to the IHS Director (or a designee) for review and signature, provided that no outstanding issues delay or prevent signature. Once the Compact and FA have been signed by both parties, they become legally binding and enforceable agreements.

A signed Compact and FA are necessary for the payment process to begin, but signed documents are not all that is necessary. In order for payments to be authorized, (1) Congress must pass an appropriations act or continuing resolution, (2) the Office of Management and Budget (OMB) must apportion the funding among Federal agencies, and (3) the IHS Headquarters OFA must subdivide the funding. Then the OTSG authorizes the payment documents in accordance with the most recent FA. The payment documents are signed by the OTSG Financial Analyst, OFA, and the OTSG Director, and the payment documents are sent to the Area Finance Office and ALN, posted to the OTSG database, and sent to the Tribe. The Area Finance Office obligates the funds and transmits the payment to the US Department of the Treasury. The US Department of the Treasury then sends the funds to the Tribe's financial institution.

Tribal Operation of IHS Programs, Services, Functions, and Activities

Program Redesign

In the TSGP, a Tribe may redesign or consolidate Programs, Service, Functions, and Activities (PSFAs) and reallocate or redirect funding without IHS approval (in accordance with the ISDEAA). The redesign or consolidation must not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law, 25 U.S.C. § 458aaa-5(e) and 42 C.F.R. § 137.185.

Performance Monitoring

In the TSGP there is no routine performance monitoring.

Health Status Reports

The ISDEAA requires that Compacts or FAs include a provision that requires the Tribe to report on health status and services delivery, 25 U.S.C. § 458aaa-6(1). These reports may only impose minimal burdens on the Tribe and will be derived from existing data elements currently collected by the Tribe, including patient demographic and workload data. Not less than 60 days prior to the start of negotiations or another mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements, 42 C.F.R. §§137.200-207.

While not mandated by law, Tribes are encouraged to participate in national IHS data reporting activities such as the Government Performance Results Act, epidemiologic reporting, and surveillance reporting in order to advance Indian health advocacy efforts.

Records

Unless specified otherwise in the Compact or FA, the records of the Tribe are not considered Federal records for purposes of the Administrative Procedure Act, 5 U.S.C. § 500. Under the ISDEAA, the Tribe is required to maintain a record-keeping system and, with 30 days advance notice, to provide access to records necessary for the Department to meet its legal recordkeeping requirements under Title 44 of the U.S. Code, sections 3101-3106, 25 U.S.C. § 458aaa-5.

How PSFAs May be Returned to the IHS

There are three ways that PSFAs may be returned to the IHS:

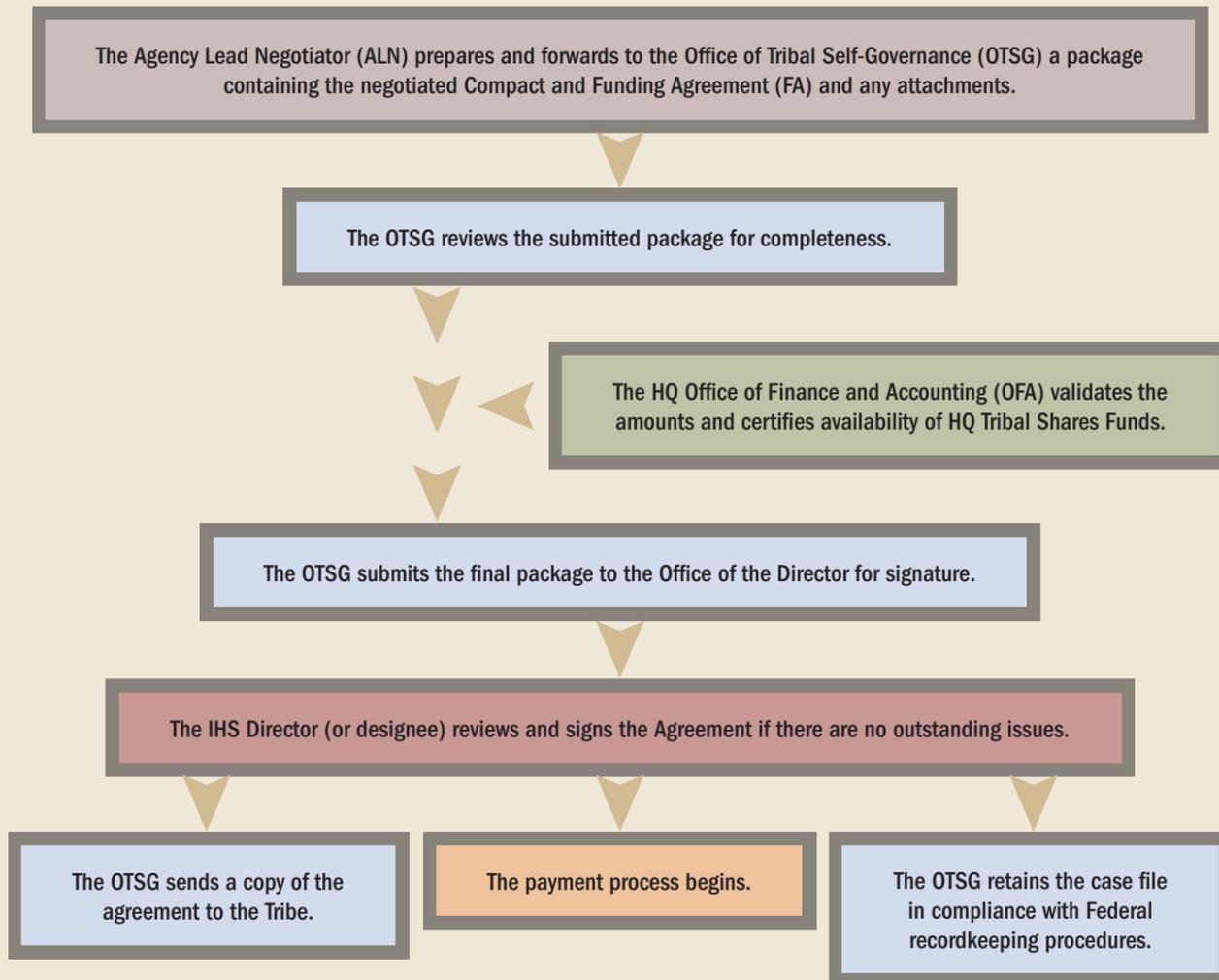
- (1) Renegotiation: A Tribe's Compact and FA may be renegotiated at the request of the Tribe. When the documents are renegotiated, the Tribe may choose to return PSFAs to the IHS that it had previously assumed.
- (2) Retrocession: A Tribe may partially or fully return PSFAs included in its Compact or FA to the IHS 25 U.S.C. § 458aaa-5(f). The retrocession will become effective:
 - Within the timeframe specified in the Compact or FA.
 - Or the earlier of –
 - One year after the request to retrocede was submitted.
 - The date on which the FA expires.
 - A date mutually agreed upon by the IHS and the Tribe.
- (3) Reassumption: Compacts and FAs must include a provision authorizing the Secretary to reassume operation of a PSFA (and the associated funding) in certain circumstances 25 U.S.C. § 458aaa-6(a)(2). In order to reassume a PSFA, there must be a specific finding related to that PSFA of:
 - Imminent endangerment of the public health caused by an act or omission of the Tribe and arising out of a failure to carry out the Compact or FA (or)
 - Gross mismanagement with respect to funds transferred to a Tribe by a Compact or FA, as determined by the Secretary in consultation with the Inspector General.

The Secretary may not reassume a PSFA unless the Secretary has (1) provided the Tribe with written notice and a hearing on the record and (2) the Tribe has not taken corrective action to remedy the imminent danger to public health or gross mismanagement.

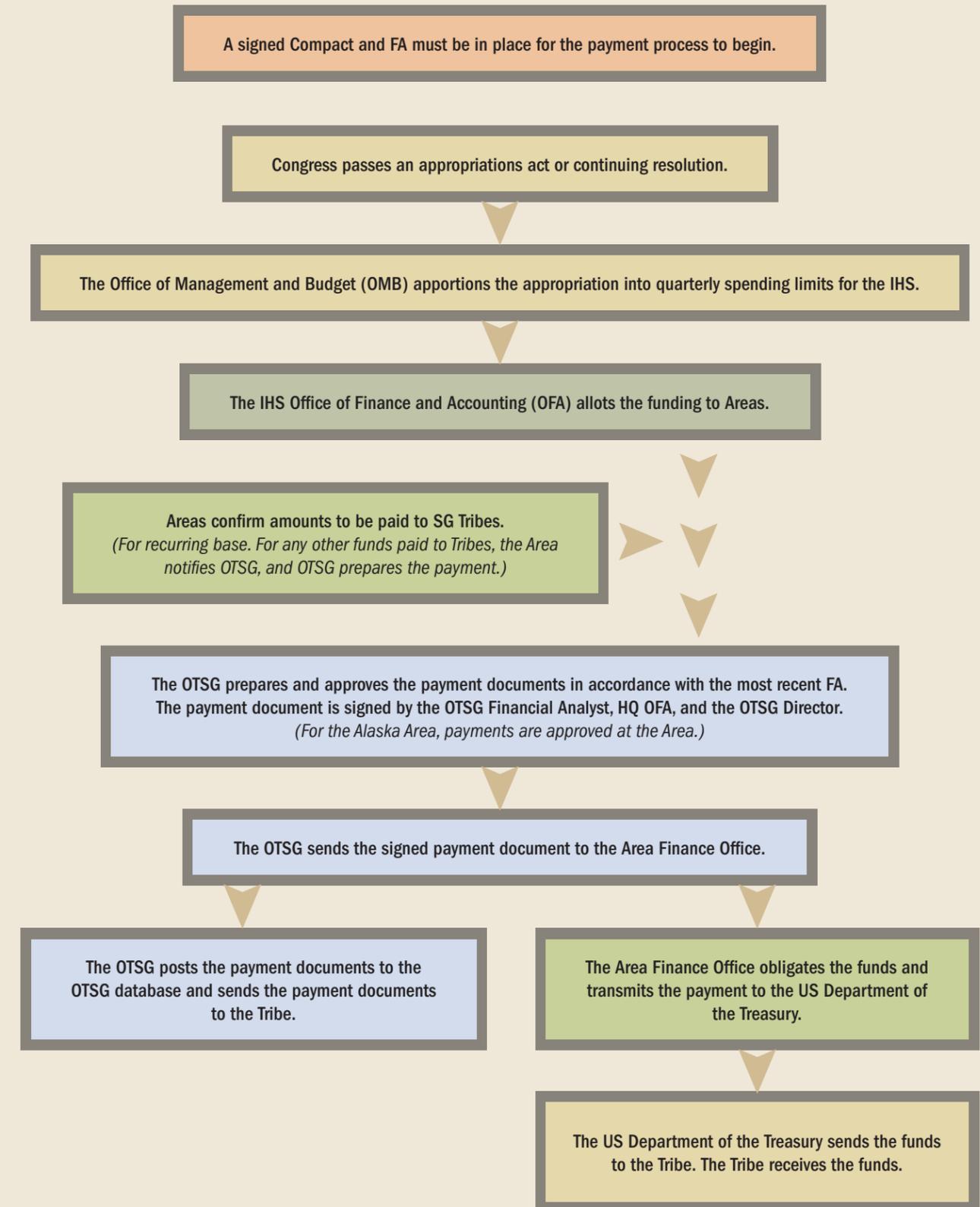
In rare circumstances, the Secretary may, upon written notification to the Tribe, immediately reassume operation of a PSFA if (1) the Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Tribe, or (2) the endangerment arises out of the Tribe's failure to carry out the Compact or FA 25 U.S.C. § 458aaa-6(a)(2)(C). In that situation, the Secretary must provide the Tribe with a hearing on the record within 10 days of reassumption.

OVERVIEW OF THE IHS TRIBAL SELF-GOVERNANCE POST-NEGOTIATIONS PROCESS

DOCUMENT PROCESSING



PAYMENTS



Note: This chart is intended to provide a general overview of the process and does not address every situation.
FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE OFFICE OF TRIBAL SELF-GOVERNANCE AT (301) 443-7821

Disputes and Appeals

Final Offer

There may be circumstances in which the Tribe and Agency do not reach mutual resolution on issues during the negotiation process. In those situations, the ISDEAA and its regulations provide a “Final Offer” process for resolving, within a specified timeframe, disputes that may develop in negotiation of Compacts and FAs [see 25 U.S.C. § 458aaa-6(b) and 42 C.F.R. §§ 137.130–55].

The written Final Offer should be submitted either to the ALN during negotiations or to the IHS Director. The Final Offer must contain a description of the disagreement between the HHS Secretary and the Tribe and the Tribe’s final proposal to resolve the disagreement. This document should be clearly identified as a “Final Offer.”

The unresolved issues should be clearly identified and separated from the full Compact, FA, or amendment. The uncontested portion of the Compact, FA, or amendment can then continue through final processing. This diverts unresolved issues into the Final Offer process, allowing the remaining provisions to go into effect. Tribes should be advised that when the entire Compact or FA is submitted as a Final Offer, it opens the entire document(s) to renegotiation, including those portions not disputed during the negotiation process.

A 45-day review period begins from the date that the IHS receives the Final Offer. If the Agency takes no action within the 45-day review period (unless a longer time period is negotiated), the Final Offer is accepted automatically by operation of law. The Secretary may only reject a Tribe’s Final Offer for one of the following reasons (25 U.S.C. § 458aaa-2):

- The amount of funds proposed in the Final Offer exceeds the applicable funding level to which the Tribe is entitled under the ISDEAA.
- The PSFA that is the subject of the Final Offer is an inherent Federal function that cannot legally be delegated to a Tribe.
- The Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health.
- The Tribe is not eligible to participate in Tribal Self-Governance under section 503 of the ISDEAA.

To reject a Final Offer, the Secretary must provide written notice to the Tribe based on the criteria referenced above not more than 45 days after receipt of a Final Offer (unless a longer time period is negotiated). If the Secretary rejects a Final Offer, then the Secretary must offer and, if requested by the Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

Appeals

The Tribe is entitled to appeal certain pre-award decisions of the HHS Secretary with (1) an agency hearing on the record and (2) the right to engage in full discovery relevant to any issue raised in the matter. Appealing a decision by the HHS Secretary does not place a hold on the remaining Compact, FA, or amendment. Any provision included in the Compact or FA that is not in dispute goes into effect. The Title V regulations describe the process by which a Tribe may appeal certain pre-award decisions made by the HHS Secretary (see 42 C.F.R. §§ 137.415–50). The decisions that a Tribe may appeal using this process are as follows:

- A decision to reject a Final Offer, or a portion thereof, under Section 507(b) of the ISDEAA.
- A decision to reject a proposed amendment to a Compact or FA, or a portion thereof, under Section 507(b) of the ISDEAA.
- A decision to rescind and reassume a Compact or FA, in whole or in part, under Section 507(a)(2) of the ISDEAA, except for immediate reassumption under Section 507(a)(2)(C).
- A decision to reject a final construction project proposal, or a portion thereof, under Section 509(b) of the ISDEAA.
- For construction project agreements carried out under section 509 of the ISDEAA, a decision to reject project planning documents, design documents or proposed amendments submitted by the Tribe under Section 509(f) of the ISDEAA, 42 C.F.R. § 137.415.

Within 30 days of one of the above decisions, the Tribe may either file a formal appeal or request an informal conference under 42 C.F.R. § 137.421. The informal conference can be a way to resolve issues quickly, without the need for a hearing. Formal administrative appeals are filed with the Interior Board of Indian Appeals (IBIA) (see 42 C.F.R. § 137.425). The IBIA has the authority to conduct a hearing on the record, to permit the parties to engage in full discovery, to issue a recommended decision and to take such action as necessary to insure the rights specified in 42 C.F.R. § 137.420. Alternatively, at its option, the Tribe has the right to challenge the Secretary’s decision in Federal district court pursuant to section 110 of the ISDEAA (see 25 U.S.C. § 450m-1).

The procedures outlined above do not apply to any other dispute, including, but not limited to the following:

- Disputes arising under the terms of a Compact, Funding Agreement or Construction Project Agreement that has been awarded.
- Disputes arising from immediate reassumption under section 507(a)(2)(C) of the ISDEAA [25 U.S.C. 458aaa-6(a)(2)(C) and 42 C.F.R. §§ 137.261–2], which are covered under a separate process found in sections 137.440–445 or the regulations (42 C.F.R. §§ 137.440–5).
- Other post-award contract disputes, which are covered under the regulations at 25 C.F.R. § 900 et seq. (see also, 42 C.F.R. § 137.412).
- Denials under the Freedom of Information Act, 5 U.S.C. § 552, which may be appealed under 45 C.F.R. § 5 et seq.
- Decisions relating to the award of grants under section 503(e) of the ISDEAA, 25 U.S.C. § 458aaa-2(e), which may be appealed under 45 C.F.R. § 5.

Informal Conference

In addition to an appeal, the Tribe also has the option of requesting an informal conference. An informal conference is a way to resolve issues as quickly as possible without the need for a formal hearing. To request an informal conference, the Tribe must file its request with the person whose decision it is appealing within 30 days of the decision. The informal conference must be held within 30 days of the date the request was received, unless the parties agree on another date.

If possible, the informal conference will be held at the Tribe’s office. If it is not possible to hold the informal conference at the Tribe’s office and it is held more than 50 miles from the Tribe’s office, the Secretary must arrange to pay transportation costs and per diem to allow for adequate representation for the Tribe.

The informal conference is conducted by a designated representative of the HHS Secretary. Only people who are designated representatives of the Tribe or authorized by the HHS Secretary, are allowed to make presentations at the informal conference.

Within 10 days of the informal conference, the person who conducted the conference must prepare and provide to the Tribe a written report summarizing the conference and recommending a decision. If the Tribe is dissatisfied with the recommended decision, it may appeal to the IBIA within 30 days of receiving the report. The Tribe may request an extension of time to file its Notice of Appeal if the Tribe needs more time. If the Tribe does not file a Notice of Appeal within 30 days (or before the expiration of its extension), the recommended decision becomes final.

For additional information on informal conferences please see the regulations at 25 C.F.R. §§900.153–159.



FURTHER INFORMATION

The Office of Tribal Self-Governance Contacts

The Tribal Self-Governance Negotiations Handbook is intended to serve as a starting point for Tribes interested in the TSGP. We encourage you to contact the OTSG for further information. As noted, Tribes will also need to contact their respective IHS Area Office to obtain further local information.

Any other questions or general requests regarding this Handbook should be directed to:

Director, Office of Tribal Self-Governance
Indian Health Service
801 Thompson Ave., Suite 240
Rockville, MD 20852

Phone: (301) 443-7821

Fax: (301) 443-1050

Website: www.ihs.gov/selfgovernance

*"No right is more sacred to a nation,
to a people, than the right to freely
determine its social, economic,
political, and cultural future without
external interferences. The fullest
expression of this right occurs
when a nation freely governs itself."*

— Joseph B. DeLaCruz
Quinault Indian Nation

Acronyms Found in the IHS TSGP Negotiations Handbook

| | |
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| ACA | Patient Protection and Affordable Care Act |
| ALN | Agency Lead Negotiator |
| BIA | Bureau of Indian Affairs |
| C.F.R. | Code of Federal Regulations |
| DOI | US Department of the Interior |
| FA | Funding Agreement |
| FOIA | Freedom of Information Act |
| HHS | US Department of Health and Human Services |
| HQ | Headquarters |
| IBIA | Interior Board of Indian Appeals |
| IHCIA | Indian Health Care Improvement Act |
| IHS | Indian Health Service |
| IPA | Intergovernmental Personnel Act agreement |
| ISDEAA | Indian Self-Determination and Education Assistance Act |
| MOA | Memorandum of Agreement |
| OFA | IHS HQ Office of Finance and Accounting |
| OGC | Office of the General Counsel |
| OMB | Office of Management and Budget |
| OTSG | Office of Tribal Self-Governance |
| PSFA | Programs, Services, Functions, and Activities |
| TSA | Tribal Size Adjustment |
| TSGAC | Tribal Self-Governance Advisory Committee |
| TSGP | Indian Health Service Tribal Self-Governance Program |
| U.S.C. | United States Code |



Successful Connections – Lasting Partnerships

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