

INDIAN PROGRAMS: INTERIOR SHOULD ADDRESS FACTORS HINDERING TRIBAL ADMINISTRATION OF FEDERAL PROGRAMS*

United States Government Accountability Office

ABBREVIATIONS

BIA	Bureau of Indian Affairs
EPA	Environmental Protection Agency
GAP	Indian Environmental General Assistance Program
HEARTH ACT	Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012
Interior	The Department of Interior
ISDEAA	Indian Self-Determination and Education Assistance Act
OSG	Interior's Office of Self Governance
SAA	Single Audit Act
TERA	Tribal Energy Resource Agreement
TPA	Tribal Priority Allocation

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WHY GAO DID THIS STUDY

For more than 4 decades, federal Indian policy has promoted tribal self government—the practical exercise of Indian tribes and nations’ inherent sovereign authority. Under ISDEAA, federally recognized tribes may request to enter into self-determination contracts and self-governance compacts with Interior, transferring the administration of federal programs to the tribe. Under the HEARTH Act, tribes may issue certain leases on their lands without Interior approval if such leases are executed under approved tribal regulations.

GAO was asked to evaluate issues related to tribal self-government. This chapter examines factors affecting tribes’ use of self-determination contracts, self-governance compacts, and tribal leasing authority under the HEARTH Act. GAO reviewed key legislation and regulations, relevant literature, federal and tribal documents; analyzed agency data; and interviewed federal officials at 12 BIA regional offices, 29 tribes that used at least one of these mechanisms, and 7 tribal organizations.

WHAT GAO RECOMMENDS

GAO is making four recommendations, including that Interior develop processes to share how it makes funding and inherently federal function determinations with tribes, to track and monitor the disbursement of funds within agreed upon time frames, and for the review of proposed tribal leasing regulations including review time frames. Interior concurred with GAO’s recommendations.

WHAT GAO FOUND

GAO found that various factors can affect tribes’ use of self-determination contracts and self-governance compacts under the Indian

Self-Determination and Education Assistance Act of 1975 (ISDEAA), as amended, and tribal leasing under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act). A key factor that helps tribes use these self-governance mechanisms is tribal government capacity to administer a federal program or manage these resources. Federal efforts that have helped build this capacity have included training, such as that offered by the Bureau of Indian Affairs (BIA) in 2014 and 2015 to educate tribes on the benefits of developing tribal leasing regulations under the HEARTH Act. In contrast, GAO found that other factors can hinder tribes' use of these mechanisms including:

Inadequate Information Sharing

The Department of the Interior's (Interior) policy and guidance states that tribes should be provided necessary information to design programs they would like to self-administer, such as the amount of funding available to the tribes for the programs and the amount retained by Interior for inherently federal functions. However, according to several tribal stakeholders and some BIA regional officials GAO spoke to, some of this information is not made available to the tribes prior to self-determination contract negotiations, such as information on funding calculations and determinations of inherently federal functions. Without this information, according to a tribal stakeholder, tribes may be at a disadvantage when negotiating with BIA and designing programs for self-determination contracts.

Delays in Disbursing Funds

According to tribal stakeholders, Interior's process does not ensure that funds associated with their self-determination contracts and self-governance compacts are disbursed in a timely manner. These funding delays can therefore be a factor that hinders their use of self-government

mechanisms. Some tribal stakeholders said that disbursement delays have ranged from weeks to months. GAO was unable to determine the extent to which Interior disburses funds in accordance with ISDEAA or within agreed-upon time frames with the tribes, because Interior does not systematically track and monitor the disbursement of these funds.

Lengthy Review of Proposed Tribal Leasing Regulations

Interior does not have a clearly documented process for reviewing proposed tribal leasing regulations submitted under the HEARTH Act with identified time frames associated with each step of the process. As a result, tribal stakeholders told GAO that they are uncertain about how long the process will take and how it aligns with the 120 day requirement in the Act. According to tribal stakeholders and GAO's analysis of proposed regulations submitted from 2012 through 2017, Interior's review process has resulted in lengthy review times—in some cases, multiple years. Some tribal officials told GAO that Interior's lengthy review process had delayed the tribe's ability to make decisions about the use of their resources. By developing a clearly documented process that includes established time frames for each step in the review, Interior can help eliminate uncertainty and improve the transparency of the review process for the tribes.

January 3, 2019

The Honorable James Lankford
Chairman

Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs United States
Senate

Dear Mr. Chairman:

For more than 4 decades, federal Indian policy has promoted tribal self-government—the practical exercise of Indian tribes and nations'

inherent sovereign authority.¹ For example, the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), as amended, authorizes federally recognized tribes² to assume the administration of a variety of federal programs³—or portions thereof—that were previously managed by the Department of the Interior (Interior).⁴ Title I of ISDEAA allows tribes to enter into agreements with Interior, referred to as self-determination contracts, and transfers the administration of particular federal programs from Interior to the tribe. In 1988, Congress amended ISDEAA to authorize a tribal self-governance demonstration project, giving selected federally recognized tribes the option of entering into self-governance compacts.⁵ Following the demonstration project, in 1994, Congress amended ISDEAA again, establishing self-governance compacts as a permanent option for tribes.⁶ Title IV of ISDEAA, as amended, created

¹ Depending on the tribe's preference, Indian tribes may be referred to as tribal nations, bands, villages, pueblos, rancherias, and communities. In this report, we use these terms interchangeably depending upon a tribe's preference. For federal purposes, the term "Indian nation" is used in a wide array of federal statutes to refer to native political groups. *See, e.g.*, 25 U.S.C. § 71 (end of treaty making); 25 U.S.C. § 177 (Nonintercourse Act); 25 U.S.C. § 2501 (a) (Tribally Controlled School Grants Act).

² As of December 2018, the federal government recognized 573 Indian tribes as distinct, independent political communities that possess certain powers of self-government. Tribal members are individuals who are enrolled citizens or members of a tribe.

³ Indian tribes and nations have taken over the administration of a variety of programs and functions from the Department of the Interior covering activities, including but not limited to: programs to manage natural resources and economic development, operate utilities, repair and maintain roads and bridges, inspect oil and gas operations, survey lands, manage land records, conduct land appraisals, administer social services and child welfare programs, administer tribal courts, implement land and water claims settlements, administer education and scholarships programs, and provide law enforcement services.

⁴ The act also allows tribal governments to take over administration from the Indian Health Service of federal programs that are administered for the benefit of Indians because of their status as Indians. For this review, we focused on tribes' use of ISDEAA to take over the administration of specified federal programs and activities from Interior. In addition, ISDEAA authorizes tribal organizations and tribal consortia, as well as Indian tribes and nations, to take over administration of specified federal programs or activities if their participation is authorized by an Indian tribe. For the purpose of this report, we do not distinguish between a tribal government, tribal organization, or tribal consortia.

⁵ The act created a research and demonstration project in which the Secretary was to select 20 tribes, which would be allowed to negotiate a self-governance compact with Interior. Under the demonstration project, authorized federally recognized tribes that met established criteria could negotiate funding agreements with Interior for programs, services, functions or activities administered by the Bureau of Indian Affairs.

⁶ In addition to tribes already participating in self-governance compacting, under the 1994 amendment, the Secretary of the Interior may select, from among those tribal applicants that

self-governance compacts as an option for tribes to negotiate broad agreements with Interior that could cover multiple programs, allowing tribes to assume the administration of all programs, functions, services, activities, and competitive grants or portions thereof. Each federally recognized tribe voluntarily decides whether, and to what extent, to pursue the administration of federal programs. According to a recent law journal article, by 2017, nearly all tribes had used a self-determination contract or self-governance compact to take over the administration for one or more federal programs, and nearly all tribes had decided to retain the administration for one or more programs with Interior's Bureau of Indian Affairs (BIA)—the agency with primary responsibility to administer federal Indian programs.⁷

Tribal self-government can provide numerous benefits to a tribe. For instance, a 2004 report commissioned by the Department of Health and Human Services found that the Citizen Potawatomi Nation experienced a 300 percent increase in revenues after taking over the management of tribal funds from Interior. The Citizen Potawatomi Nation achieved higher revenues by investing the funds in money market and other low-risk instruments that pay higher interest than was earned when the funds were managed by Interior.

In addition to ISDEAA, the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) enables tribal self-government by authorizing federally recognized tribes to issue leases of restricted Indian lands for residential, business, agriculture, wind, and solar use without the approval of the Secretary of the Interior if such leases are executed under tribal regulations that have been approved by the Secretary. According to BIA, as of June 2018, there were leasing regulations approved under the HEARTH Act from 42 tribes. According to BIA, the potential tribal benefits of developing tribal leasing regulations for approval under the HEARTH Act include more efficient and timely execution of leases that can encourage investment and economic

meet certain criteria (e.g., demonstrating financial stability and management capability), up to 50 new tribes per year to participate in self-governance compacting under ISDEAA.

⁷ Danielle Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, American Indian Law Journal, Vol. 5 Issue 2, July 1, 2017.

development in tribal communities. At a December 2017 webinar one tribal stakeholder provided an example of such a benefit, stating that when the tribe took over the review and approval of business leases on its lands from the federal government, the tribe reduced the review time from 8 to 9 months to about 1 month, allowing it to more quickly pursue economic development opportunities.⁸

According to Cohen's Handbook of Federal Indian Law, the history of federal control over the administration of programs that serve tribes and its management of tribal resources has limited growth for some tribal economies.⁹ In our June 2015 report on energy development, for example, we found that BIA had mismanaged Indian energy resources and thereby limited opportunities for tribes and their members to use those resources to create economic benefits and improve the well-being of their communities.¹⁰ In February 2017, we added federal management of programs that serve Indian tribes and their members to our biennial update of high-risk areas, in part, because of long-standing problems with Interior's management of these programs.¹¹

You asked us to review issues related to tribal self-determination contracts, self-governance compacts, and leasing authority under the HEARTH Act. This chapter examines factors that have affected tribes' use of these mechanisms to further tribal self-government.

To identify factors that have affected tribes' use of self-determination contracts, self-governance compacts, and leasing authority under the HEARTH Act, we reviewed federal laws, regulations, and guidance; reviewed reports, congressional testimony, and other articles; reviewed federal data; and interviewed tribal leaders and officials and federal officials from Interior and the Environmental Protection Agency (EPA).

⁸ This example was included in presentation materials during a December 2017 webinar on tribal leasing under the HEARTH Act sponsored by the National Congress of American Indians.

⁹ Felix Cohen, *Handbook of Federal Indian Law*, § 21.01, (2012 ed.).

¹⁰ GAO, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502 (Washington, D.C.: June 8, 2015).

¹¹ GAO, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, GAO-17-317 (Washington, D.C.: Feb. 15, 2017). Our high-risk program identifies government operations with greater vulnerabilities to fraud, waste, abuse, and mismanagement or the need for transformation to address economy, efficiency, or effectiveness challenges.

Based on information found in the literature we reviewed and views provided during our interviews, we identified a number of factors that can affect tribes' use of self-determination contracts, self-governance compacts, and the HEARTH Act. The factors we included in this chapter are those that were most frequently mentioned in interviews with tribal and federal officials and that are specifically related to federal government policies and processes. Any factors identified by tribes we interviewed that are not related to the federal government were not included in our scope.

We first reviewed ISDEAA, the HEARTH Act, and associated federal regulations and guidance, such as BIA's handbook for implementation of ISDEAA, to understand attributes associated with each self-governance mechanism. We reviewed federal reports, congressional testimony, and other articles that provided general background information, historical perspectives, and examples of factors that can affect tribes' decisions to use self-determination contracts, self-governance compacts, and authority under the HEARTH Act. In addition, we reviewed federal data that included, among other things, data on tribal participation and key dates associated with BIA's review of tribal leasing regulations. To assess the reliability of the federal data we obtained, we consulted with knowledgeable officials who are responsible for the programs and corroborated the data with various sources. Based on these steps, we determined that the data were sufficiently reliable for the purposes of this chapter.

We also interviewed or received written responses from Interior officials representing, among others, Interior's Office of Self-Governance (OSG), BIA's Office of Trust Services, and all 12 BIA regions that provided information on federal processes and activities related to tribes' use of the mechanisms included in our review. We interviewed leaders and officials from 29 Indian tribes and nations, selected to ensure a representation of tribes with a range of experience using one or more of the three mechanisms included in our review. In addition, we interviewed representatives from 5 tribal consortia—the Coalition of Large Tribes; the Great Plains Tribal Chairmen's Association; the United Indian Nations of Oklahoma, Kansas, and Texas; the United South and Eastern Tribes; and

the Department of the Interior Tribal Self-Governance Advisory Committee. We also met with non-profit organizations such as the National Congress of American Indians—and the Native Governance Center, a non-profit organization focused on tribal government capacity building. For the purposes of this review, we refer to tribal leaders, tribal government officials, and representatives from tribal consortia as tribal stakeholders.

Throughout the report, we use the following categories to quantify statements made by stakeholders: “some” is defined as statements made by 2 to 5 entities, and “several” is defined as statements made by 6 to 10 entities. Each of the 573 federally recognized Indian tribes and nations is unique. Therefore, the information obtained in our discussions with tribal stakeholders is not generalizable but provides examples of tribes’ experiences with self-determination contracts, self-governance compacts, and the HEARTH Act. In addition, given our methodology, it is possible we did not identify every factor that can affect a tribe’s use of self-determination contracts, self-governance compacts, or the HEARTH Act.

We conducted this performance audit from February 2017 to January 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

BACKGROUND

Indian tribes and nations are recognized as “distinct, independent political communities” that are part of the unique political structure of layered sovereigns and internal governments that comprise the U.S. system

of government.¹² Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decision, and administrative practice.¹³ Tribal governments have many of the same responsibilities as state and local governments. However, tribes are generally unable to establish a strong tax base structured around the property taxes and income taxes typically available to state and local governments, according to a 2016 joint report from the Native Nations Institute and the Harvard Project on American Indian Economic Development and a 2003 report from the U.S. Commission on Civil Rights.¹⁴ For example, the reports found that tribes are unable to levy property taxes on some of their lands because of the legal status of the land. In addition, most tribes have a limited land base. Tribes generally do not levy income taxes because many tribal communities have disproportionately high levels of unemployment and a lack of employment opportunities. To the degree that they are able, some tribes use sales and excise taxes, but these do not generally generate enough revenue to fully support tribal governments. Therefore, some tribes rely on a combination of federal funds and economic development initiatives as fundamental sources of financial support for the government programs and services provided to their communities.

According to Cohen's Handbook of Federal Indian Law, "federal services to Indians were never mere gratuities. Instead, they were provided in exchange for cessions of land and rights, and to achieve distinctly federal purposes."¹⁵ Generally, the programs that provide basic tribal services are supported through tribal priority allocation (TPA) funds that Congress appropriates. TPA funds are used to provide a wide variety of

¹² According to Cohen's *Handbook of Federal Indian Law*, "[Indian sovereignty] is the principle that those powers which are lawfully vested in an Indian tribe, are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."

¹³ Cohen, § 4.01(1)(a).

¹⁴ Croman, Kelly S and Taylor, Jonathan B., "Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country", Joint Occasional Papers on Native Affairs, The Harvard Project on American Indian Economic Development and The University of Arizona Native Nations Institute, JOPNA 2016-1 (Tucson, AZ: May 4, 2016); and U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country* (Washington, D.C.: July 2003).

¹⁵ Cohen, § 22.01.

services to tribal communities—either through BIA-administered programs or self-determination contracts and self-governance compacts—and all federally recognized tribes are eligible to receive those funds.¹⁶

Bureau of Indian Affairs

BIA, through its 12 regional offices and more than 80 agency offices, administers programs that provide services and funding to tribes. For example, BIA programs include social services, natural resources management, economic development, law enforcement and detention services, tribal court administration, implementation of land and water claim settlements, repair and maintenance of roads and bridges, repair of structural deficiencies on high hazard dams, land consolidation activities, and electric utilities. In some cases, a BIA agency office may serve one tribe, and in other cases, a BIA agency office may administer programs on behalf of more than one tribe. For example, BIA's Central California Agency administers programs to 56 tribes, the largest multi-tribal field office in the contiguous 48 states.

These programs may also be administered by tribal governments under a self-determination contract or self-governance compact. BIA is responsible for administering self-determination contracts, including negotiating and approving each contract and its associated annual funding agreement and disbursing funds to the tribes. For instance, under its procedures, BIA is to provide tribes that are interested in pursuing a self-determination contract with key information about the program and available funding. ISDEAA transfers control over programs to tribes, but as stated in Cohen's Handbook of Federal Indian Law, "financial responsibility remains with the federal government."¹⁷ ISDEAA provides that tribes who decide to administer federal programs are to receive the

¹⁶ In 2003, the U.S. Commission on Civil Rights noted that TPA funds facilitate self-determination. U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country* (Washington, D.C.: July 2003).

¹⁷ Cohen, § 22.02(5).

same funds that would have been provided had the federal government operated the programs.

BIA identifies the amount of funds available to a tribe under a self-determination contract or self-governance compact for the administration of a federal program. In general, the most basic process for calculating the program amount is as follows:

The program amount equals the total amount of funds Interior used to operate a program minus residual funds.

Residual funds are the funds necessary for the federal government to carry out residual functions. Residual functions are inherently federal functions that only federal employees' may perform if all tribes were to assume responsibilities for all programs that ISDEAA permits. Inherently federal functions are not defined in Title I or Title IV of the ISDEAA, and a 1994 Solicitor of the Interior memo reports that inherently federal functions are to be determined on a case-by-case basis when they fall outside certain defined categories.¹⁸ BIA officials told us the basic calculation is most likely to be used when a tribe is served by an agency office that only serves one tribe and the tribe took over administration of a program from that agency office.

In cases where the total amount of funds BIA used to operate a program serves more than one tribe, additional data and factors may be included in the methodology to calculate the amount of funds available to administer the program. This is needed to ensure BIA can continue to provide services to the tribes that did not take over administration of the program. A BIA official told us that some regions and agency offices may divide the total amount by the number of tribes served, as shown in the following example:

¹⁸ The phrase is defined as "those federal functions which cannot legally be delegated to Indian tribes" under Title V of ISDEAA. Title V applies to Indian Health Service programs, not Interior programs. The Indian Health Service is a federal agency that administers health services and programs to tribes and their members.

The program amount equals the total amount of funds Interior used to operate a program minus residual funds divided by the number of tribes served by the program.

In other cases, regions and agency offices may include additional data to weight the calculation, such as tribal population or tribal land acres. When a tribe elects to pursue a self-determination contract, BIA is to meet with tribal officials to discuss and negotiate the terms of the contract, including what functions will be retained by BIA, the annual funding amount, and terms for the frequency of disbursing funds—that is, disbursed in a single lump sum or other intervals, such as quarterly payments.

According to Interior budget officials responsible for BIA's budget, after Interior receives its appropriations, departmental budget officials determine how to distribute any changes between the Administration's budget and the final budget among BIA offices that deliver direct services to tribes and to tribes that contract the services through self-determination contracts. According to Interior budget officials, they calculate changes in the budget amounts for each contract after consulting BIA program officials and based on statutory requirements, historical percentages, or other distribution factors. After the budget calculations are completed, Interior officials transfer funds to BIA regional offices to distribute to BIA agency offices and tribes. An awarding official in the regional or agency office then provides contracting tribes an updated annual funding agreement that identifies the amount of funds for that fiscal year.

Self-Determination Contracts and Self-Governance Compacts

ISDEAA authorizes federally-recognized tribes to assume administration of certain federal programs and functions that were previously managed by the federal government. It is Interior policy to facilitate tribal

administration of programs through self-determination contracts and remove obstacles that hinder tribal autonomy and flexibility to administer such programs.

Under Title I of ISDEAA, an interested tribe may request by tribal resolution to enter into a self-determination contract with BIA. ISDEAA requires the parties to such contracts to negotiate annual funding agreements and determine the frequency and timing of payments under the contract. Payments may occur throughout the fiscal year in accordance with terms identified in the annual funding agreements as Interior's Indian Affairs Office of Budget and Performance Management makes appropriated funds available.

Under Title IV of ISDEAA, an interested tribe may request to enter into a self-governance compact. Under the law, to be eligible for participation in self-governance compacting, a tribe must, among other things, demonstrate financial stability and management capability, which can be evidenced by participating in a self-determination contract for at least 3 years with no material audit exceptions. Interior's Office of Self-Governance (OSG) is responsible for administering self-governance compacts and funding agreements for Interior programs. OSG assists tribes that want to enter into self-governance compacts by providing training, determining eligibility, participating in negotiations with the tribes and Interior agencies to identify the amount of funds that will be included in the self-governance compacts, and approving tribes to participate in self-governance. In addition, tribes with self-governance compacts negotiate annual funding agreements with OSG rather than BIA. OSG is also responsible for transferring funds from Interior to tribes with a self-governance compact, ensuring audit compliance, and processing waivers of BIA regulations. Further, OSG is responsible for preparing an annual report to Congress on the costs and benefits of self-governance. As of fiscal year 2016, OSG has entered into self-governance compacts that cover 47 percent of federally recognized tribes (267 tribes).

For additional information on the differences between self-determination contracts and self-governance compacts, see Table 1.

Table 1. Comparison of Attributes of Tribal Self-Determination Contracts and Self-Governance Compacts

Attributes	Self-Determination Contract	Self-Governance Compact
Eligibility/ participation	All tribes (and tribal organizations authorized by tribes) may submit a contract proposal to Interior for review.	In addition to existing participants, the Secretary of the Interior may select up to 50 new tribes per year to participate in self-governance. The qualified applicant pool for the program is to consist of each tribe that successfully completes the planning phase and has demonstrated financial management capability.
Reporting requirements	Tribes are authorized, with respect to allocations within the approved budget of the contract, to re-budget funding allocations if such re-budgeting would not have an adverse effect on the performance of the contract.	Participating tribes are required to submit an annual audit report to Interior under the SAA. The SAA requires that all non-federal entities that expend \$750,000 or more of federal funds per year complete an annual audit in conformity with the SAA.
Standards for administering programs	Tribal proposals must include the standards under which the tribe will operate all non-construction programs, services, activities, or functions that are included in the proposal.	Tribes do not have to identify the standards for administering programs.
Right to redesign programs	Tribes may propose to redesign non-construction programs included in a contract, including non-statutory program standards, to make them more responsive to the population being served. Tribes must notify the Secretary of their intent to redesign. A proposal to redesign must be evaluated by the Secretary.	Tribes may redesign or consolidate programs without review by the Secretary except where the redesign involves a waiver of a regulation that would otherwise apply to the program or function.
Right to reallocate funds	Participating tribes are required to submit an annual audit report to Interior under the Single Audit Act (SAA). The SAA requires that all non-federal entities that expend \$750,000 or more of federal funds per year complete an annual audit in conformity with the SAA.	Tribes may reallocate funds to any program authorized by Congress in the approved budget of the compact.

Source: GAO analysis of Indian Self-Determination and Education Assistance Act of 1975, as amended. I GAO-19-87.

**SEVERAL FACTORS, INCLUDING CERTAIN FEDERAL
ACTIONS, CAN AFFECT TRIBES' USE OF SELF-
DETERMINATION CONTRACTS, SELF-GOVERNANCE
COMPACTS, AND THE HEARTH ACT**

Several factors, including federal agencies' processes and actions, can affect tribes' use of mechanisms that further tribal self-government such as self-determination contracts, self-governance compacts, or leasing authority under the HEARTH Act that further tribal self-government. Some of these factors, such as federal training and resources, can help tribes develop the tribal capacity that is needed to take over administration of federal programs and thereby facilitate tribes' use of these mechanisms. In contrast, other factors, specifically federal processes and actions, can hinder or delay tribes' use of these mechanisms. Some of these processes include: (1) BIA's approach for sharing information with tribes, (2) Interior's process to disburse funds, and (3) Interior's process to review proposed tribal leasing regulations submitted under the HEARTH Act. In addition, the adequacy of federal resources that is needed to administer a program is a factor that can affect tribes' use of self-determination contracts and self-governance compacts, according to several tribal stakeholders and federal officials we spoke with, government reports, our prior reports,¹⁹ and other articles we reviewed.²⁰

¹⁹ GAO, *Indian Economic Development: Relationship to EDA Grants and Self-determination Contracting Is Mixed*, GAO-04-847 (Washington, D.C., September 8, 2004), GAO, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed*, GAO/RCED-99-150 (Washington, D.C.: June 30, 1999), and GAO, *Indian Programs: Tribal Influence in Formulating Budget Priorities is Limited*, GAO/RCED-91-20 (Washington, D.C., February 7, 1991).

²⁰ See, for example, Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1 2014-2015.

Tribal Capacity is a Key Factor That Can Facilitate Tribes' Use of Self-Determination Contracts, Self-Governance Compacts, and Authority under the HEARTH Act

The capacity of a tribal government to administer a federal program or manage its resources is a key factor that can affect a tribe's decision to enter into a self-determination contract or self-governance compact, or to use the authority available under the HEARTH Act, according to some reports we reviewed.²¹ For example, the Harvard Project on American Indian Economic Development found that successful tribal assertions of sovereignty and self-government are backed by capable institutions of governance that contribute to tribal capacity.

According to federal officials and agency training documents we reviewed, Interior has contributed to the capacity of tribal governments by increasing tribes' knowledge about self-governance compacting and the HEARTH Act. For example, Interior's OSG provides opportunities for tribes to learn about self-governance compacting and build capacity by partnering with a non-profit organization to conduct training events, including an annual week-long training program. In addition, BIA offered several training sessions in 2014 and 2015 on the HEARTH Act to educate tribes on the benefits of developing tribal leasing regulations. Furthermore, Interior's Office of Indian Energy and Economic Development administers a grant program, Tribal Energy Development Capacity, intended to help tribes build the capacity to enter into a tribal energy resource agreement (TERA) or develop leasing regulations under the HEARTH Act.²²

²¹ Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1 2014-2015. Cornell, Stephen, Joseph P. Kalt. "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," Joint Occasional Papers on Native Affairs No. 2003-03, The Harvard Project on American Indian Economic Development, Native Nations Institute for Leadership, Management, and Policy, The University of Arizona. Tucson, Arizona. 2003. JOPNA.

²² A tribal energy resource agreement is an agreement between a tribe and the Secretary of the Interior that allows the tribe, at its discretion, to enter into leases, business agreements, and right-of-way agreements for energy resource development on tribal lands without review and approval by the Secretary. Under this authority, tribes may grant rights-of-ways over

Some tribal stakeholders identified the EPA's Indian Environmental General Assistance Program (GAP) as a model for a federal program that helped their tribes build the capacity needed to administer environmental programs from EPA.²³ These tribal stakeholders also told us this capacity benefitted the tribes as they sought to take over similar programs from Interior. Some tribal stakeholders told us the GAP program is effective in assisting tribal governments build capacity because it is designed to provide consistent funding over multiple years. According to reports we reviewed that discuss building tribal capacity, effective capacity building efforts should both provide for sustained, consistent funding over time, since developing capacity can be an ongoing effort that may take longer than 1 year to achieve and facilitate a tribe's ability to develop a program that is responsive to each tribe's unique conditions and priorities.²⁴

Factors That Can Hinder Tribes' Use of Self-Determination Contracts, Self-Governance Compacts, and Authority under the HEARTH Act

We found that several factors can hinder tribes' ability to use self-determination contracts, self-governance compacts, or leasing authorities under the HEARTH Act, including: (1) BIA's approach for sharing key information with tribes seeking to develop a program using a self-determination contract, (2) Interior's process to disburse funds to tribes

tribal land for pipelines or electric transmission or distribution lines, without Secretarial approval, if they meet certain requirements.

²³ GAP was outside the scope of our review but provides financial assistance to tribal governments and intertribal consortia to build capacity to administer environmental regulatory programs that may be delegated by EPA on Indian lands, including the implementation of solid and hazardous waste programs, and provides technical assistance from EPA to Indian tribal governments and intertribal consortia in the development of multimedia programs to address environmental issues on Indian lands.

²⁴ See, for example, First Nations Development Institute, *Native American Asset Watch: Rethinking Asset-Building in Indian Country* (Longmont, CO: 2009); see also EPA Office of Inspector General, *Framework for Developing Tribal Capacity Needed in the Indian General Assistance Program*, Report No. 08-P-0083 (Washington, D.C.: Feb. 19, 2008).

associated with self-determination contracts and self-governance compacts, (3) Interior's review of tribal leasing regulations submitted under the HEARTH Act, and (4) BIA's management and maintenance of federal programs that tribes may pursue to take over under a self-determination contract.

BIA's Approach for Sharing Key Information with Tribes

According to several tribal stakeholders, BIA's approach for sharing key information with tribes does not always ensure that tribes have the information they need to design programs under self-determination contracts prior to negotiations. As a result, this has been a factor that has hindered or delayed tribes' use of self-determination contracts for administering programs.²⁵

Interior guidance and policy call for BIA to provide tribes information that includes, among other things, calculations BIA uses to identify the amount of funds available to a tribe if it takes over administration of a program. In accordance with Interior's policy, BIA should provide tribes with the information necessary to design programs those tribes would like to administer under a self-determination contract to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious, and institutional needs. Also in accordance with Interior guidance, when a tribe requests to enter into a self-determination contract with Interior, BIA should disclose information to the tribe that identifies the amount of program funding available, the methodology used to identify available amounts, the process used to arrive at available amounts, an identification of the amount of funding retained by BIA, and any other information useful to understand how contract amounts were calculated.²⁶ Moreover, Interior regulations call for BIA to provide to tribes, for the negotiation of annual funding agreements for self-

²⁵ As self-determination contracts are generally the first step to moving toward a self-governance compact, factors that hinder self-determination may also hinder the potential for a tribe to later pursue a self-governance compact.

²⁶ DOI/HHS Internal Agency Procedures Workgroup, Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I Of The Indian Self-Determination and Education Assistance Act, Chapter 2, pages 2-1 and 2-2, July 28, 1999.

governance compacts, a brief justification as to why specific functions have been determined inherently federal.²⁷ However, according to several tribal stakeholders, they do not receive this information, including calculations BIA uses to identify the amount of funds available to tribes, prior to negotiating their self-determination contracts.

Some BIA regional and agency office officials we interviewed told us they do not generally provide information to tribes prior to negotiating the terms of a self-determination contract because the determinations of inherently federal functions and the amount of funding the bureau would retain to perform such functions generally occurs during meetings with BIA and the tribe. A tribal stakeholder told us that without documentation on funding calculations and methodologies, tribes are at a disadvantage and have little basis to negotiate during these meetings.²⁸ A tribal stakeholder told us that, in practice, the negotiation generally consists of BIA informing the tribe of the amount of funds to request in its proposal and what federal functions BIA will retain without any documentation to support its determination of inherently federal functions or the resources to be made available to the tribe to administer a program using a self-determination contract.

BIA's approach is not consistent with Interior's policy of sharing information so tribes can develop programs. By developing a process that results in BIA's regional and agency offices providing tribes with documentation on calculations and methodologies to identify resources available to administer a program using a self-determination contract, BIA would be adhering to Interior's policy and have greater assurance that tribes have the information they need to design the programs that they would like to pursue under a self-determination contract.

²⁷ 25 C.F.R. § 1000.95.

²⁸ BIA's not sharing information with tribes is a long-standing concern that tribes have reported as a factor hindering tribal self-government for decades. For example, a House Report from 1991 found that BIA did not provide timely and current financial information to assist tribes in the planning and negotiation process associated with participation in self-governance. The report further states that the Committee fully expects that BIA will ensure that Indian tribes receive this information in a timely and expeditious manner. House Report 102-320, 102D Congress, 1st Session (1991).

In addition, BIA guidance states the bureau will ensure functional consistency in the determination of inherently federal functions when the Central Office and all regional offices are compiling that information for negotiating annual funding agreements with tribes.²⁹ We found examples that suggest that BIA has not consistently determined whether programs and functions are inherently federal, which can affect some tribes' use of self-determination contracts. For example, a BIA official in one regional office told us that the region had previously decided all functions associated with the Land Titles and Records Offices were inherently federal and told tribes that BIA would not approve a self-determination contract for those functions.³⁰ However, other BIA regional offices did not consider the functions of the Land Titles and Records Offices as inherently federal, and some tribes in those regions had taken over administration of those functions.

BIA does not have a process that results in consistent determinations of inherently federal functions and does not provide tribes with information on its prior determinations. A BIA official told us that determinations of inherently federal functions are made on a case-by-case basis because each tribe and its circumstances are unique. However, this approach does not provide BIA leadership with reasonable assurance of functional consistency throughout the bureau in the determination of inherently federal functions—consistent with bureau guidance. By developing a process that results in consistent determinations of inherently federal functions, BIA could have greater assurance that these decisions are being made appropriately across the agency. BIA could also increase transparency in the process by providing tribes with documentation on activities and functions previously determined to be inherently federal and the basis for making these determinations.

²⁹ 25 C.F.R. § 1000.95.

³⁰ The BIA's Land Titles and Records Offices are to maintain certified title, encumbrance and ownership services and to provide land title services for all Federal Indian trust and restricted lands.

Interior's Process to Disburse Funds

According to tribal stakeholders we spoke with, Interior's process to disburse funds associated with the tribes' self-determination contracts and self-governance compacts is a factor that hinders expansion of self-determination contracts or self-governance compacts. Several tribal stakeholders and federal officials we interviewed said that the process does not ensure that tribes receive funds within the time frame specified in ISDEAA's Model Agreement for self-determination contracts or as agreed to by Interior and the tribes in their annual funding agreements.³¹ Two tribal stakeholders stated that in prior years, funds were disbursed several weeks or months after Interior received its apportionment from the Office of Management and Budget.³²

We were unable to determine the extent to which Interior disburses funds for self-determination contracts within the time frame agreed to in a self-determination contract because Interior does not systematically track the disbursement of funds from the date it received its appropriations through the date that it made funds available to tribes and does not compare its actual performance to expected performance. Not tracking this information and comparing actual performance to expected performance is contrary to federal internal control standards, which state that agency management should design control activities to achieve objectives and

³¹ ISDEAA's Model Agreement for self-determination contracts states that BIA shall make payments as expeditiously as practicable. In addition—unless the parties agree in the contract to some other arrangement—the Model Agreement specifies that funds will be made available to the tribal contractor on the first day of each quarter or, where the first day of the quarter coincides with the first day of the federal fiscal year, not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to the contract.

³² Interior's ability to disburse funds in a timely manner has been a long-standing management challenge. A 1987 Senate Report (100-274, 100th Congress, 1st Session) found that many tribes that participate with self-determination contracts had "experienced considerable problems with cash flow at the beginning of the fiscal year due to the problem of delays in the enactment of annual appropriations legislation and the consequent delays in the apportionment and allocation of funds to federal agencies and the tribes." It noted that most of the problems occurred during the first quarter of the Federal fiscal year, e.g., October through December. The report also found that "many tribes have been forced by delays in placing contract awards on the letter of credit system to borrow from commercial banks in order to maintain program operations." Further, the report found that "tribes had been unsuccessful in recovering interest costs necessitated from the Federal agencies."

respond to risks, such as by comparing actual performance to planned or expected results and analyzing significant differences.³³

This is not a new issue for Interior. Specifically, in 2015, an Interior contractor reported on an evaluation of Interior's process for disbursing funds and identified opportunities for improvement.³⁴ Consistent with our findings, the report also found that, among other things, the process used by Interior to disburse funds is a manual process that does not include a real-time tracking mechanism. Without such a mechanism, the report found that officials must spend time trying to determine the status of documents and finding misplaced or lost documents. For example, the report found that in fiscal year 2014, Interior had more than 6,000 scanned documents that required up to 6 signatures each, for a total of up to 36,000 signatures, to disburse funds including funds to tribes for self-determination contracts or self-governance compacts. To finalize these documents, the report estimates that 600 hours of staff time were spent scanning, uploading, and printing the documents. Several Interior officials told us they conduct monitoring activities within a specific BIA region or BIA agency office, such as tracking disbursement information through an Excel spreadsheet, but these activities were not part of a systematic process. An Interior official told us there are no plans to develop a real-time tracking mechanism.

Interior officials we interviewed cited several reasons why some funds associated with self-determination contracts and self-governance compacts were not disbursed in accordance with time frames outlined in its Model Agreement or negotiated in funding agreements. The reasons include the following:

- Interior's financial data management system. Interior officials told us that the agency's financial data management system is used for all of Interior and is not equipped for the unique aspects of self-

³³ GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 10, 2014).

³⁴ Upper Mohawk, Inc. *Department of the Interior Indian Affairs, Fiscal Funding Stream Assessment, Phase Two- Funding Stream Process Improvement Recommendations Final Report, Contract A14PC00266* (Titusville, Florida: January 20, 2015).

determination contracts and self-governance compacts—making it difficult to properly track and monitor key actions.

- Prior use of an inefficient process. An Interior official told us that prior to fiscal year 2017, BIA used several spreadsheets to coordinate TPA information for distributions. The official stated that these spreadsheets were over 15 years old, and they made the process inefficient and time-consuming. To distribute funds, officials would use one spreadsheet to gather information and another to summarize the amounts by functional area and region. The official stated that BIA updated the process in fiscal year 2018 and does not expect it to delay funding in the future.
- Staff shortages in key positions. BIA officials in several regions told us they are experiencing staff shortages in key positions that are responsible for the transfer of funds from BIA to tribal governments, such as awarding officials.³⁵ Interior officials said the Office of Self Governance also needs additional awarding officials with only one awarding official for self-governance compacts. Interior officials stated that the challenges from staff shortages are compounded by Congress' use of continuing resolutions that result in BIA repeating its fund distribution process multiple times in a single year.
- Delays in receiving tribal signatures. Interior officials we interviewed told us that they have experienced delays disbursing funds to a tribe because they must wait for tribal officials to sign documents before funds may be disbursed.

³⁵ The 2015 report on Interior's disbursement process also found that increasing the number of self-determination specialists and awarding officials would improve the transfer of funds to tribal governments. Specifically, the 2015 report noted that a 2006 workload analysis study found that BIA had 50 awarding officials in 2006 but identified an optimal staffing level of 235 awarding officials. As of March 2018, BIA had 43 awarding officials—192 less than it identified as optimal in 2006. Our prior work found that BIA had not conducted key workforce planning activities that may be further contributing to its longstanding workforce challenges. See GAO, *Indian Energy Development: Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development*, GAO-17-43 (Washington, D.C.: Nov. 10, 2016).

When funds are not disbursed in a timely manner, a tribal stakeholder told us that tribes may have to use funds from their general revenue accounts to cover expenses for federal programs or seek other sources, such as loans, to cover program expenses. According to several tribal stakeholders, when a tribe has to use its own funds for the administration of programs—even temporarily—it can adversely affect the tribe in various ways, including lost opportunities to use tribal funds for improving the tribes' economic conditions, reducing other services provided to tribal communities, and furloughing tribal government employees. In addition, several tribal stakeholders told us that the timeliness of disbursements for self-determination contracts is a factor they consider when deciding whether to take over additional programs under a self-determination contract. The tribal stakeholders said that the tribe must consider if it is able to use tribal funds or willing to obtain a loan to fund a program when the federal government is late disbursing funds. Without establishing a process for tracking and monitoring the disbursement of funds associated with self-determination contracts and self-governance compacts, Interior will not have reasonable assurance it disburses funds in a systematic way or in accordance with agreed upon time frames.

Interior's Process for Reviewing Proposed Tribal Leasing Regulations

Interior has not clearly documented its process for reviewing proposed tribal leasing regulations with timeframes associated with each step of the process. The process can often be lengthy and time consuming; according to tribal stakeholders, this can be a factor that hinders the tribes' ability to make decisions about the use of tribal resources. Under the HEARTH Act, tribes are to submit proposed leasing regulations for Interior's review and approval before a tribe can approve leases for the use of tribal lands, and Interior's review is to be completed within 120 days after the dates on which the tribal regulations are submitted to

the agency.³⁶ Interior officials told us they interpret the statutory review time frame requirements of the HEARTH Act as applying only to the agency's review to ensure tribes incorporated all changes identified in prior reviews. Specifically, Interior officials told us the agency does not consider the statutory time frame to begin until it has received a final version of the proposed tribal leasing regulations. These officials described the final version of proposed tribal leasing regulations as regulations that have already undergone review by BIA and Interior's Solicitor's office, have been revised by the tribe, and have been resubmitted for additional review by BIA and the Solicitor's office. This process can be repeated multiple times before Interior considers the tribe's proposed leasing regulations to be final.

In contrast, a tribal stakeholder told us that Interior's interpretation of how to measure the time frame is inconsistent with the tribe's interpretation of the statutory time frame. The tribal stakeholder told us that a tribe considers its leasing regulations initially submitted to Interior as final, although the tribe understands that BIA and the Solicitor's office may request revisions. Some tribal stakeholders told us that because Interior is not considering the 120 days as a time frame from first submission until approval, tribes do not know when to expect a final decision on draft tribal regulations.

We found that some of this confusion could be attributed to the fact that Interior has not clearly documented its review process to include established time frames associated with each step of the process. Under federal standards for internal control, management should design control activities, such as clearly documenting internal control in management directives, administrative policies, or operating manuals. The HEARTH Act seeks to expand tribal self-government and promote economic development by shifting the authority for leasing from the Secretary to the tribes. By developing a clearly documented review process that includes established time frames for each step in the process for reviewing proposed

³⁶ This timeframe may be extended by the Secretary, after consultation with the tribal applicant. 25 U.S.C. § 415(h)(4)(C). However, based on BIA's interpretation of the statutory review provision, discussed below, it is unlikely that this extension provision would be invoked.

tribal leasing regulations submitted under the HEARTH Act, Interior can better ensure that it is eliminating uncertainty and better communicating the process for approval to the tribes.

We also found that the approval process can be lengthy in some cases. Our review of 42 tribal leasing regulations submitted to Interior for review from 2012 through 2017 for which BIA provided us with data on the date the tribe submitted the regulations to Interior and the date of Interior's approval found that 4 of the 42 leasing regulations were approved within 120 days. For the other 38 proposed regulations, the time from when the tribe submitted the regulations to Interior to when the agency approved the regulations ranged from 134 days to 980 days. Half of the 42 proposed regulations were under review by Interior for a year or longer, with 5 of the 21 under review for more than 2 years. Interior's review was generally not continuous during the entire period; instead, these time periods included review by BIA and the Solicitor's office and the time spent by the tribe revising its leasing regulations in response to Interior's review.

Tribal stakeholders also shared with us several examples that illustrate Interior's lengthy review process for tribal governments' use of the HEARTH Act. For example, in one case, Interior received a tribe's leasing regulations for review and approval in May 2015. Interior approved the tribe's leasing regulations and published the decision in the Federal Register in April 2018—more than 2 years later.³⁷ Officials representing this tribe told us they considered the leasing regulations initially submitted on May 18, 2015, as final, though they understood that Interior could request revisions. These officials explained that the tribe has its own extensive process and procedures for lawmaking and developed its leasing regulations consistent with its Constitution, Legislative Procedures Act, and Administrative Rulemaking Procedure, which take into account comments from tribal members and tribal agencies and includes a judicial review, legislative analysis, fiscal impact review, and adoption by the tribe's elected business committee.

³⁷ 83 Fed. Reg. 17,430 (Apr. 19, 2018).

Tribal stakeholders told us that after each communication with BIA about the leasing regulations, they believed the regulations were satisfactory for approval. For example, the tribe received preliminary approval from BIA in October 2016. Then, tribal stakeholders said in August 2017—nearly 10 months later—the tribe received correspondence from BIA stating that the tribe needed to add several additional provisions, including language regarding Indian irrigation projects and districts even though the tribe does not have any irrigation projects or districts within its boundaries. Additional correspondence took place between the tribe and Interior, resulting in final approval in January 2018. Tribal stakeholders told us that the lengthy review delayed the tribe’s ability to implement leasing regulations and delayed the tribe’s ability to make decisions about the use of tribal resources.

In another case, Interior received tribal leasing regulations for review and approval on January 17, 2014. The tribe stated in documentation submitted to Interior that it was seeking increased decision-making authority under the HEARTH Act because it had finalized various construction agreements and needed to approve surface leases for an economic development project. During the time that the tribe’s leasing regulations were under review at Interior, BIA asked the tribe to submit multiple versions of its leasing regulations.

According to BIA documents, the bureau took approximately 2 months to transfer the tribe’s regulations from BIA headquarters to a regional office for its review. Once the regional office received the tribal leasing regulations, the office conducted its review over a 3-month period and provided comments to BIA’s headquarters. BIA’s data show that headquarters sent the tribe’s leasing regulations to the Solicitor’s office nearly 5 months after it received the tribal leasing regulations. Over the next couple of years, Interior requested the tribe make changes to its leasing regulations three more times and resubmit revised versions for review.

On March 3, 2016—more than 2 years after receiving the tribe’s leasing regulations—Interior documented that it had “one small change” it would like the tribe to make to the regulations. The tribe made the

requested change and resubmitted the leasing regulations to Interior via certified mail, which showed receipt at Interior on July 1, 2016. Interior approved the tribal leasing regulations on October 7, 2016—more than 3 months after the tribe submitted regulations with the “small change.” Interior approved the tribe’s leasing regulations and published the decision in the *Federal Register* in October 2016—more than 2 years after Interior first received the tribe’s leasing regulations.³⁸

Interior officials told us there was not a single reason for the lengthy review times. In some cases, Interior officials said the review times were long because the BIA official responsible for managing Interior’s review had left the bureau. In other cases, Interior officials told us they were short-staffed in the Office of the Solicitor and the legal review took longer than anticipated. However, they acknowledged that the uncertainty associated with how long Interior’s review will take can make it difficult for tribes to plan and execute economic development projects. For example, a BIA official told us that a tribe was unable to pursue an economic development opportunity because of the time it took for Interior to complete the process to review the tribe’s regulations.

In contrast, a timely review of a tribe’s proposed leasing regulations can positively affect tribal control and decision making. For example, a tribal stakeholder said after several months waiting for BIA to approve a surface lease needed for a tribe to develop a wind farm, the tribe decided to pursue authority under the HEARTH Act so that it could review and approve the lease without waiting for BIA’s review of the surface lease. Interior reviewed and approved the tribe’s leasing regulations submitted under the HEARTH Act authority in 31 days. According to the tribal stakeholder, the timely review and approval of the tribe’s leasing regulations allowed the tribe to review and approve the surface lease needed for construction of the wind farm to commence before the expiration of tax credits—a key component that made the project feasible.

³⁸ Interior approved the tribe’s leasing regulations on October 7, 2016, and published the decision in the *Federal Register* on October 20, 2016. 81 Fed. Reg. 72,607 (Oct. 20, 2016).

BIA's Past Management of Federal Programs

Past mismanagement of federal programs under the administration of BIA is a factor that can affect tribes' decisions whether to take over federal programs through self-determination contracts, according to several tribal stakeholders and BIA officials. As documented in a 2003 report by the U.S. Commission on Civil Rights, decades of general mismanagement of infrastructure and programs under BIA's administration can hinder a tribes' use of self-determination contracts.³⁹ In 1999, BIA reported to Congress that funds provided under self-determination must be used not only for current operations but also "to repair 150 years of general neglect" of Indian programs.⁴⁰ In these cases, taking over programs with long-standing neglect is a liability that some tribes are not willing to assume. For example, a tribal stakeholder told us that its BIA agency office neglected tribal land records for many years.⁴¹ As a result, the tribe is reluctant to assume the liability associated with administering a real estate program without accurate property records.

In another example, BIA operates an irrigation project that provides electric utility service to two tribes. Both tribes have taken over certain functions associated with the utility service provided to their communities through self-determination contracts, and both tribes have expressed interest in expanding the functions they administer. However, BIA and tribal officials said that concerns over infrastructure that needs to be repaired or replaced and the liability associated with rights-of-way have deterred both tribes from taking over the remaining functions of the utility. For example, many utility poles on the project's transmission lines are more than 50 years old and are in need of replacement, and the project has over 1,500 miles of transmission lines and 2,000 miles of distribution lines. According to a BIA document, these lines might have been extended

³⁹ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Need in Indian Country*, (Washington, D.C.: July 2003).

⁴⁰ Department of the Interior, *Bureau of Indian Affairs, Report on Tribal Priority Allocations*, (Washington, D.C.: July 1999).

⁴¹ In 2014, Interior's Inspector General found that land records at a BIA agency office were in disarray and that another BIA agency office's system for leasing activities was inadequate. Further, we reported in June 2015 that some BIA agency offices cannot verify ownership of some Indian resources or where leases are in effect (GAO-15-502).

without receiving a formal right-of-way. The report states that “many of [San Carlos Irrigation Project]’s rights-of-way are unperfected and there are no supporting documents evidencing a legal right-of-way.” According to tribal stakeholders these kinds of uncertainties are significant factors they must consider in their decisions related to self-governance of BIA programs.

ADEQUACY OF RESOURCES AFFECTS TRIBES’ USE OF SELF-DETERMINATION CONTRACTS AND SELF-GOVERNANCE COMPACTS

The adequacy of resources is a long-standing concern that has been a factor affecting tribal participation in self-determination contracts and self-governance compacts, according to several tribal stakeholders and federal officials we interviewed, government reports, our prior reports,⁴² and articles we reviewed.⁴³ Specifically, a lack of adequate resources has been a long-standing concern that can limit the number of programs tribes take over using self-determination contracts and self-governance compacts. For example, the U.S. Commission on Civil Rights 2003 report noted that the authority tribes have to take over the administration of federal programs is useful to the extent that adequate funds are made available to the tribes to operate the program.⁴⁴ According to Interior officials, Interior does not have an estimate on the extent to which it can provide adequate resources to tribes that want to administer federal programs. For one program, BIA estimated in a report to Congress that the dollars BIA expended in fiscal

⁴² GAO-04-847, GAO/RCED-99-150, and GAO/RCED-91-20.

⁴³ See, e.g., Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1 2014-2015.

⁴⁴ U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Need in Indian Country*, (Washington, D.C.: July 2003).

year 2013 for BIA and tribes to operate detention and corrections centers fund about forty percent of the estimated operating needs.⁴⁵

Faced with funding shortfalls from the BIA budget to administer federal programs under federal self-determination contracts or self-governance compacts, many tribal stakeholders told us that they supplement federal funding. Officials from one tribe told us that the tribe has supplemented all the programs it has taken over from BIA. For example, the tribe reported that the Land Titles and Records Program has a shortfall of about \$300,000 annually; the Law Enforcement program with about \$564,000 annually; and the Probate Program with about \$129,000 annually. Officials from the tribe told us that tribes may rely on revenues generated from economic development or tax revenue to supplement federal dollars for programs they have taken over from the federal government.

However, tribal stakeholders we interviewed told us that not all tribes are in a position to supplement additional federal programs because of limited economic development opportunities and tax revenue; therefore, those tribes may not have the option to take over additional federal programs. According to a tribal stakeholder, dual-taxation—when both a tribe and state tax the same non-tribal members and businesses on tribal land—can significantly limit a tribe's tax revenue because tribes must reduce or eliminate their taxes to stay competitive and attract business and enterprise to their lands. Furthermore, the funds tribes may use to supplement federal programs are needed to fund other governmental services and activities, which place tribal leaders in the position of deciding whether to use funds to provide governmental services not funded by the federal government or to increase self-governance by administering additional federal programs. As we have previously reported, when tribes supplement the federal program they take over, it diverts funds away from

⁴⁵ Bureau of Indian Affairs, Report to the Congress on Spending, Staffing and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country (August 2016). The dollars do not reflect funds tribes may receive from other federal, state, and tribal organizations.

other economic development opportunities and other government functions and services they provide to their communities and citizens.⁴⁶

Lastly, several tribal stakeholders told us that not receiving adequate resources from the federal government to administer federal programs makes them reluctant to administer additional federal programs because they believe BIA has a better chance than the tribe to obtain additional resources that can be used to supplement program shortfalls. This is, in part, because they believe that BIA agency offices and regional offices have access to funding sources that are not available to tribes and because BIA does not always make tribes aware of funds that are available. For example, the Department of the Interior's Self-Governance Advisory Committee reported in 2015 that the distribution of year-end funds is entirely within the discretion of the local awarding official and that not all tribes are notified that these funds are available.⁴⁷

CONCLUSION

Interior has taken steps to assist tribes pursuing tribal self-government by providing training opportunities focused on self-governance compacts and the use of the HEARTH Act to help increase tribal capacity. However, several factors have continued to hinder tribes' use of these mechanisms to further tribal self-government. First, BIA's approach for sharing key information with tribes when tribes seek to administer a program using a self-determination contract does not provide the tribes with the information they need to understand how the self-determination contract amounts were calculated. As a result, tribal leaders are at a disadvantage in making sound decisions regarding the feasibility of taking over the administration of federal programs.

⁴⁶ GAO-04-847 and GAO/RCED-99-150.

⁴⁷ Department of the Interior Self-Governance Advisory Committee *Recommendations to Improve Coordination and Communication with Self-Governance Tribes* (McAlester, Oklahoma: April 2015). Interior established the Self-Governance Advisory Committee in 1998, and they provide advice on self-governance issues.

Second, BIA does not have a process that results in consistent determinations of inherently federal functions and does not provide tribes with information on its prior determinations. By developing a process that results in consistent determinations of inherently federal functions, BIA could have greater assurance that such determinations are being made appropriately across the agency and BIA could increase the transparency of the process by providing tribes with documentation on activities and functions previously determined to be inherently federal and the basis for the determinations.

Third, Interior does not have an effective process for tracking and monitoring the disbursement of funds associated with tribes' self-determination contracts and self-governance compacts or as agreed to with the tribes. Without establishing an effective tracking and monitoring process, Interior does not have reasonable assurance that it is disbursing funds in accordance with ISDEAA or time frames agreed to with the tribes.

Lastly, Interior has not documented its process to include established time frames associated with each step of the process to review proposed tribal leasing regulations submitted under the authority provided by the HEARTH Act. This has resulted in lengthy review times—in some cases, multiple years. By developing a clearly documented review process that includes established time frames for each step in the process for reviewing proposed tribal leasing regulations submitted under the HEARTH Act, Interior can better ensure that it is eliminating uncertainty in the process to approve tribal leasing regulations.

RECOMMENDATIONS FOR EXECUTIVE ACTION

We are making the following four recommendations to Interior:

- The Assistant Secretary of Indian Affairs should develop a process so that all regional and agency offices consistently provide tribes with documentation on calculations and methodologies to identify

resources available to administer a program using a self-determination contract. (Recommendation 1)

- The Assistant Secretary of Indian Affairs should develop a process that results in consistent determinations for inherently federal functions and to provide documentation to tribes on specific activities and functions determined to be inherently federal. (Recommendation 2)
- The Assistant Secretary of Indian Affairs should establish a process to track and monitor the disbursement of funds associated with self-determination contracts and self-governance compacts. (Recommendation 3)
- The Assistant Secretary of Indian Affairs should coordinate with the Office of Solicitor and BIA to develop a clearly documented process with established time frames for each step in the process for reviewing proposed tribal leasing regulations submitted under the HEARTH Act. (Recommendation 4)

AGENCY COMMENTS

We provided a draft of this chapter to Interior for comment. In its comments reproduced in appendix II, Interior generally concurred with our recommendations. Interior also provided technical comments, which we incorporated as appropriate.

Sincerely yours,

Frank Rusco
Director, Natural Resources and Environment

APPENDIX I: SCOPE AND METHODOLOGY

For this chapter, we reviewed a range of reports, articles, conference proceedings, congressional testimony, and other publications from federal and tribal governments, academics, and nonprofit organizations. These

publications included general background information related to tribal self-government and tribes' use of self-determination contracts, self-governance compacts, and the HEARTH Act, as well as historical perspectives, successes and challenges, and identified some factors that can affect a tribe's decision to use one of these mechanisms. We identified these articles and publications by searching various Web-based databases, such as ProQuest, Scopus, DIALOG, Academic OneFile, JSTOR, and Lexis to identify existing studies from articles, peer-reviewed and other journals, including law review journals, and government and academic publications. We searched terms such as tribal sovereignty, self-governance, self-determination, and capacity, as well as relevant acts or program names. We also asked tribal stakeholders that we interviewed to recommend additional reports, congressional testimony, and other articles on the topic.⁴⁸ We did not set specific time frames for the search, and identified more than 50 articles from 1982 to 2017. We examined summary-level information about the literature identified in our search and identified a few of the articles as directly related to our report. These five publications are identified throughout this chapter. Other articles provided beneficial context and historical information but did not contribute to us identifying factors to include in this chapter.

We reviewed relevant laws and regulations including the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), as amended and Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act). We also reviewed Interior's policy manual, Interior's procedures handbook for contracting under Title I of ISDEAA, the Interior Solicitor's opinions on inherently federal functions, and other guidance documents. We reviewed Interior reports and audits related to self-determination contracts, self-governance compacts, and the Hearth Act, including Interior budget justification reports and evaluations of tribes' performance with trust programs administered under a self-governance compact. ISDEAA also allows tribal governments to take over administration of certain programs from the Department of

⁴⁸ For the purposes of this review, we refer to tribal leaders, tribal government officials, and representatives from tribal consortia as tribal stakeholders.

Health and Human Service's Indian Health Service. For this review, we focused on tribes' use of self-determination contracts and self-governance compacts to administer Bureau of Indian Affairs (BIA) programs.

To determine tribes' use of self-determination contracts, we obtained data from Indian Affairs' Office of Chief Financial Officer for all current contracts as of November 2017. The data provided included the contract number, the tribe or tribal organization with the contract, and the program included in the contract. To assess the reliability of the data, we consulted with knowledgeable federal officials and found examples in one of our prior reports that generally supported the data we obtained from the Office of Chief Financial Officer.⁴⁹ To determine tribes' use of self-governance compacts, we reviewed data that Interior provides to Congress in annual reports that cover tribal use of self-governance compacts. To assess the reliability of the data, we consulted with Interior's Office of Self Governance officials and tribal stakeholders and compared information provided to us from Interior with information obtained from the Tribal Self-Governance Communication and Education Consortium. We determined that the data were sufficiently reliable for the purpose of our report.

To obtain a better understanding of the information found in self-determination contracts, we requested BIA provide information from self-determination contract files. We requested contract files that would represent a range of BIA regions and programs. We also sought to use this information to identify examples from the contract file where BIA documented the amount of program funding available to the tribe and retained by BIA, and the methodology BIA used to identify available amounts. Through our review of several contract files, we were able to corroborate information from BIA officials and tribal stakeholders, who told us that BIA does not systematically document the amount of program funding available to the tribe and retained by BIA and the methodology BIA used to identify available amounts. The findings from the contract reviews are not generalizable to those we did not request and obtain. We

⁴⁹ GAO, *Indian Economic Development: Relationship to EDA Grants and Self-determination Contracting Is Mixed*, GAO-04-847 (Washington, D.C., Sept. 8, 2004).

also collected information from 9 BIA regions on the number of retrocessions (tribes that voluntarily turned back administration of a program to BIA), reassumptions (programs where BIA took back administration from a tribe because of noncompliance with contract requirements), and declinations (programs that tribes requested to take over administration but BIA declined) from 2012 through 2017. BIA does not have a centralized data system to collect this information and through consultations with knowledgeable federal officials, we determined that each of BIA's regions was in the best position to provide us with this information.

To determine tribal participation with the HEARTH Act and the extent to which Interior's review is consistent with the Act, we collected data from BIA on the number of tribes that have submitted leasing regulations for BIA's review, and the number of tribal leasing regulations BIA approved under the HEARTH Act. In most cases, Interior provided an internal checklist that included, among other things, the dates tribes submitted information and dates of Interior responses. We used this information to identify the amount of time associated with BIA's review of tribal leasing regulations. In some cases, we also gathered information from tribes. We determined that the data were sufficiently reliable for the purposes of this chapter.

We interviewed federal officials from Interior's Office of Solicitor, Indian Affairs' Office of Self Governance, Office of the Chief Financial Officer, and Office of Budget and Performance Management. Within BIA, we met with officials from Office of Trust Services, the Office of Indian Services and interviewed or received written responses from regional officials in all 12 BIA regions. Through these interactions we asked officials to identify processes associated with tribes entering into, negotiating, and administering federal programs under a self-determination contract or self-governance compact. We also discussed processes associated with Interior's disbursement of funds agreed upon in contracts and compacts. In addition, we discussed processes for tribes to submit leasing regulations to BIA and for BIA's review of tribal leasing regulations. We compared the information collected through discussions

with federal officials and federal documents with Interior guidance documents and Standards for Internal Control in the Federal Government. We also discussed the use of self-determination contracts and self-governance compacts with Interior's Bureau of Land Management and Bureau of Reclamation, and interviewed officials from the Environmental Protection Agency to discuss tribes' use of existing authorities to administer environmental programs and the agency's efforts to build tribal capacity.

To identify factors that can affect a tribe's decision to use self-determination contracts, self-governance compacts, and the HEARTH Act—as well as tribes' experience with these mechanisms—we interviewed leaders and officials from 29 federally recognized Indian tribes and nations, the Department of the Interior Self-Governance Advisory Committee, and non-profits representing tribal interests, such as the National Congress of American Indians (NCAI) and the Native Governance Center. The key factors we included in this chapter are those that were most frequently mentioned and that are specifically related to federal government policies and processes. During the review, we identified factors that tribes may consider but that are not related to the federal government; because these factors were outside of the scope of this review, we did not include them in our report. We selected Indian tribes and nations to ensure a representation of tribes with a range of experience using self-determination contracts and self-governance compacts, tribal size, and geographic location. We also selected tribes to ensure we had representation from tribes that developed leasing regulations under the HEARTH Act and those that have elected to not yet develop or submit leasing regulations under the HEARTH Act.

We also met with representatives from tribal consortia, such as the Coalition of Large Tribes; the Great Plains Tribal Chairman's Association; the Department of the Interior Tribal Self-Governance Advisory Committee; the United South and Eastern Tribes; and the United Indian Nations of Oklahoma, Kansas, and Texas to gather additional perspectives on factors that can affect tribal participation. To encourage increased participation and perspectives from tribal leaders and officials, we

provided opportunities for tribes to contact us for individual discussions by requesting that tribal consortia, as well as NCAI, include information about our review in their newsletters or other correspondence with tribal stakeholders. As a result of these efforts, several additional tribes contacted us to share information about their experiences.

For the purposes of this review, we refer to tribal leaders, tribal government officials, and representatives from tribal consortia as tribal stakeholders. Throughout the report, we use the following categories to quantify statements made by stakeholders: “some” is defined as two to five entities and “several” is defined as six to 10 entities. Because each of the federally recognized tribes and nations are unique, the information obtained in our discussions with tribal stakeholders is not generalizable, but provides examples of tribes’ experiences with self-determination contracts, self-governance compacts, and the HEARTH Act. It is possible we did not identify all of the factors that can affect a tribe’s decision to use self-determination contracts, self-governance compacts, or the HEARTH Act and there may be other factors we did not present.

We conducted this performance audit from February 2017 to January 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

APPENDIX II: COMMENTS FROM THE DEPARTMENT OF THE INTERIOR

Frank Rusco
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 2054&

Dear Mr. Rusco:

Thank you for providing the Department of the Interior (Department) the opportunity to review and comment on the draft Government Accountability Office (GAO) report entitled, *INDIAN PROGRAMS: Interior Should Address Factors Hindering Tribal Administration of Federal Programs* (GAO-19-87). We appreciate GAO's review of the actions the Department has taken to assist Tribes pursuing self-governance by providing training opportunities focused on self-governance compacting and the use of the *Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012* (HEARTH Act) to help increase tribal capacity.

GAO issued the Department four recommendations to address its findings. Below is a summary of actions planned or taken to address the implementation of the recommendations.

Recommendation 1: The Assistant Secretary of Indian Affairs should direct the Bureau of Indian Affairs (BIA) to develop a process so that all regional and agency offices consistently provide tribes with documentation on calculations and methodologies to identify resources available to administer a program using a self-determination contract.

Response: Concur. While each Region is diverse in program implementation and interaction with their Tribes based on local conditions, Indian Affairs (IA) agrees the consistency in calculating available administrative funding across programs could be improved. To ensure the process meets all needs, IA will create a workgroup consisting of Headquarters and field budget staff to develop standard criteria. Once the criteria is developed, this process will be incorporated into the budgeting processes in the Indian Affairs Manual (IAM) to ensure it is consistently implemented across all offices.

Recommendation 2: The Assistant Secretary of Indian Affairs should direct BIA to develop a process that results in consistent determinations for inherently federal functions and to provide documentation to tribes on specific activities and functions determined to be inherently federal.

Response: Concur. As programs have evolved, the individual programs defined as inherently federal within IA have changed over time. We agree

that a consistent application of the definition of inherently federal functions is necessary. IA will create a workgroup consisting of Headquarters and field staff along with staff from the Department's Office of the Solicitor (SOL) to outline and define those functions consistent with existing laws including the *Federal Activities Inventory Reform Act of 1998*. Once these determinations are made, IA will develop and promulgate a formal Policy Memorandum to ensure consistency across Indian Affairs' programs. As programs and regulations continue to evolve, the memorandum may be reissued to ensure an updated/current listing is always available for staff to refer to when negotiating contracts or compacts.

Recommendation 3: The Assistant Secretary of Indian Affairs should establish a process to track and monitor the disbursement of funds associated with self-determination contracts and self-governance compacts.

Response: Concur. IA has taken actions to address many of the recommendations issued by the contractor that reviewed the funds distribution process, as mentioned in your report. In an effort to improve processing time, the Central Budget Office has realigned staff and automated the funds distribution and transfer systems. The Office of Self-Governance is preparing to update its financial database to allow for better funds management and reporting for compacts. A shortage of Awarding Officials will be addressed using contract employees who will supplement fulltime staff. Additionally, we will develop a tracking system that will allow us to monitor the disposition of awards to tribes across the agency.

Recommendation 4: The Assistant Secretary of Indian Affairs should coordinate with the Office of Solicitor and BIA to develop a clearly documented process with established time frames for each step in the process for reviewing proposed tribal leasing regulations submitted under the HEARTH Act.

Response: Concur. The National Policy Memorandum of the Bureau of Indian Affairs which expired on January 16, 2014, included the process for review of tribal leasing regulations and identified the associated time frames for each step. The BIA plans to develop an IAM policy that will define the process, time frames, roles, and the responsibilities of all entities involved in the review of the HEARTH Act Regulations. The Office of

Trust Services will streamline the centralized HEARTH Act function to be directly managed and monitored by the Associate Deputy Bureau Director, to prioritize this function within the Director's office and improve collaboration with the SOL to grant final approval of all HEARTH Act applications.

Sincerely,

Tara Sweeney
Assistant Secretary for Indian Affairs

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