



Delaware Nation

Advancing Tribal Self-Determination: Examining Bureau of Indian Affairs' 638 Contracting

**Testimony of Delaware Nation President Deborah Dotson
House Resources Committee
Subcommittee on Indian and Insular Affairs
March 6, 2024**

Madam Chair, Ranking Member and members of the Committee, my name is Deborah Dotson and I am the President of Delaware Nation. I have served as President of Delaware Nation for six years. My Peoples' existence on this continent predates the concept of written history. My Nation memorialized our relationship with the United States by signing the very first Indian treaty with the United States in 1778, the Treaty of Fort Pitt,¹ while the country was still in its infancy and while this legislative body existed as the Continental Congress. Our cooperation with the Continental Congress and our 1778 treaty providing material support and allowing troops to pass through our territory played a critical role in America's success in the Revolutionary War. Today, Delaware Nation has its governmental seat in Anadarko, Oklahoma and shares its jurisdictional area with two other tribes.

I am pleased to be with you today to discuss Delaware Nation's experience in working with the Bureau of Indian Affairs (BIA) through the Indian Self-Determination and Education Assistance Act² (ISDEAA or Act). Delaware Nation operates numerous programs under our Title IV self-governance compact with the BIA. We entered the self-governance program many years ago and transferred all the programs we previously operated under self-determination contracts into our self-governance funding agreement.

While we have seen great success with the self-governance program, we have also encountered areas where improvement is needed to fully realize the power of the Act as originally envisioned by congress. We could suggest many statutory changes that would benefit Indian Tribes across the United States by improving

¹ 7 Stat., 13.

² 25 U.S.C. §§ 5301 *et seq.*

program efficiency and flexibility, but we will focus on specific issues Delaware Nation has noted over the years.

Some of the areas where improvement is needed include, in no particular order, timely distribution of program funding, upfront distribution of one hundred percent of contract support cost funding, good faith negotiation between the BIA and Indian Tribes resulting in timely review and execution of contracts, compacts, funding agreements, and leases under Section 105(l), adequate staffing within the office of self-determination and the office of self-governance, and creating flexibility to synchronize performance reporting forms with the contracting or compacting Tribe's program year.

TIMELY DISTRIBUTION OF PROGRAM FUNDING

ISDEAA requires the Office of Self-Governance to transfer funds to Tribes no later than ten days after the apportionment of such funds by the Office of Management and Budget (OMB) to the Department of the Interior (Interior or Secretary), the Department within which the BIA resides. Notwithstanding the requirement of the timely transfer of funds to Tribes, in practice it is rarely accomplished on anything approaching a timely basis.

Indeed, it is often months and sometimes even into subsequent fiscal years before funds are fully distributed. In Interior's defense, for non-Interior funds that are incorporated into the funding agreements, there are often delays in the transfer of funds from the other departments to Interior such that it cannot distribute those funds in a timely manner. However, in the year 2024, with all the conveniences of advanced technology and accounting capacity, that should not remain a perennial problem. It could surely be overcome by concerted action across the federal government.

That all being said, chronic delay in the distribution of funding for Interior programs undermines the program's objectives, is unacceptable, and can leave Tribes in particularly dire circumstances. Delaware Nation is fortunate to have other Tribal resources available to float program operations until federal dollars arrive. Many other Tribes across the country are not so situated and Interior's delay in transferring funds means a Hobson's choice between keeping the lights on or serving their people.

TIMELY PAYMENT OF CONTRACT SUPPORT FUNDS

Under the Act, Tribes are entitled to recover certain contract support costs for costs incurred in administering the contracts or compacts but which the

Secretary otherwise would not incur in administration of the programs or which the Secretary does incur but pays from other sources. Again, ISDEAA requires that funds be transferred to Tribes within ten days of apportionment of funds from OMB to Interior. Nothing in ISDEAA allows Interior to withhold program or contract support cost funding and it is required to address those funding shortfalls whenever the shortfall becomes apparent. Interior is prohibited from funding less than the full contract support cost need.

Currently, the Office of Self-Governance provides contract support cost funding at a rate of 80% of the prior year and withholds the remaining 20% until year-end. There is no authority within the Act or other federal law for such withholding of funds and it again puts Tribes in a position to rely on non-federal resources – if they even exist – to cover federal costs until Interior gets around to providing contract support cost funding.

The Act requires full upfront payment of contract support costs due to Tribes, but the reality is much different. The Act should be amended to provide monetary penalties for non-compliance. Tribes should not bear the administrative and financial burden of pursuing relief under statutes such as the Prompt Payment Act where Interior clearly runs afoul of statutory mandates. Those monetary penalties should be automatic and include any amount that is transferred outside of the ten-day statutory window. Tribes must be made whole for being forced to foot the bill of governmental inefficiency.

GOOD FAITH NEGOTIATION AND TIMELY REVIEW AND EXECUTION OF CONTRACTS, COMPACTS, FUNDING AGREEMENTS, AND SECTION 105(l) LEASES

The Act requires that Interior negotiate in good faith all contracts, compacts, funding agreements, and section 105(l) leases. In fact, ISDEAA provides a model contract that purports to contain all provisions that are required for contracting. However, Tribes often encounter instances where BIA staff require more than the provisions of the model agreement. We assume that this is because the BIA has identified some legitimate purpose for doing so, but that does not mean that their actions are lawful, and administrative add-ons only confuse participating Tribes who work hard to comply with the letter of the Act. To address this, the Act should either be amended to include all required provisions in the model agreement or a statement that the provisions contained in the model agreement are all that are required. This is one of those places where Tribes would benefit from the certainty that such a change to the law would ensure.

In addition, courts have held that Section 105(l) leases are incorporated into funding agreements under both self-determination and self-governance. Delaware Nation has been in Interior's 105(l) lease queue since December of 2022. We sit here in March of 2024 and Interior recently informed the Nation that it would likely be August of 2024 before the Nation's request is even reviewed. This is one more glaring example of Delaware Nation having to endure delay, forcing it to continue to foot the bill for federal expenses through no fault of its own, all the while hoping that it will be made whole one day.

ADEQUATE STAFFING FOR SELF-DETERMINATION AND SELF-GOVERNANCE OFFICES

Each of the areas we have already identified can be attributed in part to the lack of trained and experienced staff within the Offices of Self-Determination and Self-Governance. The Office of Self-Determination is notorious for its revolving door for self-determination officers within the regional and agency offices. This continuous changing of staff prevents Interior and Tribes from forming meaningful relationships and makes it nearly impossible for Tribes to make meaningful progress on initiatives that require focus and commitment from the regional and agency offices. The Office of Self-Governance has never been adequately staffed. When Tribes reach out to the Office of Self-Governance to inquire about the status of funding or agreements, we are often told that the Office is short staffed and is moving as fast as it can. Interior also points to staffing shortages as the primary reason for being nearly three years behind in reviewing and negotiating its Section 105(l) leases. ISDEAA and its programs are too critical to Tribal governments and the people we serve to allow our federal partners to be chronically understaffed.

Please understand, this is not a criticism of the good and dedicated staff that work hard every day within the BIA, but a clear-eyed and honest focus on this chronic staffing issue worthy of our collective attention.

SYNCING FISCAL AND PROGRAMMATIC REPORTING WITH THE TRIBE'S PROGRAM YEAR

ISDEAA authorizes Tribes to initiate self-determination contracts and self-governance compacts when the Tribe determines it wishes to do so. Nothing in the Act requires a Tribe to operate its contracts or compacts on the federal fiscal year. However, fiscal and programmatic reporting forms require reporting based on fixed dates that do not always sync to the Tribe's program year. An example would be a reporting form which captures activities for the federal fiscal year (October 1 – September 30) being used with a Tribe whose program year is April 1 to March 31.

Using the standard form, the activities reported would be for six (6) months of one funding year and six (6) months of the subsequent funding year. Delaware Nation operates its government on an October – September fiscal year but operates its self-governance compacted programs on a January 1 – December 31 program year. As such, reporting forms do not always capture the correct data. A statutory amendment which syncs the reporting periods to the Tribe’s period of performance rather than relying on standardized OMB forms would improve clarity and accuracy in tribal reporting under the Act.

APPROPRIATE AND MEANINGFUL CONSULTATION

Finally, we want to be clear that we thank you for the opportunity to testify today and welcome the fact that you are holding this hearing to gain an understanding of potential improvements in the Act. Even though you have heard many thoughts regarding potential improvements in the Act, we think that you would probably agree that appropriate government-to-government consultation is necessary before any specific legislation is introduced that would amend the Act. That is not intended in any way to diminish this vitally important hearing but to acknowledge the expectations of Indian Country. That consultation is especially important insofar as Title I, on self-determination contracts, applies to federal departments beyond Interior. Which is why the Nation respectfully submits that it is imperative that Tribes be consulted on any proposed changes in the Act and that the impacts of such changes may have on non-Interior programs be considered carefully. All Tribes participating in either self-determination or self-governance programs with any federal department must have a seat at the table.

I thank you for your time and the opportunity to testify on this important subject. Delaware Nation is happy to work with this Committee, Congress, and the Administration to consider solutions to the issues raised today and those that may arise during Tribal consultation.

Wanishi,

President Deborah Dotson
Delaware Nation