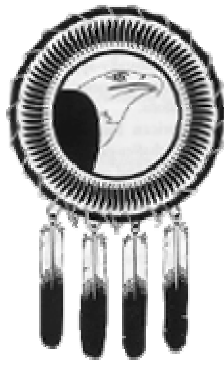


**American Indian Tribes'  
Financial Accountability  
to the United States Government:  
Context, Procedures and Implications**



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## **Abstract**

In the United States, federal funds are transferred to American Indian nations in three ways: via grants, “self-determination contracts” and “self-governance compacts.” The accountability mechanisms differ according to the type of funding arrangement. In general, grants require substantial ongoing accountability to federal funders. Self-determination and self-governance funding requires significant upfront evidence of accountability capacity, but mandates few post-funding reporting requirements. These types of funding also give tribes greater flexibility in the use of funds. While reasonably successful, the transfer of funds from the federal government to tribal governments is not without difficulties. For example, tribal governments sometimes suffer from internal financial mismanagement. It is also the case that American Indian nations are inadequately funded by the U.S. government for the administrative costs of operating programs and receive little technical help in financial management from federal agencies, which may make the federal government at least partially culpable for these difficulties. Nonetheless, the “mix” of funding opportunities available to tribal governments and the minimum accountability standards built into those funding arrangements appear to result in a set of incentives that keep most tribal governments out of financial difficulty. Additionally, these even support the growth of tribal government accountability to tribal citizens. In Canada, funding mechanisms comparable to self-determination contracts and self-governance compacts could incorporate a rights-based approach, consortia options for smaller First Nations and technical and financial support for administrative management systems.

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## Introduction

The relationship between American Indian tribes and the U.S. government is complex and evolving. For years, it was best characterized by paternalism and hostility, but in 1975, under President Nixon's leadership, Congress passed the *Indian Self-Determination and Education Assistance Act*. The policy it embodied acknowledged the failure of previous approaches and reaffirmed the government-to-government relationship between Indian nations and the U.S. government. Today, not only as a result of the Act and its "self-governance" amendments, but also because of the tribes' growing connections with departments of the U.S. government other than the Bureau of Indian Affairs (BIA), the relationship is characterized by flexibility in (or, from a tribal perspective, sovereignty over) tribal program and budget management.

This paper, written at the request of the Canadian federal government's Indian and Northern Affairs Canada (INAC) Research and Analysis Directorate, provides an overview of the methods used to manage the transfer of funds from the U.S. federal government to tribes.<sup>1</sup> Research was conducted largely through in-depth interviews with senior U.S. government staff and tribal administrators and a review of readily available background documents. Thus, this is a policy paper more than an academic review of program effectiveness. Further, it is worth noting that at the time of the interviews, the BIA was embroiled in a court case over the mismanagement of Indian trust funds<sup>2</sup>; the scandal conditioned responses, since the credibility of demanding accountability from tribes is clearly affected by the Bureau's own financial management and accountability difficulties.

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<sup>1</sup> While states may have a variety of contracts with tribes (informants from the State of Montana reported as many as 500 in early 2002), the U.S. federal government provides the overwhelming majority of external funds flowing to tribal governments.

<sup>2</sup> Interviews were held between December 2001 and February 2002. During those months, there were dramatic developments in the *Cobell v. Babbitt* (now *Cobell v. Norton*), a class-action lawsuit filed in 1996. The suit's plaintiffs allege that *billions* of dollars in Indian trust funds are unaccounted for. The Interior Department manages over 300,000 trust accounts on behalf of individual Indians, which generate over \$500 Million U.S. a year in revenue from Indian-owned lands. Numerous internal and external reviews have found acute problems with missing records and poor accounting practices. In December 2001, a federal court judge ordered that all on-line operations of the Individual Indian Monies trust data system be closed down due to a severe risk of penetration by hackers and other unauthorized individuals. In response, the BIA shut down its Internet site and, for a time, all external e-mail capability. Also in December 2001, Interior Secretary Gail Norton went on trial for contempt of court for ignoring court orders to clean up the trust and for submitting false reports on trust reform.

## Federal Allocations

The Bureau of Indian Affairs, an agency of the Department of the Interior (DOI), is the principal federal agency responsible for the administration of federal programs for the 560 recognized tribes in the United States. The BIA, however, is far from the exclusive agent of the federal government in its relations with tribes. For example, the Indian Health Service (IHS) at the Department of Health and Human Services (DHHS) provides extensive services to tribes in its role as the primary federal health care provider and health advocate for Indian people. Within their respective areas of responsibility, most other departments and agencies administer programs specifically for tribes or, at a minimum, cite tribes as eligible applicants for services available to state and/or local governments. Federal departments with significant tribal programs include the Department of Housing and Urban Development (HUD), Department of Justice (DOJ) and the Environmental Protection Agency (EPA).

Historically and at present, the BIA and IHS budgets provide the majority of federal funds to tribes. One commentator estimates that these agencies together account for approximately 65% of federal funding for Indian programs and services.<sup>3</sup> Although the amount of funds flowing to tribes from other federal departments and agencies is fairly substantial, there is a fundamental difference between the types of funding available from these sources. In a report on tribal funding, the BIA notes, "other agencies' programs provide project grants, loans, or technical assistance."<sup>4</sup> That is, a significant portion of BIA and IHS funding is recurring, provided on an on-going basis to tribal governments, while in contrast, most of the funds from other departments and agencies are project grants or loans provided under a specific program mandate.

Federal base funding for tribes is sourced primarily from the "Tribal Priority Allocations" (TPA), a specific activity within the BIA budget. In the words of the BIA, the TPA is the "principle source of funding for tribal government operations and the provision of services to tribal members."<sup>5</sup> The tribes' base includes funding for several programs and services provided to tribal members/citizens<sup>6</sup> as well as funding for local units of tribal governments and BIA agency offices on

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<sup>3</sup> Jordan S. Dill, *Indian Issues of Consequence*, <[www.dickshovel.com/biafnd](http://www.dickshovel.com/biafnd)> (May 2002). The percentage of funds provided to Indian Country from the BIA and IHS has been falling over time, but these agencies still provide the *majority* of funds to Indian Country.

<sup>4</sup> U.S. Department of the Interior, Bureau of Indian Affairs, "Report on Tribal Priority Allocations," July 1999, p. 48 (hereafter, "TPA Report").

<sup>5</sup> *Ibid.*

<sup>6</sup> The technical language of federal law in the United States refers to "tribal members." Increasingly, however, American Indians and their advocates use the phrase "tribal citizens" to reflect tribes' status as nations and their members' status as citizens of those nations.

reservations.<sup>7</sup> There are eight TPA program categories: Tribal Government, Human Services, Education, Public Safety and Justice, Community Development, Resources Management, Trust Services and General Administration. The task force that proposed the TPA budget system intended for most local programs to eventually be included in this funding category; however, that goal has been hampered by Congress' desire to earmark funds for specific programs. In 1998, approximately one third of the overall BIA operating budget was base funding to tribes.<sup>8</sup>

TPA base funding is distinguished by the fact that tribes prioritize this BIA budget element, giving "tribal governments the power to decide how scarce federal funds should be allocated."<sup>9</sup> Tribes submit prioritized requests for funding to the BIA, specify the desired level of funding per category and list categorical breakdowns for several different levels of estimated funding (such as 90%, 100% and 110% of the previous year's budget). In this way, if Congress approves an increase in TPA funding for a given year, tribes have identified their top candidate programs for additional allocations, and if TPA funding is reduced, tribes have indicated the areas in which they will make adjustments. Funding for TPA (and its precursor program) decreased in real terms from 1981 to 1990, increased in the early 1990s, decreased again in 1996 and 1997 and was restored to the early 1990s level in the late 1990s. It is widely recognized that base funding is insufficient for meeting the high level of need in Indian Country.

While tribes with a large population or land area generally receive more funds, the size of the TPA base allocation to individual tribes is not determined by consistent principles. Rather, "TPA base budgets are a result of history, geography, policies, politics and timing."<sup>10</sup> A tribe may have developed programs independently or been allocated special funding to meet immediate needs, and over time, some of these monies may have been absorbed into its TPA base. Conversely, some programs have been removed from the TPA budget, and tribes that had listed them as a high priority lost significant TPA funding from their bases.<sup>11</sup> The ad hoc way in which base funding evolved has thus led to a considerable disparity in TPA base funding between tribes. Recent increases to

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<sup>7</sup> The BIA Area (regional) and Central (national) Office operations are not funded from TPA, but from separate allocations in the budget.

<sup>8</sup> Calculation based on 1998 budget figures as reported in the "TPA Report," p. 16.

<sup>9</sup> "TPA Report," p. 14.

<sup>10</sup> "TPA Report," p. 37.

<sup>11</sup> One example is law enforcement. Congress agreed to increase spending as long as the funds were earmarked for this purpose. The program was thus removed from tribal base amounts.

the TPA have exacerbated the problem, since they have been general percentage increases based on the existing distribution of funds.<sup>12</sup>

Although the budget estimates for base funding specify amounts allocated to individual programs, tribes and BIA agency/regional offices possess some flexibility in shifting available funds. The ability of a tribe to reallocate its base funds is determined by the nature of its program management agreement(s) with the federal government, which are described in detail in the following section.

In addition to TPA base funding, tribes receive program-specific federal funds. Many of these programs, run by the BIA, IHS or other federal departments and agencies, are on-going programs funded yearly. With the exception of self-governance tribes discussed in the following section, these funds are not subject to prioritization by tribes and must be spent to meet specified, pre-determined program objectives. Examples of recurring non-base programs within the BIA budget include contract support, welfare assistance, the housing improvement program, road maintenance, schools operation and law enforcement. In contrast to base funds, BIA resources for non-base programs are allocated to tribes using a specific method of distribution, most commonly a formula or benchmarks.

The BIA, IHS and other federal departments and agencies also fund programs and projects of limited duration. This non-recurring program funding is generally allocated through competitive grant processes. The amounts involved can be substantial for tribes that choose to actively pursue such resources.

Tribes identify funds available for yearly and special programs using a number of information sources. Chief among these is the *Catalogue of Federal Domestic Assistance*, a database of federal programs, projects, services and activities providing financial and non-financial assistance. The *Catalogue* is available both in print and on-line. In addition, the *Federal Register* prints "Notices of Funding Availability." These information sources are used not only by tribes, but also by state governments, local governments, non-profit organizations, educational institutions and the general public.

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<sup>12</sup> "TPA Report," p. 14.

## Protocols and Conditions

In the last 30 years, the U.S. government and tribes have developed and refined new protocols and conditions to govern transfers of funds in keeping with the government-to-government relationship. The two major innovations in tribal funding arrangements – self-determination contracting and self-governance compacting – currently apply only to programs of the Department of the Interior (including the BIA) and the Indian Health Service (which, as noted above, is an agency of DHHS). This section addresses program grants first and then turns to these newer arrangements.

### Program Grants

Federal departments and agencies other than the BIA and the IHS fund tribes through competitive or formula-based grants. Additionally, the non-recurring programs of the BIA and the IHS are funded as competitive grants.

Each department follows its own grant awarding procedures. Generally, a tribe will submit a “needs statement” or “general identification of Tribal administrators interviewed noted that the application paperwork is manageable, particularly if the tribe has a dedicated grants staff. They added, however, that the competition for certain grants can be intense.

Recognizing the fragmented nature of existing grant funding sources, attempts have begun in Congress to improve coordination. In introducing a bill to improve the coordination of Indian development funding between federal departments, Senator Ben Nighthorse Campbell observed that:

One reason for the lack of success, despite spending billions of dollars promoting Indian economic development, is the absence of a consistent and consolidated federal mechanism that targets development resources to the areas and projects that are most promising. Indian business, economic and community development programs span the entire federal government, and for any given project undertaken by a tribe there may be 6 to 8 or more agencies involved. This fragmentation and lack of coordination is not producing the kind of results Indian country so badly needs.<sup>13</sup>

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<sup>13</sup> U.S. Senate, “Statements on Introduced Bills and Joint Resolutions,” February 15, 2001, p. S1471. This bill was introduced in the first session of the 106th Congress and referred to committee on February 15, 2001. The Senate Committee on Indian Affairs held hearings on the bill in early May 2002 but further action was not taken before the close of the Congressional session.

While important, tribal interviewees' focus was less on consolidation than on the expansion of self-determination contracting and self-governance compacting to other federal departments and agencies. Since grants are specifically targeted and of limited duration, they are obviously not particularly well suited for the provision of on-going tribal programs and services.

### **Self-Determination Contracts**

The *Indian Self-Determination and Education Act of 1975* (also known as Public Law 93-638 or simply P.L. 638) recognized the limitations of direct service delivery to tribal citizens and gave tribes the option of administering programs themselves. A contract, the elements of which are described more completely below, was the vehicle chosen for the transfer of control. Under P.L. 638, tribes can elect to contract with the Department of the Interior (including the BIA) or the IHS to self-administer one or several of the existing federal programs for their tribal citizens. Approximately 525 of the 560 recognized tribes in the United States participate in at least one self-determination contract.<sup>14</sup>

The process of assuming management control of a BIA or IHS program, as laid out in the Act's regulations, is relatively straightforward. One of the provisions is that a tribe can find out how much the agencies are spending on any particular program for tribal citizens. Any program amount that is currently being spent can be requested for transfer.<sup>15</sup> Tribes submit a document identifying the program(s) that the tribal government intends to manage. The proposal specifies how many people the tribe will serve under the contract and the type of services that will be provided. Tribes can then make adjustments in the program, providing that the basic program objectives as laid out in the contract are met. Separate contracts must be negotiated for each program that the tribe intends to administer and funds cannot be transferred between contracted programs.

The underlying principle of self-determination contracting is that tribes have the right to manage their program funds. The BIA or IHS cannot refuse to work with a tribe that has chosen to contract. If a proposal is declined, the BIA or IHS must provide technical assistance to overcome the stated objections to the proposal. The regulations stipulate that a tribal proposal may only be denied, within ninety days of receipt of the proposal, for five reasons:

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<sup>14</sup> An individual tribe or a consortium of tribes may elect to contract and many tribes, particularly smaller ones, have elected to participate in contracting via consortia. Therefore, the estimate reflects *participation* in contracting and does not necessarily imply that each of the 525 has individually contracted with the BIA or IHS.

<sup>15</sup> The program amount does not include certain administrative costs. The funding of indirect cost has been an ongoing issue for tribes and will be further discussed under the heading "Deficits and Difficulties" below.

1. The service rendered to the Indian beneficiaries will not be satisfactory
2. Adequate protection of trust resources is not assured
3. The proposed project or function cannot be properly completed or maintained
4. The amount of funds proposed is in excess of the applicable funding level
5. The subject of the proposal is beyond the scope of the programs, functions, services or activities covered under the Act.<sup>16</sup>

In practice, very few requests for contracting are denied. As one BIA representative emphasized, "It's not really a negotiation." Tribes can challenge a negative decision either by appealing to the relevant departmental Secretary or suing in a U.S. District Court.

The contracting regulations also stipulate that the tribe must meet minimal baseline standards for its organizational management systems which "permit preparation of reports required by a self-determination contract and Act and permit the tracing of contract funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or prohibitions contained in any statute that applies." Seven system elements are specifically mentioned: financial reports, accounting records, internal controls, budget controls, allowable costs, source documentation and cash management. The regulations are very clear, however, that an Indian nation develops its financial management systems in accordance with tribal laws and procedures.

### **Self-Government Compacts**

Self-governance compacting is the most recent development in federal-tribal relations. Pilot self-governance projects were run in the late 1980s/early 1990s, and the *Tribal Self-Government Act* was passed in 1994. Originally, self-governance compacts could be negotiated only for Department of Interior funds, including those of the BIA. However, eligibility for this type of funding agreement has now been extended to IHS programs.

Under self-governance, tribes are able to set their own program priorities within a global budget. Funding is transferred from the federal government for available programs chosen by the tribe using what is essentially a block grant. In late 2001, 80 tribes or tribal consortia had self-governance compacts, a figure that

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<sup>16</sup> U.S. Government Printing Office, *U.S. Code of Federal Regulations, Title 25, 2002, Section 900.22.*

encompasses the participation of 221 tribes (or approximately 40% of the total number).

Tribes electing to compact must meet several criteria, which are somewhat more stringent than the criteria for self-determination contracting. The tribal government must pass a resolution in support of compacting, undertake some type of planning activity and obtain a minimum of three consecutive clean audits (conducted by an independent auditing entity) prior to becoming a self-governance tribe. The Office of Self-Governance evaluates tribal applications and negotiates compacting agreements between tribal governments and the applicable federal departments and agencies. Notably, this office is an arm's-length federal agency, separate from the BIA.

As with tribes opting to manage programs under self-determination, if the above conditions are met, the U.S. government is obligated to proceed with self-governance compacting in response to a tribal request. Once a tribe has compacted with the federal government, there are few (some say virtually no) conditions in the Act that must be upheld in order to renew funding.

## **Accountability**

Audits and reports are the two primary tools used to ensure that U.S. government funds flowing to tribes are spent for their intended purposes. Audits provide useful post-facto accountability by exposing technical financial management problems. Non-audit reports, mostly in narrative form, are used to evaluate the extent to which program goals are being met. Generally, they are prepared at the program's completion, but they also may be requested at intervals during the program.

The *Single Audit Act of 1984* (amended in 1996) is the primary vehicle used to monitor tribal spending of federal funds. The Act requires that state and local governments, Indian tribes and non-profit institutions receiving more than \$300,000 of federal funding in a year have an audit performed. It was intended to reduce the reporting burden on non-federal entities that receive significant amounts of federal funding by setting up a uniform system of auditing. The Act attempts to replace program-specific auditing requirements by providing standardized information on the grantee's financial management and compliance system to all federal funding agencies.

An end-of-year report prepared in accordance with the Single Audit Act includes the following information:

- The results of a third-party audit of the grantee's financial statements

- A description of the system of internal controls put in place by the grantee to protect assets
- A report on compliance with federal laws common to all federal assistance awards.<sup>17</sup>

Even though departments and agencies still may choose to require individual program audits, the Single Audit is widely accepted across the federal government. For example, the self-determination and self-governance legislation specifically require that an audit be carried out pursuant to the Single Audit Act.

In fact, it is the only statutory accountability reporting required of self-determination and self-governance tribes. Federal departments and agencies also are known to use audits prepared under the Act as proof of sound management when making decisions about the provision of future monies.

The implementation of the Single Audit Act is clarified in Office of Management and Budget (OMB) circulars. Tribal governments follow the accounting and financial reporting standards established by the Governmental Accounting Standards Board (GASB), which sets standards for all governments in the U.S. other than the federal government.<sup>18</sup> Tribes, states, counties, cities and public organizations such as universities and power plants are required to follow GASB guidelines in order to obtain clean audits. Two years ago, a Native American Finance Officers Association representative was invited to join the technical advisory committee to GASB in order to provide, in addition to general advice, input and direction for tribal government financial issues. There are currently no specific GASB financial accounting and reporting standards for tribal governments.

Non-audit reporting requirements differ according to the arrangement by which the tribe receives its funds. Grants generally carry the most extensive reporting requirements. Each grant requires an annual report and some also contain provisions for quarterly or mid-year reports. There is no uniform report format, which means that each granting department or agency sets different standards for the reporting it requires. For Indian nations with significant grant monies, the burden is onerous, and for certain programs, tribal governments have been known to conclude that the administrative toll makes pursuit of a grant not worth the effort.

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<sup>17</sup> "TPA Report," p. 11.

<sup>18</sup> The GASB operates under the auspices of the Financial Accounting Foundation. GASB and the Financial Accounting Standards Board (FASB), its private-sector counterpart, determine the Generally Accepted Accounting Procedures (GAAP) for audits.

Tribes with self-determination contracts provide annual reports on their program operations. A BIA or IHS contracting officer monitors the tribes and is mandated to collect certain information based on the requirements of the contracted program(s).

Tribes operating under self-governance compacts are not required to provide information on their program objectives. Although they are encouraged to submit reports, unofficial estimates suggest that less than 50% of self-governance tribes do so. This creates a difficulty for federal officials, since their agencies nonetheless must report on the results of this category of funding under the federal *Government Performance and Results Act of 1993*. The BIA complies by providing Congress with reports based on information from its area and regional offices, with tribal comments attached. BIA personnel admit, however, "these reports provide no standard information about program accomplishments".

### **Deficits and Difficulties**

According to BIA officials, it is rare for tribes to run program funding deficits. In grant and contract spending, there is a specific amount of money designated for a defined, finite task, so it is difficult for a tribe to run a deficit. Under self-governance compacts, the block grant nature of the funding means a tribe can manage specific program deficits by switching monies from one area into another.

When they arise, tribal financial difficulties most often are related to internal problems. One BIA interviewee observed that financial management difficulties are normally explained by one of two situations: inexperienced tribal officials or tribal political conflict. BIA officials pointed out that the agency's regional and area offices work closely with tribes to resolve any issues related to financial management. Tribal interviewees, however, countered that BIA help in setting up their administrative functions was negligible or that the advice, if available, was not useful.<sup>19</sup>

If financial management problems do occur, the granting department or agency may opt to provide funds through a monthly drawdown. This places the tribe in a "pay-as-you-go" situation. In general, the department or agency will not provide additional funding until the tribe can prove that its management and accounting procedures have been modified to rectify the problem. In drastic cases, where a funding freeze would interfere in the provision of essential programs or services,

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<sup>19</sup> Of course, tribal government perceptions of the BIA's capacity for giving financial management advice are colored by the scandal surrounding the Indian trust monies. See Footnote 2.

the federal funding agency may reassume direct delivery.<sup>20</sup> For example, the authors know of several recent situations in which the BIA has resumed administration of law enforcement services. In extreme cases, where the misappropriation of federal funds is suspected, the matter is referred to the local Federal Bureau of Investigation (FBI) office and prosecuted in a federal court.

Although tribes are not experiencing undue difficulty in maintaining their program spending within available budgets, deficits in administrative costs are a major problem. The lack of adequate financial support for contract support (including indirect costs) is a long-standing issue and one that seriously threatens the viability of the self-determination contracting and self-governance compacting programs. While the legislation and regulations for these funding programs lay out the need to properly fund contract support costs, budget appropriations from Congress have failed to meet demand.<sup>21</sup> In the late 1990s, courts and administrative law judges began to award tribes substantial damages against the federal funding agencies. In response, Congress imposed a temporary moratorium on any new contracting in fiscal year 1999 and allocated an additional \$10 million U.S. to contract implementation in 2000.

Both BIA and tribal interviewees pointed to this shortfall of administrative funds as a primary source of financial difficulties for tribes. In order to support the administrative costs of grants and contracts when inadequate funding is available, Indian nations are forced to cover the costs from elsewhere in the tribal budget. Obviously, this presents particular difficulties for tribes with minimal self-generated revenues, who must either use program operation dollars or shoulder an administrative deficit. The National Congress of American Indians observes that "if tribes are not reimbursed fully for their contract support costs and they therefore experience a shortfall, they are effectively penalized for exercising their self-determination rights, since the only choice left is to actually cut into the transferred BIA and IHS programs themselves in order to cover the shortfall."<sup>22</sup>

There is no comprehensive or specific documentation of tribal deficits in program spending or government operations. A partial understanding of overall tribal government finances can be gained from BIA's analysis of tribal debt levels,

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<sup>20</sup> Federal program managers were unsure whether resumption of service delivery could be done for a self-governance tribe without a tribal request. Such a move by the BIA could perhaps lead to a court challenge.

<sup>21</sup> Indirect cost rates are determined on a tribe-by-tribe basis by the Department of the Interior Office of the Inspector General or the Department of Health and Human Services Division of Cost Allocation. One reason for individualized administrative cost allocations is that tribal rates are generally higher than the comparable federal rate. Tribes counter, however, that DOI and DHHS fail to take into account resources located at the area and central offices.

<sup>22</sup> National Congress of American Indians, "National Policy Work Group on Contract Support Costs Final Report," July 1999, p. 22.

which was conducted as a complement to the Tribal Priority Allocations review. BIA reviewed 311 tribal single audits for 1996 and found 128 tribes reporting long-term debt. The overall debt for the reporting tribes was over \$1 billion U.S. While the majority of tribes had debt under \$1 million U.S., seven tribes had debts of more than \$20 million. Certainly, debt per se is not a cause for concern. In fact, the ability to qualify for debt financing is an indicator of financial management strengths and the existence of relatively assured sources of tribal government income. However, debt in combination with other data *is* a useful indicator. For example, in the same report, the BIA noted that a third of the tribes reporting long-term debt also reported net losses from business enterprises (that is, approximately, 43 of the 311 for which single audits were reviewed). These tribes may have difficulty servicing their debts and, therefore, are more likely to carry deficits in program or government operations.

It is worth noting that tribal interviewees were emphatic that the option of running deficits and accumulating debt is their prerogative. The attitude expressed was that tribal governments should be treated no differently than any other level of government.<sup>23</sup> Indeed, for tribal governments with adequate income and financial controls, there is no reason for the federal government to prevent tribes from assuming long-term debt for which they are capable of taking responsibility and that may have important developmental purposes. This contrasts greatly with the responsibility of tribal governments and their federal trustees to prevent deficits that impede the delivery of critical services and core government operations.

### **Financial Management Incentives**

In the U.S. system of tribal funding transfers, the incentive to properly manage funds is based on self-interest at the tribal level. In the words of one BIA employee, "tribes don't want to behave recklessly since they know it jeopardizes their chances of receiving additional funds." For example, unless a Native nation that has failed to manage federal funds effectively in the past can demonstrate improvement in its management systems, funding departments and agencies are unlikely to award future competitive grants.

For Department of the Interior, BIA and IHS funds, the self-determination and self-governance policies also provide an incentive to prudent management: tribes must demonstrate their abilities to take over programs. Tribes interested in administering their own programs have a strong desire to avoid direct service delivery by the federal government.<sup>24</sup> By 2000, over 55% of the total BIA budget

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<sup>23</sup> Yet it is also worth noting that some U.S. cities and states have passed "no deficit" legislation that disallows deficit program or operational spending.

<sup>24</sup> Although admittedly, some U.S. tribes choose not to administer or control federal programs on the principle that it weakens the federal government's trust relationship.

and 40% of the IHS budget was being spent by tribal governments through the contracting and compacting programs. A National Congress of American Indians report notes that “the nation’s self-determination policy has been a resounding success for tribal communities. Virtually every tribe in the United States is involved in the operation of at least some programs and many operate or control all available programs.”<sup>25</sup> If a tribe has several self-determination contracts, there is a significant incentive to move to self-governance compacting in order to gain the ability to creatively design programs and redirect funds.

Certainly, there is an element of “sink or swim” in these funding relationships. Tribes are given increased responsibility to manage funds but must set up adequate financial management practices in order to take advantage of the choices offered. Tribal administrators interviewed for this paper noted that their governments use several strategies to promote sound internal financial management. Most often mentioned is the use of quality outside consultants, particularly accountants and auditors. Interviewees also pointed out that several Indian organizations provide support, education and networking opportunities, such as the Native American Finance Officer Association (NAFOA) and the Tribal Tax Conference. Administrators agreed, however, that there is no one model, and that each Indian nation must develop its own appropriate and workable system of financial management and internal controls.

For self-governance tribes (and to a lesser degree for tribes engaged in P.L. 638 contracting), accountability has shifted away from federal procedures and requirements to oversight by tribal governments and tribal citizens. As one BIA official observed, “either you are going to trust tribes or you are not. It’s a difference in attitude: you either assume they are going to fail, or you presume they want to be successful and create opportunity.”

## **Conclusions for Canada**

The U.S. experience in managing the various types of funding transfers from the federal government to tribes highlights some of the challenges inherent in balancing flexibility for tribes with the desire for the federal government to control the money it is spending. Several initial observations can be made.

First, the move to increased tribal control over programs and services being provided to tribal citizens stemmed from an essentially political decision to deal with tribes on a government-to-government basis. The resulting arrangements gave tribes more decision-making power and financial maneuvering room – and had far-reaching consequences for tribal financial management. Particularly under self-governance compacts, accountability requirements for transferred

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<sup>25</sup> “National Policy Work Group on Contract Support Costs Final Report,” op cit., p. 21.

funds are kept to a minimum as federal rules mandate that tribes produce relatively little evidence of their programs' effectiveness. Further, the U.S. government has little control over which tribes get this flexibility, since under its rights-based approach tribes can choose whether or not to participate. In order to participate, tribes must prove that they can meet the established eligibility criteria.

Based on the interviews conducted for this paper, however, it appears that the American approach has been fairly successful. Particularly under self-governance arrangements, responsibility for keeping tribal governments accountable for the way funds are handled has, in effect, been transferred to tribal citizens. Such accountability depends on the administrative mechanisms within the tribal government, their transparency and, ultimately, on voters' democratic choice to punish those who allow funds to be mismanaged. That tribal citizens actually have the resources to exercise this responsibility is not a condition for entry into compacting agreements. Whether or not they do is a question beyond the scope of this paper, and is an important topic for future research.

Second, one of the important features of the system of accountability in the U.S. is that tribal governments are treated similarly to other levels of government that receive federal funds. Tribal interviewees' comments suggest that this gives legitimacy to the federal government's auditing and accounting procedure requirements. An additional advantage to this even treatment in evaluation is that it makes tribes eligible for a broad range of funding opportunities. In other words, they may apply for funds from many federal programs alongside state and local governments and are not restricted to applying for funds that have been set aside specifically for Indians.

Even so, it should be noted that the administrative systems required to solicit and manage U.S. federal funding are complex. Many First Nations in Canada have very small populations, which may make it difficult to find an individual within the community with the necessary financial and administrative expertise. If a small community hires expertise, it may find it difficult to oversee the relationship. Given these considerations, a third observation is that the tribal consortia model may be an interesting organizational form for Canadian First Nations to explore. In the U.S., consortia are used mainly in Alaska and California, where tribes are typically small and the settlement pattern more closely resembles that found in Canada. Since the opportunity to enter self-determination contracts and self-governance compacts is made available to both tribes and consortia, the policy ensures that small tribes with limited personnel and administrative resources may still benefit from local program control. Critical aspects of the consortia are that tribes choose membership (it is not externally dictated), that consortia action may be restricted to one or a few issues (most consortia do not deal with a

smorgasbord of programs) and that they are Native-run. Together, these elements help the consortia fit within the spirit of self-governance.

A fourth issue underlined by the U.S. example is that a large number of First Nations lack access to significant non-federal revenue. South of the border, it is generally those tribes that are most reliant on federal dollars for tribal government revenue that have been most in need of adequate contract support funding (indirect cost reimbursement) and most tempted to use program funds to support purposes other than those for which they were intended. While a “pay-as-you-go” approach to program funding is one solution, it is not adequate when the real problem is an underdeveloped and insufficiently funded tribal administrative system. It is illustrative that every tribal interviewee stressed the importance of obtaining the resources to properly support the development and maintenance of tribal administrative systems. Some suggested that this could take the form of direct technical assistance from the federal government or the form of funding to hire an outside party to consult on management methods.

A final note of caution needs to be sounded on the relationship between accountability and the allocation of funds. Although the self-governance arrangement has proven to be popular with tribes, the lack of reporting of results to the federal government is somewhat problematic. While accountability to tribal citizens rather than the federal government leads to priorities more in tune with local realities, the overall budget for self-governance programs is still allocated by Congress. Without in-depth reporting, there is limited information on which Congress can base funding decisions. As one BIA employee pointed out, “it’s hard to make a convincing case for extra funding for a specific need when you will not necessarily spend the money on that program.” A tribal interviewee countered that lobbying at Congress takes care of this problem. In Canada, where funding allocations are determined globally by Parliament and implemented by the civil service, an approach based on lobbying is not functional. Thought must be given to finding a method or type of objective-based reporting that is not intrusive or burdensome to First Nations. To date, this goal has eluded U.S. policy-makers.

## **Conclusion**

Financial management capacity is a crucial element of overall tribal governing capacity. As this examination has highlighted, it may also provide a critical underpinning to self-rule. As tribes and First Nations regain control over

government functions and activities in their communities, other research suggests it is likely that socio-economic development will follow.<sup>26</sup>

The U.S. has experienced some notable success by responding to tribes' requests for increased tribal power over the management of programs and services provided to tribal citizens. In turn, many tribes have taken over the responsibility for spending funds in their communities. Rather than producing a situation in which funds are misused or spent ineffectively, contracting and compacting have, for the most part, led to efficient programs more in tune with tribal needs. Tribes have risen to the challenge of expanding their government functions by setting up internal accountability, controls and financial management procedures. The alternatives of dissatisfied tribal citizens, a return to direct service delivery by federal departments and agencies, and/or reduced grant monies are sufficient incentives for most tribes to maintain a viable system. With attention to capacity development and adequate funding, contracting and compacting type arrangements can be considered a feasible model for moving towards an improved government-to-government relationship between First Nations and the Government of Canada. Opportunities for grant monies from a wider variety of federal departments and increased symmetry between tribal, provincial and municipal governments may be elements of an expanded model with still more incentives for good tribal government management.

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<sup>26</sup> See, for example, Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal*, vol. 22, no. 3, 1998, pp. 187-214.

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## Interviews

Note: Interviews were conducted with the promise of confidentiality. Thus, only job titles and approximate locations identify the interviewees who contributed to this report.

Analyst. U.S. Department of the Interior, Bureau of Indian Affairs, Audit and Evaluation. December 17, 2001.

Area Manager. U.S. Department of the Interior, Office of Self-Government. January 30, 2002.

Attorney specializing in Indian issues. Washington, D.C. law firm. January 3, 2002.

Chief Financial Officer. Tribal Government (of a Northern Lakes Tribe). January 30, 2002.

Financial Manager. Tribal Government (of a Northern Lakes Tribe). January 30, 2002.

Programs Administrator for Social Services and Self-Government Coordinator. Tribal Government (of a Northwestern Tribe). January 28, 2002.

Program Coordinator. Tribal Government (of a Northwestern Tribe). December 17, 2001.

Senior Executive. U.S. Department of the Interior, Office of Self-Government. December 20, 2001.

Senior Manager. U.S. Department of the Interior, Office of Self-Government. December 20, 2001.

Senior Manager. U.S. Department of the Interior, Bureau of Indian Affairs, Self-Determination Services. January 30, 2002.

Senior Manager. U.S. Department of the Interior, Bureau of Indian Affairs, Trust Policy and Management (previously in Audit and Evaluation). January 28, 2002.