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The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting

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THE MASTER'S TOOLS: TRIBAL SOVEREIGNTY
AND TRIBAL SELF-GOVERNANCE
CONTRACTING/COMPACTING

Danielle A. Delaney

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THE MASTER'S TOOLS: TRIBAL SOVEREIGNTY AND TRIBAL SELF-GOVERNANCE CONTRACTING/COMPACTING

Danielle A. Delaney *

I. INTRODUCTION

When Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975, the goal was to create mechanisms of tribal self-governance through the process of government contracting.¹ By contracting funds to tribal governments used by federal agencies via the government contracts process, the federal government could turn over those funds to the tribal governments to manage contracted programs as they saw fit and thus provide tribes greater control over their socio-economic situation.² On a number of metrics, ISDEAA is an enormous success. More than 60% of tribal programs are administered through self-governance contracting/compacting.³ Tribal self-governance contracting/compacting has significantly raised American Indian and Alaska Native (AI/AN) health outcomes, standards of living,

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¹ FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, § 22.02 at 1386 (2012) [Hereinafter COHEN'S HANDBOOK].

² See President Richard Nixon, *Special Message on Indian Affairs*, H.R. Doc. No. 91-363, 1970. The Nixon Administration did not originate the idea of manipulating the government process in this manner. The idea began with the Kennedy Administration in response to a document released by the National Congress of American Indians (NCAI) titled "Declaration of Indian Purpose" in 1961, which decried the state of BIA controlled reservations and the lack of self-determination for AI/AN governments. The Johnson Administration initiated a series of demonstration programs which the Nixon Administration then used a blueprint for ISDEAA. Telephone Interview with Eric Eberhard, Professor of Federal Indian Law at the University of Washington School of Law and former legal counsel to the Senate Committee on Indian Affairs (Nov. 11, 2015). See further, THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, at 1961-1969 (2001).

³ See U.S. Dep't of Interior, 2008 Annual Accountability Report (Sept. 2008); see further, U.S. Government Accounting Office (GAO), "Highlights" in INDIAN ECONOMIC DEVELOPMENT, GAO-04-847 (Sept. 2004) available at <http://www.gao.gov/assets/250/243913.pdf>.

and education rates across tribal backgrounds.⁴ However, whether ISDEAA empowers tribal *sovereignty* remains an open question—a question with important policy implications for tribal governments.⁵

For example, tribal leadership in Tribal Budget Consultations with various federal agencies continually demand the full recognition of tribal sovereignty—recognition that federal agencies like the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) continually elide by suggesting that ISDEAA contracting/compacting with the tribes is the same, or functionally equivalent to, the recognition of tribal sovereignty.⁶ Conflating tribal sovereignty with tribal compacting/contracting under ISDEAA not only ignores the demands of tribal leadership, but it also obscures the legal innovation at the heart of ISDEAA.

This article charts the difference between the legal theories of tribal sovereignty and tribal self-governance contracting/compacting as argued for by tribal advocates. Conflating tribal self-governance contracting/compacting with tribal sovereignty ignores both the demands of tribal advocates and the legal history of tribal self-governance contracting/compacting. I present three interlocking arguments: (1) that ISDEAA tribal self-governance contracting/compacting was conceptualized and designed by tribal advocates to be a mechanism inside the American legal system, thus slightly removed from arguments on tribal sovereignty which tribal advocates argue stands outside the framework of United States Federal law; (2) that tribal self-governance contracting/compacting was, and continues to be, a practical strategy on the part of tribal advocates to provide for the needs of their communities, while tribal sovereignty is an ideal for which they continue to fight; and, (3) that tribal self-governance contracting/compacting cannot be considered an act of tribal sovereignty unless such claims are understood in fundamentally different—and lesser—terms than demanded by tribal advocates.⁷

⁴ See JOSEPH P. KALT, ET. AL., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION*, The Harvard Project on American Indian Economic Development (2008).

⁵ See generally KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* (2007).

⁶ See *President's FY2017 Indian Country Budget: Hearing on S. 1392 Before the S. Comm. on Indian Affairs*, 114th Cong. 2 (2016) (statement of Lawrence Roberts, Acting Assistant Secretary of Indian Affairs) (referring to tribal self-governance contract/compacting as a recognition of “Tribal Nation-Building”).

⁷ But see *supra* note 5 (arguing that ISDEAA was part of the post-colonial re-

Some tribal governments and organizations have remained skeptical of tribal self-governance contracting/compacting as a vehicle for meaningful tribal self-determination. These tribes argue that tribal self-governance contracting represents an abrogation of tribal treaty rights, and instead insist upon the direct federal provisioning of programs promised under treaty rights. These tribes are referred to within federal agency policy papers as “direct-service tribes.”⁸ Federal agencies argue that *Ramah Navajo School Board Inc. v Babbitt* 87.F3d 1338, a case against the Bureau of Indian Affairs for failure to pay the full contract support costs of Navajo Nation's education self-governance contract, demonstrate that tribal self-governance contracting has the double effect of removing the federal treaty responsibility while at the same time shifting the burden of those treaty obligations onto the tribes themselves.⁹ These tribes insist upon the fulfillment of the treaties between their individual tribes and the United States government on the grounds that anything else ignores their sovereignty as tribal nations. The Great Plains Tribal Chairman's Association has continually insisted upon the observation of treaty rights before tribal self-governance

conceptualization of tribal sovereignty within the colonial bounds of US federal law. He further argues that tribal exercise of self-governance contracting/compacting constitutes as “third space of sovereignty.”); *but see further*, Rebecca Tsosie & William Coffey, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, STAN. L. & POL'Y REV. 191, 191 (2001) (locating tribal self-governance contracting within a general legal doctrine of tribal sovereignty and arguing for its use to develop a culturally grounded theory of tribal sovereignty).

⁸ The BIA and IHS refer to these tribes as “direct-service” because the BIA and IHS provide services directly to the tribes opposed to forming self-determination contracts or compacts under ISDEAA with them. DEPARTMENT OF HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE CIRCULAR NO. 2005-03, DIRECT SERVICE TRIBES ADVISORY COMMITTEE CHARTER (2005) *available at* https://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_circ_main&circ=ihtm_circ_0503.

⁹ The *Ramah* line of cases are an important piece of case law for tribal self-governance contracting/compacting revolving around federal government obligations to pay full contract support costs in ISDEAA contracts. The *Ramah* cases were recently settled for \$940 million after the Supreme Court ruled for Navajo Nation in *Salazar v. Ramah Navajo Chapter*, finding that the agencies must pay full support costs even if Congress had not appropriated those costs. The settlement was finalized January 20, 2016; thus, the full impact of that settlement remains unclear (*see Ramah Settlement Funds Finally Released by Obama Administration*, INDIANZ (August 11, 2016); *Interior, Justice Departments Announce \$940 Million Landmark Settlement with Nationwide Class of Tribes and Tribal Entities*, DEPARTMENT OF JUSTICE (September 17, 2015); Renee Lewis, *Feds to Pay \$940 to Settle Claims over Tribal Contracts*, AL JAZEERA (September 17, 2015).

contracting/compacting in United States funding and legislative priorities.¹⁰ This power - inequality, they argue- not only makes the concept of tribal sovereignty through tribal self-governance contracting/compacting inherently flawed, but is also deeply insulting to the dignity of tribal nations.

Other tribal governments, most prominently Navajo Nation and Jamestown S'Klallam, argue that while the legal theory and execution of tribal self-governance contracting/compacting are not ideal, the use of government contracting has been the most successful legal mechanism for the preservation of tribal self-determination rights to date.¹¹ Self-governance tribes point to new methods of enforcing federal tribal consultation provisions, the ability to tailor programs for tribal needs, and the general increase in living standards for AI/AN peoples. White papers released by Self-Governance Communication and Education (SGCE)—a tribal think-tank on self-governance issues— make similar criticisms as the ones made by the Great Plains Tribal Chairman's Association, but argue that tribal self-governance contracting remains the best current mechanism for tribal-federal negotiations.¹² The Papers also distinguish tribal self-governance contracting from tribal sovereignty, but argue as a practical matter expanding ISDEAA contracting/compacting must guide federal funding priorities.¹³

¹⁰ The Great Plains Tribal Chairman's Association (GPTCA) is an organization formed by the tribal leadership of South and North Dakota, Montana, Nebraska, and Iowa. GPTCA represent the leadership of the largest proportion of 'direct-service' tribes in the country. GPTCA provides member tribes with lobbying, policy, and legal support; see United States Senate Committee on Indian Affairs, *Oversight Hearing: "Youth Suicide in Indian Country" Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2009) (testimony of Robert Moore, Rosebud Sioux Tribal Chairman); United States Cong. House Subcommittee on Interior, Environment, and Related Agencies, *American Indian and Alaska Native Public Witness Hearings on the Fiscal Year 2017*, 114th Cong. (2016) (testimony of John Yellow Bird Steele, Chairman of Great Plains Tribal Chairman's Association).

¹¹ Telephone Interview with Jim Roberts, Senior Policy Analysis, Portland Area Health Board (Dec. 11, 2015).

¹² See 2017-2019 *National Tribal Self-Governance Strategic Plan*, TRIBAL SELF GOVERNANCE COMMUNICATION AND EDUCATION CONSORTIUM, at 3, <http://www.tribalselfgov.org/wp-content/uploads/2017/04/17-19-SG-Strategic-Plan-online.pdf>. The Self-Governance Communication and Education organization is a non-profit organization that provides policy and technical expertise to tribes who have, or are interested in entering into, ISDEAA self-determination contracts/compacts. The group undertakes limited lobbying work and operates predominantly as the policy think-tank on tribal self-determination contracting. See generally, <http://self-gov.org>.

¹³ *Id.*; see further, TSG Legislative Priorities for the 115th Congress, presented at

Thus, tribal advocates are split between those who demand tribal sovereignty and those who demand better and expanded opportunities for tribal self-governance contracting. Or at least, this dichotomy is the vision of intra-tribal politics that one gets reading the policy papers from federal agencies. The reality of the situation is more complex. Tribal governments struggle between the need to solve the pressing problems facing their communities and the need to continue to fight for the sovereign rights of their individual nations. The federal agencies present a false dichotomy regarding tribal politics and tribal choices—either a tribe accepts tribal contracting/compacting as it stands with no contestation, or a tribe has chosen to continue to fight for the full recognition of their sovereignty and treaty rights.¹⁴ As a political reality, the divide between 'direct-service tribes' and 'self-governance tribes' in terms of concrete political action is not nearly so great as presented by federal agencies.¹⁵ Nearly all tribes capable of entering into a self-governance contract/compact have done so for at least one or more service or program previously administered by a federal agency. All tribes struggle for the full recognition of their sovereign rights. The idea that a tribe is either a 'self-governance tribe' – and thus uncritically embraces ISDEAA—or is a 'direct service tribe' – and thus rejects ISDEAA in favor of the ideal of substantive sovereignty—is an oversimplification of AI/AN political reality. Moreover, this either/or between ISDEAA or sovereignty both obscures and, at the same time, perpetuates the assumption that self-governance contracting/compacting *is* an act of sovereignty.

2016 Tribal Self-Governance Annual Consultation Conference April 24, 2016; *see also*, ACA/TSGAC Contract Support Costs and Other Current Topics Webinar, November 11, 2016.

¹⁴ This dichotomy is evident in the way the BIA and IHS divide their approach between “self-governance tribes” (meaning those tribes that engage in 638 contracting), and “direct-service tribes” (meaning those tribes that have not engaged 638 contracting). The distinction is a false one after a little bit of consideration because almost every tribe has entered at least one Title I, 638 contract or compact, but it is a division that both BIA and IHS reiterate in almost every Tribal Budget Consultation and within their agency handbooks.

¹⁵ A common explanation deployed by both IHS and BIA for budget choices, the lack of transparency with the development of budget documents, and for problems around paying full contract support costs tends to be a “divide within the Indian community” on budget priorities. *See, The President’s Fiscal year 2013 Budget for Native Programs, Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (2012) (testimony of Yvette Roubideaux, director of Indian Health Service); *see also, The President’s Fiscal year 2014 Budget for Native Programs, Before the S. Comm. on Indian Affairs*, 112th Cong. (2013) (testimony of Yvette Roubideaux, director of the Indian Health Service).

The debate around ISDEAA and its problems often centers around tribal self-governance contracting as a sovereignty mechanism. Understanding the difference between self-determination, self-governance and sovereignty is critical for advocating effectively for tribal interests. Arguing for better and more effective tribal contracts/compacts is not the same as advocating for the sovereignty rights of tribes; moreover, advocating for improvements to ISDEAA and tribal self-governance does not preclude indigenous activists from working towards substantive sovereignty for tribal communities.

Section two of this article provides a brief history of federal Indian policy and its approach towards tribal sovereignty. Federal Indian policy has changed radically multiple times over the course of United States history and the development of key concepts are often poorly understood—even by those tasked with its implementation.¹⁶ Understanding how federal Indian policy has developed is critical to understanding the current legal reality for tribal governments. Building from that base, I argue in section three that ISDEAA and '638-ing'¹⁷ are the foundation upon which modern tribal self-determination and self-governance is understood within the United States. In section four, I argue that tribal self-governance contracts cannot be considered expressions of tribal sovereignty, nor can they be considered a viable foundation for developing a legal framework of tribal sovereignty. I conclude by arguing that even with its problems and shortcomings, tribal self-governance contracting/compacting are vital parts of the legal framework protecting AI/AN communities and worth pursuing for tribal communities. I argue that substantive sovereignty for tribal communities cannot exist within the framework of United States law, but must exist as an exception to Congressional plenary powers; however, tribal self-governance and self-determination rights *can* exist within the framework of United States law.

¹⁶ See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 189-205* (2005) (describing ISDEAA as part of the turning point for tribal self-determination, but also explaining difficulty educating non-Indians on its application and meaning).

¹⁷ The process of entering into a tribal self-governance contract/compact is commonly referred to as '638-ing' a service, program, or facility—such as a hospital or clinic—after ISDEAA's public law number: Pub. L. No. 93-638, 88 Stat. 2203 (1975).

II. A BRIEF HISTORY OF TRIBAL SOVEREIGNTY IN UNITED STATES FEDERAL LAW

A. *The Marshall Court Sets the Frame: “Domestic, Dependent Nations”*

The idea of tribal sovereignty has a complicated history within United States Federal law. Tribes have existed half inside and half outside the framework of United States Federal law since the founding of the country. As “domestic dependent nations”, tribal governments have a right, in legal theory, to govern themselves within their own boundaries since time immemorial and without interference from the state or federal government. In practice, the continued existence of tribes, their governments, and their lands exists upon the sufferance of the United States Congress under the plenary power doctrine.¹⁸ That is, the “Congress has the plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”¹⁹ While legal scholars have critiqued the plenary powers doctrine, the doctrine has since evolved from the court's understanding that tribal sovereignty must be limited such that they cannot “conflict with the interest of the overriding sovereignty” of the United States.²⁰ The sovereign rights of tribal governments have been conditional since *Worcester v Georgia*,²¹ where the Marshall Court held that:

The Indian nations have always been considered as distinct, independent political communities retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region

¹⁸ See STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 83-84 (2012); VINE DELORIA & CLIFFORD LITTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

¹⁹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 1673 (1978).

²⁰ *Id.* at 56; see further VINE DELORIA & CLIFFORD LITTLE, TRIBES, TREATIES AND CONSTITUTIONAL TRIBULATIONS (1999); see also Robert A. Williams, *Learning Not to Live with Eurocentric Myopia*, 30 ARIZ. L. REV. 439, 441 (1988) (extensively critiquing the Court's theory of tribal sovereignty in general and the plenary powers doctrine in particular as “racist, eurocentric, and genocidal”); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, S. Ct. 1011 (1978).

²¹ 31 U.S. 515, 521 (1832).

claimed, and this was a restriction which those European potentates imposed upon themselves, as well as themselves. The very term “nation,” so generally applied to them, means “a people distinct from others.” The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.

Despite finding that the Indian nations were the same as “other nations of the earth,” the Marshall Court held back from recognizing them as equal to European nations and maintained the holding of *Cherokee Nation v Georgia*.²² The Court in *Cherokee Nation v Georgia* found that Indian nations required the protection of the federal government—protection from other European nations or, as in *Worcester*, from the states. The Marshall Court's holding created an insecure framework where Indian tribes were, in theory, free from the laws of both state and federal governments except for specific treaties made with them—but that only the United States had the right to make such treaties.²³ Indian tribes embodied a removed sovereignty, one lesser in statute than that of Western nation-states. Tribal sovereignty, even in the formulation of a sympathetic Marshall Court, was still a separate and lesser category. However, the Court maintained throughout the *Cherokee* cases that only the

²² 30 U.S. 1, 19 (1831).

²³ Justice Marshall's doctrine of domestic dependent nations was in line with the prevailing theory of “trusteeship” for non-European peoples that was popular throughout the late nineteenth century. James Lorimer, a noted international law scholar of the nineteenth century, argued “the right of undeveloped races, like the right of undeveloped individuals, is a right not to recognition as what they are not, but to guardianship, that is guidance—in becoming that, of which they are capable, and in realizing their special ideals.” JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* AT 157 (1883-1884). Justice Marshall's holding in *Worcester v Cherokee* follows this line of legal reasoning and thus sets tribal sovereignty from the beginning at a diminished status within the American legal system.

federal government itself could interfere with Indian tribes through treaty—hypothetically maintaining the sovereignty of Indian nations.²⁴ Whether the Court was protecting the plenary powers of Congress to deal with the tribes as it saw fit, or extending at least some measure of respect for the sovereignty of the tribes is a matter of ongoing legal argument.²⁵

*B. Ending the Treaties: The Allotment and Assimilation Era
1871-1928*

The shift between treaty-making between the United States and the tribes and near-unilateral federal policy on the tribes—federal policy focused forced assimilation culminating in the Dawes Act—began shortly after the dust settled around the newly created federal institutions. Treaties between the United States and various tribes have guaranteed tribal control over lands, resources, and cultural practices since the founding of the country. Unfortunately, treaty promises have rarely been worth the paper they were written upon. A steady erosion of tribal lands resulting from war, questionable treaty negotiations, aggressive Congressional action against tribal interests and the willful ignorance of Supreme Court decisions have characterized federal-Indian relationships such that any actual sovereign rights of Indian tribes were recognized only within the courtroom and rarely outside it.

Once allotment began, the concept of tribal sovereignty - as limited and stunted as it was within United States constitutional law - became a complete legal fiction not even recognized in federal legislation. The allotment and assimilation period of federal Indian policy from 1871 to 1928 began with an unassuming congressional budget rider stating:

That hereafter no Indian nation or tribe within the

²⁴ I say hypothetically because *Worcester v Cherokee* is also the case that proves the fragility of Supreme Court cases because the cases where Andrew Jackson publicly declared that the Court ought not “be permitted to control the Congress, or the Executive.” The history of federal-Indian cases has been marked by a tendency of federal agencies to ignore the rulings of the courts in favor of abrogating tribal sovereignty. JILL NOGREN, *THE CHEROKEE CASES: TWO LANDMARK CASES IN THE FIGHT FOR SOVEREIGNTY* AT 122-124 (2007).

²⁵ The Court's holding in *Worcester* has been cited in both cases that uphold the inviolability of tribal sovereignty, as in *United States v Long*, 324 F.3d 475 (7th Cir), cert. denied, 540 U.S. 822 (2003) and in cases which asserted their dependency and secondary status as in *Oliphant*.

territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.²⁶

A brief two-line rider upon a budget bill effectively ended any federal recognition of tribal sovereignty as a continuing legal doctrine, and instead turned the tribes into “the Indian problem” to be solved via federal programs to hasten their “civilization and assimilation”.²⁷ The General Allotment Act of 1887 was designed to force tribes to participate fully in the American legal system via the granting of individual property deeds.²⁸ Assimilationist reformers of federal Indian policy sought to develop programs that would ensure the erasure of tribal communities, governments, and cultures through establishment of agencies like the Courts of Indian Offenses.²⁹

In the face of federal policies determined to end their existence, tribal governments continued to insist upon their sovereignty and rights of self-determination. Even as the Bureau of Indian Affairs was created, not to work with Indian tribes, but to manage their assimilation, tribal leadership petitioned the federal government for recognition of status as sovereign nations. As Robert Yellowtail, a tribal leader from the Crow Tribe of Montana, stated before the Senate Committee on Indian Affairs in 1919:

Mr. Chairman, it is peculiar and strange to me, however, that after such elaborate and distinct understandings [referring to treaties of 1880, 1882, and 1904] it should develop that to-day, after over half a century since our agreement, you have not upon your statute books nor in your archives of law, so far as I know, one law that permits us to think free, act free, expand free, and to decide free without first

²⁶ Indian Appropriation Act of Mar. 3, 1871 Ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)).

²⁷ See FREDERICK F. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880-1934* (1984)

²⁸ COHEN'S HANDBOOK, *supra* note 1, § 1.06, at 71-72.

²⁹ See WILLIAM HAGAN, *INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL* 135-138 (1966).

having to go and ask a total stranger that you call the Secretary of the Interior, in all humbleness and humiliation, "How about this, Mr. Secretary, can I have permission to do this?" and "Can I have permission to do that"? Etc. Ah, Mr. Chairman, if you had given us an inkling then what has since transpired, I am sure that our fathers would have then held their ground until every one of them were dead or until you saw fit to guarantee to us in more explicit assurances something more humane, something more of that blessing of civil life, peculiar to this country alone that you call "Americanism."

Mr. Chairman, you President [Woodrow Wilson] but yesterday assured the people of this great country and also the people of the whole world, that the right of self-determination shall not be denied to any people, no matter where they live, no matter how small or weak they may be, nor what their previous conditions of servitude may have been. He has stood before the whole world for the past three years at least as the champion of the rights of humanity and of the cause of the weak and dependent peoples of this earth. He has told us that this so-called league of nations was conceived for the express purpose of lifting from the shoulder the burdened humanity this unnecessary load of care. If that be the case, Mr. Chairman, I shall deem it my most immediate duty to see that every Indian in the United States shall do what he can for the speedy passage of that measure, but on the other hand, Mr. Chairman, this thought has often occurred to me, that perhaps the case of the North American Indians may never have entered the mind of our great President when he uttered those solemn words; that, perhaps, in the final draft of this league of nations document a proviso might have been inserted to read something like this: That in no case shall this be construed to mean that the Indians of the United States shall be entitled to the rights and privileged expressed herein, or the right of self-determination, as it is understood herein, but that their freedom and future shall be left subject to such rules and regulations as the Secretary of the Interior may, in his discretion, prescribe.³⁰

³⁰ *The Allotment of Lands of the Crow Indians in Montana, Before the S. Comm. on Indian Affairs*, S. Rep. No. 19, 1919, 66th Cong. 1 (testimony of Robert Yellowtail of the Crow Tribe of Montana) (Mr. Yellowtail was not a trained

The rest of Robert Yellowtail's testimony goes on to explain that the Crow Tribe was, in accordance to both United States legal theory and by treaty, a sovereign nation and thus entitled to the rights of self-governance and self-determination as proclaimed by the League of Nations. His advocacy was both spirited and legally grounded. It was also unsuccessful. Allotment came to the Crow Tribe of Montana over their objections and stripped the tribe of nearly half of their lands.³¹ Despite clear understanding of the governing legal theories of self-governance, self-determination, and sovereignty as they were understood not only within the United States, but also on the international stage, Mr. Yellowtail was unable to convince the Senate Committee on Indian Affairs to apply those same principles to his tribe. The refusal of the Senate Committee on Indian Affairs to apply the concept of sovereignty in its fullness to the Crow Tribe marked not a divergence from federal Indian law, but a fulfillment of it. From the Marshall Court forward, United States federal law steadily diminished the conception of tribal sovereignty to subsume tribal governance into the general United States legal framework. Mr. Yellowtail's testimony is just one more moment in a history where AI/AN governments are set aside as not really participating in the same legal conceptions of self-rule applied to other governments—whether state or federal. In the mind of the allotment and assimilation era Congress, tribal sovereignty—the tribes themselves—were a problem within United States federal law to be solved, rather than a promise to be fulfilled.³²

C. *The Indian Reorganization Act: A Brief Reprieve for Tribes*

Mr. Yellowtail's testimony before the Senate Committee on Indian Affairs occurred in the middle period of federal Indian policy; in fact, it was nearly a decade before federal Indian policy would once again shift, this time towards a measure of respect for tribal governments *as* governments. Congress first attempted to create what Robert Yellowtail had noted as missing throughout the history

attorney, but rather an elected leader of the Crow Tribe).

³¹ See FREDRICK E HOXIE, *TALKING BACK TO CIVILIZATION: INDIAN VOICES FROM THE PROGRESSIVE ERA* 136-138 (2001) (discussing the aftermath of Robert Yellowtail's testimony before Congress).

³² See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 63-64 (2005) (describing development of the philosophies guiding the Congressional policy of allotment and assimilation).

of federal Indian law: a law upon the books which allowed tribal governments some modicum of self-governance through the Indian Reorganization Act of 1934 (IRA). The text of the IRA explicitly denied the sovereignty of tribal governments, and instead the Senate Report on the bill referred to the Supreme Court language of “domestic dependent nations” instead. The IRA was not even a vehicle of self-determination for tribal governments as it was based upon the (in)famous Meriam Report – which, despite underscoring the need for reforming the BIA, continued to refer to AI/AN communities as “the Indian Problem” and argued that eventually all AI/AN communities would be fully assimilated into the majority body politic.³³ Moreover, this assimilation was an unqualified good: “The national government can expedite the transition and hasten the day when there will no longer be a distinctive Indian Problem and when the necessary governmental services are rendered alike to whites and Indians by the same organization without discrimination.”³⁴ Tribal sovereignty was never the goal of the IRA, because that would have permanently set apart tribal communities and make full assimilation an impossibility, but tribal self-governance was something allowable within the framework of United States law.

The IRA did three critical things for the development of tribal self-governance. First, it put an end to allotment and the shattering of Indian lands. Second, it allowed tribal lands to either be held ‘in trust’ by the federal government or to be reclaimed by tribal governments. Finally, it created provisions for tribal communities to develop federally recognized constitutions as implements of self-governance.³⁵ Despite a string of Supreme Court cases recognizing the nominal rights to sovereignty and self-governance of Indian tribes, federal Indian policy until 1928 could only be categorized as paternalistic and assimilationist.³⁶ The IRA was an attempt to walk

³³ See HOXIE, *supra* note 31; Wilkinson, *supra* note 32; see further American Indian Policy Review Commission, *A Policy for the Future*, FINAL REPORT (1977).

³⁴ Lewis Meriam et al., Institute for Government Research, *The Problem of Indian Administration*, THE MERIAM COMMISSION (1928).

³⁵ See WILKINSON, *supra* note 32.

³⁶ The American Indian Policy Review Commission of 1977 found that federal Indian policy more often than not worked in complete opposition to Supreme Court rulings. One of the main legal recommendations of the Commission was that a federal agency be created with the explicit task of ensuring that federal Indian policy remain compliant with both the trust responsibility and constitutional law. See American Indian Policy Review Commission, *A Policy*

the line between the assimilationist hopes of federal Indian policy up until that point and the line of Supreme Court cases since *Worcester v Georgia* in 1832, recognizing at the very least the self-governance rights of Indian tribes. The Indian Reorganization Act was still a piece of paternalistic legislation, but it was the first piece of federal legislation that recognized the self-governance capacity of tribal governments.³⁷ Tribal sovereignty was still a bridge too far, but tribal governments saw the potential for at least some form of recognition under the IRA and tried to push that potential.

The IRA can be seen as the first moment where federal Indian policy embraced a theory of legal pluralism that incorporated tribal governance into the American legal framework.³⁸ The IRA was intensely controversial both within the federal agencies and among tribal governments.³⁹ Those in the agencies were resistant to giving up the assimilation ideals of the allotment period, and tribal governments objected to the continuing requirement that the BIA approve in writing any decision a tribal government might make.⁴⁰ The IRA period was, unfortunately, just a brief respite from the federal attacks on tribal governments. The end of World War II saw the beginning of the termination and relocation era of federal Indian policy, which have been the most destructive series of federal policies for Indian communities since the founding of the nation.⁴¹

D. Termination and Relocation: The Threat of Annihilation

The termination and relocation era (1943-1965) was heralded by the release of the *Survey of Conditions Among the Indians of the United States*, reporting results of a 15-year study on the status of

for the Future, FINAL REPORT (1977).

³⁷ See Hoxie, *supra* note 31, at 30; *see further*, ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 177-187 (2000).

³⁸ *See generally*, DALIA T. MITCHELL, ARCHITECT OF JUSTICE: FELIX COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (Cornell University Press, ed. 2007) (discussing the development of Felix Cohen's political philosophy and theory of Indian law during and after the Indian Reorganization period).

³⁹ *Id.*; *see further*, THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE INDIAN REORGANIZATION ACT (1947) (detailing the concerns and reservations within the federal agencies and their accusations of tribal intransience towards full implementation of the IRA).

⁴⁰ COHEN'S HANDBOOK, *supra* note 1, § 1.06, at 81.

⁴¹ *Id.* at 84-93; *see further*, ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (1970).

Indian people.⁴² The initial report was a complete rejection of any theory of tribal sovereignty.⁴³ It rejected the IRA approach to the status and management of Indian lands. It rejected a pluralistic vision of United States federal law that included tribal governments. It further rejected the entire concept of tribal constitutions as a fundamental threat to United States sovereignty. The report found that Indian people lived in poverty, were unable to access the benefits of the New Deal, and that jurisdictional issues prohibited the economic development of Indian lands.⁴⁴ It recommended ending the federal-tribal trust relationship developed under the IRA in favor of the complete assimilation of Indian people.⁴⁵ The 1944 Mundt Report, developed by the House Committee on Indian Affairs, reiterated these findings and recommended expedited assimilation.⁴⁶ “Termination” was chosen over the more ominous “liquidation,” but the final results were the same.

Throughout the 1940s, proposals were introduced to eliminate, reduce, or substantially modify the IRA. Some of these changes appeared to increase tribal self-governance as they extended the IRA credit programs to all tribes beyond the original demonstration programs; however, these proposals formed with the ultimate end of terminating the federal-tribal relationship and ending any legal pluralism formed under the IRA.⁴⁷ Concurrent with these policies, the BIA initiated the “Voluntary Relocation Program,” which was aimed at relocating service-age American Indians and Alaska

⁴² *Survey of Conditions of the Indians in the United States: Analysis of the Statement of the Commissioner of Indian Affairs in Justification of Appropriations of 1944, and the Liquidation of the Indian Bureau*, S. Rep. No. 78-310 (1943); S. Supp. Rep. 78-310 (1944) (hereinafter *Survey of Conditions*).

⁴³ *Id.* at 36; see further, COHEN'S HANDBOOK, *supra* note 1, at 85; TYLER LYMAN, A HISTORY OF INDIAN POLICY 151-186 (1973).

⁴⁴ *Survey of Conditions*, *supra* note 42; see generally, DONALD FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1986) (discussing the legislative history of the termination and relocation policies post-WWII).

⁴⁵ *Survey of Conditions*, *supra* note 42.

⁴⁶ See *Investigate Indian Affairs: On H. Res. 166 (A Bill to Authorize and Direct and Conduct an Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the American Indian)*, 78th Cong. 1 and 2 (1943) [hereinafter *H. Res. 166 Hearings*]. If any of the members of the Committee found their choice of language alarmingly similar to Nazi rhetoric regarding ‘the Jewish problem,’ it is not reflected in the Congressional Record.

⁴⁷ COHEN'S HANDBOOK, *supra* note 1, § 1.06, at 87; see also, Comm'n on Organization of the Executive Branch of Govt., *Indian Affairs: A Report to Congress*, H.R. DOC. NO 81-1 (1949).

Natives returning from the war.⁴⁸ Tribes faced programs that sought to remove their lands from federal trust status, and placing them up for sale to the general public on the one hand, and the relocation of their members on the other. House Resolution 82-2503 of 1952 was the capstone of termination and relocation.⁴⁹ The resolution directed the Committee on Interior and Insular Affairs to conduct a complete oversight investigation into BIA and IHS responsibilities to formulate proposals “designed to promote the earliest practical termination of all federal supervision and control over Indians.”⁵⁰

Termination policies devastated tribal communities. They ended federal programs for both tribes and individuals, introduced state and local legislative jurisdiction over traditional tribal lands and communities, and ended federal trusteeship over tribal and individual lands. Most small tribes lost their entire landholdings in short sales not designed to maximize Indian value placed in the land.⁵¹ With the termination of the federal-tribal relationship, the sale of tribal lands, and an end to Indian programs, many tribal governments became increasingly dysfunctional and were unable to exercise what few self-governance rights were left to them. In 1953, Congress further complicated tribal self-governance capacity with Public Law 280 (PL 280), which transferred criminal and civil jurisdiction over some Indian lands to state governments that elected to assume such responsibilities.⁵² The federal policies of the termination and relocation era sought not just to extinguish what lingering concepts of tribal sovereignty and self-governance that might remain within United States federal Indian law, but to also extinguish the very concept of Indians as a separate culture and people.

⁴⁸ Comm'r Ind. Aff., Ann. Rep. (1954), *excerpted* in DOCUMENTS OF UNITED STATES INDIAN POLICY 238 (Francis Paul Prucha, 3rd ed., University of Nebraska Press).

⁴⁹ H.R. REP. NO. 82-2503 (1952).

⁵⁰ *Id.*

⁵¹ COHEN'S HANDBOOK, *supra* note 1, § 1.06, at 89-90.

⁵² Pub. L. No. 83-280, 67 Stat. 588 (1953) (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C §§ 1321-1326, 28 U.S.C. § 1360, 1360 note) PL 280 only provided for the mandatory transfer of jurisdiction in five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added in 1958.

III. ISDEAA: 638-ING FOR SURVIVAL AND SELF- DETERMINATION

A. *The Kennedy & Johnson Administrations: Testing the Government Contracts Frame*

In the late 1960s, against the backdrop of tribes losing their federal recognition—and thus their lands, self-governance rights, and members—tribal leaders launched an advocacy campaign that was both desperate and bold. The American Indian Movement (AIM) has been characterized as the “last great Indian battle,” and it was certainly seen that way by the tribal advocates involved.⁵³ As Vine Deloria said at the time: “If we lose this one, there might not be another.”⁵⁴ With the very concept of Indian existence at stake, tribal advocates worked to counter, not just the specific termination and relocation policies destroying their communities, but also the underlying philosophies motivating said policies. AIM’s fundamental goal in their legislative activism was not to return to a mystical past in the federal-Indian relationship where tribal sovereignty was respected.⁵⁵ Instead, AIM leaders sought to re-imagine the entire federal-tribal relationship from the ground up.⁵⁶ Tribal advocates knew they had to change the language used by both the federal agencies and within their own documents.⁵⁷ Although tribal leadership began to use the language of self-governance and self-determination in the context of federal law, they never abandoned their demands for tribal sovereignty. They just foregrounded the need for self-governance in a deliberate strategy to gain allies.⁵⁸

As the history described in section two demonstrates, federal

⁵³ MARK TRAHANT, *THE LAST GREAT BATTLE OF THE INDIAN WARS* viii-xv (2010).

⁵⁴ See Deloria and Little, *supra* note 18, at 111. Mr. Deloria was a noted Native American political theorist and philosopher who developed the bulk of the political and policy reasoning behind AIM. His work continues to be a major touchstone for scholars working on indigenous rights issues.

⁵⁵ See VINE DELORIA & DAVID E WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* vii-xi (1999) (dismantling the idea that tribes were ever viewed as sovereign equals).

⁵⁶ See VINE DELORIA & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).

⁵⁷ See *id.* at 190-192 (describing the tribal strategy of using the language of self-determination to shift federal agency perceptions).

⁵⁸ See generally, VINE DELORIA, *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1966) (arguing for a restructuring of the federal-tribal relationship).

Indian law never had a legal doctrine of tribal sovereignty that respected the full self-governance capacity of tribes. Tribal leaders advocated for the recognition of Indian sovereignty rights and articulated perfectly workable legal theories supporting tribal sovereignty in nearly every hearing before Congress that they were permitted to attend; but a doctrine of substantive tribal sovereignty never materialized within federal statute and steadily disappeared, even within case law. The American Indian Policy Review Commission found that “there is substantial controversy surrounding the concept of tribal sovereignty and the exercise of governmental authority by the tribes within their reservation.”⁵⁹ Further, they believed that the trend of federal court decisions “has favored the tribes in their efforts to achieve good government within the reservations.”⁶⁰ However, even their hopeful analysis of the court decisions found that tribes were forced to accept “qualifications upon their sovereignty—such as extraterritorial court jurisdiction—for the sake of receiving United States protection, they relied upon remedies of small practical use.”⁶¹ The American Indian Policy Review Commission further found that even court support of tribal sovereignty ended with the 1871 congressional budget rider ending treaty-making with tribes.⁶² Faced with this legal reality, tribal leaders and their allies had to find a different legal framework to support the self-governance and self-determination rights of tribal nations. They found it within the relatively obscure provisions of government contracting.

One of the continuing critiques of federal Indian policy by tribal leaders was their inability to manage their own lands, resources, and programs. Any meaningful decision a tribe wanted to make had to be approved, in writing, by the BIA.⁶³ Thus, the goal of most tribal

⁵⁹ AMERICAN INDIAN POLICY REVIEW COMM'N., FINAL REPORT 4 (1977).

⁶⁰ *Id.*

⁶¹ *Id.* at 54.

⁶² *Id.* at 59. The Commission, however, does not discuss the *Kagama* or *Lone Wolf* decisions which upheld congressional acts encroaching upon the self-governance rights of tribes and effectively undermining the force of the *Cherokee* line of cases. *See also*, *United States v. Kagama*, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act of 1885 which removed tribal jurisdiction over major crimes between AI/AN peoples on tribal lands to federal court, effectively ending tribal court jurisdiction); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (affirming the ability of Congress to unilaterally abrogate treat provisions as part of the congressional plenary powers, thus placing such abrogation beyond judicial review).

⁶³ “They [BIA officials] would sit in on any and all tribal meetings they felt like. Anything that spent more than, say, 200 dollars, had to be approved by them.

leaders was finding a way of wresting substantive decision-making power and control—particularly over financial decisions—from the federal agencies. Tribal leaders found that insisting upon the sovereignty of Indian nations over their own lands and peoples was not a tactic that provided concrete solutions to the problems facing their communities; thus, they began to look for alternative methods to achieve their goal.⁶⁴ The fundamental problem with trying to resolve the problems of control over programs, funding, and land, revolved around the fact that federal law trumped tribal jurisdiction even in the most generous of Supreme Court rulings.⁶⁵ Tribal leaders realized that they had to find a way of gaining control *within* the legal framework of the United States if they were to limit interference from the federal agencies.⁶⁶

Until ISDEAA, the attempts by tribal leaders to retain, or regain, control over tribal lands and governance had come through arguments of tribal sovereignty—that as sovereign nations they had the right to govern their territories without interference. After the *Kagama* and *Lone Wolf* decisions, which upheld the plenary power of Congress to make unilateral decisions regarding tribes and their lands, sovereignty arguments looked fragile.⁶⁷ Rather than retread the path of the Indian Reorganization Act and try again to regain control via a framework of secondary sovereignty within that of the United States—a path that left tribes vulnerable to the whims of Congress—tribal advocates argued that it was time to make United

Anything they didn't like 'went against the handbook' [referring to the BIA Manual], which was kept in a vault so we could never see the damned thing. That entire system had to go, Navajo leadership decided. It wasn't tenable." Telephone Interview with Eric Eberhard, Professor of Federal Indian Law at the University of Washington School of Law and former legal counsel to the Senate Committee on Indian Affairs (Dec. 9, 2015) (explaining the pre-ISDEAA process of tribal decision-making and BIA interference with tribal governance); See also, *Morton v. Ruiz*, 415 U.S. 199 (1973) (ordering the BIA to make accessible BIA manual and any other documents directing the internal administration of the agency impacting the delivery of services).

⁶⁴ *Id.* (stating, "We had to change the game.").

⁶⁵ See Deloria, *supra* note 55, at 156-163; COHEN'S HANDBOOK, *supra* note 1, at 391-396; see further, *United States v. Lara*, 541 U.S. 193, 200 (2004) (holding that treaty clauses, Indian commerce clause, and the general structure of Constitution are sufficient grounds for upholding the "plenary and exclusive" power of Congress over the tribes).

⁶⁶ *Survey of Conditions*, *supra* note 42, at 227-301.

⁶⁷ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902).

has been partially rehabilitated as a holding defending the trust responsibility between the federal government and the tribes in post-termination era court holdings.

States federal laws work for them. When the National Congress of American Indians released the Declaration of Indian Purpose in 1961, tribal advocates reached out to the Kennedy Administration with an innovative idea: use the government contracting process as a mechanism for transferring control of federal funds from the federal agencies to the tribes.⁶⁸ They essentially argued for a block grant program at least six years before the first national block grant program—the Partnership for Health program of 1966—was instituted.⁶⁹ The Kennedy Administration was intrigued enough to support a few demonstration projects through the BIA under the Buy Indian Act, which began a series of limited procurement contracts to tribal organizations.⁷⁰

These demonstration projects then grew into a new series of self-governance demonstration projects under the Johnson Administration that allowed the Navajo Nation and other large tribes to begin taking over education on their reservations. By the time President Nixon addressed Congress in 1970 and called for a pivot away from the termination and relocation policies, tribes had been running a series of successful self-governance contracts through these demonstration projects.⁷¹ When Forrest Gerrard, legal counsel to Senator Jackson, began to push the senator to develop a federal plan that would open the way for self-governance contracting/compacting for all tribes, the foundation had already been well-established.⁷²

⁶⁸ Telephone Interview with Eric Eberhard, Professor of Federal Indian Law at the University of Washington School of Law and former legal counsel to the Senate Committee on Indian Affairs (Nov. 11, 2015).

⁶⁹ *Id.*

⁷⁰ See THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961-1969* (2001). These demonstration projects were also the first instances of tribal organizations wherein two or more tribes form a non-profit (generally, though not always) to administer services across a broader region than a single tribal territory. An example of a contemporary tribal organization would be the California Rural Indian Health Board (CRIHB) which provides health services for members of federally-recognized tribes in California. CRIHB is the main tribal contracting organ for the Californian tribes. The tribal organization allows the tribes to pool their 638 funds into a larger financial base for health programs across California.

⁷¹ *Id.*

⁷² Forrest Gerrard was legal counsel to Senator Scoop Jackson, the chairman of the Select Committee on Indian Affairs throughout the late 1960s and 1970s. Mr. Gerrard was one of the principle architects of the Indian Self-Determination and Education Assistance Act of 1975 as well as a number of other pieces of Indian Legislation. Eberhard, *supra* note 68; see also, Trahan, *supra* note 53.

B. *ISDEAA and the BIA & IHS Response: Problems with the Procurement Contracts Frame*

The initial passage of the Indian Self-Determination and Education Assistance Act in 1975 was met with resistance from both the Bureau of Indian Affairs and the Indian Health Service.⁷³ The BIA responded to tribal requests for contract negotiations with a sea of red tape that effectively halted the self-governance ambitions of all but the most determined of tribes—or those with the finances to hire lawyers.⁷⁴ The Indian Health Service insisted that ISDEAA contracts could not possibly apply to tribes and refused to even entertain the concept of tribal contracting/compacting.⁷⁵ With the federal agencies using the mechanisms of administrative law to effectively gut the ISDEAA, tribal leaders went back to Congress.⁷⁶

The prior history of the Kennedy and Johnson Administration demonstration programs presented an unexpected problem for tribal governments, namely that the procurement contracts framework gave significant leverage to federal agencies during the negotiations process.⁷⁷ If tribal self-governance contracts were conceptualized as procurement contracts, then the BIA had significant control over negotiations, the contract scope, reporting requirements, and even the tribes with whom the agency would enter contracts. Neither the BIA nor IHS were malicious in their initial interpretation of the ISDEAA; they were merely following a legal framework that had already been set during the previous administrations and did not appear to be overturned by the ISDEAA.⁷⁸ The fact that government procurement contracts happened to provide a great deal of leverage

⁷³ Comm'r Ind. Aff., Ann. Rep., *supra* note 48.

⁷⁴ Eberhard, *supra* note 68; *Recommendations for Strengthening the Indian Self-Determination Act, Hearing Before the Select Comm. on Indian Affairs*, 100th Cong. (1987) (the difficulty of obtaining permissions was a running theme throughout tribal testimony).

⁷⁵ Eberhard, *supra* note 68.

⁷⁶ The agencies relied upon administrative law around procurement contracts to refuse, unilaterally change, or end tribal self-governance contracting/compacting. They also refused to enter into any form of negotiated rule-making on the implementation and provisions of ISDEAA. This left the tribes in the familiar, and upsetting, territory of having to guess at the inner workings of the BIA and IHS as they could not access the internal handbooks supposedly governing agency behavior.

⁷⁷ Geoffrey Strommer & Stephen Osborne, *The History, Status, and Future of Tribal Self-Governance under ISDEAA*, 39 AMER. INDIAN L. REV. 1, 16-18 (2014).

⁷⁸ *Id.* at 20-22.

and discretion to federal agencies during contracting was just a happy accident. However, it did place tribal self-governance contracting in a framework that still put federal agencies in the position of dictating tribal policies—they just did it via contract riders, reporting requirements, and a refusal to pay contract support costs instead of agency mandates and oversight.⁷⁹

C. *Procurement to Block Grants: Changing the Government Contracting Frame*

Tribal leaders successfully convinced Congress to pass a series of strengthening amendments throughout the 1980s and 1990s. The first was the 1984 Amendments, Public Law 98-250, which exempted tribal self-governance contracting/compacting from the Federal Grant and Cooperative Agreement Act (Pub. L. 98-250).⁸⁰ Public Law 98-250 also limited the ability of federal agencies to force tribes to accept onerous reporting requirements.⁸¹ The 1984 Amendments, while deeply technical and on the surface focused on the fine details of the contracting procedure, set the tone for further amendments to ISDEAA. Rather than focus upon sweeping theories of tribal self-determination, Congress focused upon specific language fixes to ISDEAA that had, in practice, the effect of transferring greater control over the entire contracting process into tribal rather than agency hands.⁸²

The 1988 Amendments significantly expanded the scope of ISDEAA, directed the BIA and IHS to open all bureaus and divisions to tribal self-governance contracting, and removed the

⁷⁹ Eberhard, *supra* note 68; Senator Inouye specifically highlighted the “agencies’ consistent failures over the past decade to administer self-determination contracts in conformity with the law,” in particularly the agencies’ failures to cede control to the tribes. S. REP. NO. 100-274, at 37 (1987), as reprinted in 1988 U.S.C.C.A.N 2620, 2656; *See also*, U.S. Gov’t Accounting Office, *Still No Progress In Implementing Controls Over Contracts and Grants with Indians*, GAO-116394 (1981) (critiquing BIA failure to take GAO recommended action from 1978 to provide necessary measures to turn over agency functions to the tribes and ensure their smooth transition and operation).

⁸⁰ *See* H. REP. No. 98-1071 (1984) (explaining the goals and intention of the amendments).

⁸¹ *Id.*

⁸² *See* Strommer & Osborne, *supra* note 77 at 29; *see further*, S. Bobo Dean, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349, 350 (2000) (outlining the series of major amendments to ISEAA).

agency's ability to insert contract riders asserting agency control.⁸³ Tribal leadership argued before Congress that the federal agencies manipulated administrative law to avoid paying full contract support costs and otherwise backed negotiated tribes into untenable contracts.⁸⁴ Philip Martin, Chief of the Mississippi Band of Choctaw Indians noted that:

Right now, the Federal Government and the tribal governments are fighting for the same money that is appropriated for them. So, there is a big conflict of interest on the part of the BIA in carrying out the Indian Self-Determination Act. We have had nothing but problems the last 6 years with the BIA and IHS in particular about indirect costs. So, I hope that through these hearings some real amendments can be made to make sure that the rights of the tribes to contract and the rights of the tribe to receive adequate administrative costs to conduct these programs be given to the tribes, and that it is done in law so that there can be no mistake about it, rather than just putting these things vaguely into law, because the BIA and the IHS are very good at twisting words around to their own advantage.⁸⁵

Mr. Martin's critique of BIA and IHS administrative policy was not unique, nor was it the first time tribal leaders reported the federal agencies using administrative law to throw up roadblocks to tribal contracts.⁸⁶ Congress responded by initiating the self-determination

⁸³ *Id.*; see further *Amending the Indian Self-Determination and Education Assistance Act to Provide further Self-Governance by Indian Tribes*, S. REP. NO. 108-413, 108th Cong. (2003-2004).

⁸⁴ 25 U.S.C. § 450(m) (1984); 25 C.F.R. §§ 900.240-245 (1986) (allowing federal agencies to rescind a contract in whole or in part. Prior to the 1994 Amendments, this provision was left vague. BIA and IHS interpreted this provision very broadly while at the same time interpreting funding provisions quite narrowly, resulting in burdensome, underfunding contracts that set up tribes to fail. The refusal of the agencies to pay full contract support costs is an ongoing issue.).

⁸⁵ *Recommendations for Strengthening the Indian Self-Determination Act: Hearing before the Select Comm. on Indian Affairs*, 100th Cong, 100-250 (1987).

⁸⁶ *Id.* at 26-28 (Mr. Red Owl, planning director of Sisseton-Wahpeton Sioux Tribe, further reported that the federal agencies successfully used administrative law to ensure that of every dollar of Congressional funding 85 cents stayed with the agencies and 15 cents went to the tribes. He pointed to complexity of procurement contracting—particularly when applied to the tribes—as part of the issue. Mr. Martin, responding to a question from Chairman Inouye regarding agency delays in processing tribal contract proposals further stated that: “In my

demonstration program which directed the agencies to select 20 tribes to enter into self-determination compacts.⁸⁷ These compacts allowed tribes to not only assume control over federal programs, but also allowed the tribes to restructure, shift finances, and re-organize the priorities for those programs for which they compacted.⁸⁸ These self-determination compacts were far more in-line with tribal expectations of self-governance contracting and met with significant tribal interest.⁸⁹ Between limiting the administrative power of the agencies and developing the self-determination compacting demonstration projects, Congress sent strong signals that it was inclined to think of tribal self-governance contracts in broad terms. The 1988 Amendments pushed ISDEAA contracting to look more like modern Medicaid State Block Grants rather than limited government procurement contracts.

At this time, Congress was ready to rethink the relationship between the federal agencies and the tribes along these lines as they were in the process of radically reforming the majority of the legal framework around social welfare programs to transition planning and authority from the federal agencies to the states themselves.⁹⁰ Tribal advocates used the larger national debate around the scope of federal authority to argue that the expansion of tribal self-governance contracts was a logical extension of the general limitations being placed on federal power. Tribal advocates further argued that the BIA and IHS, in contradiction to the Supreme Court decision in *Morton v. Ruiz* and its descendants, relied upon internal agency regulations that were not accessible by tribal governments.

judgment, one of the reasons why we have so many problems with contracts with both agencies, BIA and IHS, is because they really don't have a contracting management system in place. It's not a priority with them to be contracting with tribes. So, when we make our proposals, they take their good old time. There is no requirement, hardly, when they have to respond. There is no penalty in case they don't carry out their agreement; there is no penalty on them.”)

⁸⁷ Indian Self-Determination Amendments of 1987, Pub. L. No 100-472, § 209, 102 Stat. 2289, 2296-98 (Codified at 25 U.S.C. § 450f note (1988)), repealed by Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260 § 10, Stat. 711, 734.

⁸⁸ See M. Brent Leonhard, TRIBAL CONTRACTING: UNDERSTANDING AND DRAFTING BUSINESS CONTRACTS WITH AMERICAN INDIAN TRIBES AT 43-45(2009) (explaining the federal statutes allowing for the shifting of tribal finances); see also Strommer & Osborne, *supra* note 77.

⁸⁹ See Comm'r Ind. Aff. *supra* note 48.

⁹⁰ Eberhard, *supra* note 68; see further, S. REP. NO. 103-374 at 2 (1994) (describing the 1988 amendments as necessary for dealing with the “excessive bureaucracy” constraining tribal self-governance).

The tribes advocated for a clarified contracting process that removed the cloud of hidden bureaucratic rules to which they were not part of making nor could even effectively refer.⁹¹ Congress agreed and, as part of the 1988 amendments, directed the BIA and IHS to work together through the new self-determination demonstration programs to find a less burdensome contracting process.⁹²

At first, the BIA and IHS worked closely with the tribes that they identified to be “key stakeholders” in a preliminary negotiated rulemaking process and developed a draft rule in late 1990.⁹³ From 1990 until 1994, the two agencies continued to work on the final rule without tribal consultation—this proved to be a mistake as tribal reaction to the presented rule, when it was revealed via the Federal Register, was overwhelmingly critical.⁹⁴ During Congressional oversight hearings, tribal advocates and leaders pointed to a two year gap in any form of tribal consultation as evidence of BIA and IHS unwillingness to consider seriously the self-governance rights of tribal governments.⁹⁵ Congress again agreed and amended ISDEAA in 1994. As part of the 1994 amendments, Congress directed the BIA and IHS to enter into negotiated rule-making with the tribes pursuant to the Negotiated Rulemaking Act of 1990, Public Law 101-648.⁹⁶ Congress further reiterated its determination to support tribal self-governance and self-determination through the contracting process—a process it desired to be unencumbered by

⁹¹ See S. REP. NO. 100-274; see further, Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1258 (1995).

⁹² S. REP. NO. 100-274, at 2 (1987); *Indian Self-Determination and Education Assistance Act: Hearing on Public Law 93-638 Before the Committee on Indian Affairs*, 100th Cong. at 2, 26-28 (1987).

⁹³ Pub L. 93-638, Proposed Final Rule 1990, Findings. Interestingly the BIA and IHS were among the first agencies to attempt a limited form of negotiated rule-making under the Negotiated Rulemaking Act of 1990, Pub. L. 101-648 despite their later hostility to any further negotiated rulemaking process.

⁹⁴ The proposed regulation was published for comment on January 20, 1994 at 59 FR 3166. Almost every federally recognized tribe submitted criticism to the proposed rule, as did most tribal organizations. Tribal response to the proposed rule ran over 80 pages in the federal register. There were very few, if any, positive comments about the proposed rule anywhere in the 80 pages of response.

⁹⁵ As point of interest, every single tribe and tribal organization that had a 638 contract as of 1994 submitted a comment to the Federal Register in response to the proposed rule. None of them were positive in their assessment. 59 FR 3166 (Jan. 20, 1994).

⁹⁶ S. REP. NO. 100-274 at 20; Indian Self-Determination Contract Reform Act of 1994, § 104(d) (1994).

agency bureaucracy.⁹⁷

The 1995-1996 negotiated rule-making on ISDEAA was one of the defining moments not just for tribal self-governance contracting, but also for the development of modern federal Indian law. It was the first time the federal agencies entered into a negotiation process in which they had to find a “unanimous concurrence among the interests represented unless the committee agrees to define such term to mean general but not unanimous concurrence,” rather than making administrative rules unilaterally and then applying them to the tribes.⁹⁸ Tribes used the 1995-1996 negotiated rulemaking process to address longstanding grievances with federal agency treatment of tribal self-governance, and while most of those concerns were set aside as outside the jurisdiction of the rulemaking process, the Federal Register report reflected a deep current of distrust.

Tribal representatives also indicated a concern that absent formal rulemaking, Federal agencies might use internal procedures to circumvent the policies underlying the Act, thwarting the intent to simplify the contracting process and free Indian tribes from excessive Federal control. Two comments suggested that negotiating rulemaking procedures will ensure that Federal agencies would be bound to follow uniform procedures to implement and interpret the Act and regulations. Two other comments wanted the regulation to state explicitly that the Secretaries lack authority to interpret the meaning or application of any provision of the Act or the regulations. Tribal representatives feared that a myriad of letters containing policy statements and correspondence interpreting reporting requirements would result if internal agency procedures are not tied to formal rulemaking.⁹⁹

Comments recorded within the federal register reflect tribal concerns regarding administrative burdens, resistant agencies, indirect costs, and the ability to shape administrative rules—but

⁹⁷ Congressional Findings, Indian Self-Determination Act of 1988 Public Law 93-638.

⁹⁸ 59 Fed. Reg. 243, 249 (Dec. 29, 1994).

⁹⁹ 61 Fed. Reg. 122-32482 (Jan. 3, 1996).

contained few appeals to tribal sovereignty.¹⁰⁰ Tribal focus during the 1995-1996 negotiated rulemaking process was on the contracting process itself and wrestling as much control as possible from the federal agencies. Tribal advocates used the canons of contract law and theories of tribal self-governance, as articulated by Congress, to whittle away at agency authority and jurisdiction. That steady approach of using government contracts law to wrestle control of funds, lands, and programs back to tribal governments continues to guide tribal advocacy on ISDEAA amendments.¹⁰¹

*D. The Current Form of 638 Contracting/Compacting:
Ongoing Problems*

Currently 638 contracting/compacting comes in two forms: Title I self-governance contracting and Title V self-determination compacting. Title I contracting is the foundation of ISDEAA and has been the primary mechanism of tribal self-governance contracting since 1975. While the process has been simplified multiple times as described above, Title I contracting is still more restrictive than Title V compacting.

Title I self-governance contracts are the most highly structured, rigid mechanism for tribes to take over a federal program, and often, the most onerous to conduct. In a Title I contract, a tribe must submit yearly audits pursuant to the Single Agency Audit Act of 1984 as well as submit to performance monitoring by the contracting agency.¹⁰² Title I self-governance contracts are open to any federally recognized tribe or tribal organization for any federal program or service provided for the benefit of AI/AN tribes or individuals.¹⁰³

¹⁰⁰ *Id.*

¹⁰¹ Congress has continued to amend ISDEAA to clarify tribal self-governance contracting and increase tribal control over their 638 contracts. *See* AMENDING THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT TO PROVIDE FURTHER SELF-GOVERNANCE BY INDIAN TRIBES, S. REP. NO. 108-413 (108th Cong. 2004); *see further*, Pub. L. 106-260 Indian Self-Determination Act Amendments of 2000.

¹⁰² 25 U.S.C. § 4501(c) (2017), 25 C.F.R. § 900.65 (2013); 25 U.S.C. §§ 4501(c)(b)(7)(C) (2013).

¹⁰³ 25 U.S.C. § 450(a)(1) (2017), 25 C.F.R. § 900.8 (2013) (while tribes have attempted to initiate 638 contracts outside of the BIA and IHS for services provided by Community Health Centers and other services they have thus far been unsuccessful. ISDEAA and modern Indian statutes specifically recognize tribal organizations—where two or more tribes enter into a contract or compact for purposes of administering a 638 contract/compact to their combined populations.).

Tribes and tribal organizations that wish to enter into a Title I self-governance contract must send a proposal to the federal agency to initiate negotiations. Funds under Title I contracts cannot be moved to other programs, nor can the structure of the contract be changed without a renegotiation.

Alternatively, Title V self-determination compacts are much more flexible. Only tribes or tribal organizations that have maintained a successful Title I contract for three years without problems in their yearly audits are eligible to enter into a Title V compact.¹⁰⁴ Understandably, after almost fifty years of tribal self-governance contracting, nearly all tribes and tribal organizations that desire to enter into tribal self-governance contracting have done so.¹⁰⁵ Under a Title V compact, a tribe may redesign or combine compacts, reallocate or redirect funding, and restructure priorities without seeking prior approval from the funding agency.¹⁰⁶ Federal agencies may only re-assume a Title V compact if (1) clear evidence of gross mismanagement of funds transferred to the tribe or tribal organization exist, or (2) if (a) a clear finding of imminent endangerment of public health exist caused by an act or omission by the tribe or tribal organization *and* (b) such endangerment arises out of a failure to carry out the compact.¹⁰⁷

Title V of the ISDEAA provides the greatest amount of flexibility, independence, and control to a tribal organization as is possible under the framework of government contracting. While there are still limitations upon the abilities of the tribes to use contracting funds as they see fit, Title V compacting provides the best mechanism for tribes to take control of federal funds and use those funds to govern themselves. Moreover, Title V compacting allows a tribe or tribal organization to combine their own funds with the compact without causing accounting issues or potentially having those funds seized by the federal government should the contracting/compacting agency re-assume the contract/compact.¹⁰⁸

Of the problems that continue to haunt the implementation of the ISDEAA, the failure of federal agencies to pay full contract support costs is the one most frequently raised by tribes and tribal

¹⁰⁴ 25 U.S.C. § 458 aaa-2 (2017), 42 C.F.R. §§ 137.15-23 (2013).

¹⁰⁵ Now Title I contracting is largely used by new tribal organizations formed by two or more tribes who wish to enter into a shared 638 contract.

¹⁰⁶ 25 U.S.C. §§ 458 aaa-6(b)-(d) (2017), 43 C.F.T. §§ 137&131-150 (2013).

¹⁰⁷ 25 U.S.C. §§ 458 aaa-4 & 458 aaa-5(e) (2017), 42 C.F.R. 137.285 (2013).

¹⁰⁸ 25 U.S.C. § 458aaa-2(e) (2017); 25 U.S.C. § 458aaa-4(b) (2013).

organizations.¹⁰⁹ Failure to pay full contract support costs threatens the integrity of both Title I contracting and Title V compacting because the tribes do not have the same resources to support the administrative requirements for programs, but those fees are rarely addressed, nor can they be easily addressed in a self-governance contract/compact. Some tribes either chose not to engage in 638 contracts/compacts because of the uncertainty around contract support costs, or chose to engage in 638 programs selectively based upon the types of administrative costs the tribe could bear.¹¹⁰ For this reason, both the BIA and the IHS have tribes which are labeled “direct service” or “self-governance.” In theory, this division is internal to the agencies, and used to mark which departments handle those tribal affairs. In practice, this division has often been used by both federal agencies as a mechanism for determining funding allocations.¹¹¹ Thus, it has given rise to a misunderstanding of intra-tribal politics where an illusion of conflict exists between “direct service” tribes and “self-governance” tribes on theories of sovereignty.

In practice, nearly all tribes have entered into Title I or Title V self-governance contracts/compacts; thus, all tribes are “self-governance” tribes. However, tribes strategically chose which programs and services to 638 based on tribal priorities and capacity. Those programs which a tribe elects to let remain with the federal agencies are thus “direct service” programs. Therefore, all tribes who have not 638-ed every federal program or service provided are

¹⁰⁹ *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 412 (2016) (holding that the tribe has 6 years from the time a claim for self-determination contract support costs initially arises to present such claim to a federal agency owing such reimbursement. Further holding that a tribe cannot rely upon equitable tolling to extend the time period unless such claims have been 1) diligently pursued, and 2) there are extraordinary circumstances beyond the tribe’s control preventing such timely presentation).

¹¹⁰ For example, Cherokee Nation has engaged in a long-term, strategic process of 638 sections of the health care system providing health services to tribal members both on and off the reservation. Much of tribal financial planning revolves around decisions on where and when to 638 a program. *See* Comprehensive Annual Financial Report, FY 2016, Cherokee Nation Financial Resources Group, *available at* <http://www.cherokee.org/LinkClick.aspx?fileticket=rj1lgepEeRY%3d&tabid=5287&portalid=0&mid=5724>.

¹¹¹ *See* Dep’t of Health & Human Services Indian Health Service, *Justification of Estimate for Appropriations Committees FY 2017*, <https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>

“direct service” tribes; consequently, all tribes are also “direct service” tribes.¹¹² The ability to freely choose whether or not to enter into a self-governance contract is fundamental to the self-determination of tribal governments. Casting the division between tribes that entered into a 638 contract versus a tribe that has not as a fundamental difference on issues of tribal governance or tribal sovereignty oversimplifies the political reality in which tribes find themselves.

E. The Choice to 638: Moments of Tribal Self-Determination

As noted above, the decision to 638 a program is a complex one. A tribe may choose to 638 a part of a program—for example: a tribe may (1) take over a drug and alcohol rehabilitation program while keeping the inpatient hospital under IHS direct control; (2) choose to enter into a regional consortium with other tribes and together enter into a 638 compact/contract; or, (3) choose to 638 an entire facility and its administration. A tribe may also elect not to 638 any part of a program/service provided by a federal agency due to administrative concerns. Each of these decisions are instances of tribes exercising their self-governance rights and arguably a moment of tribal sovereignty. However, the ISDEAA itself is not, and was not, conceptualized as a mechanism of tribal sovereignty, but rather one of protecting tribal self-governance via contracting.

Some of the confusion in the intent—and the legal doctrine that ought to apply to ISDEAA—comes from the wealth of legislation on Indian affairs that occurred from 1968 to 1977. Congress was extremely active on Indian issues as it attempted to reverse the devastation caused by termination and relocation era policies.¹¹³ The courts have similarly actively been attempting to incorporate this wealth of legislation into the broader legal framework of federal Indian law and have developed a legal understanding of ISDEAA that separates 638 contracting/compacting from other legal doctrines concerning American Indians and Alaska Natives.¹¹⁴

¹¹² *But see, The President's Fiscal Year 2014 Budget for Native Programs, Before the S. Comm. on Indian Affairs, 112th Cong. 2 (Mar. 19, 2013).*

¹¹³ *See Pevar, supra note 18 at 1-17 (2012); COHEN'S HANDBOOK, supra note 1, at 93-108.*

¹¹⁴ One way of reading the *Ramah* line of cases is the Court's attempt to square hermeneutic circle of promoting tribal self-determination, as demanded by ISDEAA, with the sheer amount of control granted to the federal agencies through the framework of government contracting. Contract support costs seem

IV. 638 CONTRACTING AND TRIBAL SOVEREIGNTY

As discussed in Section II of this article, the doctrine of tribal sovereignty within federal statute and case law is unclear, muddled by the fragmentary nature of federal Indian policy, and challenged by conflicting doctrines (like the plenary power doctrine). It is unsurprising that tribal sovereignty, as a doctrine within United States federal law, should be such a conflicted legal theory. As a legal doctrine, tribal sovereignty essentially asks the courts to protect, through the mechanisms of United States federal law, a right which exists outside of the jurisdiction of the courts. If Congress wishes to follow the doctrine of tribal sovereignty, then it must reserve jurisdiction of issues—power—to the tribes themselves and thus remove decision-making power from both itself and the states. To a certain degree, Congress has demonstrated a willingness to do so through the recognition of the validity of tribal courts, tribal governments, and tribal legislation. However, that protection only extends to removing the jurisdiction of the states over tribal members and lands. Congress has never found Indian nations beyond its reach, nor has the Court been willing to rebuke Congress in the same fashion as it has rebuked states.¹¹⁵ The plenary powers doctrine, thus far, has been a legal doctrine that overwhelms any theory of tribal sovereignty when the two come into conflict.

The case law on tribal sovereignty is further complicated by the trust doctrine—which asserts a special relationship between the federal government and the tribes based on the continuing protection of tribal interests by the United States federal government—as that

a random fight except when put in the context of both the economic necessity of recouping those costs for the tribes and pushing back against federal control. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012); *see further*, *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 412 (2016).

¹¹⁵ Tribes at different points in time have asked the U.S. Supreme Court to strike down or otherwise limit Congressional trespass on the sovereignty of Indian nations. In each instance, the Court has upheld the ability of Congress—though not always federal agencies—to interfere with tribal governance as it sees fit. *See United States v. Lara*, 541 U.S. 193, 200 (2004) (holding that commerce, treaty clauses, and structure of Constitution are the basis for “plenary and exclusive” power of Congress); *see further*, *Lone Wolf*, 187 U.S. 556-558.; *see also*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Antoine v. Washington*, 420 U.S. 194 (1975); *see further*, WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 19 (2010) (discussing the fundamental point of dissonance in asking the Western legal system to protect the sovereignty rights of tribes).

doctrine places tribal governments in an inherently weaker position.¹¹⁶ The trust doctrine has evolved considerably from the *Cherokee* line of cases where the United States Supreme Court first articulated it, but it remains one of the main pillars supporting tribal sovereignty within federal Indian case-law. The fundamental theory behind the trust responsibility is that the United States federal government has taken upon itself “moral obligations of the highest responsibility and trust” towards American Indians and Alaska Natives, and that the “fulfillment of which the national honor has been committed.”¹¹⁷ The trust responsibility has been used to justify almost every shift in federal Indian policy, including termination, as the standard for meeting the trust responsibility is extremely flexible.

In modern case law, however, tribal advocates have used the trust responsibility to support three major claims. First, the preservation of tribal lands by entering lands 'into trust' such that they become part of Indian Country; second, the continued federal funding of Indian programs; and finally, the government-to-government relationship between the United States federal government and the tribes.¹¹⁸ The vagueness of the trust doctrine is such that it provides useful ground for, not only tribal advocates, but also their opponents. Courts have provided few standards for determining whether or not a federal policy is in violation of the trust responsibility, but they have consistently found that the federal

¹¹⁶ See *supra* note 23 for a brief discussion the Marshall Court's introduction of the trust responsibility of the U.S. towards Indian nations. The trust doctrine is an extremely complex legal doctrine within federal Indian law and a detailed discussion of that doctrine goes beyond the scope of this paper. See e.g., Rebecca Tsosie, *The Indian Trust Doctrine After the 2002-2003 Supreme Court Term*, 39 TULSA L. REV. 271 (2003); Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

¹¹⁷ *United States v. Mitchell*, 463 U.S. 206, 225 (1983); see also, *United States v. Navajo Nation*, 538 U.S. 488, 490 (2003) (finding a “general trust relationship” between the federal gov’t and Indian tribes in which the federal gov’t must move to protect Indian interests).

¹¹⁸ Entering lands into trust is one of the primary methods tribes have of expanding their territories and thus jurisdiction. Lands in trust have limitations upon them as the tribes cannot sell them or enter into certain property arrangements without the permission of the Secretary of the Interior. However, placing lands in trust is still one of the best ways to ensure tribal jurisdiction over those lands. This process has unfortunately been complicated by recent Supreme Court rulings and tribes are currently seeking a legislative fix from Congress. See *Carcieri v. Salazar*, 555 U.S. 379, 380 (2009).

government has a general fiduciary duty to the tribes.¹¹⁹ Tribal advocates have also successfully used the trust doctrine to obtain legal remedies from the courts on violation of resource rights,¹²⁰ proper management of income held in federal accounts,¹²¹ and tribal sovereignty in general.¹²² On the other hand, the trust doctrine has also been used to limit tribal sovereignty and justify the termination era policies.¹²³ Moreover, locating tribal sovereignty within the trust doctrine places tribal governments in an inherently subservient position, a hierarchy of power that has been resisted by tribal advocates.¹²⁴

Despite the legislative and judicial assaults upon tribal sovereignty and its tenuous position within case law, tribal advocates have not stopped arguing for the recognition of the full and substantive sovereignty of Indian tribes; however, they have also diversified their legal strategies as demonstrated throughout this article. A century of facing the steady erosion of tribal sovereignty, self-governance rights, and control within the American legal system led tribal leaders to reach outside the traditional legal doctrines governing federal Indian law to look for innovative protections.¹²⁵ Tribal leaders have been effective navigators of both the American legal and American political system in the defense of their people, lands, and authority by manipulating whatever legal doctrine possible to advance tribal interests. Thus, it is in keeping with the adaptability of tribal advocates that they developed a theory of tribal contracting within the larger body of government contracting law in order to best protect tribal rights to self-determination.

It is not a mistake or misreading of the ISDEAA to approach

¹¹⁹ *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (holding that applicable statutes, regulations, treaties, and executive orders “define the contours of the U.S. fiduciary responsibilities” to the tribes under the trust doctrine); *see further*, *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 736-738 (2011); *Rodgers v. United States*, 697 Fed.886, 890 (9th Cir. 1983).

¹²⁰ *See White Mountain Apache Tribe v. United States*, 537 U.S. 465, 468 (2003) (protecting tribal land interest); *see also Parravano v. Babbitt*, 70 F.3d 539, 541 (9th Cir. 1995) (protecting tribal water rights); *United States v. Eberhardt*, 789 F.2d 1354, 1356 (9th Cir. 1986) (holding the trust responsibility required the federal gov’t to protect tribal fishing interest).

¹²¹ *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001); *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997).

¹²² *Harjo v. Andrus*, 581 F.2d 949, 950 (D.C. Cir. 1978).

¹²³ *Survey of Conditions*, *supra* note 42.

¹²⁴ *See ECHO-HAWK*, *supra* note 115; *see further*, *Deloria*, *supra* note 55.

¹²⁵ *See Pevar*, *supra* note 18.

638-contracting from within the framework of government contracting because that was the original intent of tribal advocates in designing the legislation, as demonstrated in section three. The Supreme Court, thus far, has resolved ISDEEA contracting/compacting cases under theories of contract without reaching for legal doctrines related to federal Indian policy.¹²⁶ In doing this, the Supreme Court has followed arguments made by tribal advocates on ISDEEA.¹²⁷ 638 contracting/compacting is a fundamental part of tribal self-determination, a federal policy which the courts have upheld, but remains separate from tribal sovereignty, which the courts have encumbered.

By arguing from within the framework of government contracting and through the modern congressional policy of self-determination, tribal advocates have been able to win back significant sectors of tribal control, free from the oversight of the federal agencies.¹²⁸ The President of the National Congress of American Indians, Jefferson Keel, stated that the policy of self-determination has been an enormous success.¹²⁹ However, President Keel was careful to delineate the tribal theory of Indian sovereignty—which is a full and substantive sovereignty that is not minimized by the plenary powers doctrine—from that of self-determination as possible under ISDEEA.¹³⁰ Tribal advocates understand the speed at which legal doctrines regarding Indian rights can turn against them and have been careful to maintain the government contracting frame around 638 contracting/compacting as demonstrated by their careful approach to the 1988, 1996, and 2000 amendments to ISDEEA.

Even without tribal advocates consistently working to maintain

¹²⁶ *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 187 (2012) (finding under government contracting provisions that the federal agencies must pay tribal governments and tribal organizations full contract support costs regardless of funds appropriated by Congress).

¹²⁷ See Testimony of Mr. Red Owl, *supra* note 86 at 21-22.

¹²⁸ See *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005) (in general, ISDEEA has been given a broad and liberal interpretation by the courts with regard to what tribes can contract for and in limiting the scope of federal agency interference); see also, *Ramah Navajo Chapter v. Lujan*, 112 F.2d 1455, 1456 (10th Cir 1997); *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1340 (D.C. Cir. 1996).

¹²⁹ Jefferson Keel, Op-ed., *Sovereignty & Trust Responsibility-40 years of Tribal Self-Determination*, INDIAN COUNTRY TODAY (Nov. 10, 2010), <https://indiancountrymedianetwork.com/news/keel-sovereignty-and-the-trust-responsibility-40-years-of-tribal-self-determination/>.

¹³⁰ *Id.*

the government contracting frame,¹³¹ 638 contracting/compacting falls outside the doctrine of tribal sovereignty because it works under the theory of Congressional delegation.¹³² Through ISDEAA, Congress essentially delegated back to the tribe the provision of services owed to them under the doctrine of the trust responsibility.¹³³ ISDEAA does not recognize tribal sovereignty, but instead, the United States' obligations to the tribes for services guaranteed to them under treaty. 638 contracting/compacting ensures that tribes maximize their control over how those services are provided to them.¹³⁴ Federal Indian policy has managed to divide self-determination and self-governance from sovereignty when it comes to the tribes. ISDEAA empowers the tribes regarding their self-governance, but it does not strengthen their sovereignty because the legal mechanisms providing that empowerment all flow from doctrines related to federal responsibilities to the tribes. While the courts have found that the federal government has a substantial interest in empowering tribal self-sufficiency, self-governance, and economic development,¹³⁵ they have thus far not found that the federal government has a similar interest in promoting tribal *sovereignty*.¹³⁶ The fact that 638 contracting/compacting language revolves around self-determination and self-governance rather than sovereignty is not an oversight nor a mistake, but a deliberate choice.

V. CONCLUSION

The courts have not erred by resolving issues arising out of ISDEAA through contract law, nor has Congress erred in treating ISDEAA as a mechanism of tribal self-determination, but not tribal sovereignty. Indeed, tribal advocates have been adamant before the courts and Congress that what tribes desire from ISDEAA is that they are to be treated as contractors with the full rights and protections normally. Tribal advocates have shifted the Congressional vision of the full scope of 638

¹³¹ See *Ramah*, 567 U.S. at 10-11.

¹³² *Supra* note 17.

¹³³ *Id.*

¹³⁴ See *Leavitt*, 543 U.S. 631.

¹³⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

¹³⁶ One could argue that the courts have not even found that the federal gov't must be respectful of tribal sovereignty, only the states, as the courts have used both the plenary power doctrine and the preemption doctrine to shut down state attempts to legislate on tribal lands.

contracting/compacting, as detailed in section three, but have not moved away from that general frame because it provides another avenue for protecting tribal interests without necessarily invoking Indian law doctrines that may be problematic. The government contracting frame has its own problems, as demonstrated by the ongoing conflict over contract support costs, but those issues are new to the debates around federal Indian policy for the tribes. The government contracting frame provides new ground to visit old problems. Thus, under ISDEAA, the issues regarding interference from federal agencies, the full funding of Indian programs, and the empowerment of tribal self-governance can be approached from new angles. Fighting the paternalism of federal agencies is an old battle for the tribes, but under ISDEAA, it becomes a new discussion that has provided significantly better remedies than previous attempts to reclaim tribal self-governance.

Approaching ISDEAA from the perspective that it either (1) reduces the tribes to government contractors, or (2) is somehow a mechanism of tribal sovereignty ignores the deliberate strategy on the part of tribal leaders and advocates to manipulate the government contracting frame. It is sometimes difficult to discern the legal and legislative strategies of the tribes, but in the drafting and evolution of ISDEAA, the choice by tribal leaders to build upon the government contracting framework in ISDEAA has been quite clear. The tribes have been active and aggressive actors in the evolution of 638 contracting/compacting, and innovative in its use. It is necessary to understand what has been the general strategy of the tribes towards ISDEAA if we are to understand how 638 contracting/compacting will continue to develop. Since 1968, tribal advocates have steadily sought to increase the legal avenues available to them in order to expand and protect tribal self-determination and control. Not all actions by the tribes should be considered within the frame of tribal sovereignty or seeking to expand tribal sovereignty because that ignores the innovations and adaptability of the tribes.

Control has been the goal of tribal advocates since the termination and relocation era—control over (1) federal funding, (2) programs to American Indians and Alaska Natives, (3) tribal lands, and (4) tribal people. Another way of interpreting Vine Deloria's famous statement that “there might not be another” battle over the rights of tribes to have control over their own destiny could be that

the tribes will not allow control to be wrestled away from them in such a manner again. 638 contracting/compacting is not an act of tribal sovereignty—at least as the tribes themselves have understood their own sovereignty—but is demonstrably an act of tribal *control*. While the courts have been content to define tribal sovereignty as a footnote to the sovereignty of the United States, the tribes themselves have never stopped demanding full and substantial sovereignty over their own lands on par with the sovereignty of the United States. To conflate 638 contracting/compacting with tribal sovereignty is to turn a deaf ear to those demands.

To understand ISDEAA as an expression of tribal sovereignty accepts the idea that the sovereignty of Indian nations is lesser than other nations, which is an idea the tribes have rejected time and time again. 638-ing is a hedge, a fail-safe, for tribes to maintain their self-determination and self-governance rights while at the same time continuing to argue for their sovereignty rights. Further, conflating tribal self-governance contracting with tribal sovereignty obscures the depths of the tribal demand for sovereignty. ISDEAA has been enormously successful. Since its implementation, tribes have drastically increased their self-governance capacity, and by doing so, have increased their ability to make demands for the recognition of their sovereignty; regardless, the ISDEAA is not a mechanism of tribal sovereignty.