



**WRITTEN TESTIMONY  
SUBMITTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE  
ON H.R. 4347, DEPARTMENT OF THE INTERIOR  
TRIBAL SELF-GOVERNANCE ACT OF 2010**

**W. RON ALLEN, TRIBAL CHAIRMAN/CHIEF EXECUTIVE OFFICER  
JAMESTOWN S'KLALLAM TRIBE  
CHAIRMAN, SELF-GOVERNANCE COMMUNICATION AND EDUCATION TRIBAL  
CONSORTIUM  
CHAIRMAN, TITLE IV TRIBAL TEAM  
CHAIRMAN, DEPARTMENT OF THE INTERIOR  
SELF-GOVERNANCE ADVISORY COMMITTEE**

**November 18, 2010**

My name is W. Ron Allen and I am the Tribal Chairman and Chief Executive Officer of the Jamestown S'Klallam Tribe, located in Washington State. I am also the Chairman of the Board for the Self-Governance Communication and Education Tribal Consortium (SGCETC), Chairman of the Title IV Tribal Team as well as the Chairman of the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC), and I submit my testimony on H.R. 4347 in all of these capacities. Collectively, I am representing the 260 Tribes in DOI and 331 Tribes in the Indian Health Service of the Department of Health and Human Services participating in Self-Governance.

I testified on H.R. 4347 before the House Committee on Natural Resources on June 9, 2010. During my testimony, I shared the Self-Governance story and the experiences and successes that the past 20 years in Self-Governance represent. The number of Tribes and Tribal consortia participating in Self-Governance today is 33 times greater than in 1991. Approximately 50-60% of all Federally recognized Tribes are Self-Governance Tribes, and the interest shown by other Tribes is continuing to grow.

Self-Governance has been a huge success. Self-Governance works because it promotes efficiency and accountability; strengthens Tribal planning and management capacities; invests in our local resources to strengthen reservation economies; allows for flexibility; and affirms sovereignty.

Success can be a very costly accomplishment and Self-Governance Tribes know this all too well. Self-Governance Tribes have consistently supported appropriation requests increases for BIA programs and services that impact American Indians and Alaska Natives. The current

regulations require that Self-Governance Tribes share equally in Congressional appropriation increases. However, our experience has been that when Indian Affairs has received these increases, oftentimes Self-Governance Tribes did not consistently receive our relative share (see attachment to this testimony: Analysis of Self-Governance Funding Increases vs. Overall Indian Affairs Budget).

I emphatically emphasized the need for amendments to Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93-638 as amended) and a brief overview of the proposed amendments in my comments to the House Committee on Natural Resources. And, today I reiterate the same message to this Committee. H.R. 4347 contains several proposed amendments to Title IV that advance important purposes. Most significantly, they create consistency between Title IV Self-Governance in DOI and Title V Self-Governance in the Department of Health and Human Services (DHHS).

Tribal, Congressional and Federal representatives have met dozens of times to discuss the provisions and have spent hundreds of hours negotiating the details of H.R. 4347's provisions. The Title IV Tribal Team has been especially active in meeting with DOI and Bureau and Indian Affairs (BIA) officials over the last few months. Significant agreement has been reached on the vast majority of the provisions in this bill. Tribes have made significant concessions in order to ensure that this important legislation is enacted in this session of Congress.

Since I testified on June 9, major progress has been made towards the goal of passage of H.R. 4347. On July 22, the House Committee on Natural Resources held a markup session, during which the House Committee unanimously approved an Amendment in the Nature of a Substitute (ANS) to H.R. 4347, which had been offered by Representative Dan Boren (D-OK). During the session, Chairman Nick Rahall (D-WV) and Representative Boren noted that the ANS resolved many of DOI's concerns after significant concessions by Tribal representatives.

On September 22, the House of Representatives considered under suspension of the rules and passed by voice vote H.R. 4347. For the most part, the House passed bill was the same as the bill marked up and reported out of the House Committee on Natural Resources on July 22.

### **Concerns Raised by DOI and Tribal Responses**

In the past, DOI has raised concerns with respect to several of the provisions in the amendments. I will briefly describe the main concerns that DOI discussed with the Title IV Tribal Team and the Tribal responses that demonstrate how these concerns have been addressed in the current provisions of H.R. 4347:

- ***Section 403 – Selection of Participating Indian Tribes.***
  - DOI Concern. DOI expressed concern regarding the process of Tribal withdrawal from a Tribal organization, as outlined in Section 403(a)(4). DOI is concerned about the possibility of withdrawal occurring during mid-cycle of a current funding

agreement and the effect that this would have on the Federal government being able to retrieve funds necessary to keep Tribes remaining in the Tribal organization operating.

- **Tribal Response.** Section 403(a)(4)(D)(iii) explains the effective date of a withdrawal. The provisions were drafted to ensure that withdrawal (and the resulting withdrawal of funds) occurs when the parties agree or during the transition between fiscal years. Additionally, in practice, the Office of Self-Governance (OSG), Tribal organizations, and withdrawing Tribes agree upon a date of withdrawal. Finally, the Director of OSG negotiated the details of this provision to reflect the process that OSG currently uses.
- ***Section 407(c)(1), (2), and (5) – Inability to Agree on Compact or Funding Agreement: Final Offer, Determination, and No Timely Determination.***
  - **DOI Concern.** DOI expressed concern with subsections (1) and (2), which cover final offers and determinations on final offers. Under the bill, if the Secretary and a Tribe are unable to agree on terms, the Tribe may submit a final offer to the Secretary. The Secretary is required to make a determination with respect to the final offer not more than 60 days after delivery of a final offer. DOI believes that the provision should allow for 90 days for the determination.

DOI has also expressed concern with subsection (5), which states that if the Secretary fails to make a determination with respect to a final offer within 60 days, the Secretary shall be deemed to have agreed to the offer. DOI would prefer that if there is no action taken by the Secretary within the required timeframe, then the Secretary would be deemed to have *disagreed* to the offer.
  - **Tribal Response.** The deemed approval/agreement concept has been fundamental to ISDEAA contracting since its inception. This concept levels the playing field and ensures that BIA acts in a timely manner with respect to contract proposals. The concept has also applied to Title IV agreements for those Tribes that have opted – as a matter of right – to incorporate the Title I declination process and criteria into their Title IV compacts and funding agreements. This concept is absolutely essential.
- ***Section 407(c)(6)(A)(iii)(I) – Inability to Agree on Compact or Funding Agreement: Rejection of Final Offer.***
  - **DOI Concern.** This subsection provides that if the Secretary rejects a final offer (or one or more provisions or funding levels in a final offer), the Secretary shall provide the Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter. DOI has indicated that they believe that discovery should not be permitted in the appeal process. Instead, DOI would prefer

- that review occur under the Administrative Procedure Act (APA) and that this review be limited to the administrative record compiled by the agency.
- Tribal Response. This provision would bring another aspect of Title IV into line with Title V. Significantly, Section 507(c)(1)(C) of ISDEAA provides a Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter. It is important for Tribes to have access to all relevant information in a hearing to facilitate a review process that is adequate and fair to Tribes.
- ***Section 407(d)(2) – Burden of Proof.***
    - DOI Concern. DOI has expressed concern with the burden of proof incorporated in this subsection. The provision states that in any action, hearing, or appeal, the Secretary shall have the burden of demonstrating by clear and convincing evidence the grounds for rejecting a final offer.
    - Tribal Response. It is critical that the provision incorporates a clear and convincing evidence standard for the protection of Tribes. This provision would bring a key aspect of Title IV into line with Title V. In appeals involving Title V, the Secretary has the burden of demonstrating by clear and convincing evidence the validity of the grounds for the decision made.
  - ***Section 409(d)(2) – Payment: Timing: Transfers.***
    - DOI Concern. This subsection provides that one year after enactment, in any instance requiring an annual transfer of funding to be made at the beginning of a fiscal year or requiring semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds to DOI, unless the funding agreement provides otherwise. DOI has taken issue with the 10-day payment period; DOI would prefer a minimum of 30 days.
    - Tribal Response. Again, this provision would bring Title IV into line with Title V, thereby creating administrative efficiencies for Tribes. Section 508(a) provides that transfers are to be made not later than 10 days after the apportionment of funds to IHS. DOI has not adequately explained why this requirement should not be incorporated into Title IV.
  - ***Section 413 – Funding Needs.***
    - DOI Concern. DOI has stated that the agency would like Section 413 to be removed from the bill. DOI has expressed frustration with the possibility of being required to

generate an additional report and also suggested that this provision might increase the Congressional Budget Office (CBO) score of the bill.

- Tribal Response. This report, which is required to accompany the annual budget request, is imperative. Without this report, Congress will not have a true understanding of the needs of Self-Governance Tribes. The cost of preparing the report was built into the CBO score that the bill received. BIA officials have stated publicly at the last Self-Governance Advisory Committee meeting that the BIA has sufficient funds available from year end funds to offset the full amount necessary to cover the cost of implementing the bill, including this reporting requirement. To reflect this BIA commitment we suggest that language be included in the Committee report on H.R. 4347 or in the SCIA Chairman's or Vice Chairman's floor statement upon Senate passage of this bill that makes clear that DOI has assured the Committee that the bill can and will be implemented without requiring any new or additional appropriations.
- ***Section 414(b)(2)(E) – Reports.***
  - DOI Concern. This subsection outlines what must be included in the annual report submitted by the Secretary to Congress regarding the administration of Title IV. The report must specify the amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of inherent Federal functions. DOI has in the past expressed concerns that implementation of this provision will be challenging because DOI does not have a system in place for this and has never gathered this type of information.
  - Tribal Response. This exact report requirement is included in Section 514(b)(2)(E) of ISDEAA. The provision will allow for consistency between Titles IV and V. When Title V was enacted in 2000 IHS did not have the infrastructure in place to implement Section 514(b)(2)(E) but the IHS made the necessary changes administratively to implement this section. We are confident that DOI will do the same after Section 414(b)(2)(E) is enacted.
- ***Section 417 – Appeals.***
  - DOI Concern. DOI has expressed concern that the appeals process included in H.R. 4347 does not fit the discretionary programs.
  - Tribal Response. First, the appeals process should apply to all non-BIA programs, whether they are mandatory or discretionary. The standard for discretionary programs is whether the Secretary has not properly exercised his discretion, which is a very high burden for Tribes to challenge. It is unlikely that Tribes will bring litigation as a result of the high burden.

### **Conclusion**

In conclusion, I urge the Committee to enact a bill identical to H.R. 4347 as soon as possible. The bill contains provisions that have been carefully crafted and negotiated over the course of nearly ten (10) years. The final step on the path toward increased Tribal Self-Governance and self-reliance is for the Senate to pass H.R. 4347.

The success of Self-Governance has been demonstrated by the overwhelming number of Tribes in Self-Governance and those Tribes who are seeking to become a part of this phenomenon. That has also been our experience at Jamestown. Self-Governance allows us to prioritize our needs and plan our future in a way consistent with the Tribe's distinct culture, traditions, and institutions.

My deepest hope is that this Congress will enact these Title IV amendments so that we can build on the successes of the past 20 years and further Tribal Self-Governance in partnership with the United States, to achieve our mission and our goals.

Thank you.

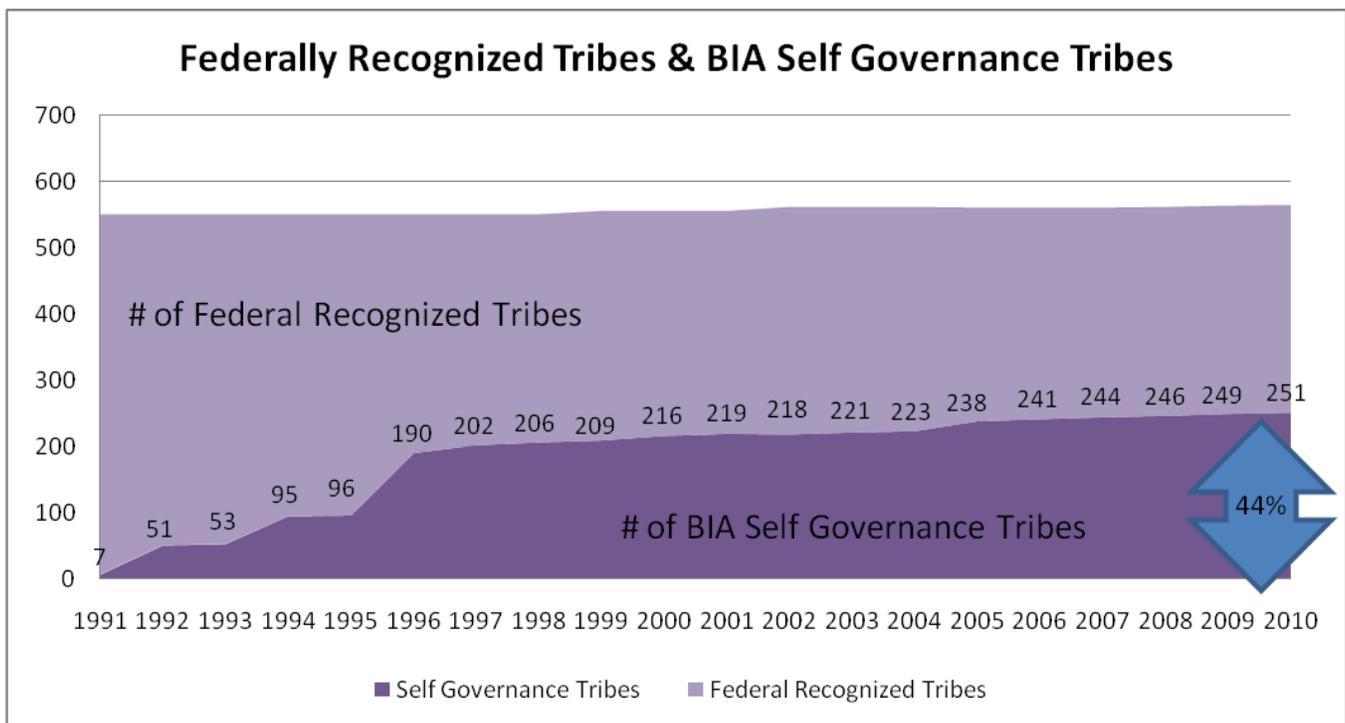
## Analysis of Self-Governance Funding Increases vs. Overall Indian Affairs Budget

**Background on Issue:** Over the past 5-8 years, Self-Governance Tribes have voiced concern over the failure to receive their fair share of subsequent BIA funding increases. As identified during the TBAC presentation at the SG Conference held in May 2010:

- Allocation of Self-Governance Increases has **NOT** been transparent.
- Clearly, BIA has been making allocation decisions without Tribal (TBAC) Input.
- Increases have **NOT** been shared equally with Self-Governance Tribes (e.g. Law Enforcement).
- Tribes do **NOT** know the allocation results (or methodology) for most other BIA Programmatic increases: Education, Natural Resources, Economic Development. (CSC is known).
- Allocation of Carryover funds is **NOT** transparent and *MAY* be inequitable as well.
- Rescissions, on the other hand, have always been shared across the board.

Many Tribes have compact language stating that the Tribe “shall be eligible for increases and new programs on the same basis as other tribes”. If Self-Governance Tribes have not been eligible on the same basis as 638 tribes, this is in non-compliance with these Agreements. Further, it is difficult--if not impossible--for a Tribe to determine if it has been treated equitably when the Department has not been transparent on what “basis” funds have been allocated.

**Analysis/Charts:** The first graph visually shows the increase in Self-Governance Tribes since it began in 1991. The first 5 years of self governance had explosive growth, and the last fifteen years have had steady growth each year. The total number of federally recognized tribes is 565, with 564 as of the notice published in 2009 (74 FR 40218) plus the Shinnecock Indian Nation, which was published in June 2010 (75 FR 34760). Self-Governance Tribes comprise 44% of all Federal Recognized Tribes as of August 2010.



**Figure 1: Figure 1: Number of tribes covered each year under BIA Funding Agreements. OSG data obtained July 20, 2010.**

Even with these increases (in the number of SG tribes and funding levels), the transfers to Self-Governance Tribes has not increased proportionately over time at the same pace as the total BIA appropriations. This graph indicates the Self-Governance proportion of the BIA Total Appropriations over the last 22 years. The first Self-Governance compacts and funding agreements were in place in 1990. The data from the last 10 years was pulled and verified through the OSG and Green Book. Dollars are nominal and do not account for inflation.

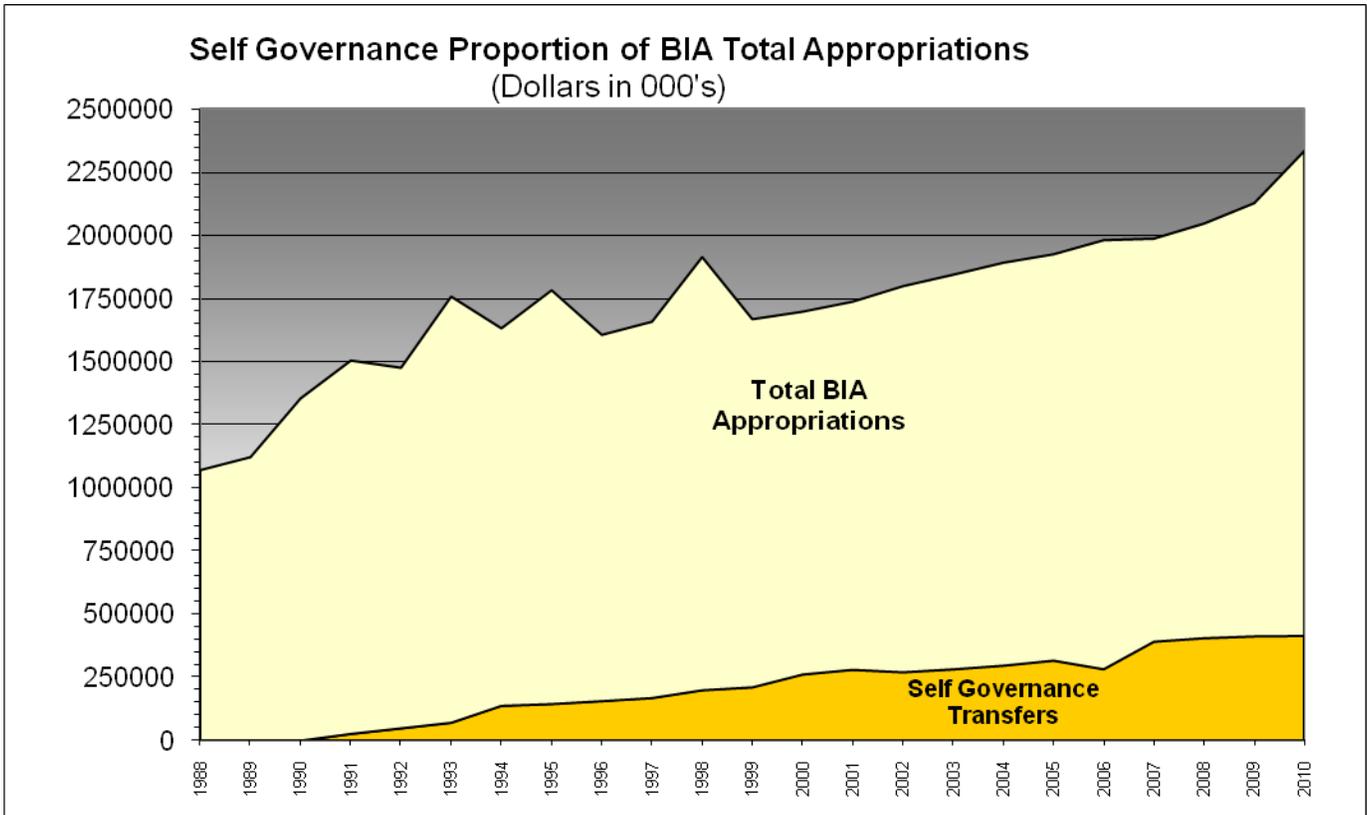
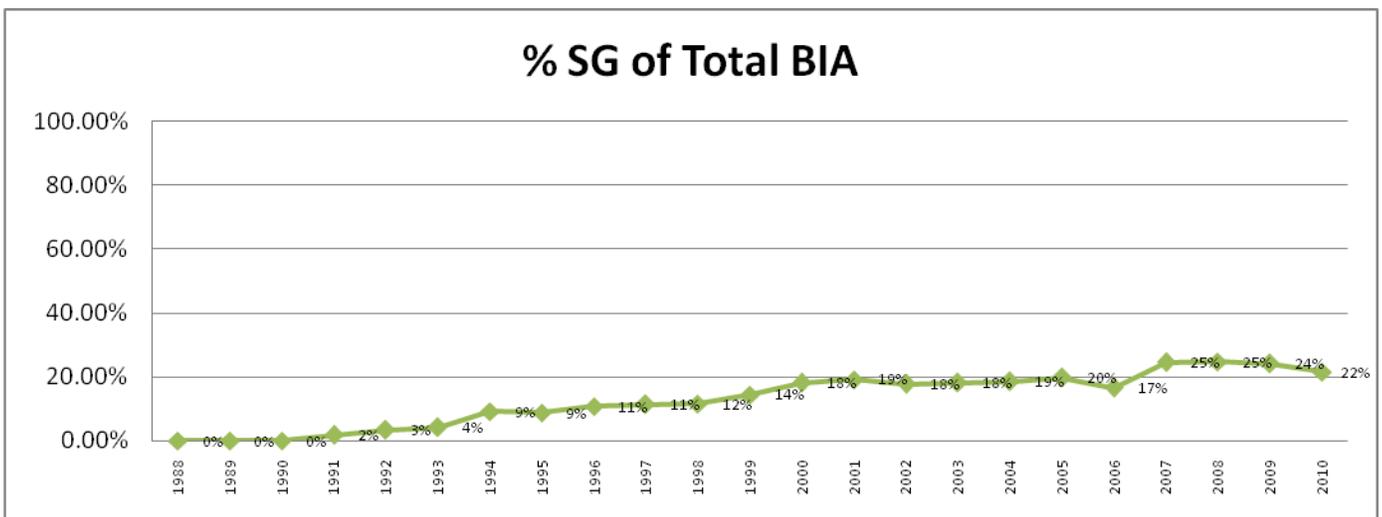


Figure 2: Data OSG, 2010 SG figure is estimate. Dollars are nominal and do not account for inflation.

Another way of looking at the transfers to Self-Governance Tribes is as a percentage of the total BIA Appropriations. The following graph shows that compared with the total BIA Appropriations, the Self-Governance Transfers climbed to 9.23% in 1995, had slow growth in 2005, a decline in 2006, followed by another increase and then decrease in 2009. The data from 2010 is still an estimate.



Dave Connor provided the following law enforcement analysis. Based on the 2005 budget, BIA law enforcement programs received nearly 145% increases by FY 2009, while 638 programs received 129% and Self-Governance Tribes lagged behind, actually receiving decreases from FY2008 to FY2009, to a total increase of 106%.

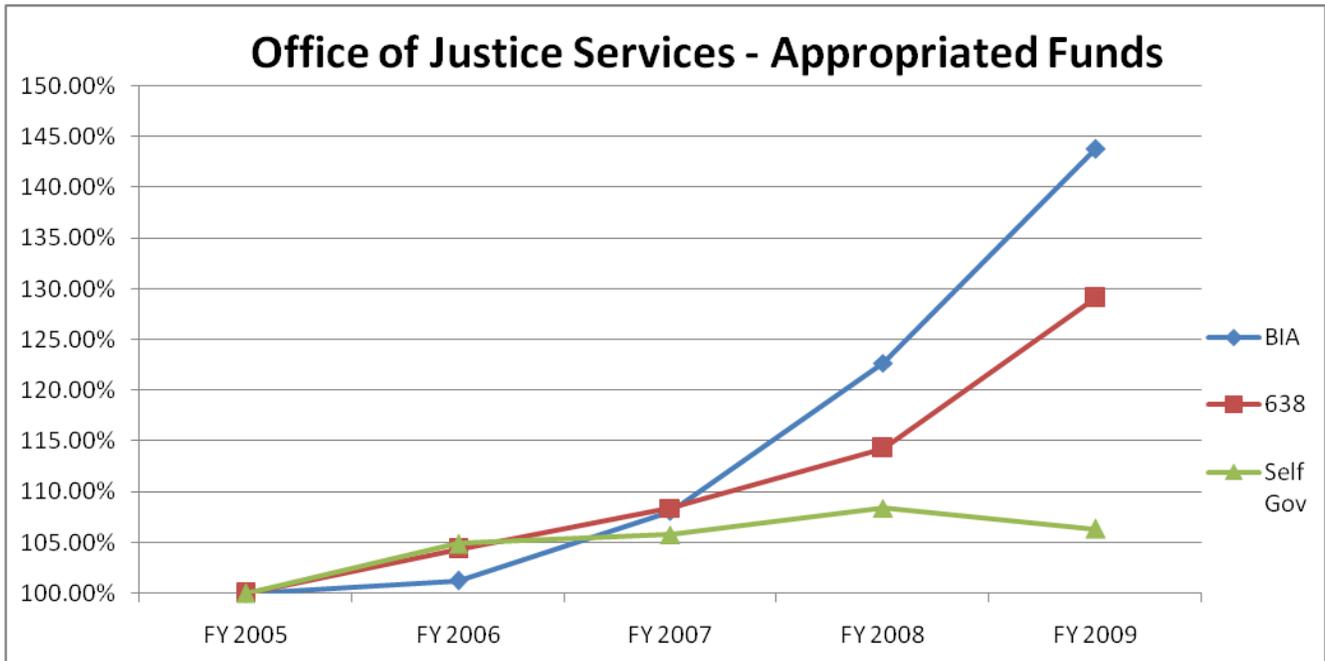
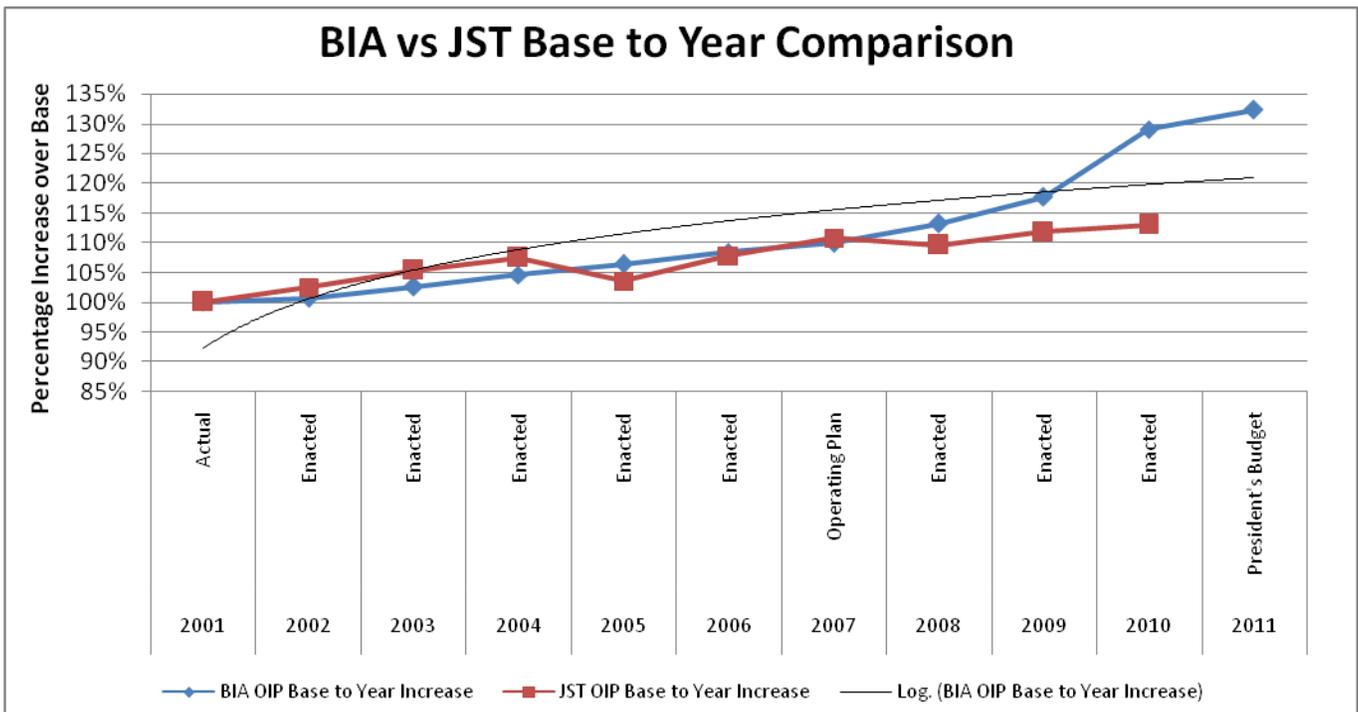


Figure 3: Increase to program per year with 2005 as base budget.

Kogi Naidoo from the Jamestown S'Klallam Tribe completed a 10-year comparison of the Tribe's TPA base compared with the BIA TPA increase over the same period of time. For FY2010, the BIA base budget increased 129% from the base year, whereas the Tribe's base budget only increased 113% from the base year.



In addition to the graphic analysis, other examples where SG Tribes were either excluded or unfairly treated for funding increases include:

1. In FY 2006, BIA had end of year natural resources funds that they wanted to distribute on short notice. No Self Governance Tribes were included in this distribution. When this was questioned by the Tribes, the Central Office program manager responded that in his experience, OSG was not efficient enough to process fund transfers on short notice, so he specifically excluded Self Governance Tribes from consideration.
2. In the 2007 TBAC discussions on how to distribute FY 2006 carryover funds, the TBAC recommended that the available amounts should be distributed pro rata for Tribes' scholarship programs. It was subsequently agreed to by the Assistant Secretary that \$4 million in FY 2006 carryover funds would go to Tribes for their scholarship programs. Prior to distribution of the funds, Mary Jane Miller made mention in a TBAC budget subcommittee email, that the \$4 million distribution would not include Self Governance Tribes, as they are not subject to decreases like 638 Tribes. In a follow up email and subcommittee conference call, Mary Jane subsequently agreed to include Self Governance Tribes in the distribution.
3. During the December 2009 TBAC meeting, it was made aware by a BIA employee that Self Governance Tribes were specifically excluded from sharing in the \$2 million CY 2010 increase for fish hatchery operations (there was also a 2010 increase of \$2 million for fish hatchery maintenance, which Self Governance Tribes would be eligible for along with 638 Tribes). The reason given for excluding Self Governance Tribes from sharing in the fish hatchery operations increase was that they were no longer included in the Greenbook section describing the program. The paperwork was completed for this distribution to the 638 Tribes. However, once Self-Governance raised their concerns in being excluded, the BIA rescinded all of the funding documents they had **already** sent to the 638 Tribes for their fish hatchery operations increases, so that they could reallocate the \$2 million fairly.
4. During April 2010 TBAC Budget Subcommittee meeting, the BIA provided FY 2012 Over Target budget justification for \$5 million in new program funding for Conservation Enforcement positions in Indian Country. The justification states that "Increased funding will be incorporated into P.L. 93-638 contracts with fish and wildlife resources tribes to allow them to hire and provide credible certification for their CLEO personnel". It was noted by the Tribal members that this needed to be corrected to include Self-Governance Tribes.

### Recommendations:

Several possible solutions have been discussed, including:

- **REDEFINE REGIONAL/TRIBAL RELATIONSHIP TO MAINTAIN PROGRAM INTEGRITY, SHARE IN PROGRAM INCREASES, AND TO SHARE IN YEAR END CARRYOVER FUNDS.** It is important that a relationship between Self-Governance Tribes and the Regional Offices/Agencies be maintained relative to program funds. Self-Governance Tribes are running programs on behalf of the federal government. Too often, the longstanding culture at the BIA has left Self-Governance Tribes out of program increases as well as carryover because BIA staff have stated that "the Tribe has received full funding and the BIA is 'finished' with it." When program fund increases and carryover are not shared equally with the Self-Governance Tribes, SG Tribal citizens do not receive the benefit of funding provided by Congress on their behalf.
- **EASE FUND TRANSFER THROUGH OSG—REDESIGN PROCESSES, ESTABLISH "FAST TRACK" TRANSFER PROCESS, INCREASED STAFFING.** Carryover funds must move quickly or they will be lost. Therefore, fund transfers through the Office of Self-Governance must be timely. At the regional level, funding is added to an open 638 contract. A similar method should be available through Self-Governance. Most likely, a combination of process redesign or "a fast track system" will need to be developed along with

increased staffing. Self-Governance Tribes have been requesting additional staffing to effectively move IRR and fire funds.

- **STRONGER SELF-GOVERNANCE ADVOCACY IN TBAC.** The BIA looks to the Tribal Budget Advisory Committee (TBAC) for direction and priorities on budgets. Without Self-Governance representation on the Committee, it is easy to overlook the specific issues faced by Self-Governance Tribes. The TBAC generally assumes that funding increases and carryover is distributed equally between direct, contracting, and Self-Governance compacting Tribes. However, history has demonstrated that technical barriers such as difficulty in transfer of funds have resulted in unequal distribution of funds.
- **PROGRAMMATIC FORMULAS FOR NEW FUNDS.** Consultation with Tribes is paramount in the development of programmatic funding formulas. Consistent, objective, and readily available variables should be used in a straightforward formula that is relatively simple to implement. Data collection is the key. Presently, even where there are formulas, the data used to calculate the distributions is inconsistent and unreliable, and often there is no formula, in which case distributions are made on a discretionary basis that is not predictable and often based on the limited personal knowledge of the Federal official. Examples of complex formulas/data collection can be seen in the allocation of IRR funds and the implementation of the CSC policy. While these two examples have been fraught with complications, (IRR and CSC funding formulas), at least Self-Governance Tribes share in funds on an equal footing. **Self-Governance Tribes recommend that BIA:**
  - Make information regarding its decision making process for each category of funding available to all Tribes, including all formulas upon which it relies, the methods for obtaining all data relied upon in the formulas, and the factors relied upon for any decision making that is not formula based;
  - Consult with Tribes regarding the formulas and other decision-making processes relied upon by BIA;
  - provide opportunities for Tribes to evaluate and comment on the accuracy of all data relied upon in any formula that BIA uses; and
  - Routinely update all information relied upon for making funding decisions and provide reasonable opportunities for Tribes to verify the data.