

**ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON TRIBAL AFFAIRS**

February 25, 2020

8:02 a.m.

MEMBERS PRESENT

Representative Tiffany Zulkosky, Chair
Representative Bryce Edgmon, Vice Chair
Representative Dan Ortiz
Representative Dave Talerico
Representative Sarah Vance

MEMBERS ABSENT

Representative John Lincoln
Representative Chuck Kopp

COMMITTEE CALENDAR

PRESENTATION: INDIAN SELF-DETERMINATION ACT

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

REBECCA PATTERSON, Attorney
Sonosky, Chambers, Sachse, Endreson & Perry
Juneau, Alaska

POSITION STATEMENT: Presented a PowerPoint on the Indian Self-Determination Act.

ACTION NARRATIVE

[8:02:40 AM](#)

CHAIR TIFFANY ZULKOSKY called the House Special Committee on Tribal Affairs meeting to order at 8:02 a.m. Representatives Edgmon, Ortiz, Talerico, Vance and Zulkosky were present at the call to order.

PRESENTATION: INDIAN SELF-DETERMINATION ACT

[8:03:19 AM](#)

CHAIR ZULKOSKY announced that the only order of business would be a presentation on the Indian Self-Determination Act.

[8:03:35 AM](#)

REBECCA PATTERSON, Attorney, Sonosky, Chambers, Sachse, Endreson & Perry, gave a PowerPoint presentation [hard copy included in the committee packet] on the Indian Self Determination and Education Assistance Act (ISDEAA). She informed the committee that she worked with tribes and tribal organizations in all matters relating to the Act, including tribes in the beginning stages that have not contracted or compacted before and want help walking through the process all the way to assumption of programs.

MS. PATTERSON stated that the ISDEAA was first introduced in 1970 by President Richard Nixon in a speech to Congress and followed an era called "Termination," a federal policy toward tribes which basically sought to do away with tribal status and "hope everything [went] well." President Nixon swung the pendulum the other way, and instead of removing tribes' status, he turned the control over those programs that served tribal members to the tribes themselves. After five years, the ISDEAA was borne.

MS. PATTERSON informed the committee of the three provisions of the Act: first, it required that the U.S. Secretary of the Interior and the U.S. Secretary of the Department of Health and Social Services would have to contract with tribes if tribes requested it; second, it allowed tribes to contract with the Bureau of Indian Affairs (BIA) for the administration of Johnson-O'Malley Act [enacted into law 1934] education funds, which previously had gone to states, and allowed for Public Health Service personnel to be detailed to tribal organizations, enabling tribes to utilize existing staff and eliminating the need for them to start from scratch; and third, it provided civil benefits to civil federal employees transferring to work for tribes.

[8:07:28 AM](#)

MS. PATTERSON said the ISDEAA was a revolutionary idea and "there was a lot of back and forth," but since 1975 it has been the bedrock between tribes and the federal government. She added that amendments and changes have only strengthened the

pro-tribal provision. Ms. Patterson directed the committee's attention to slide 2 of the PowerPoint, entitled "The ISDEAA in Parts," which lists the "Five Titles" of the original 1975 ISDEAA. Title I is Self-Determination Contracting. She paused to explain that contracting and compacting are the same general idea: the federal government is providing services, and they transfer control, authority, and funding all over to the tribe. Title I also contains details about funding as well as a model contract.

MS. PATTERSON explained Title II, Contracts with States, which refers to the Johnson-O'Malley Act funding; Title III refers to Indian Education, again in the 1975 version of the Act. The first three provisions, under slightly different titles, formed the basis of the original ISDEAA. In 1994, Ms. Patterson continued, almost 20 years later, the U.S. Department of the Interior (DoI) Self-Governance appeared [Title IV]. A bit more language to add detail and get around what had been obstacles was added for Title V's Self-Governance in 2000. The idea behind self-governance, she explained, as opposed to self-determination contracting, was to give tribes even more flexibility and even more control, and to remove paternalistic oversight by the federal government. When the BIA or Indian Health Service (IHS) were running programs, they could have the tendency to all look alike, whereas letting tribes take over enforces local autonomy, Ms. Patterson explained.

[8:12:24 AM](#)

MS. PATTERSON directed attention to slide 3, entitled "Self-Determination and the Trust Responsibility." Trust responsibility refers to the government's responsibility to Native people to provide and uphold obligations which were set by treaties for tribal land, executive orders, statutes, court decisions.

[8:13:54 AM](#)

MS. PATTERSON moved on to slide 4, "Benefits of Compacting," in which it is pointed out that two of the main benefits are flexibility in carrying out programs and funding. In terms of flexibility, Ms. Patterson pointed out that it is imperative to let tribes conduct matters their own way. There is no contract to which a tribe must strictly adhere; the tribe may choose for itself the correct way to conduct business. She gave an example of this by looking at a health context. Funding from the federal government comes in different line items, such as mental

health and dental. Certain regions may choose to redistribute these funds differently than others, giving more to one and less to another.

[8:17:06 AM](#)

MS. PATTERSON next looked at what funding meant in terms of a benefit of compacting. Because compacts are indefinite and funds can carry over from year to year, there is more scope for long-term planning, she informed the committee. She then pointed out the annual IHS grants available to help tribes with planning and negotiation. If a tribe faces a new challenge such as setting up a hospital, these grants will prove very useful from hiring experts and staff to figuring out building systems to negotiating with agencies, she imparted. "Pre-award and startup costs," the last bullet point on slide 4, refer to a one-time grant to help get the new venture off the ground.

[8:19:11 AM](#)

MS. PATTERSON moved on to slide 5, "Eligibility for Contracting." Title I refers to the fact that any tribe is eligible; Titles IV and V refer to audits, which must show three years of financial stability and management capability. Audits will spot funding or expenditure issues the tribe might have, Ms. Patterson explained. Also, entry into a contract must be by formal request, and planning must have been completed "to the satisfaction of the Indian tribe."

[8:20:41 AM](#)

MS. PATTERSON moved on to slide 6, "Funding available," on which the key point whether a tribe is in Title I self-determination or Title V self-governance compacting, everyone gets the same amount of money. The base amount or program funding, she stated, is called the "Secretarial amount" as it is what the secretary would otherwise have provided, she explained. In other words, whatever funding is being used for a local program is what is designated for a particular tribe.

MS. PATTERSON informed the committee that in 1975 [with the inception of ISDEAA], tribes were allocated the funding that was being used by the federal government to run a particular program. It became clear that tribes were not able to make use of the resources in the same way as the government because tribes had other costs that the federal government either didn't have or was able to cover with the use of other resources. This

resulted in a reduction of program funding because the federal government in some cases had to use funding to pay for other costs. Because of this, Congress added a special type of funding called Contract Support Costs, which cover retirement, health insurance, training, and other personnel-related fringe costs. She also explained indirect cost rates, which are not capped as grants often are, are tied to the yearly audits, and are negotiated separately with the federal government.

[8:23:56 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson to speak more about what is included in indirect cost rates, why they are necessary, and how they might be negotiated.

[8:24:18 AM](#)

MS. PATTERSON replied that an indirect cost rate is a ratio: there is an indirect cost pool over an indirect cost base. What goes into the pool, she continued, is any cost that services multiple programs wherein it is too burdensome to figure out how much goes into any one program. She gave as an example a tribe's human resources (HR) department, which may also be hiring for the education program and the agriculture program, so the department functions as an umbrella for different programs.

MS. PATTERSON informed the committee that often within a pool is HR, procurement, finance, and other business office functions. In the base, then, she continued, is the program funding. A small tribe may only have one or two programs, only contracting with the BIA to do fire suppression or forestry. A large tribe may run its own law enforcement and detention centers and have funding coming in from many different sources including the IHS. The indirect cost rate is the result of the total pool of expenses over the total base, the ratio of which may be 30 percent, which is then applied to programs in the base proportionally. If a tribe's biggest program is its health program, she offered, and takes about 50 percent of the tribe's funding, the idea is that the health program will then pay 50 percent of the shared pool.

[8:27:10 AM](#)

MS. PATTERSON summed up her answer by adding that the indirect cost rate is applied to the amount of funding in the base. A lot of grants get capped at 10 or 15 percent, but costs still exist: HR staff must be paid, audits must be completed, and

there are other expenses such as insurance. What ends up happening, Ms. Patterson explained, is that individual programs end up paying expenses beyond the capped rate, and the more the program has to pay for indirect administrative or overhead costs, the less it has for the actual program.

MS. PATTERSON used education, with a tribal rate of 30 percent, as an example of how indirect cost rates are negotiated: if the program must "tap indirect" at 15 percent, it would only have 15 percent left for the actual education program. This would be noticeable in that fewer teachers would be able to be hired and fewer materials would be able to be purchased. The overhead would stay the same no matter what, she explained: the difference is whether overhead costs come out of indirect funding or out of the program.

MS. PATTERSON explained how indirect cost rates are negotiated: a proposal, tied to outside audited expenditures, is usually sent to the DoI Interior Business Center (IBC), after which a rate is negotiated. Most tribes have what is called a fixed rate with carry-forward [an indirect cost rate that applies to a specific time period, usually the organization's fiscal year], Ms. Patterson related. In 2020, she gave as example, a proposal would be submitted to IBC, there would be a negotiation process, and a final rate would be determined for 2020. With regard to the "carry-forward" portion of the "fixed with carry-forward," the end of the current year's expenditures are looked at and an indirect cost rate adjustment is made.

MS. PATTERSON added that the cost rate adjustments are usually not huge adjustments; since the adjustments are based on expenditures, unless there is some sort of anomaly, expenditures are pretty uniform from one fiscal year to the next.

[8:31:19 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson why the indirect rate is not experienced the same within the state and the federal government.

[8:32:08 AM](#)

MS. PATTERSON replied that it was easy to look at in terms of the law. If the BIA were to be sued, the U.S. Department of Justice (DoJ) would assign lawyers to work on the case. The DoJ does not bill the DoI by the hour for that work. When a tribe has a question for a lawyer, it generally pays legal fees by the

hour to find answers, she said. Because of this, legal fees are usually included in the pool, she said. Most tribes, unless they are very large, do not self-insure, so they also need to purchase insurance, as well as pay auditors, on a yearly basis. In these ways, governments have a lot of internal capacity whereas tribes pay piecemeal.

[8:35:14 AM](#)

MS. PATTERSON, referencing slide 7, said there are federal employees assigned to work for the tribe. This is important, she explained, because federal benefits are quite good, and if an employee would have to entirely transfer to the tribe, that employee would have to cease contribution to his or her retirement fund. The tribe reimburses the government for the use of these employees, she explained. Other benefits are that tribal members receive government rates when they travel, as well as access to preferred vendor networks for pharmaceuticals and supplies. The benefit to tribal members is they do not have to pay another commercial entity's markup but instead have the same access as federal workers.

MS. PATTERSON informed the committee that a tribe is able to buy back unused services from the BIA and keep program income to achieve program objectives. Especially in health care, she explained, where there is sometimes extra program income, the tribe may use the income to build new facilities or hire new staff as it sees fit.

[8:39:23 AM](#)

MS. PATTERSON touched on Federal Tort Claims Act (FTCA) coverage, which states in this context that the tribe does not have to purchase a large employee liability/malpractice-type policy; instead, one will be provided to the tribe by the federal government the same as it is provided to its own programs. Last, "lease funds for operation and maintenance of facilities" refers to the buildings in use by the tribe; the tribe is allowed to propose and negotiate a lease with the federal government in the hope of being compensated for that building's operation and maintenance.

[8:40:26 AM](#)

MS. PATTERSON, moving on to slide 8, "Government Monitoring," told the committee that under Title I, the government retained more control, asking for quarterly financial reports, annual

program reports, and site visits. In this way, she explained, the federal government has a lot more input on how the tribe is running the program. This is why, when self-governance was created in Title IV and Title V, the government only intervenes when there is an audit.

[8:41:38 AM](#)

MS. PATTERSON brought the committee's attention to the slide 9, entitled "Tribal Liability." Historically, it was important to note, she said, that tribes would get insurance. However, it had been difficult for them to find insurance on the commercial market, so it had been decided that when tribes were providing services that fell within the contract, they would be covered by the FTCA. A tribe may carry "just in case" policies, but these policies are not required. This is very important to note, she stated, because in the event of a lawsuit, the federal government would step in and become the defendant.

MS. PATTERSON noted that under the ISDEAA, there is also no impact to sovereign immunity. In other words, a government cannot be sued without its permission, and it would demean tribes' status as a government, and the government-to-government relationship, to ask tribes to waive their immunity.

[8:45:00 AM](#)

REPRESENTATIVE EDGMON asked, on the issue of sovereign immunity, how a workplace environment incident, such as a sexual harassment claim, would factor in, in terms of a tribe's ability to waive its immunity.

[8:45:48 AM](#)

MS. PATTERSON answered that tribes often have their own dispute resolution process, and if there are those claims, then there is also the means for claimants to go through a judicial, grievance, or dispute resolution process to make a claim. Tribes also have limited waivers, as the state and the federal government have, for certain claims, she added. If a tribe is contracting under the ISDEAA, and a claim is brought by any employee, if it were for something within the scope of employment and services, then the federal government would step in and handle the claim, she related. She added that a gray area would be if someone were not acting within the scope of their employment; an incident that happened at a bar, for example, or somewhere otherwise outside of the workplace or work

hours, would not fall within the system, because the situation would be wholly separate from the contract.

[8:47:44 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson to explain to the committee why waiving sovereign immunity became problematic within tribal negotiations.

[8:47:57 AM](#)

MS. PATTERSON answered that sovereign immunity is a key aspect of being a sovereign and dealing in a government-to-government relationship, as opposed to dealing with a private contractor. A government has the right to decide when it will consent to be sued and often where, she added. Many tribes have their own laws via constitution or ordinance, she continued, which state when they may or may not waive sovereign immunity. To ask for a blanket waiver, as has been done in the past, is to automatically decrease the number of willing compactors. Ms. Patterson recommended other ways to solve a problem for which a waiver is being asked. In some cases, she offered, the federal government or the Department of Law (DOL) in Alaska can handle claims, which does not diminish tribes.

[8:51:07 AM](#)

MS. PATTERSON moved to slide 10, "Tribal Input". Every title [within ISDEAA] has negotiated rulemaking; regulations are not made unilaterally, but most of the time within work groups comprised of both tribal and federal members. She then gave an example of what this looked like in practice. She added that each agency has its own consultation policy.

[8:53:31 AM](#)

MS. PATTERSON moved on to slide 11, entitled "State v. Federal Compacting." She spoke of funding again at this point: supplemental funding that may be needed so that the program funding is not diluted; in the federal government scheme, contract support costs; and as funding for facility maintenance and operations. The latter is especially important in Alaska as building maintenance can be expensive. In terms of liability coverage, the federal scheme uses the FTCA and DoJ defends actions. On the state side, DOL may again step in, same as happens when the state runs programs. She noted the programs

already in place that add no workload and are run by different service providers.

MS. PATTERSON asked what type of program standards and flexibility would be imposed, and she stressed that the idea would not be to have someone doing the exact same work the state was doing in a different way, but instead to ensure the tribe would still be able to deliver services the way it wanted to deliver them. She said thinking about monitoring and oversight is important if it is desired the program provide input, yet care must be taken so as not to develop a "monitoring and oversight bureaucracy." As tribes take over more programs that were being handled by the DoI and IHS, the size of those agencies in the government shrink. Federal employees still perform some inherent functions, such as signing their own contracts, but otherwise everything should transfer, Ms. Patterson stated, in accordance with the ISDEAA.

[8:58:14 AM](#)

MS. PATTERSON reiterated that tribes are different entities than private contractors and corporations, which is important to keep in mind when talking about compacting, tribes having just as much autonomy and control and authority as the former when they would choose whether or not to contract or compact.

[8:59:36 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson, regarding consultation policies on slide 10, whether the expectations between the federal government and tribes were articulated explicitly within the authorizing language of the ISDEAA, as consultation policies were part of the self-governance and self-determination relationship.

[9:00:09 AM](#)

MS. PATTERSON replied that there was language in the ISDEAA regarding dialogue with tribes, as well as specific provisions regarding tribes not being bound by policy and how much input tribes must have. Each tribe also has its own consultation policy detailing how individual consultations within a particular tribe will be consulted. The ISDEAA provides the framework and makes it easier to have basic rules for contracting and compacting in statute. Ms. Patterson pointed out again that there is a model contract in Title I that can be looked at for reference with regard to desired provisions in

contracts being created. She added that after having been involved with the Alaska Tribal Child Welfare Compact, it is more difficult when there is no statute that guides, as every issue must be started from scratch.

[9:02:26 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson to underscore, given the current legal landscape in Alaska, important considerations moving forward as conversations take place regarding state and tribal compacting.

[9:03:17 AM](#)

MS. PATTERSON said that she thought the main thing was that the ISDEEA has always been applied in Alaska as it has been in the Lower 48, so nothing about Alaska would change, but local tribal communities know their own members best and the best way to serve them to improve outcomes and services. Respect for tribal cultures and authority were main takeaways, she reiterated, as well as for the principle that tribes know the best way to serve their members. She pointed to the Alaska Tribal Health System as a "shining example" of the way in which tribes have been able to take something that was run by the federal government and transform it into something beyond what people imagined.

MS. PATTERSON went on to say that a tribe cannot be given fewer resources than were given to the state and yet be expected to produce more. She listed the indirect costs and those associated with audits again for members' reference. She said consideration needs to be made so that funds available for service delivery are not reduced and mechanisms are in place to support that contract and service delivery. She mentioned liability again and admitted that it may be an area of discomfort for the state in terms of asking tribes to waive immunity. The federal government would need to accept the liability from a tribal member just as they would from a federal supervisor.

[9:06:59 AM](#)

MS. PATTERSON added that tribal input should not be a one-way process. She said the idea of compacting and transforming systems and getting better outcomes is based on partnership and the fact that tribes have meaningful input and should be at the table.

[9:07:53 AM](#)

REPRESENTATIVE VANCE asked Ms. Patterson what the difference would be working with the tribes when compared to working with local municipalities.

[9:09:14 AM](#)

MS. PATTERSON replied that it must be asked whether the state is meeting its responsibilities and obligations to all of its citizens - Native or non-Native. If the answer is that it is not meeting the obligations, then it can then be asked whether partnering with tribes would be a better way. She pointed out that villages in Alaska are mostly tribes, and a tribal affiliation is a political affiliation/community and possibly a village, but it is not the same as a municipality, in that the latter is a subdivision of the state whereas the former is a totally separate government.

[9:12:10 AM](#)

CHAIR ZULKOSKY asked Ms. Patterson to discuss Alaska's being a Public Law 280 (PL 280) state and what that means with regard to the ISDEAA and ongoing conversations around state and tribal compacting.

[9:12:41 AM](#)

MS. PATTERSON replied that PL 280 is a law that affects criminal jurisdiction, and in many ways it is not relevant to the ISDEAA but has to do with reservations having the federal government as the main party besides tribal jurisdiction that is responsible for prosecuting crime. The state steps in and prosecutes crime, and in communities where this happens, the role of tribal government may be more limited. The ISDEAA has to do with programs and services that are civil in nature, PL 280 doesn't have much to do with the state compacting process. She concluded that Alaska is a state that has jurisdiction to prosecute crime and is another example of the state having an obligation to tribal communities.

[9:15:18 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Tribal Affairs meeting was adjourned at 9:15 a.m.