

# Intergovernmental Agreements between the State of Arizona and Indian Nations

A Preliminary Examination

by

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## **Introduction**

Increasingly, the State of Arizona and American Indian nations within the state's boundaries are entering into intergovernmental agreements (IGAs) that address issues as broad-ranging as service delivery and revenue sharing. These agreements are broad-ranging in purpose and scope and complex in the process in which they are drafted and approved. These factors make them worthy of study, for the benefit both of tribes and the state.

This examination of IGAs is intended to serve as a starting point for discussions aimed at improving the procedures by which state and Indian entities adopt IGAs. Areas explored include: topic areas covered by IGAs, the process through which IGAs are produced, and the nature of several past and ongoing IGAs and the commitments therein.

## **Types of IGAs**

The topic areas in which Arizona and tribes produce IGAs are varied and numerous. An exhaustive list is difficult to produce, but an idea of the scope of social services can be gained from Appendix 1, which lists some of the IGAs in which the Arizona Department of Economic Security participates. A significant portion of these IGAs are the result of the devolution of federal monies for social programs to state governments, which in turn, often have the responsibility of further devolving funds to tribes. Other state departments that have IGAs with tribes include the Arizona Department of Health Services, Arizona Department of Environmental Quality, Arizona Department of Transportation, and the Arizona Department of Game and Fish.

Appendix 2 summarizes the content of three topically distinct, sample IGAs. While small, this set nonetheless presents some of the complexities of state-tribal IGAs and points to the tribes' desire to produce a more streamlined system that will better expedite the negotiation process.

## **The IGA Process**

The process that leads to the finalized IGA is lengthy and often complicated. It involves the participation of state and tribal governments including specific departmental officials, attorney general offices for both entities, and final authorization by elected officials. Many versions of the IGA may be drafted, particularly when state and tribal lawyers become involved, before they are ultimately approved. The reasons for the intricacies are numerous and are explored below.

The first step in producing the IGA is negotiations between state and tribal departments that are charged with administering the delivery of programs and services. This is generally the simplest stage of the IGA process. For example, federal monies earmarked for tribes may be sent to state coffers; because these monies are intended for tribes, little leveraging is needed by tribal departments to receive apportioned funds.

Service delivery provisions are made at this time as are any additional program requirements.

Once the state and tribal departments have agreed on the nature of the contract and the specific provisions and requirements, the draft IGA is sent to state and tribal attorneys – usually in the office of their respective attorneys general. This is where the contract is scrutinized through the lens of state and tribal law. This is also the most complex stage in crafting and adopting the draft IGA. In the simplest form, departments send the draft IGA to the lawyers, and upon agreement the draft IGA is authorized by officials as directed by state and tribal law – generally the Secretary of State for Arizona and council and/or executive officer for the tribe. Departments are charged with maintaining the terms of the contract with quality assurance, non-compliance and dispute resolution measures usually outlined within the IGA. (Our research has found that disputes are rare and when they do occur are solved not by lawyers, but through the usually amicable relationships of the state and tribal departments' personnel.)

As stated, the discussion between state and tribal lawyers is the most complex, time consuming, and cumbersome part of the IGA process. A number of issues resulting from the sovereign status of tribes means boilerplate templates generally used between the state and non-tribal governments (counties and municipalities) are ill equipped to meet the service needs of tribes and often conflict with sovereign immunity and federal-Indian law. Instances of this can be seen in template references to federal laws in which tribes are exempt including: Title VII of the Civil Rights Act that mandates hiring policies; Occupational Safety and Health Administration (OSHA) regulations; and provisions of the Fair Labor Standards Act (FLSA). State laws that direct hiring practices, such as Arizona Regulatory Statute 99-4, also do not apply to tribes but are usually contained in the template used by the State of Arizona for IGAs. The many references to laws that do not apply to tribes means that tribal attorneys must search and remove such language from draft IGAs that may total over fifty pages in full legalese – a very time consuming effort for a tribal attorney general office that handles multiple draft IGAs at any one time.

To remedy the template issue, one Arizona tribe attaches a template amendment to correct for non-applicable language. The first time that this was done the IGA was quickly approved by the state. However, a few months later this same tactic was used but in this instance the amendment was challenged and the process delayed.

This delay goes to the heart of the IGA process in which a standardized approach for tending to the special needs of tribes is lacking. Arizona tribes have stated the need for a tribal liaison or an office within the Arizona's attorney general office to administer tribal IGAs. In March 2004 a Tribal Attorneys Working Group consisting of attorney generals from a number of tribes met to discuss this and other issues. The group was in agreement that regular meetings by the group to show a more unified front on IGA processes is a desirable direction and may yield long-term, positive results in improving the process.

## Issues for Consideration and Exploration

- In many ways, state-tribal IGAs are the state-level manifestation of the type of relationship tribes have with the federal government through 638 contracting and self-governance compacting. Tribes ought to view IGAs through this lens and seek agreements that similarly promote their sovereignty.
- Arizona tribes are currently promoting a number of improvements to the IGA negotiation process (including tribe-specific template amendments that strike or alter language in the state's templates that do not apply to tribes, a tribal liaison within the state's Office of the Attorney General to address tribal needs and improve communication, mandatory tracking of IGAs through the state apparatus and tribal notification, and so on) that retain tribes' rights to negotiate individually. Beyond calling for more communication and collaboration between tribal lawyers to share information about IGAs, most Native nations in Arizona have not been interested in the development of a state-tribal IGA template. What are tribes gaining and/or losing from this partially unified approach?
- What "best practices" might be learned from other states, particularly in terms of producing a more streamlined IGA process that meets the needs of Arizona's indigenous governments?
- On paper, many of the IGAs appear to favor the power and authority of the state government as opposed to the sovereignty of tribal governments. In practice, this distinction – likely stemming largely from the newness of these agreements to state officials – has not harmed tribes, as state and tribal departmental officials have been able to work closely together to resolve concerns and make the IGAs operate smoothly. Yet, is it advisable for tribes to continue to cede so much authority on paper?

Pending discussion resulting from the Arizona Indian Town Hall meetings may yield opportunities to expand the study of IGAs including: a more comprehensive examination of the IGA process; a comparative study between Arizona and other states in creating and adopting IGAs; and developing "best practice" models and case studies for successful IGAs.

## **Appendix 1**

### **Topic Areas for Arizona-Indian IGAs relating to Economic Security<sup>1</sup>**

#### **Ak-Chin Indian Community**

- Family Support/Family Preservation
- Division of Aging & Community Services - Transportation

#### **Cocopah Tribe**

- Parent Aide
- Division of Aging & Community Services - Counseling
- Jobs/JTPA Administration - Job Training Partnership Act

#### **Colorado River Indian Tribes**

- Counseling
- Division of Aging & Community Services - Housekeeping
- Jobs/JTPA Administration - Job Training Partnership Act

#### **Fort McDowell Yavapai Nation**

- Division of Aging & Community Services - Congregate Meals, Home Delivered Meals, and Transportation

#### **Fort Mojave Indian Tribe**

- Division of Aging & Community Services - Congregate Meals

#### **Fort Yuma - Quechan Tribe**

- Parenting Skill Training
- Jobs/JTPA Administration - Job Training Partnership Act

#### **Gila River Indian Community**

- Division of Aging & Community Services - Congregate Meals and Home Delivered Meals
- Jobs/JTPA Administration - Job Training Partnership Act

#### **Havasupai Tribe**

- Division of Aging & Community Services - Utility assistance funded by the Low Income Home Energy Assistance Program (LIHEAP)
- Division of Aging & Community Services - Congregate Meals and Housekeeping

#### **The Hopi Tribe**

- Implementation of ICWA relating to Child Protective Service (Status: Pending)
- Division of Aging & Community Services - Sharing confidential information of TANF clients
- Jobs/JTPA Administration - Job Training Partnership Act

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<sup>1</sup> Appearing on Arizona Commission of Indian Affairs website:  
[www.indianaffairs.state.az.us/agreements/ades.html](http://www.indianaffairs.state.az.us/agreements/ades.html)

**Hualapai Tribe**

- Parent Aide
- Division of Aging & Community Services - Congregate Meals and Home Delivered Meals
- Jobs/JTPA Administration - Transportation Services & Job Training Partnership Act

**Kaibab-Paiute Tribe**

- Division of Aging & Community Services - Housekeeping

**Navajo Nation**

- Implementation of ICWA relating to Child Protective Services (Status: Active)
- Division of Aging & Community Services - Administration, Program Development, Transportation, Congregate Meals, Home Delivered Meals, Case Management, Ombudsman Program, Respite Care, and Capital Improvement
- Jobs/JTPA Administration - Job Training Partnership Act
- Division of Developmental Disabilities - Developmental Disabilities Case Management

**Pascua Yaqui Tribe**

- Family Support/Family Preservation
- Division of Benefits and Medical Eligibility - TANF
- Division of Aging & Community Services - Providing State matching funds and contracting to provide services for the Pascua Yaqui TANF Program
- Division of Aging & Community Services - Case Management
- Jobs/JTPA Administration - Job Training Partnership Act

**Salt River Pima-Maricopa Indian Community**

- Parenting Skill Training
- Division of Benefits and Medical Eligibility - TANF (In Process)
- Division of Aging & Community Services - Providing State matching funds and contracting to provide services for the Salt River TANF Program
- Division of Aging & Community Services - Home Delivered Meals
- Jobs/JTPA Administration - Job Training Partnership Act

**San Carlos Apache Tribe**

- Family Support/Family Preservation
- Division of Aging & Community Services - Sharing confidential information of TANF clients
- Division of Aging & Community Services - Congregate Meals, Home Delivered Meals, and Transportation
- Jobs/JTPA Administration - Job Training Partnership Act

**San Juan Southern Paiute**

- Social Development
- Division of Aging & Community Services - Adaptive Aids and Transportation

**Tohono O'odham Nation**

- Parenting Skill Training
- Division of Aging & Community Services - Utility assistance funded by the Low Income Home Energy Assistance Program (LIHEAP)
- Jobs/JTPA Administration - Job Training Partnership Act

**Tonto Apache Tribe**

- Division of Aging & Community Services - Home Delivered Meals

**White Mountain Apache**

- Counseling
- Implementation of ICWA relating to Child Protective Service (Status: Pending)
- Division of Benefits and Medical Eligibility - TANF (In Process)
- Division of Aging & Community Services - Providing State matching funds and contracting to provide services for White Mountain Apache Tribe TANF
- Division of Aging & Community Services - Home Delivered Meals and Housekeeping
- Jobs/JTPA Administration - Job Training Partnership Act

**Yavapai-Apache Tribe**

- Jobs/JTPA Administration - Job Training Partnership Act

## Appendix 2

### **Intergovernmental Agreement between the Arizona Department of Health Services (ADHS) and the Pascua Yaqui Tribe (PYT) for Behavioral Health service delivery<sup>2</sup>**

#### **Background Information:**

A contract extension between ADHS and PYT Tribal Regional Behavioral Health Authority (TRBHA)

The ADHS, Division of Behavioral Health Services through its contract with Arizona Health Care Cost Containment System (AHCCCS) is authorized to provide coordination, planning, administration, regulation and monitoring of the state public behavioral health system.

#### **Length of Contract:**

December 1, 2002 to June 30, 2004

#### **Program Requirements:**

TRBHAs are responsible for the operation and coordination of the behavioral health service delivery network, including contracting and payment for a full range of behavioral health care and prevention services to children, adults, and families with serious mental illness, adults with substance abuse/dependence and general mental health care disorders and monitoring and improving the effectiveness of services.

#### **Scope of Services:**

- I. Treatment Services
  - a. Counseling
  - b. Consultation, evaluation, and specialized testing
  - c. Other professional
- II. Rehabilitation Services
  - a. Living skills training
  - b. Cognitive rehabilitation
  - c. Health promotion
  - d. Supported employment
- III. Medical services
  - a. Medication
  - b. Laboratory, radiology and medical imaging
  - c. Medical management
  - d. Electro-convulsive therapy

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<sup>2</sup> Behavioral Health agreements between the Navajo Nation and Gila River Indian Community are nearly identical in contract outline and wording. Differences are largely in signing authority as required by the tribes' respective laws and codes.

- IV. Support Services
  - a. Case management
  - b. Personal assistance
  - c. Family support
  - d. Peer support
  - e. Therapeutic foster care
  - f. Respite care
  - g. Housing support
  - h. Interpreter
  - i. Flex fund services
  - j. Transportation
- V. Crisis Intervention Services
  - a. Mobile
  - b. Telephone
  - c. Level I crisis services/stabilization
- VI. Inpatient Services (Level I Behavioral Health Facility)
  - a. Hospital
  - b. Sub-acute
  - c. Residential treatment center
- VII. Residential Services
  - a. Level II therapeutic behavioral health residential
  - b. Level III supervised behavioral health residential
  - c. Room and board
- VIII. Behavioral Health Day Program
  - a. Supervised
  - b. Therapeutic
  - c. Medical
- IX. Prevention Services

**Financials:**

Funds are to be distributed to PYT on a monthly basis. Payment to PYT is to be made within thirty days of ADHS receipt of invoice. The PYT TRBHA will receive the federal indirect rate in addition to the case management rate. The TRBHA will be included in the ADHS budgetary process.

**Key Participants:**

**Pascua Yaqui Tribe:**

TRBHA officials	Negotiated service agreement
Chairman	Authorized signatory
Acting Attorney General	Signature required

**State of Arizona:**

Arizona Department of Health Services	Negotiated service agreement
Assistant Attorney General	Signature required
Secretary of State	Signature required

**Quality Management:**

The PYT TRBHA shall maintain a written Quality Management/Utilization Management Plan (QM/UM Plan) which complies with applicable Federal and State regulations and policies and ensure that all subcontracted providers comply with the TRBHA's QM/UM Plan. The TRBHA's QM/UM Plan shall minimally incorporate all requirements contained in the Annual ADHS/DBHS QM/UM Plan and the AHCCCS and the ADHS/DBHS Policy and Procedures Manuals.

The annual QM/UM Plan shall be submitted to the ADHS/DBHS by February 15<sup>th</sup> of every contract year, must be approved by ADHS/DBHS and shall not be changed without the prior approval of ADHS/DBHS.

The TRBHA shall establish a system to assess, plan, implement, monitor, evaluate and improve internal processes, providers, overall system performance and the appropriateness and effectiveness of care to enrolled persons, consistent with the ADHS/DBHS QM/UM Plan.

**Disputes:**

This contract shall be construed in accordance with Arizona law and any legal action thereupon shall be initiated in an appropriate court provided that nothing in this contract shall be construed to affect or be deemed to be a waiver of sovereign immunity from suit or consent to be sued by either party. All disputes between the State and Tribe under this contract shall be subject to mandatory arbitration for resolution of disputes.

## **Intergovernmental Agreement between the Department of Economic Security (DES), Division of Children, Youth and Families (DCYF) and the Navajo Nation<sup>3</sup>**

### **Purpose of the agreement:**

Provide youth and family protective services to members of the Navajo Nation.

### **Scope of Services:**

Services shall include: Protective, Counseling, Home Care, Home Management Training, Reassurance, Home Repair/Adaptation Renovation, Transportation and Case Management.

### **Length of contract:**

July 1, 1999 thru June 30, 2003

### **Program Requirements:**

The Contract Services shall be provided by the following personal positions:

<b>Position Title</b>	<b>No. of positions</b>
Accountant	1
Clerk Typist II	3
Contract Analyst III	1
Secretary I	4
Social Services Rep. III	9
Social Worker I	7
Social Worker II	6
Social Worker III	1
Social Worker IV	2
Total	34

The Contractor has to comply with the following standards and/or licensure requirements:

- A. Training (may include):
1. Human Development
  2. The Aging Process
  3. Illness and Disabilities
  4. Mental Health and Mental Illness
  5. Home Accident Prevention and First Aide
  6. Certified Cardiopulmonary Resuscitation Course
  7. Case Management
  8. Career Counseling
  9. Personal Care

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<sup>3</sup> Five amended versions.

- 10. Home Management Training
- 11. Protective Services
- B. Home Care Program
- C. Protective Services Program
- D. Case Management Program
- E. Service Goals
  - 1. To insure the availability of information about the access to human services and community resources.
  - 2. To increase or maintain self-sufficiency for eligible individuals.
  - 3. To protect the physical, emotional, and mental well-being of eligible individuals.
  - 4. To support and enhance the provision of direct services to individuals and groups.

**Financials:**

Funds may not presently be available for performance under this Contract beyond the current fiscal year. No legal liability on the part of the State for any payment may arise under this Contract beyond the current fiscal year until funds are made available for performance of this Contract. The State will make reasonable efforts to secure such funds.<sup>4</sup>

The Department may reduce or terminate this contract without further recourse, obligation or penalty in the event that insufficient funds are appropriated. The Director of the Department shall have the sole and unfettered discretion in determining the availability of funds.<sup>5</sup>

**Commitments/Obligations to the State:**

Written Contract Amendments. The Contract shall be modified only through a written contract amendment within the scope of the Contract signed by the Procurement Officer.

Assignment & Delegation. The Contractor shall not assign any right nor delegate any duty under this Contract without the prior written approval of the Procurement Officer. The State shall not unreasonably withhold approval.

Subcontracts. The Contractor shall not enter into any subcontract under this Contract without the advance written approval of the Procurement Officer. The Subcontract shall incorporate by reference the terms and conditions of this Contract.

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<sup>4</sup> AZ Uniform Terms & Conditions

<sup>5</sup> DES Special Terms & Conditions

Advertising and Promotion of Contract. The Contractor shall not advertise or publish information for commercial benefit concerning this Contract without the prior written approval of the Procurement Officer.

Property of the State. Any materials, including reports, computer programs and other deliverables, created under this Contract are the sole property of the State. The Contractor is not entitled to a patent or copyright on those materials and may not transfer the patent or copyright to anyone else. The Contractor shall not use or release these materials without the prior written consent of the State.<sup>6</sup>

**Termination of Contract:**

Termination of Contract <sup>7</sup>	
Topic	Description
Right to Assurance	If the State determines there is a need for written assurance regarding the Contractor's ability to continue with the contract and the Contractor fails to do so, termination of the contract may occur.
Gratuities	If the State determines that employment/gratuities were used to influence the outcome of the contract – termination, by written notice, of the contract may occur.
Suspension or Debarment	The State may, by written notice, immediately terminate this Contract if the Contractor has been disbarred, suspended, etc.
Termination for Convenience	The State reserves the right to terminate the Contract in whole or in part at any time when in the best interests of the State without penalty or recourse.
Termination for Default	The State reserves the right to terminate the Contract in whole or in part due to the failure of the Contractor to comply with any term/condition set forth in the Contract.
Termination for Default	If the contractor becomes insolvent, bankrupt, etc. – termination of contract may occur. If the health/safety of service recipients is endangered – termination of contract may occur.

**Key Participants:**

**The Navajo Nation:**

Contracting Officer, Office of Contracts and Grants	Receives notices
President	Authorized signatory
Vice-President	2 <sup>nd</sup> signatory
Attorney General	Signature required

**State of Arizona:**

Contract Administrator, ADES/DCYF	Negotiates services
Assistant Attorney General	Signature required
Secretary of State	Signature required

<sup>6</sup> AZ Uniform Terms & Conditions

<sup>7</sup> AZ Uniform Terms & Conditions

**Quality Management:**

Unless otherwise provided in this contract, reporting shall adhere to the following schedule: no later than the 15<sup>th</sup> day following each month during the contract term the contractor shall submit to the Department programmatic and financial reports in the form set forth in the contract. Failure to submit accurate and complete reports by the 15<sup>th</sup> day following the end of a month may result, at the option of the Department, in detention of payment. Failure to provide such report within 45 days following the end of a month may result, at the option of the Department, in a forfeiture of such payment.

No later than the 45<sup>th</sup> day following the termination of this contract, contractor shall submit to the Department a final program and fiscal report. Failure to submit the final program and fiscal report within the above time period may result, at the option of the Department, in forfeiture of final payment.<sup>8</sup>

In addition to the terms and conditions in this section of the Uniform Terms and Conditions, the following shall apply: The final fiscal report shall include all adjustments to prior financial reports submitted.<sup>9</sup>

All contractors are subject to the programmatic and fiscal monitoring requirements of each department program to insure accountability of the delivery of all goods and services, as required under Single Audit.<sup>10</sup>

**Reason for amendments:**

Amendments are primarily used to reflect changes in contract reimbursement/payment ceilings and/or to renew the contract for additional periods.

Ceiling	From	To	Amount	Date of file – w/ Sec. of St.	Amend. #
\$5,779,868	July 1, 1999	June 30, 2000	\$1,444,967 (SFY00)	7/29/99	
\$5,362,199	July 1, 2000	June 30, 2001	\$1,305,744 (SFY01)	11/15/00	2
\$4,056,455	July 1, 2001	June 30, 2002	\$1,305,744 (SFY02)	10/12/01	3
\$4,029,610	July 1, 2001	June 30, 2002	\$1,278,899 (SFY02)	06/13/02	4
\$5,308,509	July 1, 2002	June 30, 2003	\$1,278,899 (SFY03)	06/20/02	5

<sup>8</sup> DES Special Terms & Conditions

<sup>9</sup> DCYF Special Terms & Conditions

<sup>10</sup> DES Special Terms & Conditions

# **Fuel tax memorandum regarding IGAs between the Arizona Department of Transportation (ADOT) and the Navajo Nation & the White Mountain Apache Tribe**

## **Background information:**

1997 legislation authorized ADOT to enter into Fuel Tax Refund Agreements with AZ tribes. ADOT sent letters to all 21 AZ tribes. ADOT has entered into IGAs with 2 tribes – the Navajo Nation & the White Mountain Apache Tribe. Six other tribes have shown an interest in pursuing this concept.

## **Purpose of the agreement:**

To provide a method or formula to refund taxes paid on exempt motor fuel purchases or use.

## **Program Requirements:**

Both agreements contain:

- Vendors, distributors and the tribes are subject to audit by ADOT.
- Copies of fuel import documents are sent to ADOT on a monthly basis.
- Purchases of fuel off the reservation for use in tribal vehicles will be refunded upon submission of a refund request with certain specified information.
- Joint enforcement is addressed in an attempt to curtail fuel tax evasion on or through the reservation.
- Safeguards are incorporated in the agreement for re-negotiations if factors change to materially affect the agreement such as additional data collection.
- Both tribes have their own tax that equals the state gasoline and light class vehicle diesel rates (18 cents per gallon).

## **Commitments/Obligations:**

The agreements consider Arizona statutory provisions and the sovereignty of each tribe. Each agreement addresses the specific issues that each tribe has.

## **White Mountain Agreement:**

The White Mountain Apache Tribe (WMAT) agreement is based on the fact that all fuel purchased for sale on the reservation is purchased tax paid from a licensed Arizona supplier. Most of the stations on the reservation are tribally owned. Tax paid on fuel purchased for use in tribal vehicles is refunded upon receipt of requests from the tribal accounting office. Refunds for fuel tax paid on purchases by enrolled members of the tribe living and purchasing on the reservation are based on a formula.

Historically, neither the state nor the tribe has kept records on fuel sold on reservations. As such, to arrive at reasonable basis for refunding taxes on qualifying fuel sales ADOT has used a formula approach. This concept is used by other states as well. ADOT and WMAT agreed upon a formula that reflects number of vehicles, miles per gallon and miles driven. As a result refund monies are sent each month to the WMAT representing tax paid on fuel purchased by enrolled members.

**Navajo Nation Agreement:**

The Navajo reservation covers portions of three states. This creates a different environment for fuel distribution purposes and the Navajo agreement recognizes this fact.

The basic premise of the agreement allows the importation of untaxed fuel (Arizona state taxes only) onto the Navajo reservation. The Office of the Navajo Tax Commission requires licensure and reporting by distributors bringing fuel onto the reservation under the agreement. Reporting of fuel imports is submitted monthly for inclusion in the calculation on the Arizona Highway User Revenue Fund distribution to the counties and cities. Tax payment for non-exempt fuel sold on the reservation, will be made by the Tax Commission to ADOT on a quarterly basis.

The formula for payment is reverse of the WMAT agreement. The tax commission will pay a percentage of total fuel sales, as determined under the formula, for sales to non-Navajo purchasers on the reservation.

**Corrective Actions:**

Agreements are written to accommodate Arizona or tribal changes in law within reasonable boundaries.