

**W. RON ALLEN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER
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**TESTIMONY
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
OVERSIGHT HEARING ON THE SUCCESS AND SHORTFALL OF SELF-
GOVERNANCE UNDER THE INDIAN SELF-DETERMINATION AND
EDUCATION ASSISTANCE ACT AFTER TWENTY-YEARS**

May 13, 2008

Good afternoon. Thank you for the opportunity to be here today. My name is W. Ron Allen and I am the Chairman and Chief Executive Officer of the Jamestown S'Klallam Tribe, located in Washington State. I am also the Chairman of the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC), and I offer my testimony today in both capacities. My Tribe was one of the first 7 Tribes to negotiate a Self-Governance Compact and Funding Agreement in 1990. I am pleased to be able to testify on what Congress needs to do on Tribal Self-Governance.

I am here to urge you to introduce and promptly enact legislation to enhance Indian Tribes' opportunities under Self-Governance by amending Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93-638 as amended). A House version of this legislation, H.R. 3994, is currently under review by the House Natural Resources Committee. We have been told the House Committee expects to report its bill before the end of this month. We hope that members of this Committee will introduce a companion bill in the Senate and move this Committee and the Senate to approve this critical legislation this year. I attach to this testimony draft legislation substantively similar to H.R. 3994 which Tribes hope the Senate will adopt.

These Tribally proposed Title IV amendments advance several important purposes. Most fundamentally, they create consistency between the Title IV Self-Governance initiative in the DOI and the Title V Self-Governance initiative in the Department of Health and Human Services (DHHS). Since its enactment in 2000, Title V of P.L. 93-638 has proven to be a sound framework for carrying out government-to-government agreements in the health care arena. The Title IV amendments would essentially mirror Title V, enhancing consistency, clarity, and workability in the relationship between the federal and Tribal governments.

The Title IV amendments have long been a top legislative priority of Self-Governance Tribal leaders. Four years ago, Tribal leaders testified before this Committee in support of a predecessor bill, S. 1715, the Department of the Interior Tribal Self-Governance Act of 2003. That bill was favorably reported and recommended for passage by this Committee in Senate Report No. 108-413 (Nov. 16, 2004), but unfortunately died in that Congress. Two years later, I testified at this Committee's oversight hearing on Self-Governance in Indian Country, along with other Tribal leaders, in favor of comprehensive Self-Governance legislation. This Committee has thus heard about the need for this legislation on a number of occasions over the past 5 years and Self-Governance Tribes urge the Committee and the full Senate to act on this legislation this session.

Passage of the Title IV amendments would represent a major milestone on the path toward Tribal Self-Governance and self-reliance. The true import of these proposed amendments, however, cannot be understood without an appreciation of the unprecedented positive impact Self-Governance has had on Indian Tribes over the past 20 years.

Background of Title IV

Although it is hard to imagine today, prior to 1975, the federal government administered almost all programs serving American Indian and Alaska Native Tribes. In 1975, the ISDEAA was enacted with three primary goals: (1) to place the federal government's Indian programs firmly in the hands of the local Indian people being served; (2) to enhance and empower local Tribal governments and their governmental institutions; and (3) to correspondingly reduce the federal bureaucracy.

The original Title I of the ISDEAA, still in operation today, allows Tribes to enter into contracts with the DHHS and the DOI to assume the management of programs serving Indian Tribes within these two agencies. Frustrated by the stifling bureaucratic oversight imposed by BIA and the Indian Health Service (IHS), and the lack of flexibility and cost-effectiveness inherent in Title I contracting, a small group of Tribal leaders helped win passage of the Tribal Self-Governance Demonstration Project in 1988. That Project authorized the Jamestown S'Klallam and nine other Tribes to enter into compacts with DOI.

Unlike Title I contracts—which subjected Tribes to federal micromanagement of assumed programs and forced Tribes to expend funds as prioritized by BIA and IHS officials—Self-Governance agreements allowed Tribes to set their own priorities and determine how program funds should be allocated. The Demonstration Project proved to be a tremendous success, and in 1994, Congress enacted Title IV of the ISDEAA, thereby implementing permanent Tribal Self-Governance within DOI.

The Success of Self-Governance

The success of Self-Governance can be seen in the increasing number of Tribes that choose to participate. In Fiscal Year 1991, the first year Self-Governance agreements were negotiated between the BIA with Tribes, only seven Tribes entered into agreements. At that time, the total dollar amount compacted by Indian Tribes was slightly over \$27 million. By Fiscal Year 2006, 231 Tribes and Tribal consortia entered into 91 annual funding agreements, operating over \$300 million in programs, services, functions and activities.

The growth in Tribal participation in Self-Governance revealed by these numbers is remarkable. The number of Tribes and Tribal consortia participating in Self-Governance today is **33 times greater** than in 1991. While only a tiny fraction of Tribes participated in Self-Governance the first year in 1991, **today approximately 40% of all federally recognized Tribes are Self-Governance Tribes and the interest by other Tribes is continuing to grow.**

Under Self-Governance, Tribes have assumed the management of a large number of DOI programs, including roads, housing, education, law enforcement, court systems, and natural resources management. Why is this initiative such a huge success? Simply put, Self-Governance works because it:

- **Promotes Efficiency.** Devolving federal administration from Washington, D.C. to Indian Tribes across the United States has strengthened the efficient management and delivery of federal programs impacting Indian Tribes. As this Committee well knows, prior to Self-Governance, up to 90% of federal funds earmarked for Indian Tribes were used by federal agencies for administrative purposes. Under Self-Governance, program responsibility and accountability has shifted from distant federal personnel to Tribal leaders elected by those to be served. Efficiencies have increased as politically accountable Tribal leaders leverage their knowledge of actual needs, local resources, conditions and trends to make cost-saving management decisions.¹

¹ As an aside, this policy of transferring management from federal to Tribal governmental control is currently being undermined by the National Business Center (NBC), the Interior agency charged with negotiating indirect cost agreements with Tribes and Tribal organizations. NBC has recently threatened to abandon its longstanding policy of allowing, without documentation, 50% of Tribal council expenses in Tribal indirect cost pools. Under the new policy, no such expenses would be allowable as indirect costs unless a Tribe could document, through detailed personnel activity reports, the time and expense council members and staff devote to running federal programs. Many, if not most, Tribes vest managerial responsibility for carrying out ISDEAA agreements in their Tribal councils, and such Tribes count on indirect cost reimbursements to defray the cost of these Tribal governmental functions. The NBC's unilateral revocation of the "50% rule" would force Tribes to spend great amounts of time to produce—and the DOI to review—documentation parsing Tribal council minutes and activity reports to determine the precise amount of council members' time and expense devoted to federal programs. We ask this Committee to urge the Secretary to avoid this wasteful exercise by directing the NBC to abandon its plan to revoke the 50% rule.

- ***Strengthens Tribal Planning and Management Capacities.*** By placing Tribes in decision-making positions, Self-Governance vests Tribes with ownership of the critical ingredient necessary to plan our own futures: information. At the same time, Self-Governance has provided a generation of Tribal members with management experience beneficial for the continued effective stewardship of our resources.
- ***Allows for Flexibility.*** Self-Governance allows Tribes great flexibility when making decisions concerning allocation of funds. Whether managing programs in a manner consistent with traditional values or allocating funds to meet changing priorities, Self-Governance Tribes are developing in ways consistent with their own needs and priorities, not those of a monolithic federal bureaucracy.
- ***Affirms Sovereignty.*** By utilizing signed compacts, Self-Governance affirms the fundamental government-to-government relationship between Indian Tribes and the U.S. Government. It also advances a political agenda of both the Congress and the Administration: namely, shifting federal functions to local governmental control.

In short, Self-Governance works, because it places management responsibility in the hands of those who care most about seeing Indian programs succeed: Indian Tribes and their members.

Need for Title IV Amendments

While the overarching policy of Self-Governance has been a great success for my Tribe and so many others, the legal framework to carry out that policy within the DOI could be vastly improved. Shortly after Title IV was enacted, the DOI began a rulemaking process to develop and promulgate regulations. The process was a failure in many ways. Ultimately, five years after the rulemaking process began, DOI published regulations that, from the Tribal perspective, failed to fully implement Congress's intent when Title IV was enacted. The regulations moved Self-Governance backward, not forward.

In 2000, after the enactment of Title V of the ISDEAA – permanent Self-Governance within DHHS - Tribal leaders began discussions about how the Title IV statute could be amended to get the initiative back on track. The development of Title V benefitted from the lessons learned as Title IV was implemented; Title V directly addressed many of the problem issues that emerged during the Title IV rulemaking process. Congress in Title V filled many of the gaps and corrected many of the problems in Title IV. But the improvements and greater Tribal authority embodied in Title V remain absent from Title IV. Consequently, many Self-Governance Tribes today are forced to operate under two different sets of administrative requirements, one for IHS and one for BIA.

Tribal leaders have decided that Title IV needed to be amended to incorporate many of Title V's provisions, and that has been a top legislative priority for over six years. Four years ago, I testified before this Committee in support of S. 1715, a bill that would have amended Title IV in many of the same ways as H.R. 3994. Numerous meetings and extensive correspondence sought to narrow the differences between Tribal and DOI representatives. On September 20, 2006, several Tribal leaders presented testimony to this Committee regarding problems implementing Self-Governance in DOI under Title IV and made the case for legislative relief. These problems, ranging from inadequate funding levels to bureaucratic recalcitrance, have caused participation in Tribal Self-Governance to level off and even recede. That is unfortunate because Self-Governance has a proven track record of enhancing the ability of Tribes to improve the efficiency, accountability and effectiveness of programs and services.

Over the past year, discussions between the Tribal Title IV Task Force and DOI representatives intensified and yielded a number of compromise agreements reflected in the attached draft Tribally proposed bill. This bill incorporates all of the agreements reached between Tribal and DOI representatives. While some areas of disagreements remain, agreement has been reached on over 97% of the bill's contents. The vast majority of the proposed amendments are not new or radical ideas—most have been adapted directly from Title V.

Thus the Tribal draft reflects nearly six years of discussions, drafting, negotiations, and redrafting—and, as discussed below, significant Tribal concessions. The time has come to pass this legislation, which would significantly advance Congress's policy of promoting Tribal Self-Governance.

Overview of the Proposed Amendments

The proposed bill would bring Title IV into line with Title V, creating administrative efficiencies for Tribes while also importing the beneficial provisions of Title V currently missing in the earlier Self-Governance statute. Let me quickly summarize a few of the key provisions in the amendments, as embodied in the Tribal draft. To address problems in the DOI's implementation of the Tribal Self-Governance program, and to expand Tribes' options for pursuing their right to Self-Governance, the draft bill would, among other things:

- clarify and limit the reasons for which the agency may decline to enter a proposed agreement, and the time frame for making the decision;
- require that funds be transferred promptly after they have been apportioned to the Department;
- clarify how the construction provisions would apply;

- protect Tribes from DOI attempts to impose unilaterally terms in compacts or funding agreements; and,
- provide a clear avenue of appeal and burden of proof for Tribes to challenge adverse agency decisions.

Over the past four months we have had intense discussions with DOI representatives about various provisions in H.R. 3994 and the Tribal draft bill. They have made it clear that they have problems with some of the bill's provisions, and you may hear testimony from Department representatives opposing one or another provision of the bill. In weighing such testimony, I ask that you keep the following major facts in mind:

First, the Tribally proposed draft bill that is attached to my testimony is different from H.R. 3994 in a number of important respects. While it contains the consensus language that Tribal and department representatives reached on close to 95% of the provisions prior to the introduction of H.R. 3994, it also contains Self-Governance Tribes most recent efforts to bridge the gaps on the remaining areas of disagreement.

In fact, **the Tribally proposed draft bill reflects significant compromises on the part of Tribes.** For example, a major priority of Self-Governance Tribes for years has been to expand Self-Governance by making certain non-BIA programs within the DOI compactable as a matter of right. The DOI has repeatedly made clear that the administration would fight the enactment of these amendments if they contain these mandatory non-BIA provisions. To enhance the chances that this important legislation will pass during this Congress, Self-Governance Tribes reluctantly decided to strike the mandatory non-BIA provisions from the bill. We continue to think that these mandatory provisions make good policy sense and will pursue their enactment in the future. But for now, in order to get the remaining amendments passed this year, we are deferring our request as to non-BIA provisions.

Second, there is ample precedent for the few provisions in the bill with which DOI may continue to have problems. Title V, which has worked very well in the context of health care services, served as the model for H.R. 3994 and contains most of the contested provisions, none of which has caused the IHS any difficulty in its implementation of similar provisions over the past seven years.

Finally, to some extent Self-Governance presents an inherent, and perhaps intractable, tension between Tribes and the Department. A bureaucracy such as the DOI will inevitably resist yielding its authority—and its funding—to other entities, such as Tribes. For this reason, complete agreement between Tribal and federal viewpoints is likely impossible, and Congress should not wait for such agreement before acting. We believe that the Title IV amendments, especially after the most recent Tribal concessions discussed above, protect the interests of the federal government while advancing those of Tribal governments. We hope that this Committee will agree and finally take action to enact them.

Need to Clarify the Applicability of Title IV to the Department of Transportation

Almost none of the provisions presently included in H.R. 3994 are new—Self-Governance Tribal leaders have been advocating them for over six years and many of them come directly from Title V. I would like to take a moment to discuss a provision that would be new, however: the proposed Section 419 that would clarify that Title IV applies to agreements entered into by Tribes and the Department of Transportation (DOT) to carry out transportation programs such as the Indian Reservation Roads Program.

This new provision is important and necessary. The 2005 highway bill, SAFETEA-LU, authorized Tribal governments to receive funding from and to participate in a number of Department of Transportation (DOT) programs as direct beneficiaries without having the BIA or state governments acting as intermediaries. The statute specifically says that DOT and Tribes can enter into agreements for these programs "in accordance with the [ISDEAA]."² Some DOT officials have interpreted this language to mean the agreements must be consistent with the ISDEAA but are not really ISDEAA agreements. This erroneous interpretation has caused a great deal of confusion and disagreement over whether, and to what extent, Title IV applies to DOT. The new section 419 will make clear that the negotiation and implementation of Tribal funding agreements with DOT will be governed by Title IV.

Tribal Self-Determination in Natural Resource Management

Finally, a few words about another idea for advancing Tribal Self-Determination and Self-Governance that has been before this Committee in the past. The DOI Self-Governance Advisory Committee has supported legislation increasing Tribal Self-Determination in natural resource management; Title III of S. 1439 in the 109th Congress. Under that bill, Tribes would have been authorized to develop an Indian Trust Asset Management Plan that, once approved by the Secretary of Interior, could be implemented by the Tribe without the need for Secretarial approval of every individual transaction or decision. A similar concept has been incorporated into the Tribal Energy Resource Agreement provisions of the Energy Policy Act of 2005.³ We suggest that the Committee revisit the idea of expanding Tribal self-determination in natural resource management, and we are prepared to present concrete legislative proposals to that end.

² 23 U.S.C. § 202(d)(5).

³ Pub. L. No. 109-58 (Aug. 8, 2005).

Conclusion

In conclusion, I would like to step back for a moment and reinforce a broader point. As a long-term Self-Governance Tribal leader and in my role as Chairman of the DOI Self-Governance Advisory Committee, I have had the opportunity to talk regularly with many other Tribal leaders regarding Self-Governance. Although they recognize the implementation problems cited above, and the need for the Title IV amendments described earlier, every single Tribal leader made a point of praising the overwhelming success of Self-Governance. 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 the Title IV amendments proposed by the Tribes (see attached draft bill) 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.

Attachment: Tribally Proposed Draft Bill

**Tribally Proposed Bill Based on Provisions in H.R.
3994**

May 13, 2008

A BILL

To amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Department of the Interior Tribal Self-Governance Act of 2007'.

SEC. 2. TRIBAL SELF-GOVERNANCE.

Title IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended to read as follows:

` TITLE IV--TRIBAL SELF-GOVERNANCE

` SEC. 401. DEFINITIONS.

` In this title:

- ` (1) COMPACT- The term `compact' means a self-governance compact entered into under section 404.
- ` (2) CONSTRUCTION PROGRAM- The term `construction program' or `construction project' means a tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control,

transportation, or port facilities, or for other tribal purposes.

` (3) DEPARTMENT- The term `Department' means the Department of the Interior.

` (4) FUNDING AGREEMENT- The term `funding agreement' means a funding agreement entered into under section 405(b).

` (5) GROSS MISMANAGEMENT- The term `gross mismanagement' means a significant violation, shown by clear and convincing evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds transferred to an Indian tribe under a compact or funding agreement that results in a significant reduction of funds available for the programs assumed by an Indian tribe.

` (6) PROGRAM- The term `program' means any program, function, service, or activity (or portion thereof) within the Department of the Interior that is included in a funding agreement.

` (7) INDIAN TRIBE- The term `Indian tribe', in a case in which an Indian tribe authorizes another Indian tribe or a tribal organization to plan for or carry out a program on its behalf in accordance with section 403(a)(2), includes the other authorized Indian tribe or tribal organization.

` (8) INHERENT FEDERAL FUNCTION- The term `inherent Federal function' means a Federal function that cannot legally be delegated to an Indian tribe.

` (9) SECRETARY- The term `Secretary' means the Secretary of the Interior.

` (10) SELF-GOVERNANCE- The term `self-governance' means the program of self-governance established under section 402.

` (11) TRIBAL SHARE- The term `tribal share' means an Indian tribe's portion of all funds and resources that support Secretarial programs that are not required by the Secretary for the performance of inherent Federal functions.

` SEC. 402. ESTABLISHMENT.

` The Secretary shall carry out a program within the Department to be known as the `Tribal Self-Governance Program.'

SEC. 403. SELECTION OF PARTICIPATING INDIAN TRIBES.

(a) In General-

(1) PARTICIPANTS-

(A) The Secretary, acting through the Director of the Office of Self-Governance, may select up to 50 new Indian tribes per year from those eligible under subsection (b) to participate in self-governance.

(B) If each Indian tribe requests, two or more otherwise eligible Indian tribes may be treated as a single Indian tribe for the purpose of participating in Self-Governance.

(2) OTHER AUTHORIZED INDIAN TRIBE OR TRIBAL ORGANIZATION- If an Indian tribe authorizes another Indian tribe or a tribal organization to plan for or carry out a program on its behalf under this title, the authorized Indian tribe or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution).

(3) JOINT PARTICIPATION- Two or more Indian tribes that are not otherwise eligible under subsection (b) may be treated as a single Indian tribe for the purpose of participating in self-governance as a tribal organization if--

(A) each Indian tribe so requests; and

(B) the tribal organization itself or at least one of the tribes participating in the tribal organization is eligible under subsection (b).

(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION-

(A) IN GENERAL- An Indian tribe that withdraws from participation in a tribal organization, in whole or in part, shall be entitled to participate in self-governance if the Indian tribe is eligible under subsection (b).

(B) EFFECT OF WITHDRAWAL- If an Indian tribe withdraws from participation in a tribal organization, the Indian tribe shall be entitled to its tribal share of funds and resources supporting the programs that the Indian tribe is entitled to carry out under the compact and funding agreement of the Indian tribe.

(C) PARTICIPATION IN SELF-GOVERNANCE- The withdrawal of an Indian tribe from a tribal organization shall not affect the eligibility of the

tribal organization to participate in self-governance on behalf of one or more other Indian tribes.

` (D) WITHDRAWAL PROCESS-

` (i) IN GENERAL- An Indian tribe may, by tribal resolution, fully or partially withdraw its tribal share of any program in a funding agreement from a participating tribal organization.

` (ii) EFFECTIVE DATE-

` (I) IN GENERAL- A withdrawal under clause (i) shall become effective on the date specified in the tribal resolution.

` (II) NO SPECIFIED DATE- In the absence of a date specified in the resolution, the withdrawal shall become effective on--

` (aa) the earlier of--

` (AA) 1 year after the date of submission of the request; or

` (BB) the date on which the funding agreement expires; or

` (bb) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian tribe or tribal organization.

` (E) DISTRIBUTION OF FUNDS- If an Indian tribe or tribal organization eligible to enter into a self-determination contract under title I or a compact or funding agreement under this title fully or partially withdraws from a participating tribal organization, the withdrawing Indian tribe--

` (i) may elect to enter a self-determination contract or compact, in which case--

` (I) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of unexpended funds and resources supporting the programs that the Indian tribe will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the

funds were initially allocated to the funding agreement of the tribal organization); and

` (II) the funds referred to in subclause (I) shall be withdrawn by the Secretary from the funding agreement of the tribal organization and transferred to the withdrawing Indian tribe, on the condition that the provisions of sections 102 and 105(i), as appropriate, shall apply to the withdrawing Indian tribe; or

` (ii) may elect not to enter a self-determination contract or compact, in which case all funds not obligated by the tribal organization associated with the withdrawing Indian tribe's returned programs, less close-out costs, shall be returned by the tribal organization to the Secretary for operation of the programs included in the withdrawal.

` (F) RETURN TO MATURE CONTRACT STATUS- If an Indian tribe elects to operate all or some programs carried out under a compact or funding agreement under this title through a self-determination contract under title I, at the option of the Indian tribe, the resulting self-determination contract shall be a mature self-determination contract as defined in section 4(h) of this Act.

` (b) Eligibility- To be eligible to participate in self-governance, an Indian tribe shall--

` (1) successfully complete the planning phase described in subsection (c);

` (2) request participation in self-governance by resolution or other official action by the tribal governing body; and

` (3) demonstrate, for the 3 fiscal years preceding the date on which the Indian tribe requests participation, financial stability and financial management capability as evidenced by the Indian tribe having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency.

` (c) Planning Phase-

` (1) IN GENERAL- An Indian tribe seeking to begin participation in Self-Governance shall complete a planning phase in accordance with this subsection.

˘ (f) Existing Compacts- An Indian tribe participating in self-governance under this title, as in effect on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007, shall have the option at any time after that date--

- ˘ (1) to retain its negotiated compact (in whole or in part) to the extent that the provisions of the compact are not directly contrary to any express provision of this title; or
- ˘ (2) to negotiate a new compact in a manner consistent with this title.

˘ **SEC. 405. FUNDING AGREEMENTS.**

˘ (a) In General- The Secretary shall negotiate and enter into a written funding agreement with the governing body of an Indian tribe or tribal organization in a manner consistent with the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

˘ (b) Included Programs-

˘ (1) BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE-

˘ (A) IN GENERAL- A funding agreement shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs carried out by the Bureau of Indian Affairs and Office of Special Trustee, without regard to the agency or office within which the program is performed (including funding for agency, area, and central office functions in accordance with subsection 409(c)), that--

- ˘ (i) are provided for in the Act of April 16, 1934 (25 U.S.C. 452 et seq.);
- ˘ (ii) the Secretary administers for the benefit of Indians under the Act of November 2, 1921 (25 U.S.C. 13), or any subsequent Act;
- ˘ (iii) the Secretary administers for the benefit of Indians with appropriations made to agencies other than the Department of the Interior;
- ˘ (iv) are provided for the benefit of Indians because of their status as Indians; or

'(v) with respect to which Indian tribes or Indians are primary or significant beneficiaries.

(2) DISCRETIONARY PROGRAMS- A funding agreement under subsection (a) may, in accordance with such additional terms as the parties consider to be appropriate, include other programs, or portions thereof, administered by the Secretary that are of special geographic, historical, or cultural significance to the Indian tribe.

` (3) COMPETITIVE BIDDING- Nothing in this section--

` (A) supersedes any express statutory requirement for competitive bidding; or

` (B) prohibits the inclusion in a funding agreement of a program in which non-Indians have an incidental or legally identifiable interest.

` (4) EXCLUDED FUNDING- A funding agreement shall not authorize an Indian tribe to plan, conduct, administer, or receive tribal share funding under any program that--

` (A) is provided under the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. 1801 et seq.); and

` (B) is provided for elementary and secondary schools under the formula developed under section 1128 of the Educational Amendments of 1978 (25 U.S.C. 2008).

` (5) SERVICES, FUNCTIONS, AND RESPONSIBILITIES- A funding agreement shall specify--

` (A) the services to be provided under the funding agreement;

` (B) the functions to be performed under the funding agreement; and

` (C) the responsibilities of the Indian tribe and the Secretary under the funding agreement.

` (6) BASE BUDGET- A funding agreement shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (including funds available under section 106(a)) to be transferred to the Indian tribe, for such period as the Indian tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

` (7) NO WAIVER OF TRUST RESPONSIBILITY- A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian

tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

- ˘ (c) Amendment- The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe.
- ˘ (d) Effective Date- A funding agreement shall become effective on the date specified in the funding agreement.
- ˘ (e) Existing and Subsequent Funding Agreements-
 - ˘ (1) SUBSEQUENT FUNDING AGREEMENTS- Absent notification from an Indian tribe that it is withdrawing or retroceding the operation of one or more programs identified in a funding agreement, or unless otherwise agreed to by the parties to the funding agreement--
 - ˘ (A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, and, subject to appropriations, with funding paid for each fiscal year the agreement is effective; and
 - ˘ (B) the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement for the purposes of calculating the amount of funding to which the Indian tribe is entitled.
 - ˘ (2) EXISTING FUNDING AGREEMENTS- An Indian tribe that was participating in self-governance under this title on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2007 shall have the option at any time after that date--
 - ˘ (A) to retain its existing funding agreement (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or
 - ˘ (B) to negotiate a new funding agreement in a manner consistent with this title.
 - ˘ (3) MULTI-YEAR FUNDING AGREEMENTS- An Indian tribe may, at the discretion of the Indian tribe, negotiate with the Secretary for a funding agreement with a term that exceeds one year.

˘ **SEC. 406. GENERAL PROVISIONS.**

- ˘ (a) Applicability- An Indian tribe may include in any compact or funding agreement provisions that reflect the requirements of this title.

˘ (b) Conflicts of Interest- An Indian tribe participating in self-governance shall ensure that internal measures are in place to address, pursuant to tribal law and procedures, conflicts of interest in the administration of programs.

˘ (c) Audits-

˘ (1) SINGLE AGENCY AUDIT ACT- Chapter 75 of title 31, United States Code, shall apply to a funding agreement under this title.

˘ (2) COST PRINCIPLES- An Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by--

˘ (A) any provision of law, including section 106 of this Act; or

˘ (B) any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget.

˘ (3) FEDERAL CLAIMS- Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

˘ (d) Redesign and Consolidation- An Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

˘ (e) Retrocession-

˘ (1) IN GENERAL- An Indian tribe may fully or partially retrocede to the Secretary any program under a compact or funding agreement.

˘ (2) EFFECTIVE DATE-

˘ (A) AGREEMENT- Unless the Indian tribe rescinds the request for retrocession, such retrocession shall become effective on the date specified by the parties in the compact or funding agreement.

˘ (B) NO AGREEMENT- In the absence of a specification of an effective date in the compact or funding agreement, the retrocession shall become effective on--

˘ (i) the earlier of--

˘ (I) one year after the date of submission of such request; or

to by the Indian tribe, the Secretary shall review and make a determination with respect to the final offer.

` (3) NO TIMELY DETERMINATION- If the Secretary fails to make a determination with respect to a final offer within the time specified in paragraph (2), the Secretary shall be deemed to have agreed to the offer.

` (4) REJECTION OF FINAL OFFER-

` (A) IN GENERAL- If the Secretary rejects a final offer (or one or more provisions or funding levels in a final offer), the Secretary shall--

` (i) provide timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that--

` (I) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title;

` (II) the program that is the subject of the final offer is an inherent Federal function;

` (III) the Indian tribe cannot carry out the program in a manner that would not result in significant danger or risk to the public health; or

` (IV) the Indian tribe is not eligible to participate in self-governance under section 403(b);

` (ii) provide technical assistance to overcome the objections stated in the notification required by clause (i);

` (iii) provide the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised (except that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a Federal district court under section 110(a)); and

` (iv) provide the Indian tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to

any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

` (B) EFFECT OF EXERCISING CERTAIN OPTION- If an Indian tribe exercises the option specified in subparagraph (A)(iv)--

` (i) the Indian tribe shall retain the right to appeal the rejection by the Secretary under this section; and

` (ii) clauses (i), (ii), and (iii) of subparagraph (A) shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

` (d) Burden of Proof- In any administrative hearing or appeal or civil action brought under this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting a final offer made under subsection (c) or the grounds for a reassumption under subsection (b).

` (e) Good Faith-

` (1) IN GENERAL- In the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy.

` (2) POLICY- The Secretary shall carry out this title in a manner that maximizes the policy of tribal self-governance.

` (f) Savings- To the extent that programs carried out by Indian tribes and tribal organizations under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 409(c), the Secretary shall make such savings available to the Indian tribes or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

` (g) Trust Responsibility- The Secretary may not waive, modify, or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

˘ (h) Decisionmaker- A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(4) may be made--

˘ (1) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

˘ (2) by an administrative law judge.

˘ (i) Rules of Construction- Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian tribe.

˘ **SEC. 408. CONSTRUCTION PROGRAMS AND PROJECTS.**

˘ (a) Option to Assume Certain Responsibilities.— In undertaking a construction project under this title, an Indian tribe may elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions of law that would apply if the Secretary were to undertake the construction project, by adopting a resolution--

(1) designating a certifying officer to represent the Indian tribe and to assume the status of a responsible Federal official under such laws; and

(2) accepting the jurisdiction of the Federal court for the purpose of enforcement of the responsibilities of the certifying tribal officer assuming the status of a responsible Federal official under such laws.

˘ (b) Negotiations-

˘ (1) CONSTRUCTION PROJECTS- A provision shall be included in the funding agreement that, for each construction project--

˘ (A) states the approximate start and completion dates, which may extend for one or more years;

˘ (B) provides a general description of the construction project;

˘ (C) states the responsibilities of the Indian tribe and the Secretary with respect to the construction project;

˘ (D) describes--

˘ (d) Responsibility for Completion- The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the funding agreement.

˘ (e) Funding-

˘ (1) IN GENERAL- Funding for construction projects carried out under this title shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments, subject to the availability of appropriations for that purpose.

˘ (2) CONTINGENCY FUNDS- The Secretary shall include associated project contingency and retention funds in an advance payment described in paragraph (1), and the Indian tribe shall be responsible for the management of the contingency funds included in the funding agreement. Retention funds shall be retained unspent by the Indian tribe until the end of the construction project and may only be spent after approval by the Secretary.

˘ (3) REALLOCATION OF SAVINGS-

˘ (A) IN GENERAL- An Indian tribe may reallocate any financial savings realized by the Indian tribe arising from efficiencies in the design, construction, or any other aspect of a construction program or construction project.

˘ (B) PURPOSES- A reallocation under subparagraph (A) shall be for construction-related activity purposes for which the funds were appropriated and distributed to the Indian tribe under the funding agreement.

˘ (f) Approval-

˘ (1) IN GENERAL- The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Indian tribe in advance of construction of the facilities specified in the scope of work for each negotiated construction project agreement or any amendment thereof which results in a significant change in the original scope of work.

˘ (2) CONSISTENT WITH CERTIFICATION- If the planning and design documents for a construction project have been prepared in a manner consistent with the required

certification of a tribe referenced in subsection (c)(2), approval by the Secretary of a funding agreement providing for the assumption of the construction project shall be deemed to be an approval of the project planning and design documents under paragraph (1).

ˆ (3) REPORTS- The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually.

ˆ (4) INSPECTION- The Secretary may conduct onsite project inspections at a construction project semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

ˆ (g) Wages-

ˆ (1) IN GENERAL- All laborers and mechanics employed by contractors and subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of a building or other facilities in connection with construction projects funded by the United States under this Act shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494). With respect to construction alteration, or repair work to which the Act of March 3, 1931, is applicable under this section, the Secretary of Labor shall have the authority and functions set forth in the Reorganization Plan numbered 14, of 1950, and section 2 of the Act of June 13, 1934 (48 Stat. 948).

ˆ (2) AUTHORITY- With respect to construction alteration, or repair work to which that subchapter is applicable under this section, the Secretary of Labor shall have the authority and functions specified in the Reorganization Plan numbered 14, of 1950, and section 3145 of title 40.

ˆ (h) Applicability of Other Law- Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project conducted under this title.

SEC. 409. PAYMENT.

(a) In General- At the request of the governing body of the Indian tribe and under the terms of an agreement, the Secretary shall provide funding to the Indian tribe to carry out the funding agreement.

(b) Advance Annual Payment- At the option of the Indian tribe, a funding agreement shall provide for an advance annual payment to an Indian tribe.

(c) Amount- Subject to subsection (e) and sections 405 and 406 of this title, the Secretary shall provide funds to the Indian tribe under a funding agreement for programs in an amount that is equal to the amount that the Indian tribe would have been entitled to receive under contracts and grants under this Act (including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members) without regard to the organization level within the Department in which the programs are carried out.

(d) Timing- Unless the funding agreement provides otherwise, the transfer of funds shall be made not later than 10 days after the apportionment of funds by the Office of Management and Budget to the Department.

(e) Availability- Funds for trust services to individual Indians shall be available under a funding agreement only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the Indian tribe.

(f) Multiyear Funding- A funding agreement may provide for multiyear funding.

(g) Limitations on Authority of the Secretary- The Secretary shall not--

(1) fail to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this title, except as required by Federal law;

(2) withhold any portion of such funds for transfer over a period of years; or

(3) reduce the amount of funds required under this title--

(A) to make funding available for self-governance monitoring or administration by the Secretary;

(B) in subsequent years, except as necessary as a result of--

- ˘ (3) INVESTMENT STANDARD- Funds transferred under this title shall be managed using the prudent investment standard.
- ˘ (k) Carryover of Funds-
 - ˘ (1) IN GENERAL- Notwithstanding any provision of an Act of appropriation, all funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended.
 - ˘ (2) EFFECT OF CARRYOVER- If an Indian tribe elects to carry over funding from 1 year to the next, the carryover shall not diminish the amount of funds the Indian tribe is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.
- ˘ (l) Limitation of Costs-
 - ˘ (1) IN GENERAL- An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement.
 - ˘ (2) NOTICE OF INSUFFICIENCY- If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity under a compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary.
 - ˘ (3) SUSPENSION OF PERFORMANCE- If, after notice under paragraph (2), the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.
- ˘ (m) Distribution of Funds- The Office of Self-Governance shall be responsible for distribution of all Bureau of Indian Affairs funds provided under this title unless otherwise agreed by the parties.

˘ SEC. 410. FACILITATION.

- ˘ (a) In General- Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that facilitates--
 - ˘ (1) the inclusion of programs in funding agreements; and
 - ˘ (2) the implementation of funding agreements.
- ˘ (b) Regulation Waiver-
 - ˘ (1) REQUEST- An Indian tribe may submit a written request for a waiver to the Secretary identifying the

specific text in regulation sought to be waived and the basis for the request.

` (2) DETERMINATION BY THE SECRETARY- Not later than 120 days after receipt by the Secretary of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.

` (3) GROUND FOR DENIAL- The Secretary may deny a request under paragraph (1) only upon a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law.

` (4) FAILURE TO MAKE DETERMINATION- If the Secretary fails to approve or deny a waiver request within the time required under paragraph (2), the Secretary shall be deemed to have approved the request.

` (5) FINALITY- The Secretary's decision shall be final for the Department.

` SEC. 411. DISCLAIMERS.

` Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any agreement under sections 405(b)(2) or 405(b)(3)--

` (1) with respect to an inherent Federal function;

` (2) in a case in which the law establishing a program explicitly prohibits the type of participation sought by the Indian tribe (without regard to whether one or more Indian tribes are identified in the authorizing law); or

` (3) limits or reduces in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.

` SEC. 412. APPLICATION OF OTHER SECTIONS OF THE ACT.

` (a) Mandatory Application- Sections 5(d), 6, 7, 102(c), 102(d), 104, 105(a)(1), 105(f), 105(m)(1)(B), 110, and 111 and section 314 of Public Law 101-512 (covered under chapter 171 of Title 28, United States Code, commonly known as the "Federal Tort Claims Act") apply to compacts and funding agreements under this title.

` (b) Discretionary Application-

˘ (1) IN GENERAL- At the option of a participating Indian tribe or Indian tribes, any or all of the provisions of title I shall be incorporated in any Department compact or funding agreement.

˘ (2) EFFECT- Each incorporated provision--

˘ (A) shall have the same force and effect as if set out in full in this title; and

˘ (B) shall be deemed to supplement or replace any related provision in this title and to apply to any agency otherwise governed by this title.

˘ (3) EFFECTIVE DATE- If an Indian tribe requests incorporation at the negotiation stage of a compact or funding agreement, the incorporation--

˘ (A) shall be deemed effective immediately; and

˘ (B) shall control the negotiation and resulting compact and funding agreement.

˘ **SEC. 413. BUDGET REQUEST.**

˘ (a) Requirement of Annual Budget Request-

˘ (1) IN GENERAL- The President shall identify in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title.

˘ (2) DUTY OF SECRETARY- The Secretary shall ensure that there are included, in each budget request, requests for funds in amounts that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in funding identified under subsection (b).

˘ (3) RULE OF CONSTRUCTION- Nothing in this subsection authorizes the Secretary to reduce the amount of funds that an Indian tribe is otherwise entitled to receive under a funding agreement or other applicable law.

˘ (b) Present Funding; Shortfalls- In all budget requests, the President shall identify the level of need presently funded and any shortfall in funding (including direct program costs, tribal shares, and contract support costs) for each Indian tribe, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements.

SEC. 414. REPORTS.

- ^ (a) In General-
 - ^ (1) REQUIREMENT- On January 1 of each year, the Secretary shall submit to Congress a report regarding the administration of this title.
 - ^ (2) ANALYSIS- A report under paragraph (1) shall include a detailed analysis of tribal unmet need for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this title.
 - ^ (3) NO ADDITIONAL REPORTING REQUIREMENTS- In preparing reports under paragraph (1), the Secretary may not impose any reporting requirements on participating Indian tribes not otherwise provided by this title.
- ^ (b) Contents- The report under subsection (a)(1) shall--
 - ^ (1) be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds;
 - ^ (2) identify--
 - ^ (A) the relative costs and benefits of self-governance;
 - ^ (B) with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian tribes and members of Indian tribes;
 - ^ (C) the funds transferred to each Indian tribe and the corresponding reduction in the Federal employees and workload;
 - ^ (D) the funding formula for individual tribal shares of all Central Office funds, together with the comments of affected Indian tribes, developed under subsection (d); and
 - ^ (E) amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of inherent Federal functions by type and location;
 - ^ (3) contain a description of the methods used to determine the individual tribal share of funds controlled by all components of the Department (including funds assessed by any other Federal agency) for inclusion in compacts or funding agreements;

- ˘ (4) before being submitted to Congress, be distributed to the Indian tribes for comment (with a comment period of no less than 30 days); and
- ˘ (5) include the separate views and comments of each Indian tribe or tribal organization.
- ˘ (c) Report on Non-BIA, Non-OST Programs-
 - ˘ (1) IN GENERAL- In order to optimize opportunities for including non-Bureau of Indian Affairs and non-Office of Special Trustee programs in agreements with Indian tribes participating in self-governance under this title, the Secretary shall--
 - ˘ (A) review all programs administered by the Department, other than through the Bureau of Indian Affairs or Office of Special Trustee, without regard to the agency or office concerned; and
 - ˘ (B) not later than January 1 of each year, submit to Congress--
 - ˘ (i) a list of all such programs that the Secretary determines, with the concurrence of Indian tribes participating in self-governance under this title, are eligible to be included in a funding agreement at the request of a participating Indian tribe; and
 - ˘ (ii) a list of all such programs for which Indian tribes have requested to include in a funding agreement under section 405(b)(3) due to the special geographic, historical, or cultural significance of the program to the Indian tribe, indicating whether each request was granted or denied, and stating the grounds for any denial.
 - ˘ (2) PROGRAMMATIC TARGETS- The Secretary shall establish programmatic targets, after consultation with Indian tribes participating in self-governance, to encourage bureaus of the Department to ensure that a significant portion of those programs are included in funding agreements.
 - ˘ (3) PUBLICATION- The lists and targets under paragraphs (1) and (2) shall be published in the Federal Register and made available to any Indian tribe participating in self-governance.
 - ˘ (4) ANNUAL REVIEW-
 - ˘ (A) IN GENERAL- The Secretary shall annually review and publish in the Federal Register, after

consultation with Indian tribes participating in self-governance, revised lists and programmatic targets.

ˆ (B) CONTENTS- The revised lists and programmatic targets shall include all programs that were eligible for contracting in the original list published in the Federal Register in 1995, except for programs specifically determined not to be contractible as a matter of law.

ˆ (d) Report on Central Office Funds- Not later than January 1, 2010, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of Special Trustee for inclusion in the compacts.

ˆ SEC. 415. REGULATIONS.

ˆ (a) In General-

ˆ (1) PROMULGATION- Not later than 90 days after the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007, the Secretary shall initiate procedures under subchapter III of chapter 5, of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out the amendments made by this title.

ˆ (2) PUBLICATION OF PROPOSED REGULATIONS- Proposed regulations to implement the amendments shall be published in the Federal Register not later than 1 year after the date of the enactment of this title.

ˆ (3) EXPIRATION OF AUTHORITY- The authority to promulgate regulations under paragraph (1) shall expire on the date that is 24 months after the date of the enactment of this title.

ˆ (b) Committee-

ˆ (1) MEMBERSHIP- A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives.

ˆ (2) LEAD AGENCY- Among the Federal representatives, the Office of Self-Governance shall be the lead agency for the Department.

ˆ (c) Adaptation of Procedures- The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-

governance and the government-to-government relationship between the United States and Indian tribes.

ˆ (d) Effect-

ˆ (1) REPEAL- All regulatory provisions under part 1000 of title 25, Code of Federal Regulations, inconsistent with this title are repealed on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007.

ˆ (2) EFFECTIVENESS WITHOUT REGARD TO REGULATIONS- The lack of promulgated regulations shall not limit the effect of this title.

ˆ SEC. 416. EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.

ˆ Unless expressly agreed to by a participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for--

ˆ (1) the eligibility provisions of section 105(g); and

ˆ (2) regulations promulgated under section 415.

ˆ SEC. 417. APPEALS.

ˆ In any administrative appeal or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence--

ˆ (1) the validity of the grounds for the decision; and

ˆ (2) the consistency of the decision with the provisions and policies of this title.

ˆ SEC. 418. AUTHORIZATION OF APPROPRIATIONS.

ˆ There are authorized to be appropriated such sums as may be necessary to carry out this title.'

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SEC. 419. APPLICABILITY OF THE ACT TO THE DEPARTMENT OF TRANSPORTATION.

(a) The Secretary of the Department of Transportation shall carry out a program within the Department of Transportation to be known as the Tribal Transportation Self-Governance Program.

(b) Notwithstanding any other provision of law, the Secretary of Transportation shall enter into compacts and funding agreements under this title with any Tribe who elects to utilize the authority of this title to govern any funds made available to Indian tribes under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59) or successor authorities.

(c) Notwithstanding any other provision of law, the negotiation and implementation of each compact and funding agreement entered into under this section shall be governed by the provisions of this title. "

END