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TRIBAL SELF-GOVERNANCE

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON TRIBAL SELF-GOVERNANCE: OBSTACLES AND IMPEDIMENTS TO EXPANSION OF SELF-GOVERNANCE

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TRIBAL SELF-GOVERNANCE

WEDNESDAY, SEPTEMBER 20, 2006

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:38 a.m. in room 485, Russell Senate Office Building, Hon. John McCain (chairman of the committee) presiding.

Present: Senators McCain, Dorgan, and Murkowski.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. This morning the committee will receive testimony on the Department of the Interior's management of the Tribal Self-Governance Program. For many, it is hard to imagine that just a little over 30 years ago, the Federal Government was the sole provider of all or nearly all essential governmental services to Indian tribes and their members, including police, fire, education, and health care services in Indian country.

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act, Public Law 93–638. Since then, Congress has increasingly authorized Indian tribes to manage Federal programs and assume control over their own affairs. Tribal self-governance aims to foster strong tribal governments and healthy reservation economies as mechanisms to further tribal government.

Encouraged by the opportunities available under the act to operate and shape BIA programs to be more responsive to their community needs, Indian tribes across the country actively sought to contract and compact with the BIA. As more tribes assumed control over their own affairs, there has been a corresponding reduction in the Federal bureaucracy and an improvement in the quality of services delivered to tribal members.

Recently, however, many tribes have been reluctant to enter into new contracts or to expand their current contracts and compacts. Some tribes have even begun to retrocede contracts as authorized under the act. This hearing will provide an opportunity for the department and invited tribal witnesses to offer their views and comments on these trends, and possible suggestions for resolving these challenges.

The CHAIRMAN. Vice Chairman Dorgan is at a leadership meeting. He will be a few minutes late. In the meantime, Senator Murkowski?

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman, and good morning.

There is little dispute within Indian country that the policy of self-determination first enunciated by President Nixon is probably one of the best, if not the single best thing that this Federal Government has ever done to help our Native people. Alaska tribes are 100 percent self-governance for Indian Health Services program and they compact BIA program. Although none of the witnesses today are from Alaska, so many of the concerns they are going to discuss are shared by Alaska self-governance tribes.

The premise of self-determination is that Native people are stronger when they deliver Federal programs and services to their people, rather than rely on the Federal Government for service delivery. The quality of service delivery is higher when the people who deliver those services are directly accountable to tribal members. The opportunities for Native employment are greater.

Before self-governance came to Alaska, there were very few opportunities for our Native institutions to employ returning graduates from college and post-graduate programs. The self-governance institutions in Alaska have emerged as employers of choice for our Native young people.

This committee wonders with good reason why self-governance is not more popular around the country, and we need look no further than the tribes which have enthusiastically taken on Federal responsibilities under their self-governance compacts, but have then discovered that the Federal Government is unwilling to live up to its responsibilities under those compacts.

The lack of funding for contract support costs, which have been promised under the Indian Self-Determination Act and self-governance compacts leads the list of concerns that I frequently hear from Alaska tribes. I would hope this morning each of the witnesses will address themselves to the question of whether inadequate contract support costs deterred tribes from entering into self-governance compacts.

Now, we hear that BIA is giving their employees cost of living increases, but will not fund cost of living increases for tribal employees who perform the same functions under the self-governance compacts. While it is true that tribes can ask the Federal Government to take back the responsibility for delivering programs and services, self-governance is truly a matter of pride. Self-governance tribes will squeeze as much as they can out of a dollar, but more and more I am hearing that there is less and less to squeeze.

I am pleased that the committee is turning its attention to the issues of self-governance tribes today. I am hopeful that this hearing will lay the groundwork for continued dialog, the 110th Congress and I appreciate your initiative on this, Mr. Chairman.

Thank you.

The CHAIRMAN. Thank you.

Mr. Skibine, please come sit down, the Acting Deputy Assistant Secretary of Policy and Economic Development for Indian Affairs at the U.S. Department of the Interior, and old friend of the committee. He is accompanied by?

Mr. SKIBINE. I am accompanied by Ken Reinfeld, who is the Acting Director of the Office of Self-Governance.

The CHAIRMAN. Good, thank you. Welcome. Please proceed.

STATEMENT OF GEORGE SKIBINE, ACTING DEPUTY ASSISTANT SECRETARY, POLICY AND ECONOMIC DEVELOPMENT FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY KEN REINFELD, ACTING DIRECTOR, OFFICE OF SELF-GOVERNANCE

Mr. SKIBINE. Thank you very much, Mr. Chairman, Senator Murkowski. I am pleased to be here today to present testimony on the oversight hearing on tribal self-governance.

Essentially, I think my comments have been furnished to the committee and my statement will be made part of the record.

The CHAIRMAN. Without objection.

Mr. SKIBINE. Okay, thank you.

The self-governance program started in 1991 with seven tribes for about approximately $27 million. In 2006, there were 91 funding agreements providing services to 231 tribes for $300 million. So the program has been extremely successful since its inception and the department strongly supports self-governance as an exercise of tribal sovereignty and self-determination.

Its framework is one of administrative flexibility, which allows tribes to determine for themselves what are their program priorities. We have been essentially one of the success stories, I think, for the Administration since its inception.

Indian tribes, of course, may negotiate a non-BIA funding agreements for programs which are of special geographical, cultural and historical significance to the tribe, and they are first negotiating funding agreements with the BIA or other Interior agencies for programs which are available to Indians because of their status as Indians. Each year, the department publishes a list of available programs for inclusion in funding agreements to be negotiated by Interior bureaus other than the BIA. Currently, there are funding agreements with the Bureau of Land Management, the Bureau of Reclamation, the National Park Service, the U.S. Fish and Wildlife Service, and the Office of Special Trustee. Overall, approximately 14 agreements.

In addition, one of the policies of the Assistant Secretary for Indian Affairs is to hold quarterly meetings with the Self-Governance Advisory Committee to discuss and resolve issues of mutual interest. We participate in yearly self-governance conferences at the tribes' invitation. So we are essentially involved with self-governance tribes on a consultation basis pretty much year-round, so that we are well aware to feel the pulse of the tribes when it comes to issues facing those tribes in the self-governance program.

Finally, we are currently working with the title IV tribal self-governance task force to explore the need for amendments to title IV. The Secretary's office asked me this year to lead the department's team in this effort because there was some frustration on the parts of tribes and within our Administration over the length of time it was taking the department to move forward on the negotiations. So at this point, I hope that progress can be made in reaching mutually acceptable solutions to the issues raised by the proposed

amendments. I am sure some of the tribal witnesses will testify on that issue.

We did submit a list of issues we have with the proposed amendments. The tribes have responded and we are now looking forward to starting a negotiation meeting with the Tribal Advisory Committee and hopefully we can resolve most, if not all, of the issues that are of concern.

Finally, I point out in my testimony that the department this year issued a national policy on contract support costs, and hopefully that policy will help alleviate some of the issues regarding contract support funding and having the money accessible to tribes.

With that, I will complete my comments, and I am pleased to answer any questions you may have.

Thank you.

[Prepared statement of Mr. Skibine appears in appendix.]

The CHAIRMAN. How many years have you been dealing with these issues?

Mr. SKIBINE. Excuse me?

The CHAIRMAN. How many years have you been dealing with Native American issues?

Mr. SKIBINE. With Native American issues, myself? About 29 years.

The CHAIRMAN. About 29 years. And we saw when self-determination and self-governance began that it was a great success, in 1975. Right? We saw more and more tribes taking advantage of self-governance contracting, because that is the whole theory of our treatment of Indian tribes, to allow them to self-govern as much as possible. By weaning themselves away from the BIA, IHS, and others, they were able to exercise much more self-governance. Right?

Mr. SKIBINE. That is correct.

The CHAIRMAN. How do you account for what appears to be a retrograde of tribes exercising self-governance and the lack of additional tribes seeking the ability to do so? It seems to fly in the face of everything that tribes seek and what we as a Nation want tribes to be able to do?

Mr. SKIBINE. Mr. Chairman, I am, and I stand to be corrected by my acting director, but I am not aware that we are having a regression in the number of tribes that participate in the self-governance program. It is true that the number of tribes seeking self-governance contracts has slowed progressively down because ultimately we have reached a certain plateau and we are certainly open to have more tribes participate in self-governance. I think ultimately tribes, it is their decision of whether to enter into self-governance compacts or not.

The CHAIRMAN. In the 1980's when I first started getting involved in Native American issues from a legislative standpoint, self-governance seemed to be the way that we thought all tribes were going to go. And now, many of the major, largest tribes have not done so. Would you like to comment?

Mr. REINFELD. Self-governance began in 1991. You are talking about, since 1975, the contracting, the 638 contracting.

The CHAIRMAN. Yes.

Mr. REINFELD. One of the requirements to get into self-governance is to have been operating successfully a contract for 3 years.

So contracting has diminished because some of these tribes, all of these tribes have come into self-governance.

The CHAIRMAN. So we don't have any problems?

Mr. REINFELD. I didn't say that.

Mr. SKIBINE. I guess maybe we are not having, in the self-governance, under title IV, we have seen a steady increase and no reduction in the number of tribes. There has been a leveling off of the number of tribes entering into self-governance compacts because many tribes, at their option, may decide that they want to continue having 638 contracts under title I of the act, or want direct services for whatever reason. It is really their decision.

If we have a problem with tribes wanting to enter into self-governance and not doing so, then we need to hear from tribes that that is the case. I think we have not heard that.

The CHAIRMAN. Okay. Here is what we are going to hear from the witnesses, that there are bureaucratic obstacles, and there are other impediments that discourage tribes. For example, the committee has been informed that the BIA is not releasing the full amount of funding appropriated for self-governance and that these administrative hold-backs account for as much as 5 to 10 percent of the funds authorized. The Ak Chin people tell us that, and others.

Why is that occurring? Why would we hold back 5 to 10 percent of the funding?

Mr. SKIBINE. I think that there may have been a hold-back because of congressional rescissions that were essentially held back against all of our budgets, whether central office of tribes, pending knowing exactly whether there was going to be some rescission. I am not all that familiar with the inner working of the budget-area issues. If you want, we can look and ask our Office of Administration to look into that.

The CHAIRMAN. Well, we are also told the BIA sometimes doesn't distribute funding in a timely fashion. Is that legitimate?

Mr. SKIBINE. Do you have any comments on that?

Mr. REINFELD. Yes; there are certain funds that do get to our office late in the fiscal year and don't get to the tribes.

Mr. SKIBINE. But why is that?

Mr. REINFELD. Well, it depends on the particular program. Federal Highway funds is one of those. The methodology for contract support and welfare assistance gets to the tribe in two installments, so some of it gets later in the year when there is a better knowledge of the needs, the full need level that could be funded. Those are capped appropriations, so the tribe does not get 100 percent, but there is a pro-rata reduction to keep it within the appropriation limit.

The CHAIRMAN. Let me get this straight. The tribe enters into a contract with somebody to provide a certain service and they agree to pay that contract to that organization, whatever it may be, only they don't get the full amount of money to pay it. Now, if I were a tribe, I would say to heck with that. I will just let the Government pay it.

Mr. REINFELD. The appropriation language does limit the amount that can be spent for the contract support and for the welfare as-

sistance. So to keep within that appropriated level or ceiling, it is pro-rata reduced for all the tribes.

The CHAIRMAN. The IHS tells us that approximately one-half of its budget goes to tribes through self-governance contracts and compacts. I think that in your written testimony, you tell us tribes have only contracted for $300 million in the BIA programs. It seems to me IHS has been more successful than the BIA. Is that a legitimate comment?

Mr. SKIBINE. I am not familiar with the IHS program and funding, Mr. Chairman.

The CHAIRMAN. Senator Murkowski.

Senator MURKOWSKI. Thank you.

I don't know if I heard an answer there in the exchange with the Chairman, but in my opening statement I asked for the witnesses to address the question of whether or not inadequate contract support costs are deterring tribes from entering into self-governance compacts. I am not sure if you acknowledge that you agree there is a deterrent effect, if we are not adequately funding the contract support costs.

Mr. SKIBINE. I am not sure if there is a deterrent for the tribe. They can address that better than I can. I think that what we have done this year to try to ameliorate the situation with contract support is adopt this national policy, for which we have the following objectives. It will stabilize funding to each tribe from year to year. It will expedite payments for each tribe, and it will respect the Act's prohibition against reducing contract amounts from one year to the next.

The policy accomplishes these goals by requiring that, subject to appropriations, a tribe be paid the same amount it was paid in the preceding year. It allows the payment to be made very early in the fiscal year, and the only restriction is that the BIA must ensure that tribes do not receive more than 100 percent of its total requirements.

So the adoption of this policy certainly represents forward progress in the area of self-governance. We believe that it will significantly improve administrative flexibility and fiscal stability for tribes with funding agreements. To implement the funding aspect of the policy, the President's 2007 budget included a 14-percent increase for contract support costs.

Senator MURKOWSKI. So do you consider this full funding for contract support?

Mr. SKIBINE. I am not sure that it is or not.

Do you have any comment on that?

Mr. REINFELD. It remains to be seen, according to what the needs are. It may not be. I do want to add that self-governance tribes receive contract support on the same basis as contracting tribes.

Senator MURKOWSKI. Did you mention, Mr. Skibine, in your initial comments, that there is a report due out on the contract support costs? You mentioned the national policy.

Mr. SKIBINE. Yes; the national policy that we have adopted.

Senator MURKOWSKI. Okay. And that policy was adopted how long ago?

Mr. SKIBINE. It was adopted this year.

Senator MURKOWSKI. So this next fiscal year will be the first time that it is actually in place?

Mr. SKIBINE. That is correct.

Senator MURKOWSKI. Let me ask you about the PART requirement. OMB requires that Federal agencies justify their programs using the program assessment review tool. One of the concerns that we have heard from our tribes is that, well, self-governance is working for them. They have concerns that BIA is not collecting the data necessary to justify the program. Can you give me your thoughts on this? What are we doing to address this concern?

Mr. REINFELD. I think that the department is changing its strategic plan so that the data that is to be measured in that process, in the Government Performance and Results Act process [GPRA], is going to be more relevant to the tribes' activities.

Senator MURKOWSKI. It is not my understanding that it is relevancy so much as just the data is not being collected. Is there going to be an effort to step that up to make sure that we have the data that is needed for this review or required by this review?

Mr. REINFELD. We have put in the funding agreements provisions which tribes are agreeing to provide the Government Performance and Results Act, which is one of the first steps in the PART process. So yes, we have moved forward on that.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Let me just get this straight. The tribe enters into a contract for a certain service for a certain amount of money. But because of budgetary constraints or acts by the Appropriations Committee, there is not enough money, so they don't pay them as much as they originally contracted to pay. Is that correct?

Mr. REINFELD. The provision in the fund agreement says that it is just an estimate and we really don't know until the year goes on.

The CHAIRMAN. What is just an estimate?

Mr. REINFELD. For the, like, welfare assistance. They don't know what their need is going to be on contract support. They don't know what their need is. So it is an estimated amount and it is going to be based on the indirect cost rate that is negotiated. So it is dependent on how many funds they get, and it is a certain percentage of that. Part of the funding is non-recurring.

The CHAIRMAN. That is interesting, but again, is it a fact that the tribe enters into a contract for certain services, and that contract, they are able to do that under self-governance. Right?

Mr. SKIBINE. Yes.

The CHAIRMAN. Okay. So they enter into that contract and they say they will pay them a certain amount of money to perform that service, but then because of appropriations cutbacks, you may not have sufficient money to allow them to pay the commitments under that contract. Is that correct?

Mr. SKIBINE. Yes.

The CHAIRMAN. Well, I wonder what would happen if we did that with the defense contractors? I mean, that would be interesting. It would be a fascinating experience.

Mr. REINFELD. We do have a provision in the funding agreements. We negotiate off the President's budget.

The CHAIRMAN. Excuse me. But the tribes are negotiating off of what their needs are. They are contracting-out a certain service. Right?

Mr. REINFELD. We do adjust according to the appropriation, and that is a provision.

The CHAIRMAN. Have you ever adjusted up?

Mr. REINFELD. Yes.

The CHAIRMAN. You have?

Mr. REINFELD. If Congress appropriates more dollars for a program, yes, they get more dollars.

The CHAIRMAN. So again, suppose that our defense contractors were dependent upon how much money the Appropriations Committee appropriates for a certain program, and I am sorry we didn't have enough, so we are not going to pay you completely. I mean, that doesn't make any sense.

Mr. REINFELD. We roll up their base funding into one number and then adjust it. There is also not only if the President's budget is greater than the appropriated amount, then we reduce it to the appropriation. But we also add the pay costs to it, so any increases. One time, there was TPA increase, tribal priority allocation increases, that were also added. So I mean, tribes are not only getting reductions, but they are getting increases just by the nature of how it is formulated.

The CHAIRMAN. But is it true that some contracts are not given sufficient amount of money to fulfill the obligation under that contract? Is that true?

Mr. REINFELD. We have pro rata reduced contract support and that is true for that.

The CHAIRMAN. For contract support?

Mr. REINFELD. Yes.

The CHAIRMAN. If I were the guy doing the contracting, I would say, I am not sure I want to get into this contract if I could be paid 5 or 10 percent less than what I entered into. In fact, I think I would see you in court.

Senator Dorgan has just arrived. Do you have anything?

Senator DORGAN. Mr. Chairman, let me offer my regret that I was detained at another meeting, but thank you both for being here. I will defer questions.

The CHAIRMAN. Well, thank you. We will get more into this, but really, Mr. Skibine, we have known each other for a long time. It just doesn't seem appropriate to me that as we encourage tribes to contract out for certain services, and they are making the decision to do it, and then they obviously should have guidance as to how much money they can contract out for. I am sure that that is the case. But if they can't pay their bills, then it seems to me that that is not a very attractive way of doing business, where if they would just rely on the Federal Government to do the contracting, the Federal Government very rarely does not pay its bills. So I can see why this might be a disincentive.

Do you see my point?

Mr. SKIBINE. Yes; I see your point. We will certainly look into that.

The CHAIRMAN. All right. I would appreciate it. Thank you. It is good to see you all again. Thanks for coming.

Mr. SKIBINE. Thank you very much.

The CHAIRMAN. Our next panel is Delia M. Carlyle, chairwoman of the Ak Chin Indian Community; Floyd Jourdain, chairman of the Red Lake Band of Chippewas; Melanie Benjamin, chairwoman of the Mille Lacs Band Assembly; and Ron Allen, chairman of the Jamestown S'Klallam Tribe, an old friend of the committee.

We will begin with Delia M. Carlyle, since she hails from the great State of Arizona, a prerogative of the Chair. [Laughter.]

STATEMENT OF DELIA M. CARLYLE, CHAIRWOMAN, AK CHIN INDIAN COMMUNITY COUNCIL

Ms. CARLYLE. Good morning, Mr. Chairman, Mr. Vice Chairman, and Senator Murkowski.

My name is Delia Carlyle and I am currently the chairman of the Ak Chin Indian Community.

The CHAIRMAN. Located?

Ms. CARLYLE. Okay. I have that coming up, sir.

The CHAIRMAN. Okay.

Ms. CARLYLE. Our reservation was established in May 1912 and was originally comprised of over 47,000 acres. In the same year, 3 months later, our reservation was reduced by more than one-half, to its present-day size of just under 22,000 acres. My community is located approximately 35 miles south of Phoenix, AZ, and near my sister tribe of the Gila River Indian Reservation. We are a small, but proud tribe, of 767 enrolled members.

Today, my community is being significantly impacted by hypergrowth in our area. We were once a small rural farming village, but today my area is one of the fastest growing suburbs of Phoenix, if not also in the United States. The explosive growth has also brought big-city problems to my community, which adversely affect our air, water, land, culture, traditions and our own tribal members.

Thus the need for timely and full-funded self-governance programs is more important than ever to assist my community in providing necessary services for our tribal members. I am here today to speak about self-governance programs as they pertain to my community.

At Ak Chin, we have social services, criminal investigator, education, roads maintenance and other consolidated tribal government programs which includes the courts, enrollment, adult education, Band adult education in our self-governance compact. In theory, self-governance was intended to allow an Indian tribe to consolidate all its BIA 638 program funds and reporting requirements into one self-governance compact. The primary objective of self-governance programs is to enable the tribe, not the BIA, to operate its own tribal programs.

Unfortunately, self-governance programs have strayed away from their original intent to strengthen Indian self-determination and self-sufficiency.

One of our biggest problems for my tribe's self-governance program is that the BIA's Office of Self-Governance has become an additional layer of BIA bureaucracy. The problem is that our negotiator is not a local person. The individual is located over 1,000

miles away and three States away in Vancouver, WA. Thus, they do not know the local resources of our area.

Another example is that my tribe may need a social worker, teacher, nurse, therapist, or police officer to help implement a self-governance program. Because there are no local resources through the OSG, my tribe has to turn to the BIA agency and/or regional office for administrative and technical support to implement and operate our self-governance programs. This creates several problems.

First, there is no local BIA support because of the BIA's agency or regional office lost their technical support person, who was let go or reassigned when OSG took over the program administration. Furthermore, tribes may be stuck in the middle of an OSG and agency regional office turf battle. At times, tribes pay the price for BIA internal strife when an agency office loses personnel and funding to the OSG. The result is that the tribe gets the bureaucratic runaround instead of its questions answered.

In addition, technical assistance funding is practically gone. This hurts tribal program development because of the lack of BIA program technical assistance and support. This is especially true for navigating through the complex funding formula process.

Besides a lack of adequate funding for tribal programs, a huge problem is getting the available self-governance funding drawn down to my tribe. These funds are already authorized and appropriated, but my tribe gets excuse after excuse from OSG that the BIA central office has not forwarded the funds.

For example, in my case, my tribe has not yet received our fiscal year 2004 reservation roads funding. Because of my area's hypergrowth, roadway infrastructure is a major need. From 2004 to the present, we were promised almost $200,000 for road construction from OSG. Based on that information, we planned and negotiated, along with State and local county officials, for a joint roadway project to help alleviate the mass congestion of traffic going through the main road in my village. The road was built, but the funding has yet to come.

Therefore, my tribe had to cover the funding gap, which meant that other tribal programs such as meals services to our elders, as well as budget cuts to early childhood development programs, as examples, were used to make up for the self-governance shortfall.

Finally, we have recently been informed by OSG that the funding should be available soon, but the amount is less than originally promised.

Another glaring problem is the expanded use of administrative hold-backs by the BIA. In short, the BIA central office is not releasing the full amount of authorized and appropriated funds for tribes, and holding back about 5 percent to 10 percent of tribally earmarked funds. This is a direct violation of section 405 of the Interior Appropriations Act, which requires any hold-backs to be approved by the Appropriations Committee. To this date, there has been no such approval.

In some cases, the BIA claims that hurricane relief or *Cobell* litigation fees consumed the funds. In addition, at times we have also been told by staff within the BIA that instead of the funds going to the tribes, those funds were returned to the Treasury. In any

case, the funds are not going to tribal programs. As a result, tribes have to cut other much-needed tribal programs to make up for the hold-backs.

We offer the following recommendations to hopefully resolve some of these problems. First, positive impact comes simply from the BIA following Federal law and not enabling administrative hold-backs. It seems that streamlining the funding process would be another good start. There are still too many bureaucratic layers involved. It should not take over 2 years to have funds drawn down to my tribe or any other tribe. We rely on the promised self-governance funding and incorporate those funds into our annual budgets. If we do not receive those funds, we have to make cuts from other important tribal programs, which impact our elders, youth, and all our tribal members.

In addition, we respectfully recommend having local negotiators, limiting the number of tribes per negotiator, and rewarding good negotiators, while getting rid of the ineffective ones.

In conclusion, Mr. Chairman and committee members, I would like to thank all of you for this opportunity. Our community has high hopes that this committee will address the problems of self-governance and we look forward to working with you toward solutions.

Thank you.

[Prepared statement of Ms. Carlyle appears in appendix.]

The CHAIRMAN. Thank you very much.

Floyd Jourdain? Is that the proper pronunciation, sir?

Mr. JOURDAIN. Yes.

The CHAIRMAN. Thank you. Welcome.

Mr. JOURDAIN. And I agree, Arizona is a beautiful State. [Laughter.]

The CHAIRMAN. Thank you.

STATEMENT OF FLOYD JOURDAIN, JR., CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA

Mr. JOURDAIN. Mr. Chairman, Mr. Vice Chairman, members of the committee, good morning. Thank you for this opportunity to present our issue today and provide the testimony on behalf of the Red Lake Band of Chippewa Indians in Northwestern Minnesota.

I will focus my remarks on the harsh impacts on my tribe and on other tribes that have been caused by the failure of the BIA, the OMB and the Congress to fully fund pay cost increases for self-governance programs. As an aside, I want to add that the Red Lake Band supports the bootstrap amendment that Chief Executive Benjamin and Chairman Allen have testified upon, and having title V authority applied to our title IV agreement would help Red Lake in our ongoing negotiations with the BIA.

To my main point, under Public Law 93–638, tribal employees do what Federal employees previously did for tribes. Congress has regularly encouraged the Administration to treat 93–638 tribal employees the same as BIA employees are treated with respect to pay cost increases and other fixed costs. Because Congress and the Administration have failed to fully fund these costs, Indian tribes have been forced to either absorb the pay cost increases by reduc-

ing services, or to deny tribal employees the pay cost increases received by their Federal colleagues.

As a result, the House Appropriations Subcommittee wrote in its fiscal year 2005 Interior report

> Absorption of costs associated with the Federal pay increases and other unfunded fixed costs cannot continue indefinitely without further eroding core program capabilities.

Over the past 3 years, the Indian programs have absorbed over $500 million in unfunded costs. Reducing Indian services by $500 million every 3 years in order to pay our tribal employees their basic cost of living increases is not a choice tribes like Red Lake can live with.

My written testimony sets out in detail the painful funding cuts that the Red Lake Band has endured in the past 5 years. I will briefly summarize these cuts. For fiscal year 2006, we timely submitted our pay cost worksheet to BIA. If fully funded, that would have given us an increase of over $260,000. The President requested and the Congress enacted fully funded pay costs for the Department of the Interior in fiscal year 2006, but BIA gave us only $97,000.

Why was Red Lake shortchanged $153,000? It turns out BIA did not collect some pay cost worksheets from other tribes when OMB was calculating a totally funded Interior need. So BIA decided to distribute erroneously smaller amounts pro rata among other tribes. Once again, tribes like Red Lake had to pay for BIA's mistakes.

For fiscal year 2002, there apparently was such acrimony between the BIA budget office and Interior's Office of Self-Governance that when OSG missed a deadline for submitting pay cost information on self-governance tribes to BIA, $3.3 million was not included in the request that went to OMB and the Congress. When we learned about this mistake, we pleaded with the Congress to correct it. The House added $3.3 million, but at conference with the Senate, that amount was halved. So BIA pro-rated the shortfall to all tribes. Once again, tribes like Red Lake had to pay for Interior's mistakes.

For fiscal year 2003, 2004, and 2005, Red Lake believes the BIA has miscalculated Red Lake's proper share of the limited pay cost funding that was requested and appropriated. We have repeatedly asked BIA to report to us how it calculated our share for those years. They have repeatedly failed to give us the report. We even made BIA promise in our legally binding self-governance funding agreement last year to provide us with this information by April 1 of this year. The date has come and gone without the BIA report.

Mr. Chairman, the BIA's neglect and disinterest in self-governance borders on hostility because we insist on being dealt with fairly and honestly. Must a tribe like Red Lake sue the Secretary just to get something done? This year marks Red Lake's 10th anniversary under self-governance, but is there cause for celebration?

Certainly, there have been some good things that have come under self-governance, and I describe a few of them in my written testimony. Yet the fact is that prior to fiscal year 1996, the Red Lake Band enjoyed relatively stable funding for our tribal priority

programs, and even saw an occasional increase for the cost of inflation.

Then, beginning with the devastating $100 million cut to the TPA in fiscal year 1996 when Senator Gorton was an Appropriations Chairman, Red Lake saw in that year alone a sudden reduction of 16 percent to 18 percent in funding for our core service programs, including law enforcement, fire protection, social services and natural resources. That was the year we began self-governance and we have never recovered, what with the mandatory and targeted rescissions and pay cost cuts.

No matter how efficient we have become at spending our funds as a result of self-governance authority, we have gone backward because of all the funding cuts and BIA miscalculations of our pay cost increases. Core service funding is less today than 1 decade ago. Contract support has been chronically inadequate and uncontrollable fixed costs have not been funded.

It might seem easiest for some tribes to simply revert back to BIA direct service. At least the BIA service providers would get their annual and step pay increases. But is that really in our best interest? Red Lake does not think so. We want to continue on the self-governance path, but we will need your continued help, Mr. Chairman, and that of this committee, to ensure that self-governance tribes are treated fairly by the BIA, by Interior's Budget Office, by OMB and by the appropriators.

To that end, we have a couple of requests we have outlined in my written testimony. We suggest a series of questions for you to consider asking the department, and some of them you have asked today; a letter to trigger a GAO investigation of the pay cost debacles at Interior; and a request that you demand that the department immediately provide the Red Lake Band with the pay cost report promised to us by April 1, 2006; and provide us with the funds that should have been given us in prior years and add them to our base funding in future years. We need your help and we need the help of this committee.

In closing, Mr. Chairman, the failure to fully fund tribes' uncontrollable costs, especially pay costs, during the last 5 fiscal years, has caused serious and irreparable harm to tribal core service programs. Errors, omissions, and miscalculations on the part of the BIA have compounded this problem. These matters are clearly a disincentive for tribes to continue participating in or to expand their participation in self-governance.

On behalf of the Red Lake Band and tribes across the country, thank you for asking me to testify today. I appreciate the opportunity and for your assistance in drawing attention to the matters that I have presented today.

Thank you.

[Prepared statement of Mr. Jourdain appears in appendix.]

The CHAIRMAN. Thank you very much.

Chairwoman Benjamin, welcome.

STATEMENT OF MELANIE BENJAMIN, CHAIRWOMAN, MILLE LACS BAND ASSEMBLY

Ms. BENJAMIN. Good morning, Mr. Chairman and members of the committee. You have my written statement, so I will be brief. I also want to say Arizona is a beautiful State. [Laughter.]

The CHAIRMAN. Thank you.

Ms. BENJAMIN. The Mille Lacs Band of Ojibwe has been among a handful of Indian tribes that have——

The CHAIRMAN. Senator Dorgan says that is not a requirement for witnesses. [Laughter.]

Ms. BENJAMIN. The Mille Lacs of Ojibwe has been among a handful of Indian tribes that have devoted countless hours over the past 18 years to the task of shaping Federal-tribal self-governance laws, regulations, and practice. Our former tribal Chairman Arthur Gahbow was among the 10 tribal leaders who met in Kansas City under the name of the Alliance of American Indian Leaders in 1988. They were led by Roger Jourdain and Wendell Chino. As a group, they first proposed the concept of self-governance.

Our goal has always been to expand tribal participation in self-governance. But to do that, we must remove the obstacles. It is no secret that generally speaking the Federal bureaucracies are threatened by any expansion of tribal self-governance because it results in a shift of power, money and job away from the Federal agencies and into tribal government employees.

From the beginning, our tribal allies in Congress such as you, Mr. Chairman, have had to push self-governance laws without support from the Administration. Today, we are here to report that after 6 years, we have been unable to persuade the Department of the Interior to support detailed reform legislation. We only want to bring the title IV BIA self-governance statute into conformity with the title V Indian Health Service self-governance statute.

So we ask that, as an interim measure, the Congress pass a simple technical bootstrap amendment. We realize that these are the closing days of Congress, yet this amendment is so important. It will provide interim relief to expand tribal self-governance at BIA. The bootstrap amendment would simply capture the improvements made by Congress in 2000 regarding Indian Health Service and extend them to the BIA and Interior at the option of the tribes.

Put another way, it would allow self-governance tribes to apply other provisions of Public Law 93–638, especially title V, to their BIA self-governance agreement. The bootstrap would immediately make self-governance more attractive to tribes because it will, first, increase tribal flexibility in the administration of our programs; second, produce cost savings by allowing tribes to conform our BIA-funded administrative practices to our Indian Health Service-funded administrative practices; third, expand eligibility and simplify the application process; fourth, shorten negotiations by applying time lines for decisions in dispute resolution; and fifth, expand investment authority over advanced funds.

It is a very cautious approach to reform because it would apply to only existing law and authority from title V to Interior self-governance agreements. This is a law that has been working well for the past 6 years at Indian Health Service. It is time to allow tribes

and BIA self-governance compacts to take advantage of these improvements.

From its beginning days, the goal of tribal self-governance has been to allow Indian tribes to redesign programs to better meet the needs of our people and to allow us to prioritize the funds ourselves to address the needs with administrative efficiency. The bootstrap amendment would help us achieve these goals.

On behalf of the Mille Lacs Band of Ojibwe, I thank you, Mr. Chairman, for considering it and urge its swift passage.

Thank you.

[Prepared statement of Ms. Benjamin appears in appendix.]

The CHAIRMAN. Thank you very much.

Ron Allen, welcome back.

STATEMENT OF W. RON ALLEN, CHAIRMAN, JAMESTOWN S'KLALLAM TRIBE

Mr. ALLEN. Thank you, Mr. Chairman. It is always an honor to be here before you and this distinguished body, so I am very honored to be here. So I thank you and the vice chairman for inviting me.

For the record, I am Ron Allen, chairman for the Jamestown S'Klallam Tribe. You have my testimony, and I am submitting it for the record.

The CHAIRMAN. The written statement of all the witnesses will be made a part of the record.

Mr. ALLEN. Thank you, sir.

Senator DORGAN. Mr. Allen, would you like to tell us your thoughts about Arizona? [Laughter.]

The CHAIRMAN. Or North Dakota.

Mr. ALLEN. It is hot. [Laughter.]

I am from the Northwest. We like it a little cooler up there, but not as cool as it gets in North Dakota in the wintertime, mind you.

Anyhow, I am very honored to be here with my colleagues with regard to self-governance. Self-governance, as Melanie had pointed out, has been advancing since 1988. I am very honored to have been a part of that process. I remember Chairman Roger Jourdain, Chairman Art Gahbow, and Joe DeLaCruz from the Quinault Nation, Wendell Chino and Alex Lindeman from the Rosebud, and Ed Thomas from Tlingit-Haida.

There were 10 of us who wanted to move this agenda forward. I am very, very delighted that we have been moving forward, but we are here before you to talk about why it has slowed down, why we are now entering a new phase of struggles with the Administration and with the advancement of this very progressive concept of empowering tribes. That is what self-governance and self-determination is all about. It is empowering tribes to take care of ourselves, because we can be more efficient with the limited Federal dollars that are made available for our people than any other system that exists. We have shown that.

We have written books and have countless examples of how efficient that we can be. You have seen it move forward from 1988 to the enactment of title IV in 1994 and enactment of title V in 2000. As Melanie Benjamin has advocated, we are looking forward to another step progressively forward.

You have asked some interesting questions earlier with the Administration. Why are we slowing down? What is going on? What is the problem? Chairwoman Carlyle talked about her experiences down in Arizona. Quite frankly, you have an Administration who is digging in their heels. Self-governance moved forward very progressively and it has been shown to be quite successful. But now you have a bureaucracy that really does not want to let go. And that has been always the historical challenge, to let go of Indian affairs, to let us control our own destiny. And they don't want to let go.

So you have a concept out there called inherent Federal function. You have a concept called residual funding that goes with inherent Federal function, that only the Federal Government can do, that quote/unquote, the tribes cannot do. The question is, now, is that starting to grow? The answer is yes. They are starting to come up with new ways of couching what they can do and only they can do, and we can't do, and they need more resources.

So when you look at available dollars that are made available to the tribe, they are becoming less and less and less. So consequently, tribes who are interested are looking at this picture and saying, there is a problem with this picture because you are not letting go of the system. The way it was conceptually back when we began this process in the 1990's was that as we took over more of the Federal system, you should see a marked diminishment of the Federal system because their role has changed in terms of their liaison with the Congress, with regard to what the tribe is doing with those dollars. So those dollars should reciprocate as the system adjusts down, and the tribes grow in their strength, and we report to you the successes of what we are achieving.

That was what was happening, and now it is starting to slow down. We came before you after 1994 and advocated an adjustment to title IV when title V got enacted. We were opposing some significant comprehensive adjustment to move it forward beyond the BIA and into the Department of the Interior, all agencies into the Department of the Interior.

Remember back when this thing started in 1988 when you did your investigation. You said, well, we made a big mistake. We are doing a terrible job. Let's talk about a whole new Federalism concepts. Let's take our Federal dollars and turn it over to the tribe. We said we liked the concept, but we want to do it on our own terms. We want to make sure that you are not relinquishing your legal liabilities and obligations to Indian country, so it had to be on our terms.

If we are going to move that concept forward, there has to be continuity. There has to be consistency on how these Federal Governments and agencies are administering this concept. You don't have consistency. So when you look at the BIA, 231 tribes, $300 million, well, what is that? You have about a $2-billion BIA budget. That is about 15 percent, if my math is right. If you looked at the IHS, you have around 306 tribes and you probably have around $900 million. So we figure that it is somewhere in the neighborhood of 40 percent of its budget. I think the number is around $2.4 billion, something like that.

The issue is, why is it working over there? Well, you have more flexibility. They have empowered tribes. Congress has made it clear what tribes' discretion and authority is. So we have more authority, so they have less ability legally to try to restrict the tribes. We still have problems over there. You do need to know we have some issues over there. Why is it we only have 40 percent of that money? We should have a whole lot more of that money. More tribes should be taking over those resources. Under BIA, you have talked about a number of issues that are out there.

So we think that the bootstrap proposal for title V into title IV helps us move and break the logjams. We want a more comprehensive piece of legislation, but we need a progressive first step to send a clear message from the Congress to the Administration.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Thank you very much.

Just briefly, Chairwoman Carlyle, because I think this is a concrete example of what we are wrestling here, unless I am missing something. You made an agreement with the State of Arizona to have a road through the reservation. Is that right?

Ms. CARLYLE. There is a road. It is called Ralston Road, which borders the county and our side. It borders Ak Chin.

The CHAIRMAN. So this road was an agreement between you and the county?

Ms. CARLYLE. Right.

The CHAIRMAN. And did you seek permission or inform the BIA that you were going to enter into this contract?

Ms. CARLYLE. Yes; we did, Mr. Chairman.

The CHAIRMAN. And were you assured that you would get the money for it?

Ms. CARLYLE. We were told that the dollar amount given for those years is what we would be getting, the projections. I have to admit one was a projection. And so based on that, we moved forward with the road, again, to alleviate the congestion going through what is known as Farrell Road, which is the main road through the village area.

The CHAIRMAN. So did you have that in writing?

Ms. CARLYLE. Yes; we have documents. We have an agreement about the moneys to be received.

The CHAIRMAN. Send a copy of those documents to the committee, would you?

Ms. CARLYLE. I sure will.

The CHAIRMAN. And then when it came time to pay?

Ms. CARLYLE. We are still waiting to get paid.

The CHAIRMAN. But you had to go ahead and pay, along with the county, for the construction of the road, so you had to take it out of tribal funds?

Ms. CARLYLE. Yes; we did. It was a commitment. It was on schedule, which apparently the funding cycle for the bureau does not meet the schedule, obviously, with our budget. So we went under the promise that we would be reimbursed for those costs.

The CHAIRMAN. And how long has that been?

Ms. CARLYLE. We are still waiting 2004. We got our first dollar numbers for the roads project, and just recently as of yesterday I

called back home to see what the status was and the remark was still the same. It is at the area office waiting for a draw-down. I said, well, we would have withdrawn those moneys 2 years ago, and we are still waiting. That is the excuse we are getting. It is there in the central office. All it needs is a signature, but we are just not able to draw down the funds.

The CHAIRMAN. Well, then if I were you and the tribal council, I would say next time to the county, deal directly with the BIA. Maybe you will get all your money that way.

Ms. CARLYLE. Well, hopefully the full amount, because we were notified that what we were told we were going to receive was less than what now they say we will be getting.

The CHAIRMAN. So even if you receive the money, it is going to be less than what you were told.

Ms. CARLYLE. Exactly.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, we decided to hold this hearing because we wanted to understand why the tribal self-governance program was not working particularly well, why tribes were not coming to this program and making themselves available to participate.

I think when I hear the testimony today, I think I understand why that is the case. I don't think this is a mystery. Nobody is going to want to sign up to a program that puts you in this position, where you have certain requirements, contractual expectations that are not met.

So I think we have learned what we intended to learn or what we had hoped to learn today. What is going on here? Why are more tribes not coming to this program? I think I now know, and I think it gives us some responsibility here on the committee, and opportunity as well to begin to address these issues. Because I think the program, if run properly, can hold out some real promise. I think self-governance for many tribes is attractive, makes a lot of sense, gives them opportunities to make their own decisions about their own priorities. All of that makes great sense. But it doesn't make sense to sign up to something that won't work.

So I think this has been very helpful to me to hear the testimony that you all have submitted. I appreciate very much your coming to Washington, DC, and Arizona is a wonderful place. [Laughter.]

And so is North Dakota. I am sorry, Mr. Chairman.

The CHAIRMAN. North Dakota is wonderful. [Laughter.]

Could I ask you all, since you are on the receiving end, if you would correspond with us to tell us what you think the fix is. Is it legislative? Is it a mandate from Congress that full compliance with contracts that were freely entered into with the approval of the BIA have to be honored? Is that one of the answers, Ron?

Mr. ALLEN. We believe that if we are going to move it forward like we did in the 1990's, Congress has to send a clear message back to the Administration that we intended for the tribes to be empowered, to address their own affairs. You are slowing it down. So get back to work and re-empower the tribes. That message has to come from the Congress.

The CHAIRMAN. Chairwoman Benjamin, do you communicate with the BIA these concerns that you have?

Ms. BENJAMIN. Yes; we have ongoing dialog. When we have our regional meetings and we have the regional reps in the meetings, we have discussions. I think Mille Lacs is in a different position because the funding is short. We are shortchanged and we are in a position where we use our other revenue streams to kind of balance that out, but that still doesn't make it right. And also, there are a lot of other tribes across the country that are not in that same situation.

The CHAIRMAN. Chairman Jourdain, overall do you still support strongly the concept of self-governance?

Mr. JOURDAIN. Yes; we do. We feel self-governance is a very positive thing, and the tribe would like to continue on with self-governance. We are hurting as a result of the cuts and the pay cost is really an issue for us. It is hard for us to compete when, say, for instance our law enforcement officers are being paid one-third less than BIA cops. They go train. They get whatever credentials they need, and then they leave to go somewhere else to work for higher pay.

We want to carryout those programs. And us, just like the other bands represented here, have to pull money from other areas in order to cover those shortfalls. We do not have a lot of resources tribally to do that.

The CHAIRMAN. Could I end by asking a question unrelated to this hearing, that continues to be of great concern to all Americans and to you. I begin with you, Chairwoman Benjamin. How serious is the methamphetamine problem?

Ms. BENJAMIN. We are starting to see that rise on our reservation. We are about 100 miles from the Minneapolis-St. Paul area, and we are the southern-most Ojibwe Tribe in the State of Minnesota. There area those entities that are in the cities, we call it the cities, Minneapolis-St. Paul, that then travel north. We understand that there is a strategic plan from some of the drug cartels to come to the reservations, and even to marry tribal members so they have a foot in there to be able to start that new clientele, if you will.

For the Mille Lacs Band, we are working very hard to make sure that we get a hold of this. Law enforcement is one issue that is very important, but also the other important issue is why are people turning to this as their escape. We know that we have a lot of depressed people in our reservations, based on generations of oppression. So we want to go from that, and find that peace, and help our members find the peace within themselves so they don't turn to those kinds of releases.

So we do that in terms of making sure that we really enhance our cultural opportunity for them, to bring them back to the ceremonies and make sure that we have adequate housing, education, and find jobs. One of the things that we did just recently is that there are a lot of folks who for some reason are not able to work in the economic development normal sense of work. So they are unemployed and look at some of the welfare benefits.

So what we did is we now have what we call a cultural labor pool, where we are allowing our tribal members to go out and do cultural related things for their families, for instance fishing, wild rice, harvesting maple syrup, and that would be their job. We will

pay them to do this job, because is does help their families. Any of those harvesting activities that they do, and they have enough for their families and they want to sell the other portion of that, we allow them to do that to enhance that income for their families.

So we are trying to look at new ways and innovative ways to make sure that our tribal members have the opportunity to be successful. So we look at that in new ways, and hopefully educate our youth of the dangers of that meth.

The CHAIRMAN. Chairman Jourdain.

Mr. JOURDAIN. We are one of the more remote tribes in Minnesota, so we don't have a lot of exposure to the methamphetamine, although it does exist on our reservation. We are battling a crack cocaine epidemic on our reservation. But because minimally we have not seen a lot of the methamphetamine abuse on the reservation, at this point even one instance we take very, very seriously. We are concerned about methamphetamine in Indian country and the State of Minnesota, and we are talking to the other tribes as much as we possibly can to network, along with local and State and Federal authorities to see what we can do to curb drug trafficking and methamphetamine abuse in Indian country.

The CHAIRMAN. Chairwoman Carlyle.

Ms. CARLYLE. Senator, you know, I talked about hyper-growth in our area. We were just that small little rural community of about 1,000 people or so, including the town of Maricopa. I believe we are up to 18,000 plus currently, and in a few more years they are projecting 100,000 to 130,000 residents in our area.

Chairman Ron Allen was just out in our area and saw the hyper-growth happening around us. Because of that, we feel that the meth issue is there. However, unfortunately, it seems to be well hidden in our small community. Our law enforcement people have taken steps to combat this, along with council members and other community members.

Unfortunately again, too, is that we seem to be a traffic stop area from the south. Those who are drug-trafficking from the south, and Maricopa seems to be for some reason the local stop. We are still far enough from Phoenix, but still close by, if you can see what I mean about exchanges in that area to off to different ways. The O'Odham reservation has also expressed that concern about their boundaries, the border issue.

Meth, unfortunately, as we all know, is a growing problem and its effects, however, have been real devastating. We are not sure if meth was related to the suicide of three beautiful young ladies, two were 13 and one was 14, all within a span of three months. They killed themselves. So we do what we have to do and we are coming together as a community because it is not the council's problem. It not the PD's. It is not the housing. It is all our problem to find a solution to do away with this horrible, horrible, I refer it to as a disease.

The CHAIRMAN. Thank you very much.

Chairman Allen.

Mr. ALLEN. Mr. Chairman, in my community meth is a serious problem. It is a serious problem in Indian country. Our president at NCAI has declared war on meth in Indian country because it is

so devastating to our people and to our families and to our community.

We are experiencing it in my small community. The thing that is most disturbing is the limited amount of resources available to fight it, to educate our people like my colleagues have commented, and to provide them better opportunities. There are very little dollars, and so we have to use precious hard dollars to fight that fight. But it is out there. It is the ugliest drug I have ever known, and we have a lot of people getting exposed to it. Worse yet is the devastation it causes their families and our communities.

The CHAIRMAN. I thank the witnesses. We will continue to make that one of the highest priorities that we can, and our sympathy to the families, Chairman Carlyle, of that tragic incident.

I thank you all very much. This hearing is adjourned.

[Whereupon, at 10:40 a.m. the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF THE ASSOCIATION OF ALASKA HOUSING AUTHORITIES

The Association of Alaska Housing Authorities [AAHA] is pleased to have this opportunity to submit testimony for the record at this important hearing.

AAHA's membership consists of the 13 statutorily created Alaska Native regional housing authorities which collectively provide services on behalf of approximately two-thirds of the tribes in the State, with combined annual budgets of just over $100 million. Alaska's regional housing authorities (in partnership with the Alaska Housing Finance Corporation which also holds a seat on the AAHA Board) serve residents in every part of Alaska—in larger urban cities, in small towns and in Alaska's rural, "bush"communities. The regional housing authorities have built well over 6,000 housing units since their inception in 1971 and are the primary builders of new housing in rural Alaska.

Although we realize your focus is primarily on tribal self-governance programs administered pursuant to titles IV and V of the Indian Self-Determination and Education Assistance Act of 1975 [ISDEAA] [Public Law 93–638, as amended], we know the committee is well aware of the fact that housing is a critical—and sadly lacking—basic need throughout Indian country and that the policies and issues under consideration by the committee have direct cross-over implications and application to the programs AAHA and other tribes and tribal organizations administer through HUD pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 [Public Law 104–330, as amended] [NAHASDA].

As the committee members consider the future of tribal self-governance and the testimony presented by the various tribal leaders presenting at this hearing, we respectfully request that a brief look backward to the genesis of self-determination and its evolution into self-governance may be instructive.

In 1970, President Nixon gave his historic "Special Message to the Congress on Indian Affairs." In his message he stated:

> For years we talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.
>
> This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a Federal agency. [Emphasis added.]

In response, Congress passed the ISDEAAM in 1975, giving tribes at least a limited level of the decisionmaking authority President Nixon had advocated for. Tribal self-governance, which was passed as a demonstration project in 1988 and made permanent in 1994, was of course an extension, or evolution, of this self-determination philosophy.

It is well to remember however, that as tribal leaders formulated and advanced the tribal governance concept, from its infancy through the successful passage of the concept into law, tribal leaders and many Members of Congress had a much broader vision of self-governance than that which has been realized to date.

When self-governance was made permanent in 1994 [12 years ago!], the House report which accompanied the legislation contained a discussion of concerns held by the House Resources Committee over resistance within the Indian Health Service to certain aspects of self-Governance implementation. As the report stated:

> This resistance is due in large part to the misapprehension that tribal self-governance is a temporary project. Tribal self-governance, as reflected in this legislation, will be a permanent program and it is the committee's intent to expand tribal self-governance to include each Department of the Federal Government. [Emphasis added.]

Cong. Rec., at H11141, October 6, 1994.

AAHA is hopeful that the Senate Indian Affairs Committee shares the views expressed by the House Resources Committee. We contend that expanding the Self-Governance model to HUD and the Indian/Alaska Native programs which it administers pursuant to NAHASDA is a logical and much overdue next step in this evolutionary process.

In fact, it should be noted that Congress has already expressed its intent to move in this direction by passing the NAHASDA amendments of 2002 [Public Law 107–292], which included the following new provision:

"Section 202. "Eligible Housing Activities.

> (8) SELF-DETERMINATION ACT DEMONSTRATION PROJECT.—(A) IN GENERAL.—Consistent with the provisions of the Indian Self-Determination and Education Assistance Act [25 U.S.C. 450 et seq.], the Secretary shall conduct and submit to Congress a study of the feasibility of establishing a demonstration project in which Indian tribes and tribal organizations are authorized to receive assistance in a manner that maximizes tribal authority and decisionmaking in the design and implementation of Federal housing and related activity funding. (B) STUDY.—Not later than 1 year after the date of enactment of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2002, the Secretary shall submit the study conducted under subparagraph (A) to the Committee on Banking, Housing, and Urban Affairs and the Committee on Indian Affairs of the Senate, and the Committee on Financial Services and the Committee on Resources of the House of Representatives.

AAHA is not aware of any attempt by HUD to comply with this mandate. The mandated report was supposed to be submitted to this Committee over 3 years ago! Again, we are aware of no effort by HUD to comply, and if it did, to our knowledge this information has never been shared with Indian country.

The critical issue at this point in history, at least from AAHA's perspective, is that we are no longer interested in a study. Tribal Self-Governance has been aggressively pursued and implemented in Alaska now for over 15 years. Alaska has a higher concentration of Tribal Self-Governance Compacts than any region or State in the country. Most of the BIA funding and almost all of the IHS funding is already administered under Tribal Self-Governance Compacts. AAHA does not see "a study" as providing any value or benefit in terms of the ultimate objective—the improvement in the delivery of housing programs and services to our beneficiaries. To the contrary, a study would simply be an unnecessary diversion and an unfortunate waste of scarce resources.

Administering Federal Indian/Alaska Native programs and services within the framework of Tribal Self-Governance should no longer be considered novel, unique or something that needs to be done in a "demonstration" mode. The reality is that Tribal Self-Governance is now a proven, "mainstream" model for the successful administration of Federal programs and services. It is time the model be extended to housing programs administered within HUD and that those Indian housing service providers who choose to exercise self-determination and self-governance rights by adopting a self-Governance model be allowed this option.

AAHA assumes the committee is well aware that NAHASDA is up for re-authorization in 2007. While NAHASDA was a much needed improvement relative to the pre-NAHASDA administration of programs under the Housing Act of 1937, the act has significant defects and numerous substantive amendments are needed—starting with provisions that remove the necessity for some of the oppressive, bloated bureaucracy that stifles tribal innovation and drains much needed resources away from direct services in favor of meeting administrative/regulatory requirements that add little or nothing in terms of accountability or actual improved services. BIA's

(and perhaps to a lesser extent IHS's) programmatic oversight pales in comparison relative to that currently exercised by HUD.

As an example of just one gross inefficiency, funding under NAHASDA is provided and required to be tracked by the recipient on a separate grant year basis, with a lengthy "Indian Housing Plan" (much of which is needless boilerplate) to be submitted each fiscal year. This necessitates that recipients administer complex financial systems that have to spread the expenditures across multiple grants and submit a separate Annual Performance Report for each grant year that remains open, even though the goals and objective for each successive year are likely to be very similar if not identical. Under the Tribal Self-Governance model, funds are simply rolled over from year to year and accounted for through the Federal Single Audit process until expended, a system which saves considerable administrative expense.

In closing, AAHA respectfully requests that the committee exercise its jurisdiction to the fullest extent possible, and that members exercise their individual influence to assist tribes and tribal organizations to expand the tribal self-governance model—a model which has proven to be so successful in the BIA and HIS service delivery arena—into the delivery of HUD housing programs and services. In short, if Congress wants more and better services per dollar of funding provided, this is the clear path toward achieving that objective.

Thank you for this opportunity to express our concerns and positive recommendations for how we can provide the highest quality services to the tribal members we serve, with the with the least amount of administrative bureaucracy, while maintaining the highest level of accountability to all interested parties.

JAMESTOWN S'KLALLAM TRIBE
1033 Old Blyn Highway, Sequim, WA 98382 360/683-1109 FAX 360/681-4643

W. RON ALLEN, CHAIRMAN & EXECUTIVE DIRECTOR
JAMESTOWN S'KLALLAM TRIBE

TESTIMONY BEFORE THE
U. S. SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON
DEPARTMENT OF THE INTERIOR TRIBAL SELF-GOVERNANCE

September 20, 2006

Thank you for the opportunity to be here today. My name is W. Ron Allen and I am the Chairman and Executive Director of the Jamestown S'Klallam Tribe located in Washington State. I am also the Chairman of the Title IV Self Governance Amendments Tribal Task Force and offer my testimony today in both capacities.

Almost three years ago – on October 23, 2003 - I testified before this Committee in strong support of S.1715, a bill that would have amended Title IV of the Indian Self-Determination and Education Assistance Act (P.L. 93-638 as amended). I understand that my time is limited today so I do not plan to use my time to discuss why Self-Governance works and why so many Tribes are opting to enter into a Compact of Self-Governance in both the Department of the Interior, as well as in the Indian Health Service. In my October 23rd testimony I spoke of the incredible success of Self-Governance and all of the points I made then are still very much valid today.

Instead, today I would like to focus my comments on three issues: first, I will very briefly discuss the background to S. 1715 and what the bill sought to accomplish; second I will briefly bring you up to date on discussions between the Department of the Interior (Department) and the Tribal Task Force; and third I would like to ask you to consider enacting legislation that will immediately make Title V's provisions available for inclusion in Title IV agreements and help narrow the issues that the Tribal Task Force and the Department will need to address in the future.

Background to S.1715 and What the Bill Sought to Accomplish

Title IV was originally enacted in 1994. Shortly after the Act was passed the Department initiated a rulemaking process to promulgate regulations. Five years after the rulemaking process began, DOI published regulations that, from the Tribal perspective, failed to implement Congress' intent when Title IV was enacted. Instead of moving Self-Governance forward, the regulations moved it backwards.

In 2000 Congress enacted Title V of the ISDEAA, which permanently authorized Self-Governance within the Department of Health and Human Services. Among other things, Title V directly addressed many of the flaws that were in Title IV, which the Interior officials used to impede the full implementation of Self-Governance within the Department of the Interior. Almost immediately after the passage of Title V Tribal leaders decided that Title IV needed to be amended to incorporate these beneficial provisions from Title V and they assigned the task to develop a package of amendments to a Tribal Task Force.

After two years of work Tribal leaders approved amendments prepared by the Tribal Task Force that were ultimately included in S. 1715. In addition to incorporating into Title IV all of the beneficial provisions that were included by Congress in Title V the amendments had two other important objectives: first, address problems in Title IV specific to construction programs and projects; and second, modify provisions in the bill relating to the assumption of non-BIA programs.

Efforts were made to meet with Department officials to discuss the draft amendments before and after they were included in S. 1715 and the bill was introduced, but after initial discussions it became very clear that some individuals within the Department completely opposed the idea of any amendments to Title IV. In fact, if those folks had their way, Title IV would be amended to strip away Tribal rights and flexibility rather than add any. Ultimately the Administration did not support S. 1715 and, although the bill was reported out of this Committee, it did not make it to the Senate floor for a vote and it died at the end of the session.

Events Since the Demise of S. 1715

The demise of S. 1715 did not temper the desire of Tribal leaders to see the bill enacted. To the contrary, as Tribes developed more experience carrying out responsibilities included in the agreements negotiated under Titles V and IV, it became even more obvious that the differences between the two titles made no sense and needed to be corrected. After months of badgering and some key personnel changes within the Department, discussions between the Tribal Task Force and Department representatives were finally rekindled.

Over the past two years the Tribal Task Force has met several times with representatives from the Department in an effort to understand the nature of the Department's concerns with the proposed Title IV amendments. Both sides have also exchanged correspondence detailing their differing views on the bill's provisions. Most recently a chart was developed that sets out the areas of known agreements and disagreements. See the attached memorandum and enclosures that I sent to Mr. James Cason, Associate Deputy Secretary and Acting Assistant Secretary, Indian Affairs that summarize the status of our discussions.

Progress in these discussions has been very slow – so slow that only in the last few months has the Department provided us with long promised explanations of its concerns with many of the proposed provisions. The Department has raised numerous concerns with provisions in the bill and many of those concerns are troubling. Particularly troubling is the Department's resistance to the inclusion of *all* Title V provisions in Title IV. These Title V provisions have been in place since 2000 and have a track record of helping Tribes implement Self-Governance and carry out programs better and more efficiently. Moreover, Congress has already agreed with them and included them in Title V, so there is simply no reason from a public policy standpoint why they should not apply to Title IV programs as well.

The bottom line is that there are some very fundamental differences between the Tribal and departmental positions on a range of issues that will require many more months and (at the present pace) likely years of discussion before it becomes clear if compromise language will ever be achievable. I am hopeful that our continued discussions will result in a joint Tribal and departmental legislative proposal sometime in the future. But until that time comes, Tribes should not suffer by being forced to carry out programs under Title IV without all of the benefits that are presently only available under Title V.

An Immediate Legislative Solution

My most fervent wish is that Congress enacts a comprehensive piece of legislation that will address all pending issues. I am a realist, however, and understand that the prospects for developing a comprehensive version of the Title IV amendments that Tribal and Departmental representatives will agree on in the near term are not good. Until a comprehensive bill can be developed, I urge you to consider enacting a very short piece of legislation in this session that will authorize as a matter of right any Tribe with a Title IV Compact or Funding Agreement to incorporate any provision of Title V that the Tribe chooses. This idea is not new – in 1996, Senator McCain sponsored a very similar amendment that allowed Tribes in Self-Governance under Titles III and IV to incorporate as a matter of right any provision from Title I of the ISDEAA into agreements negotiated under Titles III and IV.

Enacting such an amendment will result in some important benefits. Most importantly, it will allow Tribes to incorporate into existing Title IV compacts and funding agreements provisions from Title V that Tribes know work and will help them streamline the delivery of services to their people and carry out their governmental responsibilities in an efficient and coordinated manner. Passage of the amendments will also help reinforce to the Department that Congress agrees that Title V provisions should apply to Title IV agreements as a matter of Tribal right and this should help move forward discussions with the Department over a more comprehensive set of amendments.

The office of legislative Counsel in 2002 previously prepared a version of such an amendment that reads as follows:

INCORPORATION OF SELF-DETERMINATION PROVISIONS.—Section 403 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 458cc) is amended by striking subsection (l) and inserting the following:

"(l) INCORPORATION OF SELF-DETERMINATION PROVISIONS.—

"(1) IN GENERAL.—At the option of any participating Indian tribe, any or all of the provisions of Title I or V shall be incorporated in compact or funding agreement entered into under this title.

"(2) FORCE AND EFFECT.—A provision incorporated under the foregoing paragraph (1) shall—

"(A) have the same force and effect as if included in this title; and

"(B) be deemed to:

(i) supplant any related provision in this title, as appropriate; and

(ii) apply to any agency subject to this Title.

"(3) TIMING.—In any case in which an Indian tribe requests incorporation of a provision under paragraph (1) during the negotiation stage of a compact or funding agreement described in that paragraph, the incorporation shall—

"(A) be considered to be effective immediately; and

"(B) control the negotiation and any resulting compact or funding agreement."

The only change to existing law that this amendment would implement is the addition of the words "or V" to 25 U.S.C. 458cc(l).

Conclusion

In conclusion, as you know, Self-Governance has proven to be one of the most successful options for Tribes to assume and manage programs, services, functions and activities at the local level that Congress has ever enacted for Indian people. I know first hand of this success with my experience at Jamestown. While we have had our challenges to address, Self-Governance has given us the flexibility to provide services to our people in the most efficient and effective way possible. My deepest wish is that this Congress would enact a comprehensive package of amendments to Title IV like those in S. 1715 so that we can build on the successes of the past 15 years and further enhance the ability of Tribes to achieve their dreams and goals.

I understand that a comprehensive package of amendments like those in S. 1715 will likely not be enacted this session, however, and I am committed to continuing the work we are engaged in with the Department to come up with a joint package of amendments in the future. In the meantime I urge you to seriously consider enacting the short piece of legislation discussed above which gives Tribes the right to incorporate any provision from Title V into a Title IV compact or funding agreement.

Thank you very much for the opportunity you have extended to me to express my thoughts on these critically important issues. I also want to personally take this opportunity to thank you for your years of support to Self-Governance.

JAMESTOWN S'KLALLAM TRIBE
1033 Old Blyn Highway, Sequim, WA 98382 360/683-1109 FAX 360/681-4643

September 8, 2006 Copy Sent Via Email Original Sent Via Mail

James E. Cason, Associate Deputy Secretary
Office of the Secretary
Department of the Interior
Room 6117, Main Interior Building
1849 C Street, NW
Washington, DC 20240

Re: *Title IV Self-Governance Amendments – Tribal Response to May 8, 2006 DOI Comments*

Dear Mr. Cason:

The Title IV Tribal Task Force is in receipt of and has had an opportunity to review the comments by the Department of Interior (DOI) Federal Team dated May 8, 2006, to the Tribal Draft of the Title IV Amendments dated March 3, 2005. We appreciate the time and effort the Federal Team has spent reviewing the draft amendments and remain confident that our concerns and differences will be resolved through further discussion.

Along with this memorandum, we enclose a chart that expands on the one provided by DOI on May 8, 2006. Specifically, we note the following:

1. We have condensed the multiple charts provided by DOI into one chart;
2. We have eliminated from the chart all provisions that the DOI and Tribal Team agree on, and created a separate one page summary noting those provisions (*see* attached *Appendix to Comparison of Proposed Title IV Amendments to Title V – September 7, 2006)*;
3. We have added a column for Tribal comments that addresses outstanding issues which need further discussion and resolution; and,
4. We have added a section at the end of the chart that summarizes concerns raised by DOI in its June 15, 2005 letter regarding specific Tribally proposed provisions, together with a summary of the Tribal Task Force responses to those concerns.

We look forward to meeting you and other DOI staff on Wednesday, September 20, 2006 at 9:30 a.m. to continue our discussion about these issues. If you have any question about these matters please contact me at 360/681-4621 or call C. Juliet Pittman at 202/628-1151 or email at pitt@senseinc.com and she will locate me. Thank you.

Sincerely,

W. Ron Allen

W. Ron Allen, Chairman/Executive Director
Jamestown S'Klallam Tribe and
Chairman, Title IV Tribal Task Force

cc: George Skibine, Deputy Assistant Secretary, Policy and Economic Development, BIA
Ken Reinfeld, Acting Director, Office of Self-Governance
Title IV Tribal Task Force

Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
401(1)	The term "compact" means a compact under section 404.	No provision in Title IV, but this provision in the Title IV regulations: *Compact* means an executed document that affirms the government-to-government relationship between a self-governance Tribe and the United States. The compact differs from an annual funding agreement (AFA) in that parts of the compact apply to all bureaus within the Department of the Interior rather than a single bureau. (25 CFR 1000.4)	No provision	**Definition of compact.** Section 401(1) refers to §404, which introduces undesirable additions to the regulatory definition of a compact. See the discussion of §404 below in the chart.	We disagree, see our response to Department comments § 404(b)(1) below.
401(2)	The term "construction program" means a tribal undertaking to complete any or all included programs 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. (Italics added)	No provision in Title IV, but provisions in Title I and in the Title IV regulations, as follows: "Construction programs" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities (25 USC 450b(a)) §1000.240 What construction programs included in an AFA are subject to this subpart? (a) All BIA and non-BIA construction programs included in an AFA are subject to this subpart. This includes design, construction, repair, improvement,	No provision, but this definition of "construction project": The term "construction project"- (A) means an organized non-continuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement, and (B) does not include construction program administration and activities described in paragraphs (1) through (3) of section 450b(m) of this title, that may otherwise be included in a funding agreement under this part. (25 USC 458aaa(a)(1)) Title V uses the term "construction project" rather than "construction program," and the	**Inclusion of new activities in construction programs.** The Department is concerned with the need to include the italicized words in §401(2) (i.e., administration, roads, bridges, and housing) in the definition of "construction programs." The Title IV regulations, which are shown in the next row, already define "construction programs." The italicized language in §401(2) (i.e., administration, roads, bridges, and housing) does not appear in that definition. Title V has the same restrictions as the Title IV regulations.	Housing and roads are expressly listed as within the definition of "construction programs" in the current Title IV regulations. Bridges are now within the definition of roads under SAFETEA-LU, the Act funding this activity. The tribal team agrees with the federal team's proposal to consolidate the 401(2) and 401(3) definitions by amending 401(2) and deleting 401(3) (see below). 401(2) 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,

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Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
		expansion, replacement or demolition of buildings or facilities, and other related work for Federal, or Federally funded Tribal, facilities and projects. (b) *The following programs and activities are not construction programs and activities:* *(1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, day-to-day on-site management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement except that all project design and actual construction activities are subject to all the requirements of subpart K, whether performed by a Tribe/Consortium, subcontractor, or consultant; (2) Housing Improvement Program or road maintenance program activities of BIA;* (3) Operation and maintenance programs; and(4) Non-403(c) programs.... (25 CFR 1000.240) (italics added)	definition of "construction project" includes the following: The term "construction project"- ...(B) does not include construction program administration and activities described in paragraphs (1) through (3) of section 450b(m) of this title.... (25 USC 458aaa(a)(1)) And 25 USC 450b(m)(1)-(3) provides: (1) *that is limited to providing planning services and construction management services (or a combination of such services),* (2) *for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Department of the Interior;* or (3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services. (25 USC 450b(m)(1)-(3)) (italics added)		law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities or for other tribal purposes.
401(3)	The term "construction project" means a tribal undertaking that constructs 1 or more *roads, bridges*, buildings, structures, systems or 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	No provision in Title IV, but definitions of "construction programs" in Title I and in the Title IV regulations, as shown above	The term "construction project"- (A) means an organized non-continuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement; and (B) does not include construction	**Definition of construction project.** The §401(3) definition of "construction project" should be stricken because there is no need for separate definitions of "construction program" and "construction project." The issues raised by §401(3) can be decided in the context of §401(2) because the two sections are nearly identical. Like the §401(2) definition of	Housing and roads are expressly listed as within the definition of "construction programs" in the current Title IV regulations. Bridges are now within the definition of roads under SAFETEA-LU, the Act funding this activity. The tribal team agrees with the federal team's proposal to consolidate the 401(2) and 401(3)

Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
	purposes. (Italics added)		program administration and activities described in paragraphs (1) through (3) of section 450b(m) of this title, that may otherwise be included in a funding agreement under this part. (25 USC 458aaa(a)(1))	"construction program," the §401(3) definition of "construction project" is inconsistent with the Title IV regulations and with Title V because both §§401(2) and 401(3) include the words "roads," "bridges," and "housing."	definitions by amending 401(2) and deleting 401(3) (see above).
401(5)	The term "funding agreement" means a funding agreement under section 405(b).	Title IV does not have a definitions section, but, like Title V, it specifies the contents of a funding agreement at 25 USC 458cc. More details about the contents of a funding agreement appear in the Title IV regulations	Title V does not include "funding agreement" in its definitions section, but it specifies the contents of a funding agreement at 25 USC 458aaa-4.	Section 405(b) introduces additions to the contents of a funding agreement that are undesirable See the discussion of §405(b) below in the chart.	We disagree. This brief definition is useful. *See also* comments below in response to final comment under 405(b).
401(6)	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 by a compact or funding agreement that results in a significant reduction of funds available for the included programs assumed by an Indian tribe.	No provision	The term "gross mismanagement" means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian tribe by a compact or funding agreement that results in a significant reduction of funds available for the programs, services, functions, or activities (or portions thereof) assumed by an Indian tribe. (25 USC 458aaa(3))	**Definition of gross mismanagement.** Reduction of available funds for a program is not the only possible consequence of mismanagement. The Department may want to add language specifying other circumstances that evidence mismanagement.	Please let us know what added language you have in mind.
401(7)	The term "included program" means any program, function, service or activity (or portion thereof) that is eligible for inclusion under a compact or funding agreement.	No provision	No provision	**Definition of included program.** The word "included" in §401(7) should be stricken. As a helpful shorthand, instead of defining "included program," §401(7) could define "program" as: "The term 'program' means any program, function, service or activity (or portion thereof) that is included in a funding agreement."	We accept this proposal.

Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
401(8)	The term "Indian tribe," in a case in which an Indian tribe authorizes another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out an included program on its behalf in accordance with section 403(a)(3), includes the other authorized Indian tribe, inter-tribal consortium, or tribal organization. (Italics added)	Provisions in Title IV and in Title I as follows: At the option of a participating tribe or tribes, any provisions of Title I shall be made part of a Title IV agreement (§458cc(*l*)) The Secretary is directed, upon the request of any Indian tribe, by tribal resolution, to enter into a self-determination contract with a tribal organization (§450f(a)(1)) "Tribal organization" means the recognized governing body of a tribe or an organization of Indians sanctioned by the tribe or democratically elected by the Indian community to be served (§450b(*l*))	In any case in which an Indian tribe has authorized another Indian tribe, *an inter-tribal consortium*, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this part, the authorized Indian tribe, *inter-tribal consortium*, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term 'Indian tribe" as used in this part shall include such other authorized Indian tribe, *inter-tribal consortium*, or tribal organization . (25 USC 458aaa(b)) (Italics added)	**Definition of Indian tribe as including consortium and tribal organization.** The italicized references to "inter-tribal consortium" in §401(8) are acceptable if an inter-tribal consortium is defined in §401(10) as made up of tribes that are otherwise separately eligible to participate in self-governance. The references to "tribal organization" should be stricken as unnecessary because a tribe may already authorize a tribal organization to carry out a program on its behalf under Title I: The term "Indian tribe," in a case in which an Indian tribe authorizes another Indian tribe, or an *inter-tribal consortium*, ~~or a tribal organization~~ to plan for or carry out an included program on its behalf in accordance with section 403(a)(3), includes the other authorized Indian tribe, or *inter-tribal consortium*, ~~or tribal organization~~. (Italics added)	We agree that the inclusion of "inter-tribal consortium" in this definition is not necessary. We propose the following revisions to our June proposal: "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 an included program on its behalf in accordance with section 403(a)(3), includes the other authorized Indian tribe or tribal organization."
401(9)	The term "inherent Federal function" means a Federal function that cannot legally be delegated to an Indian tribe.	No provision in Title IV	The term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes. (25 USC 458aaa(a)(4))	**Definition of inherently federal function.** Section 401(9) should be stricken. The Department's position, supported by a 1996 memorandum of the Solicitor's Office, is that inherent Federal functions must be determined on a case-by-case basis. Section 401(9), which is like Title V, would likely result in complex litigation over whether the Department can demonstrate that the "cannot legally be delegated" standard is met.	We disagree. Nothing in this brief definition is inconsistent with Mr. Leshy's 1996 memorandum and nothing in this definition will encourage litigation. This definition is in Title V and to our knowledge there has been no litigation related to IFFs under Title V since it was enacted in 2000.

Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
401(10)	The term "inter-tribal consortium" means a coalition of 2 or more separate Indian tribes that join together for the purpose of participating in self-governance.	If each 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 as a consortium. (25 USC 458bb(b)(2)) (italics added)	The term "inter-tribal consortium" means a coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations. (25 USC 458aaa(a)(5))	**Definition of inter-tribal consortium.** The requirement should be added to §401(10) that an inter-tribal consortium must be made up of tribes that are otherwise separately eligible to participate in self-governance. See 25 USC §458bb(b)(2). This requirement is particularly important if a separately eligible tribe withdraws from a consortium, leaving in the consortium tribes that are not separately eligible for self-governance.	We propose to delete the definition and use of the term "inter-tribal consortium" throughout the bill.
401(10)	The term "inter-tribal organization" includes a tribal organization. [Note: There is probably a misprint. "Inter-tribal organization" should probably read "inter-tribal consortium."]	Provisions in Title IV and in Title I as follows: At the option of a participating tribe or tribes, any provisions of Title I shall be made part of a Title IV agreement (§458cc(*l*)) The Secretary is directed, upon the request of any Indian tribe, by tribal resolution, to enter into a self-determination contract with a tribal organization (§450f(a)(1)) "Tribal organization" means the recognized governing body of a tribe or an organization of Indians sanctioned by the tribe or democratically elected by the Indian community to be served (§450b(*l*)) Provision in Title IV regulations as follows: *Consortium* means an organization of *Indian Tribes* that is authorized by those Tribes to	The term "inter-tribal consortium" means a coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations. (25 USC 458aaa(a)(5))	Section 401(10) should be stricken. Title I already allows a group of tribes to designate a tribal organization, by tribal resolution, to enter into a Title I funding agreement on behalf of the tribes. The Title IV regulations foreclose a tribal organization from joining a tribal consortium, however, by defining a consortium as made up only of tribes. See comment on §401(8), above.	We agree. *See* comment above.

Comparison of Proposed Amendments of Tribal Workgroup (9-7-2006) to Title IV and Title V with Department Comments

Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
		participate in self-governance under this part and is responsible for negotiating, executing, and implementing annual funding agreements and *compacts*. (25 CFR 1000.2) (italics added)			
401(13)	The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial included programs that are not required by the Secretary for the performance of inherent Federal functions.	No provision in Title IV, but the following provision in the Title IV regulations: *Tribal share* means the amount determined for that Tribe/Consortium for a particular program at BIA region, agency, and central office levels under sec.403(g)(3) and 405(d) of the Act. (25 CFR 1000.2)	The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions. (25 USC 458aaa(a)(8))	**Definition of tribal share.** Section 401(13) should be stricken because the Title IV regulations define tribal share more cleanly. First, the regulations define tribal share to mean the amount determined by BIA, thus avoiding disputes over whether BIA has proven that tribes/consortia are receiving the full portion of all funds and resources that support PFSAs, except for what is required for inherent Federal functions. Second, the regulatory definition avoids disputes over what is an "inherent Federal function" and disputes over what funds are "required" for the performance of inherent Federal functions.	We disagree. *See also* comment below under § 405(b)(1)(A).
403(a)(2)	In addition to those Indian tribes participating in self-governance under paragraph (1), an Indian tribe that meets the eligibility criteria specified in subsection (b) shall be entitled to participate in self-governance. The Secretary shall not limit the number of additional Indian tribes to be selected each year from among Indian tribes that are eligible under subsection (b).	In addition to those Indian tribes participating in self-governance under subsection (a) of this section, the Secretary, acting through the Director of the Office of Self-Governance, may select up to 50 new tribes per year from the applicant pool described in subsection (c) of this section to participate in self-governance. (25 USC 458bb(1))	In addition to those Indian tribes participating in self-governance under subsection (a), each year an additional 50 Indian tribes that meet the eligibility criteria specified in subsection (c) shall be entitled to participate in self-governance. (25 USC 458aaa-2(b)(1))	**Removing restriction on number of tribes eligible to participate in self-governance each year.** Section 403(a)(2) should be stricken. Like Title V, Title IV restricts the number of new self-governance tribes each year to 50. This provides for orderly management of the self-governance program. The tribal workgroup has not shown the need to lift the restriction on 50 new eligible tribes per year.	We agree.
403(a)(3)	If an Indian tribe authorizes another Indian tribe, an *inter-tribal consortium*, or a tribal	At the option of a participating tribe or tribes, any provisions of Title I shall be made part of a	In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal	**Tribe's authorization of inter-tribal consortium to carry out a program on the tribe's behalf.**	As discussed above, we agree that the term "inter-tribal consortium"

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Section	Proposed amendments (June 2006)	Title IV	Title V	Department comments	Tribal Comments
	organization to plan for or carry out an included program on its behalf under this title, the authorized Indian tribe, *inter-tribal consortium*, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution). (Italics added)	Title IV agreement (§458cc(*l*)) The Secretary is directed, upon the request of any Indian tribe, by tribal resolution, to enter into a self-determination contract with a tribal organization (§450f(a)(1)) "Tribal organization" means the recognized governing body of a tribe or an organization of Indians sanctioned by the tribe or democratically elected by the Indian community to be served (§450b(*l*))	consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this part, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe(except as otherwise provided in the authorizing resolution or in this title). In such event, the term 'Indian tribe' as used in this part shall include sch other authorized Indian tribe, inter-tribal consortium, or tribal organization. (§458aaa(b))	The italicized references to "inter-tribal consortium" in §403(a)(3) are acceptable if an inter-tribal consortium is defined in §401(10) as made up of tribes that are otherwise separately eligible to participate in self-governance. References to "tribal organization" in §403(a)(3) should be stricken as unnecessary. See comment at §§401(8) & 401(10), above: If an Indian tribe authorizes another Indian tribe, or an *inter-tribal consortium*, ~~or a tribal organization~~ to plan for or carry out an included program on its behalf under this title, the authorized Indian tribe, or *inter-tribal consortium*, ~~or tribal organization~~ shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution). (Italics added)	should be stricken. We do not agree that the term "tribal organization" should be removed. We propose the following revision to this provision: "If an Indian tribe authorizes another Indian tribe, or a tribal organization to plan for or carry out an included 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)."
403(a)(4)	Two or more 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 consortium if--(A) each Indian tribe so requests; and (B) the consortium itself is eligible under subsection (b). (Italics added)	If each 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 as a consortium. (§458bb(b)(2)) (italics added)	The term "inter-tribal consortium" means a coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations (§458aaa(a)(5))	Section 403(a)(4) should be stricken. Title IV requires tribes to be separately eligible for self-governance in order to participate in a self-governance consortium. Title V does not address whether tribes participating in a consortium must be separately eligible for self-governance.	We disagree. If a tribal organization is eligible none of its member tribes need to be eligible by themselves. The Department has interpreted Title IV in this manner for many years and the Department's comments about this language are not consistent with existing practice.
403(a)(5)(A)	An Indian tribe that withdraws from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be entitled to participate in self-governance if the Indian tribe	No provision	An Indian tribe that has withdrawn from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be entitled to participate in self-governance provided the	**Automatic eligibility for self-governance of tribe that has participated in consortium.** Section 403(a)(5)(A) should be stricken. Neither Title IV nor Title V allows a tribe that withdraws	We disagree. The Department's interests are already addressed at the end of this provision that states that a withdrawing tribe can participate "if" it is "eligible under

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	is eligible under subsection (b).		Indian tribe meets the eligibility criteria specified in subsection (c). (§458aaa-2(b)(2)(A))	from a consortium or tribal organization to participate in self-governance unless the tribe is otherwise eligible for self-governance.	subsection (b)".
403(a)(5)(B)	If an Indian tribe withdraws from participation in an inter-tribal consortium or tribal organization, the Indian tribe shall be entitled to its tribal share of funds and resources supporting the included programs that the Indian tribe will be carrying out under the compact and funding agreement of the Indian tribe.	No provision	If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, that Indian tribe shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that the Indian tribe will be carrying out under the compact and funding agreement of the Indian tribe. (§458aaa-2(b)(2)(B)	**Tribal shares for tribe that withdraws from consortium or tribal organization.** In evaluating §403(a)(5)(B), the Department is concerned whether the withdrawing tribe and the consortium will have enough resources to carry out programs, after the withdrawing tribe takes away its tribal shares from the consortium. In any case, §403(a)(5)(B) should be amended to read, "If an Indian tribe withdraws from participation in an inter-tribal consortium ~~or tribal organization~~, the Indian tribe shall be entitled to its tribal share of funds and resources supporting the ~~included~~ programs that the Indian tribe ~~will be carrying~~ is entitled to carry out under the compact and funding agreement of the Indian tribe." As written, §403(a)(5)(B) corresponds to Title V.	*See* comments above about the deletion of the term "inter-tribal consortium" throughout the bill. We agree with the other proposed changes.
403(a)(5)(C)	The withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization shall not affect the eligibility of the inter-tribal consortium or tribal organization to participate in self-governance on behalf of 1 or more other Indian tribes.	No provision	In no event shall the withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization affect the eligibility of the inter-tribal consortium or tribal organization to participate in self-governance. (§458aaa-2(b)(2)(C))	In evaluating §403(a)(5)(C), the Department is concerned whether the withdrawing tribe and the consortium will have enough resources to carry out programs, after the withdrawing tribe takes away its tribal shares from the consortium. In any case, §403(a)(5)(C) should be amended to read, "The withdrawal of an Indian tribe from an inter-tribal consortium ~~or tribal organization~~ shall not affect the eligibility of	We disagree with the proposed changes to delete the term "tribal organization" and to add clarifying language about the need for member tribes to be independently eligible to participate in self-governance. Also, as mentioned above, we believe that all references to inter-tribal consortia throughout this provision should be deleted.

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				the inter-tribal consortium ~~or tribal organization~~ to participate in self-governance on behalf of 1 or more other Indian tribes, so long as each tribe remaining in the consortium is otherwise eligible to participate in self-governance." See comment for §403(a)(3), above.	
403(a)(5)(D)(i)	An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its tribal share of any included program in a compact or funding agreement.	No provision	No provision	**Tribe's right to withdraw its tribal shares from a consortium's funding agreement.** In evaluating §403(a)(5)(D)(i), the Department is concerned whether the withdrawing tribe and the consortium will have enough resources to carry out programs, after the withdrawing tribe takes away its tribal shares from the consortium. In any case, the words "or tribal organization" in §403(a)(5)(D)(i) must be stricken. See SOL advice at §§401(8), 401(10), 403(a)(3), & 403(a)(5)(C). The effect of §403(a)(5)(D)(i) would be similar to the effect of §403(a)(5)(B), which corresponds to Title V.	We disagree with the proposal to delete "tribal organization." As mentioned above, we propose instead that the term "inter-tribal consortium" be deleted.
403(a)(5)(D)(ii)	**(aa)** A withdrawal under clause (i) shall become effective on the date specified in the resolution that authorizes transfer to the participating tribal organization or inter-tribal consortium. **(bb)** In the absence of a date specified in the resolution, the withdrawal shall become effective on-- **(I)** the earlier of-- **(AA)** 1 year after the date of submission of the request; or **(BB)** the date on which the	No provision	No provision	The references to "inter-tribal consortium" in §403(a)(5)(D)(ii) are acceptable if an inter-tribal consortium is defined in §401(10) as made up of tribes that are otherwise separately eligible to participate in self-governance. The references to "tribal organization" should be stricken as unnecessary because a tribe may already authorize a tribal organization to carry out a program on its behalf under Title I. See comment on §401(10).	We disagree with the proposal to delete "tribal organization." As mentioned above, we propose instead that the term "inter-tribal consortium" be deleted.

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	funding agreement expires; or (II) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the tribal organization or inter-tribal consortium that signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.				
403(a)(5)(E)	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 inter-tribal consortium or tribal organization, the withdrawing Indian tribe— (i) may elect to enter [into] a self-determination contract or compact, in which case-- (aa) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds and resources supporting the included 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 inter-tribal consortium or tribal organization), and (bb) the funds referred to in subclause (I) shall be withdrawn by the Secretary from the funding agreement of the inter-tribal consortium or tribal organization and transferred to the withdrawing Indian tribe, on the condition that the provisions of sections 102 and 105(i) of this title, as appropriate,	No provision	If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, that Indian tribe shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that the Indian tribe will be carrying out under the compact and funding agreement of the Indian tribe. (§458aaa-2(b)(2)(B)	In evaluating §403(a)(5)(E), the Department is concerned whether the withdrawing tribe (or the Secretary, for a withdrawing tribe that elects not to enter into a 638 agreement) and the consortium will have enough resources to carry out programs, after the withdrawing tribe takes away its tribal shares from the consortium.. In any case, the phrase, "or tribal organization," should be stricken wherever it appears in §403(a)(5)(E). See SOL advice at §403(a)(5)(B).	We disagree about the need to delete the term "tribal organization" and propose instead that the term "inter-tribal consortium" be deleted.

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	shall apply to the withdrawing Indian tribe; or (ii) may elect not to enter a contract or compact, in which case all funds not obligated by the inter-tribal consortium associated with the withdrawing tribe's returned included programs, less close-out costs, shall be returned by the inter-tribal consortium to the Secretary for operation of the included programs included in the withdrawal.				
403(a)(5)(F)	If an Indian tribe elects to operate all or some included 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.	No provision in Title IV, but these provisions in Title I explain what a mature contract is and the advantage it has: "mature contract: means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, [a] contract of the tribal organization which meets this definition shall be considered to be a mature contract (§450b(h)) A self-determination contract shall be– for a definite or an indefinite term, as requested by the tribe.., in the case of a mature contract. (§450j(c)(1)(B))	No provision	**Automatic right to elect a mature self-determination contract.** In evaluating §403(a)(5)(F), the Department is concerned whether the withdrawing tribe and the consortium will have enough resources to carry out programs, after the withdrawing tribe takes away its tribal shares from the consortium. Section 403(a)(5)(F) would allow a tribe to choose to have a mature self-determination contract instead of remaining in a consortium. A mature self-determination contract can be for an indefinite term. An indefinite contract term is not significant to the Department, but lack of adequate funding for the tribe and the consortium is.	The Department does not appear to propose any changes to the tribal draft, is that correct?
403(b)	To be eligible to participate in	The qualified applicant pool for	The qualified applicant pool for	**Eligibility for participation in**	

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	self-governance, an Indian tribe shall-- **(1)** 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.	Self-Governance shall consist of each tribe that-- **(1)** successfully completes the planning phase described in subsection (d) of this section; **(2)** has requested participation in Self-Governance by resolution or other official action by the tribal governing body; and **(3)** has demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by the tribe having no material audit exceptions in the required annual audit of the self-determination contracts of the tribe. (§458bb(c))	self-governance shall consist of each Indian tribe that-- **(A)** successfully completes the planning phase described in subsection (d); **(B)** has requested participation in self-governance by resolution or other official action by the governing body of each Indian tribe to be served; and **(C)** has demonstrated, for 3 fiscal years, financial stability and financial management capability. (§458aaa-2(c)(1)) For purposes of this subsection, evidence that, during the 3-year period referred to in paragraph (1)(C), an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability. (§458aaa-2(c)(2))	**self-governance.** In evaluating §403(b), the Department is concerned whether §403(b)'s liberalization of Title IV and Title V requirements would allow tribes that are not competent to participate in self-governance. First, §403(b) removes the word "successfully" in subsection 1, so as to minimize the Department's evaluation of a tribe's planning phase. Second, §403(b) lowers the standard for demonstrating financial stability and financial management capability to the Title V standard. Rather than having "no material audit exceptions," a tribe need only have "no *uncorrected significant* and material audit exceptions" (italics added). Section 403(b) implicitly removes the restriction on the number of tribes that can be admitted to self-governance each year by removing the reference to "qualified applicant pool" that appears in Titles IV and V.	1) We agree to add the word "successfully" between "shall – (1)" and "complete"; 2) We do not agree that the standards for financial stability and financial management capability are weaker in the tribal proposal. This new language, which has worked well in Title V, allows for a tribe to cure a problem in an audit before it can be eligible so the Department's interest to ensure that good financial management practices are in place is addressed. 3) This section has nothing to do with the number of tribes that can be admitted to the qualified applicant pool, which is covered in § 403(a) above.
404(b)(1)	A compact...shall-- (1) specify the general terms of the government-to-government relationship between the Indian tribe and the Secretary, and	No provision	Each compact...shall set forth the general terms of the government-to-government relaitonship between the Indian tribe and the Secretary. (25 USC 458aaa-3(b))	**Definition of compact-- the terms of the government-to-government relationship.** Section 404(b)(1) should be stricken. Section 404(b)(1) is unnecessary because the Title IV regulations define "compact" satisfactorily. Section 404(b)(1) is also worded awkwardly. To "specify the general terms of the government-to-government relationship" is self-contradictory. Title V, by contrast, says that the compact shall "set forth the general terms." Still, the language	We disagree that this definition should be stricken. We think the statute should define this critical term. We also prefer the language in Title V to the language in the Title IV regulations and do not believe that there any inherent contradictions in the language.

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				of the Title IV regulations is superior. The regulations say that the compact "affirms the government-to-government relationship." (25 CFR 1000.4)	
404(b)(2) & 404(c)	A compact...shall--...(2) include such terms as the parties intend shall control year after year. (404(b)) A compact...may be amended only by agreement of the parties. (404(c))	No provision	Each compact...shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary, including such terms as the parties intend shall control year after year. Such compacts may only be amended by mutual agreement of the parties. (25 USC 458aaa-3(b))	Section 404(b)(2) should be stricken. Sections 404(b) & (c) correspond to Title V. But terms about specific programs should appear in funding agreements, even when they are intended to control year after year, so that they can be negotiated in tandem with funding.	We disagree. Both provisions set forth in these sections are fundamental and we believe they should be clearly addressed in the statute.
404(d) & 404(e)	The effective date of a compact under subsection (a) shall be—(1) the date of the execution of the compact by the Indian tribe, or (2) another date agreed upon by the parties. (404(d)) A compact under subsection (a) shall remain in effect for so long as permitted by Federal law or until terminated by written agreement, retrocession, or reassumption. (404(e))	No provision	The effective date of a compact shall be the date of the approval and execution by the Indian tribe or another date agreed upon by the parties, and shall remain in effect for so long as permitted by Federal law or until terminated by mutual written agreement, retrocession, or reassumption. (25 USC 458aaa-3(d))	**Effective date and duration of compact.** The language, "retrocession, or reassumption," in §404(e) should be stricken. Sections 404(d) & (e) correspond to Title V. The language, "retrocession, or reassumption," appears only because §404(b) calls for compacts to "include such terms as the parties intend shall control year after year." If compacts remain simple affirmations of "the government-to-government relationship between a self-governance Tribe and the United States," 25 CFR 1000.4 & 1000.161, there is no ground for terminating them based on retrocession or reassumption of particular programs.	We disagree. Compacts are not "simple affirmations" between the parties: they contain binding terms that can only be terminated by written agreement by both parties, retrocession, or reassumption. These are fundamental ISDEAA concepts that we believe need to be clearly spelled out in the statute.
405(b)(1)(A)	A funding agreement shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer,	Each funding agreement shall--(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services,	Each funding agreement...shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer,	**Contractible BIA and OST programs.** The language, "and receive full tribal share funding," in § 405(b)(1)(A) should be	We disagree. The concept of "tribal shares" is well developed and reflects years of thoughtful discussion and negotiation

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	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, or (iv) are provided for the benefit of Indians because of their status as Indians.	functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3) of this section, and including any program, service, function, and activity, or portion thereof, administered under the authority of – (A) the Act of April 16, 1934 (25 U.S.C. 452 et seq.); (B) the Act of November 2, 1921 (25 U.S.C. 13); and (C) programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior (25 U.S.C. § 458cc(b)(1))	and receive full tribal share funding, including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed (25 U.S.C. § 458aaa-4(b)(1))	stricken even though it parallels the language in Title V. "Tribal shares" is not necessarily the appropriate methodology for calculating the funding amounts that the "Secretary would have otherwise provided for the operation of the programs" (25 U.S.C. § 450j-1(a)(1)). The wording of Title IV is preferable.	between tribal and federal representatives about how to fairly and accurately calculate the amount of funds that a tribe should be entitled to be paid when it assumes specific PFSAs. These are concepts that work well in Title V and there is no reason why they cannot work well within DOI, for BIA/OST programs especially.
405(b)(1)(B)	Programs described in subparagraph (A) shall include all programs with respect to which Indian tribes or Indians are primary or significant beneficiaries.	None	Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), including grants..., with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and all local, field, service unit, area, regional, and central headquarters or national	**BIA and OST programs are contractible if Indians are primary or significant beneficiaries.** Section 405(b)(1)(B) should be stricken. Although it parallels § 458aaa-4(b)(2) of Title V, its ambiguous wording allows more than one interpretation. Under one interpretation, the subsection is superfluous. Under the other interpretation, the subsection does not serve the Department's interests.	We disagree. The Department's comments to this subsection are incomprehensible. We believe that if a program was established by Congress with Indians as either "primary" or "significant" beneficiaries that it should be compactable as a matter of right by the affected tribe(s). Assuming, as the Department's comments does, that tribes will "look after non-Indian interests less vigorously than the Secretary

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			office functions so administered under the authority of –(A) [various acts]; (F) any other Act of Congress authorizing any agency of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such a program, service, function or activity (or portions thereof) described in this section that is carried out for the benefit of Indians because of their status as Indians; or (G) any other act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof) (25 U.S.C. § 458aaa-4(b)(2)).	Title V allows tribes to contract PFSAs with respect to which tribes or Indians are primary or significant beneficiaries when the PFSAs are (1) administered by the Indian Health Service and (2) carried out for the benefit of Indians because of their status as Indians. Section 405(b)(1)(B) allows tribes to contract PFSAs that are carried out by BIA and OST with respect to which tribes or Indians are primary or significant beneficiaries. If § 405(b)(1)(B) is read as incorporating the requirement in § 405(b)(1)(A) that PFSAs be carried out for the benefit of Indians because of their status as Indians, nothing is to be gained by adding that Indians may be primary or significant beneficiaries of the programs. Under this reading, § 405(b)(1)(B) should be stricken as unnecessary. But § 405(b)(1)(B) could be read as expanding the list of contractible PFSAs in § 405(b)(1)(A) to include PFSAs that are carried out by BIA and OST with respect to which tribes or Indians are primary or significant beneficiaries, although the PFSAs are not carried out for the benefit of Indians because of their status as Indians. These would be PFSAs for which funding has been transferred to BIA or OST from another Interior bureau or office. This reading gives § 405(b)(1)(B) a different meaning than § 405(b)(1)(A). It goes beyond Title V by authorizing contracting	would is ridiculous and insulting to the integrity of tribal governments. Tribes have every reason and motivation to ensure that they carry out programs that impact Indians as primary or significant beneficiaries successfully, and doing so requires that the interests of non-Indians who may tangentially benefit from the programs be managed just as well as the portion of the program that affects Indians. The insinuation that tribes would discriminate against non-Indians in carrying out these programs is purely hypothetical and not based on fact.

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				of PFSAs not intended to serve Indians exclusively. This reading is unfavorable to the Department's interests if the Department is concerned that tribes will look after non-Indian interests less vigorously than the Secretary would. This reading is likely to be a first step in a legislative campaign to render non-Indian PFSAs contractible under Public Law 93-638.	
405(b)(2)(A)	A funding agreement under subsection (a) 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 Secretary outside of the Bureau of Indian Affairs, 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). The programs within the scope of this subparagraph (A) are those provided for the benefit of Indians because of their status as Indians, or those programs with respect to which Indian tribes or Indians are primary or significant beneficiaries.	Each funding agreement shall-- ...subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 458ee(c) of this title, except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law (25 U.S.C. § 458cc(b)(2)).	None	**Contractible non-BIA programs.** Section 405(b)(2)(A) should be stricken because Title IV is preferable. Section 405(b)(2)(A) goes beyond Title V and removes necessary Secretarial discretion and negotiation authority. Under Title IV, tribes may carry out PFSAs administered by non-BIA bureaus and offices, "subject to such terms as may be negotiated." Section 405(b)(2)(A) would make agreements to carry out such PFSAs obligatory "as determined by the Indian tribe." Section 405(b)(2)(A) introduces language that funding agreements shall authorize tribes to "receive full tribal share funding." Title I and Title IV, however, do not contain entitlements to "tribal share" funding. This language is undesirable because "tribal shares" are not necessarily the appropriate methodology for calculating the funding amounts that the "Secretary would have otherwise provided for the operation of the programs" (25 U.S.C. § 450j-1(a)(1)). Finally, §405(b)(2)(A) goes beyond Title	We disagree. *See* comments above related to the Department's views on § 405(b)(1)(A). Our position is that the Department should have no discretion over a tribe's right to assume PFSAs and related funds from non-BIA bureaus if they are PFSAs that were established for the benefit of Indians (which is the exact scope of contracts under Title I) or if Indians are primary or significant beneficiaries (which is a slight expansion of Title I's language but consistent with past views of the Department). Title V's provisions are not on point on these scope issues because they were developed based on a different background and are consistent with Title VI, which required a study on the feasibility of compacting non-IHS DHHS PFSAs, which is not being proposed here.

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				V in authorizing tribes to contract PFSAs carried out by non-BIA bureaus and offices with respect to which tribes or Indians are primary or significant beneficiaries. Title V does not authorize tribes to contract programs carried out in HHS outside IHS. Nor does Title V authorize contracting of PFSAs that are not intended to serve Indians exclusively.	
405(b)(2)(B)	Programs described in subparagraph (A) shall include, at the option of the tribe, all programs (or portions thereof) that restore, maintain or preserve a resource (for example fisheries, wildlife, water or minerals) in which a tribe has a federally reserved right: Provided, that the Secretary shall make available a proportional share of the funding of such a program (or portion thereof) that the Secretary would otherwise provide to restore, maintain or preserve such a resource in an amount equal to the proportional share of the resource that is associated with the tribe's federally reserved right.	None	None	**Expanding contractible non-BIA programs to include programs pertaining to resources in which tribes have federally reserved rights.** The provision that the Secretary shall make available a share of funding proportional to the tribe's share of the resource should be stricken. Management of a resource is likely to require an integrated plan. If tribes were permitted to demand proportional shares of funds and to design management programs independently, it is likely that effective management programs could not be carried out to protect the resources.	We believe that federally reserved rights should be managed by the beneficiaries. We think that effective management of resources can and will take place if a tribe assumes responsibilities associated with its part of the resources. The Compact and FA can contain provisions that ensure effective and consistent management of the resource if it is part of a broader multi-party integrated plan consistent with the Department's own management plan.
405(b)(4)	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.	None	None	**No bar to contracting programs with non-Indian interests or to competitive bidding requirements.** Subsection 405(b)(4)(B), stating that the section does not prohibit inclusion in a funding agreement of a program in which non-Indians have an incidental or legally identifiable interest, should be stricken. Like §§ 405(b)(1)(B)	We disagree. The Department's comments are incomprehensible. This provision is meant to make clear the rights that tribes have proposed in § 405(b)(1)-(3) are not undermined after the statute by technical arguments that hostile Department personnel could raise to thwart the intention of Congress.

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				and 405(b)(2)(A), § 405(b)(4)(B) goes beyond Title V by recognizing that PFSAs may be contracted even though they are not intended to serve Indians exclusively.	
405(b)(5)	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.); **(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); and	Each funding agreement shall--(4) prohibit the inclusion of funds provided-(A) pursuant to the Tribally Controlled Community College Assistance Act of 1978...; (B) for elementary and secondary schools under the formula developed pursuant to section 2008 of this title, and (C) the Flathead Agency Irrigation Division or the Flathead Agency Power Division, except that nothing in this section shall affect the contract authority of such divisions under section 450f of this title....(25 U.S.C. § 458cc(b)(4)).	None	**Types of funding excluded from funding agreements.** Section 405(b)(5) should be stricken. Subsections (A) and (B) have the same effect as Title IV, but Title IV's wording is preferable. Indian tribes do not receive funding under the Tribally Controlled College or University Assistance Act, as amended, and they do not receive tribal share funding under 25 U.S.C. § 2008. Therefore, the wording of § 405(b)(5)(A) & (B) is inaccurate. The Department is opposed to the elimination of § 405(b)(5) because of ongoing negotiations relating to the Flathead Irrigation project.	We would agree with retaining the existing language in Title IV with the exception of the language in section (C). The Confederated Salish and Kootenai Tribes disagree and would like the option of compacting a portion or all of the Flathead Irrigation project.
405(b)(7)	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.	None in the statute, but see 25 C.F.R. §§ 1000.105-1000.109. For example: A Tribe/Consortium self-governance base budget is the amount of recurring funding identified in the President's annual budget request to Congress. This amount must be adjusted to reflect subsequent Congressional action (25 C.F.R. §1000.105(a)) Self-governance base budgets must not include...Congressional earmarks...(25 C.F.R. §1000.105(b)). [U]nless otherwise requested by the	At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funding (including, for purposes of this provision, funds available under section 450j-1(a) of this title) to be transferred to such Indian tribe, for such period as may be specified in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations by sub-subactivity excluding earmarks (25 U.S.C. § 458aaa-4(g)).	**Base budgets for BIA and non-BIA funding agreements.** Section 405(b)(7) expands the concept of base budget, which appears in 25 C.F.R. Part 1000 with reference to annual funding agreements for BIA programs, to apply to non-BIA programs, as well. While § 405(b)(7) would have the same effect as the Part 1000 regulations for base budgets for BIA programs, § 405(b)(7) would allow tribes, at their option, to include recurring funding for non-BIA programs in base budgets.	The Department's interpretation of the intent behind this provision is correct. Tribal representatives see no reason why the advantages of stable base budgets cannot be extended to non-BIA programs that are intended to be carried out over a period of time.

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		Tribe/Consortium, these amounts are not renegotiated each year (25 C.F.R. §1000.106). At the request of the Tribe/Consortium, a self-governance base budget identifying each Tribe's funding amount is included in BIA's budget justification for the following year, subject to Congressional appropriation (25 C.F.R. §1000.108).			
405(c)	The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe.	None	None	**Tribal consent required for terms in funding agreements.** Section 405(c) should be stricken. Otherwise, the Secretary would not be able to insist on terms in new or subsequent funding agreements that are required by statutory, regulatory, or case law or required for fulfillment of the Secretary's trust responsibility.	We disagree. Funding agreements are bilaterally negotiated agreements and neither party should have the right to unilaterally modify them.
405(e)(1)	Absent notification from an Indian tribe that is withdrawing or retroceding the operation of 1 or more included 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 effect until a subsequent funding agreement is executed, and **(B)** the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.	None in the statute, but see 25 C.F.R. § 1000.90: If the effective date of the successor AFA is not on or before the expiration of the current AFA, subject to terms mutually agreed upon by the Tribe/Consortium and the Department at the time the current AFA was negotiated or in a subsequent amendment, the Tribe/Consortium may continue to carry out the program authorized under the AFA to the extent adequate resources are available. During this extension period, the current AFA shall remain in effect,...and the Tribe/Consortium may use any funds remaining under the AFA, savings from other programs or Tribal funds to carry out the program…The	Absent notification from an Indian tribe that is withdrawing or retroceding the operation of one or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, and the terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement (25 U.S.C. §458aaa-4(e)).	**Carryover of funding agreement during "gap period" before new funding agreement becomes effective. SOL advice:** Section 405(e)(1) should be stricken because our regulations provide for a process that meets the Department's interests better. Although § 405(e)(1) parallels Title V language, its wording is undesirable because of ambiguity between subsections (A) and (B). Subsection A suggests that the terms of an initial funding agreement 1apply during the "gap period" between the end point of funding agreement 1 and the execution of its successor funding agreement 2. By contrast, subsection B suggests that the terms of funding agreement 2 will be retroactive to the end of	We disagree. We do not think Sections (A) and (B) are ambiguous. In practice, this provision has worked well with the IHS and has prevented tribes from losing FTCA coverage and other Title V benefits in the "gap" period and we believe that this same provision is appropriate in Title IV.

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		successor AFA must provide funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the programs, functions, services, and activities or portions thereof (PFSAs) for the full period it was or will be performed.		funding agreement 1. The current regulation, 25 C.F.R. § 1000.90, provides a more fiscally protective solution for the Department. The regulation allows a tribe to continue operating a program during the "gap period" under the terms of funding agreement 1 "to the extent adequate resources are available." The regulation provides that funding agreement 2 must afford necessary funding "for the full period" that the program "was or will be performed." Unlike § 405(e)(1), the regulation is unambiguous about what terms apply during the "gap period" between funding agreements 1 and 2.	
406(b)	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 included programs.	None, but see 25 C.F.R. §§ 1000.460 - 1000.465 on conflicts of interest.	Indian tribes participating in self-governance under this part shall ensure that internal measures are in place to address conflicts of interest in the administration of self-governance programs, services, functions, or activities (or portions thereof) (25 U.S.C. § 458aaa-5(b)).	**Conflicts of interest.** Section 406(b) should be stricken because it does not protect federal interests in conflict-of-interest situations as well as current regulations do. If current regulations were eliminated in favor of tribal law and procedures, the federal government would have no assurance that conflicts involving the financial interests of the United States or express statutory obligations of the United States to third parties would be immediately disclosed to the Secretary, as required by 25 C.F.R. §§ 1000.460 & 1000.461; or that tribes would maintain written standards of conduct to govern their employees and agents, as required by 25 C.F.R. § 1000.462; or that tribes would	We disagree. The proposed language for this section mirrors Title V's language which has worked well. If the Department believes that regulations help clarify this provision then it can raise this as a topic for rulemaking under § 416(b).

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				have mechanisms to ensure that employees do not review trust transactions in which they have an interest, as required by 25 C.F.R. § 1000.463; or that tribes' personal conflict-of-interest standards would conform to the requirements in 25 C.F.R. § 1000.464.	
406(c)(3)	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).	None	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 450j-1(f) of this title (25 U.S.C. § 458aaa-5(c)(2)). All provisions of section []...450j-1(a) through (k)...of this title..., to the extent not in conflict with this part, shall apply to compacts and funding agreements (25 U.S.C. § 458aaa-15(a)).	**Procedural requirements for the Secretary to disallow costs.** The Office of Audit and Evaluation should advise on § 406(c)(3). The section constrains the Secretary's ability to disallow costs if she has not given notice of the disallowance within 365 days of receiving a tribe's audit report, if she has not given notice within 60 days of receipt of an audit report that the report is insufficient.	Please let us know what the Office of Audit and Evaluation's position is on this provision.
406(d)	An Indian tribe may redesign or consolidate included programs or reallocate funds for included 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.	Each funding agreement shall--(3) subject to the terms of the agreement, authorize the tribe to redesign or consolidate programs, services, functions, and activities, or portions thereof, and reallocate funds for such programs, services, functions, and activities, or portions thereof, except that, with respect to the reallocation, consolidation, and redesign of [non-BIA] programs..., a joint agreement between the Secretary and the tribe shall be required (25 U.S.C. § 458cc(b)(3)).	An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement...and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if 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 (25 U.S.C. § 458aaa-5(e)).	**Redesign and consolidation of programs and reallocation of funds.** Section 406(d) should be stricken, although it parallels Title V, because (1) the section removes the Department's ability to condition redesign or consolidation of PFSAs or reallocation of funds in the terms of a BIA funding agreement and (2) the section removes the requirement for the Department to agree to reallocation of funds or redesign or consolidation of non-BIA programs.	We disagree. From its inception the Self-Governance Program has been squarely aimed at reducing to the maximum extent feasible the Department's ability to micro-manage tribes as they carry out programmatic responsibilities under Compacts and FAs. The Department's position would gut Title IV and allow the Department once again to micromanage how and when a tribe can redesign a program and reallocate funds to better suit local conditions and needs. This position is unacceptable. We also see no reason why the ability to redesign should not apply to non-BIA

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					programs as well, particularly if the are mandatory programs.
406(g)	(1) In general.--Unless an Indian tribe specifies otherwise in the compact or funding agreement, records of an Indian tribe shall not be treated as agency records for purposes of chapter 5 of title 5, United States Code. (2) Recordkeeping system.--An Indian tribe shall (A) maintain a recordkeeping system, and (B) on 30 days' notice, provide the Secretary with reasonable access to the records to enable the Department to meet the requirements of sections 3101 through 3106 of title 44, United States Code.	None, but see 25 C.F.R. §§ 1000.392(b) & 1000.393: At the option of the Tribe/Consortium under section 108 of the Pub L. 93-638, except for previously provided copies of Tribe/Consortium records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping system of the Department of the Interior, records of the Tribe/Consortium shall not be considered Federal records for the purpose of the Freedom of Information Act (25 C.F.R. § 1000.392(b)). At the option of the Tribe/Consortium, section 108(b) of Pub.L. 93-638, as amended, provides that records of the Tribe/Consortium must not be considered Federal records for the purposes of the Privacy Act (25 C.F.R. § 1000.393)	(1) In general. Unless an Indian tribe specifies otherwise in the compact or funding agreement, records of the Indian tribe shall not be considered Federal records for purposes of chapter 5 of Title 5. (2) Recordkeeping system. The Indian tribe shall maintain a recordkeeping system, and, after 30 days advance notice, provide the Secretary with reasonable access to such records to enable the Department of Health and Human Services to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of Title 44 (25 U.S.C. § 458aaa-5(d)). All provisions of section [] 450c(b)...of this title..., to the extent not in conflict with this part, shall apply to compacts and funding agreements authorized by this part (25 U.S.C. § 458aaa-15(a)). The...Secretary...shall, until the expiration of three years after completion of the project or undertaking..., have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the...Secretary may be related or pertinent (25 U.S.C. § 450c(b)).	**Records, tribal recordkeeping systems, and Secretarial access to records.** Section 406(g) should be adopted with slight changes. Section 406(g) is similar to Title V, except that it contains some undesirable word changes in subsection (1) and desirable word changes in subsection (2). Section 406(g) does not have a counterpart in Title IV, and our regulations do not cover records and tribal recordkeeping systems as thoroughly as does § 406(g). In subsection (1) of § 406(g), Title V's language, "shall not be considered Federal records" should be substituted for "shall not be treated as agency records" because (a) Title 5, chapter 5 uses the phrase "Federal records," not "agency records," and (b) the phrase "agency records" may appear in laws or regulations that we are not now reviewing, and our adoption of "agency records" may unintentionally affect interpretation of those laws or regulations. Section 406(g)(2) improves on Title V's language that the Secretary should be able "to meet...minimum legal recordkeeping system requirements" for federal agencies with the language that the Secretary should be able to "meet the requirements" of records management for federal agencies. This change is desirable and should be retained.	We agree with both of these comments.

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				The language of 25 U.S.C. § 450c(b), which Title V applies to self-governance tribes, should be added to § 406(g).	
407(b)(1)	In general.—A compact or funding agreement shall include provisions for the Secretary to reassume an included program and associated funding if there is a specific finding relating to that included program of --(A) Imminent jeopardy to a physical trust asset, natural resources, or public health and safety that—(i) Is caused by an act or omission of the Indian tribe; and (ii) Arises out of a failure to carry out the compact or funding agreement; or (B) Gross mismanagement with respect to funds transferred to an Indian tribe by a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.	Funding agreements negotiated between the Secretary and an Indian tribe shall include provisions-- .(2) for the Secretary to reassume a program, service, function, or activity, or portions thereof, if there is a finding of imminent jeopardy to a physical trust asset, natural resources, or public health and safety (25 U.S.C. § 458cc(d)(2)).	In general. Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision authorizing the Secretary to reassume operation of a program, service, function, or activity (or portions thereof) and associated funding if there is a specific finding relative to that program, service, function, or activity (or portion thereof) of-(i) imminent endangerment of the public health caused by an act or omission of the Indian tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement, or (ii) gross mismanagement with respect to funds transferred to a tribe by a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate (25 U.S.C. § 458aaa-6(a)(2)(A)).	**Grounds for reassumption.** Section 407(b)(1) should be adopted. It parallels Title V. Subsections (i) and (ii) of § 407(b)(1)(A) are found in Title V, but not in Title IV. Like the language in § 407(b)(1)(A) that the Secretary must make "a *specific* finding ***relating to that included program***" (italics added), these two subsections increase the burden on the Secretary to justify reassumption. But the requirement that the Secretary must show the tribe's fault in administering the program before reassuming the program is fair. Subsection 407(b)(1)(B) appears in Title V, but not in Title IV. Adding the option that the Secretary can justify reassumption because of a tribe's gross mismanagement of funds increases the Secretary's ability to protect federal funds. Subsection 407(b)(1)(B) is desirable and should be adopted.	We agree.
407(b)(2)	Prohibition.--The Secretary shall not reassume operation of an included program unless— (A) the Secretary first provides written notice and a hearing on the record to the Indian tribe; and (B) the Indian tribe does not take corrective action to remedy gross mismanagement or the imminent jeopardy to a physical trust asset, natural resource, or public health and safety.	None, but see 25 C.F.R. Part 1000 Subpart M procedures: The Secretary must reassume a program within 60 days of a finding of imminent jeopardy (25 C.F.R. § 1000.306). (If there is an immediate threat to human health, safety, or welfare, the Secretary may immediately reassume the program (25 C.F.R. § 1000.305(b)).	The Secretary shall not reassume operation of a program, service, function, or activity (or portions thereof) unless--(i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe; and (ii) the Indian tribe has not taken corrective action to remedy the imminent endangerment to public health or gross mismanagement (25 U.S.C. § 458aaa-6(a)(2)(B)).	**Notice, hearing, and opportunity for corrective action before reassumption.** Although § 407(b)(2) corresponds to Title V, its procedures are inferior to those in the regulations and, therefore, § 407(b)(2) should be stricken. The regulation's procedures give a tribe notice and an opportunity for corrective action before reassumption (except when there is an	We disagree. We believe that the proposed statutory language is better. If the Department wants to develop regulations that clarify certain aspect of how this language will be implemented that can be done in the rulemaking process set out in Section 416.

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		On discovering imminent jeopardy, the Secretary immediately notifies the tribe in writing of her supporting reasons and of specific measures the tribe must take to eliminate the imminent jeopardy (25 C.F.R. §§ 1000.305(a) & 1000.308(a) & (b)). A tribe has 5 days to respond to the notice (25 C.F.R. § 1000.309). The response must indicate the specific measures that the tribe will take to eliminate the imminent jeopardy (25 C.F.R. § 1000.310(a)). The Secretary makes a written determination within 10 days of the tribe's response as to whether the proposed measures will eliminate the imminent jeopardy (25 C.F.R. § 1000.311). If she finds that the proposed measures will not mitigate imminent jeopardy, she will notify the tribe in writing of the right to appeal (25 C.F.R. § 1000.313).		immediate threat to human health, safety, or welfare). In place of a cumbersome and time-consuming hearing process, the regulations call for a 15-day timeline for exchange of information between the tribe and the Secretary about whether the tribe can take measures to eliminate the imminent jeopardy. Reassumption must take place within 60 days of a finding of imminent jeopardy, unless the Secretary has determined that the tribe is able to mitigate the conditions. The tribe may appeal and request stay pending appeal, to protect its interests. The streamlined procedures and timeframes in the regulations provide appropriate protection to public health and safety, trust assets, and natural resources.	
407(b)(3)(A)	Notwithstanding subparagraph (2), the Secretary may, on written notice to the Indian tribe, immediately reassume operation of an included program if--(i) the Secretary makes a finding of both imminent and substantial jeopardy and irreparable harm to a physical trust asset, a natural resource, or the public health and safety caused by an act or omission of the Indian tribe, and (ii) the imminent and substantial jeopardy, and irreparable harm to the physical trust asset, natural resource, or public health and safety arises out of a failure by the Indian tribe to carry out its	None, but see 25 C.F.R. § 1000.305(b): If there is an immediate threat to human health, safety, or welfare, the Secretary may immediately reassume operation of the program regardless of the timeframes specified in this subpart.	Notwithstanding subparagraph (B), the Secretary may, upon written notification to the Indian tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if--(I) the Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian tribe; and (II) the endangerment arises out of a failure to carry out the compact or funding agreement (25 U.S.C. § 458aaa-6(a)(2)(C)(i)).	**Circumstances for immediate reassumption and standards for immediate reassumption.** Although § 407(b)(3) corresponds in many ways to Title V, its standard of proof for immediate reassumption is higher than the standard in our regulations. Therefore, § 407(b)(3) should be stricken. The standard for immediate reassumption under § 407(b)(3) (i.e., "imminent and substantial jeopardy and irreparable harm...caused by an act or omission of the Indian tribe...[and arising] out of a failure by the Indian tribe to carry out its	We disagree. We believe that reassumption by the Department should be subject to the same high standard that Congress enacted for health programs in Title V.

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	compact or funding agreement.			compact or funding agreement" is harder for the Secretary to prove than the standard under our regulations ("immediate threat") or under Title V ("imminent substantial and irreparable endangerment of the public health cause by an act or omission of the Indian tribe...[and arising] out of a failure to carry out the compact or funding agreement"). Our regulations allow immediate reassumption in narrower circumstances than § 407(b)(3) does (i.e., when "human health, safety or welfare," rather than a "physical trust asset, a natural resource, or the public health," is at stake).	
407(b)(3)(B)	If the Secretary reassumes operation of an included program under subparagraph (A), the Secretary shall provide the Indian tribe with a hearing on the record not later than 10 days after the date of reassumption.	None, but see 25 C.F.R. §§ 900.171-900.176 & 1000.430 and 43 C.F.R. Part 4. For appeals from reassumption of PFSAs that the Secretary provides for the benefit of Indians because of their status as Indians, an ALJ holds a hearing within 10 days of the Secretary's notice of intent to reassume a program, unless the tribe agrees to a later date (25 C.F.R. § 900.171(a)). The ALJ issues a recommended decision within 30 days of the hearing (25 C.F.R. § 900.172 (a)). The tribe may appeal the recommended decision to the IBIA within 15 days of receipt of the recommended decision (25 C.F.R. § 900.173). The IBIA has 15 days from receipt of the written objections to modify, adopt, or reverse the recommended decision, which otherwise	If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the Indian tribe with a hearing on the record not later than 10 days after such reassumption (25 U.S.C. § 458aaa-6(a)(2)(C)(ii)).	**Hearing on immediate reassumption.** Although the hearing procedures in § 407(b)(3) correspond to those in Title V, § 407(b)(3) can be stricken as unnecessary because our regulations provide a similar right to hearing within 10 days for programs that are provided for the benefit of Indians because of their status as Indians. Our regulations establish timelines that are likely to result in quicker resolution of the reassumption issues than the open-ended procedure in § 407(b)(3).	We disagree. We believe that this issue should be addressed in the statute. If the Department wants to develop regulations that clarify certain aspect of how this language will be implemented that can be done in the rulemaking process set out in Section 416.

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		becomes final for the Department (25 C.F.R. § 900.174). For appeals from reassumption of PFSAs other than those that the Secretary provides for the benefit of Indians because of their status as Indians, IBIA procedures at 43 C.F.R. Part 4 apply.			
407(d)	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...a reassumption under subsection (b).	None	In any hearing or appeal involving a decision to reassume operation of a program, service, function, or activity (or portion thereof), the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence the validity of the grounds for the reassumption (25 U.S.C. § 458aaa-6(a)(2)(D)).	**Burden of proof at reassumption hearing.** Our regulations do not specify the burden of proof. In the context of immediate reassumption, under exigent circumstances where arrangements must be made quickly to transfer responsibility for PFSAs from a tribe to the Secretary, it is preferable to give appeal officials latitude to make a prudent decision, rather than to require the Secretary to prove her case by a burden of proof that is higher than the usual burden of proof in civil cases.	We disagree. We believe that the burden of proof for reassumption should be the same as the burden of proof that exists under Title V. We particularly disagree that the appeal official should have unlimited discretion to make up a burden of proof standard on the fly.
408(a)	An Indian tribe participating in tribal self-governance may carry out construction programs and projects under this title in the same manner the Indian tribe carries out other included programs under this title, consistent with the provisions of all applicable Federal laws.	See, for example: (1) Regarding construction programs or projects, the Secretary and Indian tribes may negotiate for the inclusion of specific provisions of the Office of Federal Procurement and Policy Act and Federal acquisition regulations in any funding agreement entered into under this subchapter. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply. (2) In all construction projects performed pursuant to this part, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements. (25	Indian tribes participating in tribal self-governance may carry out construction projects under this part if they elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969..., the National Historic Preservation Act..., and related provisions of law that would apply if the Secretary were to undertake a construction project...(25 U.S.C. § 458aaa-8(a)).	**Mandatory terms for construction programs and projects.** Section 408(a) should be stricken. It departs from the language of Title V (see § 458aaa-8(a)) in order to remove the Secretary's authority to require that construction programs be carried out in accord with Federal laws and regulations; appropriate construction, health, and safety standards; and project design criteria and other terms and conditions that are meant to ensure fulfillment of the Secretary's oversight responsibilities.	We disagree. Title V does not distinguish between a construction-related program, service, function or activity (PSFA), and a non-construction-related PSFA. Nor does Title V burden a tribe with any additional requirements when a tribe undertakes a construction project. NEPA and NHPA requirements apply to construction activities regardless of who (a tribe or a federal agency) undertakes them. The proposed language in 408(a) merely sets out the simple proposition that, just like in Title V, Title IV should not add any requirements to a PSFA simply

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		U.S.C. § 458cc(e)). Also see the regulations: The AFA must comply with applicable Federal laws, program statutes and regulations (25 C.F.R. § 1000.243(c)). If Tribal construction standards are consistent with or exceed applicable Federal standards, then the Secretary must accept the Indian Tribe/Consortium's proposed standards (25 C.F.R. § 1000.246). [T]he relevant bureau may provide to the Tribe/Consortium project design criteria and other terms and conditions that are required for such a project. The project must be completed in accordance wit the terms and conditions set forth in the AFA (25 C.F.R. § 1000.247).			because the FSFA is construction-related. The federal concern (that it removes the Secretary's authority to force a tribe to comply with federal law) is without foundation since it overlooks the savings clause that requires a tribe to comply with "all applicable Federal laws." Further, the federal concern is addressed in other provisions of the tribal proposed comment that spells out what needs to be in an FA. See e.g. § 408(c)(2) & (3).
408(b)	An Indian tribe participating in tribal self-governance may, in carrying out construction projects under this title, 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 a 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	None, but see the regulations: What special provisions must be included in an AFA that contains a construction program? An AFA that contains a construction program must address the requirements listed in this section. * * ** (c) The AFA must comply with applicable Federal laws, program statutes and regulations (25 C.F.R. § 1000.243(c)). May the Secretary require design provisions and other terms and conditions for construction programs or activities included in an AFA under section 403(c) of the Act?	Indian tribes participating in tribal self-governance may carry out construction projects under this part if they 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 a 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	**Applicability of specific environmental and historic preservation laws to construction programs and projects.** Section 408(b) should be stricken because it removes the Secretary's authority to require that tribes assume Federal responsibilities under the National Environmental Policy Act of 1969 and the National Historic Preservation Act, when tribes carry out construction programs and projects. By changing the wording of Title V from "Indian tribes...may carry out construction projects...*if* they elect to assume all Federal responsibilities" to "An Indian tribe...*may*, in carrying out construction projects, elect to assume all Federal	We disagree. The provisions of 408(b) provide more precision and detail than do comparable provisions in Title V, but 408(b) is completely consistent with its comparable Title V provisions. A careful reading of both Title V and 408(b) will reveal that neither waives or relieves NEPA or NHPA requirements. The only issue is *who* carries out approval powers under those Acts. Title V authorizes a tribe to assume those powers, if it wants. If a tribe chooses not to assume those approval powers, the Secretary must retain them.

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	of the responsible Federal official under applicable environmental law.	Yes, the relevant bureau may provide to the Tribe/Consortium project design criteria and other terms and conditions that are required for such a project. The project must be completed in accordance wit the terms and conditions set forth in the AFA (25 C.F.R. § 1000.247).	of the responsible Federal official under such environmental laws (25 U.S.C. § 458aaa-8(a)).	responsibilities," § 408(b) relaxes Title V's requirement that tribes assume Federal environmental and historic preservation responsibilities. Section 408(b) would reduce the Secretary's authority to require terms to protect the environment and preserve historic sites.	
408(c)(1)	In accordance with all applicable Federal laws, a construction program or construction project shall be treated in the same manner and be subject to all provisions in this Act as are all other tribal assumptions of included programs under this Act.	None, but see the regulations: Yes, all provisions of other subparts apply to construction portions of AFAs unless those provisions are inconsistent with this subpart (25 C.F.R. § 1000.252).	None, but see the regulations: Yes, all provisions of other subparts apply to construction portions of AFAs unless those provisions are inconsistent with this subpart (25 C.F.R. § 1000.252).	**Construction agreements treated same as other agreements.** Section 408(c)(1) may be stricken as unnecessary because 25 C.F.R. § 1000.252 already provides that Title IV regulations apply to construction agreements as they do to other agreements.	We disagree. The proposed language in 408(c)(1) merely sets out the simple proposition that, just like in Title V, Title IV should not add any requirements to a PSFA simply because the PSFA is construction-related. It is necessary because current Title IV regulations impose an unnecessary and wasteful layer of bureaucracy, delay and expense on construction-related PSFAs.
408(c)(2)	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 1 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– (i) The ways in which the Indian tribe will address project-related environmental considerations; and (ii) The standards by which the Indian tribe will accomplish the project; and (E) The amount of funds provided for the project.	None, but see the regulations: An AFA that contains a construction program must address the requirements listed in this section. (a) The AFA must specify how the Secretary and the Tribe/Consortium must ensure that proper health and safety standards are provided for in the implementation of the AFA, including but not limited to: (1) The use of architects and engineers licensed to perform the type of construction involved in the AFA; (2) Applicable Federal, state, local or Tribal building codes and applicable engineering standards, appropriate for the particular project; and (3) Necessary inspections and testing	None, but see the regulations: An AFA that contains a construction program must address the requirements listed in this section. (a) The AFA must specify how the Secretary and the Tribe/Consortium must ensure that proper health and safety standards are provided for in the implementation of the AFA, including but not limited to: (1) The use of architects and engineers licensed to perform the type of construction involved in the AFA; (2) Applicable Federal, state, local or Tribal building codes and applicable engineering standards, appropriate for the particular project; and (3) Necessary inspections and testing	**Contents of funding agreements for construction programs and projects.** Section 408(c)(2) may be stricken as unnecessary because 25 C.F.R. § 1000.243 already provides sufficient guidance on the contents of funding agreements and § 408(c)(2)(D) is only necessary if subsections 408(a) & (b) are retained, but the Department recommends that subsections 408(a) & (b) be stricken.	We disagree. 408(c)(2) we think is necessary in order to set forth in statute what is required to be included in the funding agreements so as to avoid unnecessary and wasteful requirements being added by regulation contrary to the intent of Congress.

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		by the Tribe. (b) The AFA must comply with applicable Federal laws, program statutes and regulations. (c) The AFA must specify the services to be provided, the work to be performed, and the responsibilities of the Tribe/Consortium and the Secretary under the AFA. (d) The Secretary may require the Tribe/Consortium to provide brief progress reports and financial status reports. The parties may negotiate in the AFA t he frequency, the format and content of the reporting requirement. As negotiated, these reports may include: (1) A narrative of the work accomplished; (2) The percentage of work completed; (3) A report of funds expended during the reporting period; and (4) The total funds expended for the project (25 C.F.R. § 1000.243).	by the Tribe. (b) The AFA must comply with applicable Federal laws, program statutes and regulations. (c) The AFA must specify the services to be provided, the work to be performed, and the responsibilities of the Tribe/Consortium and the Secretary under the AFA. (d) The Secretary may require the Tribe/Consortium to provide brief progress reports and financial status reports. The parties may negotiate in the AFA t he frequency, the format and content of the reporting requirement. As negotiated, these reports may include: (1) A narrative of the work accomplished; (2) The percentage of work completed; (3) A report of funds expended during the reporting period; and (4) The total funds expended for the project (25 C.F.R. § 1000.243).		
408(d)	A funding agreement shall contain a certification by the Indian tribe that the Indian tribe will establish and enforce procedures designed to assure that all construction-related included programs undertaken through this funding agreement adhere to building and other codes and architectural and engineering standards (including public health and safety standards) identified by the Indian tribe in the funding agreement, which codes and standards shall be in conformity with nationally recognized standards for comparable projects in comparable locations.	In all construction projects performed pursuant to this part, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements (25 U.S.C. § 458cc(e)(2)). (a) The AFA must specify how the Secretary and the Tribe/Consortium must ensure that proper health and safety standards are provided for in the implementation of the AFA, including but not limited to: (1) The use of architects and engineers licensed to perform the type of construction involved in the AFA; (2) Applicable Federal,	The Indian tribe and the Secretary shall agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which shall be in conformity with nationally recognized standards for comparable projects (25 U.S.C. § 458aaa-8(c)).	**Building codes and health and safety standards.** Section 408(d) should be stricken as unnecessary because 25 C.F.R. § 1000.243(a) & (b) already adequately addresses compliance with building codes and health and safety standards.	408(d) is necessary in order to set forth in statute what is required to be included in the funding agreements so as to avoid unnecessary and wasteful requirements being added by regulation contrary to the intent of Congress. 408(d) requires a tribe to certify that it will adhere to nationally-recognized standards which protect the public health and safety. This requirement is identical to the tribal certifications that have long been required in all titles of P.L. 93-638 in lieu of day-to-day review and oversight

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		state, local or Tribal building codes and applicable engineering standards, appropriate for the particular project; and (3) Necessary inspections and testing by the Tribe. (b) The AFA must comply with applicable Federal laws, program statutes and regulations (25 C.F.R. § 1000.243(a) & (b)).			by a federal bureaucracy that is duplicative. Given the federal concern, the tribes propose to add the following sentence at the end of proposed 408(d): "The tribe shall ensure that all construction plans and specifications and activities, and as-built plans are certified, by a licensed professional engineer, as being in compliance with nationally-recognized standards, and such certification shall be kept by the tribe in its records."
408(e)	The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the funding agreement.	None, but see the regulations: Under the Act, the Indian Tribe/Consortium must successfully complete the project in accordance with the terms and conditions in the AFA (25 C.F.R. § 1000.248(a)).	The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement (25 U.S.C. § 458aaa-8(d)).	**Tribal responsibility for completion of construction project.** Although § 408(e) is consistent with Title V (see § 458aaa-8(d)), it can be stricken because 25 C.F.R. § 1000.248(a) already contains the same requirement.	We disagree. 408(e) is necessary in order to set forth in statute the obligations of a tribe without latitude for additional requirements to be added by regulation contrary to the intent of Congress.
408(f)(1)	At the option of an Indian tribe, full funding for a construction program or construction project carried out under this title shall be included in funding agreements as an annual advance payment.	None in Title IV or in 25 C.F.R. Part 1000 pertaining specifically to construction programs and construction projects, but see: The funding agreements authorized by this part...shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes (25 U.S.C.§ 458cc(g)(2)).	Funding for construction projects carried out under this part 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 (25 U.S.C. § 458aaa-8(e)).	**Annual advance payment.** Section 408(f)(1)should be stricken because it introduces ambiguities of language not present in Title V and, besides, it is unnecessary because Title IV already allows tribes to receive annual advance payments. "[F]ull funding for a construction program or construction project" could be deemed to mean that, if the Secretary has appropriations for construction sufficient to fully fund a tribe's construction project in a given year, the tribe could demand full funding as an annual advance payment. This ambiguity is avoided in Title IV (see § 458cc(g)(2)).	To respond to the federal concern, the tribal team would propose to add the following phrase before the period at the end of 408(f(1): ", subject to the availability of appropriations for that purpose"

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408(f)(2)	Notwithstanding the annual advance payment provisions or any other provision of law, an Indian tribe is entitled to receive in its initial funding agreement all funds made available to the Secretary for multi-year construction programs and projects carried out under this title.	None in Title IV or in 25 C.F.R. Part 1000 pertaining specifically to construction programs and construction projects, but see: The funding agreements authorized by this part...shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes (25 U.S.C.§458cc(g)(2)).	None	**Multi-year advance payment.** Section 408(f)(2) goes beyond the Part 1000 regulations and Title V and should be stricken because it would remove necessary flexibility from the Secretary to determine use of funds for all construction projects for which she has funding in a given year.	We disagree. As in the preceding sub-paragraph, to respond to the federal concern, the tribal team would propose to add the following phrase before the period at the end of 408(f(2): ", subject to the availability of appropriations for that purpose"
408(f)(3)	The Secretary shall include associated project contingency 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.	None, but see the regulations: [T]he Secretary must retain project funds to ensure proper health and safety standards in construction projects. Examples of purposes for which bureaus may retain funds include: **** (d) Requiring corrective action during performance when appropriate (25 C.F.R. § 1000.256).	The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of contingency funds included in funding agreements (25 U.S.C. § 458aaa-8(e)).	**Advance payment of contingency funds to tribes.** Although § 408(f)(3) is consistent with Title V (see § 458aaa-8(e)), it should be stricken because the Secretary must retain contingency funds in order to properly oversee construction projects. 25 C.F.R. § 1000.256 sets out reasons why the Secretary must retain funding.	We disagree. Given the transfer of Secretarial responsibility in other provisions, and the alternative ways in which corrective actions are made, there remains no rationale for the Secretary's retention of contingency funds.
408(f)(4)	(A) Notwithstanding any other provision of an annual Act of appropriation or other Federal law, 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) A reallocation under subparagraph (A) shall be for construction-related activity purposes generally similar to those for which the funds were appropriated and distributed to the Indian tribe under the funding agreement.	None, but see the regulations: Yes, any funds remaining in an AFA at the end of the funding year may be spent for construction under the terms of the AFA (25 C.F.R. § 1000.245). No, a Tribe/Consortium may not reallocate funds from a construction program to a non-construction program unless otherwise provided under the relevant appropriations acts (25 C.F.R. § 1000.254). Yes, a Tribe/Consortium may reallocate funds among	None	**Reallocation of savings.** Section 408(f)(4) should be stricken because 25 C.F.R. §§ 1000.245, 1000.254, 1000.255 & 1000.400 regulate tribes' use of savings in a preferable manner that avoids potential conflicts with appropriations law.	We disagree. There is a compelling need for an express statutory provision in this area because the current Title IV regulations stray far from the general authority in the current Title IV statute. This is another example why new Title IV statutory authority is needed to more precisely implement the original congressional intent and not allow the regulatory process to make the Title IV program more restrictive than the Title V program.

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		construction programs if permitted by appropriation law or if approved in advance by the Secretary (25 C.F.R. § 1000.255). Yes, for BIA programs, the Tribe/Consortium may retain savings for each fiscal year during which an AFA is in effect. A Tribe/Consortium must use any savings that it realizes under an AFA, including a construction contract: (a) To provide additional services or benefits under the AFA, or (b) As carryover; and (c) For purposes of this subpart only, programs administered by BIA using appropriations made to other Federal agencies, such as the Department of Transportation, will be treated in accordance with paragraph (b) of this section (25 C.F.R. § 1000.400).			
408(g)(1)	If the planning and design documents for a construction project have been prepared by an Indian tribe in a manner consistent with the certification given by the tribe as required under subsection (d), approval by the Secretary of a funding agreement providing for the assumption of the construction project shall be deemed to be an approval by the Secretary of these construction project planning and design documents.	None, but see the regulations: Except as provided in § 1000.256, the Secretary may review and approve planning and design documents in accordance with terms negotiated in the AFA to ensure health and safety standards and compliance with Federal law and other program mandates (25 C.F.R. § 1000.249(a)). [T]he Secretary must retain project funds to ensure proper health and safety standards in construction projects. Examples of purposes for which bureaus may retain funds include: **** (c) Providing for sufficient	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 amendment thereof which results in a significant change in the original scope of work (25 U.S.C. § 458aaa-8(f)).	**Secretary's approval of planning and design documents.** Section 408(g)(1) should be stricken because it goes beyond the Part 1000 regulations and Title V, to the detriment of the Secretary's ability to oversee planning and design of construction projects. 25 C.F.R. §§ 1000.249 & 1000.256 allow the Secretary to review and approve planning and design documents; to retain funds so that she can monitor design during construction; and to require corrective action during construction. By contrast, § 408(g)(1) allows a tribe to consider that its planning and design documents have been	We disagree in part with the Federal comments. Given the tribal proposals (see above) regarding mandatory certifications by licensed engineers of all aspects of a project, the Secretary's responsibility is sharply limited and consequently the Federal concerns outlined here are not relevant. We agree in part with the Federal comments seeking, as in Title V, a requirement for further Federal approval of any "significant change in the original scope of work", and so would propose that the Title V (25 U.S.C. 458aaa-8(f)) language be added to the

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		monitoring of design...by the Secretary; and (d) Requiring corrective action during performance when appropriate (25 C.F.R. § 1000.256).		deemed approved by the Secretary so long as the tribe prepares planning and design documents consistently with the certification negotiated in the funding agreement. Title V allows the HHS Secretary an opportunity to approve planning and design documents before construction if (1) a tribe amends the planning and design documents after negotiating a construction project agreement and (2) the amendment results in a significant change in the original scope of work. Section 408(g)(1) renders ambiguous the Secretary's opportunity to approve significant changes in planning and design documents after a construction project agreement is negotiated. Section 408(g)(1) says that the Secretary's approval of a funding agreement shall be deemed to be approval of "*these* project planning and design documents" (italics added), if the documents are prepared consistently with the tribe's certifications. It is ambiguous whether the deemed approval extends to significant changes in the original planning and design documents.	existing language in 408(g)(1).
408(i)	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.	Regarding construction programs or projects, the Secretary and Indian tribes may negotiate for the inclusion of specific provisions of the Office of Federal Procurement and Policy Act and Federal acquisition regulations in any funding agreement entered into under this subchapter. Absent a negotiated agreement, such provisions and regulatory	Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction project conducted under this part (25 U.S.C. §	**Applicability of other law.** Section 408(i) tracks Title IV (see § 458cc-8(e)(1), except for the language, "or any other law or regulation pertaining to Federal procurement (including Executive orders)," which also appears in Title V (see § 458aaa-8(h)). With the exception of this language, § 408(i) can be stricken as unnecessary.	We disagree. As in Title V, there is a compelling need for an express statutory provision in this area because the current Title IV regulations stray far from the general authority in the current Title IV statute. This is another example why new Title IV statutory authority is needed to more precisely implement the original congressional intent and

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		requirements shall not apply (25 U.S.C. § 458cc-8(e)(1)). See also 25 C.F.R. § 1000.242 (same). But see 25 C.F.R. § 1000.143, which is made applicable by 25 C.F.R. § 1000.252 : May the bureaus negotiate terms to be included in an AFA for non-Indian programs? Yes, as provided for by section 403(b)(2) and 403(c) and as necessary to meet program mandates.	458aaa-8(h)).	The language quoted above should also be stricken because it would conflict with 25 C.F.R. § 1000.143, which allows non-BIA bureaus and offices to negotiate for terms that are "necessary to meet program mandates." Thus, § 408(i) should be stricken in its entirety.	not allow the regulatory process to make the Title IV program more restrictive than the Title V program.
409(d)	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	None	In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise (25 U.S.C. § 458aaa-7(a)).	**Timing of payments.** The Department is concerned whether funds can be transferred to tribes within 10 days after apportionment from OMB, as required by § 409(d)..	The IHS has no problem complying with this requirement and we see no reason why the Department cannot do so as well.
410	(a) Inclusion as Contract.--Except as provided in subsection (b), for the purposes of section 110, the term 'contract' shall include a funding agreement. (b) Contracts with Professionals.--For the period during which a funding agreement is in effect, section 2103 of the Revised Statutes of the United States (25 U.S.C. § 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. § 476), shall not apply to a contract between an attorney or other professional and an Indian tribe.	(1) Except as provided in paragraph (2), for the purposes of section 450m-1 of this title, the term 'contract' shall include agreements entered into under this part. (2) For the period that an agreement entered into under this part is in effect, the provisions of section 81of this title, section 476 of this title, and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply to attorney and other professional contracts by Indian tribal governments participating in Self-Governance under this part	(a) For the purposes of section 450m-1 of this title, the term "contract" shall include compacts and funding agreements entered into under this part. (b) Section 81 and section 476 of this title, shall not apply to attorney and other professional contracts entered into by Indian tribes participating in self-governance under this part. (c) All references in this subchapter to section 501 of this title are hereby deemed to include section 82a of this title (25 U.S.C. § 458aaa-10).	**Secretarial approval of agreements encumbering tribal land.** Section 410 can be stricken as unnecessary because § 458cc(h) and 25 C.F.R. 1000.404 already contain this provision. Besides, 25 U.S.C. § 81 has been amended and regulations have been promulgated to implement the amendments. Under 25 C.F.R. § 84.005, the Secretary does not approve tribal contracts or agreements unless they encumber tribal lands for seven or more years.	We agree.

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		(25 U.S.C. § 458cc(h)).			
411(b)	(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 60 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 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.	(A) A tribe may submit a written request for a waiver to the Secretary identifying the regulation sought to be waived and the basis for the request. (B) Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the Secretary shall either approve or deny the requested waiver in writing to the tribe. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. The Secretary's decision shall be final for the Department (25 U.S.C. § 458cc(i)(2)).	(1) An Indian tribe may submit a written request to waive application of a regulation promulgated under section 458aaa-16 of this title or the authorities specified in section 458aaa-4(b) of this title for a compact or funding agreement entered into with the Indian Health Service under this part, to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request. (2) Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation for a compact or funding agreement entered into under this part, the Secretary shall either approve or deny the requested waiver in writing. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. A failure to approve or deny a waiver request not later than 90 days after receipt shall be deemed an approval of such request. The Secretary's decision shall be final for the Department (25 U.S.C. § 458aaa-11(b)).	**Waiver of regulations.** Subsection 411(b)(4) should be stricken. The subsection parallels Title V (§ 458aaa-11(b)(2)). But the 90-day timeframe for responding to waiver requests can be difficult to meet when additional information is needed from a tribe or local BIA office in order to respond to a waiver request. The Secretary cannot responsibly exercise her waiver authority in all cases within a 90-day time limit.	We disagree. We think that the proposed timeframe is very reasonable and in fact has worked well with IHS under Title V. Moreover, if the Secretary needs additional information he can ask the tribe to extend the timeframe.
412	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 415(c)(1) --	Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under subsection (b)(2)	Nothing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian tribe under this or other applicable Federal law. Any	**Disclaimers.** Section 412 should be stricken as unnecessary because it parallels Title IV (see §§ 458cc(k) & 458ff(a)) on all but one point and, on that point, Title IV is preferable. Title IV allows	We disagree. The proposed language is consistent with and clarifies existing Title IV language.

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	(1) With respect to an inherent Federal function; (2) In a case in which the statute establishing a program explicitly prohibits the type of participation sought by the Indian tribe (without regard to whether 1 or more Indian tribes are identified in the authorizing statute); 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.	of this section and section 458ee(c)(1) of this title with respect to functions that are inherently Federal or where the statute establishing the program does not authorize the type of participation sought by the tribe: *Provided*, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under subsection (b)(2) of this section (25 U.S.C. § 458cc(k)). Nothing in this part shall be construed to limit or reduce in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 450f of this title or any other applicable Federal law (25 U.S.C. § 458ff(a)).	Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 450m-1 of this title (25 U.S.C. § 458aaa-14(a)).	the Secretary not to enter into funding agreements "where the statute establishing the program does not authorize the type of participation sought by the tribe." Section 412 would allow the Secretary to enter into funding agreements unless "the statute establishing a program explicitly prohibits the type of participation sought by the Indian tribe." Since most statutes do not refer to the possibility of Indian participation, and statutes predating Public Law 93-638 were not passed with the possibility of Indian participation in mind, section 412 would check the Secretary's exercise of discretion to discern when Indian participation, while not explicitly prohibited by a statute, is not authorized.	
413	(a) Mandatory application.--All provisions of sections 5(d), 6, 7, 102(c), 104, 105(f), 110, and 111 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 or title V shall be incorporated in any Interior 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	At the option of a participating tribe or tribes, any or all provisions of part A of this subchapter shall be made part of an agreement entered into under title III of this Act or this part. The Secretary is obligated to include such provisions at the option of the participating tribe or tribes. If such provision is incorporated it shall have the same force and effect as if set out in full in title III or this part (25 U.S.C. § 458cc(*l*)). All provisions of sections 450c(d), 450d, 450f(c), 450i, 450j(f), 450m-1, and 450n of this title shall apply to agreements provided under this part (25	(a) All provisions of sections 450c(b), 450d, 450e, 450f(c) and (d), 450i, 450j(k) and (*l*), 450j-1(a) through (k), and 450n of this title and section 314 of Public Law 101-512 (coverage under chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this part, shall apply to compacts and funding agreements authorized by this part. (b) At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this part, shall be made a part of a funding agreement or compact entered	**Application of other sections of the Act.** Section 413 should be stricken because Title IV (see §§ 458cc(*l*) & 458ff(c)) is preferable. Incorporating some Title V provisions into funding agreements, as § 413(b)(1) provides, would be undesirable. Title IV (see § 458ff(c)) already provides for mandatory application of the sections cited in § 413(a).	We disagree. The Department does not explain why the option of incorporating a provision from Title V is undesirable. The tribal view is that the option should be retained.

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	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 finding agreement.	U.S.C. § 458ff(c)).	into under this part. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this part. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement (25 U.S.C. § 458aaa-15).		
414(a)	(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) Timing.--All funds included within funding agreements shall be provided to the Office of Self-Governance not later than 15 days after the date on which funds are apportioned to the Department. (4) Distribution of Funds.--The Office of Self-Governance shall be responsible for distribution of	The Secretary shall identify, in the annual budget request of the President to the Congress under section 1105 of Title 31, any funds proposed to be included in agreements authorized under this part (25 U.S.C. § 458dd).	(a) (1) The President shall identify in the annual budget request submitted to Congress under section 1105 of Title 31, all funds necessary to fully fund all funding agreements authorized under this part, including funds specifically identified to fund tribal base budgets. All funds so appropriated shall be apportioned to the Indian Health Service. Such funds shall be provided to the Office of Tribal Self-Governance which shall be responsible for distribution of all funds provided under section 458aaa-4 of this title. (2) Nothing in this subsection shall be construed to authorize the Indian Health Service to reduce the amount of funds that a self-governance tribe is otherwise entitled to receive under its funding agreement or other applicable law, whether or not such funds are apportioned to the	**Budget request.** Section 414(a) should be stricken. Section 414(a)(1) tracks Title V language, but current Title IV language is preferable because § 414(a)(1) would likely require the Secretary to identify tribes' annual funding requests before funding agreements are negotiated. Section 414(a)(2) prevents the President from exercising discretion as to the amount of funding to seek from Congress for self-governance agreements and, therefore, constrains the President's budget requests as to other matters. Section 414(a)(3) is neither necessary nor desirable because the Department's internal organizational processes should not be dictated by statute. Section 414(a)(4), even though it tracks Title V language, should be stricken for the same reason.	We disagree. The proposed language is consistent with and builds on the provisions and principles that are presently contained in Title V.

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	all funds provided under this title. (5) 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.		Office of Tribal Self-Governance under this section (25 U.S.C. § 458aaa-12(a)).		
414(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 of Interior, under self-determination contracts, or under compacts and funding agreements.	None	(B) In such budget request, the President shall identify the level of need presently funded and any shortfall in funding (including direct program and contract support costs) for each Indian tribe, either directly by the Secretary of Health and Human Services, under self-determination contracts, or under compacts and funding agreements authorized under this part (25 U.S.C. § 458aaa-12(b)).	**Budget request.** Section 414(b) should be stricken because OMB is not receptive to identifying funding shortfalls in the President's budget.	We disagree. This provision is consistent with Title V.
415(b)(1) & (2)	The report under subsection (a) 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 bureaucracy;	The report shall-- (1) identify the relative costs and benefits of Self-Governance, (2) identify, with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance tribes and their members; (3) identify the funds transferred to each Self-Governance tribe and the corresponding reduction in the Federal bureaucracy; (4) include the separate views of the tribes; and (5) include the funding formula for individual tribal shares of Central Office funds, together with the comments of affected Indian tribes, developed under subsection (d) of this section.	The report under subsection (a) shall-- (1) be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds; and (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 their members; (C) the funds transferred to each self-governance Indian tribe and the corresponding reduction in the Federal bureaucracy; (D) the funding formula for individual tribal shares of all headquarters	**Contents of report.** Subsection 415(b)(2)(E) should be stricken because the Department identifies inherent Federal functions on an as-needed, case-by-case basis, and the Department's budget does not show expenditures in terms of inherently Federal functions vs non-inherently Federal functions.	We disagree. This provision is consistent with Title V.

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	(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.	(25 U.S.C. § 458ee(b)).	funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c); and (E) amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location (25 U.S.C. § 458aaa-13(b)(1) & (2)).		
415(b)(3) - (b)(5)	(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.	The report shall-- ... (4) include the separate views of the tribes; and (5) include the funding formula for individual tribal shares of Central Office funds, together with the comments of affected Indian tribes, developed under subsection (d) of this section. (25 U.S.C. § 458ee(b)(4)-(5)).	(3) contain a description of the method or methods (or any revisions thereof) used to determine the individual tribal share of funds controlled by all components of the Indian Health Service (including funds assessed by any other Federal agency) for inclusion in self-governance 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, beginning on the date of distribution); and (5) include the separate views and comments of the Indian tribes or tribal organizations. (25 U.S.C. § 458aaa-13(b)(3)-(b)(5)).	**Contents of report. SOL advice**: Subsections 415(b)(3)-(5) can be stricken as unnecessary because Title IV (see § 458ee(b)(4)-(5)) already addresses these matters, albeit in less detail. Subsections 415(b)(3)-(5) parallel Title V(see § 458aaa-13(b)(3)-(b)(5)). The differences between the proposed amendments and Titles IV and V create unnecessary inefficiencies for the Department. For instance, subsection 458aaa-13(b)(5) would require the separate views of each tribe to be included in the reports to Congress, while current Title IV allows the Secretary to consolidate statements of tribes for a more meaningful narrative. The difference between including the funding formula for individual tribal shares, which Title IV requires (see § 458ee(b)(5)), and describing the methods used to determine individual tribal shares, as subsection 458aaa-13(b)(3) would require, does not appear meaningful.	We disagree. This provision is consistent with Title V.
416(b)	(1) Membership.--A negotiated	A negotiated rulemaking	(1) A negotiated rulemaking	**Negotiated rulemaking**	

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	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. (2) Lead Agency.--Among the Federal representatives, the Office of Self-Governance shall be the lead agency for the Department of the Interior.	committee established pursuant to section 565 of Title 5, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be representatives of Indian tribes with agreements under this part (25 U.S.C. § 458gg(b)).	committee established pursuant to section 565 of Title 5, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this subchapter. (2) The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members (25 U.S.C. § 458aaa-16(b)).	committee. Subsection 416(b)(2) should be stricken because the Secretary should have discretion to determine whether there will be a "lead" bureau or office from Interior and who will lead Interior's team.	We agree.
416(d)	(1) Repeal.—All regulatory provisions under Part 1000 of Title 25 of the Code of Federal Regulations are repealed on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2004. (2) Effectiveness Without Regard to Regulations.—The lack of promulgated regulations shall not limit the effect of this Act. (3) Interim Provision.—Notwithstanding this subsection, any regulation under Part 1000 of Title 25, Code of Federal Regulations, shall remain in effect, at a tribe's option, in implementing compacts until regulations are promulgated.	The lack of promulgated regulations shall not limit the effect of this part (25 U.S.C. § 458gg(d)).	The lack of promulgated regulations shall not limit the effect of this part (25 U.S.C. § 458aaa-16(d)).	**Effect of lack of regulations.** Subsections (1) and (3) should be stricken because they would cause confusion in administration of self-governance. No regulations would be in force should any statutory amendments pass, and each tribe could decide for itself whether a particular repealed regulation would govern until new regulations were promulgated.	We disagree. We believe that keeping in place outdated and inconsistent regulations will lead to confusion and that the solution is to let the statute apply by its own terms until new regulations are promulgated.
418	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--	None in Title IV, but see 25 U.S.C. § 458ff(c), incorporating 25 U.S.C. § 450m-1(contract disputes) and see 25 C.F.R. Part 1000, Subpart R (Appeals).	In any appeal (including civil actions) involving decisions made by the Secretary under this part, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence--(1) the validity of the	**Appeals.** Section 418 should be stricken because, even though it parallels Title V (see 25 U.S.C. § 458aaa-17), it inappropriately subjects all decisions of the Secretary to the "clear and convincing" standard of proof,	We disagree. We believe that reassumption by the Department should be subject to the same high standard that Congress enacted for health programs in Title V.

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	(1) the validity of the grounds for the decision; and (2) the consistency of the decision with the provisions and policies of this title.		grounds for the decision made; and (2) that the decision is fully consistent with provisions and policies of this part (25 U.S.C. § 458aaa-17).	which exceeds the usual "preponderance of evidence" standard of proof in civil cases.	

Concerns raised by DOI in correspondence dated June 15, 2005.	**Tribal response to DOI issues noted in June 15, 2005 correspondence.**
1. A tribally proposed provision to allow tribes to invest advanced funds under the "prudent investment standard" is unacceptable to DOI. DOI views such investments as an unacceptable risk to the security of government funds for construction programs, functions, services, and activities. If tribes invest advanced funds in private securities and experience a loss, the Secretary is unable to replace those funds, and, should a tribe retrocede construction programs because of financial losses, the Secretary would have responsibility to complete the programs without funds.	We disagree. The prudent investment standard has been in place for the management of funds transferred to tribes under Self-Governance within the IHS since FY 1994. This tribally proposed provision is substantively identical to the provision contained in Section 508(h) of Title V and in the Title V regulations. *See* 42 CFR 137.100-101. The prudent investment standard provides a workable mechanism for ensuring that risk of loss is properly balanced against the ability of tribes to generate interest on funds that are transferred in a lump sum at the beginning of a funding year. As formulated in Title V and its implementing regulations, the prudent investment standard allows tribes to earn a higher return on their investment, while still providing meaningful standards that guide the level of risk that these funds should be subject to.
2. The DOI objects to any tribally proposed provisions in the amendments that would allow contracting of additional PFSAs that are carried out by bureaus and offices other than the BIA, while at the same time reducing the Secretary's discretion about contracting those PFSAs. DOI notes that tribes can already contract for non-Indian programs. *See* CFR § 1000.398; 25 U.S.C. § 458cc(b)(2) and § 458cc(c). DOI believes that the provisions would authorize tribes to contract for all programs of which tribes or Indians are primary or significant beneficiaries. Further, it believes that because the term "primary or significant beneficiary," is not defined it could, therefore, apply to any Department activities. Hence, any resident or entity in the US conceivably is a "significant beneficiary" of the Secretary's activities. The effect of these provisions would be to open up DOI PFSAs to non-competitive contract by tribes and entities designated by tribes The Secretary would lose control over the way that non-Indian government PFSAs are carried out.	We disagree and think that the Department's concerns reflect a misunderstanding about how Title IV will work if these amendments are enacted. The proposed provisions do not strip the Secretary's authority to ensure that PFSAs are carried out in a manner that protects all beneficiaries' interest. The provisions balance the requirement that the Secretary negotiate with tribes in a timely manner with provisions that spell out the Secretary's right to negotiate provisions in self-Governance agreements that protect the federal government's interests. The Secretary retains the right to reject a tribe's final offer for agreement language based on enumerated statutory criteria. The final offer process, timelines and rejection criteria that the tribes propose are the same as comparable provisions found in Section 507(c) of Title V. If the Department has concerns about the final offer process and criteria it should propose alternative criteria. In addition, the lack of a definition of "primary or significant beneficiary" that concerns the Department has been addressed in Title V in § 505(b)(2) and § 505(b)(2)(B). If the Department believes that defining this phrase is important, we recommend that it propose a definition for inclusion in the Title IV amendments for consideration by tribal representatives.
3. The DOI objects to provisions that would reduce the time limits for the Secretary to consider a contract proposal before having to approve or decline it and reduce the grounds on which the proposal may be declined. The DOI objects to concept of approval of a proposal based on a tribe's "final offer" and the reduction of grounds on which the Secretary can decline a funding agreement. The DOI believes that such provisions would unduly hamper the Secretary's ability to assure agreement terms that will serve the Secretary's Indian and non-Indian beneficiaries	We disagree. These provisions will not limit the Secretary's ability to negotiate agreement terms satisfactory to both parties, as DOI contends, but rather, we believe they are critical to ensuring that the negotiation process conclude on a timely basis, and that there is clarity about why the Secretary is rejecting a tribe's final offer. These provisions would mirror language in §§ 507(b) and (c) of Title V and the implementing regulations. *See* 42 CRF 137.134, 135, 142 and 144. Also, § 102(a) and (b) of Title I of the ISDEAA contain similar final proposal/declination process

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satisfactorily.				language and extensive regulations have been enacted implementing those provisions. *See* 25 CFR Part 900. The intent of this provision is to avoid having negotiations drag on for months, or breakdown altogether after years of contentious negotiations. These provisions seek to impose on the DOI no more thank what Congress has already agreed to in Title V.	
4. DOI believes that the current standard for re-assumption is high and that the proposed provision related to re-assumption would increase the difficulty for DOI to re-assume a PFSA. Further, DOI views the reassumption provision as going beyond that of Title V because the Title V provision only applies to Indian programs, whereas this provision would set imprudently high standards for re-assumption of both Indian and non-Indian programs.				The Tribal Teams believes that reassumption of a tribally run program should be a last resort for DOI to turn to. The proposed provisions regarding reassumption (*see* §§ 407(b)(1), 407(b)(2), 407(b)(3)(A) and 407(b)(3)(B)) expand the grounds for reassumption by DOI, and the Tribal Team believes appropriately balances the DOI's interest in having a mechanism available for immediate reassumption and the tribal interest on ensuring that the process can only be utilized in very limited circumstances.	
5. The DOI objects to the redesign and consolidation of trust programs and non-Indian programs, and the reallocation of funds for such programs, without Secretarial approval. The DOI believes that the proposed provisions would reduce the Secretary's ability to oversee construction activities contracted under Title IV. DOI believes that ultimate trust responsibility resides with the Secretary and that Secretarial approval of the redesign and consolidation of non-Indian programs and reallocation of funds for non-Indian programs is necessary in order for the Secretary to fulfill her responsibilities to non-Indian beneficiaries.				The Tribal Team disagrees and believes that redesign and reallocation authorities are central to the ability of Indian tribes to implement Self-Governance successfully and that reallocation and other provisions in Title IV must ensure maximum tribal flexibility to exercise that authority. The proposed provision at § 406(d) would bring Title IV's reallocation and redesign provisions in line with those in Section 506(a) of Title V. With regard to construction activities, one of the principle goals of the amendments, consistent with provisions in Title V, is to ensure that construction programs under Title IV are treated similarly to other non-construction PFSAs. Section 408(d) requires a tribe to certify that it will "adhere to building and other codes and architectural and engineering standards . . ." Section 409(g) provides that tribes shall provide the Secretary with progress and financial reports on at least a semiannual basis. Thus, under the proposed provisions, tribes will be required to comply with adequate codes and standards and the Secretary retains an active supervisory role to ensure compliance.	
6. The DOI objects to a number of the funding provisions in the proposed amendments because they require unworkable funding methods for non-BIA bureaus and offices. DOI is particularly concerned about construction projects and believes that the Secretary must retain a portion of the amount that would otherwise have been spent to carry out the projects in order to fulfill the Secretary's responsibilities. DOI acknowledges that some budgetary concepts are unique to the BIA and that due to annual appropriations fluctuations, non-BIA bureaus and offices need flexibility to negotiate funding on an annual basis. DOI considers the provision for OSG to disburse funding to tribes within 15 days of apportionment to the Department as unworkable, particularly for non-BIA funding agreements because bureaus and offices usually assume responsibility for monitoring the use of funds that they disburse. Therefore, OSG is not equipped to monitor funding agreements with non-BIA bureaus and offices.				We understand that the budget and financial management systems of non-BIA bureaus and agencies may not, at the present time, be in a position to accommodate all of the financial implications of the proposed amendments. We believe that these issues are more appropriately dealt with in the implementing regulations. The proposed amendments are the beginning not the end point to improving the interaction between DOI bureaus and Indian tribes under Self-Governance. With respect to construction programs and the concerns raised by DOI, the intent of the proposed amendments is to make the administration of Title IV construction programs on a par with the administration of Title V construction programs, which have been successfully administered under the Title V implementing regulations. We believe that similar provisions can be put in place that would similarly ensure the successful administration of construction programs under Title IV.	

[redacted]

Melanie Benjamin

Office of the Chief Executive

STATEMENT OF
MELANIE BENJAMIN, CHIEF EXECUTIVE
MILLE LACS BAND OF OJIBWE

September 20, 2006
Before the Senate Committee on Indian Affairs
Oversight Hearing on Tribal Self-Governance

Good morning, Mr. Chairman, Mr. Vice Chairman, and members of the Committee. My name is Melanie Benjamin. I am the elected Chief Executive of the Mille Lacs Band of Ojibwe.

I have two points to make in my testimony today. First, I will identify what hinders the widespread tribal desire to expand self-governance authority and participation levels among tribes. And second, I will suggest a practical step that the Congress can take to remove obstacles to greater tribal self-governance. But first, I will give a brief background.

BACKGROUND

A. Mille Lacs Band History and Structure

A century ago, after our lands were stripped away from us by both law and lawlessness, the U.S. Congress referred to us as the "homeless nonremoval Mille Lacs Indians" and restored to us a small fraction of our original lands. That land today comprises the center of the Mille Lacs Indian Reservation in central Minnesota about two hours' drive from Minneapolis. Most of our approximately 3,800 tribal members live on or near our checker-boarded Reservation and its three separate Reservation Districts.

Mille Lacs Band of Ojibwe
43408 Oodena Dr.
Onamia, MN
56359

In the 1980s we organized our constitutional government into three branches of government, with an Executive, a unicameral Legislature, and an independent judiciary. Over the past two decades, through a combination of self-governance authority and the exercise of lawful governmental gaming, our Band has been transformed from the darkest of nights into a bright new day.

B. Leadership in Self-Governance

I am proud to say that the Mille Lacs Band has been a leader among other Tribes in seeking greater tribal self-governance authority and in putting it into practice. The Band was among the first ten Indian Tribes to participate in self-governance with the Bureau of Indian Affairs (BIA) in the late 1980s and the first Tribe to negotiate an agreement with the Indian Health Service (IHS) in the early 1990s.

We will always be grateful to you, Chairman McCain, and to a handful of your colleagues, for having been responsive, time and time again, to tribal calls for writing into federal statute greater tribal self-governance authority that curbs the federal bureaucracy's insatiable appetite to dominate tribal operations. Congress, at your behest, has repeatedly had to step in with statutory changes to correct the tendency of federal agencies to place a strait-jacket on tribal authority, priorities, administration, and programs. Today, we urge you to step in again and change the law to remove more obstacles to tribal self-governance.

OBSTACLES TO TRIBAL SELF-GOVERNANCE

As you know, Mr. Chairman, it was the scandal of a corrupt and wasteful BIA, uncovered by the *Arizona Republic* newspaper in 1987, that led the Congress to impose by law upon the BIA a "demonstration" project for tribal self-governance in 1988. Congress expanded that authority in 1991 to IHS, made it permanent for Interior in 1994 and, in 2000, made it permanent for IHS. In each of these enactments, Congress made specific changes to the law to remove obstacles to greater self-governance. In each case, Congress had to amend the statute to correct what the federal agencies either had distorted by regulation and practice or had balked at implementing.

A. Over-Reach by Federal Agencies

Each of the previous four congressional reform efforts was embraced in rhetoric but opposed in practice by the Administration, regardless of political party or leadership. The message of the federal agencies has always been – 'we cannot trust the tribes to do better for themselves than we are able to do for them.' This is not a position rooted in partisan ideology. It is instead pure paternalism, fed by an institutional desire to preserve itself, its power, its prerogatives, and its personnel at all

Of course there will be mistakes made by tribes in the exercise of self-governance authority. But there are built-in correctives. First, the people closest to the action – the tribal member constituents and beneficiaries – hold the power to correct tribal leaders through the ballot box and other political restraints available in tightly-knit Reservation communities. Second, stringent audits and corrective actions are required. Third, federal criminal sanctions against misappropriation of funds apply. And fourth, the tribal self-governance movement is very protective of its reputation and encourages inter-tribal cooperation and assistance.

B. Involuntary Transfer of Power

Federal agencies do not give up power easily or willingly. Whether a transfer of power is required by a President or a Secretary or by an Act of Congress, those involved in implementation have many opportunities to blunt, curb, avoid or undermine directives to transfer authority to tribes. The resistance to change is great in an entrenched bureaucracy whose primary reason for existence is to exercise authority over others. The more precise the statute, the less latitude is left to the bureaucrats to resist the change intended by Congress.

Congress has had to amend the self-governance statute four times. Each time, it has done so to correct distortions that have been made to the statute by the federal agencies. We are again at such a point with Title IV and its application to the BIA.

C. Stifling Policies and Procedures

Federal agencies want to impose uniformity that is inflexible and unresponsive to local needs and priorities. One size does not fit all. There are many ways to a common objective. The specifics of what works in Window Rock may not work as well in Onamia.

The rationale for detailed policies and procedures, for program manuals, negotiation guidelines, and regulations, is that a tribe won't get it right without using the bureaucracy's cookie cutter. It is at its root a fundamental lack of trust in tribes to seek their own best interests and an unwillingness to let go of control so that leaders closer to the people served may govern their own people.

D. Conflicting BIA and IHS Requirements

contain provisions that differ from each other and thus require self-governance tribes to operate separate administrative structures and systems for programs funded by IHS and BIA. Congress expanded tribal authority and flexibility when it enacted Title V governing IHS-funded programs. But the same tribes still labor under the more restrictive authority of Title IV governing BIA-funded programs. These dual requirements are an administrative and cost burden that weighs against more tribes assuming more federal program administration under self-governance authority.

THE BOOTSTRAP AMENDMENT – A PRACTICAL WAY TO EXPAND SELF-GOVERNANCE PARTICIPATION

A. The Last Six Years: Stalemate at Interior

In 1994, Congress enacted Title IV, which at the time was landmark permanent authority for tribal self-governance related to BIA. It was enacted over the objections of the Administration. The negotiated rulemaking that followed was contentious, concluding in late 2000 when Interior over-rode tribal interpretations of Title IV and published a rule that construed the statute to limit tribal authority in many key areas. Meanwhile, on a dual track in the late 1990s and informed by their difficult experience with Interior-BIA, the tribes worked with Hill allies and this Committee to reform IHS-related tribal self-governance authority. The result in 2000 was enactment of a detailed new Title V that expanded specific tribal authorities over IHS programs. The ensuing negotiated rulemaking process with IHS on this new Title V concluded quickly with the support of the tribes.

In 2001, the tribes began an effort to develop legislation to completely overhaul Title IV (BIA-Interior) modeled after the expanded tribal authority enacted in Title V (IHS) in 2000. The draft bill mandated strict timeframes, clarified appeal rights, and expanded tribal flexibility in administration. Many other ambiguities in Title IV were clarified so that, like with Title V, there would be little left to argue about in the regulations. Negotiations between tribal leaders and a succession of Interior Department officials on the tribal draft bill over the last five years have been protracted and unsuccessful.

B. A Simple Solution – "Bootstrap" Title V Authority Into Title IV

Given the complications arising from a detailed bill, the tribes crafted an alternative "bootstrap" amendment that simply would allow any Indian tribe to elect to apply existing Title V authority to its BIA-Interior self-governance activity. Several Senate (e.g., May 12, 2004, S. 1715) and House hearings were held on the larger and bootstrap alternatives, and the

larger bill was reported at the end of 2004 but was not acted upon by the Senate.

The attempt to gain Interior support for the detailed tribal bill to conform Title IV to Title V is basically at a stalemate today, and has been for years. Bureaucratic opposition has stalled all progress. So the tribes now ask that the Committee support enactment this year of a simple alternative statutory amendment that borrows from something the Congress did a decade ago – authorize any self-governance tribe to apply the same flexible authorities to its Interior-funded programs that Title V permits a tribe to apply to its IHS-funded programs. We ask that the Committee secure enactment of this technical amendment before adjournment.

In 1996, Congress adopted a similar "bootstrap" amendment you sponsored, Sen. McCain, that applied the latest reforms of Title I (self-determination) to Title III and IV (self-governance) administration. The bootstrap amendment we ask you to consider would, in substance, simply add the phrase "Title V" to the bootstrap provision in existing law, at 25 U.S.C. 458cc(l) so that Title V reforms, like Title I reforms, may be applied by any tribe to its Title IV program authorities.

The rationale for this is plain and simple -- if the IHS has survived the application of Title V provisions over the past five years, so too can Interior. Having the same rules apply to all tribal self-governance operations of a tribe like Mille Lacs will enable us to run a more efficient tribal administration with less duplication of effort and greater cost sharing. Timeframes, reporting requirements, control structures, systems architecture, fiscal management and investment, and other activities can be made more congruent. Such bootstrap authority would offer the Mille Lacs Band and other tribes a greater potential to better coordinate all our federal programs at the tribal level and thereby increase the program benefits to our people.

C. The Specific Benefits of "Bootstrap" Authority

The "bootstrap" would allow an Indian tribe, at its discretion, to apply any provision of enacted Title V authority to its negotiation and administration of BIA-Interior funds. This would capture the improvements made by Congress in 2000 regarding IHS and extend them to BIA-Interior. Some examples of the added authority include: (a) greater eligibility to participate; (b) simplification of the application process; (c) strict timeframes for application, negotiation, decision-making, and dispute resolution; (d) more flexible tribal administrative authority; (e) expanded tribal investment authority over advanced funds; and (f) cost savings and efficiencies realized from allowing a tribe to conform its administrative

practice regarding BIA-funded programs to that of its IHS-funded programs.

The bootstrap amendment is the kind of simple, house-keeping legislative reform that can have lasting positive impact. It would adopt the extensive work done by Congress in 2000 on Title V and apply it to Title IV at tribal option. Its enactment would remove many of the known federal obstacles to full tribal participation in self-governance at BIA-Interior. Presumably BIA-Interior would take no position on or oppose the bootstrap amendment, but their grounds for any opposition would likely not be very compelling.

Attached is a copy of the bootstrap bill language previously prepared by the Senate Office of Legislative Counsel and considered by the Committee in 2002. The only substantive change to existing law it would make is to add the words "Title V" to 25 U.S.C. 458cc(l).

CONCLUSION

For six years we have tried to negotiate with Interior to gain its agreement to add to Title IV (BIA) the reforms made by Congress to Title V (IHS). We have not succeeded. A simpler approach is for Congress to enact legislative "bootstrap" authority this year, patterned after what it did in 1996, which would allow a self-governance tribe to apply Title V authority to its Title IV agreements with Interior.

The broader Title V self-governance authority has worked well at IHS where there is widespread participation by tribes in self-governance. We believe tribal participation would expand if Title V was applied, at tribal option, to Interior-BIA agreements. More efficient and responsive tribal program administration is not the only product of expanded tribal self-governance authority. Broad-based and sustained economic development and growth also follows where a tribal government exercises self-governance, according to research conducted by Harvard University's Kennedy School of Government.

From our first days in tribal self-governance, the vision of the Mille Lacs Band has been to move closer to a large, comprehensive block-grant program that includes all of the federal dollars we are eligible to receive. We do not want to have to go through the State of Minnesota for any federal flow-through dollars, and we want the flexibility to determine our own priorities and to reprogram federal funds at all levels of the federal government. We would propose a new demonstration project, similar to the "New Federalism" proposed years ago, that is rooted in the federal trust responsibility and includes a Department of Indian Affairs that administers all Indian programs. And we would be pleased to work with you and this Committee to that end. However, as a very interim step, we need quick enactment of this "bootstrap" Title V authority for Title IV. And so we ask the Committee to marshal its energies and persuade Congress to enact this "bootstrap" amendment in the closing days of this Congress.

Thank you for this opportunity to express the views of the Mille Lacs Band of Ojibwe, and for your work, Mr. Chairman, and the work of this Committee over the years in supporting tribal self-governance at the request of tribal governments and in the face of resistance from the federal agencies.

Miigwetch.

Attachment: "Bootstrap" amendment language

"(B) DESCRIPTION OF CLAIM.—A claim described in this subparagraph is—

"(i) a claim by a person for a fee for services relating to an appeal described in paragraph (1) that are performed on or after March 29, 1996; or

"(ii) a claim by a person for a fee for services that—

"(I) is asserted on or after March 29, 1996; but

"(II) is for a fee for services relating to an appeal described in paragraph (1) performed before that date.".

(b) INCORPORATION OF SELF-DETERMINATION PROVISIONS.—Section 403 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 458cc) is amended by striking subsection (l) and inserting the following:

"(l) INCORPORATION OF SELF-DETERMINATION PROVISIONS.—

"(1) IN GENERAL.—At the option of any participating Indian tribe, any or all of the provisions of title I or V shall be incorporated in a compact or funding agreement entered into under this title.

"(2) FORCE AND EFFECT.—A provision incorporated under paragraph (1) shall—

"(A) have the same force and effect as if included in this title; and

"(B) be deemed to—

"(i) supplement or supplant any related provision in this title, as appropriate; and

"(ii) apply to any agency subject to this title.

"(3) TIMING.—In any case in which an Indian tribe requests incorporation of a provision under paragraph (1) during the negotiation stage of a compact or funding agreement described in that paragraph, the incorporation shall—

"(A) be considered to be effective immediately; and

"(B) control the negotiation and any resulting compact or funding agreement.".

Subtitle D—Indian Arts and Crafts

SEC. 10401. INDIAN ARTS AND CRAFTS ACT AMENDMENTS.

Section 2(g) of the Act of August 27, 1935 (25 U.S.C. 305a(g)), is amended—

(1) in paragraph (1), by inserting "trademarks for" after "products and";

TESTIMONY OF
CHAIRMAN DELIA CARLYLE
ON BEHALF OF THE
AK-CHIN INDIAN COMMUNITY

BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

September 20, 2006

Introduction

Good Morning, Mr. Chairman, Mr. Vice-Chairman and other distinguished members of this Committee.

My name is Delia Carlyle and I am the Chairman of the Ak-Chin Indian Community.

The Ak-Chin Indian Community Reservation was established in May 1912 and comprised 47,600 acres. A few months later, the Reservation was reduced by more than half to its present day size of 21,840 acres. The Community is located approximately 35 miles south of Phoenix, Arizona, near the Gila River Indian reservation. We are a small tribe with 767 enrolled members.

Ak-Chin is an O'odham word which means "people of the wash." The term refers to a type of farming that depends on the area's washes where our ancestral people planted beans, corn and squash which were irrigated from the wash runoff from storms.

Today, the Ak-Chin Indian Community ("Community" or "Tribe") is being impacted by hyper-growth in our area. We were once a small, rural farming village. Today, however, the area is one of the fastest growing suburbs of Phoenix. In the year 2000 there were about 1000 people in the adjacent town of Maricopa.[1] In 2004, the town had grown to over 5000 people.[2] Last year the population swelled to approximately 18,000, and in a few years the population is projected to exceed 100,000 people.[3] The explosive growth has also brought big-city problems to the Community which adversely affect our air, water, land, culture and traditions. These problems, such as an increase in traffic, congestion, crime, drugs, pollution and other effects of rapid urban expansion - directly impact our children, elders, and our way of life. Thus, the need for timely and fully-funded self-governance programs is more important than ever to assist the Community in providing necessary services for our tribal members.

On behalf of the Ak-Chin Indian Community I would like to thank the Chairman, Vice Chair, and the other members of this Committee for holding this hearing on Indian self-governance programs.

Self-Governance

I am here today to speak about self-governance programs as they pertain to the Ak-Chin Indian Community. At Ak-Chin we have our Social Services, Criminal Investigator, Education, Roads Maintenance and other Consolidated Tribal Government Programs which include courts, enrollment and adult education in our self-governance compact.

In theory, self-governance was intended to allow an Indian tribe to consolidate all of its Bureau of Indian Affairs ("BIA") 638 programs, funds and reporting requirements into one self-governance compact. The primary objective of self-governance programs is to enable the tribe - not the BIA - to operate its own tribal programs. The tribe, therefore, delivers local, day-to-day services directly to its tribal members. Unfortunately, self-governance programs have strayed from their original intent to strengthen Indian self-determination and self-sufficiency.

Problems

One of the biggest problems for our Tribe's self-governance programs is that the BIA's Office of Self-Governance ("OSG") has become an additional layer of BIA bureaucracy. The OSG negotiator acts as a liaison between the Tribe and the BIA and Indian Health Services ("IHS") programs. The problem is that the negotiator is not a local person. In our case, our OSG negotiator is located over 1000 miles and three states away in Vancouver, Washington. Thus, they do not usually know the available or previously utilized local resources.

For example, my Tribe may need a social worker, teacher, nurse, therapist or police officer to help implement a self-governance program. Because there are no local resources through the OSG, my Tribe has to turn to the BIA Agency and/or Regional Office for administrative and technical support to implement and operate our self-governance programs. This creates several problems. First, there is no local BIA support because the BIA's Agency or Regional Office lost their technical support person who was let go or reassigned when OSG took over the program administration. Consequently, when that person left, all the local institutional knowledge and experience left as well.

Furthermore, tribes may be stuck in the middle of an OSG and Agency/Regional Office turf battle. At times, tribes pay the price for BIA internal strife when an Agency Office loses personnel and funding to the OSG, and the result is that the Tribe gets the bureaucratic runaround instead of its questions answered.

In addition, technical assistance funding is practically gone. This hurts tribal program development because of the lack of BIA program technical assistance and support. This is especially true for navigating through the complex funding formula process.

A significant problem is getting the available funding drawn down to the Tribe. It seems that streamlining the funding process would be another good start. There are still too

many bureaucratic layers involved. It should not take over two years to have funds drawn down to my Tribe.

The draw down process must be streamlined. We deal constantly with different people in multiple BIA departments giving us their different interpretations of how and when the funding will be sent to the Tribe. In the end, we still have *not* received our roads funding.

For example, in our case, we are still waiting for our fiscal year 2004 reservation roads funding. Because of the hypergrowth in our area, roadway infrastructure is a major need. From 2004 to the present, we were promised almost $200,000 for road construction from OSG. Consequently, we planned and negotiated with the County and State for a shared roadway to alleviate the massive traffic congestion. The road was built, but the funding did not come in. My Tribe, therefore, had to cover the funding gap which meant that other Tribal programs, such as meals and services to the elderly were cut, as well as budget cuts to early childhood development programs to make up for the self-governance shortfall. Finally, we have recently been informed by OSG that the funding should be available soon but the amount is less than originally promised.

Again, these funds are already authorized and appropriated, but my Tribe gets excuse after excuse from OSG that the BIA Central Office has not forwarded the funds. Even when funds are received, they are generally not for the entire amount. When asked where the remainder went, the Tribe usually gets a bureaucratic explanation that is lost in funding formula doublespeak. At a minimum, it would be nice to know where the Tribe's funds went.

Another glaring problem is the expanded use of "administrative holdbacks" by the BIA. In short, the BIA Central Office is not releasing the full amount of authorized and appropriated funds for tribes and holding back about 5-10% of tribally earmarked funds. This is a direct violation of Section 405 of the Interior Appropriations Act which requires any holdbacks to be approved by the Appropriations Committee. In this case, there has been no such approval. (Exhibit A).

In some cases, the BIA claimed that hurricane relief or *Cobell* litigation fees consumed the funds. (Exhibit B). In addition, at times, we have been told by staff within the BIA, that instead of the funds going to tribes, those funds are returned to the Treasury. In any case, the funds are not going to tribal programs. As a result, tribes have to cut other much needed tribal programs to make up for the holdbacks.

Recommendations

Positive impact would come simply from the BIA following federal law and not enabling administrative holdbacks. Section 405 of the Interior Appropriations Act *prohibits* administrative holdbacks and requires the BIA to send the full amount of authorized and appropriated funds directly to tribes unless the holdbacks were approved by the Appropriations Committee.

It seems that streamlining the funding process would be another good start. There are still too many bureaucratic layers involved which breed confusion and uncertainty. In addition, we respectfully recommend limiting the number of tribes per negotiator and rewarding good negotiators while getting rid of the ineffective ones.

Tribes also want a collaborative and cooperative partnership with the BIA and OSG. Moreover, there needs to be better coordination between the OSG and the Local BIA Office to actually deliver administrative, technical, and support assistance to tribes.

In conclusion, Mr. Chairman and Committee members, I would like to thank all of you for this opportunity. Our Community has high hopes that this Committee will address the problems of self-governance and we look forward to working with you toward solutions.

Thank you.

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[1] 2000 U.S. Census
[2] 2005 U.S. Census Bureau, Special Census
[3] City of Maricopa Planning Department

A

117 STAT. 1318 *Public Law 108-108*, Title III, section 343 *"Estimated overhead charges, deductions, reserves or holdbacks from programs, projects and activities to support government-wide, departmental, agency or bureau administrative functions or headquarters, regional or central office operations shall be presented in annual budget justifications. Changes to such estimates shall be presented to the Committees on Appropriations for approval."*

Bureau of Indian Affairs Reserves or Holdbacks

The Bureau of Indian Affairs (Bureau) allocates funds for regional and headquarters overhead, administrative services and personnel services through separate program sub-elements within all of the Activities. It is not standard practice to routinely hold funding allocations in reserve for any of these administrative functions.

However, if unplanned, high priority Departmental and Bureau projects require additional funding, the Bureau may hold back a percentage of Operation of Indian Programs and Construction FY 2006 allocations. For example, in 2003 the Bureau held back 0.4% of OIP and construction to fund unplanned the Activity Based Costing deployment project and the expanded trust fund audit. At this time, no holdbacks are planned for 2006.

Bureau of Indian Affairs to Department of the Interior charges and deductions

Two tables are attached that reflect data for collections under the Working Capital Fund (WCF) centralized and direct billings.

B

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 26 2006

Dear Tribal Leader:

This letter is to inform you about activities in the *Cobell v. Norton* case that has had an effect upon the financial resources available to carry out Indian programs.

In response to plaintiff's motion for attorney fees pursuant to the Equal Access to Justice Act, for activities through the Phase 1.0 Proceeding, the U.S. District Court issued an Order requiring the prompt payment of a "total Interim Fee Award" in the amount of $ 7,066,471.05. The components of the fee award include:

FEES

Dennis Gingold	$ 2,007,032.16
Thaddeus Holt	$ 490,678.40
Mark Brown	$ 79,947.77
Kilpatrick Stockton	$ 406,097.60
Native American Rights Fund	$ 1,502,311.84
Geoffrey Rempel	$ 40,278.60
Stacy Gingold Bear	$ 7,929.60
TOTAL FEES	**$ 4,534,275.97**

EXPENSES

PriceWaterhouseCoopers	$ 2,531,838.40
Thaddeus Holt	$ 356.68
TOTAL EXPENSES	**$ 2,532,195.08**
TOTAL FEES & EXPENSES	**$ 7,066,471.05**

As this interim fee award was not a planned expense, the Department considered a range of options to comply with the Court's Order for prompt payment which was sent to plaintiff's counsel on January 18, 2006.

We utilized several sources of funds to pay the fee award. Please be advised that the Bureau of Indian Affairs contributed $3 million ($2 Million from an account used to reimburse tribal attorney's fees and about $ 1million generated by a 0.1% across-the-board retention of program funds, with some exclusions), the Office of Historical Trust Accounting contributed $ 2million from funds that were targeted to reconcile the ownership of Special Deposit Account funds, the Office of Special Trustee for American Indians contributed $300,000 of funds planned for trust improvement activities and the Department of Treasury contributed the balance of

$ 1,766,471.05. To the extent that these funds have been redirected to comply with the Court's Order, these funds are no longer available thus associated program activities will not be undertaken. Please ensure that care is taken to understand whether these financial changes affect your planned program activities.

Should you have questions about these financial matters, please feel free to contact Mary Jane Miller, Director, Office of Management and Budget, [(202) 208-6342] for further information.

Thank you for your patience and understanding.

Sincerely,

James E. Cason

James E. Cason
Associate Deputy Secretary

Red Lake Band of Chippewa Indians

Red Lake, MN 56671
Phone: 218-679-3341
Fax: 218-679-3378

TESTIMONY OF THE HONORABLE FLOYD JOURDAIN, JR.
CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS

Before the Senate Committee on Indian Affairs
Oversight Hearing on Tribal Self Governance and Pay Costs
September 20, 2006

Mr. Chairman, I thank you and the other distinguished members of the Committee for this opportunity to provide testimony on behalf of the Red Lake Band of Chippewa Indians. The focus of my testimony will be on the impacts upon Indian tribes of the inequitable and partial funding of uncontrollable fixed costs (particularly Pay Costs) to Indian Self Determination and Self Governance.

As you know, many Indian tribes have assumed, under the Indian Self-Determination Act ("ISDA"), the administration of core service programs and salaried positions previously carried out and filled by federal employees. As a matter of equity and fairness, the Congress regularly has encouraged the Administration to treat ISDA tribal employees the same as Bureau of Indian Affairs ("BIA") employees are treated with respect to pay cost increases and other fixed costs.

Without increased funds for fixed costs like pay cost adjustments, Indian tribes must either "absorb" pay cost increases by reducing their core program service delivery budgets or deny tribal employees the pay cost increases enjoyed by their federal colleagues. The result is an accumulating series of reductions in program service delivery year upon year. As the House Subcommittee on Interior Appropriations noted at page 6 of its FY 2005 Interior and Related Agencies report (House Rept. 108-542), "Absorption of costs associated with Federal pay increases ... and other unfunded fixed costs cannot continue indefinitely without further eroding core program capabilities. Over the past three years, ... Indian programs have absorbed over $500 million in unfunded costs."

I now will discuss several ways in which tribes have been shortchanged in their pay cost allocations. Some of these are unique to tribes, resulting in tribes being even more severely affected than other federal agencies.

1. In FY 2003-2005, and again in FY 2007, the President requested that only a portion of pay costs be actually funded, resulting in a permanent pay cost reduction for all tribes.

The failure to fully fund fixed costs over the last several years has resulted in a real, $1.2 billion cut to just the Department of Interior agencies. For tribes, these cuts have been particularly crippling, even exceeding the devastating cut to Tribal Priority Allocations (TPA) back in FY 1996. At Red Lake, we estimate these pay cost cuts have resulted in our core, recurring service funding levels being permanently reduced by $600,000 - $800,000 each year.

We believe it is much more difficult for tribes to absorb these cuts than for a large federal agency to absorb them. Salaries for tribal employees have quickly fallen far behind their federal counterparts. At Red Lake, we try to at least provide annual cost of living increases to our employees, but this must come from a reduction in core services. Step and grade increases, which federal employees are guaranteed, are the exception not the rule at Red Lake. As an example, we know our law enforcement and detention officers are paid less than BIA officers. As I speak, we are engaged in discussion with the BIA over this very issue. The BIA wants us to increase our officer salaries. We likewise want to increase our officer salaries. But this is an extremely difficult and frustrating process in light of the federal government's chronic failure to fully fund pay costs.

The House Interior Subcommittee language accompanying each of the last four Interior Appropriations bills was highly critical of the practice of the Administration requesting only partial pay cost increases, citing an inability of programs to absorb these uncontrollable costs leading to inevitable declines in services to the American people. The Subcommittee also "urged" the President to request full funding of uncontrollable costs (including pay costs) in all future budget submissions.

2. In FY 2006, the President requested, and Congress enacted, full pay cost funding. Nevertheless, when Interior distributed the appropriation, the Indian tribes received far less than full pay cost funding.

With the enactment of full fixed cost funding in the FY 2006 Interior Appropriations bill, we were hopeful we would see some relief from the pay cost cuts of previous years. To our dismay, when we received our pay cost allocation, we found it was less than 40% of our reported pay costs for FY 2006. The intent of Congress to fully fund these costs was thwarted by the BIA.

Only after many meetings with the BIA were we able to figure out how this happened. Red Lake submitted its FY 2006 pay cost worksheet in October of 2004 to then Assistant Secretary for Indian Affairs Dave Anderson. Included in our worksheet was $7.5 million in eligible salaries from which our FY 2006 pay costs were to be calculated. That should have generated a pay cost allocation to the Tribe in FY 2006 of approximately $262,500. Instead, BIA allocated only $97,262 to the Tribe.

We knew $97,262 was far less than we should have received. In FY 2000 for example, Red Lake received $153,895 in pay costs, and this was before the Tribe's new detention facility opened with more than 30 FTEs, which were new positions eligible for additional pay costs in FY 2006. We have tried to get from the BIA the formulas they use in reporting and allocating pay costs, but they will not provide them to us. We know, however, what we timely reported to BIA was consistent with BIA's uniform reporting requirements as our pay costs for FY 2006. The $262,500 we believe was owed the Tribe assumes a pay cost percentage increase of 3.5% for our FY 2006 $7.5 million in payroll salaries.

When the Tribe inquired of BIA's Office of Self Governance (OSG) why Red Lake received such a small amount of the FY 2006 pay cost funds, we were told that some other tribes failed to submit any pay cost data to BIA for FY 2006, so BIA decided to take the full funding that the President requested based on reported pay cost data and that the Congress appropriated based on reported pay cost data, and instead distribute the pay cost funds to every tribe regardless of whether they had submitted pay cost data or not. That means the "full funding" of reported pay costs of tribes like Red Lake was reduced, arbitrarily by BIA.

The Red Lake Band objected to BIA's redistribution of the pay cost increases appropriated by Congress. We do not believe BIA had authority to redistribute these funds in a manner different from the way they were requested and appropriated. The Tribe desperately needs our full amount of pay costs, based upon the pay cost information we diligently reported and supplied to the BIA for FY 2006, and which Congress subsequently enacted. Each year we are shortchanged in mandatory pay costs, and this loss is compounded annually because every year thereafter that money is missing from our recurring base budget.

3. In FY 2002, the OSG and BIA failed to include pay costs for Self Governance tribes in the President's budget, resulting in a permanent pay cost reduction for all tribes.

Each year, as part of the Interior budget process, tribes are required to report their pay cost data to the BIA. Prior to FY 2003, Self Governance tribes reported their data to OSG, who then supplied this data to the BIA. For FY 2002, Red Lake and other Self Governance tribes timely reported their pay cost data to OSG. But because OSG missed a deadline for submission of pay cost data to BIA, and because of apparent acrimony between BIA and OSG, the BIA did not include $3,350,000 in Self Governance tribes' pay costs in the President's FY 2002 budget request.

Red Lake was the first tribe to learn of this egregious activity, and we took action. In July of 2001, we wrote to the Chairmen of the Senate and House Appropriations Committees, notified them of BIA's failure to include Self Governance tribes' pay costs in the President's FY 2002 budget request, and asked them to add back these funds. The House agreed to our request, and fully restored the $3,350,000. The Senate failed to do

so. In the final FY 2002 Interior Appropriations bill, only one-half ($1,675,000) of Self Governance tribes' $3,350,000 in pay costs was restored.

To partially address this problem, the BIA pro-rated tribal pay costs in FY 2002, spreading the shortfall to all tribes, with the net effect that all tribes received only 75% of their legitimately due pay costs. No federal agencies were shorted in FY 2002, only tribes were shorted.

4. In FY 2003, and possibly other years, the BIA miscalculated Red Lake's share of pay costs, resulting in questions about BIA's pay cost allocation methodology.

Because of the unfair pay cost shortage in FY 2002 described above, Red Lake has scrutinized all subsequent pay cost allocations. Since that time, our annual allocations have dropped dramatically. Certainly part of the problem was the Administration's decision to request only partial funding of pay costs in FY 2003-2005. However, in FY 2003 we received only about 15% of the pay cost amount we estimated we should have received. We complained about this problem to the BIA for three years. Finally, this year the BIA admitted it miscalculated Red Lake's share of pay costs in FY 2003, and they did restore some of those funds.

The actions described above have caused us to question the BIA's ability to accurately account for scarce pay cost dollars. We believe there were errors in our pay cost allocations in FY 2005 and 2006 as well, but the BIA insists they only erred in FY 2003. In our FY 2006 Self Governance agreement, the BIA contractually agreed to provide the Tribe by April 1, 2006, a detailed analysis of pay cost allocations for FY 2002-2006. This was to include detail on methodology, to assist the Tribe in determining for ourselves the true story on pay cost allocations. As of today, the BIA has failed to honor their contractual obligations by providing the promised analysis.

Self Determination or Self Termination

This year marks Red Lake's 10th anniversary under Self Governance. But is there cause for celebration? Certainly there have been some good things that have come under Self Governance. We have gained increased flexibility, which has allowed us to shift program dollars to high priority areas. One example is Law Enforcement. Because of inadequate BIA Law Enforcement funding, Self Governance has enabled us to reprogram funds from other core service programs to cover our Law Enforcement annual shortfall of about $500,000 (albeit at the expense of those other programs).

Self Governance has given us the means to undertake some bold initiatives. As an example, during our first year as a Self Governance tribe, Red Lake initiated an effort to rehabilitate its commercial fishing industry. The Red Lake commercial fishery was the largest and longest continuously operated freshwater fishery in America. And it was the only Indian fishery regulated by the Secretary of Interior. Due in part to the failure of the Secretary to manage the fishery according to sound biological principals, populations of walleye, the principal economic species, collapsed by 1996. Red Lake teamed up with the State of Minnesota and the BIA, and we restored Red Lake walleye populations to

record levels. This effort has been hailed as the largest freshwater fish species recovery in modern day America, and it was conducted in record time. This represents a true Self Governance success story.

Unfortunately, impediments to Self Governance have been severe, especially when it comes to funding for core programs. Prior to FY 1996, tribes enjoyed relatively stable funding for their TPA programs, and even saw occasional inflationary adjustments. But tribes have never recovered from the devastating, $100 million cut to the TPA in FY 1996. That year, Red Lake saw an instant reduction of 16-18% to its core service programs including law enforcement, fire protection, social services, and natural resources. Recognizing the damage this caused, Congress provided a small, General Increase to the TPA in FY 1998. This was the last one we have seen.

During this, our 10th anniversary year as a Self Governance tribe, we find that the accumulation of 10 years of mandatory and targeted rescissions have now exceeded the TPA General Increase provided in FY 1998. This means we have gone backwards to where we were a decade ago, when the FY 1996 TPA cut was implemented. The only funding increase we could count on was pay costs. Therefore, our concern about pay cost shortfalls should be understood.

Self Governance and the Future

Currently, there is little financial incentive to encourage tribes newly contemplating Self Governance, or even for existing Self Governance tribes to maintain their status. Core service funding is less today than a decade ago, contract support has been chronically inadequate, and uncontrollable fixed costs have not been funded. It might seem easiest for some tribes to simply revert back to BIA Direct Service. At least, the BIA service providers would get their annual and step pay increases. But is that really in our best interest?

Instead of throwing in the towel, the Red Lake Band, and we believe other tribes, wish to continue on the Self Governance path. But to do so Mr. Chairman, we need your help. With regard to pay costs, there are several things that could be done.

Fixing the Pay Cost Problems

We ask the Committee to do the following:

1. Immediately engage the BIA about the process it used to collect and report FY 2006 pay cost data, to determine why tribes received such a small amount of pay costs in a year in which Congress enacted full fixed cost funding. A list of sample questions is attached to this testimony. Emphasis should also be placed on ensuring the BIA requests the full amount of FY 2008 pay costs tribes are eligible to receive. This emphasis is time critical as the Administration is in the final stages of preparing its FY 2008 request.

2. Request the Government Accountability Office (GAO) to investigate the methodology by which the BIA has distributed so-called "pay cost increases" within the "fixed-cost" FY 2006 accounts which the President's FY 2006 budget request described as "fully-

funded" and which the Congress funded as requested. This request should be designated as a high priority, as findings could have utility in shaping the FY 2008 appropriation. A sample letter to GAO is attached to this testimony.

3. Direct the BIA to provide the pay cost analysis to Red Lake, which it contractually agreed to do by April 1, 2006. The actual CY 2006 pay cost footnote language describing this analysis is attached to this testimony.

4. Communicate to the President and Appropriations Committees that, in FY 2008, nothing short of full fixed cost funding is acceptable. Although we appreciate the fact that Congress has asked the President to include full fixed cost funding in all future budget submissions, Congress needs to ensure this actually happens.

5. Conduct an oversight hearing, or request the GAO conduct an investigation, on the matter of pay for tribal workers under Self Determination contracts and Self Governance compacts. Although we are confident that such an investigation will reveal dramatic disparity in compensation between tribal workers and their federal counterparts, tribes have limited ability to conduct such an analysis on their own.

In closing Mr. Chairman, the failure to fully fund tribes' uncontrollable costs (especially Pay Costs) during the last 5 fiscal years has caused serious and irreparable harm to tribal core service programs. Errors, omissions, and miscalculations on the part of the BIA have compounded this problem. These matters are clearly disincentives for tribes to continue participating in or to expand their participation in Self Governance.

On behalf of the Red Lake Band of Chippewa Indians, and tribes across the country, I thank you for asking me to testify today, and for your assistance in drawing attention to the matters I've presented.

I have attached several documents to this testimony which will support some of my statements today.

Miigwetch

Attachment A

Footnote to Red Lake's CY 2006 Funding Agreement, Prepared by the Tribe, BIA, and OSG, and Agreed to By All Parties.

Line Item: 638 Pay Costs

This amount to be determined by Congressional appropriation. The BIA will make every effort to treat Red Lake Tribal employees the same as all other Tribal and Federal employees for purposes of pay cost adjustments in FY 2006. The BIA and OSG agree to make every possible effort to recover for the Tribe all 638 Pay Cost shortages for FY 2003-2005, which were legitimately due to the Tribe, but which were not received because of Administration oversight and/or internal errors or omissions. Further, the BIA and OSG agree to provide to the Tribe by April 1, 2006, a detailed Pay Cost analysis for the years 2003-2006, showing what the Tribe was eligible to receive each year based upon Pay Cost data the Tribe provided, the actual amount received, and the shortfall or unfunded amount. This analysis will include Law Enforcement. The analysis will separately show the total amounts received each year for Self Governance tribes, contracting tribes, and BIA programs, as well as the total amounts the BIA was eligible to receive for these programs based upon data it compiled. The above information has been requested by the Tribe to verify whether Red Lake, other Self Governance tribes, contracting tribes, and BIA programs were treated the same way with regard to the distribution of Pay Costs for the years 2003-2006. It is noted that the Tribe has proposed the above footnote language be applied to CY 2002. The BIA Midwest Region Director is trying to get more Pay Cost information on CY 2002, and agrees to provide this information to the Tribe if it is available. The BIA agrees it failed to provide $30,900 in base eligible Pay Costs to the Tribe in CY 2003. The BIA agrees to restore the full amount due, plus interest at the current Prompt Pay rate of 4.3%, to the Tribes CY 2006 AFA. The estimated restoration amounts are $34,465 (2003), $33,236 (2004), $31,424 (2005), and $29,651 (2006). The BIA further agrees these amounts shall be base transferred in CY 2006.

Attachment B

Sample Questions for BIA Regarding Pay Cost Data Collection, Reporting, and Allocation Procedures

1. Last year (FY 2006) the President requested, and the Congress fully funded, pay costs for tribal employees under P.L. 93-638 agreements at the same level as pay costs requested and provided for federal employees. Does the President's FY 2007 budget request fully-funded pay costs for such tribal employees at the same level as the pay costs it seeks for federal employees? If not, why not?

2. What dollar amount of fixed pay costs was requested in FY 2006? What amount is requested for FY 2007? Please explain what is the reason for any difference in these amounts.

3. After having timely and uniformly filed their pay cost data with BIA, some Indian tribes have reported that they nevertheless received less than 40% of the pay cost increases they were to receive for FY 2006. Are you aware of these complaints of inequitable distribution and if so, how will you resolve them?

4. Explain in detail what methodology was used by BIA to distribute the fully-funded pay cost increases in FY 2006?

5. Explain in detail the relationship between the pay cost data provided by tribes in response to the BIA data call for FY 2006, and the actual pay cost increase distribution decisions made for FY 2006.

6. If an Indian tribe failed to submit timely and uniform pay cost data in response to the BIA data call for FY 2006, did such an Indian tribe nevertheless receive pay cost increases in FY 2006? If so, what was the impact on the amount of pay cost increases received by an Indian tribe that did submit timely and uniform pay cost data?

7. Please provide the Committee with a report of the pay cost data the BIA has compiled for FY 2007, which data should reveal, region by region, the total amount of tribal salaries.

8. Detail the procedures BIA used to collect, report, and allocate pay costs for tribal and BIA employees for FY 2006. Include copies of actual memos, emails, worksheets, and other paperwork used to notify and collect the pay cost data.

9. Identify, by BIA Region, which tribes and BIA programs actually provided FY 2006 Pay Cost data, and which ones did not, if any. If some tribes and BIA programs did not submit FY 2006 Pay Cost data, describe any follow-up procedures BIA used to ensure due diligence in the collection and reporting of the Pay Cost data.

10. Identify which BIA Regions had Budget Officers vacant or non-existent at the time of the FY 2006 Pay Cost data call.

11. Describe in detail the process used to compile Pay Cost data received from tribes and BIA programs, and how the data was reported for the FY 2006 budget request.

12. Describe, and provide copies of, any instructions and directives from OMB and offices of the Department of the Interior on how FY 2006 Pay Cost requests were to be determined and reported.

13. Describe in detail the process BIA used to allocate FY 2006 Pay Costs received, to tribes and BIA programs. Include baseline statistics such as the total of salary data for tribes, the total of salary data for BIA programs, the respective totals of Pay Cost funds requested, the grand total of Pay Cost funds received, the total amount of Pay Cost funds allocated to tribes, and the total amount of Pay Cost funds allocated to BIA programs.

14. Of the total amount of FY 2006 Pay Cost funds the BIA received, what amount, if any, was provided to tribes and BIA programs which did not report FY 2006 Pay Cost data.

15. What procedures does BIA intend to implement for the FY 2008 budget process to ensure that Pay Cost data is fully, fairly, and accurately collected and reported for all tribes and BIA programs?

16. If the BIA failed to collect and report all eligible Pay Cost data for FY 2006 and FY 2007, does the BIA plan to collect the remaining amounts and request them in the FY 2008 budget request?

17. Is the BIA aware of any errors it made in the allocation of Pay Cost funds to any tribes and BIA programs during the last 5 fiscal years? If so, describe the errors found, how they were found, steps taken to check for additional errors, and steps taken to rectify the errors.

Attachment C

DRAFT LETTER TO GENERAL ACCOUNTABILITY OFFICE (GAO) re BIA FAILURE TO REQUEST ACCURATE TRIBAL PAY COSTS

Hon. David M. Walker
Comptroller General
General Accountability Office
441 G St., NW
Washington, DC 20548

Dear General Walker:

As you know, many Indian tribes have assumed, under the Indian Self-Determination Act ("ISDA"), the administration of core service programs and salaried positions previously carried out and filled by federal employees. As a matter of equity and fairness, the Congress regularly has encouraged the Administration to treat ISDA tribal employees the same as Bureau of Indian Affairs ("BIA") employees are treated with respect to pay cost increases and other fixed costs.

Without increased funds for fixed costs like pay cost adjustments, Indian tribes must either "absorb" pay cost increases by reducing their core program service delivery budgets or deny tribal employees the pay cost increases enjoyed by their federal colleagues. The result is an accumulating series of reductions in program service delivery year upon year. As the House Subcommittee on Interior Appropriations noted at page 6 of its FY 2005 Interior and Related Agencies report (House Rept. 108-542), "Absorption of costs associated with Federal pay increases ... and other unfunded fixed costs cannot continue indefinitely without further eroding core program capabilities. Over the past three years, ... Indian programs have absorbed over $500 million in unfunded costs."

In order for OMB and the Congress to provide pay cost increases, BIA must provide accurate and timely information on pay cost data. But there is evidence that in the past decade the BIA has failed to provide OMB and the Congress with accurate reports of the pay cost adjustment requirements of ISDA tribal programs, on par with those reported for federal programs, and that as a result, there has been a significant erosion in the funding of core tribal program capabilities.

Accordingly, the Committee requests that you investigate the methodology by which the BIA has distributed so-called "pay cost increases" within the "fixed-cost" FY 2006 accounts which the President's FY 2006 budget request described as "fully-funded" and which the Congress funded as requested.

For example, there are reports from certain Indian tribes, including the Red Lake Band of Chippewa Indians, that tribes who timely and fully reported their FY 2006 salary pay cost

data to BIA subsequently were shortchanged by BIA when BIA distributed pay cost funds for FY 2006. Please investigate whether this was in fact the case, and if so, why.

It appears that this problem may have been caused by a BIA decision to use incomplete data for purposes of its FY 2006 budget request despite BIA's assertion that it was a fully funded request, and then a subsequent decision by BIA to add belatedly discovered or erroneously compiled need data or estimates of need data after the FY 2006 budget request was submitted and funded but before distribution.

In light of your findings as to the FY 2006 distribution, we ask that you examine the basis for and completeness of the President's FY 2007 budget request for pay cost increases for tribal employees. In order for this investigation to have some utility to the Congress in shaping the FY 2007 appropriation, we ask that you give this investigation your priority attention.

Please contact _____ at 202-224-2251 if you have any questions.

Sincerely,

John McCain
Chairman

Byron Dorgan
Vice Chairman

Attachment D

Various Documents Follow Which Provide Background in Support of Testimony

RED LAKE BAND
of CHIPPEWA INDIANS

Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

DIVISION:

July 16, 2001

The Honorable Robert C. Byrd, Chairman
Committee on Appropriations
S-128 Capitol
Washington, D.C. 20510

Dear Chairman Byrd:

I request your assistance to provide $3,350,000 for Self Governance Compacts Fixed Costs in the Tribal Priority Allocations (TPA) account of the final FY 2002 Interior Appropriations bill. Because of a technical oversight by the Department of Interior, these uncontrollable fixed costs were not included in the President's FY 2002 budget request to Congress. The House of Representatives included this amount in its version of the FY 2002 Interior Appropriations bill, but the Senate did not.

These fixed costs represent uncontrollable pay cost adjustments for self governance tribes. These costs were included for federal agencies and contracting tribes, but again, because of an oversight self governance tribes were left out of the FY 2002 budget request. The tribes had nothing to do with this oversight.

As it is, tribes generally must manage their TPA programs with fewer staff (at lower wages) and with fewer dollars than their state and federal counterparts. The inclusion of uncontrollable fixed costs is a requisite component of tribes' budgets, just as it is for federal agencies.

In conclusion, the omission of $3,350,000 for Self Governance Compacts Fixed Costs in the TPA account of the FY 2002 Interior Appropriations bill was a technical oversight not of the tribes' making. The House of Representatives sought to correct this oversight when it included these funds in its version of the Interior bill. I ask that the final version of the FY 2002 Interior Appropriations bill include the requisite, and critically needed, $3,350,000 for Self Governance Compacts Fixed Costs.

Thank you.

Sincerely,

Bobby Whitefeather
Chairman
Red Lake Band of Chippewa Indians

RED LAKE BAND
of CHIPPEWA INDIANS
RED LAKE NATION HEADQUARTERS

PO Box 550, Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

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JIM WHITE
WILLIAM "BILLY" GREENE
RICHARD BARRETT, SR.
ADVISORY COUNCIL:
7 HEREDITARY CHIEFS

September 4, 2003

Honorable Terrence Virden
Director
Bureau of Indian Affairs
1849 C Street NW
Washington, D.C. 20240

RE: Urgent Request For Pay Cost Investigation

Dear Director Virden:

I am requesting your assistance to resolve a critical funding issue for the Red Lake Band of Chippewa Indians. We recently discovered that our CY 2003 Pay Cost funds (FFS Cost Code 39902) may not be increased above the $31,000 received to date. We originally suspected this was a just a partial release of funds, with the remainder to be forthcoming. Now we suspect there is a serious problem.

At our CY 2004 Self Governance negotiations on August 4, 2003, we asked BIA Midwest Region Director Larry Morrin, and OSG Policy Analyst Ken Reinfeld, to determine why we were shorted in Pay Cost funding, prior to our finalizing our CY 2004 Agreement. To date, they have been unable to provide an answer.

To put things in perspective, recent Pay Cost allocations for Red Lake are as follows:

CY 2000	$153,895
CY 2001	$144,343
CY 2002	$129,464
CY 2003	**$ 31,000**

You will recall, because of a technical oversight by the Department of Interior (the tribes had nothing to do with this oversight), Pay Costs for Self Governance tribes were not included in the President's FY 2002 budget request to Congress. Congress only partially rectified this problem, with the result that the BIA gave us only 75% of what we should have received in CY 2002. For CY 2003, it appears we have received *only 20%* of what we are due.

The Pay Cost funds received by the Band represent the *only* increase we receive for our TPA programs. As it is, we must manage our TPA programs with fewer staff (at lower wages) and with fewer dollars than our state and federal counterparts. The inclusion of full Pay Costs is absolutely vital.

I ask that you look into this matter immediately, and call me or Roger Head, Executive Administrator, as soon as possible. Thank you.

Sincerely,

George W. King
Chairman
Red Lake Band of Chippewa Indians

cc: Judy Roy, Secretary
Darrell Seki, Treasurer
Roger Head, Executive Administrator
Francis Brun, Tribal Administrator

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ABQ-03-005

TITLE: Tribal Pay Cost Shortages

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the largest component of the Bureau of Indian Affairs (BIA) budget, the Tribal Priority Allocations (TPA) account, provides direct funding for tribes to provide vital governmental services to Indian people, including law enforcement, justice, fire protection, education, social services, and resource management; and

WHEREAS, tribes are locked in a desperate struggle to protect the funding levels provided for these services, especially since the crippling, nearly $100 million cut in the TPA in FY 1996, with only one minor, general increase in the TPA since that time (FY 1998), and with the result that each tribe's TPA funding is less today than it was a decade ago; and

WHEREAS, the only general increase tribes could count on each year was a cost of living increase, known as the 638 Pay Cost account, and which is similar to what the Administration and Congress provide for federal workers employed by federal agencies each year; and

WHEREAS, due to federal administrative oversight and through no fault of the tribes, tribes received only 75% of their 638 Pay Cost funding in FY 2002; and

WHEREAS, due to an Administration decision, tribes received only 15% of their 638 Pay Cost funding in FY 2003, and are slated to receive only a small portion of their 638 Pay Costs in FY 2004; and

NCAI HEADQUARTERS
1301 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
202.466.7767
202.466.7797 fax
www.ncai.org

WHEREAS, because there have been no general TPA increases (except the minor one in FY 1998), tribes cannot absorb this repeated loss of pay cost increases without drastically cutting already inferior services to Indian people; and

WHEREAS, Title 25 of the Federal Code of Regulations, Part 12, Section 34 mandates that a tribal government which assumes the federal functions of law enforcement must pay its tribal law enforcement officers at least the same salary as a BIA officer performing the same duties ("Any contract or compact with the BIA to provide law enforcement services for an Indian tribe must require a law enforcement officer to be paid at least the same salary as a BIA officer performing the same duties." 25 CFR 12.34); and

WHEREAS, it is grossly inequitable and irresponsible for federal agencies like the BIA and OMB to fail to request from or defend before Congress parity in pay cost funding between federal and tribal employees; and

WHEREAS, it is grossly inequitable and irresponsible for the federal government to withhold Pay Cost increases to tribal programs but provide Pay Cost increases to federally-administered programs while at the same time the federal regulations require tribes to meet pay parity requirements; and

WHEREAS, the failure of the BIA, OMB and the Congress to ensure that Pay Cost parity between federal and tribal employees is protected seriously undermines the federal Indian policy that favors, pursuant to Public Law 93-638, as amended, the assumption by tribes of programs, functions, services and activities formerly carried out by federal employees.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby strongly urge the Administration and Congress to immediately restore full 638 Pay Cost funding for tribes in FY 2004 and in future years, and to consider restoring 638 Pay Cost funding not received in FY 2002 and FY 2003 through a special appropriations equitable adjustment.

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 60th Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, Albuquerque, New Mexico, on November 21, 2003 with a quorum present.

President

ATTEST:

Recording Secretary

Adopted by the General Assembly during 60th Annual Session of the National Congress of American Indians, held in Albuquerque, New Mexico, from November 17-21, 2003.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

DEC 24 2003

Honorable George W. King
Chairman, Red Lake Band of Chippewa Indians
P.O. Box 550
Red Lake, Minnesota 56671

Dear Mr. King:

Thank you for your letter of September 4, 2003, expressing your concerns about the Fiscal Year 2003 Pay Cost funding allocations. We apologize for the delay of our response to you.

During Fiscal Year (FY) 2003, the Department received only 15 percent of the identified Pay Cost for both Federal and tribal employees. The portion of the Pay Cost not funded must be absorbed by the Federal Government or tribe for their respective employees. We assure you the Pay Cost shortfall was shared equally by the Bureau of Indian Affairs and tribal governments.

We know this created a hardship for your Tribe, as well as all tribes entitled to receive Pay Cost funding. However, we will continue to work through the Department of the Interior, Office of Management and Budget and Congress to ensure they are aware of the impact these funding shortfalls have on Native American communities.

We distributed the same share of pay cost funding, including allocations for Self-Governance Tribes. We were unable to request the total amount needed to fund the full cost of the FY 2003 pay raise to Federal or tribal employees. We received only15 percent and had to absorb the remaining $7.2M for federal pay costs and $5.9M for the tribal pay costs.

If you have further questions please feel free to contact me at (202) 208-7163.

Sincerely,

Woodrow W. Hopkins Jr.
ACTING Principal Deputy Assistant Secretary – Indian Affairs

RED LAKE BAND
of CHIPPEWA INDIANS
RED LAKE NATION HEADQUARTERS

PO Box 550, Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

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ALLEN PEMBERTON
DONALD R. DESJARLAIT
DONALD J. "DUDIE" MAY
WILLIAM "BILLY" GREENE
RICHARD BARRETT, SR.

ADVISORY COUNCIL:
7 HEREDITARY CHIEFS

October 7, 2004

Honorable Dave Anderson
Assistant Secretary - Indian Affairs
1849 C Street NW
Washington, D.C. 20240

Dear Assistant Secretary Anderson:

I write to you for two purposes. The first is to transmit the Red Lake Band of Chippewa Indians FY 2004 Pay Cost data to be used in the FY 2006 budget process. The Office of Self Governance and Self Determination (OSG&SD) informed us that the BIA Central Office has a deadline of October 15, 2004 to receive all Pay Cost data by tribe and Region. We contacted BIA Midwest Region, who could provide us with no information on the subject, so there appears to be inadequate coordination with the Central office. In the past it has been the responsibility of the Regional Budget Officer to ensure Pay Cost data is submitted to Central Office on time. The problem appears to be that BIA Central Office made a decision not to fill the vacant Midwest Region Budget Officer position. This comes to the second purpose of this letter, which is to request you reverse the decision not to fill this key position. Concerns about this issue were raised by several regions at the most recent BIA Tribal Budget Advisory Council meeting.

Red Lake is particularly concerned about the Pay Cost issue. Pay Costs represent the ***only*** source of critical core service funding which receives an annual upward adjustment. Although these increases have themselves been sharply reduced the last three years, to preserve our ability to receive future adjustments it is essential that the Pay Cost data be compiled and submitted timely. At least one time (FY 2002 to be exact), tribes received only 75% of their Pay Cost funds specifically because the OSG&SD and BIA failed to meet their obligations to protect tribes interests.

The Regional Budget Officer plays a crucial role in ensuring tribes' receive all of the financial resources due them – a critical part of the Federal Indian trust responsibility. Meeting this trust responsibility requires substantial effort and focus at the Regional level, and includes but is not limited to budget preparation, justification and monitoring for several fiscal years at one time,

and gathering and processing requisite, time-sensitive data from tribes including budget justifications, unmet needs, pay costs, and recently mandated increases in financial reporting to the Office of Management and Budget. The need to fill the Midwest Region Budget Officer position is clear. Thank you.

Sincerely,

Floyd Jourdain, Jr.
Chairman
Red Lake Band of Chippewa Indians

cc: Michael Olsen, Principal Deputy Assistant Secretary for Indian Affairs
Brian Pogue, BIA Director
Debbie Clark, BIA Chief Financial Officer
Terry Virden, BIA Midwest Region Director
Ken Reinfeld, Office of Self Governance and Self Determination

PAY COST WORKSHEET

Red Lake Band of Chippewa Indians CY 2006 Pay Cost Data

TPA BASE SALARIES ($IN THOUSANDS)

PRGM CODE	PROGRAM TITLE	BASE SALARIES
39220	Other Aid to Tribal Govt.	51,042.00
392---	Consolid. Tribal Govt Prg (CTGP)	
39250	New Tribes	
39280	Tribal Courts	371,964.00
39270	Contract Support	1,440,636.00
	TRIBAL GOVT.	**1,863,642.00**
39310	Svcs to Children, Elderly & Fam	208,466.00
39320	ICWA	
39330	Welfare Assistance	38,815.00
39370	Housing Improvement Prg.	12,000.00
	HUMAN SERVICES	**259,281.00**
39110	Scholarships	82,345.00
39140	Johnson O'Malley	
39130	Adult Education	206,412.00
39120	TCCC's	
39190	Other, Education	
	EDUCATION	**288,757.00**
39430	Community Fire Protect.	202,887.00
	PUBLIC SAFETY & JUSTICE	**202,887.00**
39535	Job Placement & Training	
39510	Economic Development	51,796.00
39550	Road Maintenance	267,249.00
36730	Housing Development	60,989.00
	*COMMUNITY DEVELOPMENT	**380,034.00**
39605	Natural Resources, Gen	223,296.00
39610	Agriculture	
39630	Forestry	655,329.00
39640	Water Resources	72,098.00
39650	Wildlife/Parks	153,392.00
39660	Minerals/Mining	
	RESOURCES MANAGEMENT	**1,104,115.00**

PAY COST WORKSHEET

39710	Trusrt Svcs., General	
39720	Other Rights Protection	
39770	Other Real Estate Svcs.	102,172.00
	Probate	
39740	Environ. Quality Svcs/.	
39750	ANILCA	
39760	ANCSA	
	TRUST SERVICES	**102,172.00**

39810	Executive Direction	47,500.00
39820	Admin. Services	78,052.00
39830	Safety Mgmt.	
	GENERAL ADMIN.	**125,552.00**
	****TOTAL TPA****	**4,326,440.00**

NON TPA
OTHER-RECURRING

PROGRAM TITLE	
ISEP (Formula Funds)	
ISEP (Program Adjustments)	
Early Childhood Development	
Student Transportation	
Institutionalized Disabled	
Facilities Operations	
Area/Agency Technical Support	
Operating Grants	
Technical Assistance	
Endowment Grants	
EDUCATION	

Irrigation O&M	
Western Washington (Boldt)	
Columbia River	
Klamath Conservation Program	
Great Lakes Area Res. Mgmt.	
US/Canada Pacific salmon	
Upper Columbia United Tribes	
Lake Roosevelt Management	
Fish Hatchery Operations	135,680.00
Fish Hatchery Maintenance	
Tribal Mgmt. Development Program	
RESOURCE MANAGEMENT	135,680.00
TOTAL - ORP	**135,680.00**

PAY COST WORKSHEET

NON-RECURRING: ($IN THOUSANDS)

Noxious Weed Eradication	
Gila River Farms Project	
Forestry Development	277,019.00
Fire Preparedness	329,055.00
Waste Management Development	
Unresolved Hunting & Fishing Rights	
Minerals & Mining	
Endangered Species	
RESOURCE MANAGEMENT	606,074.00

Water Rights Negotiations/Litigation	
Real Estate Services	
Environmental Management	
Navaho/Hopi Settlement	
TRUST SERVICES	
TOTAL – NRP	606,074.00

SPECIAL PROGRAMS/POOLED OVERHEAD

Indian Police Academy	
Substance Abuse	
Law Enforcement Initiative	1,822,309.00
PUBLIC SAFETY & JUSTICE	1,822,309.00

United Tribes Technical College	
COMMUNITY DEVELOPMENT	

Facilities Operations	194,939.00
Facilities Maintenance	
GENERAL ADMINISTRATION	194,939.00
TOTAL PROGRAMS/POOLED	2,017,248.00

FEDERAL HIGHWAY TRUST FUND

93100	IRR PROGRAM	405,310.00
	TOTAL IRR	405,310.00

****TOTAL TPA****	4,326,440.00
TOTAL ORP	135,680.00
TOTAL NRP	606,074.00
TOTAL SPECIAL PRGM/POOL	2,017,248.00
TOTAL IRR	405,310.00

GRAND TOTAL	7,490,752.00

RESOLUTION OF THE BIA/TRIBAL BUDGET ADVISORY COUNCIL CALLING FOR A PAY COST ANALYSIS AND REPORT AND REIMBURSEMENT TO TRIBES FOR ANY PAY COST SHORTFALL

WHEREAS, the BIA Budget Advisory Council was established in 1999 to facilitate tribal government participation in the planning of the BIA budget and includes two tribal representatives from each of the 12 BIA regions; and

WHEREAS, self-rule by American Indians and Alaska Natives within the United States as separate sovereign governments predates the formation of the United States and these governments are acknowledged to be separate sovereign governments in Article I, Section 8 of the United States constitution; and

WHEREAS, through treaties and other agreements, and in exchange for appropriating from American Indians and Alaska Natives for its use vast tracts of land and the resources of those lands, the United States has accepted certain fundamental trust obligations to American Indians and Alaska Natives, including providing health care, education, housing social welfare, law and order, transportation, and many other services to American Indians and Alaska Natives; and also has accepted the role of trustee and manager of resources owned in trust by the United States for the benefit of American Indians and Alaska Natives; and

WHEREAS, the Snyder Act, 25 U.S.C. Section 13, and other sections of law encodify these obligations to American Indians and Alaska Natives, and the Indian Reorganization Act of 1934, 25 U.S.C. Sections 450 et seq., requires the Secretary of the Interior to consult with tribal governments on Federal funding concerning programs for American Indians and Alaska Natives; and

WHEREAS, the largest component of the Bureau of Indian Affairs (BIA) budget, the Tribal Priority Allocations (TPA) account, provides direct funding for tribes to provide vital governmental services to Indian people, including law enforcement, justice, fire protection, education, social services, and resource management; and

WHEREAS, tribes are locked in a desperate struggle to protect the funding levels provided for these services, especially since the crippling, nearly $100 million cut in the TPA in FY 1996, with only one minor, general increase in the TPA since that time (FY 1998), and with the result that each tribe's TPA funding is less today than it was a decade ago; and

WHEREAS, the only general increase tribes could count on each year was a cost of living increase, known as the 638 Pay Cost account, and which is similar to what the Administration and Congress provide for federal workers employed by federal agencies each year; and

WHEREAS, due to federal administrative oversight and through no fault of the tribes, tribes received only 75% of their 638 Pay Cost funding in FY 2002; and

WHEREAS, due to an Administration decision, tribes received only 15% of their 638 Pay Cost funding in FY 2003, and are slated to receive only a small portion of their 638 Pay Costs in FY 2004; and

WHEREAS, because there have been no general TPA increases (except the minor one in FY 1998), tribes cannot absorb this repeated loss of pay cost increases without drastically cutting already inferior services to Indian people; and

WHEREAS, Title 25 of the Federal Code of Regulations, Part 12, Section 34 mandates that a tribal government which assumes the federal functions of law enforcement must pay its tribal law enforcement officers at least the same salary as a BIA officer performing the same duties ("Any contract or compact with the BIA to provide law enforcement services for an Indian tribe must require a law enforcement officer to be paid at least the same salary as a BIA officer performing the same duties." 25 CFR 12.34); and

WHEREAS, it is grossly inequitable and irresponsible for federal agencies like the BIA and OMB to fail to request from or defend before Congress parity in pay cost funding between federal and tribal employees; and

WHEREAS, it is grossly inequitable and irresponsible for the federal government to withhold Pay Cost increases to tribal programs but provide Pay Cost increases to federally-administered programs while at the same time the federal regulations require tribes to meet pay parity requirements; and

WHEREAS, the failure of the BIA, OMB and the Congress to ensure that Pay Cost parity between federal and tribal employees is protected seriously undermines the federal Indian policy that favors, pursuant to Public Law 93-638, as amended, the assumption by tribes of programs, functions, services and activities formerly carried out by federal employees.

NOW THEREFORE BE IT RESOLVED, that the Pay Cost analysis and report, in the format as proposed by the Red Lake Band of Chippewa Indians it its January 6, 2005 letter to Assistant Secretary Dave Anderson, be completed as soon as possible, and be distributed to the tribes.

THEREFORE BE IT FINALLY RESOLVED, if any tribe received less Pay Cost dollars in 2002 through 2005 than the percentage distribution to the BIA dictates, then the Bureau of Indian Affairs shall reimburse those tribes who were shorted.

CERTIFICATION

The foregoing resolution was adopted at a meeting of the BIA/Tribal Budget Advisory Council at San Marcos Resort in Chandler, Arizona on February 17, 2005 with a quorum present.

Jim Gray, Co-Chair
BIA/Tribal Budget Advisory Council

Tex G. Hall, Co-Chair
BIA/Tribal Budget Advisory Council

RED LAKE BAND
of CHIPPEWA INDIANS
RED LAKE NATION HEADQUARTERS

PO Box 550, Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

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JUDY ROY, Secretary
DARRELL G. SEKI, SR., Treasurer

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GLENDA J. MARTIN
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ADVISORY COUNCIL:
7 HEREDITARY CHIEFS

February 22, 2005

Debbie Clark
Deputy Assistant Secretary for Budget
Bureau of Indian Affairs
~~1849~~ C Street NW
Washington, D.C. 20240

Dear Debbie:

As you requested, attached is a letter dated December 24, 2003, from Acting Principal Deputy Assistant Secretary Woodrow Hopper. As we informed you at the budget meeting last Friday, Mr. Hopper stated in this letter that Red Lake received only 15% of its Pay Costs in FY 2003. This letter was in response to our letter to BIA Director Terry Virden dated September 4, 2003 (copy also attached). It should be clear from examining these two letters, that there is a major discrepancy in the Pay Cost figures we received in CY 2003, versus the percentages you spoke of at the meeting.

You indicated that upon receipt of Mr. Hopper's letter, you would investigate Red Lake's Pay Cost allocations to determine if Red Lake received less than it should have in FY 2002 - 2005, and what adjustments may be due. In conducting this investigation, please bear in mind that Red Lake is a calendar year tribe, and usually receives one Pay Cost allocation each year from the Office of Self Governance and Self Determination. Per the terms of our Self Governance Agreement, this allocation should represent the distribution for the calendar year.

As you investigate the Pay Cost discrepancies, I ask that you send me the following information as soon as possible (please fax to me at 218/679-3378):

1.) For each of the years FY 2002-2005, what was the actual percentage allocation of calculated Pay Costs that the BIA received, as well as the dollar amount;

2.) What is the exact formula the BIA used when calculating its Pay Cost requests for each of the years FY 2002-2005;

3.) From the formulas and calculations identified in Item (2) above, what were the resultant dollar amounts for Pay Costs attributable to Red Lake *before* any reductions, for each of the years FY 2002-2005; and,

4.) What is the allocation methodology for Self Governance tribes like Red Lake, whose agreements are based on the calendar year.

I thank you in advance for your assistance with the above.

Sincerely,

Darrell Seki
Treasurer
Red Lake Tribal Council

cc: Chairman Floyd Jourdain, Jr.
Secretary Judy Roy
Red Lake Tribal Council District Representatives
Terry Virden, BIA Midwest Region Director
Bill Sinclair, Director of Self Governance and Self Determination

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February 16, 2006

Honorable Conrad Burns, Chairman
Honorable Byron Dorgan, Ranking Member
Senate Appropriations Subcommittee on Interior and Related Agencies
SD-131
Washington, D.C. 20510

Re: Pay Costs in FY 2006 Interior Appropriations Act

Dear Chairman Burns and Ranking Member Dorgan:

Thank you for enacting in FY 2006, for the first time since FY 2002, full fixed cost funding including pay costs. We must inform you, however, that the BIA has once again thwarted your intention and paid the Red Lake Band of Chippewa Indians (the "Tribe") less than 40% of the Tribe's reported pay costs for FY 2006.

The Tribe submitted its FY 2006 pay cost worksheet in October of 2004 to then Assistant Secretary for Indian Affairs Dave Anderson. Included in our worksheet was $7.5 million in eligible salaries from which our FY 2006 pay costs were to be calculated. That should have generated a pay cost allocation to the Tribe in FY 2006 of $262,500. Instead, BIA allocated only $97,262 to the Tribe.

We know $97,262 is far less than we should have received. In FY 2000 for example, Red Lake received $153,895 in Pay Costs, and this was before the Tribe's new detention facility opened with more than 30 FTEs, which were eligible for pay costs in FY 2006. We have tried to get from the BIA the formulas they use in reporting and allocating pay costs, but they will not provide them to us. We know, however, what we timely reported to BIA consistent with BIA's uniform reporting requirements as our pay costs for FY 2006. The $262,500 we believe was owed the Tribe assumes a pay cost percentage increase of 3.5% for our FY 2006 $7.5 million in payroll salaries.

When the Tribe inquired last week of BIA's Office of Self Governance why Red Lake received such a small amount of the FY 2006 Pay Cost funds, we were told that some other tribes failed to submit any Pay Cost data to BIA for FY 2006, so BIA decided to take the full funding that the President requested based on reported pay cost data and that the Congress appropriated based on reported pay cost data, and instead distribute the pay cost funds to every tribe regardless of whether they had submitted pay

cost data or not. That means the "full funding" of reported pay costs of tribes like Red Lake was reduced, arbitrarily by BIA.

The Red Lake Band objects to BIA's redistribution of the pay cost increases appropriated by Congress. We do not believe BIA had authority to redistribute these funds in a manner different than they were requested and appropriated. The Tribe desperately needs our full amount of pay costs, based upon the pay cost information we reported and supplied to the BIA, and which Congress subsequently enacted. We have already suffered serious and irreparable harm from pay cost shortfalls going back to FY 2002.

We know you are concerned about the damaged caused when fixed costs are not fully funded. The Red Lake Band was diligent in supplying the requisite FY 2006 pay cost data to the BIA. We now ask for your assistance to ensure Red Lake gets our full amount of pay cost funding in FY 2006 and following years, consistent with the intent of Congress.

I thank you in advance for your assistance with my request.

Sincerely,

Floyd Jourdain, Jr.
Chairman
Red Lake Band of Chippewa Indians

Cc: Honorable Jim Cason, Associate Deputy Secretary
Honorable Norm Coleman, United States Senator
Honorable Mark Dayton, United States Senator
Honorable Collin Peterson, United States Representative
Honorable Richard Pombo, Chairman, House Committee on Resources
Honorable Nick Rahall, Ranking Member, House Committee on Resources
Honorable John McCain, Chairman, Senate Committee on Indian Affairs
Honorable Byron Dorgan, Vice-Chairman, Senate Committee on Indian Affairs

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ADVISORY COUNCIL:
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February 16, 2006

Honorable Charles Taylor, Chairman
Honorable Norman Dicks, Ranking Member
House Subcommittee on Interior, Environment and Related Agencies
B-308 Rayburn House Office Building
Washington, D.C. 20515

Re: Pay Costs in FY 2006 Interior Appropriations Act

Dear Chairman Taylor and Ranking Member Dicks:

Thank you for enacting in FY 2006, for the first time since FY 2002, full fixed cost funding including pay costs. We must inform you, however, that the BIA has once again thwarted your intention and paid the Red Lake Band of Chippewa Indians (the "Tribe") less than 40% of the Tribe's reported pay costs for FY 2006.

The Tribe submitted its FY 2006 pay cost worksheet in October of 2004 to then Assistant Secretary for Indian Affairs Dave Anderson. Included in our worksheet was $7.5 million in eligible salaries from which our FY 2006 pay costs were to be calculated. That should have generated a pay cost allocation to the Tribe in FY 2006 of $262,500. Instead, BIA allocated only $97,262 to the Tribe.

We know $97,262 is far less than we should have received. In FY 2000 for example, Red Lake received $153,895 in Pay Costs, and this was before the Tribe's new detention facility opened with more than 30 FTEs, which were eligible for pay costs in FY 2006. We have tried to get from the BIA the formulas they use in reporting and allocating pay costs, but they will not provide them to us. We know, however, what we timely reported to BIA consistent with BIA's uniform reporting requirements as our pay costs for FY 2006. The $262,500 we believe was owed the Tribe assumes a pay cost percentage increase of 3.5% for our FY 2006 $7.5 million in payroll salaries.

When the Tribe inquired last week of BIA's Office of Self Governance why Red Lake received such a small amount of the FY 2006 Pay Cost funds, we were told that some other tribes failed to submit any Pay Cost data to BIA for FY 2006, so BIA decided to take the full funding that the President requested based on reported pay cost data and that the Congress appropriated based on reported pay cost data, and instead distribute the pay cost funds to every tribe regardless of whether they had submitted pay

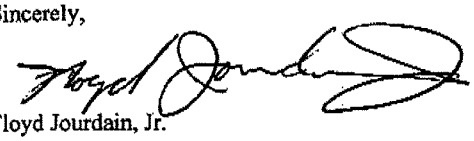
cost data or not. That means the "full funding" of reported pay costs of tribes like Red Lake was reduced, arbitrarily by BIA.

The Red Lake Band objects to BIA's redistribution of the pay cost increases appropriated by Congress. We do not believe BIA had authority to redistribute these funds in a manner different than they were requested and appropriated. The Tribe desperately needs our full amount of pay costs, based upon the pay cost information we reported and supplied to the BIA, and which Congress subsequently enacted. We have already suffered serious and irreparable harm from pay cost shortfalls going back to FY 2002.

We know, and greatly appreciate, the fact that in each of the last three Interior Appropriations bills, you expressed the Subcommittee's concerns about providing less than full fixed cost funding. The Red Lake Band was diligent in supplying the requisite FY 2006 pay cost data to the BIA. We now ask for your assistance to ensure Red Lake gets our full amount of pay cost funding in FY 2006 and following years, consistent with the intent of Congress.

I thank you in advance for your assistance with my request.

Sincerely,



Floyd Jourdain, Jr.
Chairman
Red Lake Band of Chippewa Indians

Cc: Honorable Jim Cason, Associate Deputy Secretary
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Honorable Collin Peterson, United States Representative
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TESTIMONY OF THE HONORABLE FLOYD JOURDAIN JR
CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS

Before the House Appropriations Subcommittee on Interior, Environment, and Related Agencies
Regarding the FY 2006 BIA, IHS, and EPA Budgets, March 30, 2006

Mr. Chairman, I thank you and the other distinguished members of the Committee for this opportunity to provide testimony on behalf of the Red Lake Band of Chippewa Indians. On behalf of the people of Red Lake, who reside on our reservation in northern Minnesota, we respectfully submit that the budget appropriation process represents for us the major avenue through which the United States government fulfills its trust responsibility and honors its obligations to Indian tribes. We must depend on you to uphold the trust responsibility which forms the basis of the government to government relationship between our tribe and the federal government. The Red Lake Band of Chippewa Indians requests $2.8 million in additional FY 2007 funding from the Department of Interior for Red Lake's programs.

Red Lake is a fairly large tribe with 10,000 members. Our 840,000 acre reservation is held in trust for the tribe by the United States. While it has been diminished in size, our reservation has never been broken apart or allotted to individuals. Nor has our reservation been subjected to the criminal or civil jurisdiction of the State of Minnesota. Thus, we have a large land area over which we exercise full governmental authority and control, in conjunction with the United States.

At the same time, due in part to our location far from centers of population and commerce, we have few jobs available on our reservation. While the unemployment rate in Minnesota is about 4%, ours remains at an outrageously high level of more than 50%. The lack of good roads, communications, and other necessary infrastructure continues to hold back economic development and job opportunities.

The President's FY 2007 budget request for Indian programs falls far short of what tribes throughout Indian Country actually need. It especially falls short for tribes, like Red Lake, who are located in remote areas far from major markets. The following testimony highlights some of the most critical needs of the Red Lake Band of Chippewa Indians in FY 2007.

Tribal Priority Allocations (TPA)

Tribal governments have suffered terrible and unprecedented erosion in federal funding for their critical core governmental services in the last decade. These services, including law enforcement, fire protection, courts, road maintenance, resource protection, and education and social services, affect the every day lives of people in Indian communities.

Tribes are locked in a desperate struggle to protect the funding levels provided for these services, especially since the crippling, nearly $100 million cut in the TPA in FY 1996. Although the President's budget has occasionally requested an increase in the TPA, in fact, except for a few targeted exceptions, *none of these increases ever go to tribes' existing TPA programs* to offset inflation. Instead, these increases go to fund new tribes and for certain internal transfers and uncontrollable costs. There has been only one small General Increase in the TPA over the past decade – and that occurred in FY 1998.

Further exacerbating the situation, tribes' core service funding has been subjected to permanent, across-the-board reductions each year, as well as permanent, targeted reductions such

TRIBAL COUNCIL Organized April 18, 1918 (Revised Constitution & By-Laws, January 6, 1959)
CHIEF COUNCIL OF 1889: May-dway-gwa-no-nind, Nah-gaun-e-gwun-abe, Maya-co-co-caw-ay, Ahnah-me-ay-ge-shig, Naw-ay-ish-wewh, Nah-wah-quay ge-shig

as the FY 2004 reduction in tribal funding used to finance the BIA bureaucracy's Information Technology upgrades. Additional, steep TPA cuts are proposed in FY 2007 for BIA Welfare Assistance, Johnson O'Malley, Community Fire Protection, Roads Maintenance, and other BIA-funded programs. It has become a major task each year just to count up the number of ways the TPA is being cut. We strongly oppose these cuts and ask the Committee to restore them.

As a result of the above, tribes' core service funding is far less, in real terms, than a decade ago. Critical services continue to be eroded, seriously undermining our ability to provide minimal public safety, security, and well-being for people who already struggle to survive under some of the worst living standards in America. It may be the case that some federal agencies can absorb all of these cuts, but tribes like Red Lake cannot - we have reached the breaking point.

Let me provide an example of how real the funding crisis for basic services is at Red Lake. Below is a table showing TPA funding versus actual expenditures for just two of our critical service programs, Community Fire Protection and Tribal Courts.

Red Lake Program	CY 2005 Actual TPA BIA Budget	CY 2005 Actual Expenditures	CY 2005 Actual Shortfall*	CY 2005 Unmet Need**	CY 2005 Total Need
Fire Protection	$42,500	$374,448	**($331,948)**	$599,979	$931,927
Tribal Courts	$246,900	$579,341	**($332,441)**	$765,000	$1,097,441
Totals	$289,400	$953,789	**($664,389)**	$1,440,762	$2,045,488

* The actual shortfall, $664,389 for just these two programs, had to be taken from other Tribal programs, sharply reducing services provided by those programs.
** The Unmet Need for Fire Protection is primarily to renovate two fire station buildings due to age and deterioration. The Unmet Need for Tribal Courts is primarily for additional staff to resolve a tremendous backlog of more than 1,000 cases.

The above example illustrates the damage caused by the cuts to the TPA. The only solution to this crisis is a General Increase in the TPA, to be distributed to all tribes. The increase should be no less than 5% ($39 million) over the FY 2006 enacted level. This amount will not come close to replacing funds lost to inflation and budget cuts, but will provide a good start. We also concur with the Committee that the BIA's budget restructuring makes it difficult for tribes to track changes to the TPA, and we request better transparency in future budget submissions.

P.L. 93-638 Pay Costs

The failure to fully fund tribes' uncontrollable costs (especially Pay Costs) during the last 5 fiscal years has caused serious and irreparable harm to tribal core service programs. Due entirely to an error made by the Interior Department, tribes got only 75% of their Pay Costs in FY 2002. Due to an Administration decision, tribes received only about 30% of their Pay Cost funding in FY 2003-2005, and we're slated for yet another cut in FY 2007. When combined with the cuts to the TPA described above, our desperation should be understood. We greatly appreciate the Committee's concerns, expressed in each of the last three Interior Appropriations bills, about providing less than full fixed cost funding, and the Committee's urging the President to request full funding of uncontrollable costs in all future budget submissions.

Thank you for enacting in FY 2006, for the first time since FY 2002, full fixed cost funding including pay costs. We must inform you however, that the BIA has once again thwarted your intention and paid the Red Lake Band less than 40% of our reported pay costs for FY 2006. We understand the reason for this was that BIA failed to collect and report Pay Cost data from all tribes, in part due to a conscious decision of BIA not to fill several of its regional budget officer positions. The fact that BIA failed in its responsibility to completely report our Pay Cost needs in FY 2002, and now FY 2006 (and very possibly other years), is unacceptable.

Tribes have been dealt a double blow with regard to Pay Costs. First, we've been subjected to

partial funding of Pay Costs going back to FY 2002. Second, the BIA has failed to properly report the full amount of Pay Costs we were due. Red Lake has studied these Pay Cost shortages carefully, and we have briefed Committee staff about them. We ask your help to do the following: 1) Direct the BIA to immediately review the FY 2007 Pay Cost data it submitted, to determine if BIA yet again requested less Pay Cost funding for tribes than it should have; 2) Provide a specific earmark to Red Lake in the amount of $165,238, representing the amount of FY 2006 Pay Costs we believe we were unjustly shorted; and 3) Provide full fixed cost funding in FY 2007, and tell the Administration that shorting fixed costs will no longer be tolerated.

Contract Support Costs

Contract Support Cost (CSC) funds are critical for tribes to successfully operate programs under self-determination policy. The Administration and Congress have historically underfunded tribes' CSC. The CSC account is presently funded at less than 90% of need. No other entity the federal government contracts with is shorted on its overhead costs. We support the President's decision to request an increase of $19 million for contract support in FY 2007.

Health Services

The President's FY 2007 IHS request is $4 billion, an increase of $124 million over FY 2006. This includes anticipated offsets from insurance collections of $678 million and diabetes grants of $150 million, leaving a net request for budget authority of $3.2 billion. This modest increase is in actual fact a painfully sharp funding cut in real dollars.

In just the last five years, the IHS service population has risen by about 11.5% (with at least 30,000 new patients each year), while medical costs have risen by about 15% each year. We're falling further and further behind, and this is reflected in diminished health and well-being of our people. I am sure you are familiar with some of the American Indian health statistics, such as our rates being the highest in the nation for cardiovascular disease, diabetes, tuberculosis, Sudden Infant Death Syndrome, obesity, and tobacco use. Our average life span is 6 years less than other Americans. Our infant mortality and unintentional death rates are two-times, teen suicide rate three-times, and alcoholism five-times that of the rest of America. These statistics can be directly tied to chronically inadequate federal funding.

Health care expenditures for Indian people are *far* below 50% of the per capita health care expenditure for mainstream America, and only 50% of per capita expenditures for *federal prisoners*. As the Administration and Congress continue to cut health services to Indian people by not providing funding levels even remotely in line with inflation, the rates of illness and death from disease will grow worse each year. The FY 2006 IHS "Needs Based Budget" is $19.7 billion. We ask that the Committee reallocate funding priorities so as to significantly address this deficiency with substantial funding increases this year. In no case should the FY 2007 increase be less than the $200 million. We strongly oppose the President's request to eliminate the Urban Indian Health Program. There was no justification provided for this request, and this program is critical for tribal members residing in urban areas. Finally, we ask for the Committee's support to reauthorize the Indian Healthcare Improvement Act.

Circle of Flight Program

The Circle of Flight Tribal Wetland & Waterfowl Enhancement Initiative, under the BIA's Other Recurring Programs category, was again eliminated by the President in his FY 2007 budget request. The Circle of Flight has been one of Interior's top trust resource programs for 15 years. Elimination of the Circle of Flight would cripple Great Lakes tribes' ability to continue successful partnerships which have benefited a diverse array of wildlife and associated habitats. We greatly appreciate the Committee's recognition of the importance of the Circle of Flight by restoring funding in FY 2003-06. We again ask that you restore this program to the BIA's FY 2007 budget to at least the FY 2006 level of $600,000, and to consider providing the FY 2007

requested amount of $1.1 million.

Housing Improvement Program (HIP)

Housing is one of the most basic needs of every American. Funding for BIA's HIP program is terribly inadequate and has remained flat at about $19 million each year. Red Lake recently submitted its 2003 HIP Work Plan Report to the BIA documenting 188 families in need of housing upgrades or replacement, for which the BIA is responsible to assist with. The total need documented for just BIA's share of housing repair and new housing at Red Lake was $1.2 million, yet Red Lake received less than $1,000 in each of the last two years from HIP. We ask the Committee for a specific earmark of $1.2 million for Red Lake in FY 2007, and that the BIA HIP budget be increased to at least $32 million.

Law Enforcement and Community Fire Protection

The President's FY 2007 budget for Indian Country Law Enforcement requested $8.1 million for repair of dilapidated detention facilities, $2.7 million for new detention facility operations, and $1.8 million for high crime areas. While we support these increases, they do not begin to address Law Enforcement base shortfalls, which grow worse each year due to inflation, annual rescissions, and Pay Cost cuts. On top of this, most COPS grants, which provided critical sworn officer positions, have expired or will expire by the end of this year. At the same time, crime rates in Indian Country are rising, drug problems have become epidemic, tribes have increased homeland security responsibilities, and court case backlogs are monumental. Tribes simply do not have the resources, at current levels, to combat these problems.

Law enforcement expenditures at Red Lake in FY 2005 were about $2.1 million, with BIA funding levels at about $1.6 million. The shortfall of about $.5 million had to be taken from other programs. It's been difficult for us to hire and keep good cops on the street because funding shortages prevent us from being able to offer competitive wages. We request additional law enforcement funding of $500,000 in FY 2007 to make up this shortfall.

We are very concerned about the President's FY 2007 intent to eliminate funding for Community Fire Protection. Our tribe is solely responsible for fighting fires on our reservation and protecting peoples' lives, *on an annual BIA funded budget of $42,500.* I cited above, the huge disparity between BIA funding and actual expenditures for Community Fire Protection at Red Lake. We ask the Committee for a specific earmark for Red Lake in FY 2007 of $900,000.

EPA Programs

Water, wetlands, and the fish and wildlife which rely on them are precious to us. Red Lake is home to the sixth largest natural, freshwater lake in the United States and it is truly a national treasure. Red Lake is larger even than Lake Champlain, which as you know temporarily held the title of the "6th Great Lake" a few years ago. Two programs which are critical in our efforts to protect the environment at Red Lake are the Indian General Assistance program (GAP) and Section 106 Pollution Control grants (Section 106). The President's FY 2007 budget continues a $4.5 million cut to GAP begun in FY 2006, despite an Adequate PART rating. We ask that you fund GAP in FY 2007 at no less than the FY 2005 enacted level of $62 million. The President's request for FY 2007 Section 106 grants is $5.5 million over the FY 2006 level. However, the amount allocated to tribes like Red Lake has sharply decreased. The reason is each year more tribes become eligible for and receive this funding, but the tribal allocation formula stays the same. Thus fewer dollars go to tribes to conduct pollution control activities. We ask that in FY 2007, you include language recommending no less than 15% of the Section 106 funds be made available to tribes.

Thank you for allowing me to present, for the record, some of the most immediate needs of the Red Lake Band of Chippewa Indians in FY 2007, and for your consideration of these needs.

STATEMENT OF GEORGE T. SKIBINE
ACTING DEPUTY ASSISTANT SECRETARY – INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
AT THE OVERSIGHT HEARING
ON TRIBAL SELF-GOVERNANCE
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

SEPTEMBER 20, 2006

Good morning Mr. Chairman, Mr. Vice-Chairman, and members of the Committee. My name is George T. Skibine, and I am acting Deputy Assistant Secretary Indian Affairs – Policy and Economic Development at the Department of the Interior (Department). I am pleased to appear before you this morning to present testimony on Tribal Self-Governance.

In 1988, Congress amended the Indian Self-Determination and Education Assistance Act (the Act) by adding Title III, which authorized the Bureau of Indian Affairs (BIA) and Indian Health Service (HIS) to enter into self-governance compacts for the first time under a demonstration project. Congress again amended the Act in 1994, adding Title IV, which established the permanent Tribal Self-Governance program within the Department. The 1994 amendments authorized federally recognized tribes to negotiate funding agreements with the Department for programs, services, functions or activities administered by the Bureau of Indian Affairs (BIA), and in certain circumstances, with other Bureaus of the Department. In 2000, the Act was again amended to include Titles V, which established permanent self-governance authority for the IHS within the Department of Health and Human Services. The 2000 amendments also included a new Title VI that provided for a study to determine the feasibility of conducting a Self-Governance Demonstration Project in other programs of the Department of Health and Human Services, which has since been completed.

The Department strongly supports self-governance as an exercise of tribal sovereignty and self-determination. Tribal self-governance is a framework for progress because it empowers tribes to prioritize their needs and plan their futures at their own pace, consistent with their own distinct cultures, traditions, and institutions. Many tribes have made this choice, which is demonstrated by the fact that in 2006, the BIA has 91 funding agreements providing services to 231 tribes,[1] for a total of $300 million, which is a significant increase from a total of $27 million for the funding agreements with seven tribes made in 1991,[2] the year the program began.

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[1] By BIA region, the number of funding agreements is as follows: Alaska, 26; Eastern, 1; Eastern Oklahoma, 11; Midwest, 9; Northwest, 20; Rocky Mountain, 1; Southern Plains, 8; Southwest, 1; Western, 6; Pacific, 8. Neither the Navajo Region nor the Great Plains Region has self-governance funding agreements.

[2] The seven tribes that signed funding agreements in 1991 are the Absentee Shawnee Tribe of Oklahoma, Cherokee Nation, Hoopa Valley Tribe, Jamestown S'Kallam Tribe, Lummi Nation, Mille Lacs Band of Ojibwe, and the Quinault Indian Nation.

In addition to administering BIA programs, tribes have successfully negotiated funding agreements with the following agencies within the Department: the Bureau of Land Management,[3] the Bureau of Reclamation,[4] the National Park Service,[5] the U.S. Fish and Wildlife Service,[6] and the Office of the Special Trustee for American Indians.[7] Tribes are typically successful in obtaining these agreements where a compacted program is of special geographical, cultural, or historical significance to them, such as the agreement between the U.S. Fish and Wildlife Service and the Council of Athabaskan Tribal Governments (Council). This agreement allowed the Council to perform certain functions within the Yukon Flats National Wildlife Refuge, an area of special significance to it, during FY 2004-2005.

As to non-Department programs, we understand that questions have been raised as to whether our self-governance policies should be made more consistent with the self-governance provisions governing IHS programs. In fact, the Department has been working with the Title IV Tribal Task Force to explore the need for amendments to Title IV. At this time, the approach embodied in the self-governance provisions applicable to Department programs should be evaluated carefully.

At the Department, Tribal Self-Governance for BIA programs is administered by the Office of Self-Governance (OSG) in Washington, D.C. The OSG has eight permanent staff positions and operates annually on a budget of $1.1 million, and was organized so as not to duplicate BIA field structure and operations. The OSG Director reports to the Deputy Assistant Secretary – Policy and Economic Development within the Office of the Assistant Secretary – Indian Affairs. The responsibilities of the OSG include approving tribes to participate in self-governance; negotiating annual funding agreements; ensuring audit compliance; providing financial management, budgeting, and accounting services associated with self-governance funding; processing waivers of BIA regulations; preparing an annual report to Congress on the costs and benefits of self-governance; and developing and implementing regulations, policies and guidance regarding self-governance programs. In addition, we support the activities of the Self-Governance Communication and Education Tribal Consortium, and the Assistant Secretary – Indian Affairs holds quarterly meetings with the Self-Governance Advisory Committee to discuss and resolve issues of mutual interest and concern.

One issue of recurring concern among compacting and contracting tribes has been contract support costs. The Department recently participated in the formulation of a

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[3] Council of Athabascan Tribal Governments.
[4] Gila River Indian Community, Karuk Tribe of California, Duckwater Shoshone Tribe, and the Yurok Tribe.
[5] The Grand Portage Band of Lake Superior Chippewa Indians, Lower Elwha S'Klallam Tribe, Tanana Chiefs Conference, and Yurok Tribe.
[6] Council of Athabascan Tribal Governments and the Confederated Salish and Kootenai Tribes of the Flathead Reservation.
[7] Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Wyandotte Tribe of Oklahoma.

national policy in order to provide tribes, the BIA, and the OSG with guidance regarding this issue. The goals of the policy are threefold: 1) to stabilize funding to each tribe from year to year; 2) to expedite payment for each tribe; and 3) to respect the Act's prohibition against reducing contract amounts from one year to the next. The policy accomplishes these goals by requiring that, subject to appropriations, a tribe be paid the same amount it was paid in the preceding year.. The policy allows the payment to be made very early in the fiscal year, and the only restriction is that the BIA must ensure the tribe does not receive more than 100% of its total requirements. The completion of this policy certainly represents forward progress in the area of self-governance, and we believe that it will significantly improve administrative flexibility and fiscal stability for tribes with funding agreements. To implement the funding aspect of this policy, the President's 2007 Budget included a 14% increase for contract support costs.

The Department believes the national policy on contract support costs will encourage non-participating tribes to think about exercising their option to take over BIA programs or portions of programs to promote self-governance on their reservations. For the last few years, the percentage of participating tribes has remained relatively flat, at about 50 percent. The Department would like to get the percentage up and in BIA discussions with tribes, tribes have indicated that they would increase their overall participation if the issue of contract support cost funding was resolved.

The Department looks forward to working with the Committee in order to make continued progress in Tribal Self-Governance. I would be happy to answer any questions the Committee may have.

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